STATE OF WEST VIRGINIA

Report

of the

Court of Claims

For the Period from July 1, 1999

to June 30, 2001

By

CHERYLE M. HALL

Clerk

Volume XXIII

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

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Letter of Transmittal

To His Excellency
The Honorable Robert E. Wise, Jr.
Governor of West Virginia

Sir:

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

Respectfully Submitted,

Cheryle M. Hall,
Clerk

Terms of Court

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

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

OPINION ISSUED JULY 13, 1999

BELL ATLANTIC - WEST VIRGINIA, INC.
VS.
ADJUTANT GENERAL
(CC-99-191)

Claimant represents self.
Joy M. Cavallo, 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 $1,108.32 for providing telephone services to the respondent during the 1998 fiscal year for which it has not been paid. The documentation for these services was not processed for payment within the appropriate fiscal year; therefore, the claimant has not been paid. In its Answer, the respondent admits the validity of the claim and the amount, and states that there were sufficient funds expired in the appropriate fiscal year from which the claim could have been paid.

In view of the foregoing, the Court makes an award in the amount of $1,108.32.

Award of $1,108.32.

OPINION ISSUED JULY 13, 1999

LARRY T. BRAGG
VS.
DIVISION OF HIGHWAYS
(CC-97-311)

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

PER CURIAM:

The claimant brought this action for damage to his motorcycle which occurred when he encountered a large hole in the pavement of W. Va. Route 21/33 (also known as Barrington Hill Road) in Oak Hill, Fayette County. This is a residential area and the road basically serves the residents there.

This incident occurred on July 26, 1997, at approximately 5:30 a.m. It was dark, but the weather was clear. The claimant was proceeding from his home in Oak Hill to Dunbar, W.Va., where he was attending school. He described the road as a two-lane, blacktopped road which is straight at the scene of the incident but on a hill. He was going downhill at approximately 15 to 20 miles per hour when he saw a large hole at the bottom of the hill. He was unable to avoid striking the hole with his Yamaha motorcycle. He described the hole as being over a foot in diameter and six to eight inches deep. He was familiar with the road, but he had not noticed hole prior to this particular morning. The motorcycle sustained damage to a wheel and a tire in the amount of $567.52 which includes the cost of mounting and balancing the tire.

The respondent offered no witnesses on its behalf.

The Court, having reviewed the facts in this claim, has determined that the respondent had to have had at least constructive notice of the hole on County Route 21/33 based upon its size as described by the claimant. Therefore, the Court is of the opinion that respondent was negligent in its maintenance of this road as of the date of claimant's accident, and the Court makes an award to the claimant for the damages to his motorcycle in the sum of $567.52.

Award of $567.52.

OPINION ISSUED JULY 13, 1999

GEORGE A. DEER
VS.
DIVISION OF HIGHWAYS
(CC-97-358)

Claimant appeared *pro se.*

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

PER CURIAM:

The claimant brought this action for damage to his vehicle after he encountered an area of road construction and his vehicle, a 1997 Toyota pickup truck, received paint damage from spots of concrete. The damages to the truck exceeded the amount of claimant's insurance deductible of $500.00 to which he is limited in his recovery.

The incident which resulted in the damages to claimant's truck occurred on

September 2, 1997, when claimant and his wife were driving towards her place of work. Claimant drove through a construction area on W. Va. Route 10, also known as Logan Boulevard, where concrete was being poured by respondent's employees.

He noticed that the wind was blowing, but he did not stop. Later that same day, he had driven to Charleston with a friend when he noticed little specks on the hood, windshield, fenders, front bumper, and grill which appeared to have eaten into the paint on the truck. His vehicle was having rims placed on it so he mentioned the specks to an employee at the automobile shop who told him to return the next day for an inspection by the body shop. Upon his return for the inspection, he was informed that the specks were concrete. He then had another shop in Logan also inspect his vehicle and they informed him that indeed it was specks of concrete.

Approximately six months later, claimant traded his pick up truck for another Toyota vehicle. Claimant is certain that the concrete blew onto his vehicle when he was driving through the construction area on W. Va. Route 10 on September 2, 1997.

Respondent offered no witnesses to rebut the testimony of the claimant.

The Court, having reviewed the facts of this claim, is of the opinion that claimant's vehicle was damaged at the scene of the road construction when respondent's employees were pouring concrete. The wind created a hazardous condition for motorists passing through the area as it is more than just happenstance that concrete was sprayed all over claimant's truck. For this reason, the Court makes an award to the claimant for the damage to his truck in the amount of $500.00.

Award of $500.00

OPINION ISSUED JULY 13, 1999

LINDA K. DUNCAN AND RICHARD L. DUNCAN
VS.
DIVISION OF HIGHWAYS
(CC-97-374)

Claimants appeared *pro se*.

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

PER CURIAM:

The claimants brought this action for damage to their vehicle after claimant Richard L. Duncan was driving their 1976 GMC pickup truck and he encountered a hole at the edge of Manilla Creek Road in Poca, Putnam County. Claimants' vehicle sustained damage during this incident for which they claim $2,100.00. Claimants' insurance coverage is for liability only, but they did receive $400.00 for glass breakage.

Claimant Richard L. Duncan and a friend were proceeding in claimants'

pickup truck on Manilla Creek Road on September 16, 1997, when the vehicle went into a hole described as being a broken off section of the edge of the road which was two feet long and one and a half feet deep at the edge of the road. Manilla Creek Road was described as being a narrow, one lane road approximately 12 feet in width.

Claimants lived about one mile from the area of the incident. Mr. Duncan was very familiar with the road and drove it on a daily basis. He explained that on this particular occasion his truck went into the hole at the edge of the road and proceeded over the hill striking some trees which actually stopped the truck from going further down the hillside.

The report compiled by the investigating law enforcement agency, the Putnam County Sheriff's Department, was introduced into evidence by Mr. Duncan. The officer marked two boxes "Failure to Maintain Control" and "Other Roadway Defects" on the front of the report and he wrote in the description that "... a portion of roadway was missing and truck rolled over embankment on right side of roadway". The investigation was completed while claimants' truck was still at the scene, but some hours after the accident. Mr. Duncan had proceeded immediately after the accident with his friend to the hospital for medical treatment.

Claimants' pickup truck was totaled as a result of this accident. Mr. Duncan received about $500.00 and $400.00 from his insurance carrier for all of the glass breakage which occurred. He estimated the value of the truck at $3,000.00 for a loss of about $2,100.00.

Respondent did not offer any witnesses or other evidence at the hearing.

The Court assumes that Manilla Creek Road in Putnam is a State maintained road. It is a narrow road apparently serving residents in the area. It is blacktopped, but according to the claimant, Mr. Duncan, there is little, if any, berm on the side of the road at least in the direction in which he was traveling on the date of the incident. The deteriorated condition of the edge of the roadway in September 1997 leads this Court to opine that the respondent did not maintain the roadway in proper condition; however, claimant Richard Duncan was very familiar with the road. The Court has determined that Mr. Duncan did not use the proper precaution of the reasonable, prudent driver while traversing Manilla Creek Road on the date of his accident. Therefore, the Court concludes that the parties were equally negligent and under the doctrine of comparative negligence the claimants may not recover.

In accordance with the findings of the Court as stated herein above, the Court denies this claim.

Claim disallowed.

OPINION ISSUED JULY 13, 1999

TERRY R. WOOTEN

VS.
DIVISION OF HIGHWAYS
(CC-97-7)

David G. Thompson, Attorney at Law, for claimant.
Andrew F. Tarr, Attorney at Law, for respondent.

BAKER, JUDGE:

The claimant brought this action for personal injuries which occurred as a result of a slip and fall accident while walking on Route 3, which is a road maintained by the respondent in Raleigh County. The Court is of the opinion to deny the claim for the reasons more fully stated below.

The incident giving rise to this claim occurred on November 26, 1995 at about 7:15 p.m. The claimant, Terry R. Wooden, was helping a friend deliver mining equipment to Glen Daniels, West Virginia. After moving the equipment, the claimant went to the Citgo station on Route 99 to eat. Afterwards, the claimant decided to walk to his friend's house to shower, which is about ½ mile from Route 3 (the transcript is unclear which direction the claimant was heading). While walking, the claimant had his attention on the area between the white line on the berm of the road and the guardrail, which was about five feet. Previously, the claimant, who was an avid walker, had been on Route 3 three to four times. At no time in the past had he noticed any subsiding or deterioration of Route 3.

While a pedestrian on Route 3 in the Bolt area of Raleigh County, West Virginia, the claimant encountered a portion of the road which had fallen away. Before he saw that a portion of the road as subsiding, or deteriorating, he stepped into that area. Subsequently, he lost his balance and fell ten to twelve feet into a ditch-like area. When the claimant fell into the ditch-like area, he hit his ankle against the guardrail. The claimant tried to get up, but fell again. Finally, on the third attempt, the claimant was able to pull himself up and flag down traffic. Eventually, two Deputy Sheriff officers arrived at the scene and called an ambulance for the claimant.

As a result of the injury, the claimant has incurred medical bills in the amount of $8,011.11. However, under an insurance policy held by the claimant, he has been responsible for only $906.50 of the medical bills. Claimant's injuries have required surgery and physical therapy. Additional medical expenses are anticipated in the future. Unfortunately, the claimant has retained a slight limp, and he some loss of mobility in his left ankle.

The position of the respondent in this claim is that it did not have actual or constructive notice of the condition of Route 3 at the site of the claimant's accident. There had been no calls or letters describing any subsiding condition or deterioration of Route 3 at the scene described herein. Moreover, Route 3 is a first priority road. Consequently, the road is patrolled regularly for road defects. However, no defects were ever found on Route 3 by the respondent's substation road crew located at Bolt. Thus,

there was no notice of any road defects on Route 3 which should have been repaired.

It is well established that the State is neither an insurer nor a guarantor of the safety of motorist upon its roads. *Adkins vs. Sims*, 130 W.Va. 645; 46 S.E.2d 81 (1947). In order to hold the respondent liable for road defects of this type, the claimant must prove that the respondent had actual or constructive notice. *Pritt vs. Dept. of Highways*, 16 Ct. Cl. 8 (1985); *Harmon vs. Dept. of Highways*, 16 Ct. Cl. 127 (1986). The Court is of the opinion that the respondent did not have any notice, actual or constructive, of this road hazard on Route 3; therefore, respondent did not have an opportunity to make repairs.

In the present claim, the evidence established that the respondent sent its employees to inspect the area of Route 3 in question on a regular basis. The evidence further established that the respondent has not been put on notice from the general public through phone calls or letters. While sympathetic to the claimant's situation, the Court is of the opinion that the respondent took reasonable steps to ensure the safety of Route 3 and that there is insufficient evidence of negligence upon which to justify an award. Therefore, in view of the foregoing, the Court denies this claim.

Claim disallowed.

STIPULATION ENTERED AUGUST 4, 1999

IN THE COURT OF CLAIMS, STATE OF WEST VIRGINIA

RICHARD E. EASTER, SR., and
DEBRA SUE EASTER, his wife,
Claimants,
v. CLAIM NO. CC-95-334
WEST VIRGINIA DEPARTMENT
OF HIGHWAYS,
Respondent.

STIPULATION

On this day came the claimants, Richard E. Easter and Debra Sue Easter, by counsel, Joseph P. Whittington, and respondent, West Virginia Department of Highways, by counsel, Andrew F. Tarr and Xueyan Zhang, and announced to the Clerk of the Court of Claims that the parties have agreed to stipulate to the above-referenced claim. Specifically, the parties stipulate to the following:

1. Respondent admits that it is responsible for the maintenance of West Virginia Secondary Route 8 and Secondary Route 8/4 in Kanawha County, West Virginia.

2. Respondent admits some, but not all, responsibility for the deterioration of claimants' retaining wall that is the subject of the above-styled claim. Claimants' retaining wall is located near the intersection of West Virginia Secondary Route 8 and Secondary Route 814 in Kanawha County, West Virginia.
3. The parties stipulate and agree that other factors, including, but not limited to, the age and construction of claimants' retaining wall, also contributed to the deterioration of said wall.
4. Respondent agrees to reimburse the claimants in the total amount of Five Hundred Dollars ($500.00) for that portion of the deterioration to claimants' retaining wall that can be attributed to respondent.
5. The parties to this claim agree that the total sum of Five Hundred Dollars ($500.00) paid by respondent to claimants in Claim No. CC-95-334 acts as a full and complete settlement, compromise and resolution of all matters in controversy in said claim and as full and complete satisfaction of any and all past and future claims claimants may have against respondent arising from the matters described in said claim.

WHEREFORE, in accordance with the agreement contained in this stipulation, this Court makes an award of Five Hundred Dollars ($500.00) to the claimants in Claim No. CC-95-334.

STIPULATION ENTERED AUGUST 5, 1999

JANET JACKSON,
Claimant,
v. CLAIM NO. CC-97-418
WEST VIRGINIA DEPARTMENT
OF HIGHWAYS,
Respondent.

STIPULATION

On this day came the claimant, Janet Jackson, by counsel, John R. Mitchell, and respondent, West Virginia Department of Highways, by counsel, Andrew F. Tarr and Xueyan Zhang, and announced to the Clerk of the Court of Claims that the parties have agreed to stipulate to the above-referenced claim. Specifically, the parties stipulate to the following:
1. Respondent admits that it is responsible for the maintenance of West Virginia Route 315 in Mingo County, West Virginia.

2. Respondent admits some, but not all, responsibility for the automobile . accident involving claimant that is at issue in the above-styled claim.
3. Respondent agrees to reimburse the claimant in the total amount of Three Thousand Five-Hundred Dollars ($3,500.00) for damages for that portion of claimant's accident that can be attributed to respondent.
4. The parties to this claim agree that the total sum of Three Thousand Five- Hundred Dollars ($3,500.00) paid by respondent to claimant in Claim No. CC-97-418 acts as a full and complete settlement, compromise and resolution of all matters in controversy in said claim and as full and complete satisfaction of any and all past and future claims claimant may have against respondent arising from the matters described in said claim.

WHEREFORE, in accordance with the agreement contained in this stipulation, this Court makes an award of Three Thousand Five-Hundred Dollars ($3,500.00) to the claimant in Claim No. CC-97 -418.

OPINION ISSUED AUGUST 24, 1999

BARBOUR COUNTY COMMISSION
VS.
DIVISION OF CORRECTIONS
(CC-99-202)

Claimant appeared *pro se*.
Joy M. Cavallo, 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.

The claimant, Barbour County Commission, is responsible for the incarceration of prisoners who have committed crimes in Barbour County, but have been sentenced to facilities owned and maintained by the respondent, Division of Corrections. The claimant brought this action to recover $ 1,850.00 in costs for providing housing and/or medical care to 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 *County Comm'n. of Mineral County vs. Div. of Corrections*, unpublished opinion issued November 21, 1990, (CC-89-340), that

the respondent is liable to the claimant for the cost of housing and providing medical care to inmates sentenced to a State penal institution.

Pursuant to the holding in *Mineral County*, the respondent reviewed this claim to determine the invoices for the services for which it may be liable. Respondent then filed an Answer admitting the validity of the claim in the amount of $1,850.00.

In view of the foregoing, the Court makes an award to claimant in the amount of $1,850.00.

Award of $1,850.00.

OPINION ISSUED AUGUST 24, 1999

BATRA CARDIOLOGY ASSOCIATES, INC.
VS.
DIVISION OF JUVENILE SERVICES
(CC-99-155)

Claimant appeared *pro se*.

C. Scott Mckinney, 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 $276.00 for providing medical services to a juvenile inmate at the Northern Regional Juvenile Detention Center in Wheeling, a facility of the respondent. The documentation for these services was not processed for payment within the appropriate fiscal year; therefore, the claimant has not been paid. In the Answer, respondent admits the validity of this claim as well as the amount, and states that there were sufficient funds expired in the appropriate fiscal year from which the claim could have been paid.

Accordingly, in view of the foregoing, the Court hereby makes the following award.

Award of $276.00.

OPINION ISSUED AUGUST 24, 1999

DOROTHY HARTLEY
VS.

DIVISION OF HIGHWAYS
(CC-98-277)

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

PER CURIAM

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

1. On April 18, 1998, claimant was traveling north on W. Va. Route 2, coming out of Point Pleasant, at the flood wall in Mason County, when the claimant's vehicle hit a large hole located in the center of the road.

2. As a result of this incident, claimant's vehicle sustained damage in the sum of $148.39.

3. Respondent owns and maintains W. Va. Route 2 in Mason County, in a reasonably safe condition.

4. On the date of the incident herein, respondent failed to maintain W. Va. Route 2 in Mason County, in a reasonably safe condition.

5. Respondent agrees that the amount of damages as put forth by the claimant is fair and reasonable.

The Court has reviewed the facts of the claim as stated in the Stipulation, and adopts the statement of facts as its own. The Court finds that respondent was negligent in its maintenance of W. Va. Route 2 on the date of the claimant's incident; that the negligence of the respondent was the proximate cause of the damages sustained to claimant's vehicle; and that the amount of the damages agreed to by the parties is fair and reasonable. Accordingly, the Court makes an award in the amount of $148.39 to the claimant.

Award of $148.39.

OPINION ISSUED AUGUST 24, 1999

DWIGHT MAYS
VS.
DIVISION OF HIGHWAYS
(CC-98-138)

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

PER CURIAM:

The claimant brought this action for vehicle damage which occurred as a result of two separate collisions with fallen trees on Route 34 and Route 34/8, which are roads maintained by the respondent in Putnam County.[1] The Court is of the opinion to deny this claim for the reasons more fully stated below.

The first incident giving rise to this claim occurred on March 7, 1997 sometime in the night. Claimant's wife was traveling on Route 34 at Red House at a speed of about twenty-five to thirty miles per hour. When the claimant's wife came around a curve, she suddenly encountered a tree that had fallen over the guardrail and the claimant's vehicle collided with the tree. Claimant's wife alleged that she was not able to see the fallen tree before the collision. This particular road is frequently traveled by the claimant and his wife. In fact, claimant and his wife had been on the same road six hours earlier, but did not see the fallen tree at that time. Damage to claimant's 1986 Toyota four-wheel drive pickup as a result of the first incident was a broken antenna and mirror as well as damage to left quarter panel, left tail light and four pin stripes. Because no repair work has been done to the claimant's vehicle as of the June 11, 1999, hearing and the claimant was only able to produce an estimate for $1,040.92, the exact amount of damages was unclear. Also, the record is unclear whether the claimant had full or liability insurance coverage that would cover this accident.

The second incident giving rise to this claim occurred on July 2, 1997 at about 11:00 p.m. Claimant's wife was traveling on Route 34/8 (Bowles Ridge, off of Route 34) to a friend's house in Grandview Ridge on the stormy night in question. Claimant's wife went around a corner and suddenly encountered another fallen tree and claimant's vehicle collided with that tree. Like the first incident, claimant wife was unable to see the tree until the collision. The resulting damage to the claimant's 1986 Toyota four-wheel drive pickup that was the vehicle's exhaust system was torn from the vehicle. Claimant's out-of-pocket expense for this accident was $100.44. As aforementioned, the record is unclear whether claimant had full or liability insurance coverage that would cover this accident.

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[1]The styling of this claim was changed at the June 11, 1999, hearing when it was learned that Jenny Mays, the person who was operating the vehicle during the two accidents and who originally filed this claim, did not own the vehicle. Rather, the vehicle was owned by her husband, Dwight Mays. Thus, this claim was transferred to his name.

The position of the respondent was that it did not have actual or constructive notice of the conditions on Route 34 or Route 34/8 at the sites of claimant's accidents for either of the dates in question. Even though claimant alleges to the contrary, there was no evidence that there had been any calls or letters describing any fallen trees or other debris on Route 34 or Route 34/8 at the site of the claimant's accidents for either of the dates in question. Moreover, Route 34 is a first priority road. Consequently, the road is patrolled regularly for road defects, such as fallen trees and debris. Similarly, Route 34/8 is patrolled regularly for road defects, such as fallen trees and debris. However, on July 3, 1999, the day after a bad storm and claimant's wife's second accident, fallen trees and debris were found and removed on secondary roads in the area by the respondent's employees in Putnam County, but it is unclear whether any fallen trees or debris were ever the cause of claimant's accident or were removed from the locations in question. Thus, there was no notice of any road defects on Route 34 or Route 34/8 which should have been repaired.

The well established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of motorist upon its roads. *Adkins vs. Sims*, 130 W.Va. 645; 46 S.E.2d 81 (1947). In order to hold the respondent liable for road defects of this type, the claimant must prove that the respondent had actual or constructive notice. *Pritt vs. Dept. of Highways*, 16 Ct. Cl. 8 (1985); *Harmon vs. Dept. of Highways*, 16 Ct. Cl. 127 (1986). The Court is of the opinion that the respondent did not have actual or constructive notice of any road hazard on Route 34 or Route 34/8. Respondent did not have ample opportunity to make repairs. Thus, the claimant is not entitled to an award for his losses.

In the present case, the evidence established that the respondent regularly sent its employees to inspect the locations in question. Further, the evidence established that the respondent was not put on notice about any fallen trees or debris in the locations in question. The Court is of the opinion that the respondent did take reasonable steps to ensure the safety of Route 34 and Route 34/8 in Putnam County. The respondent was vigilant. Consequently, there is insufficient evidence of negligence upon which to justify an award. In view of the foregoing, the Court denies this claim.

Claim disallowed.

OPINION ISSUED AUGUST 24, 1999

MONTGOMERY GENERAL HOSPITAL
VS.
DIVISION OF CORRECTIONS
(CC-99-212)

Claimant appeared *pro se*.
Joy M. Cavallo, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks payment in the amount of $9,772.63 for medical services rendered to inmates in Mount Olive Correctional Center, a facility of the respondent. Respondent, in its Answer, admits the validity of the claim, but states that there were insufficient funds in its appropriation for the fiscal year in question from which to pay the 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 24, 1999

RADIOLOGY, INC
VS.
DIVISION OF CORRECTIONS
(CC-99-243)

Claimant appeared *pro se*.
Joy M. Cavallo, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks payment in the amount of $33.00 for medical services rendered to an inmate in the Cabell County Jail, but who is supposed to be in the custody of the respondent. Respondent, in its Answer, admits the validity of the claim, but states that there were insufficient funds in its appropriation for the fiscal year in question from which to pay the 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 24, 1999

TAX NET GOVERNMENTAL COMMUNICATIONS CORPORATION
VS.
DEPARTMENT OF TAX AND REVENUE
(CC-99-224)

Claimant represents self.

Joy M. Cavallo, 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 $2,124.43 for network services provided to the respondent. The documentation for these services was not processed for payment within the appropriate fiscal year; therefore, the claimant has not been paid. In its Answer, the respondent admits the validity of the claim and the amount, and states that there were sufficient funds expired in the appropriate fiscal year from which the claim could have been paid.

In view of the foregoing, the Court makes an award in the amount of $2,124.43.

Award of $2,124.43.

OPINION ISSUED AUGUST 24, 1999

TYGART VALLEY TOTAL CARE CLINIC
VS.
DIVISION OF CORRECTIONS
(CC-99-195)

Claimant represents self.

Joy M. Cavallo, 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 $625.00 for medical services rendered to an inmate in Pruntytown Correctional Center, a facility of the respondent. Respondent, in its Answer, admits the validity of the claim, but states that there were insufficient funds in respondent's appropriation for the fiscal year in question from which to pay that portion of 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 24, 1999

WEST VIRGINIA ASSOCIATION OF
REHABILITATION FACILITIES
VS.
DEPARTMENT OF ADMINISTRATION
(CC-98-395)

Claimant appeared *pro se*.

Brian Casto, Attorney at Law, for respondent.

PER CURIAM:

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

Claimant seeks $27.62 for providing bulk mailing services to respondent's office at the West Virginia Capitol Building in Charleston. The documentation for these services was not processed for payment within the appropriate fiscal year; therefore, the claimant has not been paid. In the Answer, respondent admits the validity of the claim as well as the amount, and states that there were sufficient funds expired in the appropriate fiscal year from which the claim could have been paid.

Accordingly, in view of the foregoing, the Court hereby makes the following award.

Award of $27.62.

OPINION ISSUED SEPTEMBER 8, 1999

CINDY ADKINS
VS.

DIVISION OF HIGHWAYS
(CC-98-95)

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

PER CURIAM:

Claimant brought this action for damage sustained to her vehicle as a result of an encounter with a large hole at the junction of W. Va. Route 61 and County Route 79/3, a junction maintained by respondent in Kanawha County. The Court is of the opinion to make an award for the reasons more fully stated below.

At the junction of W. Va. Route 61 and County Route 79/3 there is an underpass, which is approximately thirty to fifty feet in length. Surprisingly, the underpass throughway is flat. County Route 79/3 is about twenty-two feet wide, whereas W. Va. Route 61 is about twenty-four feet wide. The underpass is controlled by a stoplight which restricts traffic flow to one direction at a time. A motorist coming out of the underpass onto W. Va. Route 61 would encounter a large hole located approximately fifty to seventy feet after passing the underpass. The hole was four to six inches deep and was wide enough to encompass the centers of both lanes on W. Va. Route 61. Further, the hole did not become visible to the motorist until after she passed through the underpass. Respondent was aware of this defective condition and placed two steel plates, measuring ten feet by fourteen feet by three inches thick, over the hole. Moreover, respondent was aware that large trucks would often push these steel plates under one another, exposing the hole.

One day in January of 1998 at about 12:00 p.m., claimant was driving her 1991 Pontiac Grand Am from County Route 79/3, Cabin Creek, to W. Va. Route 61. Traveling at a rate of speed about twenty miles per hour in a thirty-five miles per hour zone, claimant's vehicle hit a large hole, which was not covered by steel plates. Previously, claimant had driven the same road. However, on those previous occasions, metal plates covered the hole. The damage that resulted from hitting the hole was that the 1991 Pontiac Grand Am was knocked out of alignment and there was damage to the tires, which were new. Total damage to the vehicle as a result of hitting the hole was in

the sum of $145.15. Claimant's insurance had a deductible feature of five hundred dollars. There was a ten month lapse between the accident and notice of the damage to her tires. Afterwards, claimant contacted the respondent regarding the accident.

Respondent acknowledged that the hole on W. Va. Route 61 was a very bad and ongoing problem. Specifically, there was a "base failure" which was exacerbated by the traffic flow of large trucks. This defective condition on W. Va. Route 61 existed approximately three hundred feet from respondent's garage. Cold mix asphalt was used on a regular basis to fix the hole, since hot asphalt mix is unavailable during the winter. The large trucks would knock off steel plates and dig out the cold mix asphalt. Consequently, the road was difficult to maintain during the winter. Further evidenced was the fact that daily reports showed work on the road on a regular basis. Eventually, the black top was removed to secure the metal plates in the road during March of 1998. Future work has been scheduled to give the road more stability.

The well established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of motorists upon its roads. *Adkins vs. Sims*, 130 W.Va. 645; 46 S.E.2d 81 (1947). In order to hold respondent liable for road defects of this type, claimant must prove that respondent had actual or constructive notice. *Pritt vs. Dept. of Highways*, 16 Ct. Cl. 8 (1985); *Harmon vs. Dept. of Highways*, 16 Ct.Cl. 127 (1986).

In the present case, the evidence established that respondent's employees inspected the junction of W. Va. Route 61 and County Route 79/3 on a regular basis. This inspection usually resulted in repair work to the junction in question. Thus, respondent had actual notice of the condition then and there existing. The Court is of the opinion that respondent did not take reasonable steps to ensure the safety of motorists traveling at the junction of W. Va. 61 and County Route 79/3. Consequently, there is sufficient evidence of negligence to base an award.

In view of the foregoing, the Court makes an award in the amount of $145.15 to claimant for the damages to her vehicle.

Award of $145.15.

OPINION ISSUED SEPTEMBER 8, 1999

JOHN ALLEN BAILEY
VS.
DIVISION OF HIGHWAYS
(CC-99-119)

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

PER CURIAM:

Claimant brought this action for vehicle damage from a wreck which occurred on Route 52/3 (Johnstown Road), Harveytown, as a result of negligent maintenance of a storm drain and ditch from Interstate 64. Route 52/3 (Johnstown Road), Harveytown, is a road maintained by respondent in Cabell County. The Court is of the opinion to make an award for the reasons more fully stated below.

The incident giving rise to this claim occurred on February 25, 1998, at about 7:30 a.m. On the morning in question, claimant was traveling to work. The temperature was cold. Claimant was traveling at about twenty-five miles per hour. Claimant frequently traveled Route 52/3 (Johnstown Road) about five times per week for the past two to three years. But, claimant had not been on that road for a few days preceding the accident.

Route 52/3 (Johnstown Road) is a two lane road about sixteen to eighteen feet wide. At the location in question, the road is curved and slants downhill. About one-tenth of a mile away from the accident site, there is a storm drain from Interstate 64. According to claimant, there has been a drainage problem, from the storm drain of Interstate 64, and drivers must drive on the other side of the road at this particular location in order to avoid ice and snow in the road. However, on this particular day, claimant was trying to stay out of the ice and snow on his side of the road, but oncoming traffic forced him onto his side of the road. Subsequently, claimant's vehicle encountered sand and gravel that was on top of ice, which forced him to lose control of his vehicle and collide with a private landowner's fence and wall.

The resulting damage to claimant's 1979 Plymouth Volare Duster was estimated at $1,191.26. Claimant's vehicle sustained damage to the front and inner fender, a headlight rim, the corner of the grill, the bumper as well as a bent frame. No repair work has been done to the vehicle as of the April 14, 1999 hearing, but claimant did introduce into evidence an estimate for repair of $1,180.84. Because cost of repair would exceed the value of claimant's vehicle, the vehicle was deemed "totaled." Eventually, the vehicle was sold for salvage and the claimant received the sum of $100.00. Claimant did not have insurance coverage that would cover this accident. In addition, Claimant personally fixed the private landowner's fence for a cost of $10.42.

The position of respondent was that it was never in receipt of actual or constructive notice of the condition of Route 52/3 (Johnstown Road) an the site of claimant's accident. There had been no calls or letters describing any drainage problems at the site of claimant's accident. Respondent's position was that any drainage problem was from private landowners' yards and driveways that encroach onto the State's right-

of-way and there is not enough distance to put in a culvert. Consequently, the State's options are limited. However, photographic evidence introduced at the April 14, 1999, hearing demonstrated that there was debris in the storm drain ditch which forced water onto the road. Likewise, the photographic evidence also demonstrated that there was a crack in the storm drain that allowed water to bypass the storm drain and exacerbate the drainage problem. Respondent was unaware of any inspections of the storm drain site in question. There had been construction work on a bridge in the vicinity of the storm drain in question by respondent. Respondent acknowledged that from the photographic evidence there was ice and debris on Route 52/3 (Johnstown Road) on the date and time in question.

The well established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of motorists upon its roads. *Adkins vs. Sims*, 130 W.Va. 645; 46 S.E.2d 81 (1947). In order to hold respondent liable for road defects of this type, claimant must prove that respondent had actual or constructive notice. *Pritt vs. Dept. of Highways*, 16 Ct. Cl. 8 (1985); *Harmon vs. Dept. of Highways*, 16 Ct. Cl. 127 (1986).

In the present case, the evidence established that the respondent was put on notice about the drainage problem, that respondent knew or should have known that the drainage problem at the location in question was a hazard, and that the respondent did not take reasonable steps to ensure the safety of those on such a road. Consequently, there is sufficient evidence of negligence to base an award.

Notwithstanding this finding of negligence, the Court is still faced with the issue of the value of claimant's vehicle. At the April 14, 1999, hearing, there was no testimony regarding the value of claimant's vehicle in order to substantiate the claimed values. Accordingly, the Court finds the value of claimant's vehicle to be $1,000.00 Therefore, in view of the foregoing, the Court hereby makes the following award.

Award of $1,000.00

OPINION ISSUED SEPTEMBER 8, 1999

RONALD E. BAILEY
VS.
DIVISION OF HIGHWAYS
(CC-98-146)

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

PER CURIAM:

Claimant brought this action for tire damage which occurred as a result of an encounter with a road sign which had fallen from the 35th Street Bridge after repair work on the bridge had commenced by the contractor for respondent. The 35th Street Bridge is maintained by respondent in Kanawha County. The Court is of the opinion to make an award for reasons more fully stated below.

The incident giving rise to this claim occurred on April 9, 1998, at about 12:00 p.m. Claimant was traveling on the 35th Street Bridge ramp towards Kanawha City, in Kanawha County. The day in question was cloudy and windy. There was little traffic on the road. Claimant was traveling at about twenty-five to thirty miles per hour across the bridge. Suddenly, an orange road sign that was attached to the 35th Street Bridge fell off the bridge and onto the road, fifteen to twenty feet in front of claimant. Unable to avoid the fallen road sign, claimant's vehicle struck the fallen road sign. By the time claimant got to the Kanawha City side of the 35th Street Bridge, his right rear truck tire was flat. The collision with the sign resulted in claimant's right rear truck tire being slashed. Claimant incurred loss in the amount of $50.00.

Respondent denied liability for the accident in question. Respondent acknowledges that claimant collided with a road sign that had fallen from the 35th Street Bridge. However, respondent introduced evidence that a contractor, Ahern & Associates, was doing repair work on the 35th Street Bridge on the day in question pursuant to a contract between respondent and the contractor. The contract between respondent and contractor, Ahern & Associates, provided for a "save harmless" clause. Respondent moved to dismiss the claimant's claim at the hearing which motion was denied by the Court based upon the "save harmless" clause. The contractor, Ahern & Associates, executed a bond for this project upon which respondent may recover any award made to claimant by this Court.

Respondent had employees at the construction site responsible for supervising the actions of the contractor with regard to the safety of the traveling public. Therefore, respondent had an obligation and a duty to ascertain that the sign in question at the construction site was secured in a proper manner such that it did not pose a hazard to the traveling motorist using the 35th Street Bridge. The failure of respondent's employees to supervise the contractor in the proper placement of the sign constitutes negligence for which claimant may recover his loss.

Accordingly, the Court is of the opinion to and does make an award in the amount of $50.00 to claimant.

Award of $50.00.

OPINION ISSUED SEPTEMBER 8, 1999

BLUEFIELD REGIONAL MEDICAL CENTER
VS.
DIVISION OF JUVENILE SERVICES
(CC-99-308)

Claimant appeared *pro se*.
C. Scott McKinney, 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 $209.75 for providing medical services to a juvenile at respondent's facility in Bluefield, Mercer County. The documentation for these services was not processed for payment within the appropriate fiscal year; therefore, claimant has not been paid. In its Answer, respondent admits the validity of the claim as well as the amount, and states that there were sufficient funds expired in the appropriate fiscal year from which the invoices could have been paid.

Accordingly, the Court hereby makes an award to claimant in the amount of $209.75.

Award of $209.75.

OPINION ISSUED SEPTEMBER 8, 1999

CAMDEN CLARK MEMORIAL HOSPITAL
VS.
DIVISION OF JUVENILE SERVICES
(CC-99-232)

Claimant appeared *pro se*.
C. Scott McKinney, 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 $75.00 for providing medical services to a juvenile at respondent's facility in Parkersburg, Wood County. The documentation for these services was not processed for payment within the appropriate fiscal year; therefore, claimant has not been paid. In its Answer, respondent admits the validity of the claim as well as the amount, and states that there were sufficient funds expired in the appropriate fiscal year from which the invoice could have been paid.

Accordingly, the Court hereby makes an award to the claimant in the amount of $75.00.

Award of $75.00.

OPINION ISSUED SEPTEMBER 8, 1999

TREVA CLUTTER
VS.
DIVISION OF HIGHWAYS
(CC-98-157)

Claimant appeared *pro se*.

Xueyan Zhang, Attorney at Law, for the respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred as a result of an encounter with a hole while traveling northbound on Route 2 from Point Pleasant, which is a road maintained by the respondent in Mason County. The Court is of the opinion to make an award for the reasons more fully stated below.

The incident giving rise to this claim occurred on April 3, 1998 at approximately 2:15 p.m. Following work, claimant was traveling northbound on Route 2 to go home. The day in question was clear and there was no oncoming traffic on the road. Claimant was traveling the speed limit, which was fifty-five miles per hour. Unfortunately, claimant's vehicle hit a previously patched hole on the right berm of the road that had become uncovered. Claimant knew of the hole's existence, but on April 3, 1999, was unable to avoid hitting the hole. Apparently, the hole on the right berm of the road had eroded part of the road. The hole was approximately four inches wide and six to eight inches deep. The resulting damage to claimant's 1995 Monte Carlo was two bursted tires and a bent wheel rim. Claimant's loss totaled $277.58. Claimant had collision insurance with a deductible of $250.00.

The well established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of motorist upon its roads. *Adkins vs. Sims*, 130 W.Va. 645; 46 S.E.2d 81 (1947). In order to hold respondent liable for road defects of this type, claimant must prove that respondent had actual or constructive notice. *Pritt vs. Dept. of Highways*, 16 Ct. Cl. 8 (1985); *Harmon vs. Dept. of Highways*, 16 Ct. Cl. 127 (1986).

In the present case, the evidence established that the respondent was put on notice about the hole, especially after the claim *Jason L. Shaffer vs. Division of Highways* (CC-98-149), which was an accident at the exact same location in question about two months prior to claimant's April 3,1999, accident. The Court is of the opinion that respondent did not take reasonable steps to ensure the safety of Route 2 in Mason County. Respondent did have ample opportunities to make repairs and should have been more vigilant. Consequently, there is sufficient evidence of negligence to base an award. However, claimant is entitled to an award for her loss, to the extent of the deductible feature on her collision insurance. Therefore, in view of the foregoing, the Court hereby make the following award.

Award of $250.00

OPINION ISSUED SEPTEMBER 8, 1999

EMP OF OHIO COUNTY
VS.
DIVISION OF JUVENILE SERVICES
(CC-99-303)

Claimant appeared *pro se*.

C. Scott McKinney, 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 $135.40 for providing medical services to a juvenile at respondent's facility in Wheeling, Ohio County. The documentation for these services was not processed for payment within the appropriate fiscal year; therefore, claimant has not been paid. In its Answer, respondent admits the validity of the claim as well as the amount, and states that there were sufficient funds expired in the appropriate fiscal year

from which the invoice could have been paid.

Accordingly, the Court hereby makes an award to the claimant in the amount of $135.40.

Award of $135.40.

OPINION ISSUED SEPTEMBER 8, 1999

LINDA L. FOSTER
VS.
DIVISION OF HIGHWAYS
(CC-98-120)

Claimant appeared *pro se*.

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred as a result of an encounter with a hole in the right-hand lane of Route 79/3, Cabin Creek Road, coming out of Kayford, which is a road maintained by the respondent in Kanawha County. The Court is of the opinion to deny the claim for the reasons more fully stated below.

The incident giving rise to this claim occurred on March 28, 1998 at approximately 5:00 to 6:00 p.m. The weather was sunny and clear. Claimant was proceeding along Route 79/3 at about twenty to thirty miles per hour. Furthermore, claimant was traveling in the right-hand lane of Route, Cabin Creek Road, coming out of Kayford, West Virginia, when her vehicle struck a hole in the road. Having moved back to this particular area, claimant had not traveled on Route 79/3 in several years prior to the March 28, 1998 accident. Claimant maintained that she did not see the hole until after the collision. However, on cross-examination, the claimant maintained that she could not avoid the collision with the hole because she had been confronted by oncoming traffic. As a result of the accident, claimant suffered two bursted tires and a bent rim on her 1986 Chevy Caprice Classic. Unfortunately, claimant only had liability insurance coverage on her vehicle, which precluded any reimbursement from her insurance carrier. Claimant suffered a loss of $325.15. No documentary evidence was introduced by the claimant to prove these expenses at the June 11, 1999 hearing.

The well established principle of law in West Virginia is that the State is neither

an insurer nor a guarantor of the safety of motorists upon its roads. *Adkins vs. Sims*, 130 W.Va. 645; 46 S.E.2d 81 (1947). In order to hold respondent liable for road defects of this type, claimant must prove that respondent had actual or constructive notice. *Pritt vs. Dept. of Highways*, 16 Ct. Cl. 8 (1985); *Harmon vs. Dept. of Highways*, 16 Ct. Cl. 127 (1986).

In the present case, claimant never established that respondent was put on notice about the hole on Route 79/3, Cabin Creek Road, in Kanawha County. There was no evidence presented by claimant that the respondent did not take reasonable steps to ensure the safety of Route 79/3. Respondent did not have ample opportunity to make repairs to the road in question. Nor was there evidence presented by claimant that respondent should have been more vigilant. Consequently, there is insufficient evidence of negligence to base an award. Claimant is not entitled to an award for her loss. Therefore, in view of the foregoing, the Court hereby denies this claim.

Claim disallowed

OPINION ISSUED SEPTEMBER 8, 1999

VIRGINIA GALLOWAY
VS.
DIVISION OF HIGHWAYS
(CC-98-211)

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred as a result of an encounter with a falling tree while traveling west on U. S. Route 60 at Cedar Grove, which is a road maintained by respondent in Kanawha County. The Court is of the opinion to deny this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred on June 8, 1998, at approximately 6:30 a.m. At daybreak on the morning in question, claimant was making her routine drive to Charleston for work. Claimant was traveling westbound in the right-hand lane of the four-lane section of U. S. Route 60 and proceeding to the two-lane section of U. S. Route 60. A coal truck was in front of claimant's vehicle. The coal truck made the trees and greenery move as it proceeded down U. S. Route 60. As

claimant came to the two-lane portion of U. S. Route 60, a dead tree fell and struck claimant's vehicle. The impact broke the vehicle's windshield and luggage rack. Then, the tree bounced on the front end of her vehicle and broke the headlight. Claimant had only liability insurance coverage. The estimated damage to claimant's 1989 Dodge Caravan was in the amount of $1,101.02, but claimant explained that her actual expenses for repair were $2,000.00.

The position of respondent was that it did not have actual or constructive notice of the condition of such tree on U. S. Route 60 at Cedar Grove in Kanawha County. According to respondent's daily reports from the Chelyan office, emergency service was dispatched to remove the tree from U. S. Route 60. The tree was removed as soon as the call was received. Respondent had no prior information regarding condition of the tree or that it may have posed a danger to the traveling public.

This Court has previously held that when the evidence indicates that respondent does not have notice of a hazard, such as a falling tree, and a reasonable opportunity to remove it, respondent cannot be held liable. *Jones v. Division of Highways*, 21 Ct. Cl. 45 (1995).

There are several trees in this location of U. S. Route 60 at Cedar Grove in Kanawha County. No evidence was presented as to whether the tree was on the State's right of way. Clearly, respondent can not be responsible for inspection of all the trees in the area that may or may not be in the State's right of way. Respondent had no notice of the tree's condition or that the tree's potential for falling posed a hazard to the traveling public. Consequently, there is insufficient evidence of negligence upon which to base an award.

In view of the foregoing, the Court hereby denies this claim.

Claim disallowed.

OPINION ISSUED SEPTEMBER 8, 1999

GREEN ACRES REGIONAL CENTER
C/O SHELTERED WORKSHOP OF
NICHOLAS COUNTY
VS.
DIVISION OF CORRECTIONS
(CC-99-304)

Claimant appeared *pro se*.

Joy M. Cavallo, 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 $468.40 for providing bottled water delivery and services at Mount Olive Correctional Center, respondent's facility in Fayette County. The documentation for these services was not processed for payment within the appropriate fiscal year; therefore, claimant has not been paid. In its Answer, respondent admits the validity of the claim as well as the amount, and states that there were sufficient funds expired in the appropriate fiscal year from which the invoices could have been paid.

Accordingly, the Court hereby makes an award to the claimant in the amount of $468.40.

Award of $468.40.

OPINION ISSUED SEPTEMBER 8, 1999

ANGELA D. HARLESS
VS.
DIVISION OF HIGHWAYS
(CC-98-178)

Claimant appeared *pro se.*

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

PER CURIAM:

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

1. On March 6, 1997, claimant was traveling on W.Va. Route 10, Gaylor Lane, Kanawha County, when her vehicle hit a large rock located in the center of the road.

2. As a result of this incident, claimant's vehicle sustained damage in the sum of $202.11.

3. Respondent owns and maintains W.Va. Route 10, Gaylor Lane, Kanawha County, in a reasonably safe condition.

4. On the date of the incident herein, respondent failed to maintain W.Va. Route 10, Gaylor Lane, Kanawha County, in a reasonably safe condition. The rock in the road had been left there by respondent's employees after culvert work was performed at this location

5. Respondent agrees that the amount of damages as put forth by claimant is fair and reasonable.

The Court has reviewed the facts of the claim as stated in the stipulation, and adopts the statement of facts as its own. The Court finds that respondent was negligent in its maintenance of W.Va. Route 10, Gaylor Lane, Kanawha County, on the date of claimant's incident; that the negligence of respondent was the proximate cause of the damages sustained to claimant's vehicle; and that the amount of the damages agreed to by the parties is fair and reasonable.

Accordingly, the Court makes an award in the amount of $202.11 to claimant.

Award of $202.11.

OPINION ISSUED SEPTEMBER 8, 1999

CORNELIUS R. LEWIS
VS.
DIVISION OF HIGHWAYS
(CC-98-106)

Claimant appeared *pro se*.

Xueyan Zhang, Attorney at Law, for the respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred as a result of an encounter with a hole on Route 19 (Robert C. Byrd Drive), southbound between Beckley and Mt. Hope, which road is maintained by respondent in Raleigh County.[1] The Court is of the opinion to make an award in the claim for reasons more fully stated below.

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[1] Testimony from the hearing on May 7, 1999, indicated that the hole was on the southbound side of Route 19. However, testimony and an observation of a map of West Virginia's state highways shows that the claimant was actually traveling northbound. Accordingly, the Court takes official notice of this fact.

The incident giving rise to this claim occurred on February 17, 1998, at about 11:00 p.m. After work, claimant was taking a friend home, who lived in Beckley. At the time in question, there was minimal traffic flow on the road. The weather that night was clear and the road was dry. Claimant was traveling at about fifty miles per hour, which was the speed limit. After dropping his friend off, he proceeded through a stop light when his vehicle's passenger-side tire struck a hole. The hole was located on the southbound, far right lane of the four lane highway. The hole was a few inches deep, eight to ten inches wide, and about one foot in length. Claimant had traveled on this portion of Route 19 before, but he had not seen the hole prior to February 17, 1998.

After traveling two to three hundred feet from the hole, claimant stopped and checked his vehicle. The passenger wheel of the claimant's 1995 Pontiac Tran Sport had burst and the alignment was knocked out of place. The resulting damage to claimant's vehicle was $171.72. This amount was less than his insurance deductible of five hundred dollars.

Following the accident, claimant reported the road defect to the respondent's Skelton office.

Respondent acknowledged that it had prior knowledge of the hole in question. On February 9, 1998, respondent's employees had patched the hole. Cold mix asphalt was used to fill the hole, since hot mix asphalt is unavailable during the winter. Unfortunately, due to inclement weather, the cold mix had come out of the hole. According to respondent's daily reports, no further was work done nor were there any further complaints made about this portion of Route 19 until claimant's accident.

The well established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of motorists upon its roads. *Adkins vs. Sims*, 130 W.Va. 645; 46 S.E.2d 81 (1947). In order to hold respondent liable for road defects of this type, claimant must prove that respondent had actual or constructive notice. *Pritt vs. Dept. of Highways*, 16 Ct. Cl. 8 (1985); *Harmon vs. Dept. of Highways*, 16 Ct. Cl. 127 (1986).

Respondent is well aware of the propensity of cold mix to come out of patched holes, and respondent has a duty to maintain those areas on priority roads in a more diligent manner.

In the present case, the evidence established that respondent knew about the hole in the far right lane of the south bound side of Route 19, which is a priority road. Likewise, respondent's knowledge of the hole resulted in repair work to the hole in question. The Court is of the opinion that respondent did not take reasonable steps to ensure the safety of those on Route 19, a priority road, and respondent should have been more vigilant. Consequently, there is sufficient evidence of negligence to base an award. In view of the foregoing, the Court is the opinion to and does make an award to claimant in the amount of $171.72 for the damages to his vehicle.

Award of $171.72.

OPINION ISSUED SEPTEMBER 8, 1999

BERTHA NOBLE
VS.
DIVISION OF HIGHWAYS
(CC-98-326)

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred as a result of claimant's vehicle going into a manhole depression while traveling northbound on County Route 52/61 (Railroad Avenue) in the City of Wayne in Wayne County. County Route 52/61 (Railroad Avenue) is a road maintained by respondent. The Court is of the opinion to make an award to the claimant for the reasons more fully stated below.

The incident giving rise to this claim occurred on September 5, 1998, at approximately 1:30 p.m. The weather was clear. Claimant was traveling northbound on County Route 52/61 (Railroad Avenue) in the City of Wayne, Wayne County. County Route 52/61 (Railroad Avenue) had just been paved. As claimant proceeded along the narrow road at a speed of about twenty-five to thirty miles per hour in a speed zone of thirty-five miles per hour, she noticed children playing nearby. Claimant was watching the children as she continued along the road when her 1998 Nissan Pulsar suddenly struck a manhole that had not been brought level to the pavement. The manhole was approximately five to six inches deep. Claimant's vehicle wheel hit and came out of the manhole. When the right, front tire of claimant's vehicle struck the hole, something hit the engine, causing damage. Claimant never saw the manhole depression. After having her vehicle towed to her home, claimant informed respondent about the manhole. Claimant had only liability insurance coverage on her vehicle, which precluded any reimbursement from her insurance carrier. The estimated damage to claimant's vehicle was $500.00 for replacement of the motor and motor mount bolts.

Respondent asserts that it is not responsible for the maintenance of the manholes on County route 52/61 (Railroad Avenue). County Route 52/61 (Railroad Avenue) had been grandfathered into the State system during the 1970's . As a result, the utilities are covered under the "Accommodation of Utilities on Highway Right of

Way" which made the City of Wayne responsible for the manholes. This situation meant that the series of manholes, including the one in question, that were in the roadway prior to the road being taken into the State system were grandfathered with the exclusion of not having to move the manholes out of the traffic pattern. Consequently, the City of Wayne is obligated to adjust the manhole covers for the drains to the proper level after paving operations are completed by respondent. Respondent also asserts that the paving was performed by a contractor for the State.

The Court, having considered the positions of the respective parties, has determined that respondent has obligation to inspect and to ascertain that County Route 52/61 (Railroad Avenue)is maintained in a proper manner for the safe and convenient use of the traveling public. This obligation requires respondent to inspect the road after any paving operation in order to determine if any warning signs were necessary. In the instant claim, as respondent's contractor paved County Route 52/61 (Railroad Avenue) and left manholes unpaved, warning signs apparently were necessary. The failure of respondent's employees to supervise the road pavement work and to inspect the proper placement of the warning signs constitutes negligence for which claimant may recover her loss.

In view of the foregoing, the Court is of the opinion to and does make an award in the amount of $500.00 to the claimant.

Award of $500.00

OPINION ISSUED SEPTEMBER 8, 1999

JASON L. SHAFFER
VS.
DIVISION OF HIGHWAYS
(CC-98-149)

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred as a result of an encounter with a hole while traveling northbound on Route 2 from Point Pleasant, which is a road maintained by respondent in Mason County. The Court is of the opinion to make an award for the reasons more fully stated below.

The incident giving rise to this claim occurred on February 27, 1998, at

approximately 1:00 p.m. Claimant is a member of the United States Air Force and is stationed in Dayton, Ohio, at Wright-Patterson Air Force Base. Following work, claimant was traveling northbound on Route 2 in Mason County in order to go home for the weekend. The location in question is twelve miles off Route 33 on Route 2 between Ripley and Point Pleasant. Route 2 is two-lane road that is sixteen feet wide. Apparently, the hole on the right berm of the road had eroded part of the road beyond the white line, into the paved portion of the highway. The hole was approximately four inches wide and six to eight inches deep.

The day in question was clear and there was no oncoming traffic on Route 2 in Mason County. Claimant was traveling fifty miles per hour in a fifty-five miles per hour speed zone. Unfortunately, claimant's vehicle hit a hole in the right edge of Route 2 in Mason County. Claimant did not know of the hole's existence. The resulting damage to claimant's 1998 Cavalier Z24 was two bursted tires, two bent wheel rims, inner fender damage and front-end alignment. The claimant's loss totaled $1,426.21. Claimant had a deductible of $500.00 in his collision insurance coverage. However, if claimant turned in the accident to his insurance, his twenty percent discount for safe driving would be lost, which would further cost claimant $540.00.

Respondent denied prior knowledge of the hole in question. According to respondent's daily records no work was ever done nor were there any further complaints made about this portion of Route 2 in Mason County. Further, respondent acknowledged that the road was regularly inspected. However, respondent did not know how long the eroded hole had been at this location.

The well established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of motorists upon its roads. *Adkins vs. Sims*, 130 W.Va. 645; 46 S.E.2d 81 (1947). In order to hold respondent liable for road defects of this type, claimant must prove that respondent had actual or constructive notice. *Pritt vs. Dept. of Highways*, 16 Ct. Cl. 8 (1985); *Harmon vs. Dept. of Highways*, 16 Ct. Cl. 127 (1986).

In the present case, the evidence established that respondent was at least on constructive notice about the hole. The Court is of the opinion that respondent did not take reasonable steps to ensure the safety of Route 2 in Mason County. Respondent should have been more vigilant. Consequently, there is sufficient evidence of negligence upon to base an award. Therefore, in view of the foregoing, the Court makes the following award to claimant which is limited to the deductible feature of his collision insurance.

Award of $500.00.

OPINION ISSUED SEPTEMBER 8, 1999

JASON R. SIMMONS
VS.
BOARD OF TRUSTEES OF THE UNIVERSITY
SYSTEM OF WEST VIRGINIA
(CC-99-205)

Claimant appeared *pro se*.
Samuel R. Spatafore, 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 $100.00 for his VCR that was destroyed when electrical work was done in the apartment which claimant rented from respondent. In its Answer, respondent admits the validity of the claim and that the amount is fair and reasonable. The Court is aware that respondent does not have a fiscal method for paying claims of this nature; therefore, the claim has been submitted to this Court for determination.

Accordingly, the Court makes an award to the claimant for his loss in the amount of $100.00.

Award of $100.00.

OPINION ISSUED SEPTEMBER 8, 1999

TAYLOR & JAMES, PLLC
VS.
WEST VIRGINIA INSURANCE COMMISSION
(CC-99-290)

Claimant appeared *pro se*.
Joy M. Cavallo, 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 $4,127.00 for providing legal services to respondent in Charleston. The documentation for these services was not processed for payment within the appropriate fiscal year; therefore, claimant has not been paid. In its Answer,

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

Accordingly, the Court hereby makes an award to claimant in the amount of $4,127.00.

Award of $4,127.00.

OPINION ISSUED SEPTEMBER 8, 1999

WEST GROUP
VS.
DIVISION OF CORRECTIONS
(CC-99-278)

Claimant appeared *pro se*.

Joy M. Cavallo, 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 $5,317.08 for providing legal publications to Mount Olive Correctional Complex, respondent's facility in Fayette County. The documentation for these publications was not processed for payment within the appropriate fiscal year; therefore, claimant has not been paid. In its Answer, respondent admits the validity of the claim as well as the amount, and states that there were sufficient funds expired in the appropriate fiscal year from which the invoices could have been paid.

Accordingly, the Court hereby makes an award to claimant in the amount of $5,317.08.

Award of $5,317.08.

OPINION ISSUED SEPTEMBER 8, 1999

DELORIS B. YOUNG
VS.
DIVISION OF HIGHWAYS

(CC-98-87)

Claimant appeared *pro se*.

Xueyan Zhang, Attorney at Law, for the respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred as a result of an encounter with a hole after claimant exited Harper Road (Route 3) onto Harper Park Drive, a road maintained by respondent in Raleigh County. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred on February 11, 1998, at about 6:30 - 7:00 p.m. After having been at work, claimant was traveling home on Harper Park Drive, a two lane highway that is twenty feet wide with ten feet per lane. At the time in question, visibility was near zero due to fog and some snow on the road. There was no lighting in the area. Claimant was proceeding along Harper Park Drive at about ten to twenty miles per hour. Due to the inclement weather conditions, claimant carefully navigated her vehicle close to the right berm of the road. Suddenly, claimant was blinded by the lights of an oncoming truck. Her vehicle then struck a hole on the right side of the road. Having recently moved to the area, claimant asserted that she had not observed this hole prior to February 11, 1998. After her vehicle hit the hole and traveled about five feet, she got out and inspected her 1993 Nissan Sentra. The vehicle's tires were damaged and the vehicle pulled to one side. The condition of claimant's vehicle required her to obtain a rental vehicle. The resulting damage to claimant's vehicle was $882.01, not including rental cost of $286.20 and $40.00 in emergency repairs on the night of the incident, required for claimant to drive her vehicle from the scene. However, claimant had insurance coverage which covered all but $576.20 of her total damages.

Shortly after the accident, acquaintances of claimant took photographic evidence of Harper Park Drive and the hole in question for use in her claim.

Respondent denied prior knowledge of the hole in question. However, respondent had an office on George Street, which is an adjacent street to Harper Park Drive. According to respondent's daily reports, no work was done since December, 1997, nor were there any further complaints made about this portion of Harper Park Drive. Respondent acknowledged that Harper Park Drive was not regularly inspected.

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

vs. Dept. of Highways, 16 Ct. Cl. 8 (1985); *Harmon vs. Dept. of Highways*, 16 Ct. Cl. 127 (1986).

In the present case, the evidence established that respondent was put on notice about the hole on Harper Park Drive. The photographic evidence offered by claimant at the May 7, 1999, hearing established that respondent knew or should have been put on notice that the hole in question was a hazard. The Court is of the opinion that respondent did not take reasonable steps to ensure the safety of those using Harper Park Drive. Respondent should have been more vigilant. Consequently, there is sufficient evidence of negligence to base an award.

In view of the foregoing, the Court makes an award in the amount of $576.20 to claimant for the damages to her vehicle.

Award of $576.20

ORDER ENTERED OCTOBER 1, 1999

WILLIE LEE DOTSON, AS PERSONAL
REPRESENTATIVE OF THE ESTATE
OF TRESA MYRETTA DOTSON, FOR
AND ON BEHALF OF THE SAID ESTATE
AND THE SURVIVORS THEREOF, AND
WILLIE LEE DOTSON, AS GUARDIAN,
NATURAL PARENT AND NEXT FRIEND OF
AUSTIN RYAN DOTSON, AN INFANT,
Claimants,

VS. VS. CLAIM NO. CC-97-388

DIVISION OF HIGHWAYS,
Respondent.

O R D E R

On a former day this claim came before the Court upon a Second Stipulation filed by Jack H. Vital, III, counsel for the claimants, and Andrew F. Tarr, counsel for the respondent, wherein the issues of liability and damages have been agreed to by the parties,

And the Court, having duly considered the Second Stipulation (signed by

counsel for the claimants on the 24th day of August, 1999, and signed by counsel for the respondent on the 1st day of September, 1999) and being of the opinion that it is in order, doth Order that such Second Stipulation be and the same is hereby filed,

And the Court, having further determined that it has jurisdiction in the premises, finds that the settlement of the claims of the said Willie Lee Dotson, both as personal representative and as guardian, for the gross sum of $125,000, is fair and reasonable, and the same is hereby approved, ratified and confirmed.

It is, Accordingly, Ordered that an award of $125,000 be made in this claim, allocated as follows:

(a) To Willie Lee Dotson, as Administrator of the Estate of Tresa Myretta Dotson, deceased, the sum of $99,000, and

(b) To Willie Lee Dotson, as Guardian for Austin Ryan Dotson, an infant, the sum of $26,000.

It is further Ordered that, as a condition upon the payment of the award to him in the amount of $99,000, the said Willie Lee Dotson, as Administrator of the Estate of Tresa Myretta Dotson, deceased, execute a good and sufficient bond before the Clerk of the County Commission of Mingo County, West Virginia, in the penalty of $99,000, with corporate surety, conditioned as provided by law, and that, as a condition of the payment of the award to him in the amount of $26,000, the said Willie Lee Dotson, as Guardian for Austin Ryan Dotson, an infant, execute a good and sufficient bond before the said Clerk of the County Commission of Mingo County, West Virginia, in the penalty of $26,000, with corporate surety, conditioned as provided by law, and that certified copies of the Letters of Administration and Guardian's Certificate showing compliance with such conditions be filed with the Clerk of this Court.

OPINION ISSUED OCTOBER 19, 1999

CHARLES BURKIEVICZ
VS.
DIVISION OF HIGHWAYS
(CC-99-284)

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

PER CURIAM:

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

1. On June 25, 1999, claimant was traveling southbound on Route 250 when claimant was directed to pull over by a member of the WV State Police. When claimant drove his vehicle to the side of the road, both tires on the vehicle's passenger side were sliced open by a cut-off road sign post which was about four and a half inches high.

2. As a result of this incident, claimant's vehicle sustained damage in the sum of $216.24.

3. Respondent owns and maintains Route 250 in Mineral County and on the date of the incident herein, respondent failed to maintain Route 250 in Mineral County in a reasonably safe condition.

5. Respondent agrees that the amount of damages as put forth by claimant is fair and reasonable.

The Court has reviewed the facts of the claim as stated in the Stipulation, and adopts the statement of facts as its own. The Court finds that respondent was negligent in its maintenance of Route 250 on the date of claimant's incident; that the negligence of respondent was the proximate cause of the damages sustained to claimant's vehicle; and that the amount of the damages agreed to by the parties is fair and reasonable. Accordingly, the Court makes an award in the amount of $216.24 to claimant.

Award of $216.24.

OPINION ISSUED OCTOBER 19, 1999

CHARLESTON DEPARTMENT STORE
VS.
PUBLIC SERVICE COMMISSION
(CC-99-373)

Claimant appeared *pro se*.

Joy M. Cavallo, 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 $463.79 for providing work clothing to respondent. The documentation for the merchandise was not processed for payment within the appropriate fiscal year; therefore, claimant has not been paid. In its Answer, respondent admits the validity of the claim as well as the amount, and states that there were sufficient funds expired in the appropriate fiscal year from which the invoice could have been paid.

Accordingly, the Court hereby makes an award to claimant in the amount of $463.79.

Award of $463.79.

OPINION ISSUED OCTOBER 19, 1999

PHYLLIS HAYNES EDENS, CCR
VS.
BOARD OF BARBERS AND COSMETOLOGISTS
(CC-99-359)

Claimant appeared *pro se*.

Joy M. Cavallo, 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 $209.60 for providing court reporter services before respondent's hearing examiner in Charleston. The documentation for these services was not processed for payment within the appropriate fiscal year; therefore, claimant has not been paid. In its Answer, respondent admits the validity of the claim as well as the amount, and states that there were sufficient funds expired in the appropriate fiscal year from which the invoice could have been paid.

Accordingly, the Court hereby makes an award to claimant in the amount of $209.60.

Award of $209.60.

OPINION ISSUED OCTOBER 19, 1999

HAMPSHIRE COUNTY COMMISSION
VS.
DIVISION OF CORRECTIONS
(CC-99-317)

Stephen W. Morelan, Attorney at Law, for claimant.
Joy M. Cavallo, 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, Hampshire County Commission, is responsible for the incarceration of prisoners who have ommitted crimes in Hampshire County, but have been sentenced to facilities owned and maintained by respondent, Division of Corrections. Claimant brought tis action to recover $13,813.53 in costs for providing housing and/or medical care to 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 *County Comm'n. of Mineral County vs. Div. of Corrections*, 18 Ct. Cl. 88 (1990), that respondent is liable to claimant for the cost of housing and providing medical care to inmates sentenced to a State penal institution.

Pursuant to the holding in *Mineral County*, respondent reviewed this claim to determine the invoices for the services for which it may be liable. Respondent then filed an Answer admitting the validity of the claim in the amount of $13,813.53.

In view of the foregoing, the Court makes an award to claimant in the amount of $13,813.53.

Award of $13,813.53 .

OPINION ISSUED OCTOBER 19, 1999

McDOWELL COUNTY CORRECTIONAL CENTER
VS.

DIVISION OF CORRECTIONS
(CC-99-310)

Sidney H. Bell, Prosecuting Attorney, for claimant.
Joy M. Cavallo, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant, McDowell Couny Correctional Center, is responsible for the incarceration of prisoners who have committed crimes in McDowell County, but have been sentenced to facilities owed and maintained by respondent, Division of Corrections. Claimant brought this action to recover $224,690.14 in costs for providing housing and/or medical care to 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 *County Comm'n. of Mineral County vs. Div. of Corrections*,18 Ct. Cl. 88 (1990), that respondent is liable to claimant for the cost of housing and providing medical care to inmates sentenced to a State penal institution.

Pursuant to the holding in *Mineral County*, respondent reviewed this claim to determine the invoices for the services for which it may be liable. Respondent then filed an Answer admitting the validity of the claim in the amount of $224,690.14.

In view of the foregoing, the Court makes an award to claimant in the amount of $224,690.14.

Award of $224,690.14 .

OPINION ISSUED OCTOBER 19, 1999

BOBBIE J. RARDON
VS.
DIVISION OF HIGHWAYS
(CC-98-345)

Claimant appeared *pro se*.

Xueyan Zhang, Attorney at Law, for respondent.

PER CURIAM:

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

1. On August 6, 1998, claimant was traveling southbound on Interstate 79 in Harrison County at mile marker 111, near Lost Creek, when claimant's vehicle struck a hole in a construction area that employees of respondent had dug during the project. The hole was one of several and it was not marked with any warning devices for the traveling public.

2. As a result of this incident, claimant's vehicle sustained damage in the sum of $474.80. However, claimant has a deductible feature of $250.00 in his motor vehicle insurance policy coverage.

3. On the date of the incident herein, respondent failed to maintain Interstate79 in Harrison County in a reasonably safe condition.

4. Respondent agrees that the amount of damages as put forth by the claimant is fair and reasonable.

The Court has reviewed the facts of the claim as stated in the Stipulation, and adopts the statement of facts as its own. The Court finds that respondent was negligent in its maintenance of Interstate 79 in Harrison on the date of claimant's incident; that the negligence of respondent was the proximate cause of the damages sustained to claimant's vehicle; and that the amount of the damages agreed to by the parties is fair and reasonable. Claimant is entitled to an award for his loss to the extent of the deductible feature in his motor vehicle insurance policy.

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

Award of $250.00.

OPINION ISSUED OCTOBER 19, 1999

SHERRI GOODMAN REVEAL
VS.
ETHICS COMMISSION

(CC-99-339)

Claimant appeared *pro se*.
Joy M. Cavallo, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $2,706.28 for providing legal services to respondent. The documentation for these services was not processed for payment within the appropriate fiscal year; therefore, claimant has not been paid. In its Answer, respondent admits the validity of the claim as well as the amount, and states that there were sufficient funds expired in the appropriate fiscal year from which the invoices could have been paid.

Accordingly, the Court hereby makes an award to claimant in the amount of $2,706.28.

Award of $2,706.28.

OPINION ISSUED OCTOBER 19, 1999

JULIET R. STEVENSON
VS.
ATTORNEY GENERAL'S OFFICE
(CC-99-256)

Claimant appeared *pro se*.
Joy M. Cavallo, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks payment in the amount of $11,706.13 for travel expenses incurred as an employee of respondent. Respondent, in its Answer, admits the validity of the claim, but states that there were insufficient funds in its appropriation for the fiscal year in question from which to pay the 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 OCTOBER 19, 1999

UNIVERSITY HEALTH ASSOCIATES
VS.
DIVISION OF CORRECTIONS
(CC-99-271)

Claimant appeared *pro se*.

Joy M. Cavallo, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks payment in the amount of $77,501.75 for medical services rendered to inmates in the custody of respondent's facilities at Huttonsville, Pruntytown and Mount Olive. 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 OCTOBER 19, 1999

WOOD COUNTY COMMISSION
VS.
DIVISION OF CORRECTIONS
(CC-99-328)

Genny Conley, Prosecuting Attorney, for claimant.

Joy M. Cavallo, 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, Wood County Commission, is responsible for the incarceration of prisoners who have committed crimes in Wood County, but have been sentenced to facilities owned and maintained by respondent, Division of Corrections. Claimant brought this action to recover $30,375.00 in costs for providing housing and/or medical care to 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 *County Comm'n. of Mineral County vs. Div. of Corrections*, 18 Ct. Cl. 88 (1990), that respondent is liable to claimant for the cost of housing and providing medical care to inmates sentenced to a State penal institution.

Pursuant to the holding in *Mineral County*, respondent reviewed this claim to determine the invoices for the services for which it may be liable. Respondent then filed an Answer admitting the validity of the claim in the amount of $30,375.00.

In view of the foregoing, the Court makes an award to claimant in the amount of $30,375.00.

Award of $30,375.00.

OPINION ISSUED NOVEMBER 15, 1999

JESS W. WHITE
VS.
DIVISION OF CORRECTIONS
(CC-99-382)

Claimant appeared *pro se*.

Joy M. Cavallo, 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 $12.00 for lost clothing. In its Answer, respondent admits the validity of the claim and that the amount is fair and reasonable. The Court is aware that

respondent does not have a fiscal method for paying claims of this nature; therefore, the claim has been submitted to this Court for determination.

Accordingly, the Court makes an award to the claimant for his loss in the amount of $12.00.

Award of $12.00.

OPINION ISSUED NOVEMBER 15, 1999

JOHN C. WITTMAN
VS.
DIVISION OF HIGHWAYS
(CC-98-244)

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred as a result of an encounter with a drain cover while traveling eastbound on Route 892, seven miles from Parkersburg in Wood County. Route 892 is a road maintained by respondent in Wood County. The Court is of the opinion to deny this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred on June 28, 1998, at approximately 9:00 a.m. Claimant was making a trip to purchase gas at Powell's General Store, located on Route 892. The weather was rainy. Adjacent to Route 892 at Powell's General Store is a drain that is thirty-two feet from the center line. The drain is located in the parking lot of Powell's General Store. Claimant knew of the drain but was unaware that on the day in question, the drain had become uncovered. As claimant was turning his 1993 Dodge Dakota into the store parking lot when the front tire of his vehicle struck a drain cover that had become exposed. After striking the drain cover, claimant's tire burst and the rim was broken. Claimant observed that there was another person in the parking lot whose vehicle had also struck the exposed drain cover. Moreover, claimant was informed by the store owner that the drain belonged to and was maintained by respondent. Claimant carried liability insurance coverage only. The resulting damage to claimant's vehicle was $554.13, for a new tire, rim and realignment.

The position of respondent is that it was not responsible for any damage caused by the drain in question. According to respondent, its right of way extends twenty feet from the center line. The drain in question is located thirty-two feet from the center line.

Thus, the drain is outside of respondent's right of way. Further, there is no evidence of work or maintenance by respondent on the drain. Neither was there evidence of a permanent drainage easement.

In the present claim, it was established that respondent was not responsible for the maintenance of the drain adjacent to Route 892. Therefore, in view of the foregoing, the Court is of the opinion to and does deny this claim.

Claim disallowed.

OPINION ISSUED DECEMBER 6, 1999

A & B SALES, INC.
VS.
DIVISION OF MOTOR VEHICLES
(CC-99-104)

J. D. Miller, Attorney at Law, for claimant.
Joy M. Cavallo, Attorney at Law, for respondent.

PER CURIAM:

Claimant, formerly a West Virginia corporation in Ohio County, brought this action to recover a financial loss it incurred when respondent failed to indicate a lienholder on a certificate of title for a motor vehicle. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

In the ordinary course of business at respondent's Charleston office, two forms must be received together in order to process a certificate of title for a motor vehicle. The two forms are a Division of Motor Vehicles Reassignment Supplement, form TM-5, and an application for a certificate of title for a motor vehicle.[1] After receiving the forms, respondent's employees review and process both forms. To continue the processing of the forms, the forms must contain the identical information. If one of the forms is different from the other, respondent's employees must seek clarification from the individuals tendering the forms. If clarification is not made, the processing of the certificate of title for the motor vehicle must stop and desist. Once both forms contain

[1]The Division of Motor Vehicles Reassignment Supplement is a form used when there is a sale between dealers. When the sale is retail, an application for a certificate of title for a motor vehicle is necessary.

the identical information, a certificate of title can be issued for a motor vehicle.

On May 14, 1996, a customer of claimant bought a 1994 Ford Taurus, VIN # 1FALP52U5RA109248. The title paperwork was completed and sent by respondent on June 10, 1996. The necessary forms were sent to respondent's Charleston office. Prior to this date, claimant had been in contact with respondent regarding the title process and had thereafter followed respondent's instructions. However, only the Division of Motor Vehicles Reassignment Supplement, WV417229, contained the lienholder information. When the certificate of title paperwork was processed and the certificate of title was issued, the lienholder information was not placed on the certificate of title. Subsequently, on October 6, 1998, Household Automotive Financing Corporation, who bought out OFL-A Receivables Corporation, attempted to repossess the vehicle only to discover that the customer had already traded the vehicle on a previous date. As a result of not being able to take possession of the vehicle because the lienholder was not indicated on the title, Household Automotive Financing Corporation required claimant to repurchase the vehicle loan through proceeds from another transaction. The resulting financial loss to claimant was in the amount of $9,013.17.

In this claim, respondent clearly failed to follow the proper procedure for processing and issuing the certificate of title for the motor vehicle. The failure of respondent's employees to reasonably follow established rules and regulations for the processing and issuance of a certificate of title for a motor vehicle constitutes negligence for which claimant may recover. Thus, the Court finds that the respondent was negligent in its failure to indicate the lienholder information on the certificate of title for the motor vehicle.

In view of the foregoing, the Court is of the opinion and does make an award to the claimant in the amount of $9,013.17.

Award of $9,013.17.

OPINION ISSUED DECEMBER 6, 1999

JOSEPH J. BANIAK & MARY V. BANIAK
VS.
DIVISION OF HIGHWAYS
(CC-96-419)

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

PER CURIAM:

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

1. In 1977, respondent completed a construction project on Dents Run Road, Granville, Monongalia County. This construction project caused continual flooding problems onto claimants' real property. In addition, the continuing flooding damaged a house located on claimants' real property.

2. As a result of this incident, claimants' real property and house sustained damage in the sum of $25,000.00. However, claimants agreed to relinquish and settle this claim against respondent for the sum of $5,000.00.

3. During the time period in question, respondent bore some responsibility for not maintaining Dents Run Road, Granville in Monongalia County in a reasonably safe condition.

4. Respondent agrees that the amount of damages as agreed to by claimants is fair and reasonable.

The Court has reviewed the facts of this claim as stated in the Stipulation, and adopts the statement of facts as its own. The Court finds that respondent was negligent in its maintenance of Dents Run Road, Granville, Monongalia County during the time period in question; that the negligence of respondent was the proximate cause of the damages sustained to claimants' property; and that the amount of the damages agreed to by the parties is fair and reasonable.

Accordingly, the Court makes an award in the amount of $5,000.00 to claimants.

Award of $5,000.00.

OPINION ISSUED DECEMBER 6, 1999

ROBERT C. BOOKER
VS.
DIVISION OF HIGHWAYS
(CC-98-263)

Shannon M. Bland, Attorney at Law, for claimant.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

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

1. On May 11, 1997, claimant was walking eastbound on U. S. Route 60 across the Coal River Bridge, near Saint Albans, Kanawha County. As claimant stepped onto the sidewalk of the bridge, the concrete underneath him gave way and claimant's leg went completely through the sidewalk up to his patella.

2. As a result of this incident, claimant sustained a personal injury with damages in the amount of $9,000.00. However, claimant agreed to relinquish and settle this claim against respondent for the sum of $4,000.00.

3. On the date of the incident herein, respondent failed to maintain the Coal River Bridge on U. S. Route 60 in Kanawha County in a reasonably safe condition.

4. Respondent agrees that the amount of damages as put forth by claimant is fair and reasonable.

The Court has reviewed the facts of this claim as stated in the Stipulation, and adopts the statement of facts as its own. The Court finds that respondent was negligent in its maintenance of the Coal River Bridge on U. S. Route 60 in Kanawha County on the date of claimant's incident; that the negligence of respondent was the proximate cause of the injuries suffered by claimant; and that the amount of the damages agreed to by the parties is fair and reasonable.

Accordingly, the Court is of the opinion to and does make an award in the amount of $4,000.00 to claimant.

Award of $4,000.00.

OPINION ISSUED DECEMBER 6, 1999

CLYDE W. BOYLES
VS.
DIVISION OF HIGHWAYS
(CC-98-170)

Claimant appeared *pro se*.

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when his vehicle struck a hole on Interstate 64, westbound, near the Huntington airport. The westbound lane of Interstate 64 is maintained by the respondent in Wayne County. The Court is of the opinion to make an award for reasons more fully stated below.

The incident giving rise to this claim occurred on April 18, 1998, at approximately 10:30 p.m. The weather was wet, rainy and dark. Claimant, who is domiciled in Greenup County, Kentucky, was traveling west on Interstate 64 in Wayne County. Construction work had commenced on Interstate 64, so traffic was merged into the left-hand lane and claimant had reduced his vehicle speed to approximately fifty-five miles per hour. Claimant did not know that there was a hole on Interstate 64. Without warning, claimant's 1997 Jeep Cherokee hit the hole on the interstate. The hole was deep. Immediately, both of the tires on the driver's side burst. As claimant made his way to the other side of the road, he noticed four other vehicles that also had damaged tires. Because two tires had burst, claimant had to have his vehicle towed. Subsequently, claimant's vehicle was towed to the BP station on U. S. Route 23, in Greenup County, Kentucky. Claimant had a deductible of $500.00 on his collision insurance coverage. The resulting damage to claimant's vehicle was $295.56, for two tires and a tow bill.

Respondent denied liability for the accident in question. Respondent acknowledges that claimant collided with the hole in the westbound lane of I-64. However, respondent introduced evidence that a contractor was doing repair work on this portion of I-64 on the day in question pursuant to a contract between respondent and the contractor. The contract between the respondent and contractor included a "save harmless" provision and the respondent takes the position that the "save harmless" provision constitutes a defense to the claim against it. We disagree. We hold that the respondent cannot avail itself of the protection of a "save harmless" provision in a contract between the respondent and the respondent's contractor as against an injured third party, the claimant, who is not privy to said contract.

A review of the facts in this claim reveals that respondent's employees who had a duty to inspect the site conditions of the project failed to protect the traveling public from a hazardous condition and we hold that this failure constitutes negligence. In a previous decision, *Bailey v. Div. of Highways*, (CC-98-146, Opinion issued September 8, 1999). The Court held that respondent had a duty to inspect the construction site and to act upon its inspection in a proper manner. Failure to do so was held to be negligence.

Accordingly, the Court is of the opinion to and does make an award in the amount of $295.56 to claimant.

Award of $295.56

OPINION ISSUED DECEMBER 6, 1999

ROBERT L. BRATTON
VS.
DIVISION OF HIGHWAYS
(CC-98-169)

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

PER CURIAM:

Claimant brought this action for vehicle damage from striking a crown at the intersection of Pennsylvania Avenue (U. S. 119) and Quarrier Street in Charleston. Pennsylvania Avenue is a road maintained by respondent in Kanawha County. The Court is of the opinion to deny this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred on March 27, 1998, at about 5:00 p.m. After crossing Pennsylvania Avenue, Quarrier Street becomes Randolph Street. Pennsylvania Avenue is maintained by the State while Randolph Street is maintained by the City of Charleston. From Quarrier Street to Randolph Street is one-hundred twenty to one-hundred thirty feet. As one crosses the intersection at this point, claimant alleges that there is a pronounced crown on Pennsylvania Avenue, which caused the damage to his vehicle.

On the clear day in question, claimant was traveling westbound on Quarrier Street, proceeding to his residence from his place of employment. Claimant was traveling at the speed limit of thirty miles per hour in his 1962 Austin Healy 3000, a short wheel-based vehicle. As claimant's vehicle crossed the intersection of Pennsylvania Avenue and Quarrier Street, his vehicle crossed the crown on Pennsylvania Avenue and then went nose first into the dip, with the front of his vehicle striking the surface of the road. The collision caused claimant's vehicle to bounce, which in turn caused his forearm to move the gear shift lever, resulting in the transmission being put into reverse, destroying the transmission. After the incident, claimant alleges that he pushed his 1,875 pound vehicle to Wyoming Street, approximately one and a half blocks

from Randolph Street[1].

Afterwards, claimant inspected his vehicle. Claimant observed that the linkage was intact but saw scars underneath the vehicle from the impact of the road. The vehicle was insured under a liability insurance policy, but there was no insurance coverage for this incident. Claimant's out-of-pocket expenses were $797.40. Specifically, the expenses reflect a $50.00 towing bill and $747.40 in repair work to the transmission.

The position of the respondent was that the incident did not occur on a road that it maintained. An on-site inspection of Pennsylvania Avenue by the chief inspector for respondent, an eighteen year veteran, revealed that there was no pronounced crown on Pennsylvania Avenue. Rather, there is a pronounced crown on Randolph Street. According to respondent, Randolph Street starting at and including Quarrier Street, belongs to the City of Charleston. No changes have been made to Pennsylvania Avenue since March 27, 1998. Also, there have been no other complaints regarding a crown on Pennsylvania Avenue.

After a review of the evidence adduced at the June 11, 1999, hearing and a view of the intersection by the Court, the Court is of the opinion that there is a pronounced crown at the intersection in question. However, the change in grade at this intersection is not unlike other West Virginia roads. While the Court is sympathetic to claimant's predicament, the Court is unwilling to declare the change in grade at the intersection of Pennsylvania Avenue and Quarrier Street to constitute negligence on respondent's part. The opinion of the Court is that the intersection was reasonably maintained. Respondent can not be required to build West Virginia roads to suit specialty vehicles such as that of claimant. Otherwise, a undue burden would be placed on the State. Consequently, there is insufficient evidence of negligence on which to base an award.

In view of the foregoing, the Court hereby denies this claim.

Claim disallowed.

OPINION ISSUED DECEMBER 6, 1999

J. CHRISTOPHER BURKET

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[1]While claimant contends that he was at this location, the receipt from the towing bill states that the location of the vehicle was at the intersection of Ohio and Wyoming Streets, which are streets maintained by the City of Charleston.

VS.
DIVISION OF MOTOR VEHICLES
(CC-99-282)

Claimant appeared *pro se*.
Joy M. Cavallo, Attorney at Law, for respondent.

PER CURIAM: This claim was submitted to the Court for decision upon a tipulation entered into by claimant and respondent wherein certain facts and circumstances of the claim were set forth as follows:

1. On April 4, 1998, claimant J. Christopher Burket purchased a 1995 Yamaha motorcycle represented to have a clear certificate of title issued by respondent. Upon returning to Pennsylvania, claimant attempted to obtain a certificate of title issued in Pennsylvania. The State of Pennsylvania would not issue claimant a certificate of title because the motorcycle had been previously "junked" in Pennsylvania. Eventually, the State of Pennsylvania did issue a certificate of title, but the certificate of title reflected a reconstructed certificate of title, indicated by a "R" on the certificate of title. The reconstructed certificate of title decreased the value of the motorcycle to one-half the blue-book value.

2. As a result of this incident, claimant sustained damage in the sum of $5,035.20. However, claimant agreed to relinquish and settle this claim against respondent for the sum of $2,500.00.

3. Respondent maintains and produces certificates of titles for motorcycles and on the date of the incident herein, respondent failed to follow established reasonable procedures in the issuance of the certificate of title for claimant's motorcycle.

4. Respondent agrees that the amount of damages as set forth in the settlement is fair and reasonable.

The Court has reviewed the facts of the claim as stated in the Stipulation, and adopts the statement of facts as its own. The Court finds that respondent was negligent in its production of the certificate of title for claimant's motorcycle; that the negligence of respondent was the proximate cause of the decrease in the value of claimant's motorcycle; and that the amount of the damages agreed to by the parties is fair and reasonable. Accordingly, the Court makes an award in the amount of $2,500.00 to claimant.

Award of $2,500.00.

OPINION ISSUED DECEMBER 6, 1999

BEULAH BURKHAMMER, AS EXECUTRIX
OF THE ESTATE OF OKEY LOWTHER
VS.
DIVISION OF HIGHWAYS
(CC-95-307)

DORA TALBOTT
VS.
DIVISION OF HIGHWAYS
(CC-95-308)

Stephen F. Gandee, Attorney at Law, for claimants.
Andrew F. Tarr & Xueyan Zhang, Attorneys at Law, for respondent.

STEPTOE, JUDGE:

In each of these cases the claimant seeks an award from the Division of Highways (hereinafter the "State"), alleging that the State was negligent in the design, construction, and maintenance of the intersection, in Gilmer County, West Virginia, of two public roads, U.S. Route 33 and W. Va. 47, and that as a result of the State's negligence, Okey Lowther was killed in a two-car collision, and his sister, Dora Talbott, received permanent injuries.

The Court ordered that the two cases be consolidated for hearing, which began on the 6th day of April, 1999, at Flatwoods, West Virginia, on the issue of liability only.

U.S. 33, broadly speaking, is a road which runs north and south in West Virginia, and W.Va. 47 runs east and west. The easterly end of W.Va. 47 is U.S. 33 so neither road crosses the other, and their meeting place might be termed a "T" intersection.

The intersection is in a rural area, but there are a country market and a filling station on the easterly side. U.S. 33 is the right of way road, with the pavement being 26 feet wide with a good base and shoulders and is asphalt covered with a double yellow line designating the middle of the paved area. W.Va. 47 is asphalt covered but is less wide.

The opening of W.Va. 47 into U.S. 33 is spacious, the intersection having been redesigned and reconstructed in 1983.

The accident took place at about 2:35 p.m. on Tuesday, the 22nd day of November, 1990. The pavements were slightly wet, but there was no evidence that

water on the surfaces of the roads was a factor in producing the collision. The air was clear except for a light rain; no other vehicles were involved in the accident.

The 1989 Pontiac LeMans, owned and operated by Mr. Lowther, and also occupied by Mrs. Talbott, who was seated on the right side of the front seat, had been approaching from the west, and the driver intended, upon entering the intersection, to make a left turn into the northbound traffic lane of U.S. 33 and to proceed in a northerly direction towards Weston, their destination. The evidence preponderates that Mr. Lowther stopped where he was supposed to stop, near a "stop sign" in the southwest quadrant of the intersection, which was intended to bring eastbound drivers to a stop to look for other vehicles approaching the intersection on U.S. 33, from each direction, before entering the intersection.

At about the same time a 1975 Chevrolet Camaro, owned and operated by Charles K. Paxson (hereinafter "Paxson"), was proceeding southwardly on U.S. 33 at a speed of or slightly less than the posted speed limit of 55 miles per hour. His front seat passenger was his wife, and their infant daughter was in the back seat, well secured. He was not required by traffic signs to reduce his speed in the intersection.

There were no known eyewitnesses to the accident except for the drivers and the occupants of the two vehicles.

Shortly after the collision, Senior Trooper Michael Robinson, of the West Virginia State Police, arrived on the scene and became the investigating officer. The two damaged vehicles then were in the positions in which they had come to rest after the collision, and the Trooper was able to trace the movements of the two vehicles between the place of collision and the places at which each came to rest. He was also able to identify the point of impact of the two vehicles by some gouge marks in the surface of the road in the intersection, in the southbound traffic lane, probably near the center. He inspected the Lowther vehicle and determined that the point of initial impact was the left front of the vehicle; the point of initial impact of the Paxson vehicle was its front.

Neither driver was cited by Trooper Robinson, who, however, was not satisfied with Mr. Paxson's statement that immediately before the accident he, Mr. Paxson, was driving between 50 and 55 miles per hour, and he later asked for the assistance and advice of an accident reconstructionist, Trooper Leonard Miller, a trained and qualified accident reconstructionist with three years experience, who testified at the hearing as an expert witness.

Trooper Miller, at some time before or after making his investigation at the scene of the accident, had an opportunity to examine the damaged Paxson car (the Lowther car was not available), and upon the basis of the measurements of its damaged sections, to give a professional opinion that at the time of its collision with the Lowther car, the speed of the Paxson car "could not have exceeded the posted 55 mile an hour

speed limit."

Early in May 1991, Trooper Miller and Trooper Robinson met at the scene of the accident and made measurements of sight distances, from the point at the intersection at which drivers intending to enter U.S. 33 from W.Va. 47 actually stopped to determine whether any vehicles were approaching the intersection, on U.S. 33, from the north or from the south, and when it might be safe to enter U.S. 33. One trooper seated himself in his cruiser (#1), at that point, while the other trooper took his cruiser (#2), to a position on U.S. 33 north of the high point on a vertical curve in the surface of the pavement of U.S. 33, a position which was out of sight of the trooper in cruiser #1; then cruiser #2 was driven slowly southbound until the bank of lights on the roof of cruiser #2 was visible to the trooper in cruiser #1, and the point of first visibility was determined to be 447.50 feet from the trooper in cruiser #1; cruiser #2 was driven southward and downward until its wheels were visible on the pavement; Trooper Miller cautioned, however, that the sight distance between the Lowther car and the Paxson car when the Paxson car first became partially visible to Mr. Lowther on the day of the accident would be a little less than 447.50 feet because of the bank of lights on top of cruiser #2, and opined, as did Lance Robson, hereinafter identified, the sight distance of Mr. Lowther was probably 430 feet.

Trooper Miller also measured the distance between the point at which the Lowther car was probably brought to a dead stop before entering U.S. 33, and the point of collision of the two cars on U.S. 33, and found said distance to be 38.33 feet; and he testified that it would have taken Mr. Lowther 1.9 seconds to go that distance from a dead stop, not counting reaction time.

Lance Robson, a registered professional civil engineer, from Lancaster, Pennsylvania, called by the claimants, and qualified before the Court as an expert in the fields of highway construction design and of accident reconstruction, visited the scene of the accident on December 6, 1993, and at the hearing of this case he testified that the area of U.S. 33 hereinbefore described as the vertical curve north of the intersection, but which he said should be called a vertical crest curve, was "a little bit lower or pretty much just on" the specification of the construction plans of 1982 ... and "The worst I found was that at one point it was a hundredth of a foot higher, so I concluded that the road had been built in accordance with the plans." Mr. Robson used a photograph which he took probably on December 6, 1993, from a point at the intersection northward where he testified drivers intending to enter U.S. 33 from W.Va. 47 would stop before entering U.S. 33, to look for approaching traffic on U.S. 33, northward toward the vertical curve on U.S. 33. He testified that the camera lens height was 3'6" from ground level, and that he saw the roof of a car at the vertical crest curve which was four feet, six inches above ground level, and that the sight distance between the two points was 430 feet.

Mr. Robson explained that his investigation and survey of the intersection led him to the conclusion that the intersection had been constructed in accordance with the plans and specifications as provided by respondent to the construction contractor. He noted that the plans contain a note stating that the "design speed" was 40 miles per hour. At the scene he noted that the posted speed limit was 55 mile per hour. This appeared to be inconsistent to him so he took his measurements for determining the sight distance for the driver entering the intersection from W.Va. 47 and looking left for oncoming traffic approaching from the north on U.S. 33 in order to determine if the sight distance was sufficient if oncoming traffic was approaching at the posted speed limit. It is his opinion that the intersection should have been designed for a speed greater than the posted speed limit, and since it was not constructed based upon that criterion, the sight distance at this intersection "is inadequate for the operating speed by a substantial amount." After explaining that Mr. Lowther was at the "point of no return" in his decision-making process of making the left turn onto U.S. 33, Mr. Robson opined that the design criterion at 40 miles per hour was the wrong criterion and it should have been designed based upon 60 miles per hour, and since the intersection was already constructed, the cure for the problem would be additional signs to warn the drivers approaching the intersection on U.S. 33 at a posted speed of 55 miles per hour or a lower speed, of the proximity of the intersection.

Matthew DiGiulian, a civil engineer employed by the Division of Highways, testified that he received a request from a superior about one year before the hearing of these cases, to review the construction plans for the Linn Intersection work, which was completed about 1988, to see if an adequate sight distance was provided for a driver intending to enter U.S. 33 from W.Va. 47, with particular reference to vehicles approaching from the north on U.S. 33. He determined that the plans provided a sight distance, from the intersection to the top of the vertical curve north of the intersection, of 430 feet, which was sufficient, according to the requirements of the American Association of State Highway and Transportation Officials (AASHTO) Blue Book of 1965 for a road with a speed limit of 40 miles per hour, but insufficient for a road on which the speed limit is 45 miles per hour. He did not go to the site of the accident. When asked about the difference between design speed and posted speed, he said they are different and that different criteria are used for speed limits.

The troopers and Mr. Robson differed as to the time it would have taken Mr. Lowther to clear the southbound lane of U.S. 33 starting from a dead stop where drivers intending to enter make their surveillance of U.S. 33 for other vehicles approaching the intersection from the north or south, Trooper Miller testifying that the time was 1.9 seconds from start-up to instant of collision over a distance of some 38.33 feet, and Mr. Robson putting the time at 4 to 5 seconds (the Court will assume that he would not

disagree with 4 ½ seconds).

The question is: How many feet was the Paxson car from the collision point at the instant when Mr. Lowther from a dead stop at the mouth of W.Va. 47, put his car in motion to cross the southbound traffic lane of U.S. 33?

Trooper Miller correctly testified that a vehicle going 60 miles per hour will cover 88 feet in one second (5,280 ÷ 60 = 88).

A mile is by definition 5280 feet, and a car driven at 60 miles per hour will, in one second, go 88 feet (5,280 ÷ 60), as Trooper Miller testified, and a car driven at 55 miles per hour will, in one second, go 80.663 feet (81 feet, as rounded off by Mr. Robson).

The answer lies in a simple calculation of how many feet the Paxson car traveled, at 55 miles per hour, in 4.5 seconds, (4.5 x 80.663 = 362.983 feet, or 363 feet rounded off).

Hence, at 363 feet from the collision point the Paxson car was well within Mr. Lowther's sight distance of 430 feet, from the time Mr. Lowther made his move until the instant of collision.

The Court concludes that Mr. Lowther was negligent in entering U.S. 33 from W.Va. 47 when the Paxson car in the southbound lane was approaching the intersection, and that Mr. Lowther's negligence was the proximate cause of the accident in which Mr. Lowther was killed and Mrs. Talbott was injured.

Claimants, however, without conceding that Mr. Lowther's negligence was the proximate cause of the accident, contend that the State was negligent and that its negligence was the proximate cause, or a proximate cause of the accident resulting in the death of Mr. Lowther and in the injuries sustained by Dora Talbott.

Specifically, each claimant makes the following allegations:

1. The West Virginia Department of Highways owed to the said Dora Talbott and Okey Lowther and to other members of the traveling public a duty to design, construct and maintain the highway in such manner so as to protect the said Dora Talbott and Okey Lowther and the traveling public against unreasonable risk of injury.

The said intersection of U.S. Route 33/119 and U.S. Route 47 was negligently and carelessly designed, constructed and maintained by the West Virginia Department of Highways in such a manner as to require a vehicle, traveling east on Route 47 such as were the said Dora Talbott and Okey Lowther, to enter Route 33/119 at such a degree and angle so as to create an unreasonable risk and safety hazard and prevent a motorist from having sufficient visibility distances to enter the said roadway in a safe fashion.

The said design, construction and maintenance of the intersection by The West Virginia Department of Highways negligently created such appurtenances and environmental barriers which unreasonably and dangerously inhibited the sight distances

needed to safely enter into the intersection and unreasonably inhibited the free flow of roadway traffic.

2. The West Virginia Department of Highways owed a duty to the said Dora Talbott and to Okey Lowther and to other members of the traveling public for the proper and safe placement and operation of traffic control signals at the intersection of U.S. Route 47 and U.S. Route 33/119.

3. At the time of the collision, The West Virginia Department of Highways negligently and carelessly failed to place and maintain adequate traffic control signs at the intersection on U.S. Route 33/119 and U.S. Route 47.

4. At the time of the collision, the West Virginia Department of Highways, was aware and had knowledge that numerous other automobile accidents had occurred at the said intersection since its design, construction and completion and the West Virginia Department of Highways negligently and carelessly failed at any time to take corrective action to prevent further such automobile accidents from occurring.

5. The West Virginia Department of Highways further negligently and carelessly failed to place and maintain adequate warning signs about that roadway surface upon which the vehicle in which the said Dora Talbott and Okey Lowther and other motorists traveled that the roadway may be adversely affected when subject to certain weather conditions.

The allegations will be addressed, *seriatim*:

1. Appurtenances and environmental barriers were created by the State in the design, construction and maintenance of the intersection of U.S. 33 and W.Va. 47 and the approach of U.S. 33 to the intersection.

No evidence was submitted at the hearing to support this allegation, and the Court finds as a matter of fact that the State was not negligent as alleged, in this respect.

2. The State failed to install and maintain a traffic control signal at the intersection. Charles Raymond Lewis, II, a registered professional engineer of the Traffic Engineering Division of the Division of Highways, who had been so employed since 1971, testified that, "By definition, a traffic signal is a traffic control device that alternately assigns the right of way. It's an electrical device that alternately assigns the right of way."

Mr. Lewis opposed placement of a traffic control signal at the intersection, because the intersection seemed to operate very well without it. Had he thought there was enough traffic to justify consideration of such a signal, he testified, he would have consulted the Manual on Uniform Traffic Control Devices (MUTCD) to determine if a traffic control signal should be placed at the intersection. The Manual, he testified, sets forth criteria for the signal, called warrants, and if a signal is proposed, it must have sufficient warrants, and if a signal is in place and does not have sufficient warrants, the

signal should be removed. Mr. Lewis testified that a signal for the Linn Intersection did not have enough warrants - "it wasn't close". The Court finds as a matter of fact that the State was not negligent in failing to place and maintain a traffic control signal at the intersection. See *Gibson v. Division of Highways*, 19 Ct.Cl. 206 (1993).

3. The State failed to place and maintain adequate traffic control signs at the intersection of U.S. 33 and W.Va. 47, and their approaches.

The evidence adduced at the hearing on these complaints indicates that the State, on the date of the accident, was in compliance with the 1978 MUTCD and with the State's own design guide.

Mr. Lewis, testified that there are three types of traffic control signs on public roads:

a) regulatory signs;
b) warning signs; and
c) guide signs

The first sign on U.S. 33 that Paxson would have seen was a notice that the driver is approaching a junction with W.Va. 47;

The second sign on U.S. 33 that Paxson would have seen was a 7 ½ foot by 2 ½ foot guide sign, a green and white assembly giving major destinations, in this case Glenville on U.S. 33 and Burnt House on W.Va. 47; and

The last sign, called a Final Turn Assembly, was a guide sign, and informed the approaching driver in which lane he should be if intending to continue on U.S. 33, and which lane he should take if intending to leave U.S. 33 and to turn right onto W.Va. 47.

Mr. Lewis also testified as to traffic signs in place on W.Va. 47, immediately before the accident, notifying a driver driving from the west that he was approaching U.S. 33.

a) the first sign was an assembly sign of a junction ahead with U.S. 33 (and U.S. 119), and that W.Va. 47 would end at that junction;

b) the second sign was a 7 ½ foot by 2 ½ foot green and white guide sign informing the driver approaching from the west that at the end of W.Va. 47, if he wished to go toward Weston, he should make a left turn on U.S. 33, and if he wished to go to Glenville, he should make a right turn into U.S. 33;

c) the third sign was a stop sign, informing the driver approaching U.S. 33 from the west that he must stop and that traffic already on U.S. 33 has the right of way and that he does not have the right of way; and

d) the fourth sign was a final turn assembly sign, indicating to drivers on W.Va. 47 the number designations of roads available to him at the intersection and what direction to follow.

All seven of the foregoing signs were guide signs except the stop sign, which

was classified as a regulatory sign. There were no warning signs, the State's position having been that the described traffic control signs on U.S. 33 and W.Va. 47 were sufficient to notify approaching drivers of the imminence of the intersection. Mr. Lewis testified that at one time the MUTCD provided for a limited sight distance sign, but it was taken out of the Manual (a singular event in Mr. Lewis' memory) and, to the best of his knowledge it was because the public did not understand it.

The Court finds as a matter of fact that the State erected and maintained signs on the approaches to the intersection on U.S. 33 and W.Va. 47; and that its failure or refusal to erect a special "limited sight distance" on U.S. 33 to warn southbound drivers was not a negligent act. See *Gibson v. Division of Highways, Id.*

4. The State failed, while on notice of an elevated number of accidents at the intersection, to take corrective action to prevent such accidents from occurring.

Claimants rely upon records of the State of reports of motor vehicle accidents at this intersection (at point designated as 26.86, a mile post). Mr. Lewis testified as to two reports in the record designated as Claimants' Exhibit No. 10, and read the kinds of engineering data provided in the reports.

The first report of accidents, covering the period from October 1, 1983 to October 31, 1986, in which there were ten listed accidents, is as follows:

Linn Intersection Accidents
10/1/83 - 10/31/86

10/29/83

1) Car 1	Car 2	Car 3
heading south straight ahead no improper driving	heading north then turning left changing lanes improperly	heading west stopped in traffic lane no improper driving

10/29/83

2) Car 1	Car 2
heading north, entering or leaving driveway, circumstances unknown	heading west - going straight ahead

7/15/84

3) Car 1 Car 2

heading west then turning left, circumstances unknown	heading south going straight ahead - no improper driving

9/11/84

4) Car 1 Car 2

hit tree no special reference - foggy heading east going straight ahead	none involved

9/25/84

5) Motorcycle Car

heading south, going straight ahead - circumstances unknown	heading east then turning left

2/5/85

6) Car 1 Car 2

heading east going straight ahead - slippery pavement	heading north circumstances unknown

9/22/85

7)Motorcycle Truck

heading west going straight ahead - no improper driving	heading east - then turning left - did not have right of way

3/5/86

8) Truck Car

heading south going straight ahead - did not have right of way	heading west going straight ahead - no improper driving

8/1/86

9) Car 1	Car 2
heading west going straight ahead - no improper driving	heading north going straight ahead - no improper driving

10/22/85 HEAD-ON COLLISION

10) Car 1	Car 2
heading west going straight ahead	heading east, going straight ahead - no improper driving

The second report of accidents, covering the period from 1/1/87 to 1/22/90, in which there were seven listed accidents at the Linn Intersection, Mile Post 26.86, is as follows:

Linn Intersection Accident Listings
1/1/87 - 1/22/90

1/12/87

1) Car 1	Car 2	Car 3
heading east going straight ahead - no improper driving	heading south going straight ahead - did not have right of way	heading west slowing or stopping - no improper driving

1/21/87

2) Car 1	Car 2
side swipe - heading west - going straight ahead - no improper driving	heading west going straight ahead - no improper driving

5/28/88

3) Car 1	Car 2
heading east going straight ahead - circumstances unknown	heading north then turning left - circumstances unknown

6/9/88

4) Car 1	Car 2	Car 3
heading north going straight ahead - circumstances unknown	heading east going straight ahead - circumstances unknown	parked - no improper driving

3/20/89

5) Car 1	Car 2
heading south then turning left - did not have right of way	heading east going straight ahead - no improper driving

11/22/90

6) Car 1 (sic).	Car 2
heading west going straight ahead- V.O.B. HILLCREST	heading south then turning left V.O.B. HILLCREST

In an internal working memorandum, an intersection safety study, prepared by Mr. Lewis for his management in the Traffic Engineering Division, dated June 2, 1988

(Claimants' Exhibit No. 12), he reported on his inspection of the Linn Intersection on May 24, 1988, that:

"During the three-year data period there were six accidents at the intersection for a rate of 3.37 accidents per million entering the intersection. Five of the six accidents were 'at angle' and one involved a left turn. There was no consistency or pattern to the 'at angle' accidents.

"A field review of the intersection on May 24, 1988, revealed only minor deficiencies. The length of the stop bar on WV 47 is not adequate and the centerline on WV 47 is worn out at the intersection. The stop bar should be extended and the centerline possibly installed with lane tape.

"The intersection is on a crest and drivers exiting WV 47 cannot see the pavement to the east [north] on US 33. Sight distance to approaching vehicles is adequate. Other than renewal of the pavement markings as indicated above, no action is recommended."

The listings of 16 accidents at the intersection on which claimants base their complaint about the high rate of accidents use the rate of accidents as a reason for concluding that it was dangerously and negligently constructed, and maintained, is not supported by the statistics of the Traffic Engineering Division in Claimants' Exhibit No. 13, which show that of the accidents:

1 case in which the driver changed lanes improperly

8 cases in which the circumstances were unknown

1 case in which the driver hit a tree

1 case in which the accident was attributed to slippery pavement

4 cases in which the drivers did not have the right of way, and

1 case in which the vision of each driver was obstructed (this case)

The Court finds as a matter of fact that the statistics on the accidents at the intersection from October 1, 1983 to January 22, 1990, do not prove that before January 22, 1990, the Linn Intersection was dangerously and negligently designed, constructed and maintained, and that the State was not negligent in failing to correct alleged errors.

5. The State failed to advise, by signs along U.S. 33 and W.Va. 47 in the vicinity of the Linn Intersection, that weather conditions might affect motorists adversely. There is no evidence that water on the surface of the roads in the intersection was a causative factor in the accident.

As to the claimants' allegation (which was not made in their respective complaints or in any amended complaints) that respondent was negligent in the design of the intersection, based upon the fact that the intersection was designed for a 40 miles per hour speed but was posted for a speed limit of 55 miles per hour, the Court has determined that design speed does not control the posting of a speed limit. According

to Mr. Lewis, design speed is a number to provide certain parameters to be met for putting the road together, *i.e*., providing a set of criteria for the geometric design of the highway. On the other hand, setting the speed limit is a regulatory function for the Commissioner of Highways. The Commissioner bases this decision for the speed limit upon recommendations made by traffic engineering technicians who have analyzed data collected in the field. It is not unusual in West Virginia for the speed limit to exceed the design speed, and design speed, in most cases, is not known to the traveling public.

The Court finds that the State was not negligent in posting a speed limit of 55 miles per hour for U.S. 33 at this area notwithstanding the fact that the plans denote a design speed of 40 miles per hour in the area.

The Court also finds as a matter of fact that the sole cause of the death of Okey Lowther and of the injuries sustained by Dora Talbott was the negligence of Okey Lowther in entering U.S. 33 in the face of oncoming traffic having the right of way.

The Court also finds as a matter of fact that the State was not guilty of any negligence proximately causing, in whole or in part, the death of Okey Lowther and the injuries sustained by Dora Talbott.

The Court makes no award to Beulah Burkhammer, as Executrix of the Estate of Okey Lowther.

The Court makes no award to Dora Talbott.

Claims disallowed.

OPINION ISSUED DECEMBER 6, 1999

CAMC DENTAL CENTER
VS.
DIVISION OF JUVENILE SERVICES
(CC-99-374)

Claimant appeared *pro se*.

C. Scott McKinney, 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 $1,159.00 for providing dental services to a juvenile at

respondent's West Virginia Industrial Home For Youth. The documentation for these services was not processed for payment within the appropriate fiscal year; therefore, claimant has not been paid. In its Answer, respondent admits the validity of the claim as well as the amount, and states that there were sufficient funds expired in the appropriate fiscal year from which the invoice could have been paid.

Accordingly, the Court hereby makes an award to claimant in the amount of $1,159.00.

Award of $1,159.00.

OPINION ISSUED DECEMBER 6, 1999

ROY J. CUNNINGHAM
VS.
DIVISION OF CORRECTIONS
(CC-98-239)

Claimant appeared *pro se*.
Joy M. Cavallo, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for an unauthorized monetary ithdrawal from his prison trust account at the Mt. Olive Correctional Center, a facility owned and operated by respondent in Fayette County. Claimant is currently incarcerated at this correctional center. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

Pursuant to West Virginia Code Section 28-5-6, a warden has a duty to receive and take charge of an inmate's financial funds during the inmate's term of incarceration. In fulfilling this legislative mandate, the warden at Mt. Olive Correctional Center employed several shopkeepers to operate a cooperative exchange at the institution. Before funds are withdrawn from a prison trust account, an inmate must present the inmate's photographic institutional identification card to the storekeeper upon appearance at the store window. The transaction is processed and the inmate must then sign a sales receipt.

The incident giving rise to this claim occurred on or about Saturday, March 7, 1998. On the day in question, claimant had the sum of $1,364.96 in his prison trust account. Claimant went to the cooperative exchange, presented his photographic

identification card, made a purchase in the amount of $45.92, and signed a sales receipt. After this transaction, claimant made no further transactions with the facility's cooperative exchange during the week. However, on Sunday, March 8, 1998, respondent's employees allowed an unidentified third party to make a withdraw in the amount of $74.24 at the facility's cooperative exchange. Payment for the unidentified third party's purchase was deducted from claimant's prison trust account. Apparently, claimant's name was forged on the sales receipt. Thereafter, claimant has attempted and has been unsuccessful in obtaining reimbursement for the unauthorized transaction.

When property of an inmate is recorded for the inmate and taken for storage purposes, this Court has previously viewed such situations as a bailment. *Heard vs. Division of Corrections*, 21 Ct. Cl. 151 (1997); *Nolan vs. Division of Corrections*, 19 Ct. Cl. 89 (1992). According to *Black's Law Dictionary*, a bailment is:

> "A delivery of goods or personal property, by one person (bailor) to another (bailee), in trust for the execution of a special object upon or in relation to such goods, beneficial either to the bailor or bailee or both, and upon a contract, express or implied, to perform the trust and carry out such object, and thereupon either to redeliver the goods to the bailor or otherwise dispose of the same in conformity with the purpose to the trust. The bailee is responsible for exercising due care toward the goods." *Id* 95 (6th ed. 1990).

Consequently, respondent, the bailee, must have satisfactory documentation for management of the prison trust account for an inmate, the bailor.

In this present claim, claimant has established a prima facie case of bailment and negligent management of his prison trust account. The evidence adduced at the October 7, 1999, hearing demonstrated that there was a required delivery of claimant's financial funds to respondent. Respondent failed reasonably to account for claimant's prison trust account on March 8, 1999. Therefore, the Court concludes that there was a bailment situation and respondent was negligent in the manner in which it managed claimant's prison trust account.

In view of the foregoing, the Court is of the opinion to and does make an award in the amount of $74.24 to claimant.

Award of $74.24.

OPINION ISSUED DECEMBER 6, 1999

FRED L. DONATO

VS.
DIVISION OF HIGHWAYS
(CC-98-335)

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred s a result of a negligently maintained berm while traveling northbound on Route 35, McGraws Run Road, in Valley Grove, one-half mile north of Atkinson's Crossing Road. Route 35 is a road maintained by respondent in Ohio County. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred on September 14, 1998, at approximately 9:30 to 10:00 a.m. On the sunny morning in question, claimant was proceeding southbound on Route 35, McGraws Run Road, en route to a construction site in his 1983 Ford 800 truck. At this location, Route 35 narrows from eighteen feet to sixteen feet and two inches. However, the southbound lane is only six and one-half feet wide. Earlier in the morning, claimant had traveled to Wheeling by a different road, but was proceeding back to the construction site on Route 35 because it was the shorter distance. Claimant had not been on the road since repairs had been made to the road. As claimant drove around a curve in the road, he was met by an oncoming truck. Claimant was forced to drive to the right when his vehicle dropped off of the edge of the pavement because of the width of the road. Claimant's vehicle then slid off the road, went into a ditch, and hit the guardrail on the side of the road. After the incident, claimant used a cell-phone in his vehicle to telephone for a tow truck and the towing service in turn notified the Ohio County Sheriff's Department. A member of the Ohio County Sheriff's Department, Cpl. Stephen Bowers, was the first to arrive on the scene and conducted an investigation. In addition, claimant had a camera in his vehicle and took photographs of the scene.

After claimant's truck was removed from the ditch, claimant drove his truck to his residence. The vehicle sustained extensive damage to its front end. The vehicle was not repaired; the estimated cost of repair was $3,807.22. Also, claimant sustained a losses in the amount of $125.00 for tow truck service and $15.00 to receive a copy of the Ohio County Police Department report that was filed. The total loss sustained by claimant was in the amount of $3,947.22. Claimant did not have collision damage insurance on his truck.

This Court has been consistent in opinions involving berm claims. In *Sweda*

vs. Department of Highways, this Court held:

> "The berm or shoulder of a highway must be maintained in a reasonably safe condition for use when the occasion requires, and liability may ensue when a motorist is forced onto the berm in an emergency or otherwise necessarily uses the berm of the highway." *Id*. 13 Ct. Cl. 249 (1980)(citing 39 Am. Jur. 2d "Highways, Streets, and Bridges" § 488).

When a motorist uses the berm of the road in an emergency situation, that motorist may be entitled to recover damages if the berm is not properly maintained by respondent. *Meisenhelder vs. Department of Highways*, 18 Ct. Cl. 80 (1990).

In this claim, the Court is of the opinion that the berm on Route 35, McGraws Run Road, at the location of claimant's incident, was not maintained properly by respondent and created a hazard to the traveling public. Both the photographic evidence presented by claimant and the Ohio County Sheriff's Department Police accident report establish that the road was not wide enough for two vehicles to pass each other without using the berm. If claimant had not proceeded to the berm of the road, any subsequent accident would have been his fault. Thus, claimant did not enter the berm of the road by his own choice. Claimant was forced off the road at the moment he was confronted by the oncoming truck. The negligent maintenance of the berm on Route 35 was the proximate cause of this incident for which claimant may recover for the damage sustained to his truck.

In view of the foregoing, the Court is of the opinion to and does make an award to claimant in the amount of $3,947.22.

Award of $3,947.22.

OPINION ISSUED DECEMBER 6, 1999

RICHARD J. GANNON, SR., & MARY ELLEN GANNON
VS.
DIVISION OF HIGHWAYS
(CC-98-312)

Claimants appeared *pro se*.

Xueyan Zhang, Attorney at Law, for respondent.

PER CURIAM:

Claimants brought this action for vehicle damage which occurred as a result of claimants' vehicle striking a piece of concrete curb while claimants' son was driving their vehicle westbound on W.Va. Route 60 in Kenova, Wayne County. W.Va. Route 60 is a road maintained by respondent in Wayne County. The Court is of the opinion to deny this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred on August 21, 1998, at approximately 4:00 p.m., when claimants' son, Billy Gannon, and a friend of his son, Chad D. Chaffin, were traveling westbound on W.Va. Route 60 at the corner of 8th Street in Kenova, Wayne County. W.Va. Route 60 is a four lane highway, with each side being thirty-four feet including a distance of nine feet to the curb. On the clear day, claimants' son and his friend were proceeding in the right hand lane, the slow lane, at a speed of thirty miles per hour in claimants' 1998 Ford Mustang GT.

For the past several months, there had been a piece of concrete curb on W.Va. Route 60. This piece of concrete curb had been along the edge of the road. However, on the day in question, the piece of the curb was partially laying in the road, off to the side, beyond the white line about five inches. The piece of concrete curb was around a parking area to the right of the white line. As claimants' son came upon the piece of concrete curb, he was unable to maneuver the vehicle to avoid it because the traffic on the road prevented evasive maneuvering. Claimants' vehicle collided with the piece of the concrete curb, which twisted around and slid under the vehicle. After the incident, claimants' vehicle went up against the side walk. The resulting damage to claimants' vehicle was $557.72, for a tire, rim, and repair to the rocker panel. Claimants' collision coverage policy had a deductible feature in the amount of $500.00.

Respondent contends that it was not responsible for the damage to claimants' vehicle. Respondent had no record of any complaints regarding the area of W.Va. Route 60 for which it is responsible. Respondent's crews patrolled the location in question, but found nothing. According to respondent, it maintains the area from curb to curb, from the pavement of the left edge to the pavement of the right edge. The curb is the responsibility of the city. Anything from the curb inside to the sidewalk is maintained by the city.

The Court has determined that respondent was not negligent in this claim. The right hand lane was wide enough for a driver traveling at a reasonable speed to go around any object. The Court is of the opinion that claimants' son should have been able to maneuver the vehicle around the concrete curb. Since the Court finds no negligence on the part of respondent, claimants may not recover for the loss sustained to the vehicle.

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

claim.

Claim disallowed.

OPINION ISSUED DECEMBER 6, 1999

THOMAS E. GARDNER, JR.
VS.
DIVISION OF CORRECTIONS
(CC-99-291)

Claimant appeared *pro se*.
Joy M. Cavallo, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for the loss of his personal roperty by respondent's employees while in the custody of respondent. Claimant is currently a resident of Harrison County, but at the time of the incident he was incarcerated in respondent's facilities. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred on or about February 8, 1994, at approximately 3:30 p.m. On the day in question, claimant was incarcerated at the Moundsville Penitentiary. At the time, claimant's personal belongings were seized and documented by Officer Richard S. Strope Included in claimant's personal belongings were a wedding band, engagement ring, bracelet, West Virginia logo pendant, and a Sony walkman radio with headphones. Claimant's personal belongings were then transferred to another one of respondent's employees at Moundsville Penitentiary. During claimant's period of incarceration, both he and his personal property were to be transferred to the Huttonsville Correctional Center, next to the Denmar Correctional Center, before finally being transferred to St. Mary's Correctional Center. Following claimant's release from St. Mary's Correctional Center on April 22, 1999, respondent was unable to account for claimant's personal property. The estimated value of claimant's personal property was in the sum of $250.00.

When personal property of an inmate is recorded for the inmate and then taken for storage purposes, this Court has previously viewed such situations as a bailment. According to *Black's Law Dictionary*, a "bailment" is:

"A delivery of goods or personal property, by one person

> (bailor) to another (bailee), in trust for the execution of a special object upon or in relation to such goods, beneficial either to the bailor or bailee or both, and upon a contract, express or implied, to perform the trust and carry out such object, and thereupon either to redeliver the goods to the bailor or otherwise dispose of the same in conformity with the purpose to the trust. The bailee is responsible for exercising due care toward the goods." *Id* 95 (6th ed. 1990).

Consequently, respondent, as the bailee, must have satisfactory documentation for return of the property to the inmate, the bailor. *Heard vs. Division of Corrections*, 21 Ct. Cl. 151 (1997). Claimant has the burden of proof to demonstrate by a preponderance of the evidence that there was a delivery of claimant's property to respondent before a prima facie case is established for the failure to return items claim accrues. *Nolan vs. Division of Corrections,* 19 Ct. Cl. 89 (1992).

In the instant claim, claimant has established a prima facie case of bailment and negligent care of his personal property. The evidence adduced at the October 14, 1999, hearing demonstrated that there was a delivery of claimant's property to respondent. Respondent, as the bailee, failed reasonably to document and account for claimant's personal property since the time he first entered into the custody of respondent.

In view of the foregoing, the Court is of the opinion to and does make an award in the amount of $250.00 to claimant.

Award of $250.00.

OPINION ISSUED DECEMBER 6, 1999

DAVID SCOTT GILLENWATER
VS.
DIVISION OF HIGHWAYS
(CC-97-207)

Paul M. Stroebel, Attorney at Law, for claimant.
Andrew F. Tarr, Attorney at Law, for respondent.

BAKER, JUDGE:

Claimant brought this action for the value of his vehicle after the berm on County Route 58 (Left Fork Road) gave way, causing his vehicle to fall over an

embankment. County Route 58 is a road maintained by respondent in Lincoln County. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred on March 11, 1997, at approximately 9:00 p.m. County Route 58 is a rural residential road classified as a secondary road with a speed limit of thirty miles per hour. Guardrail is installed at several places along the road. The width of the asphalt paved portion of the road is about thirteen to fourteen feet. The north berm has a width of two feet, while the south berm has a width of three feet. There are no line markings on the road. At night, the line of sight on the road in the area of the accident is approximately three-hundred-fifty feet.

According to respondent's daily records, there was a significant flood in the area during the first part of March 1997. This situation placed respondent's employees on the status of emergency patrol of the roads. At the time, about three-fourths of the roads in Lincoln County were being repaired. This flood cleanup lasted for approximately three months. During this time, respondent had been cleaning ditches on County Route 58. On the day of the incident, a grader was used on County Route 58 to remove excess mud which was then placed onto the berm of the road . This road work left approximately three feet of mud on the side of the road. Mud was hanging on the weeds along the side of the berm.

On the evening in question, claimant and a friend, Daniel Miller, were returning from a fishing trip traveling eastbound on County Route 58 in claimant's 1994 Toyota pick-up truck. The truck had an odometer reading of 62,568. Earlier in the day, it had been sprinkling. As claimant proceeded along the road with the aid of the vehicle's headlights, he was met by an oncoming vehicle. Claimant slowed the speed of his vehicle and veered over to the south berm of the road in order to make room for the oncoming vehicle to pass. The vehicle's passenger side terrain tires went onto the south berm. Suddenly, the south berm gave way beneath the weight of claimant's vehicle and his vehicle slipped down the embankment, coming to rest on its top. Neither claimant, nor his friend, suffered personal injuries.

After the accident, Sergeant A. W. Robinson, a member of the West Virginia State Police, investigated the incident, notified respondent, and filed an incident report. Later in the evening, an uncle of claimant's wife accompanied claimant to the site of the incident to take photographs of the scene. The next day, claimant and his parents went to the site and took additional photographs.

Claimant obtained an estimate of the vehicle damage which stated that amount of repairs exceeded the value of the vehicle. Consequently, the vehicle was declared to be "totaled." The blue book value of the vehicle was in the amount of $4,950.00.

Claimant's vehicle was insured under a liability insurance policy, but there was no collision insurance coverage for this incident. Eventually, the vehicle was salvaged for $500.00.

This Court has been very consistent in regard to berm claims. In *Sweda vs. Department of Highways*, this Court held:

> "The berm or shoulder of a highway must be maintained in a reasonably safe condition for use when the occasion requires, and liability may ensue when a motorist is forced onto the berm in an emergency or otherwise necessarily uses that berm of the highway." *Id*., 13 Ct. Cl. 249 (1980) (citing 39 Am. Jur. 2d Highways, Streets, and Bridges § 488).

When a motorist uses the berm of the road in an emergency situation, that motorist may be entitled to recover damages if the berm is not properly maintained by respondent. *Meisenhelder vs. Department of Highways*, 18 Ct. Cl. 80 (1990).

In the instant claim, the Court is of the opinion that the berm on County Route 58 (Left Fork Road) was not properly maintained by respondent. The photographic evidence and testimony adduced at the October 1, 1999, hearing demonstrated that the road was not wide enough for two vehicles to pass on the road without one of the vehicles having to use the berm. Respondent knew or should have known this fact. As respondent cleaned the ditches on County Route 58, it should have taken reasonable precautions that the mud that was pushed onto the berm of the road was stable enough to support a vehicle that was forced onto the berm of the road. In this situation, claimant should have been able to rely on the south berm on County Route 58 as he and his friend made their way back from their fishing trip. Claimant's vehicle having fallen over the south berm reflects negligent berm maintenance on County Route 58 by respondent for which claimant is entitled to recover his loss.

In view of the foregoing, the Court is of the opinion to and does make an award to claimant in the amount of $4,450.00, the blue book value of claimant's vehicle minus $500.00, which claimant received for the salvage value of the vehicle.

Award of $4,450.00.

OPINION ISSUED DECEMBER 6, 1999

SANFORD D. GREEN
VS.

DIVISION OF HIGHWAYS
(CC-98-281)

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when his vehicle struck a hole on Route 85 in Wharton, Boone County. Route 85 is a road maintained by respondent in Boone County. The Court is of the opinion to make an award for the reasons more fully stated below.

The incident giving rise to this claim occurred on August 5, 1998, at approximately 4:05 to 4:10 p.m. The weather was hazy. Claimant was traveling southbound in his 1996 Pontiac Trans-Am on Route 85 en route to the local car wash. Claimant regularly travels Route 85 about every two days. Route 85 is a two lane highway in Boone County that is approximately eighteen feet wide. On Route 85 at the location in question, there is a mining company, the Wells Complex (Lightfoot) which creates substantial coal truck traffic on Route 85. This coal truck traffic leaves the road in a state of disrepair on a constant basis.

As claimant proceeded along Route 85, he came around the curve with the Wells Complex on his left hand side. After claimant drove out of the curve about one-hundred feet, the road became rough. Claimant slowed his vehicle to a speed of thirty-five miles per hour. Then, claimant's vehicle hit a hole that he was not familiar with and had not seen before. The hole protruded about one foot into the travel portion from the berm. The hole was approximately four inches deep and twelve to eighteen inches wide. The collision bent claimant's vehicle's right front passenger side wheel rim. Claimant had a deductible feature of $250.00 in his collision insurance coverage. The resulting loss to claimant was 437.78 for a new low profile seventeen inch wheel rim.

The position of respondent was that it did not have prior knowledge of the hole in question. Since Route 85 is a priority road, when respondent receives information that there is a problem on Route 85, a quick response is made. However, respondent acknowledged that the location in question is a rough section of road because of the constant coal truck traffic. Respondent has not resurfaced Route 85 in about eight to nine years. In addition, respondent admitted that there was no effort to enforce the weight limit in that area of Route 85.

The well established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of motorist upon its roads. *Adkins vs. Sims*, 130 W.Va. 645; 46 S.E.2d 81 (1947). In order to hold respondent liable for road defects of

this type, claimant must prove that respondent had actual or constructive notice. *Pritt vs. Dept. of Highways*, 16 Ct. Cl. 8 (1985); *Harmon vs. Dept. of Highways*, 16 Ct. Cl. 127 (1986).

The evidence adduced at the July 9, 1999, hearing established that respondent had at least constructive notice, if not actual notice, of the hole. The Court is of the opinion that respondent did not take reasonable steps to ensure the safety of travelers on Route 85 in Wharton, Boone County. This area of Route 85 was a known problem area because of the coal truck traffic. Respondent should have been aware of the propensity for holes to develop. Consequently, there is sufficient evidence of negligence upon which to base an award.

In view of the foregoing, the Court is of the opinion to and does make an award to claimant limited to the amount of $250.00, the deductible feature in his collision insurance policy.

Award of $250.00.

OPINION ISSUED DECEMBER 6, 1999

ARTRIDGE HENRY
VS.
DIVISION OF HIGHWAYS
(CC-99-173)

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

PER CURIAM:

Claimant brought this action for vehicle damage and personal njuries which occurred as a result of her vehicle striking rock debris while traveling southbound on W.Va. Route 2 between Paden City and Sistersville. W.Va. Route 2 is a road maintained by respondent in Tyler County. The Court is of the opinion to deny this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred on February 27, 1999, at approximately 6:30 to 6:40 a.m. On the rainy and foggy morning in question, claimant was traveling southbound on W.Va. Route 2, her regular route to her job as a home health nurse. Claimant carefully proceeded along W.Va. Route 2 with the aid of her vehicle's headlights at a speed of about forty-five miles per hour because of the weather

conditions. There was a vehicle in front of and one behind her vehicle, with about a car length between each of them. Suddenly, claimant heard a loud noise and then her 1987 Chevy Camaro was struck by falling rocks. The impact of the rocks spun her vehicle around and pushed it against the guardrail. The vehicle had to be towed to a garage for repairs. The vehicle was later determined to be a total loss and taken to a junkyard. In addition, claimant sustained knee and head injuries. Claimant did not have collision damage insurance on her car. Claimant suffered a loss in the amount of $5,000.00 for the loss of the vehicle, towing charges as well as storage of the vehicle and medical expenses.

The position of respondent was that it had neither actual nor constructive notice for this rock fall incident on W.Va. Route 2. According to claimant's Tyler County Highway Administrator, the rock fall debris was immediately removed from W.Va. Route 2 after notification. Also, the area is clearly marked by "falling rock" road signs. While claimant testified that she had contacted respondent on numerous occasions, respondent denied having any prior notice of the condition of W.Va. Route 2.

The Court has consistently held that in claims of this nature, without a positive showing that respondent had actual or constructive notice of a dangerous condition, such as falling rocks and rock debris, posing a threat of injury to property is insufficient to justify an award. *Mitchell vs. Division of Highways*, 21 Ct. Cl. 91 (1996); *Hammond vs. Division of Highways*, 11 Ct. Cl. 234 (1977). In order to establish liability on behalf of respondent, the evidence must establish that respondent had notice of the dangerous condition posing the threat of injury to property and a reasonable time to take suitable action to protect motorists. *Alkire vs. Division of Highways*, 21 Ct. Cl. 179 (1997).

In this claim, the Court is of the opinion that respondent reasonably maintained this portion of W.Va. Route 2. In the 1997 claim, *Williams vs. Division of Highways*, a similar incident occurred on W.Va. Route 2, near Sistersville. *Id.*, 21 Ct. Cl. 175 (1997). At that time, W.Va. Route 2 was described as a top priority road that was a known rock fall area and was patrolled five times per week. *Id*. In *Williams*, this Court held respondent liable when it failed to establish that it had marked the area with "falling rock" road signs. *Id*. As this Court stated in *Williams*:

> "The mountainous topography and numerous rural communities in West Virginia require the respondent to construct and maintain roads through areas which are prone to falling rocks. In these areas, the respondent has a duty to reduce the risk of harm to motorists. This duty can be fulfilled by . . . effectively warning motorists of the potential for falling rocks when correction is not feasible."

The evidence adduced at the September 16, 1999, hearing established that respondent had taken measures to help assure the safety of the traveling public while traveling on W.Va. Route 2 in Tyler County. In addition, claimant knew that this area has a propensity for rock falls and that the area was experiencing rock falls at the time of the incident. While the Court is sympathic to claimant's plight, the fact remains that there is insufficient evidence of negligence upon which to base an award.

In view of the foregoing, the Court does hereby deny this claim.

Claim disallowed.

OPINION ISSUED DECEMBER 6, 1999

HERBERT NEIL HUGHART
VS.
DIVISION OF HIGHWAYS
(CC-98-430)

Claimant appeared *pro se*.

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred as a result of his vehicle striking debris while he was traveling westbound on Interstate 64. Interstate 64 is a road maintained by respondent in Kanawha County. The Court is of the opinion to deny this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred on December 2, 1998, at about 9:00 p.m. On the clear and dry night in question, claimant was traveling westbound on Interstate 64, near milepost 56 in South Charleston, Kanawha County. At this location of Interstate 64, there are three travel lanes in each direction. Claimant was proceeding on Interstate 64 in the center lane at a speed of about sixty miles per hour as moderate flow traffic went around his vehicle. There was a distance of one-hundred-fifty to two-hundred feet between claimant's vehicle and other vehicles on the road. When a vehicle in front of claimant's vehicle changed lanes, he had no indication of any debris or trouble on the interstate. Claimant then saw debris on the highway. Claimant could not avoid the debris and his 1997 Buick Park Avenue struck and went through the debris. The unidentifiable debris was approximately the height of the vehicle's hood and about

four to six feet wide. After the accident, claimant went to the South Charleston Police Department and filed an accident report. While there, claimant was informed by the South Charleston Police Department that respondent was on its way to clear the debris. The resulting damage to claimant's vehicle was in the amount of $1,000.80. Claimant had a deductible feature of $250.00 in his insurance policy coverage which would limit any recovery to this amount.

Respondent denied prior knowledge of the debris in question. According to respondent's daily records, emergency service was dispatched to the site, where a piece of Styrofoam was found. The Styrofoam was immediately cleared off of the road. Nothing further was found in the area.

The evidence adduced at the September 3, 1999, hearing established that respondent had no notice that debris on Interstate 64 posed a hazard to the traveling public. Respondent sent employees to the scene as soon as it received notice of the situation. The Court, while understanding the distress caused to claimant in this situation, is of the opinion that respondent acted reasonably in response to notice of the debris on the interstate, and that respondent was not negligent in its maintenance of the highway.

In view of the foregoing, the Court hereby denies this claim.

Claim disallowed.

OPINION ISSUED DECEMBER 6, 1999

TERRY L. HUNDAGEN
VS.
DIVISION OF HIGHWAYS
(CC-98-303)

Claimant appeared *pro se*.

Xueyan Zhang, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred as a result of a rock fall while traveling northbound on U. S. 250, also known as Route 2, north of Glendale in the "Narrows" area. U. S. 250 is a road maintained by respondent in Marshall County. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred on March 16, 1998, at approximately 9:15p.m. On the cold night in question, claimant was traveling northbound on U. S. 250 also known as Route 2, north of Glendale in an area locally referred to as the "Narrows." U. S. 250 is a dimly lighted two lane road that is marked as a "falling rock" area with a speed limit of fifty miles per hour. Once a week, claimant travels U. S. 250 to attend a landscaping class taught at John Marshall High School. Earlier in the evening, claimant had been on U. S. 250 and the road was clear of rocks or rock debris. Claimant proceeded along U. S. 250 with the aid of the 1989 Chevrolet Beretta's headlights at a speed of about fifty miles per hour. While there was no oncoming traffic on the road, claimant knew that several of her classmates were traveling behind her vehicle. As claimant came around a curve, she saw rocks and debris about thirty feet away, coming towards her vehicle. Claimant did not have enough time to avoid the rock fall and her vehicle was struck by rocks as well as rock debris.

After the incident, claimant's vehicle began to make noises and she decided to go to a local convenience store in order to telephone her husband, an associate engineer technician for respondent in District 6. At that moment, claimant's husband happened to be passing by and stopped to see if assistance was needed. Claimant's husband did the necessary repairs so that the vehicle could be driven to their residence. Afterwards, claimant's husband reported the incident to Wheeling Tunnel and was informed that a grader had been dispatched because of another incident.

The damage sustained to claimant's vehicle was estimated between $1,150.50 and $1,652.80. Since the vehicle was insured only under a liability insurance policy, there was no insurance coverage for this incident. Claimant's husband made further repairs to the vehicle, but no receipts were kept on that work. However, the vehicle was still in need of major repairs. In April of 1998, the vehicle was used as a trade-in on a new vehicle. Claimant's husband asserted that a loss was taken for the trade-in because of the incident. As a trade-in, claimant received $1,500.00 for the damaged 1989 Chevrolet Beretta with 100,000 miles. The value of the vehicle before the incident was estimated to be about $2,800.00 to $3,000.00.

Claimant alleges that the absence of positive barriers on U. S. 250 in the "Narrows" stretch of highway constitutes negligence. Respondent should have installed positive barriers on U. S. 250 in the "Narrows" to protect the traveling public from the frequent rock falls that occur there. If positive barriers would have been installed, this incident would not have occurred.

The position of respondent was that it did not have notice of the rocks and rock debris on U.S. 250. Respondent admitted that the area in question was a well known "rock fall" area, but argued that the area was not significantly hazardous to the traveling public. The area has been clearly marked to protect the traveling public. Two federal

standard size signs, one of which is marked "Falling Rock" and the other on the same pole is marked "Next 1 Mi," were erected in the area in question to notify the traveling public of potential problems. In addition, overhead lights were installed on U. S. 250 in 1976. This area is regularly patrolled and on the night in question, a grader was immediately dispatched to the area to clear the rocks and rock debris. According to respondent's daily records, the grader remained at the scene of the incident for three hours. Before this time, respondent asserted that there was no prior notice to respondent of any potential rock falls in the area.

The general rule of this Court has been that in claims of this nature, a claimant must positively demonstrate that respondent had notice or constructive notice of a dangerous condition posing a threat of injury to property, such as falling rocks and rock debris. *Mitchell vs. Division of Highways*, 21 Ct. Cl. 91 (1996); *Coburn vs. Division of Highways*, 16 Ct. Cl. 68 (1986); Hammond *vs. Division of Highways*, 11 Ct. Cl. 234 (1977). Besides respondent's notice of the dangerous condition, the evidence must also establish that respondent had a reasonable time to take suitable action to protect motorists. *Alkire vs. Division of Highways*, 21 Ct. Cl. 179 (1997). Knowledge of other rock falls in the area near an incident can be sufficient to give respondent notice of a hazard to the traveling public. *Cole vs. Division of Highways*, 21 Ct. Cl. 15 (1995).

In the instant claim, the Court is of the opinion that this portion of U. S. 250 in the "Narrows" is a hazard to the traveling public. Respondent has known since 1941 that this area is notorious for potential rock falls. *Dunn vs. Division of Highways*, 19 Ct. Cl. 163 (1992). This portion of road is such a hazard to the traveling public that warning signs and regular patrols are not sufficient to protect the traveling public in this section of highway. This Court in finding the State Road Commissioner liable in the claim *Varner's Adm'n v. State Road Comm'n*, stated:

> "[W]hen the State Road Commissioner knows or should know that an unusually dangerous condition exits, there is a duty to inspect and to correct the condition within the limits of the funds appropriated by the Legislature for maintenance purposes."[1]

Id., 8 Ct. Cl. 119, 122 (1970); See also *Cole, Supra*; *Smith vs. Division of Highways*, 11 Ct. Cl. 221 (1997).

Just last year, this Court heard two separate claims regarding the Narrows on U. S. 250 in Marshall County. See *Peck & Peck vs. Division of Highways* (CC-97-164

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[5] Pursuant to West Virginia Code Sections 17-2A-1 and 5F-2-1, the Division of Highways, formerly the office of State Road Commissioner, was transferred to, and administratively attached to, the Department of Transportation by the Executive Reorganization Act of 1989.

& CC-97-375, unpublished opinion issued May 29, 1998); *Dimmick & Dimmick vs. Division of Highways* (CC-96-561, unpublished opinion issued May 29, 1999). Again this year, this Court heard this claim and another, *Williams vs. Division of Highways* (CC-99-114, unpublished opinion), regarding the same area in question. In many of the claims heard in the past by the Court, negligence on the part of the respondent was noted by the Court and awards were made. The notoriety of this particular area of U. S. 250 cannot be ignored by this Court. In *Dimmick*, one of respondent's employees made the analogy that driving on U. S. 250 in the Narrows in Marshall County was similar to playing "Russian Roulette." See *Id.* However, even after all of the previous incidents, no remedial measures have been taken by respondent. Frankly, the Court is at a loss as to why respondent refuses to eradicate a known dangerous condition. Routine patrols do not address the problem. The respondent is on notice of a hazardous condition which poses a potential danger to the traveling public. Therefore, the Court concludes that the conduct of respondent constitutes negligence.

The Court is of the opinion that the evidence adduced at the September 16, 1999, hearing demonstrated that a hazardous condition existed at the time of claimant's incident. There was no showing that respondent did anything beyond the routine patrolling of U. S. 250. Consequently, there is sufficient evidence of negligence upon which to base an award.

In view of the foregoing, the Court is of the opinion to and does make an award to the claimant in the amount of $1,550.00, the blue book value of claimant's vehicle.

Award of $1,550.00.

OPINION ISSUED DECEMBER 6, 1999

DEWAINE C. KING
VS.
DIVISION OF CORRECTIONS
(CC-99-252)

Claimant appeared *pro se*.
Joy M. Cavallo, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for destruction of personal roperty and alleged harassment by employees of respondent at the Mt. Olive Correctional Center. Claimant

currently is an inmate at Mt. Olive Correctional Center in Fayette County. The Court is of the opinion to deny this claim for the reasons more fully stated below.

In early June 1999, claimant alleges that he was accused of having an affair with an employee of Mt. Olive Correctional Center. During the investigation, claimant was retained in a holding cell for three hours while guards conducted a search of claimant's cell. According to claimant, the cell was left in disarray and his property was not given reasonable care. Transcripts from claimant's criminal circuit court case, as well as a book, *The Jail House Lawyer's Litigation Manual*, were destroyed. However, claimant acknowledged that this book was still legible even though some of the pages had been wet and were torn. Claimant also acknowledged that he could obtain free transcripts of his criminal circuit court case by contacting his attorney at the West Virginia Public Defender's Office.

The Court, having reviewed the record in this claim, is of the opinion that claimant's personal property was not destroyed by respondent's employees during the investigation. Claimant has possession of his book and it is still legible and useable. No further evidence regarding the destruction of the book was produced by claimant. Consequently, there is insufficient evidence of negligence on which to base an award.

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

Claim disallowed.

OPINION ISSUED DECEMBER 6, 1999

JAMES KUTHY
VS.
DIVISION OF HIGHWAYS
(CC-99-137)

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred as a result of his vehicle striking a hole while he was traveling southbound on County Route 8, also known as Chapel Hill Road, almost two miles from W.Va. Route 40, outside the town of Triadelphia. County Route 8, is a road maintained by respondent in Ohio County.

The Court is of the opinion to deny this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred on Thursday, February 4, 1999, at approximately 6:30 to 6:45 a.m. On the foggy morning in question, claimant was proceeding to his place of employment in his all-wheel drive 1988 Ford Tempo on a curve of County Route 8. While the speed limit at this location is thirty five miles per hour, claimant was traveling at a speed of twenty to twenty-five miles per hour because of fog. Claimant frequently travels southbound on County Route 8 and on the prior day did not notice any irregularities in the pavement. As claimant made his way around the winding road, he saw a hole in the road. Claimant tried to maneuver his vehicle around the hole, but was unable to avoid striking the hole. The left rear tire of claimant's vehicle went into the hole as the vehicle went into the air and around backwards in the road. The incident burst the tire and bent the wheel. Afterwards, claimant contacted the Ohio County Sheriff's Department. A member of the Ohio County Sheriff's Department arrived at the scene approximately twenty five minutes later, but no accident report was made. Claimant then drove the vehicle to his residence. After returning home, claimant telephoned the Ohio County Assistant Supervisor, Tom Sims, and informed him of the incident.

The loss sustained by claimant was in the estimated amount of $1,092.15. Claimant did not have collision damage insurance on his car. Claimant did some repairs to the vehicle, but more extensive work was needed. Three months prior to the September 17, 1999, hearing, claimant used the vehicle as a trade-in. As a result of the trade-in, claimant received $300.00 for the vehicle involved in the incident.

The position of the respondent was that it was not on notice of the hole on County Route 8. According to respondent's daily records, cold mix was used to repair the hole the same day notice was given of claimant's incident. Respondent had no prior notice of the hole.

The well established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins vs. Sims*, 130 W.Va. 645; 46 S.E.2d 81 (1947). In order to hold respondent liable for road defects of this type, claimant must prove that respondent had actual or constructive notice. *Pritt vs. Dept. of Highways*, 16 Ct. Cl. 8 (1985); *Harmon vs. Dept. of Highways*, 16 Ct. Cl. 127 (1986).

In the present claim, the evidence adduced at the September 16, 1999, hearing indicated that respondent had no notice of the condition on County Route 8, Ohio County. No evidence was presented by claimant to establish that respondent did not take reasonable steps to ensure the safety of motorists on County Route 8. Consequently, there is insufficient evidence of negligence upon which to base an award.

In view of the foregoing, the Court hereby denies this claim.

Claim disallowed.

OPINION ISSUED DECEMBER 6, 1999

GARRETT B. KUYKENDALL, JR.
VS.
STATE RAIL AUTHORITY
(CC-99-399)

Claimant appeared *pro se*.
Joy M. Cavallo, 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 the sum of $2,000.00 for a Black Angus Heifer that was struck and killed by a train. In its Answer, respondent admits the validity of the claim and that the amount is fair and reasonable. The Court is aware that respondent does not have a fiscal method for paying claims of this nature; therefore, the claim has been submitted to this Court for determination.

Accordingly, the Court hereby makes an award to claimant in the amount of $2,000.00.

Award of $2,000.00.

OPINION ISSUED DECEMBER 6, 1999

TRACY LOOSEMORE
VS.
DIVISION OF HIGHWAYS
(CC-99-92)

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

PER CURIAM:

Claimant brought two separate claims for vehicle damage which occurred as a result of highway debris being thrown onto her parked vehicle as it sat in front of her residence on W.Va. Route 27, also known as Washington Pike, in Wellsburg, Brooke County. W.Va. Route 27 is a road maintained by respondent in Brooke County. The Court is of the opinion to make an award in these claims for the reasons more fully stated below.

W.Va. Route 27, Washington Pike as it is locally known, is a high priority two lane road in Brooke County. The width of W.Va. Route 27 is twenty-one to twenty-three feet wide and there is a speed limit of forty-five miles per hour. Along the road, the ten foot berm is used for parking. The topographical outlay of W.Va. Route 27 creates a slope with sides. This topographical feature allows water runoff on to the roadway, which creates a serious drainage problem in the area. In addition, heavy truck traffic is frequently on the road. The trucks use W.Va. Route 27 as a shortcut to get to the Interstate. The combination of the drainage problem and the truck traffic keep W.Va. Route 27, Washington Pike, in a constant state of disrepair. Due to insufficient paving funds, W.Va. Route 27 has not been paved since 1987. Respondent in Brooke County repairs and sweeps the road on a regular basis. However, the road continues to fall into disrepair. As a result, the road is filled with numerous holes and scattered highway debris. When truck traffic proceeds through the area, trucks hit the holes and water, kicking up water and highway debris onto the berm areas.

The incident giving rise to the first claim occurred on January 27, 1998. Claimant's 1990 four-door Corsica was parked facing west on the berm of W.Va. Route 27 which is adjacent to her residence. Claimant is limited to parking in this area in front of her residence because of the size of the road and the drainage problem. At about 6:30 a.m., a speeding truck passed by, throwing asphalt debris onto the vehicle's front windshield, cracking it. The resulting loss to claimant for replacement of the front windshield was in the amount of $222.35. Claimant reported the incident to her motor vehicle insurance carrier and the deductible feature in the sum of $100.00 was paid by claimant in order to get the vehicle's front windshield repaired.

The incident giving rise to the second claim occurred on February 5, 1998. On this occasion, claimant's vehicle was parked facing east outside of her residence on W.Va. Route 27. Sometime during the night, a vehicle passed by throwing asphalt debris onto the vehicle, breaking the back windshield. Upon discovering the broken back windshield, claimant's fiancé, Blaine J. Pannett, Jr., telephoned the Brooke County Sheriff's Department. A member of the Brooke County Sheriff's Department investigated the incident and filed a report concluding that a vehicle had thrown highway debris onto claimant's vehicle. The resulting loss to claimant for replacement of the

back windshield was estimated in the amount of $394.88. As aforementioned, claimant has a deductible feature in the sum of $100.00 in her motor vehicle insurance policy coverage. Although, this incident was not turned over to claimant's insurance carrier, her recovery is limited to the amount of her deductible.

In order to establish liability on behalf of respondent, the evidence must establish that respondent had notice of a dangerous condition posing the threat of injury to property and a reasonable time to take suitable action to protect motorists. *Alkire vs. Division of Highways*, 21 Ct. Cl. 179 (1997); *Mitchell vs. Division of Highways*, 21 Ct. Cl. 91 (1996); *Hammond vs. Division of Highways*, 11 Ct. Cl. 234 (1977).

In the present claim, the Court is of the opinion that W.Va. Route 27 or Washington Pike, poses a hazard not only to the traveling public but also to claimant. Respondent knows that this area has a serious drainage and traffic problem. The regular maintenance procedures of respondent are no longer sufficient to maintain this roadway. The actions taken by respondent are clearly insufficient to rectify the hazardous roadway. This Court in finding the State Road Commissioner liable in the claim *Varner's Adm'n vs. State Road Comm'n*, stated:

> "[W]hen the State Road Commissioner knows or should know that an unusually dangerous condition exists, there is a duty to inspect and to correct the condition within the limits of the funds appropriated by the Legislature for maintenance purposes."[1]

Id., 8 Ct. Cl. 119, 122 (1970); See also *Cole vs. Division of Highways*, 21 Ct. Cl. 15 (1995); *Smith vs. Division of Highways*, 11 Ct. Cl. 221 (1997). Respondent has breached this duty owed to the traveling public. The evidence adduced at the September 16, 1999, hearing demonstrated that a hazardous condition of W.Va. Route 27 existed at the time of the incidents to claimant's vehicle and that respondent did nothing beyond the routine repair and sweeping of West Virginia 27, Washington Pike, in Wellsburg, Brooke County. As a result, the Court is of the opinion that respondent was negligent in its maintenance of W.Va. Route 27 for which claimant may recover for the damages sustained to her vehicle.

In view of the foregoing, the Court is of the opinion to and does make an award

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[1]Pursuant to West Virginia Code Sections 17-2A-1 and 5F-2-1, the Division of Highways, formerly the office of State Road Commissioner, was transferred to and administratively attached to the Department of Transportation by the Executive Reorganization Act of 1989.

to the claimant in the amount of her deductible feature, $200.00, for the two claims.

Award of $200.00

OPINION ISSUED DECEMBER 6, 1999

STEVE M. MATUSKY
VS.
DIVISION OF HIGHWAYS
(CC-99-170)

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

PER CURIAM:

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

1. On January 8, 1999, claimant was traveling northbound in his 1993 Plymouth Acclaim on U. S. Route 250, near Mannington, in Marion County. As claimant drove across a bridge on U. S. Route 250, his vehicle struck a metal plate covering a hole in the pavement which caused claimant to lose control of the vehicle. Claimant's vehicle then crossed into the southbound lane, striking a guardrail on the bridge. Claimant was able to maneuver the vehicle back into the northbound lane, where it finally came to a stop.

2. As a result of this incident, claimant's vehicle sustained damage in excess of the sum of $500.00, which is the deductible feature in claimant's motor vehicle insurance policy coverage.

3. On the date of the incident herein, respondent failed to maintain U. S. Route 250 in Marion County in a reasonably safe condition.

4. Respondent agrees that the amount of damages as put forth by claimant is fair and reasonable.

The Court has reviewed the facts of this claim as stated in the Stipulation, and adopts the statement of facts as its own. The Court finds that respondent was negligent in its maintenance of U. S. Route 250 in Marion County on the date of claimant's incident; that the negligence of respondent was the proximate cause of the damages sustained to claimant's vehicle; and that the amount of the damages agreed to by the

parties is fair and reasonable. Claimant is entitled to an award for his loss to the extent of the deductible feature in his motor vehicle insurance policy.

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

Award of $500.00.

OPINION ISSUED DECEMBER 6, 1999

BRENDA S. NAPIER
VS.
DIVISION OF HIGHWAYS
(CC-98-112)

Claimant appeared *pro se*.

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when her vehicle struck a hole on German Ridge Hill, which is a part of W.Va. Route 152, proceeding toward Lavalette in Wayne County. German Ridge Hill, W.Va. Route 152, is a road maintained by respondent in Wayne County. The Court is of the opinion to make an award for the reasons more fully stated below.

The incident giving rise to this claim occurred on or about December 19, 1997, at approximately 8:30 p.m. The weather that night was clear. Claimant travels this road several times per week, but had not been on the road for several days. On the night in question, claimant and her mother were traveling southbound on German Ridge Hill, which is a part of W.Va. Route 152, toward Lavalette in Wayne County. German Ridge Hill is a two lane road with a passing lane in the middle. There was a hole extending from the right edge of the road into the claimant's lane of travel. The hole was about two feet in length, six to eight inches wide, and three to four inches deep.

As claimant proceeded along German Ridge Hill in her 1995 Hyundai Elantra at a speed of about fifty-five miles per hour, her vehicle's passenger side tire struck the hole in the road. According to claimant, she did not see the hole until striking it was unavoidable. Claimant's vehicle sustained damage to the tire and the wheel assembly. Afterwards, claimant reported the hole to respondent. The total damage to claimant's vehicle was in the amount of $244.51, for a tire and a wheel assembly. Claimant's motor

vehicle insurance policy had a deductible feature in the amount of $500.00.

Respondent contends that it did not have notice regarding the hole on German Ridge Hill, W.Va. Route 152. After receiving claimant's complaint, respondent inspected the road but did not find the hole in question. There was no maintenance on the road until later in the month when the hole was patched. Respondent had been working on W.Va. Route 152 during the first part of December 1997, which included patching the location of claimant's incident. The road again was patched in January 1998. According to respondent's records, there was a hole that was worthy of being treated.

The well established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of motorist upon its roads. *Adkins vs. Sims*, 130 W.Va. 645; 46 S.E.2d 81 (1947). In order to hold respondent liable for road defects of this type, claimant must prove that respondent had actual or constructive notice. *Pritt vs. Dept. of Highways*, 16 Ct. Cl. 8 (1985); *Harmon vs. Dept. of Highways*, 16 Ct. Cl. 127 (1986).

In the present claim, the evidence established that respondent had constructive, if not actual notice of the defective condition. German Ridge Hill, W.Va. Route 152 in Wayne County is a heavily traveled road. The Court is of the opinion that respondent did not take reasonable steps to ensure the safety of drivers using German Ridge Hill, W.Va. Route 152 in Wayne County. Consequently, there is sufficient evidence of negligence upon which to base an award.

In view of the foregoing, the Court is of the opinion to and does make an award in the amount of $244.51 to claimant for the damages sustained to her vehicle.

Award of $244.51

OPINION ISSUED DECEMBER 6, 1999

LEONARD PAXTON
VS.
DIVISION OF HIGHWAYS
(CC-98-250)

Claimant appeared *pro se*.

Xueyan Zhang, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred on Piedmont Road near the intersection with Route 60 in Huntington as a result of negligent maintenance of the road. Piedmont Road is a road maintained by respondent in Wayne County. The Court is of the opinion to deny this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred on March 2, 1998, sometime after 2:00 a.m. On the night in question, claimant was en route to Ashland, Kentucky, to perform some tile work at Aldi Food Stores. Since claimant had to be at work at 5:00 a.m., he and a co-worker, Jerry Elkins, left his house at 2:00 a.m. Claimant was traveling at about twenty-five to thirty-five miles per hour and using his headlights because it was foggy with light rain falling. Claimant had not traveled this route to Ashland, Kentucky, prior to the night of this accident.

When claimant and his co-worker left his house in Saint Albans, Kanawha County, in his 1981 Ford F-150 pick-up truck, they proceeded towards Huntington where they drove to Route 52 and exited at the Chesapeake, Ohio, exit. The Chesapeake, Ohio, exit is the last exit before entering Ohio. There, they turned at the first left, Madison Avenue. The road was flat and there were street lights visible. The speed limit in this area was thirty miles per hour. Claimant passed a Rich Oil Station on his right, which is about one-thousand feet from the accident scene. Camden Park is across the street. At this point, visibility became difficult. According to claimant, he only had a view of about twenty to thirty feet. He applied his brakes thirty feet before the curve, but the road "just disappeared." Claimant missed a turn, his vehicle went off the road, and it landed in a twelve foot ravine.

When claimant's truck landed in the ravine, it was halfway on its side, but some stumps and logs caught it, keeping it from overturning. Two tires burst, all of the shocks burst, the running boards were broken off and the vehicle suffered other mechanical problems. The ceramic tile that was to be used at the claimant and co-worker's job site in Ashland, Kentucky, also was damaged. Neither claimant nor his co-worker was physically injured in the accident. The vehicle damage was extensive, but the vehicle damage did not exceed the value of the vehicle. The resulting vehicle damage was $3,017.65.

Immediately after the accident, claimant and his co-worker exited the truck and proceeded to the Rich Oil Station to telephone for help. Claimant's co-worker called the Sheriff, but there was no response. Claimant then called for a tow truck. In addition, claimant phoned Aldi Food Stores in Ashland, Kentucky, to cancel his job which was given to someone else. The truck was towed to a local garage for temporary repairs allowing claimant to drive the truck to return home. Subsequently, the oil drain plug fell

out of the oil pan and oil leaked from the engine. This leakage severely damaged the engine which resulted in the engine having to be rebuilt. Meanwhile, claimant purchased a 1975 Ford truck. Later, the damaged truck was sold.

Claimant alleges that the road was maintained in a negligent manner and presented a hazard to the driving public primarily because there were no warning signs or reduce speed signs for the curve where claimant drove off the roadway. Also, there was an unprotected embankment. There was some semblance of a former guardrail on the side of the road where the incident occurred which claimant contends should have been maintained. If all of these conditions had been addressed by respondent, claimant is of the opinion that he would not have had an accident on March 2, 1998.

Respondent asserts that it was not negligent in the maintenance of Piedmont Road. There had been no prior claims or complaints regarding the curve in the road at the scene of claimant's accident. There was a 30 mile per hour speed limit sign approximately two tenths of a mile prior to the curve on Piedmont Road.

The well established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of motorist upon its roads. *Adkins vs. Sims*, 130 W.Va. 645; 46 S.E.2d 81 (1947). As the *Adkins* Court stated:

> "[w]e do not think the failure of the state road commissioner to provide guard rails and road markers . . . constitutes negligence of any character, and particularly no such negligence as would create a moral obligation on the part of the State to pay damages for injury . . . assumed to have occurred through such failure, and as the proximate cause thereof. The very nature of the obligation of the State, in respect to the construction and maintenance of its highways, precludes the idea that its failure to exercise discretion in favor of a particular location over another, on whether it should provide guard rails, . . . or danger signals at that point, is an act of negligence. Certainly, it must be known, as a matter of common information, that places of danger on our highways exist at innumerable points, particularly on our secondary roads. . . . In the very nature of things, the road commissioner must be permitted a discretion as to where the public money, entrusted to him for road purposes, should be expended, and at what points guard rails, danger signals . . . should be provided, and the honest exercise of that discretion cannot be negligence. . . . Certainly, where the road commissioner is vested with discretion in matters of this

> character, it cannot be negligence that he selects for safety measures one point over another. . . ." Id., 130 W.Va. at 660, 661; 46 S.E.2d at 88, 89.[1]

The photographic evidence and testimony adduced at the June 24, 1999, hearing indicated that the curve on Piedmont Road was clearly a sharp curve. Respondent allowed the semblance of guardrail at the edge of the embankment to fall into disrepair. In addition, there was no indication to motorists that a potentially hazardous situation could be ahead. Notwithstanding that this conduct on the part of respondent may have been ill-advised, the Court is reluctant, in light of *Adkins v. Sims*, to conclude that respondent was negligent in that regard. The Court concludes that claimant was negligent in the operation of his vehicle. The photographic evidence indicated that there were skid marks from claimant's vehicle about the length of the vehicle itself. These skid marks indicate to the Court that claimant's vehicle was traveling at a rate of speed too fast for the road. This situation is exacerbated by the fact that there were inclement weather conditions on the day in question. Thus, the Court is of the belief that claimant did not exercise reasonable care in operating his vehicle under the then existing weather conditions.

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

Claim disallowed.

OPINION ISSUED DECEMBER 6, 1999

EDWARD PINKERTON

VS.
DIVISION OF HIGHWAYS
(CC-99-175)

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[1]The Division of Highways, formerly the office of State Road Commissioner, was transferred to, and administratively attached to, the Department of Transportation by the Executive Reorganization Act of 1989. See W.Va. Code § 17-2A-1 & 5F-2-1.

Claimant appeared *pro se*.

Xueyan Zhang, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred as a result of the alleged negligent maintenance of County Road 10/2 in Belmont. County Road 10/2 is a road maintained by respondent in Pleasants County. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred on January 28, 1999. County Road 10/2 is a third priority, twelve to fourteen foot, dirt road that is located off of County Route 1 in Pleasants County. Previously, respondent graded the dead-end road about once a year because the road was used by hunters. Some time before the incident, claimant moved to the property located about three-tenths of a mile on County Road 10/2. From County Road 10/2 to claimant's residence there has an unpaved drive-way approximately three-tenths of a mile. Currently, claimant's residence is the farthest residence down the road.

On the day in question, the road was in a state of disrepair and was saturated with mud. This state of disrepair made vehicle travel on the road difficult. As claimant proceeded up a grade in the road in his 1982 Olds Delta 88, the vehicle's wheels became stuck in the muddy road. While claimant was attempting to drive his two-door sedan out of the mud, the vehicle's engine blew up. Claimant towed the disabled vehicle to his property with the aid of his truck. At the time of the incident, there were about 89,000 miles on the vehicle's engine. The vehicle currently remains parked on claimant's property. Claimant bought a Ford Bronco II as a replacement. Since claimant had a liability insurance policy only, there was no insurance coverage for this incident. The resulting loss to claimant was in the amount of $2,152.32.

Respondent acknowledged that County Road 10/2 is a third priority road and it asserts that it took corrective measures after receiving notice of the state of disrepair on the road.

This Court previously stated in *Barnard vs. Division of Highways* that low priority roads must be maintained in a reasonable state of repair. *Id*., 21 Ct. Cl. 103 (1996). As a third priority dirt road, County Road 10/2 should be maintained in a reasonable state of repair. However, the Court is of the opinion that respondent failed to maintain County Road 10/2 in a reasonable state of repair. Respondent knew that the road had been used by hunters and that the hunters' vehicles made ruts in the road. For this reason, respondent would grade the road, especially since there were other families in the location in question that needed to be able to use the road. Simply put, respondent allowed County Road 10/2 to become a muddy mess. Unfortunately, the deterioration

of the road was the proximate cause of claimant's vehicular damage, and this is sufficient evidence of negligence upon which to base an award.

In view of the foregoing, the Court is of the opinion to and does make an award in this claim to claimant in the amount of $275.00, the blue book value of his vehicle.

Award of $275.00.

OPINION ISSUED DECEMBER 6, 1999

PUTNAM TRUCKLOAD DIRECT
VS.
DIVISION OF HIGHWAYS
(CC-98-365)

Alan G. McGonigal, Attorney at Law, for claimant.
Andrew F. Tarr & Xueyan Zhang, Attorneys at Law, for respondent.

PER CURIAM:

Claimant, an Ohio corporation, brought this action for tractor trailer damage which occurred as a result of claimant's tractor trailer striking the side of a tunnel on Secondary Route 60/14.[1] Secondary Route 60/14 is a road maintained by respondent in Greenbrier County. The Court is of the opinion to make a reduced award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred on September 16, 1998, at approximately 7:30 a.m. On the morning in question, claimant's employee, Donald Lee Stalling, was driving a tractor trailer through Charleston en route to Roanoke, Virginia. The tractor being driven by Mr. Stalling was hauling a trailer of cargo eastbound along Interstate 64 at White Sulphur Springs.[2] Suddenly, an airline leak developed on the trailer, which required immediate attention. Mr. Stalling, having never driven through

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[1] Claimant is division of P & D Transportation, Inc.

[2] The tractor was a 1985 model, while the trailer was a 1987 model. The dimensions of the trailer were forty-eight feet long, one hundred and two inches wide (the maximum federal standard) and thirteen feet four inches or thirteen feet six inches high. The height of the trailer depends on the weight of the trailer. At the time of the incident, the trailer was loaded with 35,000 pounds of cargo.

this area before, needed assistance finding an immediate truck-stop. Using his CB radio, Mr. Stalling contacted an unidentified person to ask directions to the nearest truck-stop.[1] The unidentified person instructed Mr. Stalling to take the first White Sulphur Springs exit onto Secondary Route 60/14 and take a right, which would lead to Dixon's, Inc., a truck-stop. Mr. Stalling complied with the instruction. As Mr. Stalling proceeded southward on Secondary Route 60/14 in the tractor trailer, he observed a UPS office on his left. Across from the UPS office, there was a open field. There were two signs, "one lane road" and "tunnel", along the road, but no signs warning of a low tunnel or creek in the tunnel.

Eventually, Mr. Stalling came upon a tunnel owned by the CSX railroad, which was five hundred feet from the UPS office.[2] At the tunnel, Secondary Route 60/14 is bottlenecked into one lane of traffic with a width of fourteen feet, eleven inches. The middle of the tunnel has a height of fifteen feet, six inches and the sides of the tunnel are fourteen feet, two inches. These heights are consistent through the tunnel. At the point in the tunnel where the height is thirteen feet, six inches, the width of the tunnel is ten feet, ten inches. Two signs, "15-0" and "14-2", adorn the side of the tunnel in order to indicate the height of the tunnel. The roadway through the tunnel is straight, but curves after exiting the tunnel. Inside the tunnel, a creek runs north on the tunnel's right side. On the sides of the road, outside of the tunnel, there are two diagonal striped signs, which indicate that caution is required at the tunnel.[3]

Based upon the signs on the tunnel as well as personal knowledge and experience, Mr. Stalling believed that the trailer would clear the tunnel. At this time in the morning it was becoming dawn and Mr. Stalling slowed the speed of the tractor trailer to approximately ten to fifteen miles per hour. As the tractor trailer entered the tunnel, Mr. Stalling noticed a creek running on the right hand side of the tunnel so he was forced to maneuver the tractor trailer to the left hand side. This situation concerned Mr. Stalling and he feared going into the creek or hitting the tunnel. After entering the tunnel, the driver's side of the trailer began scrapping the top of the tunnel. When the

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[1] The unknown person was incorrect in the instruction to Mr. Stalling. Since Mr. Stalling was proceeding eastbound on Interstate 64, he should have taken a left at the first White Sulphur Springs exit and then looked for Dixon's, Inc., on his right.

[2] The drainage and arch belong to CSX, while the roadway itself belongs to respondent.

[3] According to respondent's traffic engineer, Charles Raymond Lewis II, the diagonal signs are warning travelers about the creek that flows through the tunnel, not the size of the tunnel.

tractor trailer made it through the tunnel and arrived at the Greenbrier State Forest side of the tunnel, it was no longer able to carry the cargo and Mr. Stalling had to call for assistance.[1]

Sometime after the incident, Trooper T. L. Bragg, a member of the West Virginia State Police, arrived at the scene, conducted an investigation, and filed a report, but he did not issue Mr. Stalling a citation. Employees from Dixon's, Inc., also arrived at the scene with a flat-bed truck and transferred the cargo for Mr. Stalling and gave him an escort over Kate's mountain to Dixon's, Inc. Later in the morning, photographs of the area were taken by Mr. Stalling. Afterwards, Mr. Stalling traveled back to Zanesville, Ohio, without the cargo.

Claimant sustained loss in the amount of $5,178.40. This loss reflects an estimate for repair of the trailer in the amount of $4,394.90.[2] Currently, claimant still owns the trailer. The loss also reflects the amount of $783.50 for services rendered to claimant by Dixon's, Inc., at the scene of the incident. Claimant did not have collision damage insurance on his truck or its contents.

The Court is of the opinion that respondent failed to reasonably maintain the roadway portion of the tunnel on Secondary Route 60/14. The combination of the height of the tunnel and the creek which runs through the tunnel creates an unreasonable risk for motorists. Travelers are forced to maneuver their vehicles to the left side of the one lane road, which in turn increases the immediacy that a motorist's vehicle will strike some point of the tunnel's arch. At the time of the accident, there were no signs warning travelers of the double hazard they are approaching. Notwithstanding respondent's negligence, the Court is also of the opinion that claimant's employee, Donald Lee Stalling, was negligent in his operation of the tractor trailer. As Mr. Stalling made his way to the tunnel, there were signs indicating that there could be problems ahead for a tractor and trailer. Mr. Stalling could have used the open field across from the UPS office to turn around. Instead, Mr. Stalling risked the chance of the tractor trailer not making the clearance. However, under the dire circumstances, Mr. Stalling's actions were not totally unreasonable.

In a comparative negligence jurisdiction, such as West Virginia, the negligence of a claimant can reduce or bar recovery of a claim. Based on the above, the Court finds

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[1]As a safety precaution, tractor trailer drivers do not back up once in a precarious situation, such as in the present case.

[2]The fair market value of the trailer in the previous condition was approximately the sum of $5,700.00. After repairs, the trailer's value decreased approximately to the sum of $4,500.00.

that claimant was 20% negligent for the incident that occurred. Since claimant's driver's negligence is not greater than or equal to the negligence of respondent, claimant may recover 80% of the loss sustained.

In view of the foregoing, the Court makes an award to claimant in the amount of 80% of the damages for a total award of $4,142.72.

Award of $4,142.72.

OPINION ISSUED DECEMBER 6, 1999

RIVER VALLEY CHILD DEVELOPMENT SERVICES
VS.
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
(CC-98-415)

Thomas J. Obrokta, Jr., Attorney at Law, for claimant.
Joy M. Cavallo, 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 the sum of $7,788.00 for an accepted bid that was negligently revoked and then rebid. However, claimant has agreed to settle and relinquish this claim against respondent for the amount of $5,000.00. Through the settlement agreement, respondent admits that claimant is entitled to recover a sum certain and that the amount of $5,000.00 is a fair and reasonable. The Court is aware that respondent does not have a fiscal method for paying claims of this nature; therefore, the claim has been submitted to this Court for determination.

In accordance with the settlement agreement entered into by the parties, the Court hereby makes an award to claimant in the amount of $5,000.00.

Award of $5,000.00.

OPINION ISSUED DECEMBER 6, 1999

CLIFFORD S. SUMMERFIELD

VS.
DIVISION OF HIGHWAYS
(CC-98-325)

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred as a result of his vehicle striking a hole while he was traveling eastbound on Route 60/14 (Kanawha Terrace), about one-half mile west from McKinley Junior High School in Kanawha County. Route 60/14 (Kanawha Terrace) is a road maintained by respondent in Kanawha County. The Court is of the opinion to make an award for the reasons more fully stated below.

The incident giving rise to this claim occurred on August 25, 1998, at approximately 6:30 to 7:00 p.m. At dusk that evening, the weather was clear. Normally, claimant does not travel Route 60/14. Route 60/14 is a two lane road that is about twenty-two feet wide, with eleven feet per lane. As claimant proceeded along Route 60/14 at a speed of thirty to thirty-five miles per hour in a thirty miles per hour speed zone, there was traffic on the road. Unbeknownst to claimant, there was a hole on Route 60/14. The hole was approximately eight to ten inches wide and eight inches deep. When claimant observed the hole, he was unable to avoid a collision because of oncoming traffic. Claimant's 1996 Chevrolet Prism struck the hole. The resulting injury to claimant's vehicle was that the passenger side front and rear wheels as well as struts had to be replaced and the vehicle aligned. Claimant had a deductible feature in the amount of $200.00 in his collision insurance coverage.

The position of respondent was it did not have notice that there was a hole at this location. After an inspection of the area in question, respondent was unable to find the hole in question. While, the exact location of the hole was unknown, there has been repair work on Route 60/14. There have been no further complaints regarding a hole on Route 60/14.

The well established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of motorist upon its roads. *Adkins vs. Sims*, 130 W.Va. 645; 46 S.E.2d 81 (1947). In order to hold respondent liable for road defects of this type, claimant must prove that respondent had actual or constructive notice. *Pritt vs. Dept. of Highways*, 16 Ct. Cl. 8 (1985); *Harmon vs. Dept. of Highways*, 16 Ct. Cl. 127 (1986).

In the present claim, the evidence established that respondent at least had constructive notice of the defect on Route 60/14. Photographic evidence introduced at the July 9, 1999, hearing demonstrated that the hole on Route 60/14 was not a recent condition. The Court is of the opinion that respondent did not take reasonable steps to ensure the safety of travelers on Route 60/14. Consequently, there is sufficient evidence of negligence upon which to base an award.

In view of the foregoing, the Court is of the opinion to and does make an award to claimant limited to the sum of $200.00, the deductible feature in claimant's collision insurance policy.

Award of $200.00

OPINION ISSUED DECEMBER 6, 1999

DAVID ALLEN TOTO
VS.
DIVISION OF HIGHWAYS
(CC-98-315)

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred as a result of a negligently maintained berm while he was traveling westbound on Route 23/7, Clifton Heights Boulevard, approximately one-hundred-seventy-five feet east from Route 23/5, Cedar Rocks. Route 23/7 is a road maintained by respondent in Ohio County. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred on August 11, 1998, at approximately 7:45p.m. On the dry evening in question, claimant's wife, Phyllis Renae Toto, was proceeding westbound along Route 23/7, just below Jones Street, to her parents' residence, which is forty minutes away from her Adena, Ohio, residence. At this location on Route 23/7, the right side of the road has a downward slope and the left side of the road has a bank with a hillside. Claimant's wife travels Route 23/7 about once per week. In the past, claimant's wife had not noticed the deterioration in the berm of the road. As she drove on the narrow, twelve to fourteen foot, black top, second

priority local service road, she was confronted by three oncoming vehicles. When the vehicles passed her 1998 Chevy Malibu, the vehicle's passenger side front tire struck the edge of the pavement, which was experiencing deterioration in the berm about ten to twelve inches deep.

The incident burst the vehicle's tire. Since claimant's wife was not able to repair the tire, the vehicle remained on the side of the road until her brother, a mechanic, could arrive to render assistance. The resulting loss to claimant was in the amount of $105.82. Claimant's vehicle was insured under a motor vehicle insurance policy that contained a deductible feature of $250.00.

The position of the respondent was that it did not have actual or constructive notice of the deterioration of the berm along Route 23/7. Respondent previously had no record of any complaint about deterioration in the berm of Route 23/7.

This Court has been very consistent in its opinions in berm claims. In *Sweda vs. Department of Highways,* this Court held:

> "The berm or shoulder of a highway must be maintained in a reasonably safe condition for use when the occasion requires, and liability may ensue when a motorist is forced onto the berm in an emergency or otherwise necessarily uses the berm of the highway." *Id*. 13 Ct. Cl. 249 (1980)(citing 39 Am. Jur. 2d "Highways, Streets, and Bridges" § 488).

When a motorist uses the berm of the road in an emergency situation, that motorist may be entitled to recover damages if the berm is not properly maintained by respondent. *Meisenhelder vs. Department of Highways*, 18 Ct. Cl. 80 (1990).

In this present claim, the Court is of the opinion that the berm on Route 23/7, Clifton Heights Boulevard, at the location of the incident, was not maintained properly by respondent. Due to the narrow size of the road and berm deterioration, claimant's wife did not proceed onto the berm by her own choice. In effect, she was forced off the road at the moment she was confronted by oncoming traffic.

In view of the foregoing, the Court is of the opinion to and does make award in the amount of $105.82.

Award of $105.82.

OPINION ISSUED DECEMBER 6, 1999

PHILLIP A. WARD

VS.
DIVISION OF CORRECTIONS
(CC-98-289)

Claimant appeared *pro se*.
Joy M. Cavallo, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for the loss of personal property by respondent's employees at the Mt. Olive Correctional Center, a facility owned and operated by respondent in Fayette County. Claimant is currently incarcerated in this correctional center. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred on or about January 8, 1998. On the date in question, claimant was sent to lock-up for forty-five days. Claimant's personal property was placed in a laundry cart and taken to the State Shop, a restricted area, in order to be inventoried.[1] Among claimant's personal property was a pair of Reebok Kamikaze II basketball shoes and various legal papers regarding claimant's criminal case. Claimant's personal hygiene items were removed from the cart before the rest of his personal property was sent to the State shop to be inventoried. After removing claimant's personal hygiene items, the laundry cart containing claimant's personal property remained outside of the State Shop until inventoried. The inventory of claimant's personal property was conducted by Corporal Michael H. Cliver. Cpl. Cliver thoroughly inspected claimant's personal property and indicated the items on the claimant's personal property form. According to Cpl. Cliver there were no basketball shoes or legal papers in claimant's cell, so these items were not indicated on claimant's personal property form. While Cpl. Cliver described his documentation process as "meticulous," there were other personal property items, such as a television and stereo, that also were not indicated on claimant's personal property form, but were in his possession at the time.

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[1]Respondent uses a cart that holds approximately twenty bushels and is about three and a half to four feet high. The cart is on wheels and is moved to a secure location. Smaller personal property items are placed into plastic bags and then placed into the cart. Once an inmate's personal property is placed in the cart, tape is placed over the top of the cart in a "X" type design. While tape is placed on top of the cart for security purposes, some smaller items that have been placed in bags can be removed without breaking the tape.

When claimant's personal property was brought to him at a later time, the basketball shoes and legal papers were missing. According to Timothy Ray Moses, Storekeeper I, when he received the cart containing claimant's personal property, the tape that had been placed on it was still intact. However, when Carl Shillings, Correctional Counselor I, received the cart that contained claimant's personal property, the tape had been removed and the box containing the basketball shoes as well as the envelope containing the legal papers were empty. After finding his personal property items missing, claimant followed the proper procedure for filing a grievance with the appropriate officials. Neither claimant nor respondent was able to determine the whereabouts of claimant's property.

The loss suffered by claimant was estimated to be $32.75 which amount represents the cost of the new Reebok Kamikaze II basketball shoes were purchased by claimant. While the legal papers of claimant are described as "priceless," he will be able to obtain the transcripts of his criminal case free of charge. The other legal papers of claimant may be obtained by contacting his attorney.

When personal property of an inmate is recorded for the inmate and then taken for storage purposes, this Court has previously viewed such situations as a bailment. According to *Black's Law Dictionary*, a bailment is:

> "A delivery of goods or personal property, by one person (bailor) to another (bailee), in trust for the execution of a special object upon or in relation to such goods, beneficial either to the bailor or bailee or both, and upon a contract, express or implied, to perform the trust and carry out such object, and thereupon either to redeliver the goods to the bailor or otherwise dispose of the same in conformity with the purpose to the trust. The bailee is responsible for exercising due care toward the goods." *Id* 95 (6th ed. 1990).

Consequently, respondent, the bailee, must have satisfactory documentation for return of the property to the inmate, the bailor. *Heard vs. Division of Corrections*, 21 Ct. Cl. 151 (1997). Claimant has the burden of proof to demonstrate by a preponderance of the evidence that there was a delivery of claimant's property to respondent before a prima facie case is established for the failure to return items claim accrues. *Nolan vs. Division of Corrections*, 19 Ct. Cl. 89 (1992).

In the instant claim, claimant has established a prima facie case of bailment for his basketball shoes and legal papers. The evidence adduced at the October 7, 1999, hearing demonstrated that there was a delivery of claimant's property to respondent. The Court has determined that respondent failed adequately to care for claimant's personal property since it was not returned to him.

In view of the foregoing, the Court is of the opinion to and does make an award in the amount of $32.75 to claimant.

Award of $32.75.

OPINION ISSUED DECEMBER 6, 1999

JOHN KENNETH WALTERS
VS.
DIVISION OF CORRECTIONS
(CC-96-591)

Claimant appeared *pro se*.

Joy M. Cavallo, Assistant Attorney General, for respondent.

PER CURIAM:

Claimant brought this claim to recover the value of his stereo system that was broken by respondent's employees at Mount Olive Correctional Center. Currently, claimant is an inmate at Saint Mary's Correctional Center, but at the time of the incident, claimant was an inmate at Mount Olive Correctional Center in Fayette County. The Court is of the opinion to make an award to the claimant for reasons more fully stated below.

The incident giving rise to this claim occurred on October 2, 1995. During lock-down, two guards at Mount Olive Correctional Center began a shake-down of claimant's cell. While conducting the shake-down, one of the guards dropped claimant's AIWA AM/FM/Cassette/CD stereo system. At the September 3, 1999, hearing, respondent stipulated that one of the guards dropped claimant's stereo system.[1] Claimant then discovered that there was a dent on the stereo system and the re-wind button did not function properly. The value of the stereo system was estimated at $420.00. After the incident, claimant filed a grievance with the warden and later sent the stereo system to respondent's electronic technician III, Scott Sheppard, for examination on May 6, 1996. Respondent's electronic technician III informed claimant that the stereo system was not repairable. Claimant alleges that the stereo system was never returned.

The position of respondent was that no bailment situation existed because

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[1]Prior to the incident, claimant had owned the stereo system for ten months.

claimant was in possession of the stereo system at the time of the stereo system's disappearance. Documentary evidence adduced by respondent revealed that claimant acknowledged his possession of the stereo system on several signed forms during the time period in question. On claimant's signed property card of June 1, 1994, the stereo system was received by claimant. A signed property form dated May 12, 1995, indicated that claimant was still in possession of the stereo system. On September 10, 1996, an Appliances-Music Equipment form signed by claimant again demonstrated that the stereo system was still in the possession of claimant. A post-hearing affidavit of Substance Abuse Therapist II, Jamey Wilson Hunt, states that he witnessed claimant sign the September 10, 1996, form and that he saw claimant in actual possession of the stereo system at that time.[1] Not until September 12, 1996, was there documentary evidence on claimant's resident personal property form that the stereo system was no longer in the possession of claimant. Respondent further alluded to the fact that claimant did not clearly explain to the Court why the forms were signed if some of his personal property had not been received.

When personal property of an inmate is recorded for the inmate and then taken for storage purposes, this Court has previously viewed such situations as a bailment. Respondent must have satisfactory documentation for return of the property to the inmate. *Heard v. Division of Corrections*, 21 Ct. Cl. 151 (1997). Only when respondent, the bailee, has acknowledged possession of goods does claimant's, the bailor, cause of action accrue. *Nolan v. Division of Corrections*, 19 Ct. Cl. 89 (1992). A claimant, bailor, must prove that a delivery to respondent, bailee, occurred before a prima facie case is established for the bailee's failure to return items. *Id*. In such situations, claimant, the bailor, has the burden of proof. *Id*.

In this present claim, claimant has failed to establish a prima facie case of bailment or negligent care of claimant's stereo system. Despite his contention, respondent produced sufficient documentary evidence to conclude that claimant was in receipt of his stereo system. However, it is undisputed that an employee of the respondent dropped the claimant's stereo and caused the damage to the stereo of which the he complains.

The Court, having reviewed all of the evidence in this claim, is of the opinion that claimant is entitled to recover a nominal sum for the damage to his stereo and,

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[1]At the September 3, 1999, hearing, this claim was submitted subject to further inquiry into institutional records regarding the whereabouts of the stereo system. The affidavit of Substance Abuse Therapist II, Jamey Wilson Hunt, was submitted to the Court by respondent's counsel on September 29, 1999, and filed as a post- hearing exhibit and made part of the record on that date.

further, the Court has determined that $100.00 is fair and reasonable compensation for said damage.

In view of the foregoing, the Court makes an award of $100.00 to claimant for the damage to his stereo.

Award of $100.00.

OPINION ISSUED DECEMBER 6, 1999

WV REGIONAL JAIL AND CORRECTIONAL
FACILITY ATHORITY
VS.
DIVISION OF CORRECTIONS
(CC-99-451)

Chad Cardinal, Attorney at Law, for claimant.

Joy M. Cavallo, 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 Authority, provides and maintains the Eastern Regional Jail, the Central Regional Jail, the South Central Regional Jail, the Southern Regional Jail, the Southwestern Regional Jail, and the Northern 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 $4,017,465.50, to recover the costs of housing and providing associated services to 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 filed an Answer admitting the validity of the claim and that the amount of the claim is fair and reasonable.

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. This issue was considered by the Court previously in the claim of

County Comm'n. of Mineral County v. Div. of Corrections, 18 Ct. Cl. 88 (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 $4,017,465.50.

Award of $4,017,465.50.

OPINION ISSUED DECEMBER 6, 1999

JOAN L. WILLIAMS
VS.
DIVISION OF HIGHWAYS
(CC-99-114)

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred as a result of her vehicle striking rocks while traveling northbound on U.S. 250, also known as Route 2, five miles from McMechen in the "Narrows". U.S. 250 is a road maintained by respondent in Marshall County. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred on February 24, 1998, at approximately 9:00 to 9:30 p.m. On the rainy and foggy night in question, claimant was traveling northbound on U.S. 250 five miles from McMechen in an area locally referred to as the "Narrows" in Marshall County. U.S. 250 is a dimly lit two lane road that is marked as a "falling rock" area with a speed limit of fifty miles per hour. Earlier in the evening, claimant had traveled to Moundsville in order to pick up her nephew who was employed at the Moundsville Kentucky Fried Chicken. Claimant carefully proceeded along U.S. 250 with the aid of the 1998 Geo Prism's headlights at a speed of about forty miles per hour. There was no other traffic on the road. Suddenly, claimant noticed rocks in both lanes of the road. Claimant drove around the rocks in the right lane and then proceeded around rocks in the left lane. After driving back into the right lane, claimant's vehicle struck a rock, damaging the left front tire and wheel. While claimant saw the rocks on the road, she could not identify the exact rocks that she struck with her vehicle. The incident was later reported to the police, but no

report was issued.

After the incident, claimant's vehicle began to make noises and she took the vehicle to the dealership garage for repairs. The damaged sustained to claimant's vehicle was in the amount of $315.80. While claimant had a deductible feature in her motor vehicle insurance coverage policy, the amount of the deductible was $500.00. Thus, claimant was responsible for the damage sustained to the vehicle.

The position of respondent was that it did not have notice of the rocks and rock debris on U.S. 250. Respondent admitted that the area in question was a well known "rock fall" area, but argued that the area was not significantly hazardous to the traveling public. The area has been clearly marked to protect the traveling public. Two federal standard size signs, marked "Notice Falling Rock Next 1 ½ Mi" were erected in the area in question to notify the traveling public of potential problems. In addition, overhead lights were installed on U.S. 250 in 1976. This area is regularly patrolled and on the night in question, the weather was below zero and respondent was conducting snow removal and ice control. Respondent then received information regarding the incident from a person other than claimant. According to respondent's daily records, emergency service was dispatched to the site in order to remove the rocks. Before this time, respondent asserted that there was no prior notice to respondent of any rocks on U.S. 250.

The general rule of this Court has been that in claims of this nature, a claimant must positively demonstrate that respondent had notice or constructive notice of a dangerous condition posing a threat of injury to property, such as falling rocks and rock debris. *Mitchell vs. Division of Highways*, 21 Ct. Cl. 91 (1996); *Coburn vs. Division of Highways*, 16 Ct. Cl. 68 (1986); Hammond *vs. Division of Highways*, 11 Ct. Cl. 234 (1977). Besides respondent's notice of the dangerous condition, the evidence must also establish that respondent had a reasonable time to take suitable action to protect motorists. *Alkire vs. Division of Highways*, 21 Ct. Cl. 179 (1997). Knowledge of other rock falls in the area near an incident can be sufficient to give respondent notice of a hazard to the traveling public. *Cole vs. Division of Highways*, 21 Ct. Cl. 15 (1995).

In the instant claim, the Court is of the opinion that this portion of U.S. 250 in the "Narrows" is a hazard to the traveling public. Respondent has known since 1941 that this area is notorious for potential rock falls. *Dunn vs. Division of Highways*, 19 Ct. Cl. 163 (1992). This portion of road is such a hazard to the traveling public that warning signs and regular patrols are not sufficient to protect the traveling public on this section of highway. This Court in finding the State Road Commissioner liable in the claim *Varner's Adm'n v. State Road Comm'n*, stated:

> "[W]hen the State Road Commissioner knows or should know that an unusually dangerous condition exits, there is a duty to inspect and to

> correct the condition within the limits of the funds appropriated by the Legislature for maintenance purposes."[1]

Id., 8 Ct. Cl. 119, 122 (1970); See also *Cole, Supra*; *Smith vs. Division of Highways*, 11 Ct. Cl. 221 (1997).

Just last year, this Court heard two separate claims regarding the "Narrows" area on U.S. 250 in Marshall County. See *Peck & Peck vs. Division of Highways* (CC-97-164 & CC-97-375, unpublished opinion issued May 29, 1998); *Dimmick & Dimmick vs. Division of Highways* (CC-96-561, unpublished opinion issued May 29, 1999). Again this year, this Court heard this claim and another, *Hundagen vs. Division of Highways* (CC-98-303, unpublished opinion), regarding the same area in question. In many of the claims heard in the past by the Court, negligence on the part of the respondent was noted by the Court and awards were made. The notoriety of this particular area of U.S. 250 cannot be ignored by this Court. In *Dimmick*, one of respondent's employees made the analogy that driving on U.S. 250 in the "Narrows" in Marshall County was similar to playing "Russian Roulette." See *Id.* However, even after all of the previous incidents, no remedial measures have been taken by respondent. Routine patrols do not address the problem. Frankly, the Court is at a loss as to why respondent refuses to remedy a unique and dangerous condition. The respondent is on notice of a hazardous condition which poses potential danger to the traveling public. Therefore, the Court concludes that the conduct of respondent constitutes negligence.

The Court is of the opinion that the evidence adduced at the September 16, 1999, hearing demonstrated that a hazardous condition existed at the time of claimant's incident. There was no showing that respondent did anything beyond the routine patrolling of U.S. 250. Consequently, there is sufficient evidence of negligence upon which to base an award.

In view of the foregoing, the Court is of the opinion to and does make an award to the claimant in the amount of $315.80.

Award of $315.80.

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[1]Pursuant to West Virginia Code Sections 17-2A-1 and 5F-2-1, the Division of Highways, formerly the office of State Road Commissioner, was transferred to, and administratively attached to, the Department of Transportation by the Executive Reorganization Act of 1989.

OPINION ISSUED JANUARY 7, 2000

BROWNING FERRIS INDUSTRIES
VS.
DIVISION OF CORRECTIONS
(CC-99-364)

Claimant appeared *pro se*.
Joy M. Cavallo, 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 $374.25 for providing waste removal services at several of respondent's facilities. The documentation for these services was not processed for payment within the appropriate fiscal year; therefore, claimant has not been paid. In its Answer, respondent admits the validity of the claim as well as the amount, and states that there were sufficient funds expired in the appropriate fiscal year from which the invoice could have been paid.

Accordingly, the Court makes an award to claimant in the amount of $374.25.

Award of $374.25.

OPINION ISSUED JANUARY 7, 2000

CORRECTIONAL FOODSERVICE MANAGEMENT
VS.
DIVISION OF CORRECTIONS
(CC-99-69)

Claimant represents self.
Joy M. Cavallo, 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 $69,289.25 for providing food services in May 1998 to Mt.

Olive Correctional Center, a facility of the respondent. The documentation for these services was not processed for payment within the appropriate fiscal year; therefore, the claimant has not been paid. In its Answer, the respondent admits the validity of the claim and the amount, and states that there were sufficient funds expired in the appropriate fiscal year from which the claim could have been paid.

In view of the foregoing, the Court makes an award in the amount of $69,289.25.

Award of $69,289.25.

OPINION ISSUED JANUARY 7, 2000

DICKINSON FUEL COMPANY, INC.
VS.
ALCOHOL BEVERAGE CONTROL ADMINISTRATION
(CC-99-415)

Claimant appeared *pro se*.

Joy M. Cavallo, 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 $508.57 for repairing respondent’s air cooling system at its Charleston office in Kanawha County. The documentation for these services was not processed for payment within the appropriate fiscal year; therefore, claimant has not been paid. In its Answer, respondent admits the validity of the claim as well as the amount, and states that there were sufficient funds expired in the appropriate fiscal year from which the invoice could have been paid.

Accordingly, the Court makes an award to claimant in the amount of $508.57.

Award of $508.57.

OPINION ISSUED JANUARY 7, 2000

GARY PHILLIPS

VS.
REGIONAL JAIL AND CORRECTIONAL
FACILITY AUTHORITY
(CC-99-468)

Claimant appeared *pro se*.
Joy M. Cavallo, 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, formerly an inmate at the Southern Regional Jail, had some of his personal property, including a pair of Gortex Rocky boots with a thousand grams of thinsulate, inventoried and stored during his period of his incarceration by respondent's Southern Regional Jail employees. When claimant inspected his inventoried and stored personal property items, he discovered that his boots were missing. Thus far, respondent's Southern Regional Jail employees have been unable to produce claimant's boots, which had an estimated value in the amount of $200.00.

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

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

Accordingly, the Court is of the opinion to and does makes an award to the claimant for the value of his lost property in the amount of $200.00.

Award of $200.00.

OPINION ISSUED JANUARY 7, 2000

THOMAS MEMORIAL HOSPITAL
VS.
DIVISION OF JUVENILE SERVICES
(CC-99-495)

Claimant appeared *pro se*.

C. Scott McKinney, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $10.20 for providing medical services to a juvenile at the South Central Regional Juvenile Detention Center, a facility of respondent in Dunbar, Kanawha County. The documentation for these services was not processed for payment within the appropriate fiscal year; therefore, claimant has not been paid. In its Answer, respondent admits the validity of the claim as well as the amount, and states that there were sufficient funds expired in the appropriate fiscal year from which the invoices could have been paid.

Accordingly, the Court makes an award to claimant in the amount of $10.20.

Award of $10.20.

OPINION ISSUED JANUARY 7, 2000

VALLEY RADIOLOGISTS, INC.
VS.
DIVISION OF JUVENILE SERVICES
(CC-99-442)

Claimant appeared *pro se*.

C. Scott McKinney, 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 $226.00 for providing medical services to a juvenile at the Northern Regional Juvenile Detention Center, a facility of respondent in Wheeling, Ohio County. The documentation for these services was not processed for payment within the appropriate fiscal year; therefore, claimant has not been paid. In its Answer, respondent admits the validity of the claim as well as the amount, and states that there were sufficient funds expired in the appropriate fiscal year from which the invoice could have

been paid.

Accordingly, the Court makes an award to claimant in the amount of $226.00.

Award of $226.00.

OPINION ISSUED JANUARY 12, 2000

CHARLESTON AREA MEDICAL CENTER, INC.
VS.
DIVISION OF CORRECTIONS
(CC-99-265)

F. Chris Gall, Jr., Attorney at Law, for claimant.

Joy M. Cavallo, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks payment in the amount of $120,563.33 for medical services rendered to an inmate in the custody of respondent. Respondent, in its Answer, admits the validity of the claim, but states that there were insufficient funds in its appropriation for the fiscal year in question from which to pay the 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 12, 2000

DAVIS MEMORIAL HOSPITAL
VS.
DIVISION OF CORRECTIONS
(CC-99-486)

Claimant appeared *pro se*.

Joy M. Cavallo, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks payment in the amount of $34,331.13 for medical services rendered to an inmate in the custody of respondent. Respondent, in its Answer, admits the validity of the claim, but states that there were insufficient funds in its appropriation for the fiscal year in question from which to pay the 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 12, 2000

THE CONTINENTAL INSURANCE COMPANY
VS.
WEST VIRGINIA STATE POLICE AND
DEPARTMENT OF ADMINISTRATION
(CC-98-444)

Charles F. Bagley, III, Attorney at Law, for claimant.

John Poffenbarger and Brian *C*asto, Attorneys at Law, for respondent.

PER CURIAM:

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

1. On May 6, 1996, claimant executed a performance bond as surety for Jo-Del, Inc., a contractor for the construction of a public improvement project known as "State Police Headquarters Requisition No. DPS9606." The contractor and principal

on the bond, Jo-Del, Inc., failed to complete all the work on the project in accordance with the terms of the contact, and subsequently, defaulted on its payment obligations to numerous sub-contractors and suppliers. Claimant, as surety, then paid the sub-contractors and engaged another contractor to complete the project.

2. Claimant, in its performance as surety, was assessed liquidated damages in the amount of $36,000.00 by respondent, and then filed a claim in this Court to recover this amount. However, claimant has agreed to relinquish and settle its claim against respondent for the sum of $21,255.00.

3. Respondents agree that the amount of damages as agreed to by the parties is a fair and reasonable settlement of the claim.

The Court, having reviewed the facts of the claim as stated in the Stipulation, hereby adopts the statement of facts as its own. Further, the Court has determined that the amount of the settlement agreed to by the parties is fair and reasonable.

In view of the foregoing, the Court is of the opinion to and does make an award in the amount of $21,255.00 to claimant.

Award of $21,255.00.

STIPULATION ENTERED JANUARY 19, 2000

IN THE COURT OF CLAIMS OF THE STATE OF WEST VIRGINIA

AT&T CORPORATION,

Claimant,

v. CLAIM NO. CC-98-129

WEST VIRGINIA DEPARTMENT OF
TRANSPORTATION, DIVISION OF HIGHWAYS,

Respondent.

STIPULATION

On this day came the claimant, AT& T Corporation, by counsel, Daniel T. Booth, and respondent, West Virginia Department of Transportation, Division of Highways, by counsel, Andrew F. Tarr, and announced to the Clerk of the Court of Claims that the parties have agreed to stipulate to the above-referenced claim. Specifically, the parties stipulate the following:

1. On or about April 17, 1996, in the course of excavating debris caused by flooding, Ground Breakers, Inc., a contractor employed by the respondent, accidentally cut a fiber optic cable owned and operated by the claimant.
2. The location of the incident described in the preceding paragraph 'Nas a stream in Mineral County, West Virginia.
3. As a result of the fiber optic cable being cut, claimant suffered damages.
4. Respondent admits to some, but not all, responsibility for the events that led to the cutting of claimant's cable on Apri117, 1996, and further admits that the degree of its responsibility in the events that precipitated the cutting of claimant's cable creates a moral obligation on the part of respondent to provide some compensation to claimant for its loss.
5. Respondent agrees to reimburse claimant in the total amount of $90,000.00 for the damages suffered in this claim.
6. I The parties to this claim agree that the total sum of $90,000.00 paid by respondent to claimant in Claim No. CC-98-129 acts as a full and complete settlement, compromise and resolution of all matters in controversy in said claim and as a full and complete satisfaction of any and all past and future claims claimant may have against respondent arising from the matters described in said claim.

WHEREFORE, in accordance with the agreement contained in this stipulation, this Court makes an award of $90,000.00 to the claimant in Claim Number CC-98-129.

OPINION ISSUED JANUARY 25, 2000

SHERENE N. BALLENGEE
VS.
BOARD OF TRUSTEES OF THE UNIVERSITY SYSTEM OF WV
(CC-99-395)

Claimant appeared *pro se*.
Kristi A. Rogucki, 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, a student at West Virginia University, seeks $53.00 for personal items that were ruined when the sprinkler system in her dormitory room in Lyon Tower malfunctioned. In its Answer, respondent admits the validity of the claim

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

In view of the foregoing, the Court is of the opinion to and does make an award to claimant in the amount of $53.00.

Award of $53.00.

OPINION ISSUED JANUARY 25, 2000

CABELL COUNTY COMMISSION
VS.
SUPREME COURT OF APPEALS
(CC-99-476)

William T. Watson, Attorney at Law, for claimant.
Richard Rosswurm, Attorney at Law, for respondent.

PER CURIAM:

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

Claimant seeks payment in the amount of $8,908.00 for home confinement drug testing fees which were collected and inadvertently credited to the wrong account for the fiscal years 1992 through 1998, then sent to respondent. Respondent, in its Answer, admits the validity of the claim and the amount, 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 JANUARY 25, 2000

CORRECTIONAL MEDICAL SERVICES, INC.
VS.
DIVISION OF CORRECTIONS

(CC-99-504)

Claimant appeared *pro se*.
Joy M. Cavallo, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks payment in the amount of $322,005.69 for medical services rendered to an inmate in the custody of respondent. Respondent, in its Answer, admits the validity of the claim in the sum of $315,427.47, rather than the amount claimed of $322,005.69. Claimant is in agreement with respondent in its assessment that the correct amount of the claim is $315,427.47. Further, respondent states that there were insufficient funds in its appropriation for the fiscal year in question from which to pay the claim.

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

Claim disallowed.

OPINION ISSUED JANUARY 25, 2000

LOGAN MERRITT
VS.
BOARD OF TRUSTEES OF THE UNIVERSITY SYSTEM OF WV
(CC-99-472)

Claimant appeared *pro se*.
Kristi A. Rogucki, Assistat 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, a student at West Virginia University, seeks $339.18 for the value of his stereo system, model number AIW NSXA777, which was ruined when water entered through his dormitory room window at Bennett Tower and onto his stereo system. About two weeks prior to the incident, claimant informed the Bennett Tower maintenance staff of the problem with the window and the maintenance staff had taken corrective measures. However, the sealant around the window had

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

In view of the foregoing, the Court is of the opinion to and does make an award to claimant in the amount of $339.18.

Award of $339.18.

OPINION ISSUED JANUARY 28, 2000

SHANNON ADKINS
VS.
DIVISION OF HIGHWAYS
(CC-98-368)

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

PER CURIAM:

Claimant brought this action for the value of her vehicle when her vehicle went into a dug out area created by respondent which was located off of the traveled portion of W.Va. Route 55 in Craigsville. W.Va. Route 55 is a road maintained by respondent in Nicholas County. The Court is of the opinion to make an award in this claim for the reasons more fully set forth below.

The incident giving rise to this claim occurred on September 18, 1998, at approximately 9:00 p.m. On the clear night in question, claimant and her husband were proceeding along W.Va. Route 55, a high priority road, in her 1986 Mercury Lynx with the aid of the vehicle's lights. Claimant decided that she wanted to return to her residence so she attempted to turn the vehicle around. Claimant drove her vehicle into the Bubb's Produce parking lot. As she maneuvered the turn, the right side of the vehicle went into a large, unmarked hole that was between the parking lot and the road. Claimant had not observed this dug out area previously. The hole, which was by a utility pole four feet from the white line marking the edge of the pavement, was approximately four feet by four feet in size. The hole was also at least four feet deep and it was partially covered by two sheet metal plates.[1]

[1]The sheet metal plates were four feet by eight feet and had a thickness of ½ inch. Each sheet metal plate weighed about one thousand pounds.

Claimant's vehicle sustained extensive damage. After the incident, Nicholas County Sheriff Wayne Plummer happened upon the scene. Deputy Sheriff Plummer, after determining that the hole was a hazard, marked off the area with cones from the Craigsville Fire Department and evidence tape he had in his vehicle. Claimant's vehicle was then pushed to the local Napa Auto Parts store. Later, the vehicle was determined to be "totaled." Since claimant's vehicle was insured only under a liability policy, there was no insurance coverage for this incident. The value of the vehicle was estimated in the amount of $500.00.

The position of respondent was that it was not negligent in its maintenance of W.Va. Route 55 in Craigsville. Respondent acknowledged that it was responsible for creating the large dug out area in order to remedy a drainage problem, but asserts that it had taken the proper precautions to cover the hole it had created. In addition, respondent acknowledged that the area in question was known to be used by drivers as a turn-around area and that large trucks came in and out of the parking lot. According to respondent, barrels and cones were placed at the scene but had been stolen on several occasions. Several days before claimant's incident, respondent did not have material to fill in the hole, so sheet metal plates were placed over the hole. The day following the incident, the area was repaired.

The evidence adduced at the November 4, 1999, hearing established that respondent was negligent in its maintenance of W.Va. Route 55 at the site in question. Respondent was aware of the public use of the area and it should have exercised more reasonable care in the inspection of the hole until permanent repairs could be made. The Court is of the opinion that the actions of respondent were negligence for which claimant may recover the sustained loss. Consequently, there is sufficient evidence of negligence upon which to base an award.

In view of the foregoing, the Court is of the opinion to and does make an award in this claim in the amount of $500.00, for the estimated value of the vehicle.

Award of $500.00.

OPINION ISSUED JANUARY 28, 2000

BRENDA ALVARADO
VS.
DIVISION OF HIGHWAYS
(CC-98-73)

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

PER CURIAM:

Claimant brought this action for damage sustained to her vehicle when it went into a hole while traveling southbound on Route 19, five to eight miles south of exit 57, near mile post 5. Route 19 is a road maintained by respondent in Nicholas County. The Court is of the opinion to make an award in this claim for the reasons more fully set forth below.

The incident giving rise to this claim occurred on February 24, 1998, at approximately 10:30 to 11:00 a.m. On the snowy morning in question, claimant was proceeding from her residence in Elkins southbound on Route 19 to a nursing home in Fayette County for her employment. She was traveling at a speed of about forty-five to fifty miles per hour. Route 19 is a two lane highway with a speed limit of fifty-five miles per hour that was under construction at the time of the incident. At the location in question, respondent had installed concrete barriers on the right side of the road, and oncoming traffic was directed to the left of claimant. According to claimant, there was no room to maneuver a vehicle nor were there lines marking the pavement boundaries. Unbeknownst to claimant, there was large hole in her lane of travel which was approximately eighteen inches deep.

Claimant often travels this road in the same direction for her job. However, on prior occasions, claimant never noticed a hole in the road. As claimant's 1993 Toyota Corolla made its way along Route 19, the vehicle's driver side front wheel went into the hole on the road. Claimant asserted that even if she had seen the hole, she would not have been able to avoid it because of oncoming traffic. The impact bent the rim, causing a air-leak in the tire and a hubcap to be lost. On March 19, 1999, claimant had work done on the wheel rim to repair the air-leak. However, the repairs did not alleviate the problem. Claimant had to keep putting air in the tire until she could get the tire replaced on March 23, 1999. In addition, the vehicle required realignment. The resulting loss incurred by claimant was in the amount of $260.95. Claimant's motor vehicle insurance policy has a deductible feature of $500.00.

The position of respondent was that there was ongoing construction on Route 19 for twenty-six miles at the time of this incident. Respondent's employees were familiar with the defective condition of Route 19, and knew that it was a substantial hole. The contractor for the Route 19 project, Geupel Construction Company, Inc., which was under a "save harmless" obligation to respondent, was in between two projects switching traffic and did not anticipate paving Route 19 until spring. However, respondent acknowledged that Route 19 could have been patched in the meantime until the spring paving could be accomplished.

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

constructive notice. *Pritt vs. Dept. of Highways*, 16 Ct. Cl. 8 (1985); *Harmon vs. Dept. of Highways*, 16 Ct. Cl. 127 (1986).

In this present claim, the evidence established that respondent had actual notice about the hazardous condition of Route 19 in Nicholas County. As this Court stated in *Bailey vs. Div. of Highways* (CC-98-146, unpublished opinion issued September 8, 1999), respondent had employees at the construction site responsible for supervising the actions of the contractor with regard to the safety of the traveling public. Respondent had an obligation and a duty to assure that the Route 19 construction site was maintained in a proper manner such that it did not pose a hazard to the traveling public. The Court is of the opinion that respondent's employees at the construction site are responsible for supervising the actions of the contractor, and, that on the date of the incident herein, did not take reasonable steps to ensure the safety of travelers upon Route 19. The failure of respondent's employees to supervise the contractor properly constitutes negligence for which claimant may recover her loss.

The "save harmless" clause relied upon by respondent is not applicable in a claim of this nature as there is no privity between claimant, a third party, and the parties to the construction contract.

In view of the foregoing, the Court is of the opinion to and does make an award to claimant in the amount of $260.95.

Award of $260.95

OPINION ISSUED JANUARY 28, 2000

RONALD BROWN
VS.
DIVISION OF HIGHWAYS
(CC-99-325b)

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

PER CURIAM:

Claimant brought this action for damage sustained when a tree fell onto his property on County Route 68/4, Shelby Road, in Morgantown.[1] County Route 68/4, Shelby Road, is a road maintained by respondent in Monongalia County. The Court is of the opinion to make an award in this claim for the reasons more fully set forth below.

The incident giving rise to this claim occurred on July 28, 1999. Claimant resides on County Route 68/4 which is a third priority paved road with a ten foot road surface. At the location in question, respondent has a thirty feet right of way, fifteen feet from the center of the road. Across the road from claimant's residence, there were several large rotten trees, about fifteen to eighteen inches in diameter, leaning towards his residence. On two occasions in the months prior the incident, claimant went to respondent's Monongalia office to inform it about the hazard that the trees potentially posed to travelers on County Route 68/4 as well as to his residence. On another occasion, claimant informed several of respondent's employees, who were working in the area, of his concerns. During the night in question, a storm caused one of the large rotten trees to fall onto claimant's property. The falling tree destroyed a handicap ramp claimant had installed onto his house, sheared off a side-view mirror on his van, and destroyed a Blue Spruce tree and four rose bushes.

Clamant sustained a loss in the sum of $559.88 as a result of the rotten tree falling onto his property. The handicap ramp was covered under claimant's homeowner insurance policy for which he was responsible for the deductible feature of $250.00. While claimant had insurance coverage for his vehicle, he was responsible for the damage because the loss sustained to the vehicle, in the amount of $209.88, was the less than the deductible feature of $500.00. In addition, the four rose bushes were valued at $10.00 each. The Court estimates the value of the Blue Spruce tree at $60.00 based upon inquiries made of several tree nurseries in the Charleston area.

The position of respondent was that it did not have notice of the condition of the large trees across from claimant's residence on County Route 68/4. Respondent asserted that a review of its records indicated that it had received no complaints regarding the condition of County Route 68/4. According to respondent's daily work records, employees were dispatched to the area in question as soon as it learned of the tree falling onto claimant's property. In the future, respondent anticipates doing further work when the necessary equipment is available.

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[1]Claimant originally filed a claim with two separate incidents. At the October 15, 1999, hearing the two separate claims were bifurcated, with one claim styled CC-99-325a and the present claim styled CC-99-325b.

The Court has previously held that when the evidence indicates that respondent has notice of a hazard, such as a large rotten tree, and a reasonable opportunity to remove it, respondent may be held liable. *Jones v. Division of Highways*, 21 Ct. Cl. 445 (1995).

In the present claim, the evidence adduced at the October 15, 1999, hearing established that respondent had notice regarding the condition of the trees across from claimant's property on County Route 68/4. The Court is of the opinion that respondent's failure to act after claimant personally gave notice to respondent about the particular tree across from his property constituted negligence for which claimant may recover.

In view of the foregoing, the Court is of the opinion to and does make an award to the claimant in the amount of $559.88.

Award of $559.88.

OPINION ISSUED JANUARY 28, 2000

DAVID W. BURGE
VS.
DIVISION OF HIGHWAYS
(CC-98-308)

Claimant appeared *pro se*.

Xueyan Zhang, Attorney t Law, for respondent.

PER CURIAM:

Claimant brought this action for vehicle damage sustained when his vehicle struck a hole while traveling northbound on the I-79 Buffalo Creek bridge near the Gassaway exit. I-79 is a highway maintained by respondent in Braxton County. The Court is of the opinion to make an award in this claim for the reasons more fully set forth below.

The incident giving rise to this claim occurred on August 16, 1998, at approximately 7:00 p.m. On this rainy evening, claimant was traveling northbound towards Flatwoods from the Beckley exit along I-79 in his customized 1982 Chevrolet S-10 Pick-up truck at a speed of sixty-five miles per hour in a seventy mile per hour speed zone. Claimant travels this portion of highway several times each week for his employment as a security guard. On these prior occasions, claimant has never noticed any cones, barrels, flagmen or any signs indicating any potentially hazardous conditions on the highway surface of I-79. As claimant operated his vehicle in the passing lane on the reinforced concrete overpass Buffalo Creek bridge

near the Gassaway exit, he suddenly observed a very deep hole in the pavement on the bridge. Since there were two other vehicles beside claimant's vehicle at that moment, he could not maneuver his vehicle around the hole. The vehicle's front driver's side struck the hole that was two feet inside the white line. The impact burst the front driver side tire, damaged the rim and bumper, ruptured the oil pan, and caused other damages. Afterward, the vehicle was towed from the scene to the residence of the father of claimant's girlfriend. The loss of the vehicle caused claimant to miss a week of employment. Claimant sustained a total loss in the amount of $1,460.30 for the following: the estimated damages to the vehicle of $1,178.30; towing charges of $35.00; and estimated wage loss of $247.00. Claimant's liability motor vehicle insurance policy provided no insurance coverage for this incident. Eventually, the vehicle was used as a trade-in on another vehicle.

The position of respondent was that the poor condition of the highway was caused by the poor substructure which it had been working on to repair. The condition of the surface of the bridge had caused holes to form in its pavement. Respondent patrolled this particular area several times per day to repair holes with cold mix asphalt as needed. Respondent asserted that due to this condition, it gave the bridge a higher priority of care. Cold mix asphalt was used to repair the holes because the location of the hot mix plant was about seven miles from respondent. On August 14, 1999, and on August 15, 1999, respondent had been to the location in question and repaired holes in the pavement. Apparently, by the time of the incident, two days of rain had caused the cold mix asphalt to come out of the hole. Since this incident occurred on a Sunday, respondent's employees were not patrolling the bridge. According to respondent, after receiving notice of the incident herein from a member of the West Virginia State Police, employees of respondent immediately went to the scene and repaired the hole.

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

In the present claim, the evidence adduced at the November 4, 1999, hearing establish that respondent was negligent in its maintenance of the Buffalo Creek bridge of I-79 in Braxton County. The Court is of the opinion that respondent knew of the hazardous condition on the Buffalo Creek bridge, and it had a duty to warn motorists of the defective condition of the pavement on the bridge. Even with the knowledge of the Buffalo Creek bridge's hazardous condition, respondent failed to warn the traveling public. Respondent's failure to provide some form of warning mechanism to warn motorists about this hazard constitutes negligence for which

claimant may recover his loss. Consequently, there is sufficient evidence of negligence upon which to base an award.

In view of the foregoing, the Court is of the opinion to and does make an award in this claim in the amount of $1,460.30.

Award of $1,460.30.

OPINION ISSUED JANUARY 28, 2000

COMPUTER ASSOCIATES INTERNATIONAL, INC.
VS.
DEPARTMENT OF TAX AND REVENUE
(CC-00-033)

Claimant appeared *pro se*.
Joy M. Cavallo, 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 $254,000.00 for extra work that it performed under a contract with the respondent State agency for computer conversions of certain systems necessary to meet Y2K compliance. There were projects for these computer conversions being undertaken by all State agencies at this particular time. Claimant originally bid on the project for a little less than $1,300,000.00 in March 1998 at which time claimant agreed to reduce the contract bid price to $795,000.00 based upon the representations of the respondent that its own employees would be able to accomplish a portion of the conversion work necessary to bring the computer systems into Y2K compliance. A subsequent change order brought the total amount of the contract to $837,000.00. The claimant agreed to this arrangement and work on the computer system was begun in April 1998.

In August 1999, it became apparent to both parties that the Y2K conversion process would not be timely accomplished unless claimant provided the expertise necessary to accomplish this feat. There was a “fixed in stone” deadline of January 1, 2000, facing the respondent, and it was determined that unless the claimant provided additional resources to respondent, the conversion would not be completed by the critical deadline. The parties agreed that claimant would provide whatever services were needed to meet the deadline and the charges for the work would be submitted by claimant after the work was completed.

As explained by respondent's computer consultant, Mark L. Starcher, President of Scanmark, Ltd., the remediation work was to be a shared project by claimant and respondent's employees. There were three systems to be addressed, specifically being the personal income tax system, accounts receivable system, and the business tax system. The personal income tax system was completed and put into production in December 1998. As work progressed on the Y2K compliance issues, it became apparent that additional work was necessary which was beyond the scope of the Y2K remediation effort. This work involved the library of the software itself. There were obsolete programs in the library and it became apparent to all concerned that it was necessary to redo completely the software library to bring it up to date. Claimant provided the expertise and employees to address the problems with the software library so that respondent now has a production library that works. All of this work was beyond the scope of the contract entered into by the parties.

As a result of the efforts of the claimant, the Y2K computer project was completed in a timely manner on November 15, 1999, the systems were tested, placed into production, and found to be Y2K compliant.

After the systems were all in order, the parties began discussions as to the amount due the claimant for the additional work that it had performed during this critical period of time. An analysis of the amount claimed to be due by the claimant was undertaken and the parties eventually agreed that the amount of $254,000.00 was fair and reasonable. Respondent's consultant, Mr. Starcher, took an active role in the evaluation of claimant's request for additional compensation and he was of the opinion that the amount agreed upon by the parties was reasonable. However, claimant could not be paid by respondent under the terms of the contract and claimant was advised to file this claim.

A hearing was conducted on January 19, 2000, at which time the facts and information as stated herein above were provided to the Court. At that hearing, the Commissioner for the Tax Division, Joseph M. Palmer, informed the Court that he had appeared before an interim committee of the Legislature in October 1999 to provide an update on the efforts underway to address Y2K computer issues. He informed the committee that extra work was being undertaken by claimant and a claim would be filed for consideration by this Court.

The Court, having considered all of the testimony and amount of the claim, has determined that the services performed by claimant were necessary, that respondent received the benefit of expert computer services provided by the claimant, and that the amount agreed upon by the parties is fair and reasonable. Further, the Court is of the opinion that the State of West Virginia would be unjustly enriched if claimant is not compensated for the valuable expertise that it provided respondent. The respondent, as well as our State, was in a crisis at that time because the year 2000 was fast approaching. Respondent would not have been able to process business tax receipts payable to the State, it would not have been able to

track its accounts receivable or determine payments made to the State or amounts due for delinquencies. This would have been a catastrophic event for the fiscal affairs of our State. Respondent had a duty to meet the 2000 year deadline and it could not have done so without the efforts put forth by claimant. Therefore, the Court is of the opinion that an award should be made to the claimant in the amount of $254,000.00 for consideration by the Legislature during its session in 2000.

Accordingly, the Court makes an award to claimant in the amount of $254,000.00.

Award of $254,000.00.

OPINION ISSUED JANUARY 28, 2000

DANKA
VS.
ADJUTANT GENERAL
(CC-00-032)

Claimant appeared *pro se*.
Joy M. Cavallo, 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 $303.87 for maintenance services provided to respondent. The documentation for these services was not processed for payment within the appropriate fiscal year; therefore, claimant has not been paid. In its Answer, respondent admits the validity of the claim as well as the amount, and states that there were sufficient funds expired in the appropriate fiscal year from which the invoice could have been paid.

Accordingly, the Court makes an award to claimant in the amount of $303.87.

Award of $303.87.

OPINION ISSUED JANUARY 28, 2000

RANDALL W. HALL

VS.

DIVISION OF HIGHWAYS
(CC-97-410)

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

PER CURIAM:

Claimant brought this action for vehicle damage that was sustained as his wife was driving his vehicle and it went into a ditch while she was traveling on Route 1, at the bottom of Bolt Mountain. Route 1 is a road maintained by respondent in Wyoming County. The Court is of the opinion to make a reduced award for reasons more fully set forth below.

The incident giving rise to this claim occurred on October 3, 1997, at approximately 7:00 a.m. On the morning in question, claimant's wife, Patricia Ann Hall, was proceeding on Route 1 to her place of employment, the Bolt Post Office, in claimant's 1995 Dodge Stratus. Claimant's wife was driving the vehicle along the local service route at a speed of thirty-five miles per hour with the aid of the vehicle's headlights, and there was little traffic on the road. When she came upon a three foot wide construction ditch in the road surface, she was unable to avoid driving the vehicle into the depression in the roadway. She applied the vehicle's brakes, but the vehicle struck the deep ditch forcefully. She stopped the vehicle and slowly drove the vehicle out of the ditch. Claimant was able to operate the vehicle after the incident, however the vehicle sustained damage in the amount of $487.23. Claimant's motor vehicle insurance policy has a deductible feature of $250, to which claimant's recovery is limited. See *Sommerville, et al. vs. Div. of Highways*, 18 Ct. Cl. 110 (1991).

During June 1997, claimant was aware that there had been flooding in the area and that as a result, the road surface had been excavated from side to side by respondent to install drains.

In the days prior to the incident, claimant's wife had been on the road, but she had not noticed any irregularities in the pavement. Later, claimant's wife contacted respondent regarding the incident.

The position of respondent was that it did not have notice that the ditch on Route 1 in Wyoming County posed a hazard to the traveling public. According to respondent, flooding had occurred through out the county on several occasions during the year. On Route 1 at the scene of the incident herein, water flowed out of a ravine and caused the road surface to "hoove up" when rock and debris filled the drain pipe under the road. There were several areas on Route 1 where respondent had pipes wash out. As a result, respondent had been in the process of installing new pipes across Route 1 as well as cleaning the sides of the road to alleviate any problems. These areas of Route 1 were repaired and gravel was used in the areas

which were dug out. Respondent then went on to repair other roads. Respondent acknowledged that the gravel that was placed on the road often settles and possibly could form depressions that would be consistent with a ditch. The material on the road must be compacted in order to remedy the settling problem. Hot mix asphalt was placed on the road at a later date. In addition, "Rough Road" road signs were en route to the location in question at the time of claimant's wife incident.

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

In the present claim, the evidence adduced at the October 28, 1999, hearing established that respondent had notice of the condition of Route 1 in Wyoming County. Respondent knew or should have known that this portion of Route 1 would settle causing a ditch to form in the road. The Court is of the opinion that respondent did not take the proper precautionary measures in its maintenance of Route 1 at the scene of claimant's wife's accident. However, the Court is of the opinion that claimants's wife is not without fault in this incident. She was familiar with the road, and she knew that respondent had installed pipes across the road. She should have exercised more care in operating claimant's vehicle under the road conditions then and there existing.

Normally, the contributory negligence of a driver in operating a vehicle is not imputed to the owner of the vehicle. *Bartz vs. Wheat*, 169 W.Va. 86; 285 S.E.2d 894 (1982). However, the Court is of the opinion that the negligence of claimant's wife may be imputed to claimant under the family purpose doctrine. The family purpose doctrine is a legal rule by which the owner of an automobile is held vicariously liable when a member of the immediate household negligently drives the family vehicle, on the assumption that the driver is implementing a family purpose. See *Black's Law Dictionary*, 420 (6th ed.1991). West Virginia has adopted and followed this doctrine. *Bell vs. West*, 168 W.Va. 391; 284 S.E.2d 885 (1981). Since claimant's wife was operating a family vehicle to her place of employment, the Court finds that the family purpose doctrine is applicable to this situation. Thus, the comparative negligence of claimant's wife will be imputed to claimant.

In a comparative negligence jurisdiction, such as West Virginia, the negligence of a claimant may reduce or bar recovery of a claim. In accordance with the findings of fact and conclusions of law stated herein above, the Court has determined that claimant's wife was 20% negligent for the incident that occurred. Since negligence of claimant's wife was not greater than or equal to the negligence of respondent, claimant may recover 80% of his loss.

In view of the foregoing, the Court is of the opinion to and does make an award to claimant in the amount of 80% of claimant's insurance deductible feature for a total award of $200.00.

Award of $200.00.

OPINION ISSUED JANUARY 28, 2000

NANCY GODSEY-MAYLE
VS.
DIVISION OF HIGHWAYS
(CC-99-281)

Claimant appeared *pro se*.

Xueyan Zhang, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when her vehicle went off the edge of the road on County Route 24, Chestnut Ridge Road, in Barbour County. County Route 24 is a road maintained by respondent in Barbour County. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred on July 3, 1999, at approximately 5:00 p.m. On the clear evening in question, claimant was returning from a trip to a store in her 1990 Lincoln Town Car. Claimant's vehicle was proceeding from Philippi to Chestnut Ridge Road near the Badger mines on County Route 24. County Route 24, which is about two miles from the Philippi city limits, is a sixteen foot secondary road with a double-yellow centerline. There are no edge lines. Each lane of County Route 24 is about seven to eight feet wide. There is no berm on County Route 24 at the scene of claimant's accident. There is a guardrail adjacent to the road with a space from the edge of the road to the guardrail. According to claimant, County Route 24 is not wide enough for two vehicle traffic.

As claimant drove her usual route to her residence, she came to what could be termed an "S"shaped up hill curve on the road. Since claimant had experienced problems in the past, she maneuvered her vehicle at a speed of approximately ten miles per hour to avoid any further problems. Claimant was then confronted by an oncoming vehicle. In order to pass the oncoming vehicle, she drove to the right side of her lane whereupon her vehicle went off the paved portion of the road. This situation caused claimant's vehicle to roll into the guardrail. Afterwards, claimant exited the vehicle, went to her brother-in-law's and telephoned her husband for

assistance. The following day, claimant went back and photographed the area in question. Claimant's vehicle sustained damage in the amount of $3,091.24. Since claimant's vehicle was insured only under a liability policy, there was no insurance coverage for this incident.

The position of respondent was that it did not have notice regarding the defective condition on the edge of the road on County Route 24. Respondent's search of its daily records did not reveal any prior complaints. County Route 24 is patrolled on a weekly basis for irregularities in the pavement. However, respondent's County Highway Administrator for Barbour County, Carl W. Dickenson, Jr., stated that the road appeared to be unstable and had to be restabilized.

In this claim, the Court is of the opinion that the edge of the road on County Route 24, Chestnut Ridge Road, at the location of claimant's incident, was not maintained properly by respondent and created a hazard to the traveling public. The photographic evidence presented by claimant established that the edge of the road had broken away where claimant's incident occurred. As claimant approached the oncoming vehicle on the narrow road, she carefully attempted to maneuver her vehicle toward the edge of the road. Due to deterioration, there was no road surface to support her vehicle. This condition on County Route 24 constituted negligence on the part of respondent for which the claimant may recover for the damages to her vehicle.

However, the Court is of the further opinion that the estimates submitted by claimant as proof of the damages to her vehicle are suspect and appear to be inflated. The Court has reviewed the invoices and has determined that a 30 percent reduction is fair and reasonable; therefore, the Court reduces the award to the amount of $2,163.87.

In view of the foregoing, the Court is of the opinion to and does make an award to claimant in the amount of $2,163.87.

Award of $2,163.87.

OPINION ISSUED JANUARY 28, 2000

ANNA ELIZABETH MOUNT
VS.
DIVISION OF HIGHWAYS
(CC-96-578)

Herbert H. Henderson, Attorney at Law, for claimant.
Andrew F. Tarr, Attorney at Law, for respondent.

WEBB, JUDGE:

Claimant, Anna Elizabeth Mount, brought this action for damage sustained to a barn on her real property from a landslide which she alleges was the result of negligent maintenance of a ditch on the gravel road portion of County Route 7, in Lesage. County Route 7 is a road maintained by respondent in Cabell County. The Court is of the opinion to make a partial award in this claim for the reasons more fully stated below.

Claimant has resided on a portion of the property located adjacent to County Route 7 in Lesage, Cabell County since 1945. In 1972, claimant and her husband, now deceased, purchased property across the road from their residence. During the summer and fall of 1983, claimant's sons, Clyde Edward and Clarence Ray Mount, erected a barn on this particular tract, adjacent to a steep slope. County Route 7, a dirt and gravel road at this location, is at the top of this slope and there is a hillside above the road. A driveway from the road to the barn was already in place at the time the barn was built, because there had been a residence there previously. The front of the barn faces west toward the driveway; one side of the barn faces north toward the slope on County Route 7; the other side of the barn faces south toward Nine Mile Creek which is below the barn; and the back of the barn faces the east toward vacant land. According to claimant and her sons, the only excavation done to the original property while constructing the barn consisted of digging the footer which was filled with steel reinforced concrete. The foundation of the barn was built with concrete blocks that were six to ten inches thick and sixteen to eighteen inches wide. Reinforced steel was also placed in the concrete floor. The wooden, two story barn, with a tin roof, is twenty feet long, thirty feet wide and sixteen feet high. At the front of the barn, there is a large sliding door which is wide enough for a regular size pick up truck to pass through. The inside of the barn is wired for electricity, but does not have indoor plumbing. The loft is used for storing hay, and the bottom is used for processing tobacco and storing equipment. Around the outside of the barn, there are gutters with a down spout. Prior to the problems with the slip, claimant's sons were able to mow the land between the north side of the barn and the slope to County Route 7.

Claimant asserts that she had not experienced any problems at the location of her barn until 1994. In 1994, employees of respondent, using a grader, cut a ditch along County Route 7. According to claimant as well as her neighbors, Luther H. Ramey, Jr., and Lowell Elmer Gibson, this area of the ditch filled with water which was allowed to remain standing in the upper side of the road. There was no culvert along the county road to provide proper drainage. In November 1994, a slip began on County Route 7. The slip was eighteen to twenty feet deep and twelve feet lengthwise, almost encompassing the entire road. Eventually the slip affected the foundation of claimant's barn. From January 11, 1995 to June 5, 1995, claimant contacted respondent regarding the problem at least sixteen times. Respondent came

to the site several times to place tons of slag in the sunken part of the road at the slip.[1] These corrective measures did not prove to be a permanent solution to the problem, and in September to October1995 respondent installed piling at the site which corrected the slip in the road.[2] The claimant has had no further problems with this slip. Her barn appears to be in a stable position as of the dates of the hearing in this claim, September 29 and 30, 1999, but damages to the barn occurred during 1994 through 1995.

The slip that occurred beginning in 1994 and continuing into1995 on County Route 7 caused claimant's barn to shift about eighteen inches from its foundation and to move eight to ten inches off plumb. The area most affected was the northeast corner of the barn. This foundation was damaged extensively. The concrete floor of the barn remained intact, but the foundation block on which the barn was constructed overturned. This situation has made the barn unsafe for its intended purposes. According to claimant's expert in the cost and repair of damages to the barn, Bill Tassen, the barn will have to be moved forty feet to the west to avoid the slip area. A new foundation of fill dirt and concrete will be required. In addition, a entrance road will have to be built onto the property. The project is expected to take four weeks to complete and the cost is estimated in the amount of $25,500.00. Claimant does not have an insurance policy that provides coverage for this incident.

Two of claimant's neighbors, Mr. Ramey and Mr. Gibson described the measures taken by respondent in an attempt to remedy the problem of the water on the road. Mr. Ramey testified that respondent installed a twelve-inch plastic drain pipe at an angle in a curve in the road which was above the lower part of the road. Mr. Gibson testified that an eighteen inch culvert was installed across the road from claimant's barn, but it was above the water and water stood in the ditch because there was no way for it to flow out of the culvert. Additionally, Mr. Gibson testified that he had observed three to four landslides in the area in question.

According to claimant's expert in civil engineering and causation of landslides, Craig Alan Lyle, the primary cause of the landslide was the improper drainage along the ditch line which resulted in ponding of water which caused the soil beneath the road to lose shearing strength. It was his opinion that the digging of

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[1] According to Design Technician, James F. Roberts, "slag" is a cheap, waste by-product from steel mills that is used as an aggregate to repair roads maintained by respondent.

[2] According to Administrative Assistant for the Operations Division, Chirstopher Kyle Sowards, "pilings" are steel posts, beams or wooden sticks placed into pre-drilled holes in the ground which are embedded into rock.

the footer for the barn foundation eleven years prior to the slip did not bring about the eventual slip. After an inspection of claimant's property on September 26, 1998, Mr. Lyle observed that the drain installed by respondent was ineffective and clogged with leaves. According to Mr. Lyle, water flow could not be maintained through the culverts because it only had a slight slope. Therefore, the water does not drain from the area but rather it percolates into the soil. Mr. Lyle explained that when water infiltrated and saturated the ground, which consists of clay soil in large part, the ground experienced a reduction in shearing strength. The saturated soil was reduced to the point where it would no longer stand at its previous slope. Thus, the landslide made a slow progression toward claimant's barn to achieve stability. Mr. Lyle based his opinion on weather information obtained from the Huntington Sewage Treatment Plant; the Huntington Airport; and the Hogset-Gallipolis Dam that revealed that the rainfall measurements for November 28, 1994, were below normal while the rainfall measurements for May and June in1995 were above normal. Before the ditch line construction in November 1994, Mr. Lyle is of the opinion that the barn actually placed weight on the downhill side of the property and created a stable position for the barn. However, Mr. Lyle acknowledged that other factors such as water, steepness of the slope, soil characteristics, and a scarp area that exposed a sandstone outcrop also could have affected this landslide. In addition, Mr. Lyle acknowledged that this landslide was typical of most landslides in West Virginia.

The position of respondent was that it was not negligent in the maintenance of the ditch line on County Route 7. County Route 7 is a fourth priority single lane road that transverses in a west-east direction. The area in question is one-tenth of a mile from the hard top portion of County Route 7. Since County Route 7 is a fourth priority road, it is graded by respondent on an annual basis and ditched every five years. Before the slip, the portion of road in question was high and water flowed toward claimant's property. Respondent's employees went to the site and installed a drain pipe above the slip. According to the Assistant Supervisor for Cabell County, Clarence F. Scarberry, on March 10, 1995, the pipe was installed in order to reroute the water around the barn into the creek from above where the barn sets. Sometime after March 6, 1995, then Maintenance Assistant in the Maintenance Division, James F. Roberts, made a recommendation to the District Two Office[3] for piling to be installed on County Route 7.

Respondent's expert in geotechnical engineering, Dr. George Alan Hall, first visited the site on June 28, 1999. He described the area of the barn as being in a full slip plane. The landslide area was identified as an area of "rotational failure,"

[3] Decisions regarding the installations of pilings are made based on severity of the problem and available funding for the project.

which he also referred to as a "slump."[1] The slip part in question started to move first and the other part followed it immediately thereafter. These two occurrences are related. Dr. Hall asserted that the slip in question is part of an ancient landslide which developed hundreds of years ago. On June 28, 1999, Dr. Hall observed a mound of material on the hillside below the road, including a large boulder on the western side of the barn. According to Dr. Hall, the significance of the mound area and the meander in the stream is that at one time the stream flowed relatively straight across the valley; however, a large landslide developed in the hillside which pushed out into the valley and forced the stream to the other side. This situation led to a more stable slope for many years. From his personal observation, Dr. Hall was of the opinion that there was excavation in the area directly behind the barn which brought about the reactivation of the slide. This excavation cut away a stable portion of the once stable slope.

Dr. Hall further explained that the time discrepancy between the excavation for the barn in 1983 and the landslide in 1994-1995 is the result of weather conditions during the years 1980 to 1988 when the area experienced an extreme dry period that caused the clay soil to shrink. Then in 1989, the area experienced one of the wettest years on record. Thus, the excavation for the barn being at the bottom of the slip area precipitated the beginning of the landslide. In addition, Dr. Hall asserted that the pipe which had been installed due to the drop in the road prevented the water flowing in that area from flowing into the ditch, thus, it was unable to flow into the creek.

The Court has held that respondent has a duty to provide adequate drainage of surface water, and drainage devices must be maintained in a reasonable state of repair. *Haught vs. Dept. of Highways*, 13 Ct. Cl. 237 (1980). In claims of this nature, the Court will examine whether respondent negligently failed to protect a claimant's property from foreseeable damage. *Rogers vs. Div. of Highways*, 21 Ct. Cl. 97 (1996).

In the instant claim, claimant has established that respondent maintained the ditch on County Route 7, in Cabell County, in a negligent manner. The Court is of the opinion that respondent set in motion the slip that occurred by digging a ditch on the north side of Route 7 and then allowing the ponding of water in the ditch. This brought about the beginning of the slip into the barn and claimant's first complaints to respondent. Respondent failed to address the situation of the water ponding in the ditch as soon as it received notice of the problem. Rather, no action was taken until the road itself began to sink and traffic was not able to traverse the road.

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[1] "Geotechnical engineering," also known as "soils and foundations engineering" is the use of earth materials either for foundation, for structures, or to construct a structure itself.

Respondent attempted to maintain its road in the manner necessary, i.e., by placing slag in the slip on the road. As a result of the weight on the roadway from the slag, the slope adjacent to claimant's barn moved toward and against the northeast corner of the barn until it actually caused damage to the foundation blocks and then the barn began to move from its foundation. The amount of slag placed on the roadway; the later attempt to drain the area with the plastic pipe; and, the grading done in the area were not sufficient to stop the slide which had been put in motion as a result of the water in the ditch and on the road. Respondent did not take permanent, remedial action to protect the claimant's property from the effects of this slip until the fall of 1995 when the piling was installed to stop the slip completely. There have been no further problems from the slip since the piling was placed by respondent.

It appears to the Court that claimant has the option to move her barn or to effect the necessary repairs and leave it where it is now located. The evidence certainly supports the contention that the slope is no longer moving because County Route 7 is stable. The Court has considered the damage estimates in evidence. The Court is not satisfied that moving the barn to a new location is necessary; therefore, the Court has reduced the damages to reflect the approximate cost to repair the barn at its present location. The amount of $7,500.00 appears to the Court to be fair and reasonable for claimant to be able to replace the foundation blocks and place the barn back on its foundation.

In accordance with the findings of fact and conclusions of law stated herein above, the Court is of the opinion to make an award to the claimant in the amount of $7,500.00.

Award of $7,500.00.

OPINION ISSUED JANUARY 28, 2000

ANNA ELIZABETH MOUNT
VS.
DIVISION OF HIGHWAYS
(CC-96-578)

Herbert H. Henderson, Attorney at Law, for claimant.
Andrew F. Tarr, Attorney at Law, for respondent.

WEBB, JUDGE:

Claimant, Anna Elizabeth Mount, brought this action for damage sustained to a barn on her real property from a landslide which she alleges was the result of negligent maintenance of a ditch on the gravel road portion of County Route 7, in

Lesage. County Route 7 is a road maintained by respondent in Cabell County. The Court is of the opinion to make a partial award in this claim for the reasons more fully stated below.

Claimant has resided on a portion of the property located adjacent to County Route 7 in Lesage, Cabell County since 1945. In 1972, claimant and her husband, now deceased, purchased property across the road from their residence. During the summer and fall of 1983, claimant's sons, Clyde Edward and Clarence Ray Mount, erected a barn on this particular tract, adjacent to a steep slope. County Route 7, a dirt and gravel road at this location, is at the top of this slope and there is a hillside above the road. A driveway from the road to the barn was already in place at the time the barn was built, because there had been a residence there previously. The front of the barn faces west toward the driveway; one side of the barn faces north toward the slope on County Route 7; the other side of the barn faces south toward Nine Mile Creek which is below the barn; and the back of the barn faces the east toward vacant land. According to claimant and her sons, the only excavation done to the original property while constructing the barn consisted of digging the footer which was filled with steel reinforced concrete. The foundation of the barn was built with concrete blocks that were six to ten inches thick and sixteen to eighteen inches wide. Reinforced steel was also placed in the concrete floor. The wooden, two story barn, with a tin roof, is twenty feet long, thirty feet wide and sixteen feet high. At the front of the barn, there is a large sliding door which is wide enough for a regular size pick up truck to pass through. The inside of the barn is wired for electricity, but does not have indoor plumbing. The loft is used for storing hay, and the bottom is used for processing tobacco and storing equipment. Around the outside of the barn, there are gutters with a down spout. Prior to the problems with the slip, claimant's sons were able to mow the land between the north side of the barn and the slope to County Route 7.

Claimant asserts that she had not experienced any problems at the location of her barn until 1994. In 1994, employees of respondent, using a grader, cut a ditch along County Route 7. According to claimant as well as her neighbors, Luther H. Ramey, Jr., and Lowell Elmer Gibson, this area of the ditch filled with water which was allowed to remain standing in the upper side of the road. There was no culvert along the county road to provide proper drainage. In November 1994, a slip began on County Route 7. The slip was eighteen to twenty feet deep and twelve feet lengthwise, almost encompassing the entire road. Eventually the slip affected the foundation of claimant's barn. From January 11, 1995 to June 5, 1995, claimant contacted respondent regarding the problem at least sixteen times. Respondent came to the site several times to place tons of slag in the sunken part of the road at the

slip.[1] These corrective measures did not prove to be a permanent solution to the problem, and in September to October1995 respondent installed piling at the site which corrected the slip in the road.[2] The claimant has had no further problems with this slip. Her barn appears to be in a stable position as of the dates of the hearing in this claim, September 29 and 30, 1999, but damages to the barn occurred during 1994 through 1995.

The slip that occurred beginning in 1994 and continuing into1995 on County Route 7 caused claimant's barn to shift about eighteen inches from its foundation and to move eight to ten inches off plumb. The area most affected was the northeast corner of the barn. This foundation was damaged extensively. The concrete floor of the barn remained intact, but the foundation block on which the barn was constructed overturned. This situation has made the barn unsafe for its intended purposes. According to claimant's expert in the cost and repair of damages to the barn, Bill Tassen, the barn will have to be moved forty feet to the west to avoid the slip area. A new foundation of fill dirt and concrete will be required. In addition, a entrance road will have to be built onto the property. The project is expected to take four weeks to complete and the cost is estimated in the amount of $25,500.00. Claimant does not have an insurance policy that provides coverage for this incident.

Two of claimant's neighbors, Mr. Ramey and Mr. Gibson described the measures taken by respondent in an attempt to remedy the problem of the water on the road. Mr. Ramey testified that respondent installed a twelve-inch plastic drain pipe at an angle in a curve in the road which was above the lower part of the road. Mr. Gibson testified that an eighteen inch culvert was installed across the road from claimant's barn, but it was above the water and water stood in the ditch because there was no way for it to flow out of the culvert. Additionally, Mr. Gibson testified that he had observed three to four landslides in the area in question.

According to claimant's expert in civil engineering and causation of landslides, Craig Alan Lyle, the primary cause of the landslide was the improper drainage along the ditch line which resulted in ponding of water which caused the soil beneath the road to lose shearing strength. It was his opinion that the digging of the footer for the barn foundation eleven years prior to the slip did not bring about

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The position of respondent was that it was not negligent in the maintenance of the ditch line on County Route 7. County Route 7 is a fourth priority single lane road that transverses in a west-east direction. The area in question is one-tenth of a mile from the hard top portion of County Route 7. Since County Route 7 is a fourth priority road, it is graded by respondent on an annual basis and ditched every five years. Before the slip, the portion of road in question was high and water flowed toward claimant's property. Respondent's employees went to the site and installed a drain pipe above the slip. According to the Assistant Supervisor for Cabell County, Clarence F. Scarberry, on March 10, 1995, the pipe was installed in order to reroute the water around the barn into the creek from above where the barn sets. Sometime after March 6, 1995, then Maintenance Assistant in the Maintenance Division, James F. Roberts, made a recommendation to the District Two Office[3] for piling to be installed on County Route 7.

Respondent's expert in geotechnical engineering, Dr. George Alan Hall, first visited the site on June 28, 1999. He described the area of the barn as being in a full slip plane. The landslide area was identified as an area of "rotational failure,"

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which he also referred to as a "slump."[1] The slip part in question started to move first and the other part followed it immediately thereafter. These two occurrences are related. Dr. Hall asserted that the slip in question is part of an ancient landslide which developed hundreds of years ago. On June 28, 1999, Dr. Hall observed a mound of material on the hillside below the road, including a large boulder on the western side of the barn. According to Dr. Hall, the significance of the mound area and the meander in the stream is that at one time the stream flowed relatively straight across the valley; however, a large landslide developed in the hillside which pushed out into the valley and forced the stream to the other side. This situation led to a more stable slope for many years. From his personal observation, Dr. Hall was of the opinion that there was excavation in the area directly behind the barn which brought about the reactivation of the slide. This excavation cut away a stable portion of the once stable slope.

Dr. Hall further explained that the time discrepancy between the excavation for the barn in 1983 and the landslide in 1994-1995 is the result of weather conditions during the years 1980 to 1988 when the area experienced an extreme dry period that caused the clay soil to shrink. Then in 1989, the area experienced one of the wettest years on record. Thus, the excavation for the barn being at the bottom of the slip area precipitated the beginning of the landslide. In addition, Dr. Hall asserted that the pipe which had been installed due to the drop in the road prevented the water flowing in that area from flowing into the ditch, thus, it was unable to flow into the creek.

The Court has held that respondent has a duty to provide adequate drainage of surface water, and drainage devices must be maintained in a reasonable state of repair. *Haught vs. Dept. of Highways*, 13 Ct. Cl. 237 (1980). In claims of this nature, the Court will examine whether respondent negligently failed to protect a claimant's property from foreseeable damage. *Rogers vs. Div. of Highways*, 21 Ct. Cl. 97 (1996).

In the instant claim, claimant has established that respondent maintained the ditch on County Route 7, in Cabell County, in a negligent manner. The Court is of the opinion that respondent set in motion the slip that occurred by digging a ditch on the north side of Route 7 and then allowing the ponding of water in the ditch. This brought about the beginning of the slip into the barn and claimant's first complaints to respondent. Respondent failed to address the situation of the water ponding in the ditch as soon as it received notice of the problem. Rather, no action was taken until the road itself began to sink and traffic was not able to traverse the road.

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Respondent attempted to maintain its road in the manner necessary, i.e., by placing slag in the slip on the road. As a result of the weight on the roadway from the slag, the slope adjacent to claimant's barn moved toward and against the northeast corner of the barn until it actually caused damage to the foundation blocks and then the barn began to move from its foundation. The amount of slag placed on the roadway; the later attempt to drain the area with the plastic pipe; and, the grading done in the area were not sufficient to stop the slide which had been put in motion as a result of the water in the ditch and on the road. Respondent did not take permanent, remedial action to protect the claimant's property from the effects of this slip until the fall of 1995 when the piling was installed to stop the slip completely. There have been no further problems from the slip since the piling was placed by respondent.

It appears to the Court that claimant has the option to move her barn or to effect the necessary repairs and leave it where it is now located. The evidence certainly supports the contention that the slope is no longer moving because County Route 7 is stable. The Court has considered the damage estimates in evidence. The Court is not satisfied that moving the barn to a new location is necessary; therefore, the Court has reduced the damages to reflect the approximate cost to repair the barn at its present location. The amount of $7,500.00 appears to the Court to be fair and reasonable for claimant to be able to replace the foundation blocks and place the barn back on its foundation.

In accordance with the findings of fact and conclusions of law stated herein above, the Court is of the opinion to make an award to the claimant in the amount of $7,500.00.

Award of $7,500.00.

OPINION ISSUED JANUARY 28, 2000

JAMES H. OXLEY
VS.
DIVISION OF HIGHWAYS
(CC-99-330)

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

PER CURIAM:

Claimant brought this action for vehicle damage sustained when his son was operating his vehicle and struck a low railroad trestle while traveling on Route 219/6, Pigeon Creek Road, in Oakvale. Route 219/6 is a road maintained by

respondent in Mercer County. The Court is of the opinion to make an award in this claim for the reasons more fully set forth below.

The incident giving rise to this claim occurred on July 8, 1999, at approximately 6:00p.m. On the evening in question, claimant's son, Richard G. Oxley, was traveling along Route 219/6 in his father's 1969 two ton Ford truck, installed with a cattle rack and water tank, to get water for his cattle at Pigeon Creek. Claimant's other son, Danny J. Oxley, followed claimant's truck in another vehicle to assist his brother. While claimant's son frequently travels this one lane road, the last time he was on the road was about one year ago. On the way to Pigeon Creek on Route 219/6, there is a railroad trestle that claimant's vehicle must pass beneath. Unbeknownst to claimant and his sons, Route 219/6 had been paved, raising the height of the road as well as lowering the clearance of the railroad trestle to nine feet, two inches. There was no clearance limit sign posted on the trestle.

As claimant's son proceeded along Route 219/6 at a speed of about fifteen to twenty miles per hour, he came upon the railroad trestle. In the past, the nine foot, four inch truck had no difficultly passing under the trestle. However, on this occasion, as claimant's vehicle passed beneath the trestle, the top of the cattle rack struck the bottom of the trestle. The impact destroyed the cattle rack. Claimant's sustained a loss in the amount of $269.74 for the raw materials to rebuild the cattle rack. In addition, claimant sought to recover the sum of $403.00 for his son's, Richard G. Oxley, labor in repairing the vehicle. Since claimant's vehicle was insured under a liability policy only there was no insurance coverage for this incident.

In the present claim, the evidence adduced at the October 28, 1999, hearing established that respondent was negligent in its maintenance of Route 219/6 at the railroad trestle. When respondent paved the road and raised the height of the road at the site of the trestle, it had a duty and obligation to warn motorists of the lower clearance for the trestle. The failure of respondent to warn motorists of the lower clearance constituted negligence for which claimant may recover his loss of $269.74. As for the cost of labor performed by claimant's son, the Court presumes that his labor was provided gratuitously. See *Gibson vs. McGraw*, 175 W.Va. 256; 332 S.E.2d 269 (1985).

In view of the foregoing, the Court is of the opinion to and does make an award in the amount of $269.74.

Award of $269.74.

OPINION ISSUED JANUARY 28, 2000

MICHAEL EDWARD QUEEN
VS.

DIVISION OF HIGHWAYS
(CC-99-279)

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

PER CURIAM:

Claimant brought this action for vehicle damage when a tree limb that was hanging over the road surface fell onto his vehicle as he traveled along W. Va. Route 103, in Horsepen, McDowell County. W. Va. Route 103 is a road maintained by respondent in McDowell County. The Court is of the opinion to make an award in this claim for the reasons more fully set forth below.

The incident giving rise to this claim occurred on July 2, 1998, at approximately 1:00 to 1:30 p.m. On the sunny day in question, claimant and a friend were traveling on W. Va. Route 103 in Horsepen to visit claimant's "homeplace." W. Va. Route 103 is a first priority feeder road with a road surface of nineteen to twenty-one feet. On several occasions, claimant has been concerned about a large tree limb with small branches that had been hanging over the road surface of W.Va. Route 103 for about three years and he had personally contacted respondent's Havaco office regarding the tree limb. On another occasion claimant had tried pull the branch down, but was unsuccessful. However, while traveling along the road on the day in question, the tree limb fell onto claimant's 1995 Ford Mustang, impacting the windshield where the West Virginia State Motor Vehicle Inspection Sticker is normally located.[1] Following the 4th of July holiday, claimant informed respondent of the incident. The damage sustained to the vehicle was estimated in the amount of $213.66. Claimant's motor vehicle insurance policy has a deductible feature of $250.00 which is the limit of any recovery herein.

The position of respondent was that it did not have notice of the tree limb hanging over the road surface of W.Va. Route 103 in Horsepen. According to respondent, a review of its records indicated no complaints regarding this area. In addition, respondent was unable to articulate why other trees hanging over the road surface of W.Va. Route 103 have not been removed.

This Court has previously held that when the evidence indicates that respondent has notice of a hazard, such as a tree limb hanging over a road surface,

[1] A view of the vehicle at the October 28, 1999, hearing established that the impact of the tree limb caused what could be termed as a single line crack in the vehicle's windshield about four inches above the bottom of the windshield and proceeding in a transverse manner from the right driver's side almost to the passenger side.

and a reasonable opportunity to remove it, respondent may be held liable. *Jones v. Division of Highways*, 21 Ct. Cl. 445 (1995).

The evidence adduced at the October 28, 1999, hearing established that respondent knew or should have known about the tree limb hanging over the road surface of W.Va. Route 103. Claimant had informed respondent of this hazard on two prior occasions. Moreover, W.Va. Route 103 is a first priority road and a reasonable inspection of the road would have made this road hazard known to respondent. The Court is of the opinion that the actions of respondent constituted negligence for which claimant may recover the estimated sustained loss. Consequently, there is sufficient evidence of negligence upon which to base an award.

In view of the foregoing, the Court is of the opinion to and does make an award in this claim in the amount of $213.66.

Award of $213.66.

OPINION ISSUED JANUARY 28, 2000

FRED AND NETTIE RATCLIFF & LAWRENCE RATCLIFF,
THE GUARDIAN AND NEXT FRIEND
OF BENJAMIN NICHOLS RATCLIFF, AN INFANT
VS.
DIVISION OF HIGHWAYS
(CC-96-472)

Donald R. Jarrell, Attorney at Law, for claimants.
Andrew F. Tarr & Xueyan Zhang, Attorneys at Law, for respondent.

BAKER, JUDGE:

Claimants Fred and Nettie Ratcliff brought a claim for property damage and Lawrence Ratcliff brought a claim for personal injury to his son, Benjamin Ratcliff, both of which claims occurred as a result of hillside slippage on County Route 29/9 (also known as Webb Road) in Crum, Wayne County. County Route 29/9 is a road owned and maintained by respondent in Wayne County. The Court is of the opinion to deny the property damage claim and to award the personal injury claim for the reasons more fully stated below.

The incident giving rise to the property damage claim occurred on September 7 through 12, 1994. County Route 29/9 is an off-shoot road of the Tolsia Highway in Wayne County. The road is a local service route of secondary priority with a single twelve foot lane. In 1978, claimants Fred and Nettie Ratcliff moved to

property located on County Route 29/9 where they reside[1] in a manufactured home with an addition on the front. There is a porch on the front of the house. During 1990 the hillside along the road began to slip. The hillside slip ended up against the side of claimants' manufactured home. This hillside slip caused damage to their manufactured home. Then, the road was cleaned and repaired by respondent and later in 1990 steel pilings were installed in an attempt to stabilize the hillside. During that year there was a rain storm after which the steel pilings fell onto a building owned by claimants, destroying it. The hillside also fell against the house. Where the road first slipped, it pushed the house in, nudging it against the floor. Respondent straightened the step of the road, but did not remove the slip. According to respondent's DisForce supervisor, Jim Alford, the steel pilings installed had failed because the weight from the hillside slide above the road caused the steel to fail and bend allowing dirt or sloughage to slip into claimants' yard.[2] Claimants were compensated $700.00 by respondent at that time for the damages to their property.

Sometime prior to September 7, 1994, the hillside in the area again slipped. During an investigation by Ben Savilla, an investigator for respondent, information provided by the Federal Mine Reclamation indicated that the hillside slippage was caused by mine subsidence from a nearby mine. The investigator went to the site, took photographs and did sightings of how the hillside slip had moved off of the State's right-of-way. Since the expense of core sampling outweighed its benefits, core sampling was not utilized. The slope of the hillside slip appeared to be a gradual twenty feet. The bank appeared to be eight to nine feet high and the hillside was determined to be twelve to thirteen feet from the bottom of the bank to the top of the bank. The front porch is approximately twelve to fifteen feet from the hillside. A six to eight foot by ten foot building and a four room house are also on the property.[3]

From September 7 through 12, 1994, respondent again effected repairs to the road. After the failure of the piling wall, respondent's DisForce elected to relocate the roadway into the hillside which would provide a more stable environment. The operation conducted by respondent was more of a removal. The hillside had slipped onto the blacktop. Earth and rock had to be removed.

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[1] Currently, claimant Lawrence Ratcliff, his wife, and two sons occupy the property. At the time of the time of the personal injury to Benjamin Ratcliff, he was living in another house about forty feet away. Claimant Nettie Ratcliff currently resides behind the manufactured home.

[2]DisForce is respondent's heavy maintenance group.

[3] The house is located in front of the manufactured home, but down over the hill, unaffected by the hillside slip.

Respondent used trucks, a track loader and excavator to complete the job. Both the hillside slip and the steel pilings were removed. The road itself was moved back into the hillside and stabilized in order to allow for the flow of traffic. Respondent removed the wet, unstable material that had slid and replaced it with dry material. When the blacktop was removed, stone was placed on the dirt in order to stabilize the road. Eventually, the road was moved about a lane inside the hill towards the ditch line to reposition the road away from where it had slipped over the hillside. After the work was completed, respondent cleaned the area and made sure no sloughage was left on the hillside above or below the loose material for slide prevention. This work performed by respondent in September 1994 appeared to have stabilized the road.

Currently, the hillside slip is ten feet at one spot, and about four feet at another spot. The slip contains dirt, rocks of different sizes, and a few trees. As a result of respondent's past road repairs, the slip was pushed further down the hillside. Even after necessary road repairs, this hillside slippage continued. Claimants' manufactured home was once again damaged. The floor had to be replaced, new sills were installed under the floor, and new siding was put on the house. The cost to claimants was estimated at $2,000.00. No appraisals or valuations have been made of the property or the manufactured home. Claimants had grade work completed on their property by a friend from Dunlow about three months prior to the June 23, 1999, hearing. A small grader was used to landscape the front yard and a two to six foot path was cut out of the slide. Because the hillside slip continues, claimants are unable to use their property in a normal manner. They are in constant fear of the area around the slip.

The incident giving rise to the personal injury claim occurred on September 15, 1994. Benjamin Ratcliff is the son of claimant Lawrence Ratcliff, and the grandchild of claimants Fred and Nettie Ratcliff. On the day in question, Benjamin Ratcliff, who is now eight years of age, but was about three years old at that time, was playing in his grandparent's yard on County Route 29/9 about one and one-half feet from the porch. During the period of September 7-12, 1994, respondent had taken out part of the hillside slip. On this particular date of the incident an oblong rock, about three to four pounds with sharp edges, fell about six feet from the top side of the hill striking Benjamin Ratcliff in the forehead about three inches above his nose. This incident occurred about four feet from the porch.

Claimant Nettie Ratcliff witnessed the accident. Claimant Lawrence Ratcliff was not present at the time of the accident, but was informed of the accident by his mother and came to the scene within five minutes. When claimant Lawrence Ratcliff saw that his son was cut and bleeding, he immediately took him to Three Rivers Medical Center in Louisa, Kentucky. At Three Rivers Medical Center Benjamin Ratcliff received stitches and medication. The medical expenses incurred were paid by his medical card.

Before the incident, Benjamin Ratcliff had no pre-existing injures. He now appears to suffer from two to three severe headaches per week, which last about an hour. At the onset of a headache, Benjamin Ratcliff requires Motrin or Children's Tylenol to relive his headache pain. He has a knot on his forehead about the size of a nickel and a scar from the stitches. Also, Benjamin Ratcliff is nearsighted and requires glasses. The last time he had been seen by a physician was two months prior to the June 23, 1999, hearing. At the request of the Court, Benjamin Ratcliff was examined by Dr. Tommasina Papa-Rugino, a pediatric and adult neurologist. Dr. Papa-Rugino ordered an MRI which was performed upon the infant and a report of the results of the MRI was provided to her. She then issued a clinical report in which she stated "that the prognosis of post traumatic headaches is usually excellent and the headaches only persist for a short period of time. It is unlikely, although not unheard of, that post traumatic headaches will persist for so long subsequent to an injury." The Court concludes from the physical examination and the clinical record that there is little probability that the headaches which Benjamin Ratcliff complains of now are a result of the rock having struck him on his head in 1994.

The position of respondent was that it properly maintained County Route 29/9. When respondent's records were checked by the Wayne County Storekeeper, Geoffrey Adkins, found no complaints on or before 1994. Respondent's design employee, Jim Messer, found no complaints in the design records which date back to about twelve to fifteen years. Respondent was not noticed about the hillside slide problems. Only records for the hillside slip in September 1994 could be found by respondent. Since 1994, there have been no further complaints received regarding the hillside slip problem.

When respondent is on notice of instability of a hillside slip, and fails to take effective measures to deal with the problem, the failure to do so is negligence. *Bailey & Lucion v. Division of Highways*, 20 Ct. Cl. 55 (1994).

In the case at hand, respondent has been on actual notice of the condition of County Route 29/9 (Webb Road). Evidence adduced at the June 23, 1999, hearing demonstrated that complaints were made previously to respondent regarding the condition of the hillside slip. Four separate documents produced by claimants at the June 23, 1999, hearing demonstrate that respondent was placed on notice in 1989 regarding the problem. Respondent's records show that on two prior occasions in 1990, repair of the hillside slip was necessary.[4] Afterwards, respondent has been on the property several times in order to take corrective measures and to stabilize the

[4] Wayne County Storekeeper, Geoffrey Adkins, keeps records only for six months to one year. The last search of the records by the Wayne County Storekeeper regarding this claim was completed in 1995 or 1996 and the hearing was conducted on June 23, 1999.

hillside slip. However, the problem persisted and the damage continued. There is sufficient evidence of negligence on the part of respondent upon which to base liability in these claims.

Notwithstanding respondent's negligence, the Court is of the opinion to deny the property damage claim. Claimants presented no evidence of the cost of repairs to their property. This Court will not speculate as to the claimants' property damages.

In the claim for and on behalf of Benjamin Ratcliff, the Court is of the opinion to make a total award of $6,000.00 for his personal injuries from the rock fall. The Court makes an award to Lawrence Ratcliff as the legal guardian of Benjamin Ratcliff in the amount of $4,000.00 for his pain and suffering as well as the disfigurement, scar, and the knot on his forehead. In addition, the Court makes an award in the amount of $2,000.00 to Lawrence Ratcliff as the legal guardian of Benjamin Nichols Ratcliff for the child's future medical needs, if any, necessitated by the injuries which he received as the result of being struck by the rock.

The claim of Fred and Nettie Ratcliff is disallowed.

Award of $6,000.00 to Lawrence Ratcliff as the guardian and next friend of Benjamin Nichols Ratcliff, an infant.

OPINION ISSUED JANUARY 28, 2000

SHELIA F. SEABOLT
VS.
DIVISION OF HIGHWAYS
(CC-97-150)

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

PER CURIAM:

Claimant brought this action for vehicle damage sustained when her vehicle struck a hole when she was traveling northbound on U. S. Route 19, approximately one and one-half miles north of Birch River. U. S. Route 19 is a road maintained by respondent in Nicholas County. The Court is of the opinion to make an award in this claim for the reasons more fully set forth below.

The incident giving rise to this claim occurred on March 5, 1997, at approximately 10:30a.m. On the clear morning in question, claimant was proceeding northbound from Craigsville toward Grant County in her 1986 Chevy Cavalier on U. S. Route 19. Claimant travels this portion of highway about once per week. At the

time of the incident, construction work had restricted the travel portion of highway to one ten foot lane with a yellow divider line down the middle and no lines on the edges on the pavement. In addition, there were orange and white barrels on the side of the highway. Due to the construction on the highway and the vehicles ahead as well as behind her vehicle, claimant operated her vehicle at a speed of forty-five miles per hour in a sixty-five miles per hour speed zone. Suddenly, claimant observed a hole in the road, but she was unable to avoid it because of her situation. The driver's side of the vehicle struck a ten to twelve inch hole in the pavement. The impact damaged two tires, broke the vehicle's windshield and required the vehicle to be re-aligned. The loss sustained by claimant was in the amount of $358.15. Claimant's liability motor vehicle insurance policy did not provide insurance coverage for this incident.

Respondent acknowledged that there was ongoing construction on U. S. Route 19. Employees of respondent were familiar with the defective condition of U. S. Route 19, and knew that it was in a bad state of repair. According to respondent, the contractor for the U. S. Route 19 project, J. F. Allen Construction Company, Inc., which was under a "save harmless" obligation to respondent, was responsible for the construction work at the location in question. During the winter months, respondent was on snow and ice removal and had difficulty reaching the contractor. However, respondent established that it patrolled and repaired holes regularly in order to protect the traveling public.

The well established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins vs. Sims*, 130 W.Va. 645; 46 S.E.2d 81 (1947). In order to hold respondent liable for road defects of this type, claimant must prove that respondent had actual or constructive notice. *Pritt vs. Dept. of Highways*, 16 Ct. Cl. 8 (1985); *Harmon vs. Dept. of Highways*, 16 Ct. Cl. 127 (1986).

In this present claim, the evidence established that respondent had actual notice about the hazardous condition of U. S. Route 19 in Nicholas County. As this Court stated in *Bailey vs. Div. of Highways* (CC-98-146, unpublished opinion issued September 8, 1999), respondent had employees at the construction site responsible for supervising the actions of the contractor with regard to the safety of the traveling public. Respondent had an obligation and a duty to assure that the U. S. Route 19 construction site was maintained in a proper manner such that it did not pose a hazard to the traveling public. The Court is of the opinion that respondent's employees are responsible for supervising the actions of the contractor at the construction site, and, on the date of the incident herein, did not take reasonable steps to ensure the safety of travelers upon U. S. Route 19. The failure of respondent's employees to supervise the contractor properly constitutes negligence for which claimant may recover her loss.

The "save harmless" clause relied upon by respondent is not applicable in a claim of this nature as there is no privity between claimant, a third party, and the parties to the construction contract. See *Bailey*, id.

In view of the foregoing, the Court is of the opinion to and does make an award to claimant in the amount of $358.15

Award of $358.15

OPINION ISSUED JANUARY 28, 2000

CHRISTINA SELMAN
VS.
DIVISION OF HIGHWAYS
(CC-98-191)

Claimant appeared *pro se*.

Xueyan Zhang, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for damages sustained to her vehicle as her friend was driving her vehicle and it went into two holes while they were traveling together on Route 20. The incident occurred in the vicinity of the Little Glade Baptist Church at milepost 2-½ between Camden-on-Gauley and Cowen. Route 20 is a road maintained by respondent in Webster County. The Court is of the opinion to make an award in this claim for the reasons more fully set forth below.

The incident giving rise to this claim occurred on May 22, 1998, at approximately 8:00 to 9:00 p.m. On the clear night in question, claimant's friend, Kenneth Green, was driving her vehicle on Route 20 near the location of the Little Glade Baptist Church which was situate on the right side of the road. The headlights of claimant's 1990 Dodge Daytona were operating at the time. Route 20 is a priority one, two-lane, blacktop highway with a double yellow line as the centerline and white lines indicating the edges of the pavement. Each lane of Route 20 is about eight to ten feet in width. Claimant and her friend frequently travel this portion of Route 20 but were not aware of any holes in the paved surface of the road. Furthermore, neither claimant nor her friend were aware of any warning devices at the scene.

As Mr. Green drove on the straight stretch of Route 20 at a speed of forty miles per hour in the fifty-five mile per hour speed zone with no traffic in front of or behind him, the vehicle suddenly and almost simultaneously struck two separate holes, two to two and one-half feet wide and eighteen inches deep, on the right side of the road surface of Route 20. The holes were described as extending six to eight

inches into the berm at the side of the pavement and into the paved portion of the road some twelve to fifteen inches. The impact burst both of the tires on the right side of the vehicle with other structural damage as well. Mr. Green drove the vehicle to the residence of another friend for repairs. The following day, claimant stated that she contacted respondent and reported the incident. The damaged sustained to the vehicle was in the amount of $1,288.96. Claimant's liability motor vehicle insurance policy did not provide coverage for this incident.

The position of respondent was that it did not have notice of the hole on Route 20 in Webster County. A review of respondent's daily records indicates that there were no complaints regarding any holes near milepost 2-½ on Route 20 around the date of the incident, but respondent did not deny the possibility that claimant contacted its local office. Later that summer, respondent re-paved this portion of Route 20.

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

The evidence adduced at the November 4, 1999, hearing establish that respondent had notice of the existence of the holes on Route 20 in Webster County at the location of claimant's accident. It is the opinion of the Court that the size and location of the holes on Route 20 establish that they had been there for some time; therefore, respondent had constructive notice of the condition of the road. Additionally, respondent did not have record of claimant's complaint, but did not deny that claimant could have complained. If so, there could have been prior complaints without record. Consequently, there is sufficient evidence of negligence upon which to base an award.

Notwithstanding respondent's negligence, the Court is also of the opinion that the driver was negligent in the operation of claimant's vehicle. Mr. Green failed to operate claimant's vehicle in such a manner as to avoid the holes which were in their travel lane. Consequently, the Court imputes the negligence of the driver to claimant, herein. In a comparative negligence jurisdiction, such as West Virginia, a finding of negligence can reduce or bar recovery of a claim. Based on the above, the Court finds that the driver was 30% negligent for the incident that occurred. Since the driver's negligence is not greater than or equal to the negligence of respondent, claimant may recover 70% of the loss sustained.

In view of the foregoing, the Court is of the opinion to and does make an award to claimant in the amount of 70% of the damages for a total award of $902.27.

Award of $902.27.

OPINION ISSUED JANUARY 28, 2000

MARGARET ANN SHIELDS
VS.
DIVISION OF HIGHWAYS
(CC-98-01)

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

PER CURIAM:

Claimant brought this action for vehicle damage sustained when her vehicle struck a hole while she was traveling on Indian Creek Road near its junction with Route 16. Indian Creek Road is a road maintained by respondent in Wyoming County. The Court is of the opinion to make an award in this claim for the reasons more fully set forth below.

The incident giving rise to this claim occurred on November 28, 1997, at approximately 2:00 to 3:00 p.m. On the clear day in question, claimant was proceeding along a curvy two-lane section of Indian Creek Road in her 1997 Cadillac at a speed of twenty-two to twenty-seven miles per hour towards Welch, for a doctor's office visit.[1] Claimant rarely uses this route and was last on the road about five to six months prior to the incident. Suddenly, the vehicle struck a fourteen inch diameter hole in the road surface, three inches deep, and about one foot from the edge of the pavement. The impact burst a tire and bent the wheel rim. The vehicle sustained damage in the amount of $596.48. Within claimant's motor vehicle insurance policy, there is a deductible feature of $1,000.00.

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

The evidence adduced at the October 28, 1999, hearing established that the hole on Indian Creek Road was not one that was a recent occurrence. The Court is

[1] While the vehicle is owned by Automotive Rentals, claimant leased the vehicle through her employment with Mary Kay Cosmetics and is responsible for its maintenance.

of the opinion that respondent, at the least, had constructive notice that a hole in that condition was a hazard to the traveling public. Consequently, there is sufficient evidence of negligence upon which to base an award.

In view of the foregoing, the Court is of the opinion to and does make an award in this claim in the amount of $596.48.

Award of $596.48.

OPINION ISSUED MARCH 9, 2000

DELBERT E. LOCKHART AND BETTY LOU LOCKHART
VS.
DIVISION OF HIGHWAYS
(CC-97-106)

Claimants appeared *pro se*.

Andrew F. Tarr & Xueyan Zhang, Attorneys at Law, for respondent.

WEBB, JUDGE:

Claimants brought this action for damages sustained to their real property due to the alleged negligent maintenance of a ditch on the westerly side of County Route 15, locally known as Berry Hill Drive, off of W.Va. Route 119, near Davis Creek. County Route 15 is a road maintained by respondent in Kanawha County. The Court is of the opinion to deny this claim for the reasons more fully set forth below.

Claimant Delbert Lockhart has resided at this location on County Route 15 for the past fifty-two years. County Route 15 is a secondary road that traverses in a north-south direction. The road abuts a hillside on the easterly side above claimants' residence and there is a hollow in the westerly side. In 1973, claimants placed a manufactured home on the property. Beginning in 1982, claimants remodeled the manufactured home into a two-story residence. Claimants installed a driveway approximately ninety to one-hundred feet in length which extends from the north to the south across and down the hillside in front of the residence to the bottom of the hill on the south side of the residence. This driveway has a large parking area which leads to a double car garage. Between the garage and the residence, there is a breeze-way. At the back of the residence, there is a patio that wraps around the north side of the house to the front of the house where it extends across the length of the house. Claimants also built a fifty-six foot canopy six to seven years prior to November 17, 1999, where they store their motor home. Claimants' residence is situated between the bank of Davis Creek to the east behind their home and County

Route 15.[1] During the mid 1980's, claimants began placing fill dirt onto their property. Over a three-year period of time, claimants raised the level of their property behind their residence from approximately four feet above the creek to fifteen to eighteen feet above the creek. They have not experienced any flood problems from Davis Creek.

Adjacent to claimants' property to the north on the hillside, there is an abandoned mine. The opening of the mine is at ground level at the rear of claimants' residence. This structure has caused problems on occasion which are explained herein below.

Across County Route 15 on the west side of the road, there is a hollow with certain drainage structures. Above the hollow there are two residences in an area known as "Garden Heights," one of which was built on fill material. Respondent has placed some large rocks on the side of the hill where the house built on the fill material is located. Below this area, about one-hundred-fifty to two-hundred feet, there is a drain in the hollow. This hollow is directly across County Route 15 from claimants' property. During the 1980's, claimants allege that garbage was illegally dumped into the hollow. This occurred on many occasions. As a result of the illegal dumping, the drainage structure for the hollow became clogged during periods of excessive rainfall and water flowed across County Route 15 onto claimants' property. Claimant Delbert E. Lockhart was aware of and knew the identity of the individuals responsible for the illegal dumping. On several occasions, he contacted the West Virginia Division of Natural Resources regarding the illegal dumping problem, but he asserted that nothing was done to resolve the problem.

Claimants testified that on three specific occasions July 31, 1996; June 11, 1998; and June 13, 1998, water from the hollow flowed over County Route 15 and onto their property. Claimant Betty Lou Lockhart compared the flooding on their property to "Niagara Falls." In 1996, water about seventeen inches high flowed onto the back patio and breeze-way between the house and garage. This flooding caused mud to flow onto the patio, into the breeze-way, into the kitchen area, and even into the foyer from the front door. This claim is based upon the damage to claimants property and residence as a result of the these occasions of flooding.

According to Mr. Lockhart, the original stone culvert under county Route 15 had fallen into a state of disrepair and had been clogged for about twelve years. In an attempt to alleviate the drainage problem caused by the illegal dumping, claimants' son installed an eighteen-inch elbow pipe into the original stone culvert about one foot deep. Claimants' son then cut holes in the top of the culvert pipe so

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[1]At the November 17, 1999, hearing, claimant Delbert E. Lockhart stated that one of his neighbors informed him that his property is in an area that is considered to be a flood zone by the Federal Emergency Management Association .

that water would flow through it and in the process keep trash and debris out of the pipe. At the end of the pipe, claimants' son also placed a screen over the pipe. Mr. Lockhart acknowledged that the screen trapped trash, but he asserted that he and his family personally maintained the drain. Later, the eighteen inch pipe was washed out by flooding and Mr. Lockhart and his son replaced it with a thirty inch drain pipe.[2] Then, a catch basin, also known as a "clean out," was constructed by Mr. Lockhart and his son to channel water into the creek and to alleviate the trash problem. In June or July of 1999, a stone wall was built on the road side of claimants' property to divert water from their property into Davis Creek which is about fifty-five feet from the garage.

Claimants contacted respondent on approximately ten to twelve occasions in 1990 regarding this drainage problem. While respondent has taken measures to address the drainage problem, claimants assert that the problem still exists and water continues to come over the roadway onto their property. Claimants are of the opinion that the matter could be permanently resolved if respondent would install a walk-through pipe across their property to channel the water from the hollow across the road into Davis Creek instead of onto their property.

Due to the flooding on their property, claimants have had to replace marble tile, carpet, and the entry door. To prevent further flood damage to the garage area, claimants moved their garage door from the front side of the house to the end of the house. In addition, claimants anticipate having to install a retaining wall on the property. At one time, claimants had a fence line, but it has been washed out by the flooding. Claimants established that they have sustained damage in the amount of $11,859.62 as a result of the flooding. They do not have a homeowners insurance policy which would have covered these damages.

Moreover, in 1998, the main water line burst causing part of the bank on claimants' property to slip. Claimants received $8,000 from the water company to compensate them for their losses at that time. Additionally, respondent installed piling at the edge of County Route 15 to stabilize its road adjacent to the hillside above claimants' property.

On another occasion in March, 1999, the abandoned mine "blowed out" [*sic*] and water began seeping out of it. Water went through the soil which was covering the mine entrance. In an effort to eliminate water seepage from the mine, Mr. Lockhart got a backhoe and dug a ditch from the opening of the mine to the creek. The Division of Natural Resources and the Mine Reclamation Department investigated this incident. Since then, the Mine Reclamation Association reclaimed

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[2] While Mr. Lockhart asserted at the hearing that the pipe was thirty-six inches, respondent's expert in geotechnical engineering, Dr. George Alan Hall, testified that he measured the pipe and found it to be only thirty inches.

the land and repaired the damages to claimants' property caused by the landslide. At that time, the Abandoned Mine Association installed piling adjacent to claimants' driveway to stabilize the hillside adjacent to the driveway.

The position of respondent is that it took immediate corrective measures as soon as it received notice regarding the drainage problem on County Route 15. Highway Administrator Charles E. Smith visited claimant's property during the 1980's to install a driveway drain and to clean debris out of the inlet end of the pipe. Before Mr. Lockhart and his son installed their drainage system, Mr. Smith indicated that there were no records of drainage problems. Additionally, respondent has repaired three slides on County Route 15 during the three years prior to the November 17, 1999, hearing. According to the then acting Saint Albans Supervisor David Charles Starcher, pilings were installed adjacent to the site in question during Christmas of 1996.

In the spring of 1997, respondent's employees completed a drainage analysis and determined that it was necessary to install a thirty-six inch by forty feet smooth interior pipe across the road and on top of the existing culvert to address the drainage problem on claimants' property. This pipe is about four feet deep. In addition, respondent installed an overflow pipe near the top of the existing culvert and down into the catch basin. The catch basin, located just below the road, connects the pipes constructed by claimant and additions by respondent. The additions made by respondent's employees tied the two pipes together because claimants' pipe was so much lower than the one that it added to the thirty-six inch smooth interior pipe. Respondent's employees also added onto the cinder block basin built by Mr. Lockhart and his son. Currently, the pipe is one hundred seventy-seven feet from the water-hole to the point where it discharges into Davis Creek. Further, respondent advised claimants to contact the Division of Natural Resources regarding the illegal garbage dumping in the hollow.

Respondent's employees have cleaned debris from the culverts and also removed the portion of chain link fence placed by claimants' son which was covering the drainage pipe. Respondent's employees believed that the covering was not necessary. According to respondent's expert in geotechnical engineering, Dr. George Alan Hall, the construction of the riser pipe trapped water and the water ponded, creating a sediment dam off the State's right of way. During a visit to the site in 1998, Mr. Smith described the water as "sitting like a pond." Water would have to build up in order to flow through the pipe. Dr. Hall testified that the pipe claimant installed could not carry the same amount of water the original box culvert carried, and, in fact, claimants' drainage project exacerbated the problem. The velocity of the water drew in trash which was then trapped by the screen, diminishing the pipe's flow capacity.

According to Dr. Hall, there were two sources of water; the mine and the hollow. These sources of water were causing the damage to claimants' property. Dr.

Hall visited the site in August 1998, September 1998, and November 1999 to conduct an examination of the property in preparation for testifying before this Court. Dr. Hall described the drainage system in detail that exists in the hollow, under County Route 15, and through claimants' property to Davis Creek. He explained that the riser structure or pipe placed by the claimant actually created a sediment area with ponding occurring behind the structure. The culvert pipe placed by claimant is a thirty-inch pipe which cannot carry the flow of water from the original box culvert. Thus, water backs up and ponds at the upper end in order to push water through his system to flow to Davis Creek. Dr. Hall informed the Court that there had not been any problems with drainage in the area until the claimant installed his pipe. After that point, sediment became trapped because the water was being ponded. Then the addition of the riser by claimant compounded the problem and made it worse. The fencing placed at the inlet portion of respondent's thirty-six inch pipe acts as a trash rack so the flow of water through it is diminished. The length of claimants' pipe at 177 feet also reduces the capacity of the pipe due to the friction of the water. The cure in his opinion is for claimant to install a conduit pipe with a larger capacity than the box culvert originally installed by claimant, which would resolve the capacity problem.

Dr. Hall also explained that the claimants' property is subject to the flow of water from two drainage areas, *i.e.*, the hollow and the mine. The trash dumped by various people in the area above the hollow for which respondent has no responsibility has caused a portion of the problem and the actions taken by the claimants themselves altogether created the flood problems experienced by the claimants.

The Court has held that respondent has a duty to provide adequate drainage of surface water, and drainage devices must be maintained in a reasonable state of repair. *Haught vs. Dept. of Highways*, 13 Ct. Cl. 237 (1980). In claims of this nature, the Court will examine whether respondent negligently failed to protect a claimant's property from foreseeable damage. *Rogers vs. Div. of Highways*, 21 Ct. Cl. 97 (1996).

In the instant claim, claimants have failed to established that respondent maintained the drainage structures on the east side of County Route 15, in Kanawha County, in a negligent manner. The Court is of the opinion that respondent, once on notice of the situation on County Route 15, took immediate and reasonable action to prevent any further drainage onto claimants' property from excess water flowing across the road onto their property. The terrain in this area of County Route 15 places claimants' property in a low place which is the natural drainage area. In addition, the Court concludes that there are many factors, other than the actions taken by respondent, which have brought about the drainage problems and the resulting floods causing the damages to claimants' property. Consequently, there is

insufficient evidence of negligence on the part of respondent upon which to base an award.

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

Claim disallowed.

OPINION ISSUED APRIL 12, 2000

BECKLEY NEWSPAPERS
VS.
PUBLIC SERVICE COMMISSION
(CC-00-83)

Claimant appeared *pro se*.
Joy M. Cavallo, 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 $66.64 for advertisement services provided to respondent in Raleigh County. The documentation for these services was not processed for payment within the appropriate fiscal year; therefore, claimant has not been paid. In its Answer, respondent admits the validity of the claim as well as the amount, and states that there were sufficient funds expired in the appropriate fiscal year from which the invoice could have been paid.

Accordingly, the Court makes an award to claimant in the amount of $66.64.

Award of $66.64.

OPINION ISSUED MAY 4, 2000

BELL ATLANTIC-WEST VIRGINIA, INC.
VS.
EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD
(CC-00-107)

Joseph J. Seasick, Jr., Attorney at Law, for claimant.
Joy M. Cavallo, 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 $224.96 for unpaid telephone charges for the fiscal years 1997 and 1998. The documentation for these services was not processed for payment within the appropriate fiscal years; therefore, claimant has not been paid. In its Answer, respondent admits the validity of the claim as well as the amount, and states that there were sufficient funds expired in the appropriate fiscal year from which the invoice could have been paid.

Accordingly, the Court makes an award to claimant in the amount of $224.96.

Award of $224.96.

OPINION ISSUED MAY 4, 2000

MARGARET HILL
VS.
DIVISION OF HIGHWAYS
(CC-94-651)

Claimant appeared *pro se*.

Andrew F. Tarr & Xueyan Zhang, Attorneys at Law, for respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when her vehicle struck a hole in the pavement of U.S. 60 while she was traveling outside of Montgomery, near Cedar Grove in Kanawha County. The highway in question is maintained by respondent in Kanawha County. The Court is of the opinion to deny this claim for the reasons more fully set forth below.

The incident giving rise to this claim occurred on April 17, 1994, at approximately 9:45 p.m. On the night in question, claimant was traveling from Montgomery, near West Virginia University Institute of Technology, to Charleston in her 1993 Dodge Daytona. As claimant proceeded at a speed of about forty miles per hour, her vehicle suddenly struck a hole located near the double-yellow line delineating the center of the road. The impact with the defect in the road caused the vehicle’s left front tire to burst and damaged the tire on the other side. After the incident, a policeman arrived at the scene and informed claimant of an Exxon station in the vicinity. Claimant then drove her vehicle to the Exxon station where an attendant replaced the damaged tire with the spare tire. The resulting damage to

claimant's vehicle was in the amount of $318.74. Claimant has a deductible feature of $250.00 in her motor vehicle insurance policy coverage which would limit any recovery to that amount. See *Sommerville, et al. vs. Div. of Highways*, 18 Ct. Cl. 110 (1991).

Respondent did not produce any witness or other evidence in this claim, but agreed to submit the claim upon testimony taken on the 10th day of October, 1997. This claim had been scheduled on several occasions prior to the 23rd day of March, 2000, when claimant was able to appear. She agreed to submit the claim to the Court for determination on that date.

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

In the instant claim, claimant failed to establish that respondent had knowledge of the hole on the road between Montgomery and Charleston. Consequently, there is insufficient evidence of negligence on the part of respondent upon which to base an award.

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

Claim disallowed.

OPINION ISSUED JANUARY 28, 2000

MUSTAPHA M. NASSER
VS.
REGIONAL JAIL AND CORRECTIONAL
FACILITY AUTHORITY
(CC-00-104)

Claimant appeared *pro se*.
Joy M. Cavallo, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant, an employee of respondent at the Southwestern Regional Jail in Logan County, seeks reimbursement of $97.00 for items of personal clothing that were damaged in his work locker by mice. In its Answer, respondent admits the validity of the claim as well as the amount, and states that the claim is fair and reasonable. Respondent does not have a fiscal method to pay a claim of this nature.

The Court, having reviewed the facts and circumstances in this claim, has determined that the claimant is entitled to a recovery for his damaged property. Accordingly, the Court makes an award to claimant in the amount of $97.00.

Award of $97.00.

ORDERED ENTERED MAY 26, 2000

IN THE COURT OF CLAIMS STATE OF WEST VIRGINIA

NITRO ELECTRIC COMPANY,
Claimant,
v.
REGIONAL JAIL AND
CORRECTIONAL FACILITY
AUTHORITY,

DOCKET NO. CC-95-109

Respondent and Third-Party
Claimant,
v.
SILLING ASSOCIATES, INC.,
CARLTON, INC., and
INSURANCE COMPANY OF NORTH AMERICA,

Third-Party Respondents.

CONSENT ORDER
-and-
AWARD

On the 26th day of May, 2000, the parties to this action, Claimant Nitro Electric Company, Respondent and Third-Party Claimant Regional Jail and Correctional Facility Authority, and Intervenors Silling Associates, Inc., Carlton, Inc., and Insurance Company of North America, came before the Court and

requested that the Court enter this Consent Order and Award in order to effect a final resolution of the claims of the parties asserted in this action.

UPON CONSIDERATION of the following, the agreements of the parties hereto, the arguments of counsel, and the consent of the Executive Director of the Regional Jail and Correctional Facility Authority and the Office of the Attorney General of the State of West Virginia, it is hereby ORDERED as follows:

1. Prior to June 1, 1990, the RJCFA undertook to plan, design, and construct a prison facility to be known as the Mount Olive Correctional Complex, located on Cannelton Hollow Road, County Route 2, Smithers, Fayette County, West Virginia ("Project").

2. On or about June 8, 1990, the RJCFA entered into a contract with Silling Associates, Inc. ("Silling") pursuant to which Silling undertook to provide architectural, construction administration, and project management services related to the design and construction of the Project ("RJCFA/Silling Contract").

3. On or about June 4, 1992, the RJCFA entered into a contract with Carlton, Inc. ("Carlton") pursuant to which Carlton was to perform all work designated by the Contract Documents as that to be performed by the General Construction Contractor ("RJCFA/Carlton Contract").

4. On or about June 4, 1992, Insurance Company of North America ("INA") issued a performance bond wherein Carlton was named as principal, and INA was named as surety, with regard to the RJCFA/Carlton Contract ("INA Performance Bond").

5. On or about June 4, 1992, INA, issued a labor and material payment bond wherein Carlton was named as principal, and INA was named as surety, with regard to the RJCFA/Carlton Contract ("INA Payment Bond").

6. On or about June 3, 1992, the RJCFA entered into a contract with Claimant Nitro, pursuant to which Nitro was to perform all work designated by the Contract Documents as that to be performed by the Electrical Contractor ("RJCFA/Nitro Contract").

7 . During the course of the construction of the Project, Nitro contended that it was damaged as a result of, among other things, (1) Carlton's failure to perform properly its scheduling and coordination responsibilities and its work pursuant to the RJCFA/Carlton Contract, (2) Silling's failure to properly perform its construction administration and project management services pursuant to the RJCFA/Silling Contract, and (-'I) the RJCFA's failure to provide information timely from its security hardware supplier, failure to require Carlton to perform its scheduling and coordination responsibilities, failure to require Silling to perform its construction administration and project administration ser vices, and the issuance of directives to accelerate the completion of the Project in the face of delays for which Nitro contended extensions of time to the performance of the RJCFA/Nitro Contract were due to be granted (collectively "Nitro Claims").

8. By cover letter dated January 30, 1995, Claimant Nitro forwarded to the RJCFA and Silling, Nitro's claim for damages in the sum of $3,039,966, with a supporting Request for Additional Compensation dated January, 1995, and a Labor Impact Analysis dated January, 1995, prepared by an expert in the field of construction labor productivity loss and damages assessment, all supporting the claim of Nitro in the amount of $3,039,966.

9. On or about April 21, 1995, Nitro filed a Verified Notice of Claim ("Verified Claim") in the Court of Claims for the State of West Virginia, said action styled *Nitro Electric Company v. West Virginia Regional Jail and Correctional Facility Authority, State of West Virginia,* Claim No. CC-95-109 ("Court of Claims Action"), seeking damages of $3,039,966, interest, attorneys' fees, and other unspecified relief for claims relating to the RJCFA/Nitro Contract, Nitro Claims, and Project.

10. On or about December 10, 1999, Silling filed its Motion to Intervene in the Court of Claims Action in response to a demand from the RJCFA that Silling defend the RJCFA in the Court of Claims Action ("Silling Intervention").

11. On or about January 20, 2000, Carlton and INA filed their Motion to Intervene in the Court of Claims Action in response to a demand from the RJCFA that Carlton and INA defend the RJCFA in the Court of Claims Action ("Carlton/INA intervention").

12. The RJCFA as Respondent, and Carlton, INA, and Silling, as Intervenors herein, conducted extensive document and deposition discovery directed at Nitro's claim for damages totaling $3,0-'19,966. The parties reviewed thoroughly the Project records generated and maintained by the RJCFA, Nitro, Carlton, Silling, and other contractors and subcontractors not parties to this action. Nitro's job cost reports, financial information, and **claim** back-up were produced and thoroughly reviewed by representatives and counsel for the RJCFA, Carlton, INA, and Silling, as well as experts retained by the Respondent and Intervenors to review Nitro's claims. No fewer than eight (8) depositions of Nitro Project personnel were conducted, consuming over fifteen (15) days. In addition, the RJCFA and the Intervenors conducted a twelve hour deposition of Nitro's productivity and damages expert.

13. Upon conclusion ol' the discovery, the parties engaged in protracted settlement negotiations. As a result of the settlement negotiations, Claimant Nitro, Respondent RJCFA, and Intervenors Carlton, INA, and Silling reached a settlement of the Nitro Claims, as well as a resolution of all claims and disputes relating to the RJCFA/Nitro Contract and RJCFA/Carlton Contract.

14. The terms of the settlement which resolved Nitro's claims totaling $3,039,966, plus interest, are as follows:

a) Carlton, INA, and Silling will collectively pay to Nitro the sum of $1,213,000.

b) The RJCFA will pay to Nitro from special revenue fund #6676-2000-0615-099 the unpaid contract amount of $82,917 currently retained under the RJCFA/Nitro Contract.

C) The RJCFA consents to an Award in favor of Nitro in the amount of $204,083, to settle any and all disputes, including, without limitation, Nitro's claims for alleged acceleration efforts it undertook, and the resultant costs it incurred, to deliver to the RJCFA the Project on a date in advance of the date the Project would have been delivered to the RJCFA had Nitro been granted time extensions 's accordance with the terms of the RJCFA/Nitro Contract.

15. The RJCFA, through its counsel, and in conjunction with non-testifying experts retained to review the Nitro, Claims, consents to entry of this Order in that its terms represent fair compensation to Nitro, and eliminate an exposure of the RJCFA to the Nitro Claims in the principal amount of $3,039,966, which with interest at the statutory rate of *10% per annum* create a total potential liability and exposure to the RJCFA in excess of $4,500,000. In addition, the settlement of this matter will allow the RJCFA and Attorney General to avoid the attorneys' fees and experts' fees and expenses which would attend conducting the trial during the weeks of May 15-19 and June 12-16, 2000, and thereafter, if necessary, as well as additional discovery scheduled during the intervening periods.

16. All claims, counterclaims, cross-claims and third-party claims filed in this Action by any of the parties will be withdrawn with prejudice upon Nitro's receipt of the settlement proceeds set forth in paragraph nos. 1 and 2 of the Settlement Agreement and Mutual Release entered into by and among the parties.

17. The parties acknowledge that the actual payment of said sum of $204,083 is contingent upon this Consent Order and Award's approval by the Legislature of the State of West Virginia by way of appropriation from the general revenue fund, and thatsaid amount shall not be paid from the operating budget of the RJCFA.

18. By execution of this Consent Order and Award, the RJCFA represents that it is in the best interests of the State of West Virginia and the RJCFA to resolve the disputes referenced herein pursuant to the terms of this Consent Order and Award.

UPON CONSIDERATION of the foregoing, this Court hereby enters an Award in favor of Claimant Nitro Electric Company and against the Respondent Regional Jail and Correctional Facility Authority in the amount of Two Hundred and Four Thousand Dollars ($204,083.00).

SO ORDERED, this 26th day of May, 2000.

OPINION ISSUED JUNE 8, 2000

BILLY ARTHUR AND SHERRY WELLMAN
VS.
DIVISION OF HIGHWAYS
(CC-98-29)

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

PER CURIAM:

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

1. On January 24, 1996, claimants were traveling on W.Va. Route 10 in the town of Logan, in Logan County in a vehicle owned by Ms. Wellman. As claimants approached the State Police Bridge, a rock fell from the hillside beside the road and struck the vehicle. Ms. Wellman's vehicle sustained damage and Mr. Arthur sustained personal injuries.

2. On the date of the incident herein, respondent was aware that this portion of W.Va. Route 10 was known as an area prone to having rockfalls occur frequently. Respondent failed to maintain warning signs or otherwise protect the traveling public at the location in question.

3. As a result of the incident, claimants brought this claim to recover damages in the amount of $10,000.00. However, both claimants agreed to settle this claim against respondent for the amount of $4,000.00, which will be allocated as follows:

a. an award in the amount of $3,000.00 to Billy Arthur.
b. an award in the amount of $1,000.00 to Sherry Wellman.

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

The Court has reviewed the facts of this claim as stated in the Stipulation, and adopts the statement of facts as its own. The Court finds that respondent was negligent in its maintenance of W.Va. Route 10 in Logan County on the date of claimants' incident; that the negligence of respondent was the proximate cause of the injuries suffered by claimants; and that the amount of the damages agreed to by the parties is fair and reasonable.

Accordingly, the Court is of the opinion to and does make an award in the amount of $4,000.00.

Award of $3,000.00 to claimant Billy Arthur.

Award of $1,000.00 to claimant Sherry Wellman.

OPINION ISSUED JUNE 8, 2000

JO ANN BRADSHAW, INDIVIDUALLY,
AND JO ANN BRADSHAW, AS ADMINISTRATRIX
OF THE ESTATE OF BERNARD BRADSHAW, JR.
VS.
DIVISION OF HIGHWAYS
(CC-99-63)

Katherine L. Dooley, Attorney at Law, for claimant.
Andrew F. Tarr and Xueyan Zhang, Attorneys at Law, for respondent.

WEBB, JUDGE:

Claimant Jo Ann Bradshaw brought this action for personal injuries and for the wrongful death of her husband, Bernard Bradshaw, Jr., when the vehicle in which she and her husband were traveling was struck by a large boulder on I-77 one quarter mile south of the Edens Fork road exit in Kanawha County. I-77 is a highway maintained by respondent. The Court is of the opinion to deny this claim for the reasons more fully set forth below.

The incident giving rise to this claim occurred on November 7, 1998, at approximately 7:51 p.m. On the night in question, claimant and her husband were proceeding southbound in their 1998 Dodge Intrepid on I-77. They were returning from Wheeling to their residence in Huntington. They were traveling at a speed of about seventy miles per hour. Along the interstate in this vicinity, there were no signs indicating that this area was a rock fall area. As claimant's husband drove their vehicle on the interstate in the right lane of the two southbound lanes, the vehicle was struck by a large boulder that was in the act of falling from the high rock face on the west side of the highway above the interstate. The impact with the boulder crushed the front of the vehicle. Tragically, claimant's husband died at the scene and claimant sustained severe personal injuries.

Claimant asserts the following:

1) that respondent was at fault for this collision as it had actual or, at the least, constructive notice of the unsafe condition posed by the proximity of the rock wall adjacent to the highway and its potential to break away from the hillside and fall onto the highway below;

2) that despite the knowledge it had, respondent negligently and with gross and wilful, wanton and reckless disregard for the safety of citizens failed to take measures that would have protected the safety of the public generally from the dangers of falling rock where the highway passed through a cut-away hillside;

3) that the respondent failed to warn the public of the potential of falling rock; and,

4) that respondent knew or should have known of the dangers of falling rock and used accepted engineering practices to prevent the same.

Claimant established in the presentation of its claim that a rock fall had occurred in 1994, to the south of the area in question, which involved a large rock falling from the hillside above the interstate. It is this occurrence which claimant contends gave notice to respondent that the whole area had a potential for hazardous rock falls. In support of its allegations, claimant provided evidence that, as a general practice, when a rock greater in size than a person's hand falls near the road surface, the maintenance supervisor over the road in question has a duty to notify the district office. However, there was nothing in respondent's records to ascertain whether the 1994 incident was reported to the district office and there was nothing to establish that the specific hillside area had been inspected after the 1994 rock fall. Claimant contends that the incident in 1994 provided respondent with sufficient notice of a hazardous area and the opportunity to make necessary corrections, but it failed to exercise due diligence in correcting the known rock fall hazard, which could have prevented this catastrophe. In 1994, claimant asserts that respondent should have conducted an engineering survey of the hillside for potential rock fall evidence, and respondent should have installed falling rock signs at this location. Further, respondent, having had notice of the previous incident, should have monitored the area and should have taken action to remove any rocks or areas of rock that potentially could fall from the hillside onto the interstate.

Additionally, claimant established that respondent's employees did not receive specific training in the recognition of hazardous areas on hillsides of this nature so that they would have the knowledge to advise their superiors of potential rock fall areas.

Respondent maintains that it had no notice regarding potential rock fall problems in this specific area of I-77 at mile post 106 in Kanawha County. The location in question is not a known rock fall area. At the hearing, the parties stipulated that respondent's employees were on this portion of the interstate on a daily basis. These employees were performing routine maintenance.[1] Once respondent received information regarding the rock fall in this claim, it immediately dispatched employees to the site to remove the boulder, to clear rock debris from the highway, and to secure the scene. Furthermore, David Charles Fisher, Supervisor of the Sissonville office, testified that the 1994 rock fall incident occurred some one

[1]Records maintained by respondent indicated employees were looking for hazards such as debris on the road surface or on the berm area. They also patrolled for holes or other vehicular hazards.

hundred-fifty feet south of the location in this claim at mile post 111. In that incident a rock approximately three to four feet high by four feet long and three to four feet wide had fallen from the mountain and made it onto the shoulder area of the road. Before this incident, he had not observed any formations on the rock face that should have caused concern. Although Mr. Fisher was sure that he reported this incident to his superior, he did not have any record to establish that the district office was notified about the 1994 rock fall incident.

According to respondent's expert in geotechnical engineering, Dr. George Alan Hall, the rock formation at this location on I-77 consists of a fairly massive layer of sandstone approximately twenty feet thick with embedded thin layers of sandstone and soft shale and more soft shale in the hillside below the rock, a geological formation prevalent throughout the State. Dr. Hall explained that there are problems with all rock in this situation because there are joints and fractures in the rock. This particular formation also had another problem in that there is soft shale beneath the sandstone which can weather away and remove some support form the bottom of the sandstone. The fractures leave a wedge shaped piece of rock between the fractures and when shale weathers out from underneath these wedge shape fractured pieces of sandstone, frequently removing the support underneath the sandstone, then a sandstone block can break off and fall. The piece of the face of the hillside that fell onto the Bradshaw vehicle was estimated to be approximately eight feet high, seven feet wide across the face, and about three and a half feet thick. He described this piece of rock as being nearly one hundred cubic feet of rock. Photographs in evidence depict the exact area from which the boulder came out of this hillside and rolled down onto the highway. There is evidence of the path which the boulder took down the hillside since debris was left on the hillside and there was evidence that vegetation was disturbed. Dr. Hall opined that a rock fall like this can break very suddenly and there is no way to prevent it, *i.e.*, the rock fall event from occurring.

Dr. Hall indicated that employee training regarding this type of formation is an issue of common sense and that the key to a rock face inspection is observing movement in the rock face. If there is movement in the rock face as evidenced by a visual observation of fractures therein, then respondent has a cause for concern. Before the incident herein, Dr. Hall testified that he regularly traveled this portion of road, and he did not observe any movement in the hillside strata. Further, Dr. Hall is of the opinion that the crevice in the hillside visible after this particular rock fall and the rock fall itself could have occurred simultaneously. The rock that struck the Bradshaw vehicle appeared to have "popped out very quickly" from the hillside. This act gave the rock the initial velocity to roll rapidly and leap into the road. Usually there have been cycles of cooling, heating, freezing, thawing, causing the rock to break loose suddenly and move very quickly. Consequently, Dr. Hall opined that prior to the rock fall incident herein respondent had no reason to be

concerned that there was a potential for a rock fall from this exact hillside location on I-77.

In answer to questions about the use of benching on hillsides, Dr. Hall explained that benches can be used as catchment areas for rocks, but these areas are generally at the bottom of the hillside. In the instant claim at the location of the rock fall on I-77, there is an area at the bottom of the hillside 12-15 feet wide that serves as both a ditch and catchment area. There is also a guardrail at this location adjacent to the interstate. However, Dr. Hall testified that benches placed in horizontal planes on hillsides may be 10-20 feet in width and these are to weather and to help prevent the weathered zone in the shale. The benches are not intended to catch rocks falling from the hillside.

This Court has consistently held that the unexplained falling of a boulder or rock debris on the road surface is insufficient to justify an award. *Mitchell vs. Division of Highways*, 21 Ct. Cl. 91 (1996); *Hammond vs. Dept. of Highways*, 11 Ct. Cl. 234 (1977). In order to establish liability on behalf of respondent, the evidence must establish that respondent had notice of the dangerous condition posing the threat of injury to property and a reasonable time to take suitable action to protect motorists. *Alkire vs. Division of Highways*, 21 Ct. Cl. 179 (1997).

The evidence adduced by claimant at the hearing failed to establish that respondent was negligent in assuring the safety of the traveling public on I-77 in Kanawha County. As soon as respondent became aware of the rock fall on I-77, it took immediate corrective action. Based upon the resources available to the State and the number of rock formations in this State, it is a practical impossibility to do in-depth statewide inspections of all rock face hillsides along all of the State-maintained roads in our State. According to the testimony of Dr. Hall, even if an intensive inspection had been conducted in this specific area before the incident, there was nothing to indicate a hazard to the traveling public. As a practical matter, the Court is of the opinion that the usual and customary inspections of this particular rock face and hillside performed by respondent could not have prevented this terrible tragedy. While the Court is sympathetic to the plight of claimant and her family, and the ensuing tragedy with which they daily live, the fact remains that there is insufficient evidence of negligence upon which to base an award. The Court is mindful of the fact that the claimant was ably represented by her attorney who made a thorough and complete presentation of the evidence available to her.

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

Claim disallowed.

OPINION ISSUED JUNE 8, 2000

STEVEN L. BRAITHWAITE
VS.
DIVISION OF HIGHWAYS
(CC-99-435)

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

PER CURIAM:

Claimant brought this action for vehicle damage sustained when his wife was driving his vehicle southbound on Rock Cliff Drive toward Martinsburg and the vehicle struck a hole in the road surface.[1] Rock Cliff Drive is a road maintained by respondent in Berkeley County. The Court is of the opinion to make an award in this claim for the reasons more fully set forth below.

The incident giving rise to this claim occurred on September 23, 1999, at approximately 9:00 a.m. On the clear morning in question, claimant's wife, Brenda L. Braithwaite, was driving claimant's 1995 Ford Windstar southbound on Rock Cliff Drive at a speed of thirty to thirty-five miles per hour toward claimant's place of employment. Mr. Braithwaite and his grandson were passengers in the vehicle at the time. Rock Cliff Drive is a two-lane asphalt road with a speed limit of forty five miles per hour. About a block after Ms. Braithwaite drove across the I-81 overpass bridge and entered into a curve in the road, the vehicle struck a four to six inch hole on the edge of the pavement that had deteriorated into the white line indicating the edge of the road surface. The impact burst the vehicle's passenger side front tire and bent the wheel rim. Ms. Braithwaite then proceeded to the nearby state road shed and informed respondent of the incident. According to Ms. Braithwaite, she was informed by respondent's employees at the state road shed that they were aware of the hole, but had not repaired it. Since claimant has a deductible feature of $500.00, he was personally responsible for the sustained loss of $409.84, the lower of the estimates provided to the Court.

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

[1]At the April 20, 2000, hearing, the Court amended the style of the claim to reflect the fact Mr. Braithwaite was the only owner of the vehicle.

In this present claim, the evidence adduced at the April 20, 2000, hearing established that respondent had actual notice of the hole on Rock Cliff Drive in Berkeley County and failed to assure the safety of the traveling public. Consequently, there is sufficient evidence of negligence upon which to base an award.

In accordance with the findings of fact and conclusions of law stated herein above, the Court is of the opinion to make an award in this claim.

Award of $409.84.

OPINION ISSUED JUNE 8, 2000

RALPH S. COMBS AND NORMA L. COMBS
VS.
DIVISION OF HIGHWAYS
(CC-99-402)

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

PER CURIAM:

Claimants brought this action for vehicle damage sustained when their vehicle struck debris as claimant Norma L. Combs was traveling southbound on I-79 near the town of Jane Lew at mile marker 106.[1] I-79 is a road maintained by respondent in Harrison County. The Court is of the opinion to deny this claim for the reasons more fully set forth below.

The incident giving rise to this claim occurred on September 18, 1999, at approximately 10:00 a.m. On the morning in question, claimant Norma L. Combs and a friend, Carolyn Brooke, were proceeding southbound from Clarksburg. They were in the right lane of I-79 in claimants' 1998 Chrysler Concorde LXI traveling at a speed of about fifty-five miles per hour. As Mrs. Combs proceeded along the road near mile marker 106 in Jane Lew, she maneuvered the vehicle into the passing lane to pass another vehicle. After passing the vehicle, Mrs. Combs observed a binder ratchet tie down and other tractor trailer debris on the road surface of the passing lane. Mrs. Combs tried to swerve the vehicle around the debris, but during the process, the vehicle struck the debris. The impact with the debris caused the

[1]At the April 20, 2000, hearing the Court amended the style of the claim to reflect the fact that both Mr. and Mrs. Combs are owners of the vehicle.

vehicle's front tire to burst, punctured portions of the plastic cover underneath the vehicle, and punctured the gas tank. Afterwards, one of respondent's courtesy patrolmen stopped to assist Mrs. Combs in changing the vehicle's tire and cleared the debris from the road surface. While claimants sustained a loss in the amount of $1,295.03, they have a deductible feature of $500.00 in their motor vehicle insurance policy and any recovery would be limited to this amount. *Sommerville, et at. vs. Div. of Highways*, 18 Ct. Cl. 110 (1991).

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins vs. Sims*, 130 W.Va. 645; 46 S.E.2d 81 (1947). In order to hold respondent liable for road defects of this type, claimant must prove that respondent had actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman vs. Dept. of Highways*, 16 Ct. Cl. 103 (1986). The unexplained presence of debris on the road surface, without a positive showing of negligence on the part of the respondent, is insufficient to justify an award. *Salmen vs. Div. of Highways* (CC-97-365), unpublished opinion issued December 1, 1998.

In this present claim, the evidence adduced at the April 20, 2000 hearing failed to establish that respondent had notice of a hazardous condition on I-79 in Harrison County. While the Court is of the opinion that claimants' vehicle struck debris on the road surface of I-79, that fact alone is insufficient to establish negligence on the part of respondent. Consequently, there is insufficient evidence of negligence upon which to base an award.

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

Claim disallowed.

OPINION ISSUED JUNE 8, 2000

DEBRA ANN ELSEA
VS.
DIVISION OF HIGHWAYS
(CC-99-331)

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

PER CURIAM:

Claimant brought this action for vehicle damage sustained when her vehicle struck a tree while traveling on Route 45/8, locally known as Boyd Orchard Road, in

Martinsburg. Route 45/8 is a road maintained by respondent in Berkeley County. The Court is of the opinion to make an award in this claim for the reasons more fully set forth below.

The incident giving rise to this claim occurred on July 27, 1999, at approximately 5:10 a.m. At dawn on the morning in question, claimant was traveling on Route 45/8 in her 1997 Ford Aerostar van, which had a rack on the top. She was driving at a speed of about fifteen to twenty miles per hour with the aid of the vehicle's headlights. At this location, Route 45/8 is a secondary gravel road. As Ms. Elsea took her usual route on this road delivering newspapers, she approached an area with trees on the side of the road. Suddenly, her vehicle was struck by a limb hanging above the roadway from a tree on the side of the road, cracking the windshield and breaking the rack on top of the vehicle. While claimant sustained a loss in the amount of $1,060.80, she has a deductible feature of $200.00 in her motor vehicle insurance policy and any recovery would be limited to that amount. *Summerville, et al. vs. Division of Highways*, 18 Ct. Cl. 110 (1991).

The position of respondent was that it did not have notice of the condition of this particular tree on Route 45/8 in Berkeley County. However, according to respondent's daily records, respondent's employees were at the location in question on two occasions prior to claimant's incident. On July 24, 1999, respondent's employees were on Route 45/8 regarding tree problems and later on July 26, 1999, respondent's employees were mowing brush along the road.

The Court has held in prior claims that when the evidence establishes that respondent does not have notice of a hazard, such as a leaning tree, and a reasonable opportunity to remove it, respondent will not be held liable. *Jones v. Division of Highways*, 21 Ct. Cl. 445 (1995).

In this present claim, the evidence adduced at the April 20, 2000, hearing established that respondent had at least constructive notice of the that this tree posed a hazard to the traveling public. The photographic evidence adduced by claimant established that the tree in question was in fact dead. Respondent's employees were at the location on two prior occasions and should have been aware of the hazard posed by the tree. Consequently, there is sufficient evidence of negligence upon which to base an award.

In accordance with the findings of facts and conclusions of law stated herein above, the Court is of the opinion to make an award in this claim.

Award of $200.00.

OPINION ISSUED JUNE 8, 2000

SARAH FERNANDEZ

VS.
DIVISION OF HIGHWAYS
(CC-96-505)

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred as a result of her vehicle striking a hole while her son and a friend were traveling in the center westbound lane of I-64, near the Montrose exit, in South Charleston. This portion of I-64 is a road maintained by respondent in Kanawha County. The Court is of the opinion to deny this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred on May 5, 1996, at approximately 9:00 p.m. On the cloudy night in question, claimant's son, Alberto B. Fernandez and a friend, Christina Newman, were proceeding toward West Virginia State College from a trip to Norfolk, Virginia, in claimant's four door 1994 Toyota Corolla. As Mr. Fernandez drove the vehicle at a speed of about sixty miles per hour along I-64 with the aid of the vehicle's headlights, it suddenly struck a hole that covered a third of the center travel lane, near the Montrose exit. As the vehicle approached the Dunbar exit, Mr. Fernandez began to have difficulty driving the vehicle and he stopped to inspect the vehicle. The encounter with the hole burst the vehicle's left front tire and broke the wheel rim. The following day, Mr. Fernandez had the tire and wheel rim replaced. In addition, the vehicle required realignment. Claimant sustained a total loss in the amount of $320.41, however, claimant's motor vehicle insurance policy has a deductible feature of $200.00 and any recovery would be limited to that amount. *Sommerville, et al. vs. Div. of Highways*, 18 Ct. Cl. 110 (1991).

The position of respondent was that it was not on notice of the hole in the center westbound travel lane of I-64 in South Charleston, Kanawha County. According to the daily log entries of transportation crew supervisor II Stephen Wayne Knight, once respondent received notice of the hole later in the night, it went immediately to the scene to patch the hole with cold mix asphalt until the following day when the lane could be closed down and the hole repaired with hot mix asphalt. Respondent had no prior notice of the hole.

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

In the present claim, the evidence adduced at the March 23, 2000, hearing does not establish that respondent had notice of the condition in the center westbound travel lane of I-64, Kanawha County. The evidence presented by claimant failed to establish that respondent did not take reasonable steps to ensure the safety of motorists on I-64. Consequently, there is insufficient evidence of negligence upon which to base an award.

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

Claim disallowed.

OPINION ISSUED JUNE 8, 2000

MICHAEL FREYMAN, SR.
VS.
DIVISION OF HIGHWAYS
(CC-99-249)

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

PER CURIAM:

Claimant brought this action for vehicle damage sustained when his daughter was driving his vehicle on I-81 and she drove over debris that had fallen from the Rock Cliff Drive Bridge.[1] The Rock Cliff Drive Bridge over this portion of I-81 is maintained by respondent in Berkeley County. The Court is of the opinion to make an award in this claim for the reasons more fully set forth below.

The incident giving rise to this claim occurred on May 14, 1999, at approximately 5:45 p.m. On the evening in question, claimant's daughter, Michelle Freyman, along with her five-year old son, were traveling in his 1989 full size Chevrolet pick-up truck in the right lane of I-81 from Hedgesville to Martinsburg at a speed of about fifty miles per hour. Ms. Freyman took her usual route to her place of employment and as she approached the Rock Cliff Drive Bridge she noticed debris from the bridge in her lane of travel. Ms. Freyman maneuvered the vehicle from the right lane onto the berm area to avoid debris on the road surface. When she drove back to the left onto the road surface, the vehicle went over several different

[1]At the April 20, 2000, hearing, the Court amended the styling of the claim to reflect the fact that Mr. Freyman, Sr., was the sole owner of the vehicle.

pieces of debris. The debris caused damage to both tires on the passenger side of the vehicle and damaged the front of the vehicle. After this incident, three employees of respondent came upon the scene and assisted Ms. Freyman. In a letter dated June 16, 1999, the employees acknowledged that at the time of the incident concrete had fallen onto the roadway and that bridge work had been conducted by respondent. While claimant sustained a loss in the amount of $858.31, he has a deductible feature of $100.00 in his motor vehicle insurance policy and any recovery would be limited to this amount. *Sommerville et al. vs. Div. of Highways*, 18 Ct. Cl. 110 (1991).

The position of respondent was that it did not have notice of the disrepair of the Rock Cliff Drive Bridge in Berkeley County. While respondent acknowledged that the concrete on the road surface was from a deteriorated lip on the bridge, its employees responded immediately to the scene when it had notice of the bridge debris. Prior to this incident, respondent maintained that it had no knowledge of the condition of the bridge.

When respondent fails to exercise reasonable care and diligence in the maintenance of a bridge, a claimant may be entitled to recover for a sustained loss. *Anderson vs. Div. of Highways*, 21 Ct. Cl. 131 (1996).

In the present claim, the evidence adduced at the April 20, 2000, hearing established that respondent was negligent in its maintenance of the Rock Cliff Drive Bridge in Berkeley County. The Court is of the opinion that respondent was aware that work had been on-going on the bridge and it should have been aware of the dangerous road condition posed by the condition of the bridge. Consequently, there is sufficient evidence upon which to base an award.

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

Award of $100.00.

OPINION ISSUED JUNE 8, 2000

MICHAEL JUSTICE
VS.
DIVISION OF HIGHWAYS
(CC-99-9)

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when his vehicle was struck by a rock while a friend was driving his vehicle on W.Va. Route 10 from Man towards Logan. W.Va. Route 10 at this location is maintained by respondent in Logan County. The Court is of the opinion to deny this claim for the reasons more fully set forth below.

The incident giving rise to this claim occurred on December 8, 1998, at approximately 5:00 p.m. At dusk on the rainy evening in question, claimant's friend, Linda Kaye Adkins, proceeded on W.Va. Route 10 at a speed of about twenty miles per hour in a twenty-five per hour speed zone in claimant's 1997 Chevrolet Cavalier, from her place of employment in Man to her residence in Logan. Ms. Adkins travels this portion of road on a regular basis and was aware that it was a known rock fall area. As Ms. Adkins operated the vehicle on an uphill portion of the road close to the hillside, and before what she described as a sharp "S" shaped curve in the road, the vehicle was suddenly struck on the right side by a rock that had fallen from the right side of the road. Afterwards, Ms. Adkins stopped along the road at a safe location and inspected the vehicle. Fortunately, Ms. Adkins did not sustain a personal injury, but the right front area of the vehicle sustained damage. Claimant's daughter, Leigh Ann Justice, then contacted the Man Police Department regarding the incident and an officer investigated the incident and filed a police report. The damages sustained to claimant's vehicle were estimated in the amount of $754.99, however, claimant's motor vehicle insurance policy has a deductible feature of $500.00 and any recovery would be limited to that amount. See *Sommerville, et al. vs. Div. of Highways*, 18 Ct. Cl. 110 (1991).

The position of respondent was that it had neither actual nor constructive notice for this rock fall incident on W.Va. Route 10. According to respondent, this portion of road is a known rock fall area and is clearly marked by "falling rock" road signs. Before this incident, respondent denied having any notice of the condition of W. Va. Route 10.

The Court has consistently held that in claims of this nature, without a positive showing that respondent had actual or constructive notice of a dangerous condition, such as falling rocks and rock debris, posing a threat of injury to property is insufficient to justify an award. *Mitchell vs. Division of Highways*, 21 Ct. Cl. 91 (1996); *Hammond vs. Division of Highways*, 11 Ct. Cl. 234 (1977). In order to establish liability on behalf of respondent, the evidence must establish that respondent had notice of the dangerous condition posing the threat of injury to property and a reasonable time to take suitable action to protect motorists. *Alkire vs. Division of Highways*, 21 Ct. Cl. 179 (1997).

The evidence adduced at the March 23, 2000, hearing failed to establish that respondent had notice of the road condition and did not take measures to help assure the safety of the traveling public while traveling on W.Va. Route 10 in Logan County. In addition, Ms. Adkins knew that this area has a propensity for rock falls.

While the Court is sympathetic to claimant's plight, the fact remains that there is insufficient evidence of negligence upon which to base an award.

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

Claim disallowed.

OPINION ISSUED JUNE 8, 2000

KENNETH ANDY KENNEDY D/B/A KENNEDY AUTO SALES
VS.
DIVISION OF HIGHWAYS
(CC-96-373)
and
BETTY WILLIAMS STACY
VS.
DIVISION OF HIGHWAYS
(CC-96-381)

S. Douglas Adkins, Attorney at Law, for claimants.
Andrew F. Tarr & Xueyan Zhang, Attorneys at Law, for respondent.

BAKER, JUDGE:

The claimants brought these claims being considered herein to recover for damages to their respective properties as the alleged result of respondent's negligent design and maintenance of the drainage system on U.S. Route 52, in Delbarton, Mingo County. U.S. Route 52 is a road owned and maintained by respondent. The Court is of the opinion to make awards to the claimants in these claims for reasons more fully set forth below. These claims were consolidated for hearing by the Court.

Both of the claimants own property and reside on the west side of U.S. Route 52 approximately two miles south of Delbarton. At this location, U.S. Route 52 is a straight stretch of road that traverses in a north-south direction. The hillside on the east side of U.S. Route 52 slopes to the roadway. Claimants' properties on the west side gradually slope toward Pigeon Creek, which is located about one-hundred-fifty feet from the road surface of U.S. Route 52. In the past, the road surface of U.S. Route 52 was in a state of disrepair due to standing water on the road. As a result of the water on the road, there were several automobile accidents. Consequently, in 1987, respondent corrected the problem of standing water by creating a tilt in the road surface of U.S. Route 52 at this location to channel water to

the west side of the road. In 1993, respondent widened the paved surface when it engaged a contractor to pave the shoulders of the road.

After these measures had been taken by respondent, claimants allege that they began to experience excessive water drainage from the east side of U.S. Route 52. Moreover, across the road about eight to ten feet south of the Kennedy and Stacy property, a neighbor (identified as Neil Robertson) residing on the east side of U.S. Route 52 placed a paved driveway which was twelve by seventy-five feet. This driveway was constructed by the neighbor without a permit from respondent as required by law. The driveway exacerbated the water problems being experienced by both of the claimants at that time, because the neighbor covered a bridge placed by respondent for water to flow through the ditch line. The drain that he placed beneath his driveway apparently was inadequate to carry all of the water in the ditch line so it flowed across the road onto claimants' properties.

In June 1995, claimant Kenneth Andy Kennedy contacted Governor Caperton's office about his drainage problem and he was referred to respondent. Commissioner Fred VanKirk, in a letter dated July 6, 1995, stated "that the Division of Highways will do whatever we feel is necessary to improve drainage patterns as related to our roadway. Plans have been made to install a box and grate under the driveway which enters onto US 52 across from your property. This should alleviate the problem of water coming down the driveway out onto 52 and eventually crossing the highway onto your property." The letter further advised claimant Kennedy that his building sits in a low area which acts a natural drainage area. The driveway slopes toward the building and there are no slopes on the sides of the building so the water is channeled toward the building. With no gutters or downspouts, all the run off from the roof just ponds around the building.

While respondent eventually removed the Robertson driveway, the drainage structure ("box and grate") was not installed. Both claimants allege that respondent's failure to respond promptly to claimants' complaints caused the damages from the water run-off to continue, worsening the problems already being experienced by claimants. It is the position of claimants that the failure of the respondent to address the drainage problem is the proximate cause of the damages sustained to their respective properties.

The Kennedy property has been in the family of claimant Kenneth Andy Kennedy since the 1920's. The residence in which claimant makes his home with his wife was built on fill material in 1957. To the southwest of their residence is a building seventy five feet from U.S. Route 52 which was constructed by the Mingo County Economic Opportunity Commission in 1970. This structure has a tin roof, but does not have gutters or downspouts. The rear of the building is about ten feet from Pigeon Creek. Until 1986, the Mingo County Economic Opportunity Commission occupied claimant Kennedy's building. During this time, Mr. Kennedy asserted that he had no knowledge of any water problems nor had he received

complaints from the Mingo County Economic Opportunity Commission which used the building for storage of equipment that required a dry place.

At some time in the early 1990's, claimant began operating an auto body shop in the building which is known as Kennedy Auto Sales. He also sells used cars that he has parked in the lot in front of the building adjacent to U.S. Route 52 and with a driveway which abuts U.S. Route 52. This building has experienced water problems since 1987. Claimant's wife, Patricia Kennedy, stated that she telephoned respondent's main office in Charleston in the spring in the early 1990's to describe the water problem and she also telephoned the Mingo County office at least six to eight times during the 1990's. Claimant alleges that excessive water flows from U.S. Route 52 bringing mud and water into the building. Clean up efforts may take about one-and-a-half days to remove the mud from the floor after the water recedes. The water has been as high as six to seven inches in the building.

In an attempt to remedy the problems with the water and mud getting into his building, Mr. Kennedy first installed a four-inch perforated pipe covered with gravel on two sides of the building. This action did not remedy the situation because sand and water filled the pipe so he dug a ditch (described as a "moat") about two feet deep along the sides of the building allowing the water to flow into Pigeon Creek, but sand kept filling in the ditch. Since this effort also failed effectively to eliminate the water problem, he installed an eight-inch perforated pipe covered with gravel with a drain box at the front door which connects to a 12-inch pipe from which the water flows to the creek. This project, completed in July 1999, provided some relief from the water problems experienced in the building; however, water and sand still flow onto the gravel driveway in front of the building which requires constant maintenance efforts on his part. Mr. Kennedy has tried to make improvements to his property with a backhoe and gravel in an attempt to repair the damages caused by the water. The cost of these improvements to his property is estimated in the amount of $4,700.00. He does not have a homeowner's insurance policy that provides coverage for the damages to his property.

Claimant Betty Williams Stacy bought her residence on U.S. Route 52 in 1978. On the north side of the Stacy residence, which is to the south of the Kennedy property, there is a twenty-four by eighteen foot, one-and-one-half vehicle garage with a concrete floor. Water that originates across the road flows onto claimant's driveway creating gullies and ridges in the partially paved driveway and then flows into the garage. Although the Stacy property experienced water problems prior to 1993, Harvey Stacy, claimant's husband, testified that these problems "got tremendously worse" in 1993. When the garage floor started cracking in 1993, he dug a ditch in front of the garage door in an attempt to divert the water away from their residence. While the Stacy residence has a gutter and downspout on the north corner and a corresponding drainage system on the south corner, the gutter on the north corner of the residence empties water directly onto the ground.

Both claimants offered respondent a right of way to perform any necessary repairs to alleviate the water problems that they are experiencing. The damage sustained to Mrs. Stacy's garage was estimated in the amount of $10,000.00 to $11,000.00. She does not have a homeowner's insurance policy that provides coverage for the damages to her property.

Respondent's position is that it took immediate corrective measures as soon as it received notice regarding the drainage problem on U.S. Route 52. Respondent acknowledged that the road is "super elevated" toward claimants' property and that it has always been that way. The paving performed in 1993 did not alter the elevation of the road. The respondent had the berm paved on each side. It contends that nothing was done during the project to super-elevate the surface of the road. This road is designed to channel water flow toward the west side of the road. At the time of the paving project, claimants' neighbor's driveway was not paved and there were no signs of erosion. Thus, a box and grate were not installed. However, Senior Designer Phillip Van Daniels explained that when claimants' neighbor paved his driveway, the characteristics of the drainage system changed and a box and grate became necessary. On two occasions, claimants' neighbor tore out the ditch without respondent's permission, in order to install a pipe and pave over it. When the driveway was finally removed and the ditch was reconstructed, an inlet box was no longer necessary. Likewise, Senior Engineer Technician Jimmie Messer testified that he was present at the site on an occasion when water was present and he did not observe water flowing on claimants' property. Respondent asserts that both claimants lack proper drainage systems on their respective properties and this has exacerbated the water problems which they experience.

The Court has held that respondent has a duty to provide adequate drainage of surface water, and drainage devices must be maintained in a reasonable state of repair. *Haught vs. Dept. of Highways*, 13 Ct. Cl. 237 (1980). In claims of this nature, the Court will examine whether respondent negligently failed to protect a claimant's property from foreseeable damage. *Rogers vs. Div. of Highways*, 21 Ct. Cl. 97 (1996).

In the instant claims, the evidence establishes that respondent failed to maintain the drainage system on U.S. Route 52 at the location of the claimants' properties in a reasonable state of repair to protect these properties from excessive water flowing in the ditch line on the east side and from the water flowing on the road surface itself. Respondent failed to take remedial action when it had adequate notice as evidenced by the letter from Commissioner VanKirk. The road surface is lower on the west side to provide drainage for surface water which accumulates on the road surface. This is necessary to protect the traveling public using U.S. Route 52; however, respondent also has a duty to protect the adjacent property owners from excess water which flows from the roadway onto their properties. In the instant claims, respondent is responsible for casting ground water onto claimants' property.

Respondent knew or should have known that damage to claimants' real property would occur. Respondent should have been more diligent in preventing the claimants' neighbor from dismantling respondent's drainage system on U.S. Route 52. Therefore, the Court is of the opinion that respondent, once having notice of the situation on U.S. Route 52, negligently failed to take immediate and reasonable action to prevent any further damage to claimants' properties from excessive water flowing across the road.

Notwithstanding respondent's negligence, the Court is also of the opinion that both claimants bear some responsibility for the damages to their properties as they also were negligent. Neither of the claimants maintained adequate drainage systems on their respective properties to deal with water run-off from their own structures. Moreover, the claimants failed to establish the actual amounts of monetary damages which they sustained to their properties. In the Kennedy claim, claimant Kennedy estimated damages in the amount of $4,700.00 for restoration work done on his driveway and car lot. In the Stacy claim, Mr. Stacy produced an estimate for damages in the amount of $11,000.00. The Court is of the opinion that this estimate is suspect and that $7,000.00 is an amount that the Court deems would be fair and reasonable for replacing the concrete floor in the garage.

In a comparative negligence jurisdiction, such as West Virginia, the negligence of a claimant can reduce or bar recovery of a claim. The Court finds that each claimant was 49% negligent for the resulting damages to his or her property. Since the negligence of neither claimant is greater than or equal to the negligence of respondent, each of the claimants may recover 51% of his or her loss.

In accordance with the findings of fact and conclusions of law as stated herein above, the Court is of the opinion to and does make reduced awards to the claimants in these claims.

Award of $2,397.00 to claimant Kenneth Andy Kennedy d/b/a Kennedy Auto Sales.

Award of $3,570.00 to claimant Betty Williams Stacy.

OPINION ISSUED JUNE 8, 2000

MARK SCOTT KING
VS.
DIVISION OF HIGHWAYS
(CC-99-59)

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred as a result of his vehicle striking a hole while traveling eastbound on U.S. Route 33, near the town of Mason. U.S. Route 33 at this location is a road maintained by respondent in Mason County. The Court is of the opinion to make an award in this claim for the reasons more fully set forth below.

The incident giving rise to this claim occurred on January 16, 1999, at approximately 9:30 to 10:00 p.m. On the cold night in question, claimant proceeded from the Parkersburg Mall toward his residence in his 1997 Honda Accord Special Edition on U.S. Route 33 at a speed of about fifty-five miles per hour. This portion of U.S. Route 33 is a twenty two feet, two lane road with double yellow lines indicating the center of the road surface and white lines along the edges of the road surface. As Mr. King drove along the first priority road, he came upon an area of road where he knew there was a two foot irregularity in the pavement, which he had struck on a prior occasion. Mr. King noticed four to five vehicles on the right hand side of the road with their hazard lights flashing and then he slowed the speed of his vehicle to thirty-five miles per hour. Confronted by oncoming traffic, Mr. King was forced to strike the hole in the road surface. The impact burst the vehicle's tire and bent the wheel rim. After the incident, claimant telephoned the Mason County Fire Department regarding the hole in the road surface. Claimant sustained a loss in the amount of $228.28, for a tire and wheel rim. Since claimant has a deductible feature of $1,000.00 in his motor vehicle insurance policy, he was responsible for the entire loss.

The position of respondent was that it did not have notice of the hole on U.S. Route 33 in Mason County. On the days prior to the incident, respondent's employees were engaged in snow and ice removal activities. During this time, respondent's employees had no notice of the hole. While respondent acknowledged that this portion of U.S. Route 33 is notorious for holes, its daily records indicated that almost one ton of cold mix asphalt was used to repair the hole on the same night it was given notice of claimant's incident.

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

The evidence adduced at the March 23, 2000, hearing established that respondent had actual notice of the condition on U.S. Route 33 in Mason County. Respondent was well aware that winter weather conditions contribute to the failure of patching material in this area and failed to take reasonable measures to assure the safety of motorists on U.S. Route 33 in Mason County. A Mason County 911

Center audio tape of the night in question, adduced by claimant, established that U.S. Route 33 was in a state of disrepair and as a result at least nine other vehicles sustained damage. Notwithstanding the negligence of respondent, the Court is also of the opinion that claimant was negligent in his operation of the vehicle. Claimant was aware of the hole in question and had struck it on a prior occasion. In a comparative negligence jurisdiction, such as West Virginia, the negligence of a claimant can reduce or bar recovery of a claim. Based on the above, the Court finds that the negligence of claimant was responsible for one-third of his loss. Since the negligence of claimant is not greater than or equal to the negligence of respondent, claimant may recover two-thirds of the loss sustained.

In accordance with the findings of fact and conclusions of law stated herein above, the Court is of the opinion to and does make a reduced award in this claim.

Award of $152.03.

OPINION ISSUED JUNE 8, 2000

RON MACE AND JOAN P. MACE
VS.
DEPARTMENT OF ADMINISTRATION
AND
DEPARTMENT OF AGRICULTURE
(CC-99-172)

Patricia L. Kotchek, Attorney at Law, for claimants.
Joy M. Cavallo, Assistant Attorney General, for respondents.

PER CURIAM:

This claim was submitted to the Court for decision upon a Stipulation entered into by counsel for claimants and counsel for respondents, wherein certain facts and circumstances of the claim were set forth as follows:

1. On October 2, 1995, claimants, as lessors, entered into a three year lease agreement with respondent Department of Agriculture, the lessee, to provide office space in the town of Moorefield, Hardy County at a monthly rate in the amount of $637.50 and a provision to terminate the lease with thirty days written notice. Respondent Department of Administration was also identified in the lease agreement. Due to some failure of communication between the Department of Administration and the Department of Agriculture, the premises were vacated by the Department of Agriculture in February 1998, but claimants were not notified of the intent to terminate the lease agreement until April 2, 1998, thus, breaching the lease

agreement. Claimants tried but were unable to mitigate their damages by renting to another tenant, effective March 1, 1998.

2. As a result of the breach of the lease agreement, claimants sustained a loss of $1,912.50 for unpaid rent for the months of February, March and April of 1998. However, claimants agreed to relinquish and settle this claim for the amount of $1,012.50 which will be allocated as follows:

a. against respondent Department of Administration in the amount of $375.00 representing the loss of rental income for the months of March and April 1998.

b. against respondent Department of Agriculture in the amount of $637.50 representing the unpaid rental income for the month of February 1998.

3. Both Respondents agree that the amount of the damages as put forth by claimants is fair and reasonable.

The Court has reviewed the facts of this claim as stated in the Stipulation, and adopts the statement of facts as its own. The Court finds that respondents breached the lease agreement; that claimants were damaged by this breach; and that the amount of the damages agreed to by the parities is fair and reasonable.

Accordingly, the Court is of the opinion to and does make an award in the amount of $1,012.50 to claimants.

Award of $375.00 against the Department of Administration.

Award of $637.50 against the Department of Agriculture.

OPINION ISSUED JUNE 8, 2000

MARY ALICE PAYNE
VS.
DIVISION OF HIGHWAYS
(CC-98-314)

Claimant appeared *pro se*.

Xueyan Zhang, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for personal injuries and property damage sustained when her vehicle was struck by a mudslide when she traveling eastbound on Route 83 in Yukon. Route 83 is a road maintained by respondent in McDowell County. The Court is of the opinion to deny this claim for the reasons more fully set forth below.

The incident giving rise to this claim occurred on May 13, 1998. On the day in question, claimant was making a return trip from the grocery store in her 1987 vehicle while traveling eastbound on Route 83 in Yukon. Route 83 is two-lane road, with a road surface width of sixteen to eighteen feet and with guardrail protecting travelers from the forty-five to fifty foot cliffs on one side of the road. Earlier in the day, claimant had traveled along the road, and she noticed people working on the road. As claimant made her return trip from the store, she was driving uphill and around a curve in the road when suddenly her vehicle was caught in a mudslide. The impact of the mudslide pushed her vehicle against the opposite side of the road. Claimant was trapped inside the vehicle. Another vehicle pulled claimant's vehicle out of the slide, and claimant's cousin contacted the McDowell Ambulance Authority. Claimant sustained personal injuries, but refused medical assistance and remained on the scene for about one-half hour. Eventually claimant's husband drove her to Bluefield Regional Hospital for treatment.[1] According to claimant, after the incident, the mudslide "just went away." During claimant's frequent trips on this road in the past, she could not recall observing any mudslide incidents in this particular area. Photographic evidence of the vehicle and of claimant's personal injuries were taken the following day. Once the vehicle was brought back to claimant's residence, it was considered "totaled" and sold for salvage.

The position of respondent was that it did not have notice of the mudslide on Route 83 in Yukon. Respondent acknowledged that road work had been done approximately one to one-and-a- half miles from the scene of claimant's incident. According to respondent, there are no records of a mudslide having occurred occurring in this particular area on the day in question.

The evidence adduced at the October 28, 1999, hearing failed to establish that respondent had notice that a mudslide was imminent on Route 83 in Yukon. While the Court is of the opinion that claimant was involved in an incident caused by a mudslide, that fact alone is insufficient to establish negligence on behalf of respondent. Consequently, there is insufficient evidence of negligence upon which to base an award.

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

Claim disallowed.

OPINION ISSUED JUNE 8, 2000

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[1]Claimant's medical bills were paid by Medicaid and a $1,000.00 payment by her motor vehicle insurance carrier.

EUGENE SAVILLE
VS.
DIVISION OF HIGHWAYS
(CC-99-2)

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when his vehicle struck a hole when he was traveling in the right eastbound lane of U.S. Route 50, near Romney. U.S. Route 50 at this location is a road maintained by respondent in Hampshire County. The Court is of the opinion to make an award in this claim for the reasons more fully set forth below.

The incident giving rise to this claim occurred on March 30, 1998, at approximately 11:15 a.m. On the morning in question, claimant was proceeding in the right eastbound lane of U.S. Route 50 in his 1985 F-250 Ford pick-up three-quarter ton truck at a speed of about fifty miles per hour. At this location, U.S. Route 50 has three lanes each of which is twelve feet in width. Two of the lanes are eastbound and these lanes proceed straight up a mountainous slope. The posted speed limit is forty-five miles per hour. As Mr. Saville drove his truck in the right lane up the mountain, he came upon a six to seven inch hole about the width of a truck tire, with which he was familiar. Since there was a vehicle in the passing lane beside him, he was forced to drive into the hole which was near the white edge line indicating the edge of the paved surface of the road. The impact with the hole damaged the truck's transfer case. The truck became inoperable and Mr. Saville drifted his vehicle to the side of the road. Afterwards, Mr. Saville went to a salvage yard and purchased a transfer case for $450.00, which he later installed. Since claimant's truck is insured under a liability motor vehicle insurance policy only, he was responsible for the sustained loss.

The position of respondent was that it did not have notice of the hole on U.S. Route 50 in Hampshire County. According to Highway Administrator III, Olin Teter, respondent had not received any information regarding an irregularity in the road surface until December 23, 1998. While Mr. Teter produced photographs of the road near the location in question that did not show the existence of the hole, claimant's photographs established the existence of the hole and that it had been patched. Respondent did not have any record of the hole being patched.

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

constructive notice of the defect and a reasonable time to take corrective action. *Chapman vs. Dept. of Highways*, 16 Ct. Cl. 103 (1986).

In the present claim, the evidence adduced at the April 20, 2000, hearing established that respondent at least had constructive notice of the condition of the right eastbound lane of U.S. Route 50 in Hampshire County. The Court is of the opinion that the position and size of the hole in the road surface establishes that respondent should have known about the defect and should have repaired it or placed warning signs prior to claimant's incident. Consequently, there is sufficient evidence of negligence upon which to base an award.

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

Award of $450.00.

OPINION ISSUED JUNE 8, 2000

MICHAEL L. SMITH
VS.
DIVISION OF HIGHWAYS
(CC-99-74)

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

PER CURIAM:

Claimant brought this action for damages to his vehicle which occurred when his daughter was driving his vehicle and it struck a hole on Route 622, locally known as Goff Mountain Road, near Cross Lanes. Route 622 is a road maintained by respondent in Kanawha County. The Court is of the opinion to deny this claim for the reasons more fully set forth below.

The incident giving rise to this claim occurred on January 8, 1999, at approximately 3:00p.m. On the cloudy day in question, claimant's daughter, Jessica Michelle Smith, drove his 1998 Z-28 Chevrolet Camaro from Institute toward Cross Lanes on Route 622. She was proceeding at a speed of about twenty-five to thirty miles per hour. Route 622 is a two-lane, high priority road about twenty-two feet wide with a double yellow line indicating the center of the road surface and white edge lines. Ms. Smith was driving the vehicle on an uphill slope, and she had traffic in front of and behind the vehicle. Suddenly, oncoming traffic forced Ms. Smith to maneuver the vehicle toward the edge of the paved road surface, where she noticed an irregularity in the pavement. Ms. Smith slowed the speed of the vehicle, but she

was unable to prevent the vehicle from striking the irregularity in the pavement. The incident caused damage to the vehicle's passenger side rear tire. Since claimant had a deductible feature of $500.00 in his motor vehicle insurance policy, he was responsible for the loss estimated by Ms. Smith to be around $250.00.

The position of respondent was that it did not have notice of an irregularity in the pavement of Route 622 in Kanawha County on the date of this incident. A review of respondent's records substantiated its position. In addition, Highway Administrator Charles Earl Smith testified that he traveled the road about one year after Ms. Smith's incident and he did not observe any irregularity in the pavement or evidence of patching on the road in the area described as the accident scene.

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

In the present claim, the evidence adduced at the May 4, 2000, hearing failed to establish that respondent had notice of a defective condition on Route 622 or that it failed to assure the safety of motorists on Route 622 in Kanawha County. While the Court is of the opinion that Ms. Smith was involved in an incident, that fact alone is insufficient to establish negligence on the part of respondent. Consequently, there is insufficient evidence of negligence upon which to base an award.

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

Claim disallowed.

OPINION ISSUED JUNE 8, 2000

RICHARD LEON THORNTON
VS.
DIVISION OF HIGHWAYS
(CC-98-347)

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

PER CURIAM:

Claimant brought this action for vehicle trailer damage which occurred when his trailer struck a tree when he was traveling on Route 34 in Hurricane, Putnam County. Route 34 is a road maintained by respondent in Putnam County. The Court is of the opinion to deny this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred on July 17, 1998, at about 5:00 to 6:00 p.m. On the afternoon in question, claimant was hauling a loaded twenty-four foot Pace American enclosed car trailer with his 1990 Ford F-250 truck on Sunnybrook Road to drive to a specific location to apply for a new State inspection sticker. His vehicle trailer is about forty to forty-two feet long, eight feet high and eight feet wide. As claimant traveled on Sunnybrook Road to the point where he was within approximately six hundred feet to the entrance of Route 34, he encountered oncoming traffic and slowed the speed of his vehicle to less than twenty-five miles per hour. At this location, the road has a slight downward grade and is nineteen feet wide. Claimant observed a tree leaning into the roadway about one hundred feet away. As claimant approached the tree leaning into the road, his trailer was struck by the tree approximately one foot from the top of the eight foot trailer. Claimant travels this road regularly, but he had never had any trouble driving by the leaning tree on previous occasions. The property owner where the tree was located informed claimant that the tree was in respondent's right of way. The resulting damage to claimant's vehicle trailer was in the amount of $1,565.15. However, claimant had a deductible feature of $250.00 in his insurance coverage policy which would limit any recovery to that amount.

The position of respondent was that it did not have actual or constructive notice of the condition of the tree leaning into the traveled portion of Route 34. Respondent's right of way in this location is thirty feet, being fifteen feet on either side of the centerline of the traveled highway. According to testimony from respondent's District 1 Crew Leader Gary E. Stanley who conducted an investigation on Friday, July 7, 1998, after receiving claimant's complaint, he determined that the tree itself was not in respondent's right of way. From the edge of the road to the tree trunk was twelve feet which meant the tree was about seven to eight feet from the State's right-of-way. The Crew Leader also observed that the tree was leaning, and he made plans to remove the tree the following week. By the following week, however, the tree had been removed, but not by respondent. According to respondent's Crew Leader, the property owner where the tree was located informed him that he had removed the tree. Respondent had no prior information regarding the condition of the tree or that it may have posed a danger to the traveling public before receiving claimant's complaint.

The Court has held in prior claims that when the evidence establishes that respondent does not have notice of a hazard, such as a leaning tree, and a reasonable

opportunity to remove it, respondent will not be held liable. *Jones v. Division of Highways*, 21 Ct. Cl. 445 (1995).

The evidence adduced at the September 3, 1999, hearing establishes that respondent had no notice that the tree posed a hazard to the traveling public. Consequently, there is insufficient evidence of negligence upon which to base an award.

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

Claim disallowed.

OPINION ISSUED JUNE 8, 2000

SEBRINA L. WILSON
VS.
DIVISION OF HIGHWAYS
(CC-97-213)

David G. Hanlon, Attorney at Law, for claimant.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

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

1. On May 25, 1995, at approximately 10:00 p.m., as claimant traveled northbound on I-77 toward the town of St. Marys in Pleasants County, her vehicle was struck by a large piece of concrete falling from the underside of an I-77 overpass bridge in the town of Mineral Wells in Wood County. The falling concrete struck the top of claimant's vehicle, shattering the sun roof and injuring claimant.

2. For several years prior to the incident, respondent was aware of the deteriorating condition of this I-77 overpass bridge in Mineral Wells, Wood County. Respondent failed to assure the safety of the traveling public by maintaining the area in question in a reasonable state of repair.

3. As a result of the incident, claimant brought this action to recover damages in the amount of $100,000.00. However, claimant agreed to settle and relinquish this claim against respondent for the amount of $25,000.00.

4. Respondent agrees that the amount of damages as put forth by claimant is fair and reasonable.

The Court has reviewed the facts of this claim as stated in the Stipulation, and adopts the statement of facts as its own. The Court finds that respondent was negligent in its maintenance of the I-77 overpass bridge in Mineral Wells, Wood County, on the date of claimant's incident; that the negligence of respondent was the proximate cause of the injuries suffered by claimant; and that the amount of the damages agreed to by the parties is fair and reasonable.

Accordingly, the Court is of the opinion to and does make an award in the amount of $25,000.00.

Award of $25,000.00.

OPINION ISSUED JULY 19, 2000

TIMOTHY COPLEY
VS.
DIVISION OF HIGHWAYS
(CC-99-164)

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

PER CURIAM:

Claimant brought this action for vehicle damage sustained when his vehicle struck a hole while he was traveling northbound on Route 65, near Naugatuck in Mingo County. Route 65 at this location is maintained by respondent. The Court is of the opinion to make an award in this claim for the reasons more fully set forth below.

The incident giving rise to this claim occurred on March 18, 1999, at approximately 7:30 p.m. At dusk on the evening in question, Mr. Copley was traveling northbound on Route 65 toward Kermit in his 1989 Nissan Sentra at a speed of about forty to forty-five miles per hour. At this location, Route 65 is eighteen to twenty feet in width. It is a two-lane, asphalt road with double yellow lines indicating the center of the road with white lines on each edge of the pavement. Route 65 is described as being a priority road subject to heavy coal truck traffic. As Mr. Copley drove the on the wet road, he was confronted by three oncoming trucks in an area where he was aware of a hole in the road surface. Mr. Copley tried to maneuver his vehicle to the side of the road when the vehicle's right front tire struck a hole one foot in width by one foot in length in the road on the right side of his lane of travel. The subsequent impact burst the tire, broke the wheel, and damaged the CV joint. Afterwards, Mr. Copley contacted respondent's office regarding the hole

and it was patched sometime thereafter. Since Mr. Copley's vehicle was insured only under a liability policy, he was responsible for the damage in the amount of $398.77.[1]

The position of respondent is that it did not have notice of the hole on Route 65 in Mingo County. According to respondent, once it received notice of the hole it dispatched employees immediately to repair the hole. Employees patched the hole and then were involved in snow and ice removal activities in the area. During this time of the year, snow and ice removal activities are a top priority and road repair activities are conducted when the time becomes available. Prior to March 18, 1999, respondent asserts that it did not have notice of this hole.

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

In the claim, the evidence established that respondent had at least constructive if not actual knowledge of the hole on Route 65 in Mingo County. The Court is of the opinion that the hole in the road surface of Route 65 constituted a hazardous condition and that respondent should have been more observant of problems on the road since it is a priority road subject to heavy coal truck traffic. Consequently, there is sufficient evidence of negligence on the part of respondent by which claimant may recover his sustained loss.

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

Award of $398.77.

OPINION ISSUED JULY 19, 2000

HIGHLAND CELLULAR, INC.
VS.
DIVISION OF CORRECTIONS
(CC-00-206)

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[1]After a review of the evidence adduced by Mr. Copley at the June 1, 2000, hearing, the Court has determined that the amount of damages set forth should be reduced by $40.00 because that amount was incurred as a return-core deposit for the CV joint purchased by Mr. Copley.

Claimant appeared *pro se*.
Joy M. Cavallo, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks payment in the amount of $358.03 for providing cellular telephone service to the Mount Olive Correctional Complex, Fayette County. 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 JULY 19, 2000

KIMBERLY JONES AND GARY JONES
VS.
DIVISION OF HIGHWAYS
(CC-97-323)

Michael J. Aloi, Attorney at Law, for claimants.
Xueyan Zhang, Attorney at Law, for respondent.

PER CURIAM:

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

1. On August 22, 1995, claimant Kimberly Jones was walking down the steps at the residence of Kenneth Culhane which is located on Church Street, Grant Town, Marion County. While she was crossing the last step, Ms. Jones' foot landed on the upper side of the ditch adjacent to the road. She fell backwards onto the steps and sustained personal injuries to her ankle and hip in the fall.

2. At the time of the incident, respondent was at all times responsible for the maintenance of Church Street. At or about the time of this incident, respondent

was in the process of conducting a repaving project on Church Street, which included digging a ditch below the last step to the road at the Culhane residence.

3. Respondent failed safely and properly to complete the paving project as well as having failed to provide warning devices at the location of the ditch for the public. Thus, respondent bears some of the responsibility for claimant Kimberly Jones' injury.

3. As a result of this incident, claimants filed a notice of claim in the amount of $150,000.00. However, claimants agree to settle and relinquish this claim against respondent for the amount of $2,200.00.

4. Respondent agrees that the amount of damages stipulated to by the parties is fair and reasonable.

The Court has reviewed the facts of the claim as stated in the Stipulation, and adopts the statement of facts as its own. The Court finds that respondent was negligent in its maintenance of Church Street in Grant Town, Marion County, on the date of claimant's incident; that the negligence of respondent was a proximate cause of the personal damages sustained by Ms. Jones; and that the amount of the damages agreed to by the parties is fair and reasonable.

Accordingly, the Court is of the opinion to and does make an award to claimants in the amount of $2,200.00.

Award of $2,200.00.

OPINION ISSUED JULY 19, 2000

ERVIN LEE PHILLIPS
VS.
REGIONAL JAIL AND CORRECTIONAL
ACILITY AUTHORITY
(CC-00-179)

Claimant appeared *pro se*.

Joy M. Cavallo, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant, an inmate at the Southwestern Regional Jail, in Holden, Logan County, seeks $130.00 for a watch that was entrusted to respondent. When claimant inspected his inventoried and stored personal property items, he discovered that his

watch was missing. Thus far, respondent's employees have been unable to produce claimant's personal property.

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

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

Accordingly, the Court makes an award to the claimant herein in the amount of $130.00.

Award of $130.00.

OPINION ISSUED JULY 19, 2000

CHARLES SCHRADER AND HAZEL SCHRADER
VS.
DIVISION OF HIGHWAYS
(CC-97-58)

Phillip C. Monroe, Attorney at Law, for claimants.
Andrew F. Tarr & Xueyan Zhang, Attorneys at Law, for respondent.

BAKER, JUDGE:

Claimants brought this action for damage sustained to their real property from a landslide allegedly
caused by the negligent maintenance of the drainage system on U. S. Route 19. U. S. Route 19 is a road maintained by respondent in Marion County. The Court is of the opinion to deny this claim for the reasons more fully set forth below.

In 1964 claimants purchased their residence which is situated approximately thirty feet below the road surface of U. S. Route 19, near Fairmont. U. S. Route 19 is a priority road that generally traverses in a north-south direction, but at this location the road traverses east-west. The West Fork River, which flows from the west to the east, is located about forty-five feet below claimants' residence. The residence was originally built during the 1950's. In 1971, a bedroom was added to the residence. In 1991, claimants installed a septic tank behind their residence between the residence and the West Fork River. A garage, which was built about twenty to twenty-two years ago, is located on the east side of their residence. After a set of steps in front of the residence was washed away by water, claimants built a set

of concrete steps in front of the house on the east side of the residence. The steps start at road level and proceed to the bottom corner of the garage. On the west side of the property, there is an eight by ten foot building that was constructed about fifteen to eighteen years ago. Also, claimants installed guardrail in front of their residence after a vehicle being driven by an intoxicated driver crashed into their residence.

According to claimants' son, Jeffrey Schrader, a flood occurred in 1985.[1] The West Fork River flooded above its bank to the extent that water was above the twelve feet difference in elevation from the river level to the foundation of the residence and flooded the basement of the Schrader's residence. The flood did not cause any structural damage to the residence, but flood waters in the basement caused minor damage.

During the late 1980's, claimants began to experience considerable water run-off from U. S. Route 19. Jeffrey Schrader testified that the water appeared to resemble a "river coming down our front steps," causing an accumulation of three to four inches of water in their front yard. After this water run-off began, claimants began to notice that the road surface was cracking and then it began sinking in one particular spot to a depth of about six to eight inches.

In 1993, claimants began to notice problems in the basement of their home. The basement wall on the north side of the house which faces U.S. Route 19 began to bulge toward the inside of the basement and cracks began to develop across the whole wall. The residence, which does not have guttering or down spouts, has had to have major repairs on two separate occasions.

In 1994, claimants determined that the wall on the north side of the residence facing the road was in a such a state of disrepair that they were required to rebuild the wall. This repair project took about two months to complete and cost approximately $10,000.00. Then in 1996, claimants were forced to undertake a second major construction project in an attempt to save their home from being pushed completely off its foundation. To accomplish this project, claimants' residence was placed on stilts and all four walls along with the foundation were rebuilt. Claimants also had a foundation constructed for the storage building located to the west of the residence. This project took about three months to complete at cost of approximately $33,000.00.

Claimants contend that during the time beginning in 1989 or 1990 when the damage to their residence was occurring, they made telephone calls to respondent, wrote letters, and personally contacted respondent on several occasions, but respondent did not take corrective measures until 1996. Jeffrey Schrader testified

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[1]The Court takes official notice of the fact that in 1985 heavy rainfall produced tremendous flooding in the area in question.

that the drainage system on the opposite side of U. S. Route 19 does not function properly and he personally noticed water ponding on both sides of the road in the summer of 1998. After the retaining wall was constructed by respondent in 1996, Mr. Schrader dug a small drainage ditch on his property. This drainage ditch, about thirty feet from the residence, provides a path for the water to flow from the road into the West Fork River. Claimants are continuing to experience cracks in the basement on the west wall of their residence.

Along U. S. Route 19, across the road from the Schrader residence on the north side, there is a ditch from which the water flows into a culvert beneath the surface of the road. This culvert continues beneath claimants' driveway for one-hundred fifty to two hundred feet. Then the culvert and drain proceed down to the river bank. The ditch and culverts were installed by a contractor at the direction of respondent. In accordance with the terms of a 1996 contract with respondent, the contractor on the projects was required to clean the culverts on the road to alleviate a standing water problem. Claimants contend that this drain has been the source of the problems which have occurred to their residence.

The position of respondent is that it has not been negligent in the maintenance of the ditch line on U. S. Route 19. In 1991, the road was determined to be in a state of disrepair. When respondent discovered the condition of its roadway, it placed hot patch on the road surface. In1996, the road was repaved and respondent installed a retaining wall. The retaining wall consists of a whaler across the top of the frame with lagging between vertical piles which are anchored into the rock beneath the ground level about twenty-five feet.[2] According to Marion County Crew Chief, Howard Swidler, the culverts are checked when necessary and these culverts were checked after 1996 and appeared to be "wide open, clean as a whistle." However, Mr. Swidler admitted that he did not personally check the culverts because he did not believe there was a problem. Both Mr. Swidler and Marion County Foreman, Bill Ray Lane, testified that they were aware of flooding problems in the area that were caused by the river about one mile farther along the road. Both testified that the river, on occasion, flooded and required the road to be closed to the west of claimants' property.

Dr. Lyle K. Moulton, claimant's geotechnical expert in soils and foundations, examined claimants' property on four occasions from November 1997 - February 1999. It is his opinion that respondent has not responded properly to the cause of the landslide which affects not only claimants' property but also U.S. Route19. Dr. Moulton testified that the particular slide involved in this claim probably has existed since the late 1980's, but he was unable to identify what

[2] "Lagging" is material, usually timber or steel, that is placed between or behind the flanges of the piles in order to hold material that is secured.

originally caused the landslide. He is of the opinion that this slide is progressive in nature, meaning that it begins at the top above the road and is progressing down the slope toward the West Fork River with claimants' property between the road and the river. When respondent constructed the retaining wall in 1996, it addressed the landslide only as far as U.S. Route 19 is concerned. There is now a crack in the ground in front of the retaining wall which is approximately one and a half inches wide and twelve feet long. This crack proceeds through the property to the south of the retaining wall. In his opinion this is evidence of the slip plane where the residual sliding is taking place all the way to the river. Dr. Moulton suspects that water is flowing horizontally under the roadway, from the side farthest away from claimants' residence from an undetermined source toward their property, removing granular material beneath the surface of the road thus causing the road to fall and collapse. He noted that the road is giving way and must be patched with asphalt where it is sinking. The timber lagging does not go all the way down, so rock used behind the wall on one side works its way out from under the lagging on the top. The fill material between the road and the retaining wall is falling down the slope at the top of claimants' property. Dr. Moulton is of the opinion that respondent should have anticipated that this landslide would continue to cause problems farther down the slope affecting the stability of claimants' property.

Further, Dr. Moulton testified that the landslide area was aggravated by respondent's road work. The continued resurfacing of the pavement added a substantial thickness of material, which has a substantially higher unit weight than the soil itself. The existing limiting equilibrium system was aggravated by respondent's maintenance of the road when it added more weight to the top of the slope by resurfacing the roadway, which caused further movement in the slope. A stability analysis performed by Dr. Moulton indicates that this situation took place over such a long period of time that there was sufficient movement in the slope so that the residual strength of the soil was mobilized.[3] Since the weight of the road probably exceeded the peak strength, Dr. Moulton believes that the analysis shifted

[3] A "stability analysis," also known as a "Bishop analysis," is a computer program that tries to determine the critical center circle that would produce the lowest factor of safety, which would be indicated by a value of "1." This process is done by repeating the analysis many times, moving the center around and calculating the factor of safety for any circle through a particular point. The computer program keeps resolving the problem until it finds the lowest factor of safety, which is the minimum factor of safety for the particular analysis. Eventually ths program establishes where a landslide is occurring.

to residual strength.[1] Dr. Moulton believed that data from 1998 to February 1999 establish that the slide begins in the middle of U. S. Route 19 and proceeds to below the toe of the slip which is in the West Fork River. Additionally, Dr. Moulton was of the opinion that traffic proceeding over the road was another significant factor affecting the landslide.

Dr. Moulton rejected Dr. George A. Hall's , a geotechnical engineer employed by respondent, expert opinion that the landslide is a retrogressive slide and began at the toe of the slope. Dr. Moulton asserts that his observations of the river did not indicate that the landslide starts from the bottom of the slope, rather it began at the top of the slope above the road. During his on site visits to the Schraders' property, Dr. Moulton observed cracks in claimants' residence proceeding down the slope. The basement wall has moved outward, but there is not much movement in the vertical face of the south wall. While the cracks on the residence appeared before the tension cracks, Dr. Moulton believed that the residence's foundation, during construction, may have been the cause. Except for the tension cracks at the top of the road, there were no other scarps or clear signs of a step-wise failure. If the landslide is a retrogressive slide, Dr. Moulton is of the opinion that it would have affected claimants' residence before affecting the road. However, Dr. Moulton indicated that the road, not the Schrader residence, was affected. Further, Dr. Moulton asserts that Dr. Hall's failure to depict the river level explained the destabilizing effect obtained by Dr. Hall's stability analysis. All of the factors considered by Dr. Moulton led him to the conclusion that there was a progressive slide beginning at the road and moving toward the river bank. As this slide moves, it is causing the damages to claimants' property and residence.

Dr. Hall is of the opinion that the landslide which is causing the damage to claimants' property and to respondent's road (U.S. Route 19) begins at the bottom of the slope. According to Dr. Hall, this slide apparently started in the mid-1980's and moved its way up the slope through claimants' property to U.S Route 19. This particular slide is thus retrogressive in nature rather than progressive, *i.e.*, the slide is moving up the slope rather than down the slope as is the usual scenario for slides. Dr. Hall asserts that Dr. Moulton admits that the peak strength of the soil would have existed before there was a landslide at that location. According to Dr. Hall, this admission supports his theory that the only place for a failure to occur was at the bottom of the slope. Using a stability analysis utilizing residual strength, Dr. Hall observed that there was no failure once the slip plane formed all the way to the road.

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[1]"Peak strength" is when the soil is loaded up, there is a stress strain response where the shear stress develops to a certain peak level. As the deformation continues it levels out, which leave the "residual strength," which can be substantially below the peak strength.

There was a lot of water pressure from the 1985 flood which would have saturated that slope. Dr. Hall calculated the water level of the river to be twenty feet higher than the water level was prior to the flood. Dr. Hall opined that the water pressure and velocity from the higher water level would have been sufficient to cause ground erosion in the river bank. With the erosion and saturation of the soil in the lower part of the slope, when the river went back down a failure in the lower part of the slope was initiated. This condition, which eventually created a scarp, was not a total failure but it reached peak strength and probably exceeded it slightly, which allowed that material to move and remove support from the above material. At the time the piling was installed for the retaining wall, the water table was almost at the ground surface. Dr. Hall explained that additional water is coming from a previous mine, a coal seam or some typical stratum that puts water into the ground, which is a natural condition. The septic tank, added by claimants to their property in 1991, further saturated the soil with approximately one-hundred-fifty gallons of water per day. At this point, the slippery clay-silt soil at the toe of the slope became lubricated which led to the retrogressive failure and the slide which eventually moved up toward the road. Likewise, Dr. Hall observed a current residual failure in the slope, which he believes substantiates his opinion that this is a retrogressive slide with the failure starting at the bottom of the slope. Dr. Hall further testified that he did not include the river in the stability analysis because that is where the water level was at the time of the investigation.

Dr. Hall testified that an important difference between his and Dr. Moulton's expert opinions regards a scarp on the Schrader property. Dr. Moulton believes a scarp is a necessary sign of a retrogressive slide, while Dr. Hall believes that a scarp is not a necessary sign for a retrogressive slide. According to Dr. Hall, when the soil below pulls away, there is some tension and the soil can expand. Cracks and deformations can develop in the soil. In the bottom portion of the slip, the material is being pushed and compressed. If material at the bottom moves and the support is removed at the bottom, then the slip can move further up the slope. Then, when there is a crack above, this moves slightly down the slope, removing support from material further up the slope and the landslide continues to progress further up slope with each step, creating what Dr. Hall described as a "domino effect." If pressure is reduced, resistance is reduced for the next block of material, and the effect continues. Thus, a scarp is not necessary and is a matter of pressure between the different pieces of the eventual slide. He provided evidence of this opinion in photographs of the ground surface on the south side of claimant's property near the West Fork River which revealed small cracks in the soil.

Additionally, Dr. Hall disagrees with Dr. Moulton that the patching placed by respondent on U.S. Route 19 aggravated the landslide. Dr. Hall is of the opinion that the pavement irregularities developed after the cracks formed south of the retaining wall creating a material void and causing the material from behind the

piling to fall through the timber, thus pulling soil from beneath the road surface and causing the pavement to sink. Accordingly, it is his opinion that a retrogressive slide beginning below claimants' residence at the West Fork River is the proximate cause of the damage that has occurred and it is the cause of the continuing damage to claimants' residence and property.

The Court has held that respondent has a duty to provide adequate drainage of surface water, and drainage devices must be maintained in a reasonable state of repair. *Haught vs. Dept. of Highways*, 13 Ct. Cl. 237 (1980). In claims of this nature, the Court will examine whether respondent negligently failed to protect a claimant's property from foreseeable damage. *Rogers vs. Div. of Highways*, 21 Ct. Cl. 97 (1996). In the claim of *Mount v. DOH*, Opinion issued January 28, 2000, this Court held that respondent was responsible for a slide occurring on claimant's property when it continually placed asphalt on the road above claimant's property without regard to the effect of the additional weight on the soil beneath the road surface. Although the slide was progressing from above the road, the weight of the road caused the slide to progress further below the road, causing damage to claimant's property. Maintenance of the drainage ditch adjacent to the road allowed water to saturate the soil thus providing a slip plane for the slide. The claim herein presents a case of first impression for this Court as one of the experts is of the opinion that the proximate cause of the damage to claimants' property is the result of a retrogressive slide. This Court has not had a claim of that nature prior to the instant claim. However, after due consideration of the testimony of both experts, the Court has reached the conclusion that the evidence herein does make a case for a retrogressive slide rather than a progressive slide. The fact that there is evidence of cracking in the soil at and near the West Fork River; that the south basement wall of the house is beginning to fail again; the slope is elongating as the toe of the landslide is moving faster than the head of the landslide; and that there is evidence of the soil cracking at the south edge of the retaining wall all seem to the Court to substantiate the theory put forth by Dr. George Hall that this is in fact a retrogressive slide. It is an unusual phenomenon but the Court is of the opinion that Dr. Hall is correct in his analysis of the situation herein.

Further, the Court is of the opinion that respondent, once on notice of the situation on U. S. Route 19, took immediate and reasonable action to prevent any further drainage onto claimants' property from the landslide and excess water flowing across the road onto their property. The Court finds that the terrain in this area of U. S. Route 19 is typical of many areas in West Virginia which are subject to landslides. In the instant claim, claimants have failed to established that respondent maintained U. S. Route 19, in Marion County, in a negligent manner. While the Court is sympathetic to the situation of claimants, the fact remains that there are many factors which have brought about this particular landslide problem affecting their property, including the unusually high water in 1985, the natural drainage area

and the location of the residence. Consequently, there is insufficient evidence of negligence on the part of respondent upon which to base an award.

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

Claim disallowed.

OPINION ISSUED JULY 19, 2000

WILLIAM A. SCHREYER
VS.
DIVISION OF MOTOR VEHICLES
(CC-00-165)

Claimant appeared *pro se*.

Joy M. Cavallo, 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.

On December 4, 1999, Mr. Schreyer was traveling in his vehicle on Route 88, near West Liberty, Ohio County, when his vehicle was pulled over by a member of the Ohio County Sheriff's Department. Upon learning that Mr. Schreyer's driver's licence had been revoked by respondent, the Deputy Sheriff arrested him and had his vehicle towed. Apparently, respondent had failed to mail a letter of notification of revocation of driver's licence with sufficient postage to Mr. Schreyer, and it was returned subsequently to respondent's office. Claimant seeks reimbursement for the towing bill of $75.00 which he incurred as a result of the incident.

In its Answer, respondent admits the validity of the claim and that the amount is fair and reasonable. The Court is aware that respondent does not have a fiscal method to reimburse claimant for a loss such as that experienced by claimant; therefore, the claim has been submitted to this Court for determination.

The Court, having reviewed the facts and circumstances in this claim, has determined that claimant is entitled to a recovery for his sustained loss.

Accordingly, the Court makes an award to claimant in the amount of $75.00.

Award of $75.00.

OPINION ISSUED JULY 19, 2000

TIMOTHY J. TAUCHER
VS.
DEPARTMENT OF PUBLIC SAFETY
(CC-00-51)

Claimant appeared *pro se*.
Joy M. Cavallo, Assistant Attorney General, for respondent.

PER CURIAM:

Claimant, a member of the West Virginia State Police assigned to the Bureau of Criminal Investigation in Berkeley County, brought this claim for reimbursement of financial contributions which were deducted in error from his salary for deposit into the Department of Public Safety Retirement Voluntary Pledge Fund. The Department of Public Safety Retirement Voluntary Pledge Fund is not a statutory fund established by the West Virginia Legislature. The Court is of the opinion to deny this claim for the reasons more fully set forth below.

On September 12, 1994, claimant enlisted in the West Virginia State Police as a cadet. The following day, claimant was presented by respondent with a contract for the Department of Public Safety Retirement Voluntary Pledge Fund (hereinafter referred to as "the Fund").[1] Claimant made an election in anticipation of his retirement to decline the opportunity to make contributions to the Fund. However, claimant signed the contract, naming his father as beneficiary, but he wrote the word

1. The Department of Public Safety Retirement Voluntary Pledge Fund is a fund established by the West Virginia State Police in about 1963 . Members of the State Police who join the Fund voluntarily sign a contract to pay the sum of $10.00 to each participant of the Fund at retirement. The Fund does not have a tax identification or any other such number. According to paragraph 7 of the Fund contract, "The Accounting Office under the supervision of the Superintendent shall keep a proper and accurate account to all receipts and expenditures." Pursuant to paragraph 4 of the contract, "[C]ommanding Officers are authorized to make collections from the contributing member or civilian employees and forward them to the Department Accounting Office. Commanding Officers will be furnished the names of all contributing members or civilian employees." Paragraph 8 of the contract states: "Arrangements will be made with the management of the depository whereby the signature of any two (2) of Department Headquarters Senior Staff, the Superintendent, Lieutenant Colonel or Major(s) shall be honored on checks for withdrawal of said Retirement Voluntary Pledge Fund;"

"NO" by his signature. The contract was then returned to respondent. Thereafter, claimant did not make any contributions to the Fund.[1] In 1996, while assigned to the detachment in Charles Town, claimant was presented with an itemized form of the insurance and expenditures which he elected as a cadet. Listed on the form was the Fund deduction in the amount of $10.00 per month and his father as beneficiary. Claimant signed that form without realizing the error on the form. In September 1998, respondent began making deductions from claimant's salary of $10.00 for deposit in the Fund, which deductions were printed on his pay stub each pay period. Claimant discovered this oversight in January of 1999, filed a grievance through his department, and contacted the accounting office. In a letter dated January 3, 2000, from the Chief of Administrative Services, Lieutenant Colonel J. S. Powers, the erroneous entry was acknowledged and the fact that contributions had been deducted inadvertently from claimant's salary, and that such deductions had ceased. Specifically, the letter stated:

> [I] am familiar with the time period during which this transpired, and have no hesitation in telling you that it originated with an employee whose performance was less than acceptable. . . .
>
> . . . .
>
> I have discussed this issue with the Department Comptroller and the Superintendent, and our first inclination was, of course, to refund these erroneous deductions to you. Unfortunately, the Pledge Fund is not a '*State*' account. Funds flowing into the fund immediately flow right back out as they are paid to members of the fund who have retired. Since there is never any surplus of funds in this account, we have no means of making a refund, and to make a refund from any other account which the Department has access to would be illegal per se. . . .

Respondent asserts that the Fund is not a statutorily recognized fund authorized by the Legislature; therefore it is not a "state agency" within the meaning of West Virginia Code § 14-2-3. Accordingly, this Court does not have jurisdiction

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2. According to paragraph 5 of the fund contract, "In the event any member fails to contribute, such member automatically eliminates himself from participating in the Retirement Voluntary Pledge Fund."

over this claim.[1] Respondent also asserts that when the Auditor's office mistakenly approved the financial contribution deductions from claimant's salary, it acted outside the scope of its authority. Moreover, the claimant may have been negligent when he affixed his signature to the document referred to as the Fund contract as well as the 1996 written itemization form and then failed to observe the deduction printed clearly on his pay stub each pay period. Respondent further takes the position that the Fund would be unjustly enriched if revenue from the State Treasury is used to reimburse claimant.

In respondent's Motion to Substitute Respondent, filed May 26, 2000, respondent argues in the alternative that this Court may have jurisdiction over the Fund because the Fund has been given all of the *indicia* of being a State agency by its existence and operation, even though the Fund does not meet the definition of "State Agency" as outlined in W.Va. Code §14-2-3. Respondent urges the Court to find the Fund to be a State Agency based upon the analysis articulated by the West Virginia Supreme Court in *Blower vs. W.Va. Educ. Broadcasting Auth.*[4] See Id., 182 W.Va. 528; 389 S.E.2d 739 (1990). The Court does not agree with this interpretation of the West Virginia Code and case law.

In the present claim, the Court is of the opinion that the Fund is not a "State Agency" as defined by the West Virginia Code. The Fund, which was established by respondent as a separate entity, does not have a legislative framework and it does not receive State funds for any purpose. Therefore, although the financial contributions from claimant's salary were deposited with the Fund, this Court is without jurisdiction in this matter. Further, the Court is of the opinion that it is without jurisdiction to make an award against the Fund or to issue any order requiring reimbursement from the Fund itself.

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3. In part, the West Virginia Court of Claims has jurisdiction over claims against the State or any of its agencies, which in equity and good conscience should be paid. See W.Va. Code § 14-2-13(1). Specifically, W.Va. Code § 14-2-3 defines "State Agency" as "a state department, board, commission, institution, or other administrative agency of state government: Provided, that a 'state agency' shall not be considered to include county courts, county boards of education, municipalities, or any other political or local subdivision of this State regardless of any state aid that might be provided."

[4] In syllabus point 1 of *Blower*, the West Virginia Supreme Court stated: "In determining whether a particular organization is a state agency, we will examine its legislative framework. In particular, we look to see if its powers are substantially created by the legislature and whether its governing board's composition is prescribed by the legislature. Other significant factors are whether the organization can operate on a statewide basis, whether it is financially dependent on public funds, and whether it is required to deposit its funds in the state treasury."

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

Claim disallowed.

OPINION ISSUED JULY 19, 2000

TEAYS RIVER CONSTRUCTION COMPANY
VS.
DIVISION OF LABOR
(CC-00-177)

Claimant appeared *pro se*.

Joy M. Cavallo, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks payment in the amount of $6,205.04 for electrical services rendered at the scalehouse building of respondent's weights and measures section in St. Albans, Kanawha County. 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 JULY 19, 2000

UNIVERSITY OF GEORGIA RESEARCH
FOUNDATION, INC.
VS.
DIVISION OF NATURAL RESOURCES
(CC-00-109)

Claimant appeared *pro se*.

Daynus Jividen, Senior Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $3,030.00 for an annual contractual obligation to study and examine wildlife for health conditions and/or causes of mortality for respondent. The invoice for the third quarter of the 1999-2000 fiscal year was not received by the Wildlife Resources Section; therefore, the documentation for these services was not processed for payment within the appropriate fiscal year; and claimant has not been paid. In its Answer, respondent admits the validity of the claim as well as the amount, and states that there were sufficient funds expired in the appropriate fiscal year from which the invoice could have been paid.

Accordingly, the Court makes an award to claimant in the amount of $3,030.00.

Award of $3,030.00.

OPINION ISSUED AUGUST 24, 2000

KENNETH L. BAKER
VS.
DIVISION OF HIGHWAYS
(CC-99-346)

Claimant appeared *pro se*.

Xueyan Zhang, Attorney at Law, for respondent.

PER CURIAM:

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

1. On July 19, 1999, claimant was traveling in his vehicle on Waterloo Road near Leon, Mason County, when his vehicle struck a washed out portion of the berm, causing damage to his vehicle.

2. Respondent is responsible for the maintenance of Waterloo Road in Mason County.

3. Respondent was aware that the berm was in a state of disrepair and failed to provide warning devices at the location of the hole for the traveling public.

4. As a result of this incident, claimant's vehicle sustained damage in the amount of $354.30.

5. Respondent agrees that the amount of damages as put forth by the claimant is fair and reasonable.

The Court has reviewed the facts of the claim and finds that respondent was negligent in its maintenance of Waterloo Road in Mason County on the date of claimant's incident; that the negligence of respondent was the proximate cause of the damages sustained to claimant's vehicle; and that the amount of the damages agreed to by the parties is fair and reasonable. Thus, claimant may make a recovery for his sustained loss.

Accordingly, the Court is of the opinion to and does make an award in the amount of $354.30.

Award of $354.30.

OPINION ISSUED AUGUST 24, 2000

DON K. BALL
VS.
DIVISION OF HIGHWAYS
(CC-99-320)

Bradley H. Layne, Attorney at Law, for claimant.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

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

1. On April 6, 1999, claimant was traveling eastbound on U.S. Route 33, near Letart in Mason County, when a rock fell from the hillside beside the road, striking claimant's vehicle, causing claimant to lose control whereupon he drove into the ditch line.

2. Respondent is responsible for the maintenance of U.S. Route 33 in Mason County.

3. Respondent was aware that the area in question was in a known rock fall area and failed to provide warning devices at this location for the traveling public.

4. As a result of this incident, claimant's vehicle sustained damage in the amount of $7,513.24. However, claimant has agreed to settle and relinquish this claim for the amount of $5,000.00.

5. Respondent agrees that the amount of damages as put forth by the claimant is fair and reasonable.

The Court has reviewed the facts of the claim as stated in the Stipulation, and adopts the statement of facts as its own. The Court finds that respondent was negligent in its maintenance of U.S. Route 33 in Mason County on the date of claimant's incident; that the negligence of respondent was the proximate cause of the damages sustained to claimant's vehicle; and that the amount of the damages agreed to by the parties is fair and reasonable. Thus, claimant may make a recovery for his sustained loss.

Accordingly, the Court is of the opinion to and does make an award in the amount of $5,000.00.

Award of $5,000.00.

OPINION ISSUED AUGUST 24, 2000

PATRICIA A. HUGHART AND DAVID SAMUEL HUGHART
VS.
HIGHER EDUCATION POLICY COMMISSION
CC-00-137)

Claimant appeared *pro se*.
Joy M. Cavallo, 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.

Claimants seeks $2,327.00 for personal property damage as a result of a hot water valve bursting in claimant, David Samuel Hughart's, dormitory room at Arnold Hall on the West Virginia University, Morgantown campus. In its Answer, respondent admits the validity of the claim and that the amount is fair and reasonable. The Court is aware that respondent does not have a fiscal method for paying claims of this nature; therefore, the claim has been submitted to this Court for determination.

In view of the foregoing, the Court is of the opinion to and does make an award to claimant in the amount of $2,327.00.

Award of $2,327.00.

OPINION ISSUED AUGUST 24, 2000

HOWARD L. KEYSER
VS.
DIVISION OF HIGHWAYS
(CC-99-233)

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

PER CURIAM:

Claimant brought this action for vehicle damage sustained when his vehicle's windshield was struck by loose gravel when he was traveling on W.Va. Route 62 at Clifton between Point Pleasant and New Haven. W.Va. Route 62 at this location is a road maintained by respondent in Mason County. The Court is of the opinion to deny this claim for the reasons more fully set forth below.

The incident giving rise to this claim occurred on May 24, 1999, at approximately 9:30 p.m. On the night in question, claimant was traveling on W.Va. Route 62 in his 1998 Mazda 626 at a speed of about fifty to sixty miles per hour with the aid of the vehicle's headlights. Mr. Keyser frequently travels this portion of W.Va. Route 62. At this location, W.Va. Route 62 is two-lane, black top road with double yellow lines indicating the center of the road surface and white lines indicating the edges of the road surface. Crushed class 1 limestone gravel, about one-half to one and one-half inches in size, is placed along the berm of the road surface. As Mr. Keyser drove the vehicle along the road, a vehicle about four to five car lengths away propelled a piece of limestone gravel on the road surface into the air which struck his vehicle's windshield, impacting near the State inspection sticker. The subsequent impact cracked the windshield and the crack eventually split to the other side of the windshield by the following morning. According to Mr. Keyser, respondent is negligent in its placement of limestone gravel on the berms of State roadways because gravel will get onto the road surface and is then propelled by vehicles. As a result of this incident, his vehicle sustained damage in the amount of $274.58. Mr. Keyser asserts that his comprehensive motor vehicle insurance policy did not cover this incident. The Court requested an abstract of Mr. Keyser's motor vehicle insurance policy in effect at the time of the incident. As of the date of this opinion, Mr. Keyser has failed to provide the Court with his insurance abstract.[1]

[1] In past claims, failure to tender an insurance abstract requested buy the Court has been grounds for dismissal of a claim. See *Phillips vs. Division of Highways*, (CC-97-87) opinion issued April 15, 1998.

The position of respondent was that it did not have notice that the limestone gravel caused any hazard to the traveling public on W.Va. Route 62. According to H. Ross Roush, Crew Supervisor for respondent in Mason County, fifty percent of roads in West Virginia have limestone gravel along the berms. At this location, the road surface of W.Va. was last paved in 1996 or 1997. Mr. Roush asserts that he seldom receives complaints that gravel creates any problems for the traveling public. While Mr. Roush acknowledged that limestone gravel can and does get onto the road surface, he was unaware of any complaints that any broken windshields may have resulted from such loose gravel being thrown onto vehicles.

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

In the present claim, the evidence failed to establish that respondent had notice of a hazardous condition on W.Va. Route 62. While the Court is sympathetic to claimant's plight, the fact that loose gravel does get onto the road surface is insufficient to constitute negligence on the part of respondent. Respondent cannot be expected to construct every berm in this State in such a manner as to prevent loose gravel from getting onto a road surface. Consequently, there is insufficient evidence of negligence on which to base an award.

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

Claim disallowed.

OPINION ISSUED AUGUST 24, 2000

MICKEY D. MAHONE, SR.
VS.
DIVISION OF HIGHWAYS
(CC-98-63)

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

PER CURIAM:

Claimant brought this action for damages sustained to his personal property due to the alleged negligent installation of the Brent Belcher Bridge on County Route

3/23, locally known as Stowers Road, which caused the Middle Fork of the Mud River to flood in Griffithsville.[1] At this location, County Route 3/23 is maintained by respondent in Lincoln County. The Court is of the opinion to make an award in this claim for the reasons more fully set forth below.

In 1995, respondent constructed the Brent Belcher Bridge and embankment on County Route 3/23 in order to replace a bridge about fifteen-hundred feet upstream from the location in question. A separate five foot wide foot-bridge, which was forty to fifty feet long, and just upstream from the location of the Brent Belcher Bridge, was removed in order to construct the Brent Belcher Bridge. At this location, County Route 3/23 traverses in an east-west direction and crosses the Middle Fork of the Mud River which flows in a southerly direction. Respondent chose this valley location because it had a better roadway approach than the site fifteen hundred feet upstream. The beams of the seventy foot precast concrete box bridge were implanted thirty-three inches into the ground. The road surface portion of the bridge has an asphalt overlay and guardrail installed along each side of the bridge. Wing walls were not present for the foot-bridge, but were constructed for the Brent Belcher Bridge. The bottom of the bridge is approximately twelve feet above the river level, which is the same height as the previous foot-bridge.

Before construction, respondent completed a hydraulic analysis and studied the river as well as rainfall in the area. According to respondent's bridge design engineer Gregory Lee Surber, the bridge was designed and constructed with a low elevation in the approach road, so if water flowed to the bridge, it would flow through the low place in the road and subsequent damage from water flow would be reduced. Mr. Surber was not prepared to testify in detail about specifications and hydraulic studies.

At the hearing, Mr. Mahone testified that the embankment of W.Va. Route 3, proceeding north, is two and one-half feet higher in elevation than his former property. In addition, Mr. Mahone asserts that the guardrail on the bridge collects debris and adds an extra two and one-half feet to this elevation. Mr. Mahone asserts that the bridge construction, excavation and fill created a dam and "flood zone" in the valley area, which is the proximate cause for the flood damage to his personal property. Mr. Mahone stated that since March of 1997, following construction of the Brent Belcher Bridge, the area in question has flooded four times.

According to Stanley Lee Rose, a resident of the community for about twenty years, during periods of heavy rain the water from Middle Fork flows onto the

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[1]At a pre-trial conference on January 20, 2000, Mr. Mahone reduced the amount of his claim from $67,000.00 to $7,000.00, for damage only to his personal property after he sold the residence in question as the Administrator of the Estate of Lola F. Mahone.

new bridge carrying debris. The debris blocks further water which then backs up and flows onto the properties upstream which includes that of the claimant and Mr. Rose. The bridge is sufficient to handle water except when water flows to the outer banks of the river. Mr. Rose asserted that before construction of the bridge, about an inch of water would accumulate in his basement, now about four feet of water accumulates in his basement. Mr. Rose further testified that he has had to renovate his basement.

On March 2, 1997, the area in question began to flood in isolated pockets after extensive rain during the previous day. By March 3, 1997, the flood waters had receded. Emergency Services Director Allen Holder, who is the county's link to the State and Federal governments in times of disaster, testified that he observed extensive damage on March 4, 1997, and requested National Guard troops. About forty National Guard troops were sent to various locations in Lincoln County to assist in clean-up efforts. Extensive debris remained in the area, creating extensive county wide disposal cost, including tipping fees of about $9,000.00. Mr. Holder further testified that the Federal Emergency Management Agency (hereinafter referred to as "F.E.M.A.") provided monetary assistance to residents who were damaged by the flood. Mr. Holder was unable to determine the cause of the flooding.

The flood damaged Mr. Mahone's personal property which he stored in the basement of his parents' residence after he moved to the residence in 1991 in order to care for his parents. Mr. Mahone did not have flood insurance and he was not eligible for financial assistance from F.E.M.A. According to Mr. Mahone, his personal property items such as a television, VCR, Honda Moped, Onan generator, table with chairs, couch, lamps, pots, pans, table and end table could not be salvaged from the residence's basement and were discarded. Mr. Mahone calculated the sustained loss to be in the amount of $11,000.00, but he depreciated value of the items to the sum of $7,000.00 which amount represents his damages.

The position of respondent is that it was not responsible for the flooding that occurred to claimant's property. Respondent asserted that the Brent Belcher Bridge was constructed properly and that the damage experienced by claimant was the result of extensive flooding throughout Lincoln County. According to Highway Administrator Larry Paul Pauley, not since 1962 had the area experienced such flooding. Mr. Pauley further testified that as a result of the flood, the county sustained four to five million dollars in road damage.

On prior occasions, this Court has held that respondent may be liable for the condition posed by a bridge. *Burgess vs. Dept. of Highways*, 18 Ct. Cl. 2 (1989). Respondent has an obligation to construct bridges in such a manner as not to create subsequent flood problems for nearby property owners. *Daniels vs. Dept. of Highways*, 16 Ct. Cl. 43 (1986). In claims regarding water damage, the Court will examine whether respondent negligently failed to protect a claimant's property from foreseeable damage. *Rogers vs. Div. of Highways*, 21 Ct. Cl. 97 (1996).

It appears to the Court that the construction of the bridge approaches and wing walls, the increased size of the Brent Belcher Bridge over that of the previous foot-bridge, and the propensity of the bridge guard rails to collect debris, collaborated to create a damming effect at the site, resulting in the damage complained of, constituting sufficient negligence on the part of respondent on which to base an award.

Notwithstanding the negligence of respondent, the Court is of the opinion that claimant was also culpable in the loss sustained. Claimant's personal property was discarded indiscriminately. No effort was made to salvage those items of personalty which could have been saved, *e.g.*, moped, generator, pots and pans. Accordingly, the Court determines that a fair and reasonable amount for claimant's loss to be the amount of $3,900.00.

In accordance with the findings of fact and conclusions of law stated herein above, the Court is of the opinion to and does make an award to claimant in the amount of $3,900.00.

Award of $3,900.00.

OPINION ISSUED AUGUST 24, 2000

ROBIN MURPHY
VS.
DIVISION OF HIGHWAYS
(CC-99-174)

Claimant's husband, Duane Murphy, appeared on her behalf.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for vehicle damage sustained when her vehicle struck a hole while she and her husband were traveling westbound on Route 101/1, locally known as 8th Avenue, between 1st Street and 2nd Street in Huntington. Route 101/1 at this location is maintained by respondent in Cabell County. The Court is of the opinion to deny this claim for the reasons more fully set forth below.

Claimant's husband appeared and testified as to the incident giving rise to this claim which occurred on March 18, 1999, at approximately 9:00 p.m. On the night in question, Ms. Murphy was operating her vehicle with her husband as her passenger. They were traveling westbound on Route 101/1 from their residence to the local Wal-Mart in her 1988 Chevrolet Beretta. Ms. Murphy and her husband frequently travel this portion of Route 101/1 which is a narrow, two-lane, second

priority road at the location of the incident. Mr. Murphy testified that the respondent had patched holes in the area in question, but the repairs did not last and the area was in a state of disrepair. As Ms. Murphy was driving her vehicle at a speed of about twenty-five to thirty miles per hour and she was about half a block from the traffic light at First Street, when her vehicle's right front passenger tire suddenly struck a hole. Mr. Murphy described the hole as being about one foot in diameter and six to eight inches deep. After the sudden impact with the hole, Ms. Murphy maneuvered the vehicle to a safe location where she and her husband inspected the vehicle. The impact broke the aluminum rim and necessitated realignment of the vehicle. Since Ms. Murphy's motor vehicle was insured only under a liability policy, she was responsible for the sustained loss estimated in the amount of $238.40. Eventually, Ms. Murphy sold the vehicle.

The position of respondent is that it did not have notice of the hole on Route 101/1 in Cabell County. According to respondent, Route 101/1 was taken into the State Road System on June 24, 1998. Since that time, respondent had conducted temporary hole repair activities with cold patch on four separate occasions prior to Ms. Murphy's incident. Prior to March 18, 1999, respondent asserts that it did not have notice of the hole in question.

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

In the present claim, the evidence establishes that respondent had at least constructive notice of a hazardous condition on Route 101/1, and further, that it was negligent in its maintenance of Route 101/1. When respondent took Route 101/1 into the State Road System, it had sufficient time in which to inspect and make more permanent repairs to the road. Notwithstanding this finding of negligence on the part of respondent, the Court is also of the opinion that claimant also was culpable in the operation of her vehicle. She was in an area well known to her and she should have been aware of the hole in the road surface. Claimant should have been driving in a manner that took into consideration the then and there existing road conditions. In a comparative negligence jurisdiction such as West Virginia the negligence of a claimant can reduce or bar recovery in a claim. Based on the above, the Court finds that the negligence of claimant was equal to or greater than that of respondent. Consequently, the negligence of claimant is a complete bar to recovery in this claim.

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

Claim disallowed.

OPINION ISSUED OCTOBER 13, 2000

JOHN A. EDENS
VS.
DIVISION OF CORRECTIONS
(CC-00-204)

Claimant appeared *pro se*.
Joy M. Bolling, 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, formerly an inmate at the Mount Olive Correctional Center, in Fayette County, seeks $863.00 for personal property that was entrusted to respondent. When claimant entered respondent's facility, he was informed that certain items of his personal property were considered contraband. Employees of respondent confiscated claimant's personal property and agreed to mail the personal property to an address specified by claimant. When the personal property did not arrive at the specified address within a reasonable amount of time, claimant discovered that his property was missing. Thus far, respondent's employees have been unable to produce claimant's personal property.

In its Answer, respondent admits the validity of the claim in the amount of $733.00, rather than the amount of $863.00. Claimant is in agreement with respondent's assessment of this claim. The Court is aware that respondent does not have a fiscal method for paying claims of this nature; therefore, the claim has been submitted to the Court for determination.

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

Accordingly, the Court makes an award to the claimant herein in the amount of $733.00.

Award of $733.00.

OPINION ISSUED OCTOBER 13, 2000

LEONARD BRENT NEWSOME

VS.
DIVISION OF HIGHWAYS
(CC-99-298)

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

PER CURIAM:

Claimant brought this action for vehicle, boat and boat-trailer damage sustained when the axle of his boat-trailer was struck by a loose board when he was driving across a wooden bridge on State Secondary Route 3/5 in Breeden. State Secondary Route 3/5, at this location, is a road maintained by respondent in Mingo County. The Court is of the opinion to make an award in this claim for the reasons more fully set forth below.

The incident giving rise to this claim occurred on July 8, 1999, at approximately 8:30 p.m. At dusk on the evening in question, Mr. Newsome, his wife Crystal Newsome, and his son were traveling from the lake at East Lynn to their residence in Lenore. They were proceeding across a wooden bridge on State Secondary Route 3/5 in Breeden, about two miles from the Wayne County line. The wooden overlay of the bridge consists of two-inch thick by six-inch wide boards that are sixteen feet long and these are anchored to the structure by four and one-half inch nails. Mr. Newsome was aware that the wooden bridge was often in a state of disrepair. A resident of the area and Mr. Newsome's mother-in-law, Geraldine Marcum, testified that the bridge is usually in a state of disrepair because of coal truck traffic.

As Mr. Newsome slowly drove his 1989 Toyota Pick-up truck across the bridge, one of the truck's back tires went over a loose board and raised it up causing it to strike the axle of the boat-trailer which he was hauling. Both the truck and the boat-trailer were stopped suddenly. The impact broke the back axle, damaged the boat, damaged the motor attachments, bent the propeller on the motor of the boat, and damaged the truck's bumper. The boat-trailer was determined to be non-repairable. Since Mr. Newsome was insured under a liability only motor vehicle insurance policy, he was responsible for the sustained loss estimated in the amount of $1,114.43. The position of respondent is that it did not have notice of the condition of the wooden bridge on State Secondary Rout 3/5 in Mingo County. According to Transportation Worker II Cecil Collins, all of the remaining wooden bridges in Mingo County are being replaced by pre-fabricated bridges. Respondent's standard operating procedure for maintenance of these remaining wooden bridges is to make a response immediately after a complaint is filed. After each winter, these wooden bridges are inspected. Mr. Collins acknowledged that the remaining wooden bridges are a constant problem because of climate conditions and the structures

themselves. Also, Mr. Collins acknowledged that he has received legitimate complaints about the boards on the wooden bridges. Further, Mr. Collins asserted that respondent had spent many hours over a six month period on State Secondary Route 3/5, but he was unable to determine if the wooden bridge in question had been repaired during that time.

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

In the present claim, the evidence established that respondent had actual notice of the condition of the wooden bridge on State Secondary Route 3/5 in Mingo County. The Court is of the opinion that the condition of the wooden bridge in question constituted a hazardous condition and that respondent was negligent in its maintenance of the bridge.

As for the loss sustained by the claimant, the Court has determined the fair and reasonable value of the boat, boat-trailer and truck bumper to be in the amount of $1,000.00, disregarding any salvage. Consequently, there is sufficient evidence on the part of respondent by which claimant may recover his sustained loss.

In accordance with the findings of fact and conclusions of law stated herein above, the Court is of the opinion to and does make an award to the claimant in the amount of $1,000.00.

Award of $1,000.00.

OPINION ISSUED NOVEMBER 1, 2000

BILL LEWIS MOTORS, INC.
VS.
DIVISION OF LABOR
(CC-00-197)

Claimant appeared *pro se*.
Joy M. Bolling, 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 $179.10 for automotive repair services rendered to respondent in Greenbrier County. The documentation for these services was not processed for payment within the appropriate fiscal year; therefore, claimant has not been paid. In its Answer, respondent admits the validity of the claim as well as the amount, and states that there were sufficient funds expired in the appropriate fiscal year from which the invoice could have been paid.

Accordingly, the Court makes an award to claimant in the amount of $179.10.

Award of $179.10.

OPINION ISSUED NOVEMBER 1, 2000I

CABELL COUNTY COMMISSION
VS.
DIVISION OF CORRECTIONS
(CC-00-335)

William T. Watson, Attorney at Law, for claimant.
Joy M. Bolling, 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, Cabell County Commission, is responsible for the incarceration of prisoners who have committed crimes in Cabell County, but have been sentenced to facilities owned and maintained by respndent, Division of Corrections. Claimant brought this action to recover $66,550.00 in costs for providing housing and/or medical care to 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 *County Comm'n. of Mineral County vs. Div. of Corrections*, 18 Ct. Cl. 88 (1990), that respondent is liable to claimant for the cost of housing and providing medical care to inmates sentenced to a State penal institution.

Pursuant to the holding in *Mineral County*, respondent reviewed this claim to determine the invoices for the services for which it may be liable. Respondent then filed an Answer admitting the validity of the claim in the amount of $66,550.00.

In view of the foregoing, the Court is of the opinion to and does make an award to claimant in the amount of $66,550.00.

Award of $66,550.00.

OPINION ISSUED NOVEMBER 1, 2000

ERIC CORY
VS.
DIVISION OF IGHWAYS
CC-98-62)

Vincent S. Gurrera, Attorney at Law, for climant.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

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

1. On the 28th day of February, 1995, claimant Eric Cory was traveling on County Route 20 in New Cumberland, Hancock County, when he lost control of his vehicle and it struck a tree.

2. On the date in question, respondent was responsible for the maintenance of County Route 20, Hancock County, and was aware that the road was in a state of disrepair.

4. As a result of this incident, claimant sustained personal injuries and property damage. Claimant agreed to settle and relinquish this claim for the amount of $6,500.00.

5. Respondent agrees that the amount of damages as put forth by the claimant is fair and reasonable.

The Court has reviewed the facts of this claim and finds that respondent was negligent in its maintenance of County Route 20 in Hancock County on the date of claimant's incident; that the negligence of respondent was a proximate cause of the damages sustained to claimant's vehicle and claimant's physical injuries; and that the amount of the damages agreed to by the parties is fair and reasonable. Thus, claimant may make a recovery for his sustained loss.

Accordingly, the Court is of the opinion to and does make an award in the amount of $6,500.00.

Award of $6,500.00.

OPINION ISSUED NOVEMBER 1, 2000

BARBARA LINKOUS

VS.
DIVISION OF IGHWAYS
CC-00-269)

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

PER CURIAM:

Claimant brought this action for vehicle damage sustained when her vehicle struck a low manhole when she was traveling north on Routes 15 and 20, locally known as Main Street, in Webster Springs. Routes 15 and 20 are maintained by respondent in Webster County. The Court is of the opinion to make an award in this claim for the reasons more fully set forth below.

The incident giving rise to this claim occurred on June 9, 2000, at approximately 10:00 to 10:30 p.m. On the night in question, Ms. Linkous, her daughter, grand-daughter, and two friends were returning from playing bingo at the local firehouse. She was driving north on Routes 15 and 20 in her 1992 Dodge Dynasty at a speed of less than twenty-five miles per hour as she had just passed through a traffic light at an intersection. Ms. Linkous testified that she frequently travels this portion of road and was aware of a low manhole in the road. At this location, Routes 15 and 20 are a straight, narrow, two lane asphalt road with double yellow lines indicating the center of the road surface. The width of the road is twenty-four feet, which includes parallel parking spaces on the west side of the road. A four inch curb is located on the east side of the road. A traffic light is located directly south of the location in question, where Routes 15 and 20 combine into one road. In the travel portion of the north lane, a round manhole is located about five feet five inches from the second yellow line and two feet from the curb on the north side of the road. Ms. Linkous testified that the depth of the manhole from the road surface was about eight inches. As Ms. Linkous drove her vehicle through the traffic light, an oncoming flatbed truck came into her lane of travel forcing her to veer her vehicle to the right whereupon it went into the manhole. Both passenger side tires struck the hole. The impact burst the passenger side tires, bent the rims and damaged the transmission. The damage exceeded the $100.00 deductible feature in her motor vehicle insurance policy. In accordance with the Court's decision in *Summerville et al. vs. Division of Highways*, any recovery would be limited to the amount of her deductible feature. See *Id.*, 18 Ct. Cl. 110 (1991).

The position of respondent is that it did not have notice of the low manhole on Route 15 and 20 in Webster County. According to Highway Administrator Jimmy Collins, respondent had conducted a paving project on this portion of road and that manholes in the area had not been raised to pavement level. Mr. Collins further testified that he was unaware of the manhole that claimant's vehicle struck.[1] Prior to this time, respondent asserts that it did not have notice of any problems with the level of manholes on the road surface.

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

In the present claim, the evidence established that respondent had constructive notice, if not actual notice, of the low manhole on Routes 15 and 20 in Webster County. After completing its paving project, respondent was aware that structures in the road surface needed to be raised to pavement level. The Court is of the opinion that respondent should have been more diligent in its duties especially since the road is narrow and vehicles can be forced into the structures. Consequently, there is sufficient evidence of negligence on the part of respondent upon which claimant may recover her sustained loss.

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

Award of $100.00.

OPINION ISSUED NOVEMBER 1, 2000

McDOWELL COUNTY COMMISSION
VS.
DIVISION OF CORRECTIONS
(CC-00-311)

Sidney H. Bell, Prosecuting Attorney, for claimant.
Joy M. Bolling, Assistant Attorney General, for respondent.

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[1]Respondent adduced eight photographs on September 26, 2000, as post hearing exhibits, which establish the existence and location of the manhole in question.

PER CURIAM:

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

Claimant, McDowell County Commission, is responsible for the incarceration of prisoners whohave committed crimes in McDowell County, but have been sentenced to facilities owned and maintaine by respondent, Division of Corrections. Claimant brought this action to recover $237,039.89 in costs for providing housing and/or medical care to 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 *County Comm'n. of Mineral County vs. Div. of Corrections*, 18 Ct. Cl. 88 (1990), that respondent is liable to claimant for the cost of housing and providing medical care to inmates sentenced to a State penal institution.

Pursuant to the holding in *Mineral County*, respondent reviewed this claim to determine the invoices for the services for which it may be liable. Respondent then filed an Answer admitting the validity of the claim in the amount of $237,039.89.

In view of the foregoing, the Court is of the opinion to and does make an award to claimant in the amount of $237,039.89.

Award of $237,039.89.

OPINION ISSUED NOVEMBER 1, 2000

MONONGALIA COUNTY COMMISSION
VS.
DIVISION OF CORRECTIONS
CC-00-347)

Claimant appeared *pro se*.

Joy M. Bolling, 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, Monongalia County Commission, is responsible for the incarceration of prisoners who have committed crimes in Monongalia County, but have been sentenced to facilities owned and maintained by respondent, Division of

Corrections. Claimant brought this action to recover $55,248.09 in costs for providing housing and/or medical care to 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 *County Comm'n. of Mineral County vs. Div. of Corrections*, 18 Ct. Cl. 88 (1990), that respondent is liable to claimant for the cost of housing and providing medical care to inmates sentenced to a State penal institution.

Pursuant to the holding in *Mineral County*, respondent reviewed this claim to determine the invoices for the services for which it may be liable. Respondent then filed an Answer admitting the validity of the claim in the amount of $55,248.09.

In view of the foregoing, the Court is of the opinion to and does make an award to claimant in the amount of $55,248.09.

Award of $55,248.09.

OPINION ISSUED NOVEMBER 1, 2000

WEST VIRGINIA UNIVERSITY HOSPITALS, INC.
VS.
DIVISION OF CORRECTIONS
(CC-00-312)

Claimant appeared *pro se*.
Joy M. Bolling, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks payment in the amount of $117,927.64 for medical services rendered to an inmate in the custody of respondent at Mount Olive Correctional Complex, Fayette County. 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.

ORDER ENTERED NOVEMBER 30, 2000

IN THE COURT OF CLAIMS STATE OF WEST VIRGINIA

CAMERON GAS COMPANY

Claimant,

V. CLAIMS NO.: CC-99-363 & CC-99-377

WEST VIRGINIA DEPARTMENT
OF ADMINISTRATION, PURCHASING DIVISION,
Respondent.

CONSENT ORDER AND AWARD

On the 3Oth day of November, 2000, the parties to this action, Claimant Cameron Gas Company and Respondent West Virginia Department of Administration, Purchasing Division reached an agreement regarding the above two (2) styled claims currently before this Court. The parties hereby request the Court enter this final resolution of the claims of the parties asserted in these actions.

Upon consideration of the following the agreements of the parties hereto, the arguments of counsel, and the consent of the Secretary of the Department of Administration, it is hereby ADJUDGED, ORDERED, AND DECREED;

I. The Respondent hereby agrees to pay the Claimant the sum of one hundred thousand dollars ($100,000.00) as full and complete satisfaction of both of the above styled claims filed with this Court.

2. All claims filed in these actions by Claimant will be released according to law upon Claimants's receipt of the settlement proceeds set forth herein.

3. The parties acknowledge the actual payment of one hundred thousand dollars ($100,000.00) is contingent upon this Consent Order and Award being approved by the Legislature of the State of West Virginia. The award shall be paid from special revenue funds.

4. The parties hereby state that this Consent Order and Award is a compromised settlement for disputed claims within this Court. Claimant

agrees that payment of settlement amount constitutes full and complete satisfaction of both claims, i.e., CC-99-363 and CC-99-377.

5. By execution of this Consent Order and Award the Department of Administration represents that it is in the best interest of the State of West Virginia to resolve the above claims referenced herein pursuant to the terms of this Consent Order and Award,

Upon consideration of the foregoing this court hereby enters an award in favor of the Claimant and against the West Virginia Department of Administration, Purchasing Division, in the amount of one hundred thousand dollars ($100,000-00).

So ORDERED this 30th day of November, 2000.

OPINION ISSUED DECEMBER 4, 2000

WENDELL K. ASH
VS.
DIVISION OF CORRECTIONS
(CC-00-199 & CC-00-238)

Claimant appeared *pro se*.
Joy M. Bolling, Assistant Attorney General, for respondent.

PER CURIAM:

Claimant, an inmate at Mount Olive Correctional Complex, brought this claim to recover the value of colored paper taken from his cell, funds deducted from his prison trustee account for items he did not receive, overcharges on postage paid on outgoing mail, and a rug that was lost in the prison laundry.[1] Mount Olive Correctional Complex is a facility or respondent in Fayette County. Each claim will be addressed separately by the Court. The Court is of the opinion to make an award in part II of this claim and deny the rest of the claims for the reasons more fully set forth below.

I

[1]Claimant originally filed this claim as CC-00-199. However, claimant later filed the claim CC-00-238, which revised, incorporated and added to CC-00-199. Afterwards, claimant dismissed CC-00-199.

On the 8th day of August, 2000, Mount Olive Correctional Complex was under a state of emergency. All items, except for clothing were removed from each inmates cell. Eventually, the property was returned to the inmates. When claimant received his property, he discovered that his colored paper was missing. Respondent informed claimant that the paper had been confiscated because it was considered contraband in the administrative segregation unit, pursuant to Revised Operational Procedure Number 3.10, which was established on the 23rd day of August, 1996. According to Unit Manager for the Segregation Unit Lieutenant Robert Daniel, any item not specifically mentioned in the policy is considered contraband. Respondent gave claimant the option of either returning the paper or having it destroyed. Claimant testified that the paper was necessary for his legal work, pursuant to Rules of the United States Supreme Court Rule 33. Claimant filed a grievance in order to be allowed to have the colored paper. Before claimant's grievance was heard, the colored paper was destroyed. The value of the paper was estimated to be the amount of $5.19.

II

Claimant testified that he placed an order at the prison exchange, but did not receive any of the items that he ordered, nor were any items returned by him. According to claimant, receipts before and after the week of the 2nd day of November, 1999, establish that his account was charged $13.13 for items he did not receive. According to Exchange Supervisor Angela Carpenter, an order was placed, but she did not know what happened to it. Ms. Carpenter testified that items are placed in bags and then placed in carts. Afterwards, the carts are placed in the multi-purpose room where inmates sign for packages. Respondent did not have any receipts accounting for the $13.13 difference in the aforementioned receipts. Claimant's requests for his account to be credited the $13.13 difference have thus far been denied by personnel at the Complex.

III

In early December of 1999, claimant signed a blank money voucher in order to have a package mailed. The voucher cleared his prison trustee account on the 17th day of December, 1999. When claimant received a printout of his mail transactions, he discovered that the voucher had been made for the amount of $4.18. Claimant testified that he had been notified that the package cost only $1.60 to mail. According to Account Technician Rita Dunlap, money vouchers are not to be completed unless completely filled out. Ms. Dunlap testified that the Post Office checks vouchers and that her responsibility is to clear the amount of the vouchers for the Post Office. Moreover, Post Office Supervisor Patricia Hanshaw testified that only legal letters are logged. Personal letters by inmates are not logged. Thus, if an inmate has more that one personal letter, then these are totaled together and placed on one voucher. Ms. Hanshaw further testified that vouchers are not always filled out.

In addition, Ms. Hanshaw testified that if an inmate was overcharged, then the Post Office reimburses that inmate.

IV

In June of 2000, claimant sent two bags of laundry to the prison laundry. One bag contained a three feet wide by five feet long rug. Claimant had purchased the rug from the prison exchange for the amount of $17.00. Upon receiving his returned laundry items, claimant inspected his laundry and discovered that the rug was missing. Claimant filed a grievance, but the rug was not found.

The position of respondent is that it was not responsible for personal items lost in the laundry. Pursuant to Mount Olive Correctional Complex Operational Procedure Number 3.49, the facility is not responsible for personal property items lost in the prison laundry. According to Supervisor I Benton Petry, the facility's policy was in place at the time of the incident and made known to inmates. Mr. Petry stated that when a mix-up occurs in the laundry, efforts are made to determine ownership and to return the laundry items. Further, Correctional Magistrate Joseph B. Coy testified that efforts have been made to reduce the loss of laundry items due to extortion.

CONCLUSION

With regard to laundry items in part I of this claim, respondent allows inmates to have personal property items. If an inmate chooses to have such personal property items, then that inmate has a duty to secure and document such items. On prior occasions, this Court has held that inmates assume the risk for personal property items that are sent to the prison laundry. *Skaggs vs. Division of Corrections*, 21 Ct. Cl. 181 (1997).

In the present claim, claimant chose to have a rug in his cell. He assumed the risk of loss when the rug was sent to the prison laundry. Consequently, there is insufficient evidence of negligence on the part of respondent upon which to base an award for the missing rug.

With regard to part II of this claim, the amount of $13.13 appears to the Court to be an amount due and owing to the claimant. The respondent maintains these accounts at the prison exchange for and on behalf of each inmate and it is responsible for these accounts. Respondent could not establish that claimant's account was maintained accurately; therefore, the Court is of the opinion that claimant may recover the $13.13 which is missing from this particular account.

As to the other claims as described herein above, the Court is of the opinion that claimant may have sustained a loss as a result of the actions of respondent. However, the Court is further of the opinion that the maxim *de minimis non curat lex* is applicable to this claim. This venerable principle of the common law stands for the proposition that the law does not care for, or take notice of, very small or trifling matters. *Black's Law Dictionary*, 297 (6th ed. 1990). Under this principle, mere

nominal damages proved as a matter of set-off or recoupment are disregarded in the ascertainment of the amount due a claimant. *Harper vs. Coal & Land Co.*, 80 W.Va. 246; 92 S.E. 565 (1917). The Court has determined that the controversy in these claims involves damages which are inconsequential in regards to the sustained loss. Consequently, the rest of the claims should be disallowed.

In accordance with the findings of fact and conclusions of law stated herein above, the Court is of the opinion to make an award in the amount of $13.13 and to deny the remainder of the claim.

Award of $13.13.

OPINION ISSUED DECEMBER 4, 2000

JANET J. BOROWSKI
VS.
WV SOLID WASTE MAAGEMENT BOARD
(CC-00-300)

Claimant appeared *pro se*.

Joy M. Bolling, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant, an employee of the respondent State agency, seeks reimbursement in the amount of $487.29 for travel expenses incurred in her capacity as an employee for respondent. The documentation for the travel expenses was not processed for payment within the appropriate fiscal year; therefore, claimant has not been paid. In its Answer, respondent admits the validity of the claim as well as the amount, and states that there were sufficient funds expired in the appropriate fiscal year from which the invoice could have been paid.

Accordingly, the Court makes an award to claimant in the amount of $487.29.

Award of $487.29.

OPINION ISSUED DECEMBER 4, 2000

ROBERT BOWERS, III

VS.
DIVISION OF CORRECTIONS
(CC-00-270)

Claimant appeared *pro se*.
Joy M. Bolling, Assistant Attorney General, for respondent.

PER CURIAM:

Claimant, an inmate at Mount Olive Correctional Complex, brought this claim to recover the value of items which he had ordered and which he was not allowed to possess. These items were destroyed by personnel at the Complex. Mount Olive Correctional Complex is a facility of respondent in Fayette County. The Court is of the opinion to deny this claim for the reasons more fully set forth below.

Claimant ordered a clip-on-light and a four-quart food storage container from a specialized catalog approved for use by inmates. The four-quart food storage container was not approved by the facility. Pursuant to Mount Olive Correctional Complex Operational Procedure Number 3.10, the clip-on-light was allowed by the facility. Unbeknownst to claimant, the Deputy Warden had given a verbal directive that new clip-on-lights were to be restricted and no longer approved for use by the inmates. The value of the clip-on-light and the food storage container were $6.25 and $1.75, respectively. When the items arrived at the facility on or about the 20th day of March, 2000, these were confiscated by the State Shop. Respondent, in a memorandum dated the 4th day of April, 2000, informed claimant that he was not allowed to possess the clip-on-light and that it had been confiscated. The memorandum further stated that claimant had seven days to inform the State Shop whether to return the items or allow them to be destroyed. Claimant asserts that this time frame did not allow him sufficient time to appeal the decision. Thus, the items were destroyed.

The position of respondent is that it was not responsible for the demise of the ordered items. According to Assistant Warden of Operations Tim Whittington, he was given a verbal directive from the Deputy Warden to disallow new clip-on-lights from the facility. Moreover, the Deputy Warden is the individual responsible for issuing such a memorandum to inmates regarding a change in the operating policy. Mr. Whittington further testified that claimant was given an option as to how the property was to be disposed. Claimant chose to allow the property to be destroyed and in the process, suffered a loss.

In the present claim, the Court is of the opinion that claimant sustained a loss as a result of the actions of respondent. However, the Court is further of the opinion that the maxim *de minimis non curat lex* is applicable to this claim. This venerable principle of the common law stands for the proposition that the law does

not care for, or take notice of, very small or trifling matters. *Black's Law Dictionary*, 297 (6th ed. 1990). According to this principle, mere nominal damages proved as a matter of set-off or recoupment are disregarded in the ascertainment of the amount due a claimant. *Harper vs. Coal & Land Co.*, 80 W.Va. 246; 92 S.E. 565 (1917). The Court has determined that the controversy in this claim involves damages which are inconsequential. Consequently, this claim should be disallowed.

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

Claim disallowed.

OPINION ISSUED DECEMBER 4, 2000

ROGER L. DAFF
VS.
DIVISION OF MOTR VEHICLES
(CC-00-201)

George F. Fordham, Attorney at Law, for caimant.
Joy M. Bolling, 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 $320.00 for expenses incurred when he was arrested and his vehicle impounded in Grafton, Taylor County. Respondent had revoked wrongfully his motor vehicle driver's license. In its Answer, respondent admits the validity of the claim and that the amount is fair and reasonable. The Court is aware that respondent does not have a fiscal method to reimburse claimant for his sustained loss; therefore, the claim has been submitted to this Court for determination.

Accordingly, the Court makes an award to claimant in the amount of $320.00.

Award of $320.00.

OPINION ISSUED DECEMBER 4, 2000

DANNY GARRISON
VS.

DIVISION OF CORRECTIONS
(CC-00-148)

Claimant appeared *pro se*.
Joy M. Bolling, Assistant Attorney General, for respondent.

PER CURIAM:

Claimant, an inmate at Mount Olive Correctional Complex, brought this claim to recover the value of his personal bed sheets that he alleges were lost when he placed the sheets in the prison laundry. Mount Olive Correctional Complex is a facility of respondent in Fayette County. The Court is of the opinion to deny this claim for the reasons more fully set forth below.

Pursuant to Mount Olive Correctional Complex Operational Procedure Number 3.49, the facility is not responsible for personal property clothing items lost in the prison laundry. During claimant's time of incarceration, this policy was in effect. Claimant purchased personal bed sheets on the 16th day of December, 1998. During the week of the 12th of January, 2000, claimant had sent his property to the prison laundry. When it was returned to him, the bed sheets were missing. Claimant had made no effort to document his personal property clothing items, including his personal sheets, that were sent to the prison laundry on this particular occasion. The bed sheets had a value of $26.75.[1] Claimant immediately notified the on-duty supervisor and filed a grievance. Since then, the personal bed sheets have not been found.

The position of respondent is that it was not responsible for personal items lost in the laundry. According to Supervisor I Benton Petry, the facility's policy was in place at the time of the incident and made known to the inmates. Any personal clothing may be stamped if an inmate so desires in order that ownership may be determined. Mr. Petry further stated that when a mix-up occurs in the laundry, efforts are made to determine ownership and to return the laundry items.

Respondent allows inmates to have personal property clothing items, even though it provides such items. On prior occasions, this Court has held that inmates assume the risk for personal property items that are sent to the prison laundry. *Skaggs vs. Division of Corrections*, 21 Ct. Cl. 181 (1997).

In the present claim, claimant chose to have personal bed sheets rather than those provided by the facility. He assumed the risk of loss when the sheets were sent to the prison laundry. Consequently, there is insufficient evidence of negligence on the part of respondent upon which to base an award.

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[1]On the 23rd day of October, 2000, claimant adduced a receipt from his trustee account that established the date of purchase and value of the sheets.

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

Claim disallowed.

OPINION ISSUED DECEMBER 4, 2000

CHRIS PAGE
VS.
DIVISION OF CORRECTIONS
(CC-00-414)

Claimant appeared *pro se*.

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

PER CURIAM:

Claimant, an inmate at Mount Olive Correctional Complex, brought this claim to recover the value of his Aiwa Walkman, Tx-591 radio-cassette player with headphones and an AC Adapter that were not returned to him after these items had been appropriated, documented for storage, and placed in storage by respondent when claimant was in lock-up. Mount Olive Correctional Complex is a facility of respondent in Fayette County. The Court is of the opinion to make an award in this claim for the reasons more fully set forth below.

During the months of May and June, 2000, claimant was sent to lock-up. At this time, the personal property in his cell, including an Aiwa Walkman, Tx-591 radio-cassette player with headphones and an AC Adapter, were appropriated, documented and stored by employees of respondent. In June 2000, claimant was released from lock-up. Claimant was given back some of his personal property, except for the items indicated above. His Resident's Personal Property Form made note of the fact that he did not receive these items. The lost property was valued at $84.20. Since being released from lock-up, claimant has made inquiries to respondent regarding these items of personal property, but the items have not been found or returned to him.

Respondent, in its Answer, admits that this claim is valid and the amount of the claim is admitted. The Court has held in claims of this nature that a bailment situation has been created and the reasoning for that holding is stated hereinbelow.

When personal property of an inmate is recorded for the inmate and then taken for storage purposes, this Court has previously viewed such situations as a bailment. According to *Black's Law Dictionary*, a bailment is:

> "A delivery of goods or personal property, by one person (bailor) to another (bailee), in trust for the execution of a special object upon or in relation to such goods, beneficial either to the bailor or bailee or both, and upon a contract, express or implied, to perform the trust and carry out such object, and thereupon either to redeliver the goods to the bailor or otherwise dispose of the same in conformity with the purpose to the trust. The bailee is responsible for exercising due care toward the goods." *Id* 95 (6th ed. 1990).

Consequently, respondent, the bailee, must have satisfactory documentation for return of the property to the inmate, the bailor. *Heard vs. Division of Corrections*, 21 Ct. Cl. 151 (1997). Claimant has the burden of proof to demonstrate by a preponderance of the evidence that there was a delivery of claimant's property to respondent before a prima facie case is established for the failure to return items claim accrues. *Nolan vs. Division of Corrections*, 19 Ct. Cl. 89 (1992).

In the instant claim, claimant has established a prima facie case of bailment for the items which were not returned to him. The evidence established that there was a delivery of claimant's property to respondent. The Court has determined that respondent failed adequately to care for claimant's personal property since it was not returned to him.

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

Award of $84.20.

OPINION ISSUED DECEMBER 4, 2000

DAVID LEE WELCH
VS.
DIVISION OF CORRECTIONS
(CC-00-24)

Claimant appeared *pro se*.
Joy M. Bolling, Assistant Attorney General, for respondent.

PER CURIAM:

Claimant, currently an inmate at the Huttonsville Correctional Center, brought this action for reimbursement for a computer correspondence course that he was not allowed to complete while in the custody of respondent at the Mount Olive

Correctional Complex. Mount Olive Correctional Complex is a facility operated by respondent in Fayette County. The Court is of the opinion to deny this claim for the reasons more fully set forth below.

On January 2, 1997, Mr. Welch enrolled in a computer correspondence course taught by NRI Schools. Clearance for Mr. Welch's participation in the correspondence course was given by Director of Education at the Complex, Frances F. Warsing, on January 8, 1997. The cost of the correspondence course was $3,446.00. All of the course materials were to be received through Ms. Warsing. The course materials were stored in the Industries Building and Mr. Welch was required to complete his course work at that location. In order to further his studies, Mr. Welch enrolled in a computer book club, but respondent denied him access to the ordered books as they were not necessary for his course work. Mr. Welch filed a grievance for the value of the ordered books. Respondent denied the grievance pursuant to policy directive 670.00, by which Mr. Welch did not have authorization to enter into a contract with the computer book club. Ms. Warsing had determined that the computer correspondence course would meet Mr. Welch's educational needs. An employee of respondent, Dale Howe, testified that he informed claimant of the policy that the computer was to be used for educational purposes only.

On June 4, 1999, Mr. Welch's computer and course related material were seized in the automotive classroom by Correctional Officer II, Kenny Bowles. The computer and materials were placed in the communications office storage area. On August 2, 1999, Mr. Welch was required to mail the computer and materials to his mother's residence. In a memorandum dated August 17, 1999, Warden Howard Painter informed Mr. Welch that by Order of the Commissioner no computers were allowed in inmate cells, which included his computer. Policy Directive 639.01, effective August 18, 1997, established the policy for dealing with inmate ownership of personal computers. This directive superceded all other directives. Subsequently, Warden George Trent informed the Mount Olive Correctional Complex inmate population by memorandum that each inmate had until November 30, 1997, to remove their personal computers from the facility. Warden Trent's memorandum further stated that any information on the computer which involved an active legal case in which an inmate is a named party, that information would be printed out for that inmate. Mr. Welch filed a grievance on August 20, 1999, requesting that the policy be waived for his computer since it was located in the education department, but the grievance was denied.

On August 23, 1999, Mr. Welch was charged with violating Disciplinary Rule Number 2.11 regarding contraband. Officer Bowles found one roll of solder, six sheets of sticker paper, and eight sheets of laminating paper while inspecting claimant's seized property. Mr. Welch was able to produce a receipt from his inmate trustee account that established an inmate order for solder from Radio Shack. In a memorandum dated August 24, 1999, Warden Howard Painter informed Mr. Welch

that he had been informed by Magistrate Joseph B. Coy that Mr. Welch had been using the computer for personal matters and that the aforementioned Order prohibited use of the computer for personal matters. A written statement by Mr. Welch acknowledges that he used his computer for such matters. Mr. Welch was found guilty on August 25, 1999, and received a forty-five day loss of contact visitation privilege effective August 25, 1999, to October 9, 1999. Mr. Welch appealed this decision, but the decision was affirmed by Warden Painter.

Officer Bowles, in a memorandum dated October 11, 1999, informed Mr. Welch that he had until October 31, 1999, to submit to him an address and mail voucher for the items stored in the industrial tool room. Mr. Welch complied on October 15, 1999. In a letter dated October 18, 1999, Warden Painter informed NRI Schools that Mr. Welch was no longer allowed to participate in the correspondence course because of the establishment of new policies and Mr. Welch's failure to comply with those policies. Warden Painter also requested that Mr. Welch be released from his contractual obligation to continue to pay for the course. Mr. Welch appealed the ultimatum to mail out the seized contraband property, but it was denied by Commissioner Paul Kirby on October 22, 1999. Currently, Mr. Welch's mother is in possession of all of the seized property

The cost of the computer correspondence course was $3,446.00, but there was a balance of $980.00 after the computer and course materials were confiscated. The P233MMX computer, which was purchased through the course, had a value of $1,100.00. After the confiscation of the computer and course materials, three of the course lessons did not require the use of the computer. Mr. Welch also asserts damages in the amount of $1,108.39 for course related items that were used as part of the course. Thereafter, Mr. Welch's mother paid the contract balance of $980.00.

The Court, having reviewed all of the facts and circumstances in this claim, has determined that the respondent has established that the claimant used his computer for personal letters which was a violation of respondent's regulations. Therefore, respondent was within its rights to require that the claimant dispose of the computer as he desired. He, in fact, had the computer mailed to his mother who still has the computer in safe keeping for him when he is released from Huttonsville Correctional Center. Further, the Court is of the opinion that claimant is not entitled to recover any or all of the tuition which he paid for his computer course. This loss should have been anticipated when he used the computer in violation of respondent's regulations.

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

Claim disallowed.

OPINION ISSUED DECEMBER 20, 2000

LINDA D. BEAN
VS.
DIVISION OF HIGHWAYS
(CC-00-151)

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

PER CURIAM:

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

1. On February 23, 2000, at approximately 6:30 a.m. claimant was traveling in her vehicle on Riggins Run Road in Doddridge County when her vehicle struck rocks on the road surface. The rocks came from a culvert that had washed out during flooding which had occurred a few days prior to the incident.

2. On the date in question, respondent was responsible for the maintenance of Riggins Run Road in Doddridge County and was aware of the condition of the road surface.

4. As a result of this incident, the front driver's side tire burst. The sustained damage was in the amount of $38.16.

5. Respondent agrees that the amount of damages as put forth by the claimant is fair and reasonable.

The Court has reviewed the facts of the claim and finds that respondent was negligent in its maintenance of Riggins Run Road in Doddridge County on the date of claimant's incident; that the negligence of respondent was the proximate cause of the damages sustained to claimant's vehicle; and that the amount of the damages agreed to by the parties is fair and reasonable. Thus, claimant may make a recovery for her loss.

Accordingly, the Court is of the opinion to and does make an award in the amount of $38.16.

Award of $38.16.

OPINION ISSUED DECEMBER 20, 2000

DONALD L. BENNINGER AND CAROL M. BENNINGER

VS.
DIVISION OF HIGHWAYS

(CC-99-400)

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

PER CURIAM:

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

1. On March 11, 1998, at approximately 4:00 p.m. claimant Carol M. Benninger was traveling in her vehicle on Route 19 in Clarksburg, Harrison County. As she proceeded along the road, her vehicle struck a line of holes in the road surface.

2. On the date in question, respondent was responsible for the maintenance of Route 19 in Clarksburg, Harrison County and its employees were aware of the condition of the road.

4. As a result of this incident, the front passenger tire burst and necessitated alignment of the vehicle. The sustained damage was in the amount of $150.52.

5. Respondent agrees that the amount of damages as put forth by claimants is fair and reasonable.

The Court has reviewed the facts of the claim and finds that respondent was negligent in its maintenance of Route 19 in Harrison County on the date of claimant's incident; that the negligence of respondent was the proximate cause of the damages sustained to claimants' vehicle; and that the amount of the damages agreed to by the parties is fair and reasonable. Thus, claimants may make a recovery for their sustained loss.

Accordingly, the Court is of the opinion to and does make an award in the amount of $150.52.

Award of $150.52.

OPINION ISSUED DECEMBER 20, 2000

DAVID W. BOTT
VS.
DIVISION OF HIGHWAYS

(CC-99-471)

Claimant appeared *pro se*.

Xueyan Zhang, Attorney at Law, for respondent.

PER CURIAM:

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

1. On September 17, 1999, claimant was traveling northbound in his 1998 Nissan Frontier on Rt. 28 in Pocahontas County when he decided to maneuver his vehicle to the berm of the road. As he drove onto the berm, his vehicle struck a broken-off sign post.

2. On the date in question, respondent was responsible for the maintenance of Route 28 in Pocahontas County and was aware of the condition of the berm.

4. As a result of this incident, the undercarriage of the vehicle was damaged. The sustained damage was in the amount of $527.06.

5. Respondent agrees that the amount of damages as put forth by the claimant is fair and reasonable.

The Court has reviewed the facts of the claim and finds that respondent was negligent in its maintenance of Route 28 in Pocahontas County on the date of claimant's incident; that the negligence of respondent was the proximate cause of the damages sustained to claimant's vehicle; and that the amount of the damages agreed to by the parties is fair and reasonable. Thus, claimant may make a recovery for his loss.

Accordingly, the Court is of the opinion to and does make an award in the amount of $527.06.

Award of $527.06.

OPINION ISSUED DECEMBER 20, 2000

THOMAS J. CARR
VS.
DIVISION OF HIGHWAYS
(CC-00-167)

Claimant appeared *pro se*.

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

PER CURIAM:

Claimant brought this action for vehicle damage sustained when his vehicle struck a hole while he was traveling in the right lane of the eastbound lanes on I-70 at

the Exit 5 bridge in Triadelphia. At this location, I-70 is maintained by respondent in Ohio County. The Court is of the opinion to make an award in this claim for the reasons more fully set forth below.

The incident giving rise to this claim occurred on March 23, 2000, at approximately 7:30 a.m. Claimant was proceeding in the right lane of the two eastbound lanes of I-70 at the east end of the Exit Three bridge. He was driving a leased 1999 Mazda Millennium and his wife was a passenger. Claimant was traveling from his residence in Columbus, Ohio, to Orange, Connecticut, a trip he makes about three times per year. He was driving at a speed of about fifty-five to sixty miles per hour. As he proceeded on I-70, he noticed a gaping hole in the middle of the right lane of the Exit Three bridge as his vehicle was leaving the metal expansion joint. The hole was approximately two to three feet in diameter and was about six to seven inches deep. Claimant was unable to avoid having his vehicle strike the hole. The impact burst the front tire on the driver's side and bent the rim. Afterwards, claimant maneuvered the vehicle to the edge of the interstate. He then flagged down one of respondent's employees who had driven to the scene and he informed him of the hole and the incident. As a result of this incident, claimant's vehicle sustained damage in excess of the $250.00 deductible feature in his motor vehicle insurance policy. In accordance with the Court's decision in *Summerville et al. vs. Division of Highways*, any recovery would be limited to the amount of his deductible feature. See *Id*., 18 Ct. Cl. 110 (1991).

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

In this claim, the evidence established that respondent had at least constructive, if not actual, knowledge of the defective condition on I-70. The Court is of the opinion that the hole in the interstate constituted a hazardous condition and that respondent should have been more observant of problems on the interstate because of its high priority status. Consequently, there is sufficient evidence of negligence on the part of respondent by which claimant may recover his sustained loss.

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

Award of $250.00.

OPINION ISSUED DECEMBER 20, 2000

ROBERT DEAN
VS.
DIVISION OF HIGHWAYS
(CC-00-211)

Larry O. Ford, Attorney at Law, for claimant.
Andrew F. Tarr & Xueyan Zhang, Attorneys at Law, for respondent.

PER CURIAM:

This claim was submitted to the Cour for decision upon a Stipulation entered into by counsel on behalf of the parties wherein certain facts and circumstances of the claim were agreed to as follows:

1. On December 14, 1998, claimant Robert Dean was a pedestrian crossing a bridge over the Coal River near St. Albans in Kanawha County. While crossing the bridge, Mr. Dean stepped into a hole in the walkway and was injured.

2. On the date in question, respondent was responsible for the maintenance of the bridge on U. S. Route 60 that crosses the Coal River near St. Albans, Kanawha County, and was aware of the condition of the bridge.

4. As a result of this incident, claimant sustained personal injuries. The damages exceeded the amount of $15,000.00. However, claimant agreed to settle and relinquish this claim for the amount of $5,000.00.

5. Respondent agrees that the amount of damages as put forth by the claimant is fair and reasonable.

The Court has reviewed the facts of the claim and finds that respondent was negligent in its maintenance of the bridge on U. S. Route 60 in Kanawha County on the date of claimant's incident; that the negligence of respondent was the proximate cause of the personal injuries sustained by claimant; and that the amount of the damages agreed to by the parties is fair and reasonable. Thus, claimant may make a recovery for his sustained loss.

Accordingly, the Court is of the opinion to and does make an award in the amount of $5,000.00.

Award of $5,000.00.

OPINION ISSUED DECEMBER 20, 2000

JOANN FORESTER AND RICHARD C. FORESTER
VS.
DIVISION OF HIGHWAYS
(CC-00-287)

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

PER CURIAM:

Claimants brought this action for vehicle damage sustained when their son was driving their vehicle and he drove onto a deteriorated berm on County Route 38, locally known as Campbell Hill Road, in Moundsville. At this location, County Route 38 is maintained by respondent in Marshall County. The Court is of the opinion to make an award in this claim for the reasons more fully set forth below.

The incident giving rise to this claim occurred on July 4, 2000, at approximately 3:00 to 5:00 p.m. Claimants' son, Joshua Daniel Forester, was traveling on County Route 38 in claimants' 1989 Jeep Cherokee at a speed of about twenty to twenty-five miles per hour. Mr. Forester was proceeding from his residence to John Marshall High School. Mr. Forester frequently travels this road. Claimants were following behind their son in another vehicle. At this location, County Route 38 is a narrow, two-lane, asphalt road of secondary priority with a steep grade. It is approximately sixteen to eighteen feet wide and it does not have any centerline or edge lines. Moreover, there is no berm area. Guardrail is located on one side of the road whereas on the other side of the road there is a sloping embankment that is covered by vegetation. As Mr. Forester proceeded downhill, he was confronted by an oncoming pickup truck proceeding uphill. Mr. Forester maneuvered the vehicle toward the edge of the road in order to safely pass the truck. Suddenly, the vehicle began to skid and sank about twenty inches into the vegetation in the berm area. The vehicle then bottomed out after traveling a short distance in the berm area. The impact burst the two passenger side tires and damaged the underneath of the vehicle. Since the vehicle was insured only under a liability motor vehicle insurance policy, claimants were responsible for the sustained damage in the amount of $510.61.

The position of respondent is that it did not have notice of the defective condition of the berm on County Route 38 in Marshall County. According to County Administrator Ronald William Faulk, the area in question is a known landslide area. During the 1980's, a piling project was conducted in order to stabilize the area. Respondent paved the road several years ago, but Mr. Faulk stated that the berm had not been built up to the edge of the pavement. After the incident, respondent placed almost one-half ton of gabion stone on the berm. Mr. Faulk further testified that respondent did not have any records of complaints regarding this area within the past twelve years.

This Court has been very consistent in regard to berm claims. In *Sweda vs. Department of Highways*, this Court held:

> "The berm or shoulder of a highway must be maintained in a reasonably safe condition for use when the occasion requires, and liability may ensue when a motorist is forced onto the berm in an emergency or otherwise necessarily uses that berm of the highway." *Id.*, 13 Ct. Cl. 249 (1980) (citing 39 Am. Jur. 2d Highways, Streets, and Bridges § 488).

When a motorist uses the berm of the road in an emergency situation, that motorist may be entitled to recover damages if the berm is not properly maintained by respondent. *Meisenhelder vs. Department of Highways*, 18 Ct. Cl. 80 (1990).

In this claim, the evidence established that respondent had at least constructive if not actual knowledge of the berm area of County Route 38. The Court is of the opinion that the berm of the road constituted a hazardous condition. Claimants' son should have been able to rely on a safe berm when confronted by oncoming traffic. Consequently, there is sufficient evidence of negligence on the part of respondent by which claimants may recover their loss.

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

Award of $510.61.

OPINION ISSUED DECEMBER 20, 2000

JOSEPH S. FOSTER
VS.
DIVISION OF HIGHWAYS
(CC-99-194)

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

PER CURIAM:

Claimant brought this action for the value of his vehicle when his vehicle struck a boulder while he was traveling northbound on W.Va. Route 2, south of Moundsville. At this location, W.Va. Route 2 is maintained by respondent in Marshall County. The Court is of the opinion to make an award in this claim for the reasons more fully set forth below.

The incident giving rise to this claim occurred on February 28, 1999, at approximately 10:30 p.m. Claimant was traveling northbound on W.Va. Route 2 in

his 1991 Chevrolet S-1 pick-up truck from his place of employment. At this location, W.Va. Route 2 is a four-lane highway with a concrete median. While this area is not part of the area commonly referred to as "the Narrows" between Glen Dale and McMechen, it is a known rock fall area. A warning sign is posted in the northbound lane about three-quarters of a mile from the location in question. Claimant drove his vehicle through an outside turn in the road, then an inside turn in the road. Suddenly, he came upon a boulder on the travel portion of the road. He attempted to maneuver his truck around the boulder, but the right side of the truck struck the boulder. The damage sustained was determined to be greater than the value of the vehicle so the vehicle was "totaled." Claimant has a deductible feature of $1,000.00 in his motor vehicle insurance policy. In accordance with the Court's decision in *Sommerville et al. vs. Div. of Highways*, any recovery would be limited to this amount. See *Id*., 18 Ct. Cl. 110 (1991). Afterwards, claimant informed the West Virginia State Police of the incident.

The position of respondent is that it did not have notice of the boulder on W.Va. Route 2 in Marshall County. According to County Administrator Ronald William Faulk, this area is a known rockfall area and is regularly patrolled because of the freeze-thaw cycles that occur during the month of February. Mr. Faulk testified that he drives this road daily and that respondent has had numerous reports of rock removal from this portion of road. Respondent further asserts that this area is well marked as a rockfall area.

In this claim, the evidence established that respondent had actual knowledge of a hazardous condition on W.Va. Route 2 in Marshall County. Last year, the Court heard two separate rockfall claims regarding this area. See *Hundagen vs. Div. of Highways* (unpublished *opinion issued December 6, 1999*); *Williams vs. Div. of Highways*, (unpublished opinion issued December 6, 1999). In those claims, the Court held that the actions of respondent were insufficient because it had notice of a hazardous condition posing a threat to the traveling public. Since then, respondent has failed to take any permanent remedial measures in order to assure motorists may travel safely in this area. There was no showing that respondent did anything beyond routine patrolling of W.Va. Route 2. Consequently, there is sufficient evidence of negligence on the part of respondent upon which to base an award.

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

Award of $1,000.00.

OPINION ISSUED DECEMBER 20, 2000

RUSSELL S. GARRETT
VS.
DIVISION OF HIGHWAYS
(CC-99-226)

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

PER CURIAM:

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

1. On May 25, 1999, at approximately 5:00 p.m. claimant and his wife were traveling in his vehicle on Route 19, near Shinnston, Harrison County. Claimant had driven his vehicle to a gravel lot on the side of the road in order to make a telephone call. As claimant drove the vehicle back onto the road, it struck I-beams that were hidden in nearby vegetation on the side of the road.

2. On the date in question, respondent was responsible for the maintenance of Route 19 in Harrison County and was aware of I-beams on the edge of the road surface.

4. As a result of this incident, claimant's vehicle sustained damage. The sustained damage was in the amount of $372.12.

5. Respondent agrees that the amount of damages as put forth by the claimant is fair and reasonable.

The Court has reviewed the facts of the claim and finds that respondent was negligent in its maintenance of Route 19 in Harrison County on the date of claimant's incident; that the negligence of respondent was the proximate cause of the damages sustained to claimant's vehicle; and that the amount of the damages agreed to by the parties is fair and reasonable. Thus, claimant may make a recovery for his sustained loss.

Accordingly, the Court is of the opinion to and does make an award in the amount of $372.12.

Award of $372.12.

OPINION ISSUED DECEMBER 20, 2000

AUSTIN T. GETZ AND IRENE M. GETZ
VS.
DIVISION OF HIGHWAYS

(CC-99-353)

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

PER CURIAM:

Claimants brought this action for vehicle damage sustained when their vehicle struck a hole when they were traveling northbound on U.S. Route 250 between Philippi and Belington. At this location, U.S. Route 250 is maintained by respondent in Barbour County. The Court is of the opinion to make an award in this claim for the reasons more fully set forth below.

The incident giving rise to this claim occurred on June 9, 1999, at approximately 7:00 p.m. Claimants were traveling northbound on U.S. Route 250, near the southeastern corner of the Barbour County fairgrounds, in their 1999 Buick Park Avenue at a speed of about fifty to fifty-five miles per hour. They were proceeding to their residence from the Elkins Hospital. Claimants travel this portion of road about once a month. They had traveled on the same stretch of road earlier in the day. Vehicle traffic was present in both directions on the road. At this location, U.S. Route 250 is a priority two lane road with double yellow lines indicating the center of the road surface and white lines indicating the edges of the pavement. The road is twenty-two feet wide. As Mr. Getz drove the vehicle in a turn in the road, he was confronted suddenly by a hole in the road surface. The hole was about fifteen inches into the travel portion of the road from the white line on the edge of the pavement. Mr. Getz testified that when he saw the hole, he did not have time to maneuver the vehicle around the hole and the passenger side of the vehicle struck the hole. Ms. Getz testified that after the incident, she walked back to the hole, placed her foot into the hole and observed the hole's depth up to her ankle. The impact burst the front passenger side tire, bent the passenger side rims, burst the hydraulic brake hose and necessitated alignment of the vehicle. The sustained damage exceeded the deductible feature in the amount of $1,000.00 in claimants' motor vehicle insurance policy. In accordance with the Court's decision in *Summerville, et al. vs. Division of Highways*, any recovery would be limited to the amount of their deductible feature. See *Id*., 18 Ct. Cl. 110 (1991).

The position of respondent is that it did not have notice of the hole on U.S. Route 250 in Barbour County. According to Transportation Crew Supervisor II, George Michael Erwin, he inspected the scene a few days after the incident, but he was unable to locate the hole in question. Mr. Erwin testified that he was aware that heavy truck traffic caused problems along the berm of the road. These problems are patched and repaired continually.

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

Sims, 130 W.Va. 645; 46 S.E.2d 81 (1947). In order to hold respondent liable for road defects of this type, a claimant must prove that respondent had actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman vs. Dept. of Highways*, 16 Ct. Cl. 103 (1986).

In this claim, the evidence established that respondent had at least constructive if not actual knowledge of the hole on Route 250 in Barbour County. The Court is of the opinion that the condition of Route 250 constituted a hazardous condition and that respondent should have been more observant of problems on the road since this is a priority road subject to heavy truck traffic. Consequently, there is evidence of negligence on the part of respondent by which claimants may recover their loss.

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

Award of $1,000.00.

OPINION ISSUED DECEMBER 20, 2000

JAMES FRANKLIN HART
AND PATRICIA ANN HART
VS.
DIVISION OF HIGHWAYS
(CC-99-56)

Larry G. Kopelman, Attorney at Law, for caimants.
Andrew F. Tarr & Xueyan Zhang, Attorneys at Law, for respondent.

STEPTOE, JUDGE:

Claimants brought this action for damage sustained to their real property allegedly caused by the negligent maintenance of the drainage system on County Route 60/14, locally known as West Main Street, in St. Albans. This portion of County Route 60/14 is maintained by respondent in Kanawha County. The Court is of the opinion to make an award in this claim for the reasons more fully set forth below.

This claim came on for hearing on the 2nd day of August, 2000, at which time the parties, counsel, and the Court[1] met at the property which is the subject matter of the claim for a view of the property and the surrounding terrain. The Court observed the following:

1. The property owned by the claimants is located on the north side of County Route 60/14 (a road commonly known as West Main Street).

2. The residence is a two-story structure with a flat front yard; a driveway on the east side of the house extends to the front of the garage located approximately four feet from the residence; the side yard on the west side of the residence slopes northerly; and there is a terraced back yard with a creek some thirty to forty feet to the rear of the back yard.

3. County Route 60/14 abuts the property at the front. There is a ditch line across the road to the south. It had a growth of grass and weeds.

4. There is a steep drop behind the house and the garage. From the area between the house and garage, one could look over the back yard, but it was not possible to walk down to the back yard due to the steep drop. There was dirt visible beneath the garage structure and the ground from the garage sloped steeply toward the back yard.

5. Where the driveway abuts onto County Route 60/14, there is a culvert under the driveway with slots at the top and a ditch from that culvert extends across the front of claimants' property to a hollow at the west side of their property.

6. The Court also viewed a box culvert to the west side of claimants' property which appeared to empty into a hollow-like area which was grown over with trees and other vegetation.

7. The Court then drove some one hundred yards east on County Route 60/14 stopping on the south side of the road in a parking area adjacent to a residence where the Court observed a box culvert some four feet square and at least six feet in depth. It had dirt and logs built up around it. The outlet pipe was described as being beneath the roadway crossing to the north side of the road and proceeding beneath a structure across the road. The flow of water is directed by the box culvert to the creek at the rear of the properties on the north side of the road.

8. There is a gently sloping hillside to the south of the box culvert and this hillside forms the main watershed to the box culvert.

9. The Court also observed the ditch line on the south side of the road which is the beginning of the ditch line that is located on the south side of the road and across from claimants' property.

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[1] Two Judges of the Court were present for this view. On a subsequent date, the Honorable David M. Baker, Judge, viewed the property out of the presence of counsel and the parties.

10. The super-elevation of the road to the south side of the road was evident when looking west toward claimants' property from the area of the box culvert area.

FACTS OF THE CLAIM

In October 1990, claimants purchased their residence for the amount of $60,000.00, less $7,000.00 for a manufactured home that was used as a trade-in. As described above, claimants' residence is situated on the northerly side of County Route 60/14. Behind the residence, there is a drop off and the property slopes thirty to forty feet toward a nearby creek. On the east side of the residence is a garage with a wooden floor. Between the residence and the garage, there had been an eight to ten feet high retaining wall, with a wire fence on top. This retaining wall was built on two footers from the base of the back yard. A second retaining wall is located behind the residence which wall supports part of the terraced back yard. At the time claimants' purchased their home, an inspection was not conducted. However, several years later when claimants mortgaged their home, an appraisal was performed by a bank for financing purposes. No problems relating to stability of the residence or drainage were raised by the financing institution.

At this location, County Route 60/14 is a second priority road that traverses in a east-west direction. It is a two-lane road with double yellow lines indicating the center of the road surface and white lines indicating the edges of the pavement. On the south side of County Route 60/14 directly across from the claimant's residence is a two acre hillside. The ditch line on the south side of the road has a three and one-half percent grade. A culvert is located on the southwest side of the road, across from the claimant's residence and this culvert directs the flow of water from the ditch line beneath the roadway into a watershed area to the west of claimants' property. This water eventually flows into the creek behind claimants' property. The section of the road (about five-hundred feet or so) to the east of the claimant's residence is super-elevated to the south, then curves and is super-elevated to the north.

Approximately seven hundred to eight hundred feet east of the claimant's residence and on the south side of the road, there is an eight acre hollow that is approximately one-hundred-forty feet higher in elevation than the claimant's residence. At the bottom of this hollow area on the south side of the road, respondent, as the former State Road Commission, installed a box culvert four feet square and seven to eight feet deep. About one foot of sediment has collected in the bottom of this culvert.

At the time claimants purchased the property, they were aware that the residence was situated in a low lying area, but they did not observe any water damage to the structure or evidence of water drainage problems on the property. According to claimant Patricia Ann Hart, the first signs of water problems occurred in February of 1991. Respondent was contacted about these problems and it conducted an investigation of the complaint. Since that time, Ms. Hart testified that respondent has been contacted twice each year to clean the ditch on the south side of the road.

Claimant James Franklin Hart testified that since 1990, respondent has cleaned the ditch three times. However, the claimants continued to experience drainage problems.

The problems with water flowing onto claimants' property continued to increase in nature until one occasion when the force of the water flowing across their driveway knocked down the retaining wall between the garage and the residence. Afterwards, the claimants began to video tape[2] their drainage problems. On two occasions, July 28, 1997 and June 12, 1998, the claimants video taped significant water flowing across the road from the ditch line on the south side onto their property. The video depicted water flowing in a southeast direction from the ditch on the south side of the road. On another occasion, the force of the water flowing across the road from the ditch line actually broke a basement window at the front of the house and flooded the basement. Mr. Hart described the water flow as "a waterfall where it swept under our porch." A video tape from July 12, 2000, depicted vegetation and debris in the ditch line, which debris included such items as a log and a road sign.

As a result of this water drainage, the foundations of the residence and garage are deteriorating. According to the testimony of the claimants, prior to the drainage problems, the garage was supported adequately by its piers with the ground being level beneath the garage. The force of the water flowing across the driveway and beneath the garage has washed away about one-third of the dirt base. Approximately two-thirds of the garage floor now has dirt supporting it. The piers are the only support for the garage walls. Currently, the garage cannot be used to park vehicles, but is only safe enough for storage purposes. According to Bob Barnett, a contractor hired by claimants to provide an estimate for repair, the property has sustained damage in the amount of $23,500.00. He determined that the retaining wall between the residence and the garage should be replaced; that the foundations of the two structures should be repaired; and that there should be a retaining wall in the back yard to provide support for the slope. While the claimants had a homeowner's insurance policy in effect at the time of the sustained damage, it did not provide coverage for the flood damage that has occurred.

The position of respondent is that it was not negligent in the maintenance of the drainage system on County Route 60/14. In late 1998 or early 1999, Maintenance Assistance David Charles Starcher and Highway Assistant Administrator James C. Markle went to the claimant's residence to discuss the drainage problem with them. Mr. Starcher testified that he observed the ditch on the south side of the road to be seventy to eighty percent functional. The County Supervisor was contacted to removed the debris from the drain. About two weeks

[2] These video tapes were produced for viewing by the Court at the hearing.

after this meeting, respondent, on January 25, 1999, installed a twenty foot pipe, with a three inch slot across the top, in the claimant's driveway. Several days later, an additional ten foot section of pipe was added to the outlet end of the pipe in order to expand the turning radius of the driveway. An eighteen to twenty-four inch deep ditch was dug from the end of the installed pipe, proceeding west, toward the end of the claimant's property. Also, Mr. Starcher stated that respondent maintains the ditch on a three year cleaning cycle and its employees have mowed the vegetation in the southern ditch twice since the installation of the pipe and ditch. Since the completion of these projects, respondent has not received any further complaints from claimants regarding drainage problems on their property.

According to Dr. George Alan Hall, the Standards Manuals and Research Engineer and respondent's drainage expert for this particular claim, a topographical map from the United States Geological Survey indicates the area in which claimants' property is located on County Route 60/14 has a defined drainage area. Dr. Hall opined that the water problem being experienced by claimants actually was created by other landowners without respondent's knowledge. From 1996 to 1998, the property on the southwest hillside for which the box culvert described herein before was timbered and the hollow had been filled. In addition, another landowner near the same hollow installed a twenty-four inch corrugated plastic pipe, which created a hole where a box culvert went under the road. Rock, soil and logs had been piled up around this box culvert thus preventing water from flowing into the box culvert. Limbs that were on the ground washed down into the ditch line and also impeded the flow of water to box culvert. Moreover, Dr. Hall believes that the super-elevation and steep grade of the road propels water from the ditch line on the south side of the road to cross the road and flow onto claimants' property. Thus, the ditch line on the south side of the road was unable to carry storm water flow. The ditch line is now serving two drainage areas. According to Dr. Hall's calculations, the drainage system is adequate in design for the south side of the road, but inadequate for the excess water generated by the hollow area. This situation has resulted in claimants as well as other landowners adjacent to the culvert to experience drainage problems on their properties. Further, Dr. Hall explained that the vegetation in the ditch line is normal and necessary because it prevents soil erosion by slowing the flow of the water. However, Dr. Hall admitted that the log and debris in the ditch line at the time of the severe water problems described by claimants could also impede the flow of water.

ANALYSIS AND CONCLUSIONS OF LAW

The Court has held that respondent has a duty to provide adequate drainage of surface water, and drainage devices must be maintained in a reasonable state of repair. *Haught vs. Dept. of Highways*, 13 Ct. Cl. 237 (1980). In claims of this nature, the Court will examine whether respondent negligently failed to protect a claimant's property from foreseeable damage. *Rogers vs. Div. of Highways*, 21 Ct.

Cl. 97 (1996).

In this claim, the evidence establishes that respondent failed to maintain its drainage system on County Route 60/14 in Kanawha County in a reasonable state of repair. Apparently, another landowner had altered respondent's drain located southeast of claimants' residence and respondent asserts that it had no knowledge of those actions. However, the evidence establishes that respondent was informed of a drainage problem affecting claimants' property in February 1990 and the severity of the problem increased in nature until 1998. The evidence further establishes that in response to complaints, respondent cleaned the ditchline three times since 1990, before taking the step of installing a drain pipe with a slot and creating a ditch along the north side of the road in January 1999 to alleviate the water problems being experienced by claimants. Moreover, the video tape evidence established that the ditch on the southern side of the road was full of debris, including a log and a road sign. This situation significantly contributed to water flowing in a "sheet" from the south side of the road onto claimants' property. The Court is of the opinion that from 1990 to 1998, respondent's employees had reason to know of a significant amount of water flowing across the road surface during rainy periods. Respondent's employees travel on this road on a regular basis and should have been aware of the drainage problems in the area. There were sufficient complaints for respondent's employees to investigate the area further for potential drainage problems. Respondent had constructive if not actual notice of a drainage problem in the area. While the Court is mindful that the clear-cutting of another property owner potentially contributed to the water flow problem, respondent is not excused from its failure to take notice of the formation of an obvious hazard occurring in this area.

When respondent's employees inspected the area on several occasions, they apparently missed the altered box culvert to the east of claimants' property and that debris was not cleaned from the ditchline. The Court is of the opinion that the drainage system was not kept in a reasonable state of repair. Furthermore, respondent should have been more diligent in preventing other property owners from altering its drains. If the box culvert and the ditch line in the area had functioned properly, the effect of any excess water flowing onto claimants' property would have minimized. As such, respondent failed to protect claimants' property from excessive water flowing from the south side of the road. Thus the Court has reached the conclusion that the actions of respondent constituted negligence by which claimants may make a recovery in this claim.

Notwithstanding this finding of negligence on the part of respondent, the Court is not inclined to make an award in the amount of $23,500.00. The Court has determined that a portion of the recovery requested by claimants is for the betterment of their property. As such, the Court will make an award which places claimants in as good a position which they would have been but for the negligence of respondent. Therefore, the Court has determined that the amount of $23,500.00 be reduced to the

amount of $16,000.00, which the Court believes to be a fair and reasonable award for the loss sustained as a result of respondent's negligence.

In accordance with the findings of fact and conclusions of law stated herein above, the Court is of the opinion to and does make an award to the claimants in the amount of $16,000.00 in this claim.

Award of $16,000.00.

OPINION ISSUED DECEMBER 20, 2000

PENNIE L. JONES AND KENNETH A. JONES
VS.
DIVISION OF HIGHWAYS
(CC-99-401)

Claimant appeared *pro se*.

Xueyan Zhang, Attorney at Law, for respondent.

PER CURIAM:

Claimants brought this action for vehicle damage when their vehicle struck a rock on the side of the road while claimant Pennie L. Jones was traveling on County Route 5, locally known as Falls Creek Road in Tornado. At this location, County Route 5 is maintained be respondent in Lincoln County. The Court is of the opinion to make an award for the reasons more fully stated below.

The incident giving rise to this claim occurred on September 24, 1999, at approximately 10:00 a.m. Claimant Pennie L. Jones was traveling on County Route 5 in her and her husband's 1993 Chevrolet Astro Van at a speed of about twenty miles per hour. She was proceeding from her residence to her place of employment in St. Albans. At this location, County Route 5 is a two-lane asphalt road with double yellow lines indicating the center of the road surface. The road has a width of about sixteen to eighteen feet. As she drove their vehicle on the road, she observed a rock about forty feet in front of the vehicle on the edge of the road. An oncoming large logging truck forced her to drive to the berm of the road where the rock was located. Claimant's vehicle struck a rock that was on the edge of the road surface. Photographic evidence adduced by claimants established that the rock in question was embedded partially in the pavement. The impact burst both passenger side tires and bent the rims. The paint on the passenger side of the vehicle also sustained minor scratching and chipping. The sustained damage exceeded the deductible feature of $500.00 in claimants' motor vehicle insurance policy. In accordance with the Court's decision in *Summerville et al. vs. Division of Highways*, any recovery would

be limited to this amount. See *Id*., 18 Ct. Cl. 110 (1991). Afterwards, claimant Pennie L. Jones notified respondent of the incident.

The position of respondent is that it did not have notice of the rock on the berm of County Route 5 in Lincoln County. According to County Highway Administrator II, Larry P. Pauley, there are drainage problems in the area. In response, respondent placed large rocks in the ditch along the road. In 1998 or 1999, the road surface of County Route 5 was resurfaced and widened. However, Mr. Pauley was unaware of how or when the rock in question was embedded partially into the edge of the pavement. He did acknowledge that the rock should not be where it is located, but should be in the ditch along the side of the road. Mr. Pauley further testified that he travels this road on a regular basis and observes the drains. During these trips on the road, he testified that he did not observe the rock embedded on the edge of the road surface. Respondent asserts that it had no prior information regarding the rock in question.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins vs. Sims*, 130 W.Va. 645; 46 S.E.2d 81 (1947). In order to hold respondent liable for road defects of this type, claimant must prove that respondent had actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman vs. Dept. of Highways*, 16 Ct. Cl. 103 (1986). Moreover, respondent has a duty to ensure that an independent contractor completes a project in such a manner that travelers will not be put into a position of unreasonable danger. See *Tolley vs. Division of Highways*, 22 Ct. Cl. 12 (1997) and *Acree vs. Division of Highways*, 22 Ct. Cl. 137 (1998).

In the present claim, the Court is of the opinion that respondent had actual knowledge of the rock on the edge of pavement on County Route 5 in Lincoln County. The rock in question is an obvious hazard and respondent should have been aware of the rock on the edge of the pavement during the paving project in 1998 or 1999. During this project, the on-site project inspector for respondent had a duty to prevent such hazards from occurring. Consequently, there is evidence on the part of respondent upon which to base an award.

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

Award of $500.00.

OPINION ISSUED DECEMBER 20, 2000

JEFF MOZINGO
VS.

DIVISION OF HIGHWAYS
(CC-99-381)

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

PER CURIAM:

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

1. On August 5, 1998, claimant was traveling westbound in his vehicle on Route 67 McKinleyville, Brooke County. Claimant drove his vehicle onto the berm of the road and the tire of the vehicle struck a broken sign post stub.

2. On the date in question, respondent was responsible for the maintenance of Route 67 in Brooke County and was aware of the broken sign post stub on the berm.

4. As a result of this incident, the vehicle tire burst. The sustained damage was in the amount of $95.85.

5. Respondent agrees that the amount of damages as put forth by the claimant is fair and reasonable.

The Court has reviewed the facts of the claim and finds that respondent was negligent in its maintenance of Route 67 in Brooke County on the date of claimant's incident; that the negligence of the respondent was the proximate cause of the damages sustained to claimant's vehicle; and that the amount of the damages agreed to by the parties is fair and reasonable. Thus, claimant may make a recovery for his sustained loss.

Accordingly, the Court is of the opinion to and does make an award in the amount of $95.85.

Award of $95.85.

OPINION ISSUED DECEMBER 20, 2000

OHIO VALLEY MEDICAL CENTER
VS.
DIVISION OF CORECTIONS
(CC-00-436)

Claimant appeared *pro se*.
Joy M. Bolling, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks payment in the amount of $95,127.58 for medical services rendered to an inmate in the custody of respondent in Ohio County. 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 DECEMBER 20, 2000

FRED SAVAGE, ADMINISTRATOR OF
THE ESTATE OF LUTHER SAVAGE
VS.
DIVISION OF HIGHWAYS
(CC-96-447)

Ward Morgan, Attorney at Law, for claimant.[1]
Andrew F. Tarr, Attorney at Law, for respondent.

BAKER, JUDGE:

Claimant brought this action for damae sustained to real property allegedly caused by the negligent maintenance of the drainage system on County Route 1, locally known as West Virginia Avenue in Panther, McDowell County. At this location, County Route 1 is maintained by respondent. This claim was bifurcated at the initial hearing and the issue of liability was heard by the Court; the parties were later informed that the Court was of the opinion that there was liability on the part of the respondent; thereafter, several attempts were made by the Clerk of the Court to schedule a hearing on the issue of damages. The claim recently was set for hearing on

[1]At the initial hearing of this claim on November 7, 1999, claimant Luther Harmon Savage was represented by Abishi C. Cunningham. Sometime later Donald L. Pitts became counsel of record. Currently, counsel of record in this claim is Ward Morgan.

November 16, 2000, at which time the Court received and filed a stipulation wherein the parties agreed to the amount of damages. The Court is now prepared to make an award in this claim for the reasons more fully set forth below.

On June 5, 1989, Luther Harmon Savage and Helen Savage purchased the subject property in Panther, McDowell County.[1] The property is situated downhill from County Route 1. At this location, County Route 1 is a third priority, one-lane asphalt road. Beginning in July 1994, Mr. and Mrs. Savage began to experience drainage problems from water on County Route 1. On one occasion in July 1994, the Savages experienced substantial amounts of water flowing onto their property. A drain which is located fifty-two feet from the Savage property allegedly became clogged and the water flowed down the road, proceeded down the driveway and into the yard. Mr. Luther Savage asserted that the water turned his once grassy yard into a "mud hole." The water also caused the foundation of his residence to sink two to four inches. Mr. Savage placed about fifteen tons of gravel in his yard, but the water flowing into his yard washes it down the side of the mountain to the rear of the property. On several occasions, Mr. Savage had to resod the grass in his yard. On one occasion, there was a landslide which broke off part of the road and deposited debris onto the property. He stated that the water created holes in his yard. Mr. Savage contacted respondent by telephone and in person regarding the problems caused by the water flowing onto his property.

Thereafter, respondent reconstructed the drainage system and placed gabion baskets around the drain. A truck-load of debris was removed from the property. Respondent attempted to clean out the drain pipe, but according to Mr. Savage, it remained stopped up. In addition, respondent ditched the side of County Route 1 at the base of the mountain in an attempt to prevent water from flowing onto the Savage property. Mr. Savage testified that he had to personally clean out the drain pipe and the ditchline on several occasions. Since then, a significant amount of water flow has cut an area six to eight inches wide across the property. This area is about ten feet from where water originally cut a swath across the property. However, when the drain pipe is clean and the ditchline is clear, the water flows through the drain and claimants have no problems on their property. Mr. Savage tried to keep the drain pipe and the ditchline clean himself in an attempt to protect his property from the excessive water flowing from the road.

The position of respondent was that it was not negligent in its maintenance of the drainage system on County Route 1. According to Crew Leader Kenneth Bowles, County Route 1 is a third priority road. The area in question experienced

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[1] Since the November 7, 1996, hearing, Mrs. Savage passed away and Mr. Savage was appointed as the administrator of her estate. Thereafter, Mr. Savage passed away, and Fred Savage was appointed as the administrator of his estate.

flooding over the period of July 11 and 12, 1994. At that time, respondent tried to conduct repairs on damaged roads, based on priority. Mr. Bowles asserted that the damage sustained to the Savage property was a result of sudden flood waters overflowing the ditch. Prior to this time, employees of respondent dug a one foot deep ditch and checked the drains. Mr. Bowles further testified that the drains functioned properly.

The Court has held that respondent has a duty to provide adequate drainage of surface water, and drainage devices must be maintained in a reasonable state of repair. *Haught vs. Dept. of Highways*, 13 Ct. Cl. 237 (1980). In claims of this nature, the Court will examine whether respondent negligently failed to protect a claimant's property from foreseeable damage. *Rogers vs. Div. of Highways*, 21 Ct. Cl. 97 (1996).

The Court is of the opinion that respondent was negligent in its maintenance of County Route 1 in McDowell County. Respondent had actual notice of the excessive water problems occurring on the Savage property. Steps were taken by respondent to correct the problem, but the Savage property sustained damage thereto prior to the time that respondent took the corrective measures. Consequently, claimant herein may recover the sustained loss.

As a result of the events described above, the Savage property sustained damage which originally was stated in the claim to be in the amount of $9,000.00. However, as noted herein above, the parties have agreed to stipulate the damages in the amount of $4,000.00. Respondent agrees that the stipulated amount of damages as put forth by the parties is fair and reasonable.

In accordance with the findings of fact as stated herein above, the Court is of the opinion to and does make an award in this claim.

Award of $4,000.00.

OPINION ISSUED DECEMBER 20, 2000

STEPHANIE GALE STURM
VS.
DIVISION OF HIGHWAYS
(CC-99-409)

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

PER CURIAM:

Claimant brought this action for vehicle damage sustained when her vehicle struck a piece of concrete while she was traveling westbound on I-64 between Nitro and Cross Lanes. At this location, I-64 is maintained by respondent in Kanawha County. The Court is of the opinion to make an award in this claim for the reasons more fully set forth below.

The incident giving rise to this claim occurred on September 30, 1999, at approximately 11:00 p.m. Claimant Stephanie Gale Sturm was driving her 1992 BMW 325 when she entered I-64 at the Cross Lanes exit near a construction site with a break in the concrete barriers. She was traveling at a speed of about fifty-five miles per hour. Other traffic was present on the road. Claimant maneuvered her vehicle into the passing lane in order to pass a slower moving vehicle. Suddenly, she noticed a piece of concrete about twenty feet away from the vehicle in her lane of travel. The piece of concrete was positioned near a break in the wall near a construction site. The vehicle struck the piece of concrete, which had pieces of re-bar embedded into it. The impact burst all four tires and damaged the undercarriage of the vehicle. During an attempt to move the vehicle, the motor was damaged. Afterwards, claimant informed 911 of the incident, but she stated that there was no response. The sustained damage exceeded the $500.00 deductible feature in claimant's motor vehicle insurance policy. In accordance with the Court's decision in *Summerville et al. vs. Division of Highways*, any recovery would be limited to this amount. See *Id*., 18 Ct. Cl. 110 (1991).

The position of respondent is that it did not have notice of the concrete on I-64 in Kanawha County. According to Crew Supervisor Michael Escue, a contractor for respondent was conducting a widening project at the location in question. Respondent was supposed to have a project observer at the construction site to supervise the work. Mr. Escue further testified that the breaks in the concrete barriers allow trucks ingress and egress in order to remove debris from the site. Prior to claimant's incident, respondent asserts that it had no information regarding the road debris.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins vs. Sims*, 130 W.Va. 645; 46 S.E.2d 81 (1947). In order to hold respondent liable for road defects of this type, claimant must prove that respondent had actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman vs. Dept. of Highways*, 16 Ct. Cl. 103 (1986). Moreover, respondent has a duty to ensure that an independent contractor completes a project in such a manner that travelers will not be put into a position of unreasonable danger. See *Tolley vs. Division of Highways*, 22 Ct. Cl. 12 (1997) and *Acree vs. Division of Highways*, 22 Ct. Cl. 137 (1998).

In this claim, the evidence established that respondent had constructive if not actual knowledge of the road debris on I-64 in Kanawha County. The Court is of

the belief that the debris in question came from the nearby construction site. Respondent's project observer had a duty to keep the site clear of hazards to the traveling public. Consequently, there is evidence of negligence on the part of respondent upon which to base an award.

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

Award of $500.00.

OPINION ISSUED DECEMBER 20, 2000

WV REGIONAL JAIL AND CORRECTIONAL
FACILITY AUTHORITY
VS.
DIVISION OF CORRECTIONS
(CC-00-447)

Chad Cardinal, Attorney at Law, for claimant.
Joy M. Bolling, 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 Authority, provides and maintains the Eastern Regional Jail, the Central Regional Jail, the South Central Regional Jail, the Southern Regional Jail, the Southwestern Regional Jail, and the Northern 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 $4,583,896.00, to recover the costs of housing and providing associated services to 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 filed an Answer admitting the validity of the claim and that the amount of the claim is fair and reasonable.

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. This issue was considered by the Court previously in the claim of *County Comm'n. of Mineral County v. Div. of Corrections*, 18 Ct. Cl.

88 (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 $4,583,896.00.

Award of $4,583,896.00.

OPINION ISSUED DECEMBER 20, 2000

RANSOM WILEY
VS.
DIVISION OF HIGHWAYS
(CC-99-376)

Claimant appeared *pro se*.

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

PER CURIAM:

Claimant brought this action for damage sustained to his residence when a tree branch from a tree on respondent's right of way on W.Va. Route 37 fell onto his residence located in Ranger. At this location, W.Va. Route 37 is maintained by respondentin Lincoln County. The Court is of the opinion to make an award in this claim for the reasons more fully set forth below.

The incident giving rise to this claim occurred on August 19, 1999, at approximately 2:00 to 3:00 p.m. At this location, respondent has a sixty foot right of way. The right of way extends thirty feet from the center of the road surface. During a severe storm, a tree branch from a tree on respondent's right of way on W.Va. Route 37 fell onto claimant's residence. The tree in question was twenty feet from the center of the road surface. The impact put a hole in the roof, ripped off some of the overhang, ripped off some of the siding on the residence and damaged a meter base. The tree branch also damaged nearby power lines. The tree was adjacent to his residence about fifty-five to sixty feet from his residence and six feet from the paved portion of road. Prior to this incident, claimant's son, Ronald Wiley, had contacted respondent regarding the tree in question. In the summer of 1997, Ronald Wiley had contacted respondent's Administrative Assistant Christopher K. Sowards in Huntington regarding the tree. Mr. Sowards testified that he contacted County Highway Administrator II, Larry P. Pauley, to investigate the situation. Mr. Sowards did not travel to the location in question. The tree was confirmed to be on respondent's right of way, but it was entangled in the power lines. Afterwards, Mr. Sowards informed Mr. Wiley that he had to contact the power company regarding removal of the tree. The sustained damage was in excess of claimant's $1,000.00

deductible feature in his homeowner insurance policy. In accordance with the Court's decision in *Summerville et al. vs. Division of Highways*, any recovery would be limited to the amount of the deductible feature. See *Id*., 18 Ct. Cl. 110 (1991).

The position of respondent is that it did not have notice of the hazardous condition of the tree on W.Va. Route 37. According to Mr. Pauley, when he inspected the tree, it appeared to be alive. However, the tree was in the power line and he stated that respondent did not have the expertise to trim the tree. He did not believe that the tree was a hazard, and he did not contact the power company. Mr. Pauley further testified that the trees in the power lines should be allowed to fall, then the power company should be contacted in order to remedy the situation.

The Court has held in prior claims that when the evidence establishes that respondent has notice of a hazard, such as a tree, and a reasonable opportunity to remove it, respondent may be held liable. *Jones v. Division of Highways*, 21 Ct. Cl. 445 (1995).

In the present claim, the evidence established that respondent had actual knowledge of the hazardous condition of the tree in Lincoln County. Respondent should have taken affirmative action once it received notice of the tree rather than waiting for it to fall. Consequently, there is negligence on the part of respondent by which to base an award.

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

Award of $1,000.00.

OPINION ISSUED DECEMBER 29, 2000

DONNA L. CURREY
VS.
DEPARTMENT OF EDUCATION
(CC-00-355)

Claimant represents self.

Joy M. Bolling, Assistant General Counsel, for respondent.

PER CURIAM:

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

Claimant seeks payment in the amount of $971.90 in tuition reimbursement. Respondent, in its Answer, admits the validity of the claim, but states that the amount of $882.00 is the correct amount due and owing to claimant. Respondent also states

that there were insufficient funds in its appropriation for the fiscal year in question from which to pay the claim. Claimant agrees that the amount owed to her is the amount of $882.00 and she agrees to accept that amount as satisfaction for the claim.

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

Claim disallowed.

OPINION ISSUED DECEMBER 29, 2000

FERGUSON BROTHERS PLUMBING
AND HEATING COMPANY
VS.
DIVISION OF CORRECTIONS
(CC-00-467)

Claimant appeared *pro se*.

Joy M. Bolling, 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 $133.75 for air-conditioner repair and a spring inspection at the Huntington Work/Study Release Center, a facility of respondent in Cabell County. The documentation for these services was not processed for payment within the appropriate fiscal year; therefore, claimant has not been paid. In its Answer, respondent admits the validity of the claim as well as the amount, and states that there were sufficient funds expired in the appropriate fiscal year from which the invoice Cabell County could have been paid.

Accordingly, the Court makes an award to claimant in the amount of $133.75.

Award of $133.75.

OPINION ISSUED JANUARY 17, 2001

CORRECTIONAL MEDICAL SERVICES, INC.

VS.
DIVISION OF CORRECTIONS
(CC-00-474)

Claimant appeared *pro se*.
Joy M. Bolling, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks payment in the amount of $577,363.04 for medical services rendered to inmates in the custody of respondent at Huttonsville Correctional Center, Pruntytown Correctional Center, Denmar Correctional Center, and Mount Olive Correctional Center, all facilities of the respondent. Respondent, in its Answer, admits the validity of the claim, but states that the correct amount owed to claimant is $543,957.81. The respondent further states that the portion of the claim denied is for interest in the amount of $33,405.23, and there were insufficient funds in its appropriation for the fiscal year in question from which to pay the claim. Claimant, having reviewed the Answer of the respondent, agrees that it will accept the amount of $543,957.81 as full and complete satisfaction of its claim.

This Court would have denied the request for interest based upon the provisions in W.Va. Code §14-2-12 which states in part that "In determining the amount of a claim, interest shall not be allowed unless the claim is based upon a contract which specifically provides for the payment of interest." There is no provision for interest in the claim herein.

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

Claim disallowed.

OPINION ISSUED JANUARY 17, 2001

MONTGOMERY GENERAL HOSPITAL
VS.
DIVISION OF CORRECTIONS
(CC-00-488)

Claimant appeared *pro se*.

Joy M. Bolling, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks payment in the amount of $51,070.55 for medical services rendered to several inmates in the custody of respondent at Mt. Olive Correctional Center, a facility of the respondent. Respondent, in its Answer, admits the validity of the claim, and further states that there were insufficient funds in its appropriation for the fiscal year in question from which to pay the claim.

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

Claim disallowed.

OPINION ISSUED JANUARY 17, 2001

WOOD COUNTY COMMISSION
VS.
DIVISION OF CORRECTIONS
(CC-00-486)

Ginny Conley, Prosecuting Attorney, for claimant county.
Joy M. Bolling, Assistant Attorney Genel, for respondent.

PER CURIAM:

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

Claimant, Wood County Commission, is responsible for the incarceration of prisoners who have committed crimes in Wood County, but have been sentenced to facilities owned and maintained by respondent, Division of Corrections. Claimant brought this action to recover $60,919.50 in costs for providing housing and/or medical care to 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 *County Comm'n. of Mineral County vs. Div. of Corrections*, 18 Ct. Cl. 88 (1990), that respondent is liable to claimant for the cost of housing and providing medical care to inmates sentenced to a State penal institution.

Pursuant to the holding in *Mineral County*, respondent reviewed this claim to determine the invoices for the services for which it may be liable. Respondent then filed an Answer admitting the validity of the claim in the amount of $60,919.50. Claimant agrees that this is the correct amount to which it is entitled.

In view of the foregoing, the Court is of the opinion to and does make an award to claimant in the amount of $60,919.50.

Award of $60,919.50.

OPINION ISSUED JANUARY 19, 2001

VINCENT W. BROOKS AND JOHNNA BROOKS
VS.
DIVISION OF HIGHWAYS
(CC-00-143)

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

PER CURIAM:

Claimants brought this action for vehicle damage sustained when their vehicle struck a cut-away portion of road on the edge of County Route 67/1 in Beech Bottom. At this location, County Route 67/1 is maintained by respondent in Brooke County. The Court is of the opinion to deny this claim for the reasons more fully set forth below.

The incident giving rise to this claim occurred on the evening of March 16, 2000. Claimant Vincent W. Brooks was traveling on County Route 67/1 in his and his wife's 1992 Mercury Topaz. Claimant frequently travels this portion of road and was on the road earlier in the day. At this location, County Route 67/1 is a two lane asphalt road. On the day in question, respondent was conducting a ditching project in the area in question. Claimant maneuvered his vehicle onto the berm in order to pull into a local grocery store which was at a higher elevation than the road. As the vehicle crossed the berm into the store parking lot, it struck a cut-away portion of the berm. Claimant testified that he did not observe any warning signs on the road. The impact damaged the exhaust system of the vehicle. The sustained damage was in the amount of $92.17.

The position of respondent is that it was not negligent in the maintenance of County Route 67/1. According to County Administrator Sheldon Beauty, respondent was conducting a ditching project in order to remedy a drainage problem. Respondent was working on its right of way. Mr. Beauty testified that the store-owner had been contacted but refused to allow respondent to cut the slope of his driveway leading to his store. During the project, respondent had flaggers present and barrels were placed along the construction site.

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

In this claim, the evidence failed to establish that respondent was negligent in its maintenance of County Route 67/1. Respondent was prevented by the store-owner from completing properly the drainage project. Under the circumstances, the Court is of the opinion that respondent took adequate measures to warn the traveling public of potential problems entering the store driveway. While the Court is sympathetic with claimant Vincent W. Brooks' situation, the fact remains that there is insufficient evidence of negligence on the part of respondent upon which to base an award.

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

Claim disallowed.

OPINION ISSUED JANUARY 19, 2001

LEWIS M. COPEN AND
GATHALEE GALE COPEN
VS.
DIVISION OF HIGHWAYS
(CC-00-209)

Claimants appeared *pro se*.

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

PER CURIAM:

Claimants brought this action for vehicle damage sustained when their vehicle was struck by a falling rock while claimant Gathalee Gale Copen was

traveling northbound on Route 20 near Hinton. At this location, Route 20 is maintained by respondent in Summers County. The Court is of the opinion to deny this claim for the reasons more fully set forth below.

The incident giving rise to this claim occurred on March 18, 2000 at approximately 11:00 a.m. Claimant Gathalee Gale Copen was traveling northbound on Route 20 in their 1989 Buick Park Avenue at a speed of about sixty miles per hour. She was proceeding from the Summers County Hospital towards her residence in Charmco. At this location, Route 20 is a first priority, two-lane road with double yellow lines indicating the center of the road surface and white lines indicating the edge of the pavement. The road has two twenty foot lanes and two to six foot berms. Along this portion of road, there is a "Falling Rock" sign on the side of the road in each direction of travel. Claimant testified that she travels this road regularly and did not recall observing any "Falling Rock" signs along the road. As claimant drove her vehicle on the road, a rock fell from the embankment, striking the vehicle and then bouncing into a ditch along the side of the road. The rock was about one to one and one-half feet in diameter. After the incident, claimant maneuvered the vehicle to the side of the road. Charles Cales, who was following behind claimant in another vehicle, witnessed the incident and stopped to assist her. The impact damaged the front of the vehicle. The sustained damage was estimated in the amount of $750.48.

The position of respondent is that it did not have notice of a rockfall on Route 20 in Summers County. According to Highway Administrator Billy Joe Lilly, this portion of road is a known rockfall area and warning signs have been in place for about twelve years. Prior to this incident, respondent did not have any report of a rockfall in the area.

The Court has consistently held that the unexplained falling of rock or rock debris on the road surface is insufficient to justify an award. *Mitchell vs. Division of Highways*, 21 Ct. Cl. 91 (1996); *Hammond vs. Dept. of Highways*, 11 Ct. Cl. 234 (1977). In order to establish liability on behalf of respondent, the evidence must establish that respondent had notice of the dangerous condition posing a threat of injury to property and a reasonable time to take suitable action to protect motorists. *Alkire vs. Division of Highways*, 21 Ct. Cl. 179 (1997).

In this claim, the evidence failed to establish that respondent had not taken adequate measures to protect the safety of the traveling public on Route 20 in Summers County. While the Court is sympathetic to claimants' plight, the fact remains that there is no evidence of negligence on the part of respondent upon which to base an award.

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

Claim disallowed.

OPINION ISSUED JANUARY 19, 2001

NORMAN CROUSE AND LILLIE MAE CROUSE
VS.
DIVISION OF HIGHWAYS
(CC-00-56)

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

PER CURIAM:

Claimant brought this action for vehicle damage sustained when their son-in-law was driving their vehicle and it struck a rock. He was traveling northbound on Route 10 between Cyclone and Davin. At this location, Route 10 is maintained by respondent in Wyoming County. The Court is of the opinion to deny this claim for the reasons more fully set forth below.

The incident giving rise to this claim occurred on December 28, 1999, at approximately 6:30 to 7:00 p.m. Claimants' son-in-law Wiley Russell Martin was operating their 2000 Dodge Neon at a speed of about forty-five to fifty miles per hour. Mr. Martin's wife, Tammy Sue Martin, was seated in the front passenger seat. Claimant Lillie Mae Crouse and her son, Curtis Crouse, were seated in the back seats. No traffic was present on the road. At this location, Route 10 is a paved, two-lane road. The road is marked with double yellow lines indicating the center of the road surface and white lines indicating the edges of the road surface. Mr. Martin testified that he did not observe any "Falling Rock" signs on the road. As Mr. Martin was driving the vehicle through a turn and was coming out of the turn, he was confronted immediately by a large rock in the travel portion of the road. The rock was located about two feet from the white line on the edge of the road surface. Mr. Martin was unable to maneuver the vehicle around the rock and the vehicle struck the rock on the driver's side of the vehicle. Afterwards, claimants' son moved the rock off of the travel portion of the road. The impact with the rock broke the vehicle's transmission and the vehicle had to be towed to a garage for repairs. The sustained damage exceeded the deductible feature of $500.00 in claimants' motor vehicle insurance policy. In accordance with the Court's decision in *Summerville, et al. vs. Division of Highways*, any recovery would be limited to the amount of their deductible feature. See *Id*., 18 Ct. Cl. 110 (1991).

The position of respondent is that it did not have notice of a rock on Route 10 in Wyoming County. According to Assistant Supervisor James David Cox, the area is not posted as a rockfall area. Mr. Cox further testified that the area in question is not a known rockfall area, but there are a few rocks which fall each year. Prior to this incident, respondent had no records of a rockfall.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins vs. Sims*, 130 W.Va. 645; 46 S.E.2d 81 (1947). In order to hold respondent liable for road defects, a claimant must prove that respondent had actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman vs. Dept. of Highways*, 16 Ct. Cl. 103 (1986). However, the Court has consistently held that the unexplained presence of a rock on a road surface is insufficient to justify an award. *Mitchell vs. Division of Highways*, 21 Ct. Cl. 91 (1996).

In this claim, the evidence failed to establish that respondent had not taken adequate measures to assure the safety of the traveling public while traveling on Route 10 in Wyoming County. While the Court is sympathetic to claimants' plight, the fact remains that there is no evidence of negligence on the part of respondent upon which to base an award.

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

Claim disallowed.

OPINION ISSUED JANUARY 19, 2001

PHILLIP FAULKNER AND DANIELA FAULKNER
VS.
DIVISION OF HIGHWAYS
(CC-99-111)

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

PER CURIAM:

Claimants brought this action for vehicle damage sustained when their vehicle struck a hole as claimant Phillip Faulkner was traveling southbound on Route 2 towards Marshall University. Route 2 at this location is maintained by respondent in Cabell County. The Court is of the opinion to deny this claim for the reasons more fully set forth below.

The incident giving rise to this claim occurred in February 1999. In the early morning hours of a snowy February day, Mr. Faulkner was traveling southbound on Route 2, for the first time. He was proceeding towards Marshall University near the floodwall in Cabell County in his 1992 Acura Vigor. At the location in question, Route 2 is approximately thirty feet wide with two lanes. It is a blacktop road with double yellow lines indicating the center of the road. The speed

limit at this location is thirty-five miles per hour, but past the floodwall, the speed limit is reduced to twenty-five miles per hour. As Mr. Faulkner was driving the vehicle at a speed of about thirty-five to forty miles per hour, he had a visibility of about ten to fifteen feet. There was not much traffic present on the road. Suddenly, the vehicle's right passenger side tires struck a hole in the pavement, bursting the tires and breaking the rims. Afterwards, Mr. Faulkner contacted respondent and informed it of the hole on Route 2. As a result of the incident, claimant's vehicle sustained damage in the amount of $1,689.34. While claimant had a deductible feature of $500.00 in his motor vehicle insurance policy, his insurance carrier would not pay for the after market rims which he purchased for the vehicle.

The position of respondent is that it did not have notice of the hole on Route 2 in Cabell County. Respondent asserts that during the winter months, it uses cold mix asphalt to repair holes in road surfaces. However, in this claim, it did not have any information regarding a hole on the road surface of Route 2 where the incident occurred.

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

In this claim, the evidence established that respondent had at least constructive notice of a hazardous condition on Route 2 and was negligent in its maintenance of Route 2 in Cabell County. Notwithstanding this finding of negligence on the part of respondent, the Court is also of the opinion that claimant was negligent in the operation of his vehicle. Mr. Faulkner was operating his vehicle at a rate of speed too fast for the road conditions then and there existing. In a comparative negligence jurisdiction, such as West Virginia, the negligence of a claimant can reduce or bar recovery of a claim. Based on the above, the Court finds that the negligence of claimant was equal to or greater than the negligence on the part of respondent. Consequently, the negligence of claimant is a complete bar to recovery in this claim.

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

Claim disallowed.

OPINION ISSUED JANUARY 19, 2001

PHILLIP JAMES HAMILTON, JR.

VS.
DIVISION OF HIGHWAYS
(CC-00-184)

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

PER CURIAM:

Claimant brought this action for vehicle damage sustained when his vehicle encountered a sharp turn after crossing a bridge on Route 16, locally known as Princeton Garner Road, near Princeton. At this location, Route 16 is maintained by respondent in Mercer County. The Court is of the opinion to deny this claim for the reasons more fully set forth below.

The incident giving rise to this claim occurred on January 9, 2000, at approximately 10:30 p.m. Claimant was traveling southbound on Route 16 in his 1991 Pontiac Firebird GTA at a speed of about twenty-five miles per hour. This occasion was claimant's first time driving on this road at night. The weather was foggy and the roadway was wet. At this location, Route 16 is a two-lane asphalt road with double yellow lines indicating the center of the road and white lines on each edge of the pavement. Claimant testified that when he drove across a bridge, he was unable to observe the turn to his right on the westerly side of the road. However, he did indicate that he observed an orange "thirty miles per hour" road sign at the turn. He tried to maneuver his vehicle through the turn, but he lost control of his vehicle. The vehicle then slid off the road surface, breaking through a fence and striking a telephone pole. Claimant sustained minor personal injures. Afterwards, a member of the West Virginia State Police investigated this incident. The certified police report tendered by claimant indicated that the contributing circumstances to the incident were that claimant's vehicle exceeded a safe speed and that there were other roadway defects.[1] The report does not mention any roadway defects specifically. Claimant contends that the road configuration was the proximate cause of his incident. Since the sustained damage was estimated to exceed the value of the vehicle, the vehicle was deemed to be "totaled." Claimant paid $5,000.00 for the vehicle, but the vehicle had a blue book value of $6,600.00.

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[1]The certified copy of the police report tendered by claimant appears to have been amended in the section labeled as "Contributing Circumstances." It appears to the Court that two different typewriters were used on this report section and that white-out had been placed over the oval indicating "Left of Center" which had been previously marked.

The position of respondent is that it did not have notice of any problem with the curve or the road condition on Route 16 in Mercer County. According to West Virginia State Police Sergeant John C. Gillispie, the investigating officer, the proximate cause of this incident was claimant's vehicle was exceeding a safe speed. Sgt. Gillispie tendered his original police report. The report made no indication of any roadway defects or hazards, as did the copy of the report tendered by claimant. Sgt. Gillispie further testified that this was the only incident that he had encountered at this location.

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

In this claim, the evidence failed to establish that respondent was negligent in its maintenance of Route 16 in Mercer County. Claimant should have exercised greater care under the then and there existing road conditions. Moreover, claimant proffered a document purporting to be a certified copy of the original police report. This document appears to the Court to have been altered as established by the testimony of the investigating officer. The Court takes a dim view of this conduct and views such conduct with extreme disfavor. Consequently, this claim will be dismissed.

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

Claim disallowed.

OPINION ISSUED JANUARY 19, 2001

BENJAMIN DALE HERSMAN
VS.
DIVISION OF HIGHWAYS
(CC-00-36)

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

PER CURIAM:

Claimant brought this action for vehicle damage sustained when his vehicle struck a rock while he was traveling southbound on U. S. Route 219 near Ronceverte. At this location, U. S. Route 219 is maintained by respondent in Greenbrier County. The Court is of the opinion to deny this claim for the reasons more fully set forth below.

The incident giving rise to this claim occurred on October 11, 1999, at approximately 9:30 p.m. Claimant was traveling on U. S. 219 in his 1990 Ford Mustang at a speed of about fifty miles per hour. He was proceeding from Fairlea to his residence in Organ Cave. Claimant's girlfriend, Candy Hunter, was following him in another vehicle from a distance of about three car lengths. At this location, U. S. Route 219 is a primary, two-lane road with double yellow lines indicating the center of the road surface and white lines indicating the edges the pavement. A ditch is located on the side of the road about six feet from a fifteen foot embankment and a hillside about three hundred feet high. As claimant drove his vehicle around a sharp turn in the road, he observed a rock about thirty feet in front of his vehicle on the road surface. Claimant tried to maneuver his vehicle to the side of the road in order to avoid the rock, but the passenger side of the vehicle struck the rock. Ms. Hunter was able to drive her vehicle around the rock. Claimant testified that he did not observe any "Falling Rock" signs along the road. About twenty minutes before this incident, he had traveled the road in the opposite direction and he did not observe any rocks on the road surface at that time. The impact with the rock burst the front passenger side tire, bent the rim, necessitated alignment of the vehicle as well as damaging the passenger side of the vehicle. Since claimant was insured only under a liability motor vehicle insurance policy, he was responsible for the sustained damage in the amount of $790.84.

The position of respondent is that it did not have notice of a rock fall occurring on U. S. Route 219 on this date. According to Crew Supervisor II Keith Hollinghead, this area is not known as a rockfall area. In fact, prior to this incident respondent had no records of any rock falls occurring in this particular area of U.S. Route 219.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins vs. Sims*, 130 W.Va. 645; 46 S.E.2d 81 (1947). In order to hold respondent liable for road defects, claimant must prove that respondent had actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman vs. Dept. of Highways*, 16 Ct. Cl. 103 (1986). However, the Court has consistently held that the unexplained presence of a rock on a road surface is insufficient to justify an award. *Mitchell vs. Division of Highways*, 21 Ct. Cl. 91 (1996).

In this claim, the evidence failed to establish that respondent had not taken adequate measures to assure the safety of the traveling public while traveling on U. S. Route 219 in Greenbrier County. The fact that claimant had been on the road twenty

minutes before the incident and did not observe a rock in the road indicates that respondent did not have notice of the rock on the road. While the court is sympathetic to claimant's plight, the fact remains that there is no evidence of negligence on the part of respondent by which to base an award.

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

Claim disallowed.

OPINION ISSUED JANUARY 19, 2001

MARY ELIZABETH LAWRENCE, INDIVIDUALLY & AS EXECUTRIX FOR THE ESTATE OF VIOLA F. RANSBERGER; STEVEN RANDALL BROCK; AND DEBORAH ANNETTE LINEBERRY
VS.
DIVISION OF HIGHWAYS
(CC-98-70)

Shannon M. Bland, Attorney at Law, for claimants.
Andrew F. Tarr & Xueyan Zhang, Attorneys at Law, for respondent.

STEPTOE, JUDGE:

Claimants brought this action for damages sustained to their real and personal property due to the alleged negligent maintenance of the drainage system along W.Va. Route 41, locally known as Webster Road, in Summersville.[1] W.Va. Route 41, at this location, is a road maintained by respondent in Nicholas County. The Court is of the opinion to deny this claim for the reasons more fully set forth below.

In 1964, claimants' grandmother, Viola Ransberger, purchased two real property lots located on the east side of W.Va. Route 41. A house, with an estimated value of $70,000.00, is situated on one of the lots. The house was used as a twelve room boarding house while the other lot, which is on the northeast side of the house, is graveled and used for parking. This portion of W.Va. Route 41, which traverses in a north-south direction, has two twelve-foot lanes with a four foot berm on each side of the road. At the time Ms. Ransberger purchased the property in question,

[1]At the hearing, the Court amended the style of the claim to reflect the fact that Steven Randall Brock and Deborah Annette Lineberry are proper party claimants in this claim.

claimants assert that there were no drainage problems. During the late 1980's and early 1990's, claimants assert that respondent conducted two paving projects on W.Va. Route 41. During these two separate projects, the road was resurfaced and later the sidewalk was rebuilt. During the summer of 1989, employees of the City of Summersville removed a drain from in front of the house and failed to replace it. After the paving projects and the removal of the drain, the property began to experience drainage problems and complaints were made to the City of Summersville; however, no one notified respondent about these problems. City employees investigated the complaints, and thereafter rebuilt the steps and installed grates on the top of two of the steps on the northeast side of the house to alleviate the water drainage problem. The City's insurance carrier made a settlement offer in the amount of $10,000.00, but claimants refused this offer. Claimants then noticed that the inside basement wall was beginning to deteriorate and the foundation of the house had begun to shift. The house has been vacant since June of 1996. It was condemned by the City of Summersville in October 1999. In addition, claimants sustained an estimated loss in the amount of $15,500.00 for personal property that was damaged while being stored in the basement of the house. Unfortunately, claimants' homeowners insurance policy did not provide coverage for the damage to the house and the policy was cancelled by the insurance carrier on July 15, 1997.

According to claimants' professional surveyor Richard Craig Dunlap, the location of the highest point for the storm drain system is the center of the road where the road surface is crowned with a two percent grade. The water in the southbound lane of W.Va. Route 41 flows southerly against the east edge of the curb for the sidewalk, which has a four percent grade. In May 1997, Mr. Dunlap measured this portion of the eastern edge of the sidewalk at the driveway entrance and found it to be only a half-inch higher than the road surface or almost level with the road. Moreover, Mr. Dunlap observed that the northeast side of the residence was three inches out of plumb.

Claimants' expert in civil engineering, Joseph P. Young, examined Mr. Dunlap's data as well as conducting an onsite visit. He was of the opinion that water flowing onto claimants' property is a contributing factor to the problems experienced by claimants. Mr. Young observed that the design and construction of the road as well as sediment that builds up at the northeast corner of the residence, allow water to flow onto claimants' property, which saturates the soil and causes the foundation to shift. Since Mr. Young was unaware of the sequence of construction of the curb and the road surface, he was unable to determine which of these factors is the proximate cause of the damage to the house.

The position of respondent is that it was not negligent in the maintenance of the drainage system on W.Va. Route 41. Respondent asserts that it conducted only one paving project one mile north of claimants' property in1993 and it had no complaints regarding drainage problems on claimants' property until the spring of

1995.[2] During this project, respondent's employees ground up four inches of the pavement on Route 41. Then, the road was repaved with three inches of base and one inch of wearing course material for smoothness. When the project was completed according to specifications, an on-site field inspector made sure that there was no change in elevation and that there was a curb of four inches. In addition, respondent's employees installed an asphalt speed bump in the driveway portion of the sidewalk in question, in order to prevent water from draining onto claimants' property. The asphalt speed bump lasted only for a few months before it was eroded by water flow. Moreover, respondent asserted that it is not responsible for the maintenance of sidewalks on W.Va. Route 41. According to the deposition testimony of Supervisor of the Claims Section of the Legal Division Ben L. Savilla, sometime after the paving project in question, there was one patch in the road surface about eighty-two feet north of claimants' property.

Respondent's expert in geotechnical engineering Dr. George Alan Hall conducted an on-site inspection of claimants' property on September 22, 1999. Dr. Hall opined that claimants were experiencing drainage problems because the City of Summersville had negligently designed and constructed the sidewalk at a higher grade than the road surface of W.Va. Route 41 as well as the fact that the inlet drain was removed by City employees, and should have been replaced. According to Dr. Hall, the slope away from the sidewalk is much steeper than the slope of the road, so water naturally flows in that direction. The water flows along the side of the curb at a relatively high velocity. Once the water reaches the driveway, it begins to spread out and the expansion creates an expansion energy loss. When the water reaches the curb at the lower end of the driveway, a ramp is created onto the sidewalk and gallons of water flow onto claimants' property. The faster water flow also carries sediment to the end of the driveway. This sediment build-up then turns water onto claimants' property. Further, the grate constructed by City of Summersville employees directed water into the soil instead of onto the steps. Additionally, Assistant Supervisor Edward Roger Brown and Dr. Hall observed the that the downspouts and gutters are in a state of disrepair, allowing water to flow directly on the ground adjacent to the house. As a result, Dr. Hall indicated that the saturated soil has created a small landslide at the corner of the parking lot, pushing the steps into the house, causing the basement walls to buckle in the middle and actually

[2] The date of the paving project was established by respondent through affidavits and daily records admitted on May 5, 2000, as post-hearing exhibits in response to rebuttal evidence presented by claimants at the hearing. On September 26, 2000, counsel for claimants took the depositions of several individuals regarding these affidavits and daily records.

causing the interior walls to buckle throughout the northeast side of the house. The house is unstable and uninhabitable.

This Court has held that respondent has a duty to provide adequate drainage of surface water, and drainage devices must be maintained in a reasonable state of repair. *Haught vs. Dept. of Highways*, 13 Ct. Cl. 237 (1980). In claims of this nature, the Court will examine whether respondent negligently failed to protect a claimant's property from foreseeable damage. *Rogers vs. Div. of Highways*, 21 Ct. Cl. 97 (1996).

In the instant claim, claimants have failed to established that respondent maintained the drainage structures on W.Va. Route 41, in Nicholas County, in a negligent manner. The Court is of the opinion that respondent, once having notice of the situation on W.Va. Route 41, took immediate and reasonable action to prevent excess water from flowing onto their property. The terrain in this area of W.Va. Route 41 forms a natural drainage area on claimants' property. In addition, the Court concludes from all the testimony and evidence in this claim that there are several factors, other than the actions taken by respondent, which have brought about the drainage problems causing the damages to claimants' property. Consequently, there is insufficient evidence of negligence on the part of respondent upon which to base an award.

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

Claim disallowed.

OPINION ISSUED JANUARY 19, 2001

DAVID BOYD MARTIN
VS.
DIVISION OF HIGHWAYS
(CC-97-236)

William M. Tiano and Justin C. Taylor, Attorneys at Law, for claimant.
Andrew F. Tarr & Xueyan Zhang, Attorneys at Law, for respondent.

WEBB, JUDGE:

Claimant brought this action for damaes sustained to his real property and to his family residence due to the alleged negligent maintenance of the drainage system along County Route 31, locally known as Poca River Road, in Poca. County Route 31, at this location, is maintained by respondent in Putnam County. The Court is of the opinion to deny this claim for the reasons more fully set forth below.

On May 5, 1993, claimant purchased eight acres of real property with a residence built thereon in Poca, Putnam County, for the amount of $65,000.00.[1] The property was appraised for $68,000.00. The prior landowner had informed claimant that a landslide had occurred on the property in 1977, and that he had made repairs to the best of his ability.[2] Thereafter, claimant purchased the property, although he did not have the property inspected independently. An insurance agent inspected the property for insurance purposes at the time of purchase. The agent testified that she could not recall whether any repairs were necessary, but added that a homeowner's insurance policy would not have been issued if serious repairs to the residence were necessary. Claimant and his family moved onto the property during the fourth of July weekend in 1993.

At the location in question, there is a seventy foot difference in elevation from County Route 31 sloping downhill, in a northeastern direction, to the Pocatalico River. The distance of this slope between the road and the river is about six-hundred to six-hundred-fifty feet. The southwestern side of County Route 31 is a vast mountainous hillside. Claimant's residence is situated two-hundred-fifty feet uphill from the Pocatalico River. There is a driveway four-hundred to four-hundred-fifty feet long and nine feet wide, which traverses from the road to the residence. A septic tank is located on the property between the river and the residence. On the upper hillside, about three-hundred to four-hundred feet from the residence, a barn also is

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[1]This property was the subject of a prior claim by the prior landowners, O.L. "Pete" Westfall and Rebecca Westfall. See *Westfall vs. Dept. of Highways*, 16 Ct. Cl. 23 (1985). In that claim, the Court made an award of $42,500.00 for respondent's negligent maintenance of the ditchline on County Route 31, which caused a landslide.

[2]In three specific instances during Claimant's testimony, he stated that:

"Pete Westfall told me about the slip in the '70s and about the state rebuilding their portion of their area and he had fixed his property to the best of his ability to where it was at when I purchased the property" (Vol. 1, Pg. 64, lines 18-22)

* * *

"There was only one agreement. He (Pete Westfall) agreed, in the agreement it states that he had told me of the previous slip 15 years approximately and that he had repaired the home to the best of his ability and he was not going to warrant or guarantee the -(property)" (Vol. 1, Pg. 79, lines 9-13)

* * *

"To the best of my knowledge, Mr. Westfall informed me that the slip had happened in 1977 and the retaining wall, it took out the road by what he's telling me, and they installed the retaining wall I'm saying right after the slide number one." (Vol. 1, Pg. 84, lines 19-22 and Pg. 85, Line 1).

situated on the property. Approximately seven-hundred feet of claimant's property fronts County Route 31, which is a sixteen foot wide medium priority road.

Claimant's problems on his property began on December 24, 1993, when a water line about eight-hundred feet from the residence, pulled apart nine inches. This was repaired by claimant soon thereafter. Then, on the morning of March 15, 1994, Claimant's wife noticed that the basement wall was bowing and she could not enter the downstairs bathroom. Claimant determined that the residence had shifted nine inches. He and his family were forced to leave their home within two days because the foundation of the house shifted. The driveway had developed cracks and separations which made it unsafe for ingress and egress to the house. Claimant inspected the property and discovered that earth movement was putting pressure on the residence. He tried to remove this pressure, but he was not successful in his efforts. Not all of Claimant's eight acres were damaged.

In the fall 1996, claimant's residence was destroyed by a fire that was determined to be arson. The perpetrator of the crime was not apprehended. Although the residence was insured for the amount of $75,000.00, claimant and his insurance carrier became involved in a dispute over payment of his claim. Ultimately, the claim was settled for $30,000.00. The land itself was not insured. In the present claim, claimant did not assert a determined amount of damages, which, in the opinion of the Court, is limited to the value of the land.

Claimant was aware that after a major slide had occurred on County Route 31 in 1977, respondent built a three-hundred foot retaining wall with an eighteen inch culvert beneath the road surface. This culvert extends approximately three feet past the retaining wall with the outlet end discharging any water from the culvert onto Claimant's property. The water flows downhill from the southwestern side of County Route 31 across his property to the river which is approximately six-hundred feet from the road. Claimant asserts that respondent has done nothing further to control this water during his time of occupancy at the site. He estimates the water flow from the culvert at one gallon every two minutes. According to Claimant, the major source of the slide problems occurring on his property is this particular culvert that discharges water onto his property.

According to claimant's expert in landslides and culvert construction, Alexander Brast Thomas, the culvert beneath County Route 31 described herein above is the proximate cause of the damage to claimant's property. According to Mr. Thomas, respondent did not provide a path for the water discharging from the culvert to the river. Thus water discharges from the culvert at the base of the wall, allowing water to be absorbed into the subsurface of the ground, weakening the soil, and causing slip conditions. Mr. Thomas opined that the culvert is the primary source of water and there is no outfall protection or any other structure to convey water toward the river. While Mr. Thomas did not observe any other source of water, he did not examine the subsurface of the ground to ascertain its present

condition for suitable construction of a residence. Similarly, Mr. Thomas asserts that topographical maps indicate that this area is a landslide prone area. This fact provides a "caution" to a contractor, but the land can still be used for construction purposes.

Mr. Thomas believes that the culvert pipe had been moved down river after the 1977 landslide.[3] He suspects that the prior culvert pipe through the road was located above the residence before the 1977 landslide, but that it was replaced and relocated to its present location afterwards. However, Mr. Thomas could not specifically locate the prior culvert pipe. He thought that there had been a cross drain through the road at the head of the first slide. Unfortunately, the survey notes from the survey conducted by respondent's district employees of the area in question end at the side of the residence. In the area beyond the residence, Mr. Thomas believes that there was a problem in this area in the past and respondent conducted some kind of repair project.

Furthermore, Mr. Thomas testified that he was not surprised that the landslide resumed its activity since 1977. He theorized that the 1994 slide was preventable, but after respondent constructed a stable retaining wall, it left a disaster zone between the retaining wall and the river. Mr. Thomas is of the opinion that the Martin property currently is unstable and useless for any residential purpose. Mr. Thomas further testified that in order to adequately rebuild the land, it would require about one-half million dollars of construction work.

The position of respondent is that it was not negligent in the maintenance of the drainage system on County Route 31. Both Andrew Morgan Allen, then Maintenance Assistant for respondent in Putnam County and respondent's Operations Assistant Laura Ann Conley-Rinehart testified that the area in question is prone to landslides. Ms. Conley-Rinehart testified that the position of respondent is that if a landowner builds in an area prone to landslides, then the landowner is responsible for the drainage because respondent is an intermediate property owner. She admitted that respondent directs water through its culvert onto claimant's property in order for the water to flow to the lowest point. She stated that this is a common practice by respondent. She contends that the property owner is responsible for the water once it flows from respondent's property.

Ms. Conley-Rinehart also testified that she and then Area Maintenance Manager, Dennis Charles Runyon, visited the site in April, 1994, in response to a complaint from Claimant. Both individuals testified that they observed the driveway in a state of disrepair, which Ms. Conley-Rinehart believes is indicative of a

[3] However, testimony from the hearing in *Westfall* indicates that there was no retaining wall prior to the 1977 slide and it would appear to the Court that the retaining wall in question was the only wall located on the property.

continuing active landslide. Mr. Runyon testified that he observed the deck and chimney had pulled away from the residence. Additionally, Ms. Conley-Rinehart as well as Mr. Runyon testified that they observed what they thought to be spring water flowing across from Claimant's property on the south side of County Route 31. After the April, 1994, inspection, both Ms. Conley-Rinehart and Mr. Runyon assert that they did not notice any movement from the road or wall and could not identify anything that the State had done to create a problem. Thereafter, Ms. Conley-Rinehart relayed the findings of the onsite inspection to the office of the Highways Commissioner. The claimant previously had written to the Commissioner, the Governor, one of our U.S. Senators, and his Congressman about his problem and said findings were incorporated into letters from the Commissioner to the Senator and Congressman.

Mr. Allen stated that he was unaware of the natural drainage area of the water from the culvert, but he assumed it went to the river. Between March 15, 1994, and November 1999, respondent's employees only conducted repaving and reditching projects in the area for the control of surface water. Respondent did not conduct any activities with regard to the control of soil movement in the area in question.

Dr. George Alan Hall, respondent's expert in geotechnical engineering inspected the Martin property on two separate occasions after the 1994 slide. According to a West Virginia Geological and Economic Survey map, Claimant's property is located in an active landslide area. Thus, when the residence was built in 1974, he is of the opinion that it was built in the middle of the active slide. The previous landowner (Westfall) or his contractor had excavated soil from the toe of the slope during construction of the residence thus reducing the stability of the slope. The piling project and retaining wall completed by respondent after the 1977 landslide had alleviated the slip effects upon the road, but not upon the land below the retaining wall. Dr. Hall determined that the slide is actually occurring some twenty-five feet downhill from the road near a scarp on Claimant's property,. He observed a topographic condition that he described as "bulging or protruding contours." This condition indicates that the river has been protruded, but that the natural drainage channel has cut through this protrusion. All of these facts indicate an ancient landslide which extends from the hillside above the road all the way to the river itself.

Further, Dr. Hall opined that during construction of the residence, the distinct natural drainage channel had been diverted from its natural path. The survey results, which were incorporated into a topographical map, depicted the actual drainage channel from the culvert pipe under County Route 31. Water had flowed in the natural drainage channel until changed by the prior landowner's excavation. Dr. Hall asserts that the topographical information contained in Commissioner's letters mentioned above support the original design of a culvert. The culvert collects the

water and directs it toward the natural drainage channel. Not much water flows through the culvert pipe, neither is there a lot of soft ground near the outlet of the culvert pipe. The water flows through the culvert pipe in a defined channel at a high velocity, causing less water to touch and saturate the soil. Dr. Hall stated that less water infiltration occurs when water flows in a concentrated path down a natural drainage channel. If there were no culvert pipe, the water flow would spread over the ground and saturate the soil.

Moreover, Dr. Hall testified that the culvert is not the primary or only source of water. Ground water has contributed to the condition of claimant's property. Several natural springs located on Claimant's property saturate the soil. According to Dr. Hall, Mr. Thomas' testimony did not depict water flowing from holes in the ground, which were created by natural springs. However, these holes were not depicted in respondent's district survey. In addition, during March of 1994 the vicinity experienced almost twenty inches of rainfall, which was the wettest period on record since 1939. The culprit, according to Dr. Hall, is the water collecting in the hillside and released in the natural springs. These natural springs create a "seepage force," which drags the soil along with it. Dr. Hall surmised that the area could be repaired for approximately ten to fifteen thousand dollars.

The Court has held that respondent has a duty to provide adequate drainage of surface water, and drainage devices must be maintained in a reasonable state of repair. *Haught vs. Dept. of Highways*, 13 Ct. Cl. 237 (1980). In claims of this nature, the Court will examine whether respondent negligently failed to protect a claimant's property from foreseeable damage. *Rogers vs. Div. of Highways*, 21 Ct. Cl. 97 (1996).

In the instant claim, Claimant has failed to establish that respondent maintained the drainage system on County Route 31 in a negligent manner. The Court is of the opinion that respondent took immediate and reasonable action to repair the road after the 1977 landslide, which prevented further damage to claimant's property. The terrain in this area is typical of many areas in West Virginia which are subject to landslides. While the Court is sympathetic to the situation of claimant, the fact remains that there are many factors which have brought about this particular landslide problem affecting claimant's property, including the prior landowner's construction in a landslide prone area, interfering with the natural drainage area for the culvert, as well as the natural springs located on the property. Before purchasing the property, Claimant alleges that he had a conversation regarding the property on April 27, 1993, with Andrew Morgan Allen, the then Maintenance Assistant for respondent in Putnam County mentioned herein above. According to claimant, Mr. Allen never discouraged him from purchasing the property or indicated that the property was located in an area prone to landslides. Mr. Allen disputes this assertion. In fact, he testified that he told claimant not to buy the property because he personally believed that it was falling into the river.

According to Mr. Allen, Claimant indicated that he would not buy the property. Regardless of any conversation with respondent's employees, claimant was given actual notice of the condition of the land by the prior landowner, O. L. "Pete" Westfall. The Court is of the opinion that any conversation between claimant and a State employee is irrelevant. If a State employee makes a statement about property to a prospective owner, the statement would normally be outside the scope of the employee's employment with the State. Accordingly, the particular employee's action and/or statement as testified to by Claimant, even assuming its accuracy, would have been beyond the actual or implied scope of the Mr. Allen's authority. The Court is of the further opinion that Claimant failed to exercise reasonable care by not having the property independently inspected after receiving notice prior to the date of purchase. Consequently, there is no evidence of negligence on the part of respondent upon which to base an award.[4]

In consideration of all of the above, the Court is of the opinion to and does hereby deny this claim.

Claim disallowed.

OPINION ISSUED JANUARY 19, 2001

PHILLIP N. AND NICK I. MASON
VS.
ALCOHOL BEVERAGE CONTROL ADMINISTRATION
(CC-00-435)

Claimants appeared *pro se.*

William S. Steele, Managing Deputy 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 $15,000.00 for costs incurred in providing storage facilities for liquor inventory under an agreement with the respondent State agency. The documentation for providing the rental premises was not processed for payment within the appropriate fiscal year; therefore, claimant has not been paid. In its

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[4] Furthermore, claimant's final argument brief cites caselaw that concerns initiating condemnation proceedings. If the argument in claimant's brief is to be believed, then this Court would have no jurisdiction over this claim.

Answer, respondent admits the validity of the claim, but states that the amount calculated by respondent as due and owing to the claimant is $13,933.00. Claimant agrees with this amount and that it is fair and reasonable. Respondent further states that there were sufficient funds expired in the appropriate fiscal years from which the invoices could have been paid.

The Court has reviewed the documentation submitted with the claim and by the respondent State agency and has determined that the amount of $13,933.00 is fair and reasonable for both parties.

Accordingly, the Court makes an award to claimant in the amount of $13,933.00.

Award of $13,933.00.

OPINION ISSUED JANUARY 19, 2001

JIMMY MCLEAN AND PAULA MCLEAN
VS.
DIVISION OF HIGHWAYS
(CC-99-475)

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

PER CURIAM:

Claimants brought this action for vehicle damage sustained when their vehicle struck a hole while claimant Paula McLean was traveling northbound on Route 20 in Nutter Fort. At this location, Route 20 is maintained by respondent in Harrison County. The Court is of the opinion to deny this claim for the reasons more fully set forth below.

The incident giving rise to this claim occurred on November 17, 1999, at approximately 7:00 a.m. On the clear morning in question, claimant Paula McLean was traveling northbound on Route 20 in Nutter Fort in claimants' 1997 Ford Escort at a speed of about twenty-five to thirty-five miles per hour. She was driving her father to the Veterans Administration Hospital in Clarksburg. At this location, Route 20 is a two-lane asphalt road, with a width of twenty-two feet, eleven inches and a speed limit of thirty-five miles per hour. The center of the road surface is indicated by double yellow lines and white lines indicate the edges of the pavement. The width of the northbound lane is ten feet seven inches from the inside yellow line to the white line. The southern side of Route 20 is a hillside, locally known as Johnson's Hill. As Ms. McLean was driving the vehicle along the edge of the road she

inadvertently drove the vehicle onto the berm and into a deep hole. The hole was approximately five feet long, two to three feet wide, and eight inches deep. While there was moderate traffic on the road, Ms. McLean was not forced onto the edge of the road by oncoming traffic. She testified that she did not observe any warning signs on the road about the condition of the berm and she was not aware of the hole before the vehicle struck it. As a result of this incident, claimants' vehicle sustained damage in excess of the deductible feature of $250.00 in claimants' motor vehicle insurance policy. In accordance with the Court's decision in *Summerville, et al. vs. Division of Highways*, any recovery would be limited to the amount of their deductible feature. See *Id*., 18 Ct. Cl. 110 (1991).

The position of respondent was that it did not have notice of the hole on Route 20 in Harrison County. According to Investigator for the Legal Division, Paul Lister, this portion of Route 20 is a problem area because water from the hillside saturates the road and heavy truck traffic travels on the edge of the road, creating holes on the edge of the travel portion of the road. Since Ms. McLean's incident, measures have been taken to remedy this situation.

This Court has been very consistent in regard to berm claims. When a motorist uses the berm of the road in a non-emergency situation, that motorist takes the berm as the motorist finds it. *Sweda vs. Department of Highways*, 13 Ct. Cl. 249 (1980).

In the present claim, respondent had provided Ms. McLean a good roadway for travel. Ms. McLean elected to travel on the edge of the road surface. The hole in question was outside of the travel portion of the road and Ms. McLean was not forced onto the berm area. While the Court is sympathetic to claimants' plight, the fact remains that there is insufficient evidence of negligence on the part of part of respondent upon which to base an award.

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

Claim disallowed.

OPINION ISSUED JANUARY 19, 2001

ROY J. MCDANIEL
VS.
DIVISION OF HIGHWAYS
(CC-00-55)

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

PER CURIAM:

Claimant brought this action for vehicle damage sustained when his vehicle went over an embankment while he was traveling in inclement weather on County Route 1, near Bomont. At this location, County Route 1 is maintained by respondent in Clay County. The Court is of the opinion to deny this claim for the reasons more fully set forth below.

The incident giving rise to this claim occurred on December 24, 1999, at approximately 7:30 to 8:15 a.m. On the morning in question, Mr. McDaniel was traveling on County Route 1 near Bomont in his 1989 four-door Chevrolet Celebrity at a speed of about twenty miles per hour. About three inches of snow and ice had accumulated on the road surface and on the side of the road. Mr. McDaniel frequently travels this portion of road. At this location, County Route 1 is a curvy single lane, asphalt, second priority road. The road does not have lines on the road surface or guardrails. Unbeknownst to Mr. McDaniel, another traveler had a mishap on the road and he was standing at the side of the road. When Mr. McDaniel saw the individual on the side of the road, he attempted to slow the speed of his vehicle. However, as he applied the vehicle's brakes to avoid the individual, he lost control of his vehicle and it slid off the road and over a thirty-five feet embankment. The vehicle landed on its top in a creek and Mr. McDaniel sustained minor personal injuries. Since Mr. McDaniel was insured under a liability motor vehicle insurance policy only, he was responsible for the sustained loss estimated in the amount of $1,691.00.[1]

The position of respondent was that it did not have notice of the condition of County Route 1 in Clay County. According to Transportation Crew Supervisor I Larry Eugene Hubbard, respondent's garage in Clay County has five trucks for snow removal and ice control activities. Mr. Hubbard further stated that secondary roads, such as County Route 1 are treated as soon as possible after all of the primary roads have been treated.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins vs. Sims*, 130 W.Va. 645; 46 S.E.2d 81 (1947). Respondent may not be held liable for the lack of guardrail on a highway. See Id. In claims of this nature, the Court has consistently held that the State cannot be expected or required to remove hazardous conditions from highways during the winter months. *Morris vs. Div. of Highways*, 21 Ct. Cl. 117 (1996); *Treadway vs. Dept. of Highways*, 16 Ct. Cl. 101 (1986).

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[1]At the hearing, claimant asserted that the originals of his receipts were destroyed in an unrelated fire. Copies of those receipts were adduced on September 20, 2000, as post hearing exhibits and establish claimant's loss in the amount of $1,261.16.

In the present claim, the evidence failed to establish that respondent was negligent in its maintenance of County Route 1 at the time of claimant's accident described herein. While the Court is of the opinion that claimant's incident was the result of snow and ice on the road surface of County Route 1, that fact alone is insufficient to establish negligence on the part of respondent. Claimant was familiar with the road and should have been aware of potential conditions on the road during the winter months. Consequently, there is no evidence of negligence on the part of respondent upon which to base an award.

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

Claim disallowed.

OPINION ISSUED JANUARY 19, 2001

RICK MODESITT
VS.
DEPARTMENT OF TAX AND REVENUE
(CC-01-009)

Claimant appeared *pro se*.

Joy M. Bolling, 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, a Commissioner for the State Athletic Commission, a State agency, seeks $179.85 for purchases made for the Commission. The documentation for these services was not processed for payment within the appropriate fiscal year; therefore, claimant has not been paid. In its Answer, respondent admits the validity of the claim as well as the amount, and states that there were sufficient funds expired in the appropriate fiscal year from which the purchases could have been paid.

Accordingly, the Court makes an award to claimant in the amount of $179.85

Award of $179.85.

OPINION ISSUED JANUARY 19, 2001

JUANITA PUMPHREY
VS.
DIVISION OF HIGHWAYS
(CC-00-42)

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

PER CURIAM:

Claimant brought this action for vehicle damage sustained when her vehicle wrecked after sliding across a patch of ice while traveling southbound on County Route 73/73 in Fairmont. At this location, County Route 73/73 is maintained by respondent in Marion County. The Court is of the opinion to deny this claim for the reasons more fully set forth below.

The incident giving rise to this claim occurred on December 11, 1999, at approximately 9:25 a.m. Claimant was traveling southbound on County Route 73/73 in her 1988 Plymouth Horizon at a speed of about twenty-five miles per hour. She was proceeding from her residence in Fairmont toward her place of employment at the Meadowbrook Mall. Earlier in the morning, claimant heard on the radio that inclement weather conditions had created hazardous conditions on the roadways. At this location, County Route 73/73 is a first priority, two-lane road with double yellow lines indicating the center of the road surface and white lines indicating the edges of the pavement. The road is twenty-one feet wide. Each lane of travel is about nine and one-half feet wide between the lines on the road surface. As claimant drove her vehicle on the wet roads, her vehicle suddenly struck a patch of ice across the road surface. Claimant estimated that the patch of ice extended across the road about five feet. She testified that she believed that the water and ice on the road surface was due to a drainage problem in the area. After striking the patch of ice, her vehicle began to skid and she lost control of her vehicle. Claimant's vehicle swerved into the other lane of travel and into a nearby property owner's yard. It struck a gas meter as it struck the side of the property owner's residence, then it went up a slight hill and finally slid down the other side of the hill to the road surface where it came to rest in the middle of the road. Emergency vehicles were called to the scene. A member of the Marion County Sheriff's Department investigated the incident and determined that there was no improper driving on the part of claimant. The Marion County Deputy did determine that slippery pavement was the proximate cause of the

incident. Claimant sustained minor personal injuries.[1] Since the sustained damage to the vehicle exceeded the value of her vehicle, it was considered "totaled." In addition, claimant incurred travel expenses as a result of this incident. Her total loss was estimated to be in the amount of $2,128.82.

The position of respondent is that it did not have notice of the patch of ice on County Route 73/73 in Marion County. According to Transportation Crew Chief Harold Swidler, patrols are on duty all night during times of inclement weather. Prior to this incident, respondent had no information regarding the ice patch on the road where claimant had her accident.

Weather conditions in West Virginia can change rapidly during the winter months. The rapid fluctuations in temperature can cause moisture and precipitation to collect on road surfaces, forming ice, which may create slippery road conditions. Thus, in claims of this nature, the Court has held consistently that an isolated patch of ice on a highway is insufficient generally to establish negligence on the part or respondent, without notice and a reasonable opportunity to remove the hazardous condition. *Morris vs. Div. of Highways*, 21 Ct. Cl. 117 (1996); *Treadway vs. Dept. of Highways*, 16 Ct. Cl. 101 (1986).

In this claim, the evidence failed to establish that respondent had notice of a patch of ice on the road surface of County Route 73/73 in Marion County. While the Court is sympathetic to the plight of claimant, the fact that her incident was caused by a patch of ice on the surface of County Route 73/73 is insufficient to establish negligence on the part of respondent. Consequently, there is no evidence of negligence on the part of respondent.

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

Claim disallowed.

OPINION ISSUED JANUARY 19, 2001

MARY ROY AND JAMES ROY
VS.
DIVISION OF HIGHWAYS
(CC-00-29)

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[1] Claimant adduced a medical bill on November 16, 2000, as a post-hearing exhibit, which established her medical expenses as a result of this incident in the amount of $240.40.

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

PER CURIAM:

Claimants brought this action for vehicle damage sustained when their vehicle was struck by a rock while claimant Mary Roy and her uncle were traveling westbound on Route 33 outside Elkins in rainy weather. At this location, Route 33 is maintained by respondent in Randolph County. The Court is of the opinion to deny this claim for the reasons more fully set forth below.

The incident giving rise to this claim occurred on November 2, 1999. On the day in question, claimant Mary Roy and her uncle were traveling westbound on Route 33, outside Elkins toward Norton, in claimants' 1996 Ford Contour. Ms. Roy testified that she frequently travels this portion of road and she was not aware of any "Falling Rock" signs posted along the side of the road. At this location, Route 33 is a first priority road with a width of twenty-two to twenty-three feet and shoulders two to three feet in width. The north side of Route 33 is a hillside, locally known as "fossil park," and is a known rock-fall area. Along the road at this location, respondent has installed "Falling Rock" signs in each direction before travelers enter this area. The sign to the east of the accident scene is about one-quarter mile from the location in question and claimant Mary Roy would have passed the sign. These signs were installed in May of 1994. They are about fourteen feet from the edge of the pavement. As Ms. Roy drove the vehicle along the road, a rock fell from the hillside, bounced off a ledge and into the road, striking the vehicle. Ms. Roy immediately notified the local State Police Detachment about the incident. The vehicle sustained damage in excess of the $100.00 deductible feature in their motor vehicle insurance policy and claimants had to pay for a rental vehicle until the repairs on their vehicle were completed. Neither Ms. Roy nor her uncle suffered a personal injury in the incident. In accordance with the Court's decision in *Summerville, et al. vs. Division of Highways*, any recovery would be limited to the amount of their deductible feature, plus any other out of pocket expenses. See Id., 18 Ct. Cl. 110 (1991). Also, Ms. Roy claims $500.00 for pain and suffering due to emotional distress caused by this incident.

The position of respondent was that it did not have notice regarding a rock-fall on Route 33 in Randolph County. According to Assistant Supervisor Lewis Barry Gardner, the location in question is a known rock fall area and respondent had installed signs to warn the traveling public. Further, respondent did not receive any information regarding this incident.

The Court has consistently held that the unexplained falling of rock or rock debris on the road surface is insufficient to justify an award. *Mitchell vs. Division of Highways*, 21 Ct. Cl. 91 (1996); *Hammond vs. Dept. of Highways*, 11 Ct. Cl. 234 (1977). In order to establish liability on behalf of respondent, the evidence must

establish that respondent had notice of the dangerous condition posing the threat of injury to property and a reasonable time to take suitable action to protect motorists. *Alkire vs. Division of Highways*, 21 Ct. Cl. 179 (1997).

The evidence failed to establish that respondent had not taken adequate measures to assure the safety of the traveling public while traveling on Route 33 in Randolph County. While the Court is sympathetic to claimants' plight, the fact remains that there is insufficient evidence of negligence on the part of respondent upon which to base an award.

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

Claim disallowed.

OPINION ISSUED JANUARY 19, 2001

STANLEY K. SHANHOLTZ AND
MARSHA L. SHANHOLTZ
VS.
DIVISION OF HIGHWAYS
(CC-00-220)

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

PER CURIAM:

Claimants brought this action for vehicle damage sustained when their vehicle struck a hole while they were traveling southbound on County Route 3, locally known as Wyatt Road. At this location, County Route 3 is maintained by respondent in Harrison County. The Court is of the opinion to deny this claim for the reasons more fully set forth below.

The incident giving rise to this claim occurred on June 3, 2000, at approximately 5:30 p.m. Claimant Stanley K. Shanholtz was driving southbound on County Route 3 in their 1994 Pontiac Bonneville at a speed of thirty to thirty-five miles per hour. Claimant Marsha L. Shanholtz was situated in the front passenger seat.[1] At this location, County Route 3 is a second priority two lane road with no stripes on the road surface. As Mr. Shanholtz drove their vehicle over a slight incline

[1]At the hearing, Claimant Marsha L. Shanholtz was the only witness in the claimants' case-in-chief.

on the road, they came upon a hole in the right side of the road surface. Oncoming traffic prevented him from maneuvering their vehicle around the hole. The front passenger side tire struck the hole. The hole was about three to four feet wide, about one and one-half to two feet long, and was eight to twelve inches deep. Ms. Shanholtz was last on the road about three days prior to the incident and she indicated that she was aware of the hole in question. The impact with the hole burst the front passenger side tire and broke the rim. Since the sustained damage was less than the deductible feature of $500.00 in claimants' motor vehicle insurance policy, they were responsible for the loss.

The position of respondent is that it did not have notice of the hole on County Route 3 in Harrison County. According to Highway Administrator Michael A. Scott, he was last on the road about one month prior to claimants' incident. At that time, Mr. Scott acknowledged that the road was in need of repair. However, prior to claimants' incident respondent had not received any information regarding a problem in the area. After the incident, a crew was dispatched to the scene and the hole was repaired.

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

In this claim, the evidence established that respondent had at least constructive if not actual notice of a hazardous condition on County Route 3 and that respondent was negligent in its maintenance of County Route 3 in Harrison County. Notwithstanding this finding of negligence on the part of respondent, the Court is also of the opinion that claimant Stanley K. Shanholtz was negligent in the operation of his vehicle. The Court has determined that Mr. Shanholtz should have been more observant of the existing road conditions. Moreover, Ms. Shanholtz was aware of the hole in the road surface and she had an obligation to inform her husband of the existing road conditions. In a comparative negligence jurisdiction such as West Virginia, the negligence of a claimant may reduce or bar recovery of a claim. The Court finds that the negligence of claimants was equal to or greater than the negligence on the part of respondent and is a complete bar to recovery in this claim.

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

Claim disallowed.

OPINION ISSUED JANUARY 19, 2001

KAREN J. SUTPHIN
VS.
DIVISION OF HIGHWAYS
(CC-00-298)

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

PER CURIAM:

Claimant brought this action for vehicle damage sustained when her vehicle struck a low berm while she was traveling westbound on County Route 24, locally known as Pisgah road, in Princeton. At this location, County Route 24 is maintained by respondent in Mercer County. The Court is of the opinion to deny this claim for the reasons more fully set forth below.

The incident giving rise to this claim occurred on July 4, 2000, at approximately 5:00 to 6:00 p.m. Claimant was traveling westbound on County Route 24 in her 1995 Pontiac Grand Am at a speed of about thirty-five to forty miles per hour. No other traffic was present on the road. She travels this portion of road on a regular basis and was last on the road earlier in the day. At this location, County Route 24 is a two-lane road with double yellow lines indicating the center of the road surface and white lines indicating the edge of the pavement. The road is nineteen feet wide. This portion of road is straight and level although it is in between two curves. The edge of the pavement is about eight inches higher than the berm area. As claimant was driving in this straight stretch, she veered off the road and her vehicle went into the low berm area. The impact burst the tire, bent the rim and damaged the undercarriage of the vehicle. The sustained damage exceeded the deductible feature of $500.00 in her motor vehicle insurance policy. In accordance with the Court's decision in *Summerville et al. vs. Division of Highways*, any recovery would be limited to the amount of her deductible feature. See *Id*., 18 Ct. Cl. 110 (1991).

The position of respondent is that it did not have notice of the low berm on County Route 24 in Mercer County. According to Crew Leader Supervisor Melvin Blankenship, there was a drop-off from the edge of the road that proceeds into a ditch. Respondent had conducted a paving project on this road in June 2000. Respondent then tried to build up the berm area of the road after the paving project. However, Mr. Blankenship testified that there was no way to build up the berm area because the ditch line within respondent's thirty foot right of way must abut against the paved portion of the road in order to accommodate the residents in the area who have driveways with drains beneath them. Mr. Blankenship further testified that the problem would remain unless the private landowners with property adjacent to the road chose to do something about it.

This Court has been very consistent in regard to berm claims. When a motorist uses the berm of the road in a non-emergency situation, that motorist takes the berm as the motorist finds it. *Sweda vs. Department of Highways*, 13 Ct. Cl. 249 (1980).

In the present claim, the evidence established that respondent had actual knowledge of the low berm on County Route 24 in Mercer County. The Court is of the opinion that the low berm area constituted a hazardous condition to the traveling public. Notwithstanding this finding of negligence on the part of respondent, the Court is also of the opinion that claimant was negligent in the operation her vehicle. In a comparative negligence jurisdiction such as West Virginia, the negligence of a claimant can reduce or bar recovery of a claim. Therefore, the Court finds that the negligence of claimant was equal to or greater than the negligence on the part of respondent. Consequently, the negligence of claimant is a complete bar to recovery in this claim.

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

Claim disallowed.

OPINION ISSUED JANUARY 19, 2001

DENNIS GENE SUTTLE
VS.
DIVISION OF HIGHWAYS
(CC-99-106)

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

PER CURIAM:

Claimant brought this action for damage sustained to his residence due to a drainage problem on County Route 15, locally known as Old Scarbro Road, near Oak Hill. At this location, County Route 15 is maintained by respondent in Fayette County. The Court is of the opinion to deny this claim for the reasons more fully set forth below.

In 1989, claimant Dennis Gene Suttle bought his residence along the southern side of County Route 15 near Oak Hill, Fayette County. The residence has a width of fifteen feet and a length of forty feet. Prior to the purchase of the property, claimant did not have the property independently inspected. Jones creek is located on the eastern side of the residence. In addition, Jones creek intersects and flows

under County Route 15 through a culvert pipe. At this location, County Route 15 is a secondary asphalt road with two ten feet lanes.

On June 15, 1992, claimant began to experience drainage problems in the area when there were steady rains lasting three to four days. He complained to an employee of the respondent and tried to explain to him that there was a pipe beneath the road. Respondent was not aware of the pipe beneath the road but finally acknowledged that there may be a pipe located in a very deep part of the ground beneath the road. Apparently nothing was done at that time. Claimant continued to have water flowing into his yard on occasion until June 2, 1998, when the water flowed from the creek through his yard and actually flowed into his residence. It then accumulated in a low spot in his yard, which is lower than the level of the road surface. Sometime after June 2, 1998, the city of Oak Hill installed a water line on his property. On August 16, 1998, water again backed up from the creek and flowed into his residence. Apparently, the drain had become clogged and did not function properly. Afterwards, claimant again reported the problem to respondent. Claimant testified that he had done nothing to initiate the clogging of the drain, including any excavation on the property. The damage to the residence caused by the water which came into the residence on August 16, 1998, was estimated to be between $5,000.00 and $8,000.00.

The position of respondent is that it did not have notice of the drainage problem on County Route 15 in Fayette County. According to Crew Supervisor Michael R. Humphrey, he investigated the area looking for the culvert and when he found the inlet end, he discovered that it had been covered with rock fill which limited the ability of the pipe to accept water. He estimated the amount of the material covering the pipe to be thirty to forty tons of rock and he described the rocks as being sandstone with the size of the rocks ranging from two to three feet long and a foot to two feet wide. He then searched for and found the outlet end of the pipe fifteen feet on the north side of the road. Mr. Humphrey further testified that he was unaware of how or when the rocks at the inlet end of the pipe got there. He asserted that respondent was not responsible for the placement of the rocks. Thereafter on August 31, 1998, respondent removed about ten feet of rock blocking the drain and replaced the old eighteen-inch pipe with a thirty-six inch pipe. This action taken by respondent remedied the water problems claimant had been experiencing on his property.

The Court has held that respondent has a duty to provide adequate drainage of surface water, and drainage devices must be maintained in a reasonable state of repair. *Haught vs. Dept. of Highways*, 13 Ct. Cl. 237 (1980). In claims of this nature, the Court will examine whether respondent negligently failed to protect a claimant's property from foreseeable damage. *Rogers vs. Div. of Highways*, 21 Ct. Cl. 97 (1996).

In the present claim, the evidence failed to establish that respondent was negligent in its maintenance of the drainage system on County Route 15 in Fayette County. Once respondent had knowledge of the drainage problem, it investigated the water drainage provided for the area, and remedied the situation. While the Court is sympathetic to claimant's plight, the fact remains that there is no evidence of negligence on the part of respondent upon which to base an award.

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

Claim disallowed.

OPINION ISSUED JANUARY 19, 2001

ALTON DALE WEST AND ALVIN DAVID WEST
VS.
DIVISION OF HIGHWAYS
(CC-00-23)

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

PER CURIAM:

Claimants brought this action for damaged water quality as a result of blasting by a contractor for respondent near Route 97 in Hanover, Wyoming County. The Court is of the opinion to deny this claim for the reasons more fully set forth below. Claimant Alton Dale West owns a house in Hanover, Wyoming County that was built in 1968.[1] Mr. West's brother, Claimant Alvin David West resides in the house. A nearby well, dug in 1968, supplies the residence with water. The well is fifty-five to sixty feet deep and does not have a filter. All of the local residents have their own personal wells. From spring 1997 to fall 1998, Bizzack, Inc., was involved in a construction project on Route 97. During this project, Bizzack, Inc., conducted blasting operations in the area for about one year. The site of the blasting was about one hundred fifty feet from the house and it was at an elevation twenty to twenty-five feet lower than the house. On August 29, 1997, Mr. Alvin West completed a pre-blast survey in which he indicated that the well had been tested and iron was found in the well water supply. Mr. West also indicated the presence of sulphur in the well

[1] Claimants adduced two deeds on October 13, 2000, as post-hearing exhibits, which establish the chain of title of the property in question from his parents to him.

water supply. On one occasion, blasting debris struck the residence damaging an awning. Afterwards, Mr. Alvin West signed a release form and he was reimbursed for the damages by Bizzack, Inc.'s insurer. Sometime between September through November of 1998, claimant Alvin David West began to notice a discoloration in the water supply from the well. This discoloration became progressively worse. Mr. West testified that prior to the blasting, there was no problem with the water supply. After the blasting, he testified that the water was not drinkable or useable for general domestic purposes. Mr. Alvin West further testified that he has to purchase drinking water and take his clothes to the laundromat. According to Mr. Alvin West, he reported the problem to the insurer for Bizzack, Inc., and he was instructed to file a claim in this Court. The sustained damage to the well was estimated between $2,790.00 and $3,384.00. Neither Mr. Alton West nor Mr. Alvin West had a homeowner's insurance policy that would have provided coverage for this incident.

In this claim, the evidence failed to establish negligence on the part of respondent. The Court is of the opinion that the adduced evidence was too speculative to conclude that the blasting was the proximate cause of damage to the well such that the water quality was affected by an infiltration of iron. There are many other plausible reasons for the iron in the water other than the blasting. Moreover, the completed pre-blast survey indicated that there were some water quality problems prior to the blasting. While the Court is sympathetic to claimants' plight, the fact remains that there is no evidence of negligence on the part of respondent upon which to base an award.

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

Claim disallowed.

OPINION ISSUED JANUARY 19, 2001

NATHAN WILEY WILLIAMS
VS.
DIVISION OF HIGHWAYS
(CC-99-95)

Robin M. Crum, Attorney at Law, for claimant.
Andrew F. Tarr & Xueyan Zhang, Attorneys at Law, for respondent.

STEPTOE, JUDGE:

Claimant brought this action for damages sustained when he lost control of his vehicle while traveling southeast on County Route 21, locally known as

Bowman's Ridge, in Moundsville. County Route 21at this location is maintained by respondent in Marshall County. This claim was bifurcated by Order and heard on the issue of liability only. The Court is of the opinion to deny this claim for the reasons more fully set forth below.

On the day prior to the hearing of this claim, the parties, counsel, and the Court met at the scene of the accident for a view of the road and the surrounding terrain. The Court observed the following:

1. County Route 21 at the scene proceeds in a northwest-southeast direction. The accident occurred in a straight stretch of the two-lane road. There are double yellow lines indicating the center of the road surface.

2. To the southeast of the scene, there is a curve to the right in the road.

3. There is a hillside on the east side of the road and an embankment is located on the west side of the road.

4. Since the incident involving the claimant, the road has been resurfaced.

5. Both Marshall County Sheriff Daniel Wayne Garwick and the claimant indicated the location where they believed that claimant's vehicle left the road. Each of them offered differing opinions as to the exact point on the road where claimant's vehicle left the road.

FACTS OF THE CLAIM

The incident giving rise to this claim occurred on February 19, 1997, at approximately 6:00 p.m.[1] On the rainy evening in question, the claimant and a friend, Thomas Joshua Whitfield, were traveling southeast on County Route 21 in claimant's 1983 Chevrolet Monte Carlo. At this location, County Route 21 is a straight stretch, two-lane road that traverses in a southeast-northwest direction. There is a curve in the road to the right just prior to the scene of this incident. The road surface is comprised of asphalt and there are double yellow lines indicating the center of the road surface. County Route 21 cuts through a mountainous portion of Marshall County. On the eastern side of County Route 21 is a hillside and on the western side of County Route 21 is an embankment. Earlier in the evening at about 4:30 to 5:00 p.m., claimant had been driven to his residence by Thomas Richard Whitfield, claimant's employer and Thomas Joshua Whitfield's father, after they had spent the day working in Wheeling. After arriving at his residence, claimant ate his supper and then left his residence in his vehicle. He drove northwest on County Route 21 to the Whitfield residence to pick up Thomas Joshua Whitfield and return to his own residence. After the claimant picked up Mr. Whitfield, they began the return trip to the Williams' residence proceeding southeast.

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[1]Mr. Williams testified that the incident occurred at approximately 6:00 p.m. However, statements given to Marshall County Deputy Sheriff Daniel Wayne Garwick indicate that the incident occurred at approximately 6:45 p.m.

About one-half mile from the Whitfield residence, claimant was driving his vehicle at a speed of about thirty-five miles per hour when he came upon a hole estimated to be eighteen inches in diameter and ten inches deep. Claimant was aware of this hole, but on this occasion, he did not observe it until he was about ten to twelve feet from it. He made a decision to have his vehicle encounter the hole rather than attempting to maneuver his vehicle around the hole; therefore, the front passenger side tire struck the hole. The impact caused the right front tire to burst whereupon claimant lost control of his vehicle. The vehicle crossed the road and proceeded over the embankment through a small barbed wire fence. The vehicle began rolling on its side about four to five times and in the process both claimant and his passenger were ejected from the vehicle. Mr. Whitfield sustained only minor personal injuries, but claimant suffered a broken clavicle as well as other personal injuries. After the incident, claimant and Mr. Whitfield walked to the top of the road. A neighbor arrived at the scene and drove them to the Whitfield residence. Thomas Richard Whitfield then transported the two individuals to Reynolds Memorial Hospital in Glen Dale.

Thomas Richard Whitfield and William Robert Anderson, both of whom live in the area, testified that on the day in question there was gravel and cinders were present on the road surface and this was the condition on the road at the time of claimant's accident.

Later in the evening on the day of the accident, Marshall County Deputy Sheriff Daniel Wayne Garwick investigated this incident. Deputy Garwick obtained statements from the claimant and Mr. Whitfield, at the hospital. Both of the statements were to the effect that the claimant lost control of the vehicle before the far turn in the road as they proceeded southeast and that the vehicle went over the embankment. Neither of the statements taken by Deputy Garwick mentioned any roadway defect. After taking the statements at the hospital, Deputy Garwick proceeded to the accident scene in order to gather information whatever information he could about the exact site of the accident and to view the vehicle. Deputy Garwick indicated in his report that he did not observe any roadway defects. Deputy Garwick followed up his investigation by citing Mr. Williams for failure to maintain control of the vehicle, improper registration of the vehicle, and lack of motor vehicle insurance.

Respondent maintains that it did not have any notice of any roadway defect on County Route 21 in Marshall County at the scene of claimant's accident. According to Crew Leader-Foreman, Kevin Leonard Cottrell, respondent patrolled County Route 21 regularly. He was not aware of any particular road defect. Moreover, County Administrator Ronald William Faulk testified that respondent had not received any complaints regarding a roadway defect on the road prior to claimant's incident. Daily work records indicated that respondent's employees conducted roadway patching along County Route 21 after claimant's incident.

ANALYSIS AND CONCLUSION

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

The Court is mindful that there is a discrepancy regarding the time frame of the incident and the exact point where the vehicle veered off the road. However, these issues are not germane in the final analysis of the facts and circumstances of this claim. The ultimate issue is whether respondent had notice of a roadway defect on County Route 21 in Marshall County. In the present claim, the evidence fails to establish that respondent had notice of a roadway defect on County Route 21 in Marshall County. The evidence establishes that claimant was familiar with the condition of the road at the time of the incident. The Court is further of the opinion that claimant should have exercised more care under the existing conditions. Consequently, there is insufficient evidence of negligence on the part of respondent upon which to base an award.

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

Claim disallowed.

OPINION ISSUED JANUARY 30, 2001

ATTORNEY GENERAL
VS.
DIVISION OF CORRECTIONS
(CC-00-487)

Claimant appeared *pro se.*
Joy M. Bolling, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks payment in the amount of $25,518.50 for professional services rendered to respondent. The documentation for these services was not processed for payment within the appropriate fiscal year; therefore, claimant has not

been paid. In its Amended Answer, respondent admits the validity of the claim, but states that the correct amount owed to claimant is $19,829.75. Respondent further states that there were sufficient funds expired in the appropriate fiscal year from which the invoices could have been paid. Claimant has reviewed the Amended Answer and agrees that the amount of $19,829.75 is the correct amount owed by respondent.

Accordingly, the Court makes an award to claimant in the amount of $19,829.75.

Award of $19,829.75.

OPINION ISSUED JUNE 29, 2001

WILLIAM ADKINS
VS.
DIVISION OF CORRECTIONS
(CC-00-121)

Claimant appeared *pro se*.
Joy M. Bolling, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this claim to recover the value of a certain television set that he alleges was lost or stolen while he was in lock-down at Mt. Olive Correctional Center where claimant is an inmate.

The critical issue in this case is whether or not this claim was timely filled. A hearing was conducted by this Court on September 29, 2000, at which time the claimant testified as to the facts and circumstances that gave rise to this claim. Claimant was moved from Stewart Hall to Quilliams, also referred to as being in lock-down, in January 1997. He was released from lock-down in April of 1997, at which time he discovered that his television was missing. In July 1997, claimant was returned to lock down status. Claimant did not file a claim with the Court of Claims during the time period between April 1997 and July 1997. He testified that he was in lock-down from July 1997 until March 2000. Claimant asserts that he was not able to file a claim with the Court of Claims while he was in lock-down.

The Associate Warden of Operations, Tim Whittington, testified that an inmate at Mt. Olive, regardless of which unit of the prison he is held, can request the forms to file a grievance or a claim with the Court of Claims at any time, and that such forms would be provided. Robert Daniel, the unit manager over Mr. Adkins stated that any prisoner in Quilliams may file claims with the Court of Claims. He

stated that there is an inmate request form available to all inmates to do so upon request. The request form is sent to Robert Daniel's office to be copied and filed as proof that said request was made. Mr. Daniel testified that the claimant did not request any claim forms. The claimant himself testified that he did not request permission to file with the Court of Claims during the period that he was in lock-down from July 1997 through March 2000.

In accordance with the provisions of W. Va. Code §14-2-21, the Court has no jurisdiction over a claim unless the claim is filed within the applicable statute of limitations. *Bell vs. Division of Highways, 19 Ct. Cl. 1 (1991).* W.Va. Code §55-2-12, is the applicable statute of limitations for a property claim, and provides that this claim should have been brought within two years of the date that claimant discovered the property loss. However, W. Va. Code §55-2-15 provides that if a person is under a disability which prevented him from filing any action, then the statute of limitations is tolled until the disability is removed. *Glover vs. Narick , 184 W. Va. 381, 400 S.E.2d 699 (1994).*

The evidence in this claim establishes that claimant did not file his action within the appropriate two year limitation. Claimant discovered that his television was missing in April 1997, but he did not file the claim herein until March 21, 2000. The evidence further establishes that claimant was not under any disability which would extend the period of time beyond two years as he was not prohibited from filing a claim while he was in lock-down in Quilliams. Furthermore, claimant did not request any claim forms or request permission to file with the Court of Claims. Claimant's only request was that someone look for his television.

Accordingly, the Court is of the opinion that the filing of the claim herein by the claimant in March 2000 was not within the applicable statute of limitations. The Court, lacking jurisdiction in this matter, is required to and does disallow this claim.

Claim disallowed.

OPINION ISSUED JUNE 29, 2001

ALLTEL CORPORATION
VS.
DEPARTMENT OF NATURAL RESOURCES
(CC-01-053)

David A. Barnette, Attorney at Law, for clamant.
Daynus Jividen, Senior Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $6,931.96 for providing state-wide mobile telephone services to respondent in accordance with a contact entered into with the State of West Virginia. The documentation for these services was not processed for payment within the appropriate fiscal year; therefore, claimant has not been paid. In its Amended Answer, respondent admits the validity of the claim, but states that the correct amount owed to claimant is $6,916.59. Respondent further states that there were sufficient funds expired in the appropriate fiscal year from which the invoices could have been paid. Claimant indicated that it agrees to accept the admitted amount as full and complete satisfaction of this claim.

Accordingly, the Court makes an award to claimant in the amount of $6,916.59.

Award of $6,916.59.

OPINION ISSUED JUNE 29, 2001

ALFRED E. COLLINS and NANCY C. COLLINS
VS.
DIVISION OF HIGHWAYS
(CC-98-290)

Michael L. Glasser, Attorney at Law, for claimant.
Andrew F. Tarr and Xueyan Zhang, Attornys at Law, for respondent.

WEBB, JUDGE:

Claimants brought this action for permanent physical injuries, loss of consortium, and property damage sustained when a vehicle being driven by claimant Nancy Collins collided with a concrete barrier erected at a bridge construction site while she was traveling southbound on State Route 65 in North Matewan, Mingo County. At this location, State Route 65 is maintained by respondent. The Court will make an award for the reasons more fully set forth below.

FACTS OF THE CLAIM

The incident giving rise to this claim occurred on May 31, 1998, at approximately 9:15 p.m. On the day in question, claimant Nancy C. Collins was driving a 1988 Chevrolet S-10 pickup truck. The vehicle was owned by her husband Alfred E. Collins. Mrs. Collins was traveling southbound on State Route 65 in

North Matewan, Mingo County. According to Mrs. Collins, she was traveling at "no more than twenty-five miles per hour." The posted speed limit was forty-five miles per hour. It was a dark and rainy night. The roadway surface was wet. The bridge at issue in this claim is commonly referred to as the Red Jacket Bridge, and it is located in North Matewan. State Route 65 runs north and south across the Red Jacket Bridge. Mrs. Collins routinely traveled this portion of highway. She traveled north on State Route 65 and crossed the Red Jacket Bridge to get to her place of employment, Mate Creek Mining Company, Inc., which is located in Red Jacket. Mrs. Collins had worked for Mate Creek Mining Company, Inc., for the previous six years, and she averaged working five days a week .

Red Jacket Bridge was under construction at the time of this incident. Construction began on May 26, 1998, and the bridge was completely closed to traffic going both directions. The respondent set up a detour around the construction site just north of Matewan. The detour then crossed over a small creek, curved back to the right to by-pass the construction on the Red Jacket Bridge, and ended on the south side of the bridge where traffic was directed back onto State Route 65 on the opposite side of Akers' Supply Company, Inc. The bridge was blocked off with four barriers on both ends. These barriers were concrete and were similar or identical to the type of concrete barriers used to divide an interstate highway.

Sometime between approximately 5:30 p.m. and 6:00 p.m. on Sunday, May 31, 1998, claimant Nancy Collins went to work. She traveled Route 65 north to Red Jacket, as she routinely did, to get to Mate Creek Mining Company, Inc. The visibility at this time was good. Mrs. Collins testified that as she approached the detour at the construction site, which would have been the south end of the Red Jacket Bridge, all she saw was "a piece of large equipment setting in front of the bridge in the road, that side of the bridge (the south end of the bridge) in front of the bridge." Mrs. Collins testified that she knew that the bridge was closed on the south end. She had traveled that very same route on four separate days during the previous week. Mrs. Collins got off work at approximately 9:00 p.m. and proceeded to travel back to her home in Matewan. She was traveling south on State Route 65 when she drove around a curve and came upon a small straight stretch just before the Red Jacket Bridge. As she approached the Red Jacket Bridge, two of the four concrete barriers were opened up, giving her the impression that southbound traffic was being directed through the barriers. Previously these barriers on both sides of the bridge were placed upright, side by side, blocking access to the bridge. Mrs. Collins testified that on one of the open barriers there was a " red fluorescent type arrow ". She testified that she thought this arrow was directing her to travel between the barriers and then across the Red Jacket Bridge.

As she started to drive between the two open barriers, her vehicle suddenly struck another concrete barrier that was knocked over on its side. She stated that she did not see this barrier due to the darkness and the rain. Her vehicle struck the

barrier resulting in a violent impact of her vehicle with the barrier when the vehicle came to a dead stop.

Claimant states that upon striking the barrier, the impact threw her forward and her head struck the windshield, causing the windshield to shatter. She described the impact as violent. It jerked her backwards and forwards, knocking her head into the side window. After the vehicle came to a stop, claimant took her seatbelt off and quickly exited the truck. Local residents came to assist. She went inside one of their homes and someone called the police for help. Sergeant Scott Wigal of the West Virginia State Police responded to the scene of this accident to conduct a formal investigation.

Claimant did not go to the hospital on the night of this incident; however, she was in serious pain the day following the accident so she had her husband, claimant Alfred Collins, drive her to the emergency room at Williamson Memorial Hospital where she was treated and released. The claimant was instructed to follow up with another physician upon release. She then sought treatment from Dr. Lura Beth Williams, a Doctor of Chiropractic, located in South Williamson, Kentucky.

Claimants assert that respondent negligently placed barriers at the bridge site; that it negligently failed to illuminate the bridge; and that it failed to place the proper warning signs and/or signals in place for the southbound traffic. Claimant Nancy Collins asserts that respondent's negligence has caused her serious injuries including injuries to her neck, mid back, low back, and hip. She is seeking an award for past medical expenses, economic loss both past and future, and pain and suffering. Claimants Alfred E. Collins and Nancy C. Collins have been married seventeen years. Alfred Collins seeks an award for loss of consortium due to his wife's injuries. He asserts that his wife's injuries have negatively affected their marital relationship. He also seeks an award for damages to his truck in the amount of $2,800.00.

Respondent's position is that Nancy Collins was or should have been aware of the on-going construction project at the Red Jacket Bridge and that the bridge was closed. Further, she could and should have avoided the barriers completely by simply using the detour. The project to repair the Red Jacket Bridge began on Tuesday, May 26, 1998. Respondent argues that since claimant traveled this same portion of road to and from work on May 26, May 27th, May 28th , and finally on her way to work on the evening of the incident, Sunday, May 31, that she knew or should have known the bridge was closed. Respondent argues, since claimant knew that the northbound portion of the bridge was closed as she traveled to her job at approximately 5:30 p.m. on May 31, she should have also known that the southbound portion of the bridge was closed as well. Respondent also contends that if there were any problems with warning signs or the placement of the barriers, it did not have notice of these problems until after claimant's accident on May 31, 1998.

Sergeant Scott Wigal was the Assistant Detachment Commander in Mingo County at the time of this incident. Sergeant Wigal arrived at the scene at 9:35 p.m., shortly after the incident. He testified that although he vaguely remembers being at the scene of this accident near Red Jacket, he did not have any specific recollection of the details other than the information provided in the Uniform Traffic Accident Report which he completed on May 31, 1998. Sergeant Wigal took Mrs. Collins' statement at the scene. He noted in his report that Mrs. Collins did have both her lap and shoulder harness belts on at the time of the incident. He also noted the weather and road conditions at the time of the accident. Specifically, he noted that it was dark, rainy, and that visibility was obscured by the rain. In addition, the black top road surface was wet. Sergeant Wigal concluded that Mrs. Collins "Failed to Maintain Control" of her vehicle and that her vehicle collided with a concrete barrier in the roadway. He testified that it was his opinion that claimant's failure to maintain control of her vehicle was a contributing cause to this incident. He did not cite the claimant with any improper driving nor did he conclude that she was speeding or driving too fast given the circumstances. When questioned to clarify his finding that claimant failed to maintain control of her vehicle, he responded that based upon his training at the academy, a driver has a responsibility to avoid colliding with "normal things like road construction equipment and barriers and so forth."

Sergeant Wigal's testimony regarding the signs at or near the scene also was based upon the notes he made in the Uniform Traffic Accident Report. He stated that he had no direct memory of it, but, referring to the accident report, he noted that there was a detour sign north of the concrete barriers and a bridge closed sign just south of the concrete barriers in the vicinity of the accident vehicle. Sergeant Wigal indicated in his report that the "Bridge Closed" sign was lying on the roadway near claimant's vehicle. He also testified that there was a detour sign north of the concrete barriers, but he did not recall any other detour signs, bridge closed signs, or other warning devices, including flashing lights and he did not indicate any being present at the scene in his report. Sergeant Wigal admitted that if there had been any other signs, flashing lights, or red flags, he probably would have indicated such in his report. He also agreed that since his report made no mention of any illumation on the side of the bridge which claimant struck, it was safe to conclude that there was no such illumination. It was his opinion that the vehicle had struck two concrete barriers and then came to rest in between the two barriers. However, he did admit after reviewing photographs of the vehicular damage submitted in evidence that this evidence did raise some questions as to whether or not claimant may have struck a third barrier which had been lying in the roadway on its side and that this would be consistent with the damage to claimant's vehicle.

An owner of a business adjacent to the accident site, David B. Akers, testified about the scene of this incident as well as testifying regarding the number of accidents at this location, both prior to and after claimant's incident. Mr. Akers

described the detour scene. He stated that there were four concrete barriers at each end of the bridge which were lined up side by side in a straight line so as to completely block traffic from crossing the bridge. These barriers were approximately thirty-six to forty inches high. However, the barriers were not locked together nor were they anchored to the ground. Mr. Akers testified that these barriers were struck numerous times by other vehicles. He testified that there were approximately ten accidents involving vehicles colliding with these barriers within the first week to ten days of this project. Although he never saw any vehicles strike the barriers, he heard many of the collisions and he assisted drivers whose vehicles had struck the barriers or whose vehicles got stuck on the barriers. Mr. Akers and some of his employees would use Akers' heavy equipment to assist respondent's bridge crew in replacing the barriers.

Mr. Akers also testified that these barriers had arrows painted on them with a fluorescent orange or red-like color that directed the southbound traffic to veer to the left to enter the detour. He stated that there were not any signs, signals, or directions other than the arrows painted on the barriers, indicating to the traffic that it had a left detour ahead. It was his opinion that this was one of the main reasons why so many vehicles collided with these barriers. He described how drivers traveling south on State Route 65 would come upon this detour suddenly and without adequate warning. Furthermore, the detour sign referred to in the accident report is approximately a quarter mile north of the project. He does not recall any other signs between this detour sign and the bridge. In his opinion, many drivers did not realize that there was a detour, and their vehicles would clip the barriers and knock some of them over. He also testified that when these barriers were hit and turned sideways, "it would have been pretty likely that a car could have went through there."

David McCoy also testified regarding the nature of this construction site, and as to the number of accidents involving vehicles slamming into the concrete barriers. David McCoy's home is adjacent to the Red Jacket bridge. The front of David McCoy's home is approximately thirty-five to forty feet from the nearest barrier. He heard many vehicles collide with the concrete barriers, and he would see the damage to the barriers and how much they had been moved around as a result of these collisions. He helped people who had just struck the barriers to make sure they were all right, and he also assisted the employees from Akers' Supply in placing the barriers back into position so as to prevent anyone else from striking them. Mr. McCoy also testified that most of the collisions occurred at dark or just before dark. He explained during his testimony that his son had driven his vehicle into the same concrete barriers that the claimant drove into. He testified that his son's vehicle collided with these barriers at "a high rate of speed either on May 29 or May 30, 1998." This collision displaced the barriers, and, according to David McCoy's, testimony, the barriers were not replaced or moved back into position so as to fully block the bridge. As far as warning signs are concerned, David McCoy testified that

there was a "Bridge Closed" sign that was set up on something like a tripod brace. He testified that the sign did not always stay up throughout the bridge construction. It was knocked over "routinely" by people and the wind would even blow it down. He had to pick the sign up on at least four different occasions and set it back up.

Respondent asserts that it was in total compliance with the Federal Traffic Control Manual for Street and Highway Construction and Maintenance Operations, adopted by the West Virginia Division of Highways in 1994. Specifically, the respondent was referring to Case A12 of the Manual. The respondent presented testimony through Edwin Layman, who is the Transportation Services Supervisor for District II, regarding the requirements of the Case A12 and its application in this case. Mr. Layman testified that he was responsible for having the proper signs in place at the construction project in accordance with the provisions of the manual. He sent his crew to set up the signs at this project and he went to the project shortly afterwards and field checked what had been done on May 27, 1998. Mr. Layman testified that when a project falls under the specifications of this manual, then it must be used, and all specifications must be followed. He also testified that he took a copy of the Case A12 diagram and slowly drove through the project to make sure that each sign that was required to be in place according to the manual was actually in place.

ANALYSIS AND CONCLUSIONS OF LAW

The well established principle of law in the State of West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims*, 130 W.Va.645; 46 S.E.2d 81 (1947). However, the State does have a duty to exercise reasonable care and diligence in the maintenance of its highways under all circumstances. *Adams vs. Dept. of Highways*, 14 Ct. Cl. 214 (1982); *Hobbs vs. Dept. of Highways* 13 Ct. Cl. 27 (1979). In order to hold the respondent liable for road defects of this type, a claimant must prove that respondent had actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman vs. Dept. of Highways*, 16 Ct. Cl. 103 (1986). Finally, to be actionable, negligence must be the proximate cause of the claimant's injuries. *Louk vs. Isuzu Motors, Inc*. 198 W.Va. 250; 479 S.E.2d 911 (1996); *Roush v. Johnson*, 139 W.Va. 607, 80 S.E.2d 857 (1954).

The first issue in this claim is whether or not the respondent had the proper signs in place to provide adequate notice to drivers that the Red Jacket Bridge remained closed to southbound traffic on Route 65. Second, if respondent did have the proper warning signs in place, were these placed in a proper, secure manner and in proper working condition. Given the testimony presented at the hearing of this matter, it is this Court's opinion that respondent did not fulfill its obligations to the claimant herein.

A review of the testimony from various witnesses familiar with this scene and State Route 65 establishes that there was inadequate warning to the southbound traffic of the approaching detour. It is evident that the "bridge closed" sign was not

properly placed nor secured, so as to give motorists warning that there was a detour and that the Red Jacket Bridge remained closed.

The lack of signs or notice of the detour created a hazardous situation for drivers approaching the Red Jacket Bridge from the north. Unfortunately, an already dangerous situation was made worse by the improper placement and use of the concrete barriers which were used primarily to block the entrance to the bridge, but they also were used to channel the traffic through the detour with the use of the painted orange arrows. Testimony adduced from numerous witnesses leads the Court to conclude that the lack of proper signs and the improper use of and placement of the concrete barriers created what was in essence a trap for unsuspecting motorists, especially for those motorists traveling at night. There was insufficient illumination on the bridge and the barriers. There is also undisputed testimony that these barriers had arrows painted on them with an orange fluorescent-type paint. The lack of warning signs, along with the lack of adequate illumination, apparently made it very difficult for drivers to see that there was a detour and that they were approaching a concrete barrier.

The Court is of the opinion that it was foreseeable that a driver approaching the Red Jacket Bridge and observing the barriers inadvertently could drive through the barriers and have a collision. The fact that the barriers were not secured together or anchored in some way so that no separation could occur if the barriers were moved by traffic allowed the barrier with an arrow on it to move in such a way as to create a trap for an unsuspecting driver. The evidence adduced at the hearing, especially the photographs of the damage to the vehicle, indicate that Mrs. Collins did in fact have enough room to maneuver her truck between the two open barriers to cross what she thought was the Red Jacket Bridge and then strike a barrier knocked over on its side. The photographs of the vehicle Mrs. Collins was driving clearly show that she did not simply crash into two upright barriers. The photographs of the damage to her vehicle are consistent with her version of the accident as the damage was limited to the lower left portion of the vehicle. Officer Wigal also testified that whatever impacted the truck hit it at a height of approximately eighteen inches, which is much more consistent with striking a barrier turned over on its side than one standing upright. This evidence leads the Court to the conclusion that there was enough room for Mrs. Collins to maneuver her vehicle through the two barriers where it struck the barrier which was already knocked over on its side. Thus, there was a combination of negligent acts and omissions on the part of the respondent that constitutes the proximate cause of this accident.

However, the Court is also of the opinion that Mrs. Collins was twenty percent at fault in this incident. The evidence adduced at this hearing also established that Mrs. Collins was familiar with State Route 65. She was aware that the Red Jacket Bridge was under construction as of May 26, 1998, and that it was closed to both northbound and southbound traffic. She also passed the construction

site as she traveled through the detour three different times to and from work prior to the night of the accident. On the date of the accident May 31, 1998, Mrs. Collins passed the Red Jacket Bridge while driving north to her place of employment. Given the fact that she knew that the bridge had been totally blocked to traffic in both directions as she came home from work on May 26, May 27, and May 28, she should have been more cautious as she returned home from work on May 31, 1998. Although the respondent did not have adequate signs in place, and was negligent in the use and placement of the concrete barriers, she should have traveled at a slower rate of speed than that at which she was traveling. Therefore, the issue of the adequacy of signs at the scene is negated by the fact that Mrs. Collins had driven through the area several times prior to the night of her accident. However, the Court is of the opinion that if she had been traveling at a slower rate of speed, she may have been able to avoid the dangerous trap that awaited her, or at least reduced her damages. The Court concludes that claimant Nancy C. Collins be assessed twenty percent for her comparative negligence.

DAMAGES

Claimant Nancy Collins suffered serious physical injuries as a result of this incident. She testified to the Court that she is in constant pain. She has a great deal of pain including headaches, neck pain, mid-back pain, low-back pain, and pain in her right hip. Mrs. Collins also had a noticeable limp due to the injury to her right hip. Dr. Lura Beth Williams, D.C., treated Mrs. Collins for approximately five months. She ran numerous diagnostic tests including physical exams, x-rays, ultrasounds, and a CPT current perception threshold, which is a nerve study. Dr. Williams diagnosed Mrs. Collins as having sub-acute cervical strain and localized edema and scarring in this same region. This has resulted in diminished movement and function of the muscles in the cervical region. Dr. Williams also diagnosed her with lumbar strain, edema, and scarring. Also, there are some arthritic changes to the facets in the lumbar region.

Mrs. Collins also suffers from a limp on her right side due to a serious sprain, strain, and muscle compensation to her hip. Dr. Williams testified that Mrs. Collins is "antalgic" meaning that she is unable to stand erect. She also lacks range of motion in her hip demonstrating significant trauma to this area. Mrs. Collins also suffers from a leg length discrepancy due to the injuries to her leg and hip muscles.

Dr. Williams treated Mrs. Collins by applying adjustments to her injured areas along with other conservative treatment. When Dr. Williams was not able to treat Mrs. Collins to a state at or near her pre-accident physical condition, she recommended cessation of the treatment.

Claimant also was treated by Dr. Panos Ignatiadis, a neurosurgeon, who performed an MRI on Mrs. Collins. He did not find any need at that time for surgical intervention. Mrs. Collins had a second MRI in January 2001 at the request of her family physician, Dr. Camomot. This MRI was performed on her cervical spine, her

right hip, and her proximal femur. The findings were as follows: degenerative disc disease from levels C3 through C7; obliteration of the spinal foramina at C4-C5; and at C5-C6. Finally, Mrs. Collins also suffers from osteoarthritic changes in her hips.

These injuries have caused Mrs. Collins a great deal of pain and suffering, loss of enjoyment of life, and depression. She is unable to perform those duties around the home that she formerly was able to do. She requires the help of her husband to get through her daily life. It is difficult for her to bathe, cook, and clean house due to the pain. She is now on anti-depression medication as a result of her injuries. She is no longer able to work due to her injuries and she has been declared disabled. She receives disability from the Social Security Administration.

Both Mr. and Mrs. Collins testified that this incident has had a very negative effect on their marriage. Mr. Collins testified that his wife is not as happy or as active as she was before this incident. This incident has also had a dramatic effect on the claimants' personal and intimate relations as well. The Court is of the opinion that claimant Alfred E. Collins has suffered a loss of consortium as a result of the injuries to his wife and the loss of his truck. Therefore, the Court finds that the claimant Alfred E. Collins is entitled to an award of $7,800.00. The Court also finds that claimant Nancy C. Collins is entitled to an award of $96,000.00 which amount is reduced by the assessment of comparative negligence for a total award of $76,800.00.

In accordance with the finding of facts and conclusions of law as stated herein above, the Court makes an award in the amount of $76,800.00 to claimant Nancy C. Collins and an award in the amount of $7,800.00 to claimant Alfred E. Collins.

Award of $76,800.00 to Nancy C. Collins.
Award of $7,800.00 to Alfred E. Collins.

OPINION ISSUED JUNE 29, 2001

JEREMY TAIT HUNT
VS.
DIVISION OF HIGHWAYS
(CC-96-492)

Letisha Bika, Attorney at Law, for claimant.
Andrew F. Tarr and Xueyan Zhang, Attorneys at Law, for respondent.

STEPTOE, JUDGE:

Claimant, Jeremy Tait Hunt, brought this action for permanent physical injuries he sustained when the vehicle in which he was a passenger went off a bridge on Sate Route 49 in Thacker, Mingo County. The driver of the vehicle and claimant were traveling northbound between Edgarton and Matewan. At this location, State Route 49 is maintained by respondent, the Division of Highways. The Court is of the opinion to disallow this claim for the reasons more fully stated below.

FACTS OF THE CLAIM

The incident giving rise to this claim occurred on June 26, 1993, at approximately 12:30 p.m. On the day in question, the sixteen year-old claimant was a passenger in a 1991 Ford Escort driven by Celia Michelle Murphy.[1] The vehicle was owned by Ms. Murphy's father, Larry Murphy. Ms. Murphy and the claimant were traveling northbound on State Route 49 at a speed of about thirty to thirty-five miles per hour, in the opinion of Ms. Murphy. The unposted speed limit for this road was fifty-five miles per hour. Ms. Murphy regularly traveled this portion of road of State Route 49 on her way to and from high school. She was very familiar with the road. At the time of the incident herein, claimant and Ms. Murphy were proceeding from her residence in Edgarton towards Matewan with the final destination being the Huntington Mall.

At this location, State Route 49 is a two-lane road with double yellow lines indicating the center of the road and white lines on the edges of the pavement. Ms. Murphy testified that the road was in a state of disrepair. She asserted that there were ruts in the pavement. The weather on the day in question was rainy and the roads were wet. As Ms. Murphy drove over a crest at the top of a hill on State Route 49, she proceeded downhill towards the Grapevine Bridge at the bottom. When the vehicle began moving downhill, Ms. Murphy testified that the vehicle began to hydroplane and she lost control of the vehicle. She panicked, shut her eyes, and took her hands off the steering wheel. Ms. Murphy further testified that after she released the steering wheel, she remembered the claimant having grabbed the steering wheel. At that point, the vehicle left the surface of the road, went to the right of the Grapevine Bridge, proceeded in the air across Grapevine Creek and Lick Fork Road, struck the northeastern side of the embankment at the north end of the bridge, flipped in the air, and landed on its top on Lick Fork Road directly beneath the Grapevine Bridge. Ms. Murphy sustained personal injuries which were not permanent in nature. Ms. Murphy recalled that she did not have the automatic shoulder harness across her body, but she did have on the lap belt. She did not believe that claimant had on his lap belt.

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[1]Since the incident in question, Celia Michelle Murphy has married and her name has changed to Celia Michelle Stumbo. The Court will refer to this witness using her maiden name.

The claimant herein was very familiar with State Route 49 at the scene of this accident. He went back and forth to high school using this stretch of roadway. On the day of this incident, he explained that he was tired as he had worked that night before and his mother took him to Michelle Murphy's home so the two of them could go to the Huntington Mall. He testified that it was raining at the time. He was in a reclined position in the passenger seat in the vehicle with both of his seat belts, the lap belt and the shoulder harness, in place. He recalled that he heard Ms. Murphy scream, he then raised up in his seat, leaned forward to try to place his hands on the dashboard, and realized that they were already going off the bridge. He stated that he "didn't have time to even say nothing (sic). I was just overwhelmed by what was happening. It just was unreal." In his opinion, the vehicle was going 40-45 miles per hour immediately prior to the accident. Claimant testified that there were two sags in the pavement in their lane of travel, one located about six to eight inches from the yellow line and the other located about one and one-half to two feet from the white line. He remembers being in the vehicle under the bridge after the accident, but he could not see because of an injury to his forehead. He described Ms. Murphy as being "hysterical and freaked out." He felt numb, his face was sore, and he was having trouble breathing so he "kind of laid still."

Emergency personnel were alerted by some people who were at the scene under the bridge. The emergency crews arrived at the scene in order to transport both claimant and Ms. Murphy. Claimant was taken to an area where a medical helicopter flew him to St. Mary's Hospital in Huntington, Cabell County, because of the severity of his injuries.

Claimant in this action contends that the respondent was negligent in its maintenance of State Route 49 and the Grapevine Bridge on State Route 49 on the date of the accident described herein above. Claimant asserts that respondent failed to properly maintain the road surface of State Route 49, specifically on the downgrade portion approaching the Grapevine Bridge, and that this failure caused the vehicle in which claimant was a passenger to hydroplane. Further, claimant alleges that respondent failed to replace a portion of the guardrail that was missing on the Grapevine Bridge and that this guardrail would have prevented the vehicle in which he was a passenger on June 26, 1993, from going over the embankment and landing in the area below the bridge, causing him to suffer severe injuries.

Respondent's position is that the proximate cause of the accident was the failure of the driver to maintain control of her vehicle; the speed of the vehicle at the time of the accident; the action of the claimant in grabbing the steering wheel; and the condition of the tires on the vehicle. As to the issue of the maintenance of the bridge, respondent asserts that the guardrail was not a factor in this claim for two reasons: first, the area where the vehicle in which claimant was a passenger went off the Grapevine Bridge on State Route 49 was an area where the missing guardrail would not have extended; and second, even if the guardrail were present, the accident

still would have occurred and the vehicle still would have gone into the ravine resulting in the injuries to the claimant.

This accident was investigated by a member of the West Virginia State Police, Trooper First-Class Michael Allen Smith. At the location in question, Trooper Smith took about thirty photographs of the scene which were admitted into evidence. Statements from the claimant and Ms. Murphy were taken on another occasion by another trooper. Trooper Smith concluded in his Uniform Traffic Accident Report that the driver of the vehicle, Ms. Murphy, was exceeding a safe speed limit due to the fact that she lost control of the vehicle, it was raining, and the surface of the road was wet. He came to this conclusion because there were no observable skid marks and the vehicle had crossed the area over Grapevine Creek and Fork Lick Road before striking the other side of the embankment. Although the speed limit for State Route 49 at this particular location is 55 miles per hour, Trooper Smith acknowledged that there was a difference between the speed limit and a safe speed. He was of the opinion from his observations at the accident scene that Ms. Murphy should have been operating the vehicle at a slower speed. It is his opinion that "a driver has to adjust for any conditions he might encounter. Just because the speed limit is say for instance 55 or 75 on the highway, you know, if safety doesn't warrant that speed, you shouldn't go that speed." Ms. Murphy was not issued a citation by Trooper Smith for this incident. Trooper Smith did not recall seeing any ruts in the road surface of State Route 49. He stated that if he had thought that there was a problem with the road, he would have taken photographs of the area. He was also of the opinion that he would have taken additional photographs of any unusual conditions on the surface of Route 49 if he had noticed these during his investigation. He was of the opinion that he remembered being concerned about all of the area surrounding the accident scene due to the severity of the accident. He was requested to review photographs of the accident scene during his testimony and he made various marks on these photographs including a mark on the a photograph of the hillside where he thought the vehicle struck the hillside before falling into the area beneath the bridge.

The Grapevine Creek Bridge was constructed by respondent in 1961. It is sixty-three feet in length, twenty-three feet five inches in width and has a weight limit of fourteen tons. Since the bridge has a weight limit of less than fifteen tons, it is not a posted bridge. The bridge is suspended about twenty-five feet over Grapevine Creek and Lick Fork Road. Proceeding northbound, the bridge first crosses over Grapevine Creek and then it crosses over Lick Fork Road. A power line is suspended about one-quarter from the southern end of the bridge over Grapevine Creek.

The evidence in this claim establishes that bridges throughout the State of West Virginia are inspected every two to four years in accordance with federal regulations. These inspections are performed by individuals designated as bridge

inspectors and reports are written for the specific bridge inspected. Generally, within one month of a bridge inspection, the report is prepared. This report is reviewed by an evaluation engineer who signs it on the first page and by the bridge engineer in the particular district. These reports are then sent to respondent's office in Charleston. If there is a critical structural problem, the evaluation engineer informs his superior or a supervisor in the area immediately. Otherwise, the repair process may take longer. For the Grapevine Bridge, Mansour Saber was the evaluation engineer. His focus for the bridge inspection reports is to note any deficiencies in the structure of the bridge, i.e., the underneath of the bridge, the steel, the connection, anything that might indicate that the bridge could fall. Any non-structure related problems such as the condition of the guardrails on the bridge are not within his area of responsibility. The bridge engineer would be the individual in a district to address an issue regarding guardrails.

During the hearing of this claim, four of respondent's bridge inspection reports dated December 11, 1989; May 16, 1989; May 20, 1991; and June 3, 1993, were admitted into evidence. Each report included photographs of the location in question, and each report indicated that eighteen feet of guardrail on the eastern side of the bridge was missing. Bridge Inspector Johnie Lee Clagg inspected the bridge on December 11, 1989, and noted in his report that a portion of guardrail was missing. His inspection report also noted that as of December 11, 1989, the Grapevine Bridge was not in a safe condition and corrections should be made. During the six years following the December 11, 1989, report, until the date of claimant's incident, the condition of the bridge remained unchanged even though the average daily travel count increased from 1,900 to 3,300 vehicles by June 3, 1993. Bridge Safety Inspector III, Roger Eugene Chapman, inspected the bridge on June 3, 1993. In that report, he noted that the guardrail was damaged, in critical condition, and should be replaced. However, he could not remember having seen any approach guardrail at this location on the Grapevine Bridge in any of his inspections of the bridge. These reports substantiate the allegation of the claimant that there was guardrail missing on the Grapevine Bridge and that this fact was known by the bridge inspectors who were assigned to inspect this bridge.

According to District II Administrator Wilson Braley, the May 16, 1989, report that indicated the deficiencies on the Grapevine Bridge, including the missing guardrail, created a critical condition on the bridge. He stated that guardrail at the ends of the bridge are flared out and were not attached to the side of the bridge. In addition, he acknowledged that the May 20, 1991, report also mentioned that the guardrail was in critical condition and needed to be replaced.

As the District II Administrator, it was Mr. Braley's responsibility to assign the work for guardrail repair. If the project was one that would take three to six months to complete, he would obtain a purchase order and hire a contractor to do the project. In order to replace the missing guardrail on the Grapevine Bridge, Mr.

Braley testified that two pieces of guardrail should have been sufficient to complete the project. Guardrail usually comes in sections about thirteen feet long to provide coverage for an area of about twelve feet, six inches. Guardrail is connected with vertical posts, often called "lookout posts." The "lookout posts" are welded to the outside beam of the bridge.

From 1985 to 1987, respondent's maintenance office in Mingo County stocked guardrail and would have been responsible for its installation. The Mingo County Supervisor, Barry Mullins, testified that he is on State Route 49 on a regular basis, but he did not inspect the bridge for any missing guardrail. He asserted that if he had seen any missing guardrail, he would have had it replaced. He further stated that he would remedy any hazard or danger immediately. Of course, these repairs would be temporary because the Mingo County office does not have the equipment or skill to conduct more permanent guardrail repairs. He stated that once he received notice of an incident, he would make an on-site inspection of the area in question. Evidence adduced at the hearing indicated that the West Virginia Maintenance Manual (1989 edition) states that guardrail inspections are to take place twice per year. Repairs are to be noted on a form in triplicate and scheduled. Mr. Mullins stated that his office does not have any such form and no such inspection program is in place. Maintenance Assistant Jimmie Messer testified that when guardrail is missing, he would discuss the issue with the County Supervisor and no written records would be made unless there was a complaint. According to Mr. Messer, in 1993, if guardrail was damaged in a few sections, a contractor would do the routine replacement work, but he was not prepared to testify if that extended to bridges.

According to claimant's expert Dr. Kenneth William Crowley, a highway traffic engineer, if the missing section of the guardrail on the Grapevine Bridge would have been properly maintained, this incident involving the claimant would not have occurred. Dr. Crowley did not visit the site, but he based his calculations on the measurements obtained by Donald Underwood, respondent's expert in accident reconstruction. Although, Dr. Crowley used these measurements, he opined that the measurements obtained by respondent gave "the illusion of precision." Moreover, it is Dr. Crowley's opinion that the purpose of guardrail is to help keep errant vehicles on the road. The presence of guardrail extends the time for vehicular stopping points and reduces the severity of impacts. Dr. Crowley acknowledged that guardrail is a hazard in and of itself, so it is only placed where it is needed.

In order to establish his position, Dr. Crowley calculated two momentum analyses of the incident in question. The concept of "momentum" was defined as weight of a vehicle times the speed of the vehicle times the angle of the vehicle. The weight of the vehicle was estimated at 2,550 pounds, including the vehicle and passengers. First, Dr. Crowley determined the speed of the vehicle. He did this by calculating the distance traveled and the distance dropped based upon the laws of speed and gravity. The speed of the vehicle was estimated between thirty and fifty-

three miles per hour. Ms. Murphy testified that the speed of the vehicle was about thirty miles per hour. Claimant testified that the speed of the vehicle was about forty-five miles per hour and Mr. Underwood determined the air speed of the vehicle as it left the edge of the pavement at about fifty-three miles per hour. Dr. Crowley opined that the highest possible speed of the vehicle was fifty- eight miles per hour.

Calculating the angle of impact of the Murphy vehicle with the guardrail was also part of Doctor Crowley's analysis in this claim. He used impact angles of twenty-five degrees for the first analysis and fifty-three degrees for the second analysis. He determined the angle of impact from tread marks he identified in photographs. It is his opinion that the tire marks on the bridge indicate that the vehicle was going straight and that it was not skidding at the point of impact. The trajectory of the vehicle followed the bridge. If the vehicle had impacted higher on the embankment, the speed would be higher than if the point of impact was lower on the embankment. Based upon his calculation, Dr. Crowley determined that the impact momentum would be less than the weight of the Murphy vehicle; therefore, the presence of guardrail would have contained the Murphy vehicle on impact and directed it back to the road. Dr. Crowley opined that at the top speed of the vehicle, the guardrail would have directed the Murphy vehicle to a safe situation.

At thirty-five miles per hour, Dr. Crowley opined that the vehicle would have struck the base of the embankment. Dr. Crowley also estimated the speed needed to clear the power wire under the bridge at thirty-five miles per hour.

Furthermore, Dr. Crowley defined the action of vehicular hydroplaning as being the involuntarily loss of control by the driver of the vehicle because of water on the road surface. Turning the steering wheel while hydroplaning would not affect control of the vehicle. Dr. Crowley stated that it would be possible for a vehicle to hydroplane with ruts in the road surface. The tire would float in the low spots or ruts in the road. Dr. Crowley was unable to opine whether claimant's action in grabbing the wheel was prudent because it would depend on the situation. If the pavement had been dry, Dr. Crowley believed that the vehicle would have veered to the left or right.

Since early 1999, respondent's expert in auto accident reconstruction, Donald Lee Underwood, visited the accident site six times. On three occasions, he and Charles Raymond Lewis, II, a traffic engineer for respondent, searched for a possible point of impact of the Murphy vehicle in the northeastern side of the embankment. In the spring of 2000, Mr. Underwood found what they believed to be physical evidence of the point of impact of the vehicle. Mr. Underwood was climbing on the embankment when he found a small piece of glass in the hillside. It is his opinion that the glass was of the type used for automobile headlights. Therefore, he believed that this was the point of impact for the Murphy vehicle. Mr. Underwood acknowledged that he was not sure if the glass that he found belonged to the Murphy vehicle. Also, Mr. Underwood was unaware of other accidents in the

same location and he acknowledged that vegetation had grown up in the area and it is a rocky embankment.

Mr. Underwood used the angles, distances, and elevations based on the glass shard to calculate the point of impact. He also based this point upon a survey of the bridge performed by Roger Newsome, one of respondent's surveyors, who calculated the elevation by establishing a point on the bridge and measuring to the point of impact on the hillside. The slope was determined to be 61.70 feet and the elevation was determined to be 100 feet. A vertical distance of 8.49 feet was determined from the point where the glass was located in the hillside to the top of the embankment. The 8.94 feet is the difference in elevation from the abutment on the southern wing wall to the point of impact. Using the survey results, Mr. Underwood then calculated the point of impact of the Murphy vehicle and the speed at which the vehicle was traveling when it left the roadway. Mr. Underwood determined the airborne speed to be fifty-three miles per hour.

As a part of his investigation, Mr. Underwood examined the photographs taken of the scene on the day of the incident. One of the photographs depicts a tire imprint on the abutment. Mr. Underwood opined that this was characteristic of a rolling tire, which he believed indicated no brake application. However, Mr. Underwood was unaware of which tire of the Murphy vehicle if any made the impression. He acknowledged that if in fact the mark was from the passenger side tire, then the Murphy vehicle would have been going slower according to his speed calculation. Mr. Underwood also acknowledged that the speed calculation is sensitive. He estimated a measure of five miles per hour per one foot drop. Mr. Underwood could not precisely pinpoint the point of departure and no measurements were made. In addition, Mr. Underwood testified that photographs of the Murphy vehicle after the incident indicates evidence of tire wear. He could obtain the speed of the vehicle only from its point of departure from the bridge, which he termed the "airborne speed." Based upon all the factors that he took into consideration, he was of the opinion that the calculation of speed of the Murphy vehicle at fifty-three miles per hour was reasonable and accurate.

ANALYSIS AND CONCLUSIONS OF LAW

The Court desires to first address respondent's contention that the claimant was somehow negligent in his action if he grabbed the steering wheel in an attempt to prevent an accident. The Court is of the opinion that the facts do not support this contention. The driver of the vehicle stated that she closed her eyes and took her hands off the steering wheel when she felt the vehicle was out of control. The claimant remembers being in a reclined position and having time only to reach for the dashboard before the vehicle was airborne. The Court believes the claimant's version of his own actions. Accidents occur in milliseconds of time. The driver had her eyes closed as well as being hysterical so it is difficult to believe that she would have been cognizant of what was going on inside the vehicle. Even if her version is

to be believed, would not a reasonable, prudent person observing that the driver released the steering wheel be in a position of feeling forced to grab the steering wheel of the vehicle? Is this not the expected reaction of a passenger in an emergency situation? This Court cannot agree with the position of the respondent. In fact, the sudden emergency doctrine is a viable doctrine under comparative negligence. *Moran v. Atha Trucking, Inc*., 208 W.Va. 379, 540 S.E.2d 903 (1997). The sudden emergency doctrine defines conduct to be that expected of a prudent person in an emergency situation. The essential element of the sudden emergency doctrine is that a party not have time for reflection. The Court is of the opinion that the doctrine could be, and, in fact, would have been applicable to the claimant herein if the Court had found that the evidence established that the claimant had grabbed the steering wheel in an attempt to gain control of the moving vehicle. However, as previously stated, the Court concludes that the evidence does not support the theory that the claimant is responsible in some way for the accident; therefore, there is no basis for this position of the respondent.

Claimant alleges that the accident began when the vehicle began to hydroplane on State Route 49 because respondent's negligent maintenance of the surface of State Route 49. The evidence fails to establish that the road surface was the cause of the driver's loss of control of her vehicle. The photographs taken by Trooper First Class Smith, the investigating officer of the accident, and placed in evidence do not exhibit any unusual road surface conditions. The officer himself explained to the Court that if the road surface had exhibited a condition other than that normally anticipated, he would have noted that fact on his Uniform Traffic Accident Report. He indicated that he also would have taken photographs of any abnormal road condition during his investigation. The Court is of the opinion that Trooper First-Class Smith performed an in-depth investigation of this accident and the Court accepts his statements about the condition of the surface of State Route 49. Therefore, the Court concludes that the cause of the driver losing control of her vehicle was not the fault of any negligent maintenance of State Route 49.

Therefore, the critical issue to be addressed in this claim is whether or not there was a defective condition having to do with the guardrail and whether respondent had notice of this defect and a reasonable time to repair it. The claimant bases the crux of his claim upon the fact that a section of missing guardrail on the Grapevine Bridge constitutes actionable negligence on the part of respondent. The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins vs. Sims*, 130 W.Va. 645; 46 S.E.2d 81 (1947). In order to hold respondent liable for road defects of this type, a claimant must prove that respondent had actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman vs. Dept. of Highways*, 16 Ct. Cl. 103 (1986). When the condition of a bridge should have been anticipated by respondent, its failure to maintain the bridge properly constitutes

negligence. *Eller vs. Div. of Highways*, 13 Ct. Cl. 155 (1980). This Court has also held that respondent does have a duty to maintain existing guardrail or replace missing guardrail on bridges in a timely manner. *Woody vs. Dept. of Highways*, 18 Ct. Cl.29 (1989). In *Shabdue vs. Sims*, the Court held that the State's failure to properly repair and maintain the floor, railing, and guardrail of a bridge in a reasonably safe condition constituted negligence. *142 W. Va. 805, 98 S.E.2d 433 (1957).*

The evidence in this claim clearly establishes that the guardrail on the Grapevine Bridge was defective; that respondent had actual notice of the missing guardrail; and that respondent had a reasonable time in which to effect repairs. The respondent's bridge inspection reports clearly demonstrate that there was eighteen feet of guardrail missing on the eastern side of the bridge. From the date of the first available bridge inspection report, dated May 16, 1989, there were notations that the guardrail and handrail are in critical condition and that railing should be replaced. The evidence in this claim clearly established that as of December 11, 1989, the Grapevine Bridge was not in a safe condition and that it should have been corrected. This was some three and a half years prior to the accident which is the subject matter of this claim. Subsequent reports reiterate that an eighteen foot section of guardrail was missing from the upstream side at abutment number one.

Furthermore, the Mingo County Maintenance Office also had at least constructive notice, if not actual notice of the missing guardrail on the Grapevine Bridge and failed to take any action whatsoever to remedy the situation. Certainly respondent's employees frequently traveled State Route 49 during routine road inspections which necessitated their driving across the Grapevine Bridge.

The Court is of the opinion given the testimony that the respondent had actual notice of the damaged and missing guardrail on the Grapevine Bridge, and respondent had more than a reasonable time to repair to make the appropriate repairs. Respondent knew or should have known that the failure to replace the guardrail presented a hazard to the traveling public. As respondent's employees were in agreement that the guardrail should have been replaced; that this condition posed a hazard to the traveling public; and, that the purpose of the guardrail is to deflect traffic on an errant path on the roadway, the Court concludes that the failure to act on the part of the respondent is inexcusable and an act of gross negligence.

However, the crux of this case is the proximate cause of the accident and subsequent injuries to the claimant. The law in West Virginia requires that a finding of negligence, in and of itself, is insufficient to find liability on a party. To constitute actionable negligence there must be a finding that the negligence was the proximate cause of the injuries to the complaining party. *Roush vs. Johnson, 139 W.Va. 607; 80 S.E.2d 857 (1954); Matthews vs. Cumberland & Allegheny Gas Co. 138 W.Va. 639, 77 S.E.2d 180. (1953).* This issue rests upon whether or not the negligence of the respondent in failing to replace this missing guardrail was the proximate cause of the

accident. If the Court finds that the injuries to the claimant would not have occurred but for the negligence of the respondent, then a recovery on behalf of the claimant would be in order. The testimony of claimant's expert, Dr. Kenneth Crowley, would have the Court enter into the world of speculation. According to Dr. Crowley, if the guardrail had been in place, if the vehicle struck the guardrail at a particular angle, and if the guardrail were of such and such a strength, then the vehicle in which claimant was a passenger would not have gone airborne, struck the hillside on the north side of the Grapevine Bridge, and would not have dropped into the bottom of a ravine causing injuries to the claimant. What would have happened to the vehicle if it had struck a guardrail, of course, cannot be answered. This Court, in its determinations of many claims previously heard and submitted for decision, has declined to speculate in order to find liability upon a respondent State agency. *Mooney vs. Department of Highways, 16 Ct. Cl. 84 (1986); Phares vs. Division of Highways, 21 Ct. Cl. 92 (1996).*

The Court is constrained by the time-honored principle of law that the preponderance of the evidence must establish that the negligence of the respondent is the proximate cause of the injuries to the complaining party for there to be a recovery. It is the opinion of the Court in the claim herein that the preponderance of the evidence does not support a finding that the negligence of the respondent was the proximate cause of the accident that resulted in the serious injuries suffered by the claimant. The proximate cause of the accident herein was the driver error committed when the driver failed to maintain control of her vehicle. At that point, the existence or non-existence of the guardrail, even if the missing 18-foot section would have covered the area where the vehicle went off the paved portion of the road, becomes a moot issue. Who can say what would have happened at that juncture of the on-going action of the vehicle? What if the vehicle struck the guardrail head on and flipped over? Would both occupants be alive today? Would they have suffered no injuries? This Court declines to speculate as to what could or would have happened. It cannot answer these questions to its satisfaction. Therefore, the Court concludes that the proximate cause of the accident in this claim is driver error, and not negligence on the part of the respondent.

The Court is most cognizant of the severity of the injuries to the claimant, and the Court is most sympathetic with the plight of the claimant. Claimant Jeremy Tait Hunt appears to the Court to be a young man who is determined to accept his physical limitations and to live his life to the fullest. The Court has the utmost respect and admiration for this young man. However, the Court cannot speculate to the degree required in this claim that the severe and permanent injuries he suffered in this accident were proximately caused by the negligence of the respondent. Thus, the Court is required by the applicable law to hold that there may be no recovery on the part of the claimant in this claim.

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

Claim disallowed.

OPINION ISSUED JUNE 29, 2001

NATIONAL ENGINEERING AND CONTRACTING COMPANY
VS.
DIVISION OF HIGHWAYS
(CC-99-180)

Stephen A. Weber and Michael F. McKenna, Attorneys at Law, for the claimant.

Jeff J. Miller, Attorney at Law, for respondent.

PER CURIAM:

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

1. Claimant National Engineering and Contracting Company (hereinafter referred to as National) is an Ohio corporation with its principal place of the bid of business in Strongsville, Ohio, and is a pre-qualified construction contractor in the State of West Virginia.

2. The respondent is a State agency delegated with the responsibility of designing, planning, and administering public highway projects in the State of West Virginia.

3. This claim consolidates two claims on highway construction contracts. Both contracts were entered into in 1995 to perform certain repair work on I-64 in Cabell County. The first project is commonly referred to as the Mud River Bridge Project and is Project No. S306-64-25.21, 26.45, and 27.10, and the second project, commonly referred to as the Mud River/Indian Meadows Bridge Project, is Project No. 27.110.

4. As part of the terms of the contract for Project No. S306-64-25.21, 26.45, and 27.10, National was required to furnish and erect about 13,300 lineal feet of temporary concrete median barrier conforming to the bid proposal for the purposes of maintaining two-way traffic through the project. The temporary barriers called for in the contract utilized a “pin and loop” positive connection system.

5. National made arrangements for concrete median barriers to be supplied by a subcontractor, Swank Sign Erection, Inc., which had furnished median barriers

for other highway projects. Specifically, the median barrier company had furnished barriers on a project on Route 22 near Weirton, as well as for a project on I-79, commonly referred to as the FBI Interchange project. The same type barrier was also used on other projects performed by other construction contractors for respondent.

6. On those other projects, the median barrier company had furnished what is commonly referred to in the industry as a Pennsylvania or PennDOT barrier, which is so named as it is a commonly used median barrier that is made to special Pennsylvania Department of Transportation standards. The PennDOT barrier has a "slot and plate" connection rather than a "pin and loop" connection, and has other design features that may be distinguished on the plan detail sheets for each respective type of barrier. On the other projects, the median barrier company sought and received permission from respondent to use the PennDOT barrier.

7. Although the PennDOT barrier did not meet project proposal specifications for this project as bid, the median barrier company sought approval from respondent to use the PennDOT barrier on this project.

8. On February 9, 1996, respondent informed National that the PennDOT median barrier could be used long as respondent was furnished with a certification that the barrier complied with NCHRP 350 criteria. This was the first time that respondent had ever made this alternative condition a part of the approval process.

9. After calling the Pennsylvania Department of Transportation to check on the standard of the PennDOT barrier, the subcontractor to National certified to respondent that the PennDOT median barrier met the NCHRP 350 standard. However, the median barrier did not meet that standard. The parties do not believe that the median barrier company intentionally misrepresented this fact, but rather did so out of mistake.

10. At that time, no barrier in the world had been tested or certified as meeting the NCHRP 350 standard since it was a newly adopted standard. The contract did not require a contractor to use median barrier that met the NCHRP 350 standard.

11. The PennDOT barrier did meet the NCHRP 230 standard which was the NCHRP standard then in place.

12. The median barrier company began to deliver the median barrier to the project prior to having received the required approval of the use of the barrier by respondent.

13. On April 22, 1996, respondent informed National that it would not approve the use of the PennDOT barrier because this particular barrier met neither the original bid proposal specifications nor the NCHRP 350 standard. National was given a third alternative of imbedding the PennDOT barrier two inches into a slot in the pavement to provide lateral support; however, National determined that this requirement would make the PennDOT barrier too costly to use on the project.

14. National ultimately replaced the PennDOT barriers with a WVDOH type barrier, which also did not meet NCHRP 350 standards, but which did conform to the original plan documents. The removal and replacement of the PennDOT barriers cost $209,047.46 for which National now makes this claim.

15. National also contracted with respondent in 1995 to perform certain repair work on project no. S306-64-20.19 and respondent rejected the use of the PennDOT barrier as the temporary concrete barriers on this project as well which National alleges the cost for the removal and replacement of the barrier at $49,156.06.

16. The parties stipulate to the admission of the project proposal plans and contract documents, including all standard and supplemental specifications, special provisions and detail sheets, including the WVDOH Standard Detail, "Temporary Concrete Barrier", Standard Sheet GR 10, Prepared 1-1-93; the admission of photocopies of commonwealth of Pennsylvania DOT RC-57, "CONCRETE MEDIAN BARRIER", recommended 3-30-92, comprising three sheets; and the deposition of Charles Shaver, a construction engineer for respondent at the time of these projects, with attached exhibits.

The Court, having reviewed the stipulation, memoranda of law submitted by the parties, the exhibits, and the facts and circumstances of this claim, finds that claimant, National Engineering and Contracting Company, did not establish by a preponderance of the evidence that the respondent breached any of its contractual duties to National. The Court finds that National made a unilateral mistake by relying upon the mistaken misrepresentation of its subcontractor, Swank Sign Erection, Inc., that the PennDOT barrier met the contractual requirements.

The respondent did not allow the use of the PennDOT barrier brought to the site by National due to the fact that it did not meet the contractual requirements for concrete barrier on these two projects. National had three alternatives under the contract. First, it could have used the GR10 barrier (the "pin and loop" barrier) which was available to it and which met all contractual conditions for temporary barriers. Second, National had the alternative of providing barriers which meet the NCHRP 350 standards. Third, National could have chosen to comply with respondent's instructions to embed the delivered PennDOT barriers to meet respondent's requirements. At the time that these projects were let to bid, the NCHRP 350 standard was replacing the 230 standard for temporary barriers. National made the decision to have the PennDOT barriers delivered to the project sites prior to receiving the required approval from respondent. These temporary barriers use the "slotted plate connection" instead of the "pin and loop." The slotted plate connection barriers were required to meet the NCHRP 350 standards. National relied upon the representation of its subcontractor that the PennDOT barriers met the NCHRP 350 standards. Based upon this representation, National proceeded to have

the PennDOT barriers delivered to the project sites only to be informed by respondent that these barriers did not meet the NCHRP 350 standards.

It is the opinion of the Court that National placed itself in an unfortunate position by having the delivery of the PennDOT barriers made to the project sites only to find out that the barriers would not be used in light of its decision to reject respondent's requirement that these be embedded. Any financial loss on the part of National was due to its reliance on its own subcontractor's representations that the barriers were in compliance with the NCHRP 350 standard. Further, the Court is of the opinion that respondent acted in a fair and reasonable manner in its insistence upon a safe and secure barrier being used as the median barrier for traffic upon I-64.

Accordingly, the Court has determined that National has failed to substantiate its claim against the respondent, and further, the Court is of the opinion to and does hereby deny this claim.

Claim disallowed.

OPINION ISSUED JUNE 29, 2001

MARY KATHERINE (LEE) O'NEAL
VS.
DIVISION OF HIGHWAYS
(CC-99-52)

Greg K. Smith, Attorney at Law, for claimant.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

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

1. On September 2, 1997, claimant Mary Katherine (Lee) O'Neal was walking on U.S. Route 52 near Williamson in Mingo County. She planned to enter the downtown area of Williamson by and through the Pike Street underpass.

2. While claimant was walking on U.S. Route 52, she stepped into a large hole and suffered injuries to her right foot.

3. Respondent is responsible for the maintenance of the portion of U.S. Route 52 in or near Williamson, Mingo County, where claimant was injured.

4. Respondent concedes that it had at least constructive notice that the portion of U.S. Route 52 where claimant was injured was in a state of disrepair at the

time of claimant's injury and that there is a moral obligation on its part to provide some compensation to the claimant for her injuries.

5. As a result of this incident, claimant brought this action to recover damages in the amount of $20,000.00. However, claimant has agreed to settle and relinquish this claim against respondent for the amount of $3,000.00. Respondent agrees that the amount of damages as put forth by claimant is fair and reasonable.

The Court has reviewed the facts of this claim as stated in the stipulation, and adopts the statements of facts as its own. The Court finds that respondent was negligent in its maintenance of a portion of U.S. Route 52 in or near Williamson on the date of claimant's incident; that the negligence of respondent was the proximate cause of the injuries suffered by claimant; and that the amount of the damages agreed to by the parties is fair and reasonable.

Accordingly, the Court is of the opinion to and does make an award to the claimant in the amount of $3,000.00.

Award of $3,000.00.

OPINION ISSUED JUNE 29, 2001

DIVISION OF ENVIRONMENTAL PROTECTION
VS.
DIVISION OF CORRECTIONS
(CC-01-178)

Claimant appeared *pro se*.

Jendonnae L. Houdyschell, 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 $189.00 for providing a Sludge Land Application Fee as required by law for Huttonsville Correctional Center, a facility of respondent in Huttonsville. The documentation for these services was not processed for payment within the appropriate fiscal year; therefore, claimant has not been paid. In its Answer, respondent admits the validity of the claim as well as the amount, and states that there were sufficient funds expired in the appropriate fiscal year from which the invoice could have been paid.

Accordingly, the Court makes an award to claimant in the amount of $189.00.

Award of $189.00.

REFERENCES

- **BERMS – See also Comparative Negligence and Negligence**
- **BRIDGES**
- **CONTRACTS**
- **COMPARATIVE NEGLIGENCE – See also Berms; Falling Rocks and Rocks; Negligence & Streets and Highways**
- **DAMAGES**
- **DRAINS and SEWERS**
- **FALLING ROCKS AND ROCKS – See also Comparative Negligence and Negligence**
- **LEASES**
- **MOTOR VEHICLES**
- **NEGLIGENCE – See also Berms; Falling Rocks and Rocks & Streets and Highways**
- **NOTICE**
- **PEDESTRIANS**
- **PRISONS AND PRISONERS**
- **PUBLIC EMPLOYEES**
- **STATE AGENCIES**
- **STREETS & HIGHWAYS – See also Comparative Negligence and Negligence**
- **TREES and TIMBER**
- **VENDOR**
- **VENDOR – Denied because of insufficient funds**
- **W. VA. UNIVERSITY**

The following is a compilation of headnotes representing decisions from July 1, 1999 to June 30, 2001. Because of time and space constraints, the Court has decided to exclude certain decisions, most of which involve vendors, typical road hazard claims and expense reimbursements.

BERMS – See also Comparative Negligence and Negligence

BAKER VS. DIV. HIGHWAYS (CC-99-346)

Claimant and respondent stipulated that claimant's vehicle sustained damage when it struck a washed out portion of the road and respondent had failed to provide proper warning devices for the traveling public. The made an award to the claimant. . . . . p. 212

BOTT VS. DIV. OF HIGHWAYS (CC-99-471)

The parties stipulated that claimant's vehicle sustained damage when it went over a cut-off sign post which respondent had left on the berm; that respondent was responsible for the maintenance of the area; and that respondent was negligent. The Court made an award. . . . . p. 243

BROOKS VS. DIV. OF HIGHWAYS (CC-00-143)

A claim for damages to a vehicle was denied where respondent was performing work and maintained signs for the traveling public but claimant drove into a store parking lot where the berm had been cut away during respondent's project. Claimant failed to establish any negligence on the part of respondent. . . . . p. 271

DONATO VS. DIV. OF HIGHWAYS (CC-98-335)

The Court held that the berm of Route 35, McGraws Run Road, was negligently maintained and was the proximate cause of claimant's damages, where claimant's vehicle was forced off the road due to an oncoming vehicle. The berm of a road must be maintained in a reasonably safe condition for use when a motorist is forced onto the berm in an emergency or for an otherwise necessary use. Award of $3,947.22. *Sweda vs. Dept. of Highways*, 13 Ct. Cl. 249. . . . . p. 69

FORESTER VS. DIV. OF HIGHWAYS (CC-00-287)

Claimants' son was operating their vehicle on a narrow, two-lane road when he drove to the right for on-coming traffic and the vehicle went into a deep depression in the berm. The Court held that respondent was negligent in its maintenance of the berm and made an award for the damages to the vehicle. . . . . p. 246

FREYMAN VS. DIV. OF HIGHWAYS (CC-99-249)

Where the evidence established that there was on-going construction on a bridge which resulted in the deterioration of the concrete surface and this condition caused damage to claimant's vehicle, the Court will find respondent negligent and make an award to the claimant. . . . . p. 179

GANNON VS. DIV. OF HIGHWAYS (CC-98-312)

Where claimants' vehicle struck a piece of concrete curb broken off and laying along the edge of the road and berm, the Court held that claimants' son should have had enough room to maneuver the vehicle around the piece of concrete. Claim disallowed. . . . . p. 71

GARRETT VS. DIV. OF HIGHWAYS (CC-99-226)

The parties stipulated that there were I-beams located on the berm of the road which were hidden in vegetation such that claimant's vehicle sustained damage when his vehicle was driven onto the berm. Respondent agreed that there was negligent maintenance of the area on its part and the Court made an award. p. 250

GILLENWATER VS. DIV. OF HIGHWAYS (CC-97-207)

Where respondent had just cleaned the ditches along the roadway following flooding and pushed mud onto the berm of the road, the Court held that it did not take reasonable precautions to make sure the berm was stable enough to support a vehicle that was forced onto the berm of the road. As a result, claimant's vehicle fell over an embankment after the berm gave way. Award of $4,450.00. . . . . p. 74

GODSEY-MAYLE VS. DIV. OF HIGHWAYS (CC-99-281)

Where claimant's vehicle was forced to the edge of the road and the pavement broke away due to deterioration, the Court held that the berm of the road was not maintained properly and created a hazard to the traveling public. Award of $2,163.87. . . . . p. 134

MCCLEAN VS. DIV. OF HIGHWAYS (CC-99-475)

The Court denied a claim for damages to a vehicle which struck a hole at the edge of the road in the berm area where it found that claimant was not in an emergency situation and did not need to be driving in a area outside the travel portion of the road . . . . . p. 290

MOZINGO VS. DIV. OF HIGHWAYS (CC-99-381)

The parties stipulated this claim for damages to claimant's vehicle which went over a broken sign post left on the berm of the road. This constituted a hazard

for which respondent is responsible. The Court made an award based upon the stipulation. . . . . p. 260

SHAFFER VS. DIV. OF HIGHWAYS (CC-98-149)

Where claimant's vehicle struck a large hole on the berm of the road which had eroded part of the road beyond the white line and into the paved portion of the highway, the Court held that respondent was on constructive notice and did not take reasonable steps to ensure the safety of the traveling public. Award of $500.00.

. . . . . p. 31

SUTPHIN VS. DIV. OF HIGHWAYS (CC-00-298)

Where the berm was in a state of disrepair, but the claimant was not in an emergency situation when she drove onto the berm, the Court denied the claim.

. . . . . p. 299

TOTO VS. DIV. OF HIGHWAYS (CC-98-315)

Claimant brought this action to recover damages caused to his vehicle when his wife was forced to maneuver it onto the berm of Route 23/7, Ohio County due to three oncoming traffic. The Court held that due to the narrow size of the road and berm deterioration claimant's wife did not travel the berm by her own choice. The Court held that the berm was negligently maintained and said negligence was the proximate cause of claimant's damages. Award of $105.82. . . . . p. 102

BRIDGES

BOOKER VS. DIV. OF HIGHWAYS (CC-98-263)

This claim came before the Court upon stipulation entered into by the parties where the facts and circumstances were set forth by the parties. The claimant was walking across the Coal River Bridge, Kanawha County when the concrete on the sidewalk gave way causing him serious injuries. The Court having reviewed the stipulation adopts it as its own and finds respondent negligent in its maintenance of the bridge and agrees that the amount of the damages is fair and reasonable. Award of $4,000.00. . . . . p. 49

BURGE VS. DIV. OF HIGHWAYS (CC-98-308)

Where respondent knew of the poor substructure of the bridge and made numerous repairs to holes with the use of cold mix asphalt, the Court held respondent was on notice of the hazardous condition of the bridge; but failed to warn motorists of the defective condition of the bridge. Award of $1,460.30. *Adkins v. Sims*, 130 W.Va. 645; 46 S.E.2d 81 (1947); *Chapman vs. Dept. of Highways*, 16 Ct. Cl. 103 (1986). . . . . p. 127

COLLINS VS. DIV. OF HIGHWAYS (CC-98-290)

Claimant received severe injuries in an accident where she drove her vehicle into a concrete barrier placed by respondent as part of a detour around the Red Jacket Bridge which was under construction. The Court determined that the barriers were not properly secured and that the signage for the area was not adequate and constituted negligence. It was foreseeable that a driver approaching the scene and observing the barriers could inadvertently drive through the barriers and have a collision. The Court made a reduced award. . . . . p. 309

DEAN VS. DIV. OF HIGHWAYS (CC-00-211)

While claimant was walking across a bridge, he stepped into a hole in the walkway causing an injury. The parties stipulated the facts and that respondent was negligent in its maintenance of the bridge. The Court made an award in the amount of the settlement. . . . . .p. 245

HUNT VS. DIV. OF HIGHWAYS (CC-96-492)

Claimant was the passenger in a vehicle which went off the road just prior to the Grapevine Bridge. The driver lost control of the vehicle on wet pavement at which time the vehicle went air borne across a ravine, struck a rock wall, flipped in the air, and fell beneath the bridge on its top. The evidence established that the bridge itself was in a state of disrepair but its condition was not the proximate cause of the accident. The Court denied the claim. . . . . p. 317

HUNT VS. DIV. OF HIGHWAYS (CC-96-492)

Where claimant received severe injuries in an accident alleged to be caused by respondent's failure to maintain the guardrail at the approach to the Grapevine Bridge, the Court held that the missing guardrail was not the proximate cause of the accident that had occurred and the claim was denied. . . . . p. 317

HUNT VS. DIV. OF HIGHWAYS (CC-96-492)

Even though the Court determined that respondent had actual notice of the disrepair of the Grapevine Bridge where claimant was involved in an accident and the respondent was negligent in its maintenance of the bridge, the Court denied the claim as the crux of the claim was the determination of the proximate cause of the accident which the Court determined was the negligence of the driver of the vehicle and not the respondent. . . . . p. 317

HUNT VS. DIV. OF HIGHWAYS (CC-96-492)

The sudden emergency doctrine is a viable doctrine under comparative negligence so the Court found that a passenger claimant who may have grabbed the steering wheel when the driver left go of the steering wheel after losing control of the

vehicle was the act of a reasonable, prudent person observing such an action of the driver. . . . . p. 317

HUNT VS. DIV. OF HIGHWAYS (CC-96-492)

The Court adheres to the time-honored principle of law that the preponderance of the evidence must establish that the negligence of the respondent was the proximate cause of the injuries to the complaining party for there to be a recovery. The claim was denied as the Court determined that respondent's negligence was not the proximate cause of the accident which occurred causing the injuries to the claimant. . . . . p. 317

HUNT VS. DIV. OF HIGHWAYS (CC-96-492)

In a claim where experts provided testimony to reconstruct the accident, the Court determined that claimant's expert would have the Court speculate and this Court declines to speculate in order to find liability upon a respondent State agency. . . . . p. 317

MAHONE VS. DIV. OF HIGHWAYS (CC-98-63)

The construction of a bridge with wing walls and bridge approaches increased the size of the prior structure and created a damming effect at the site which is sufficient to constitute negligence on the part of the respondent for the resulting flooding which caused damages to claimant's personal property. The Court made an award to claimant based upon its determination of a fair and reasonable amount. . . . . p. 216

MATUSKY VS. DIV. OF HIGHWAYS (CC-99-170)

This claim came before the Court upon a stipulation. The Court having reviewed it adopts it as its own and holds that respondent was negligent in not securing a metal plate covering a hole on a bridge, and said negligence was the proximate cause of claimant's damages. Award of $500.00. . . . . p. 90

NEWSOME VS. DIV. OF HIGHWAYS (CC-99-298)

The Court made an award for damages to claimant's boat, boat-trailer, and truck when a wooden bridge deck with a loose board caused the damages. The Court held that respondent had actual notice of the condition of the bridge deck which constituted a hazard to the traveling public; therefore, negligence on the part of respondent was established. . . . . p. 222

OXLEY VS. DIV. OF HIGHWAYS (CC-99-330)

Claimant brought action to recover costs to replace a cattle rack which was destroyed when his vehicle struck a low railroad trestle. The Court held that

respondent was negligent in its maintenance of the road when it paved it thus raising the height of the road as well as lowering the clearance of the trestle. Respondent should have warned motorists of the lower clearance. However, the Court only awarded claimant the cost of the cattle rack and not costs of the labor which claimant's son performed. The Court presumes that his labor was provided gratuitously. Award of $269.74. *See Gibson vs. McGraw*, 175 W.Va. 256; 332 S.E.2d 269 (1985). . . . . p. 145

WILSON VS. DIV. OF HIGHWAYS (CC-97-213)

Claimant and respondent stipulated the facts and amount of this claim for personal injuries suffered by claimant when pieces of concrete fell from the underside of an interstate overpass and struck her vehicle. The Court adopted the finding of facts as its own and made an award to the claimant. . . . . p. 195

CONTRACTS

COMPUTER ASSOCIATES INTERNATIONAL, INC. VS. DEPARTMENT OF TAX AND REVENUE (CC-00-033)

Claimant seeks $254,000.00 for extra work it successfully performed under a contract with the respondent for Y2K computer compliance. The parties agree that this amount is fair and reasonable. The Court is of the opinion that respondent would be unjustly enriched if claimant was not compensated for the critical Y2K preparations made to respondent's computer systems. Award of $254,000.00.

. . . . . p. 129

NATIONAL ENGINEERING AND CONTRACTING COMPANY VS. DIV. OF HIGHWAYS (CC-99-180)

The parties stipulated the facts in this claim involving the use of concrete barriers during two construction projects. Claimant alleged that respondent refused to accept for use a different median barrier than that provided in the contract, but the Court determined that the claimant placed itself in an unfortunate position by having barriers delivered to the site that did not meet respondent's requirements and it should bear any costs associated with its own actions. The Court denied the claim.

. . . . . p. 328

NITRO ELECTRIC COMPANY VS. REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY VS. SILLING ASSOCIATES, INC., CARLTON, INC., AND INSURANCE COMPANY OF NORTH AMERICA (CC-95-109

Claimant contractor alleged it was damaged by actions of other contractors during the construction of the Mount Olive Correctional Complex and by failure of

respondent to provide information in a timely manner to claimant about the construction of the project. The parties entered into settlement negotiations and settled the action. The Court, having reviewed the Consent Order and Award, made an award to claimant for that part of the settlement agreed to by respondent. . . . . p. 165

RIVER VALLEY CHILD DEVELOPMENT SERVICES VS. DEPARTMENT OF HEALTH AND HUMAN RESOURCES (CC-98-415)

Claimant brought action to recover $7,788.00 for an accepted bid that respondent then negligently revoked and rebid. However, the parties agreed to settle and relinquish the claim for $5,000.00. The Court aware that the respondent does not have a fiscal method for paying claims of this nature agrees that the settlement is fair and reasonable and makes an award of $5,000.00. Award of $5,000.00. . . p. 100

COMPARATIVE NEGLIGENCE – See also Berms; Falling Rocks and Rocks; Negligence & Streets and Highways

COLLINS VS. DIV. OF HIGHWAYS (CC-98-290)

Claimant received severe injuries in an accident where she drove her vehicle into a concrete barrier placed by respondent as part of a detour around the Red Jacket Bridge which was under construction. The Court determined that the barriers were not properly secured and that the signage for the area was not adequate and constituted negligence. It was foreseeable that a driver approaching the scene and observing the barriers could inadvertently drive through the barriers and have a collision. The Court made a reduced award as it determined that claimant was familiar with the construction in the area and she should have been driving at a slower rate of speed. . . . . p. 309

DUNCAN VS. DIV. OF HIGHWAYS (CC-97-374)

Where claimants vehicle was damaged as a result of striking a hole on the edge of Manilla Road in Putnam County and rolling over a large hill, the Court held that respondent failed to maintain the roadway in proper condition, but that the negligence of claimant was equal to or greater than any negligence attributable to respondent and disallowed the claim. Claim disallowed. . . . . p. 3

FAULKNER VS. DIV. OF HIGHWAYS (CC-99-111)

Even though the Court found respondent had constructive notice of a hole in the pavement, the Court denied the claim as claimant was operating his vehicle too fast for the conditions then and there existing. His negligence was equal to or greater than that of the respondent. . . . . p. 275

HALL VS. DIV. OF HIGHWAYS (CC-97-410)

Claimant's wife drove his vehicle into a ditch on Route 1 which arose as a result of respondent's excavating work to install drains due to flooding. The Court held that respondent knew or should have known that the road would settle causing a ditch to form and did not take proper precautionary measures. However, the Court found claimant's wife was familiar with the road and that pipe had been installed and made an 80% award of $200.00. Award of $200.00. . . . . p. 132

HAMILTON VS. DIV. OF HIGHWAYS (CC-00-184)

A claim for damages to a vehicle was denied where the Court found no negligence in the maintenance of the road on the part of the respondent but that claimant failed to exercise the care required under the circumstances then and there existing. . . . . p. 277

KENNEDY AND STACY VS. DIV. OF HIGHWAYS (CC-96-373 & CC-96-381

Comparative negligence will be assessed against claimants who bear some of the responsibility for damages to their own property from water drainage flowing from the highway onto the properties. Claimants failed to maintain adequate drainage structures to protect their properties and thus were also responsible for the damages. . . . . p. 182

KING VS. DIV. HIGHWAYS (CC-99-59)

The evidence established that respondent had actual notice of a defective condition in the road surface, but claimant also was aware of the state of disrepair so the Court reduced the award based upon the comparative negligence of the claimant. . . . . p. 186

MURPHY VS. DIV. OF HIGHWAYS (CC-99-174)

The Court held that respondent was negligent in its maintenance of the road just taken into its system when it failed to inspect and make permanent repairs to the road; however, claimant's negligence was equal to or greater than that of respondent since she was aware of the condition of the road and failed to operate her vehicle for the conditions then and there existing. The Court denied the claim. . . . . p. 219

PUTNAM TRUCKLOAD DIRECT VS. DIV. OF HIGHWAYS (CC-98-365)

Claimant's employee drove a tractor trailer through a tunnel on Secondary Route 60/4, Greenbrier County in Route for emergency repairs of an airline leak. The driver was unfamiliar with the road and the tunnel, and as he was going through the tunnel, the truck sustained damages as a result of scraping the tunnel. The Court held that respondent was negligent and created an unreasonable risk to vehicles due to the combination of the low tunnel height and the creek running through it, which

forces driver's to maneuver around the water and increases the risk of striking the tunnel's arch. However, the Court made a reduced award finding that claimant was 20% at fault for failing to exercise due caution, the Court made an 80% award of $4,142.72. Award of $4,142.72. . . . . p. 97

SUTPHIN VS. DIV. OF HIGHWAYS (CC-00-298)

Even though respondent acknowledged that the road and berm were in state of disrepair, the Court determined that claimant was negligent in the operation of her vehicle. In a comparative negligence jurisdiction such as West Virginia, the negligence of a claimant can reduce or bar recovery in a claim. The claim was denied. . . . . p. 299

DAMAGES

COLLINS VS. DIV. OF HIGHWAYS (CC-98-290)

Claimant received severe injuries in an accident where she drove her vehicle into a concrete barrier placed by respondent as part of a detour around the Red Jacket Bridge which was under construction. The Court determined that her injuries have caused her a great deal of pain and suffering, loss of enjoyment of life, and depression. She is unable to engage in the same activities such as working as she did prior to the accident; therefore, the Court made an award based upon the effects of the injuries upon her life. . . . . p. 309

COLLINS VS. DIV. OF HIGHWAYS (CC-98-290)

Claimant received severe injuries in an accident where she drove her vehicle into a concrete barrier placed by respondent as part of a detour around the Red Jacket Bridge which was under construction. The Court determined that her injuries have caused her a great deal of pain and suffering, loss of enjoyment of life, and depression. The Court also made an award to claimant's husband for his loss of consortium due to his wife's accident and the effects of her injuries upon his life.

. . . . . p. 309

LOCKHART VS. DIV. HIGHWAYS (CC-97-106)

If claimants fail to establish that respondent negligently maintained its drainage structures which are alleged by claimants to have caused excessive water to flow onto their property, the Court will deny the claim. . . . . p. 157

LOCKHART VS. DIV. HIGHWAYS (CC-97-106)

Where respondent, once on notice of situation, took immediate and reasonable action to prevent further damage to claimants alleging damage from water

flowing from the road onto their property, the Court will not find respondent negligent in its maintenance of its drainage structures. . . . . p. 157

OXLEY VS. DIV. OF HIGHWAYS (CC-99-330)

Claimant brought action to recover costs to replace a cattle rack which was destroyed when his vehicle struck a low railroad trestle. The Court held that respondent was negligent in its maintenance of the road when it paved it thus raising the height of the road as well as lowering the clearance of the trestle. Respondent should have warned motorists of the lower clearance. However, the Court only awarded claimant the cost of the cattle rack and not costs of the labor which claimant's son performed. The Court presumes that his labor was provided gratuitously. Award of $269.74. See Gibson vs. McGraw, 175 W.Va. 256; 332 S.E.2d 269 (1985). . . . . p. 145

RATCLIFF, THE GUARDIAN AND NEXT FRIEND OF BENJAMIN NICHOLS RATCLIFF, AN INFANT VS. DIV. OF HIGHWAYS (CC-96-472)

The Court denied a claim for property damage caused by a hillside slippage where the claimants presented no evidence of the costs of repairs made to their property. The Court will not speculate as to claimants' property damages. The Court did make an award of $4,000.00 to Lawrence Ratcliff as the legal guardian of Benjamin Ratcliff for personal injuries the minor suffered as a result of a rock fall. The Court also awarded $2,000.00 to Lawrence Ratclif as the legal guardian of the child for future medical expenses. Award of $6,000.00. . . . . p. 148

SEABOLT VS. DIV. OF HIGHWAYS (CC-97-150)

Where evidence establishes that respondent's employees had actual notice of a hazardous condition on a highway, the fact that a contractor for respondent created the hazardous condition will not relieve respondent of its obligation and duty to assure that the construction site was maintained in a proper manner. . . . p. 152

SEABOLT VS. DIV. OF HIGHWAYS (CC-97-150)

The provision of a "save harmless" clause in a construction contract does not relieve respondent of its duty to protect the traveling public where its employees are responsible for patrolling the road during the construction project. An award was made to a claimant traveling in a construction area where a hazardous condition at the site existed. . . . . p. 152

SELMAN VS. DIV. OF HIGHWAYS (CC-98-191)

Where the size and condition of holes in a highway are such that respondent had constructive notice of the condition, there is sufficient evidence upon which to base an award. . . . . p. 154

SELMAN VS. DIV. OF HIGHWAYS (CC-98-191)

If a driver of a vehicle is aware of a poorly maintained section of highway, the Court will find that the driver was guilty of comparative negligence and reduce the award accordingly. . . . . p. 154

SHIELDS VS. DIV. OF HIGHWAYS (CC-98-01)

The Court will look to the size and condition of the hole in a roadway to determine if respondent had constructive notice of the condition. If constructive notice is established, the Court will find respondent negligent in the maintenance of the road and make an award to the claimant. . . . . p. 156

DRAINS and SEWERS

HART VS. DIV. OF HIGHWAYS (CC-99-56)

Claimants' property sustained damages as the result of respondent's failure to provide adequate drainage maintenance for the drains along the highway in front of claimants' property. The Court made an award for the damages as respondent was negligent. . . . . p. 252

KENNEDY AND STACY VS. DIV. OF HIGHWAYS (CC-96-373 & CC-96-381)

Where the evidence establishes that respondent failed to maintain the drainage system adjacent to its highway, the Court will make an award to the property owners who suffer damages from excess water flowing from the highway onto their properties. . . . . p. 182

KENNEDY AND STACY VS. DIV. OF HIGHWAYS (CC-96-373 & CC-96-381)

Comparative negligence will be assessed against claimants who bear some of the responsibility for damages to their own property from water drainage flowing from the highway onto the properties. Claimants failed to maintain adequate drainage structures to protect their properties and thus were also responsible for the damages. . . . . p. 182

LAWRENCE, ET AL. VS. DIV. OF HIGHWAYS (CC-98-70)

A claim for propery damage alleged to be caused by excessive water flowing from the road adjacent to the property was denied by the Court as the evidence failed to establish that respondent maintained its drainage structures in a negligent manner. . . . . p. 280

MARTIN VS. DIV. OF HIGHWAYS (CC-97-236)

Where the evidence failed to establish that respondent maintained its drainage system in a negligent manner, but rather that respondent took appropriate

action to repair its road after a landslide which prevented further damage to claimants' property, the Court denied the claim. . . . . p. 283

MARTIN VS. DIV. OF HIGHWAYS (CC-97-236)

If a State employee makes a statement about property to a prospective property owner, that statement would normally be outside the scope of the employee's employment. The claimant failed to exercise reasonable care by not having the property independently examined after receiving notice prior to the sale that the terrain of the property being purchased may be subject to a slide. . p. 283

MOUNT VS. DIV. OF HIGHWAYS (CC-96-578)

Claimant brought this action against respondent for damage to her barn as a result of a landslide which occurred adjacent to Route 7 in Cabell County. Respondent allowed water to pond in the ditch which was situated above claimant's property. This set in motion the slip which proximately caused the foundation blocks and claimant's barn to move. The Court held that respondent breached its duty to provide an adequate drainage system and failed to protect claimant''s property from foreseeable damage. Award of $7,500.00 *Haught vs. Dept. of Highways,* 13 Ct. Cl. 237 (1980). *Roger's vs. Div. of Highways,* 21 Ct. Cl. 97 (1996). . . . . p. 135

SAVAGE VS. DIV. OF HIGHWAYS (CC-96-447)

An award was made for property damage occasioned by the negligent maintenance of a drain adjacent to respondent's road that was clogged and resulted in excessive water flowing onto the property. The Court has held previously that respondent has a duty to provide adequate drainage of surface water and devices must be maintained in a reasonable state of repair. . . . . P. 261

SCHRADER VS. DIV. OF HIGHWAYS (CC-97-58)

Claimants' alleged that the landslide which was destroying their home was caused by respondent's failure to maintain the ditchline adjacent to the highway abutting claimants' property. The Court held that respondent's geotechnical engineer who determined that a retrogressive slide was occurring from the West Fork River which was below claimants' property and this slide was pulling claimants' property toward the river causing the damage to their residence was correct in his analysis of this particular situation. The Court denied the claim. . . . . p. 200

SUTTLE VS. DIV. OF HIGHWAYS (CC-99-106)

Where claimant fails to establish negligence on the part of the respondent for drainage problems on his property alleged to have been caused by lack of maintenance, the Court will deny the claim. The Court noted that respondent took

remedial measures upon receiving notice of the problem with the culvert which had been covered at the inlet end with rocks. . . . . p. 300

FALLING ROCKS AND ROCKS – See also Comparative Negligence and Negligence

BALL VS. DIV. HIGHWAYS (CC-99-320)

Claimant and respondent stipulated that respondent was responsible for damage to claimant's vehicle when a rock fell from the hillside striking the vehicle and respondent had failed to erect the proper warning signs for the traveling public. . . . . p. 213

BEAN VS. DIV. OF HIGHWAYS (CC-00-151)

The parties stipulated that claimant's vehicle sustained damage when it struck rocks on the road which had been washed out from the adjacent culvert. Respondent was aware of the condition and failed to take corrective action. The Court made an award to claimant. . . . . p. 242

BRADSHAW VS. DIV. OF HIGHWAYS (CC-99-63)

Claimant and her decedent husband were in an accident wherein a large boulder came from a mountainside on I-77 and rolled onto their vehicle. The Court held that respondent was not liable in this claim because claimant failed to establish that respondent was negligent in providing for the safety of the traveling public on I-77. It is a practical impossibility for respondent to perform intensive investigations of all of the rock formations abutting the highways throughout this State. Thus, the Court denied the claim. . . . . p. 170

BRADSHAW VS. DIV. OF HIGHWAYS (CC-99-63)

Where testimony from respondent's expert geotechnical engineer was that the rock formation consisted of a massive layer of sandstone with soft shale below the rock, there are problems with all rock of this nature because there are joints and fractures in the rock. The fractures result in weathering of the support for the rock and the sandstone block may then fall off as occurred in the instant claim when a boulder fell from the hillside of I-77 causing injuries to the claimant and death of her husband. However, the Court denied the claim as an unexplained falling of a rock onto a roadway is insufficient to justify an award. . . . . p. 170

COPEN VS. DIV. OF HIGHWAYS (CC-00-209)

A claim for damage to a vehicle which struck a rock in the road was denied where the evidence established that "Falling Rock" signs were posted by respondent

and there was no notice to respondent of the rock fall. There was no negligence established on the part of the respondent. . . . . p. 272

CROUSE VS. DIV. OF HIGHWAYS (CC-00-56)

Where respondent did not have notice of the rock in the road and the area was not known for having incidents of this nature, the Court denied a claim for damages to claimant's vehicle which struck a rock in the road on Route 10. p. 274

FOSTER VS. DIV. OF HIGHWAYS (CC-99-194)

Claimant's vehicle was damaged when it struck a boulder in the section of W.Va. 2 in Marshall County know locally as "the Narrows", a section of road subject to numerous rock falls. The Court held that the evidence established that respondent has actual knowledge of the hazardous rock falls but has not taken remedial steps to prevent the occurrence of these incidents; therefore, respondent is negligent in its maintenance of the area. The Court made an award in the claim. . . . . p. 248

HENRY VS. DIV. OF HIGHWAYS (CC-99-173)

Claimant's vehicle struck rock debris on Route 2, Tyler County a known rock fall area. To hold respondent liable claimant had to demonstrate that respondent had actual or constructive notice of the rock fall hazard and failed to take timely and reasonable measures to assure the safety of the traveling public. The Court held that respondent had taken timely and reasonable measures to ensure safety by clearly marking this area with "falling rock" signs. Claim disallowed. . . . . p. 78

HERSMAN VS. DIV. OF HIGHWAYS (CC-00-36)

Where the evidence fails to establish that respondent had not taken adequate measures to protect the traveling public, the claim will be denied. Thus, a claim for damages to a vehicle which struck a rock in the road was denied as this was an area not known for having rocks fall onto the road. . . . . p. 278

HUNDAGEN VS. DIV. OF HIGHWAYS (CC-98-303)

Claimant brought action for vehicle damage caused by a rock fall while traveling U.S. Route 250 also called the "narrows". The Court held that given the length of time which respondent has known of the rock falls, and the frequency of claims brought due to rock falls in the same area that respondent's remedial measures of warning signs, over head lights and frequent patrols are not enough to eradicate this hazard. Award of $1,550.00. . . . . p. 81

JONES VS. DIV. OF HIGHWAYS (CC-99-401)

Claimants' vehicle struck a rock in the roadway and sustained damages for which the Court made an award as it held that respondent was negligent for failing to

remedy a situation where a rock was imbedded in the pavement at the edge of the road creating a hazard for the traveling public even though this occurred as the result of a paving project by an independent contractor. . . . . p. 258

JUSTICE VS. DIV. OF HIGHWAYS (CC-99-9)

Without a positive showing that respondent had actual or constructive notice of a dangerous condition, such as falling rocks and rock debris, posing a threat of injury to property is insufficient to justify an award. Therefore, the claim was denied where claimant's vehicle struck a rock on the berm of the road and respondent did not have notice of this condition. . . . . p. 180

PAYNE VS. DIV. OF HIGHWAYS (CC-98-314)

The Court disallowed a claim where claimant was driving on a road which suddenly was involved in a mudslide from the adjacent hill and respondent had no notice that such a slide was imminent. There was insufficient evidence of any negligence on the part of the respondent. . . . . p. 189

ROY VS. DIV. HIGHWAYS (CC-00-29)

Where claimant's vehicle sustained damage from a rock that came off the adjacent hillside and struck the vehicle, the Court denied the claim as respondent had "Falling Rock" signs posted and this incident was an unexplained falling of rock or rock debris on a road which is insufficient to justify an award. . . . . p. 295

WELLMAN VS. DIV. OF HIGHWAYS (CC-98-29)

An award was made to each of the claimants for personal injuries and property damage where the parties stipulated that respondent was aware that the area of the accident was a known for having rocks fall from the hillside, but respondent failed to mark the area with signs or to otherwise protect the traveling public.

. . . . . p. 169

WILLIAMS VS. DIV. OF HIGHWAYS (CC-99-114)

Claimant brought this action for vehicle damage as a result of striking rocks while traveling on U.S. 250 in Marshall County. The Court held, given the long history and notoriety of this particular area of U.S. 250 as a well known serious rock fall hazard, that respondent was and is on notice of a hazardous condition which poses potential danger to the traveling public. Award of $315.80. . . . . p. 109

INDEPENDENT CONTRACTORS

BAILEY VS. DIV. OF HIGHWAYS (CC-98-146)

Claimant brought action for damages caused to his vehicle when a road sign fell from the 35th Street Bridge in Kanawha County during construction by a contractor. The Court held that in spite of a "save harmless" clause between the contractor and respondent, that respondent was responsible for supervising the safety of the contractor with regard to the traveling public and that respondent had employees on location to do so. Award of $50.00. . . . . p. 19

BOYLES VS. DIV. OF HIGHWAYS (CC-98-170)

The Court held that a "save harmless" provision in a contract between respondent and its contractor who was employed to do repair work on I-64 does not constitute a defense to a claim for negligence. Respondent cannot avail itself of the protection of a "save harmless"clause between itself and its contractor, against a third party, who is not privy to said contract. Furthermore, the facts reveal that the respondent's employees failed to inspect the job site, and failed to protect the public. Award of $296.56. . . . . p. 50

JONES VS. DIV. OF HIGHWAYS (CC-99-401)

Claimants' vehicle struck a rock in the roadway and sustained damages for which the Court made an award as it held that respondent was negligent for failing to remedy a situation where a rock was imbedded in the pavement at the edge of the road creating a hazard for the traveling public even though this occurred as the result of a paving project by an independent contractor. . . . . p. 258

LEASES

MACE VS. DEPT. OF OF ADMIN. AND DEPT. OF AGRICULTURE (CC-99-172)

Claimants sustained a loss of rent when the Dept. of Agriculture vacated leased premises without notice to the claimants. The Dept. of Administration had failed to provide proper notice of the termination of the lease. The parties stipulated the claim and the agreed to the damages for which the Court made an award.

. . . . . p. 188

MOTOR VEHICLES

A&B SALES, INC. VS. DIVISION OF MOTOR VEHICLES (CC-99-104)

Claimant brought action to recover a financial loss it incurred when respondent failed to follow proper procedure and did not indicate a lien holder on a certificate of title for a motor vehicle. As a result of not listing the lien holder on the certificate, claimant could not take possession of the vehicle. The Court held that the

failure to follow proper procedure for processing and issuing a certificate of title constitutes negligence. Award of $9,013.17. . . . . p. 47

BURKET VS. DIVISION OF MOTOR VEHICLES (CC-99-282)

This claim came before the Court upon a stipulation between the parties. The Court held that respondent was negligent in its production of the certificate of title for claimant's motorcycle and its failure to follow reasonable procedures in the issuance of the certificate of title for claimant's motorcycle causing claimant damages. Award of $2,500.00. . . . . p. 53

DAFF VS. DIV. OF MOTOR VEHICLES (CC-00-201)

Where respondent inadvertently revoked claimant's motor vehicle driver's license, the Court made an award to him for expenses he incurred when he was arrested and had his vehicle impounded as a result. . . . . p. 236

SCHREYER VS. DIV. OF MOTOR VEHICLES (CC-00-165)

An award was made to claimant for a towing charge which he incurred during a traffic check when it was established that respondent had failed to mail a letter of notification of the revocation of claimant's driver's license with proper postage to him and it was returned to respondent. Claimant was unaware of the revocation of his license when he was stopped by law enforcement. . . . . p. 207

NEGLIGENCE – See also Berms; Falling Rocks and Rocks & Streets and Highways

BANIAK VS. DIV. OF HIGHWAYS (CC-96-419)

This claim came before the Court upon a stipulation wherein certain facts and circumstances were agreed to. Respondent completed a construction project in 1977 on Dents Run Road, Monongalia County. The project resulted in flood damage to claimant's property. The Court after reviewing the claim and the stipulation finds that respondent was negligent and that the amount of the damages is fair and reasonable. Award of $5,000.00. . . . . p. 48

BOYLES VS. DIV. OF HIGHWAYS (CC-98-170)

Where claimant's vehicle struck a large hole on I-64 during construction by respondent's contractor, the Court held that respondent was negligent for failing to inspect the site conditions. The Court held that respondent had a duty to inspect the site and the failure to do so presented a risk to the public. Award of $295.56. p. 50

BRAGG VS. DIV. OF HIGHWAYS (CC-97-311)

Claimant's motorcycle struck a hole on Route 21/33 in Fayette County. The Court held respondent had constructive notice of the hole and made an award.
. . . . . p. 1

CLUTTER VS. DIV. OF HIGHWAYS (CC-98-157)

Claimant brought action for damage to his vehicle caused by a large hole in Route 2, Mason County. The Court held that respondent was on notice about this hole, especially given the fact that a prior claim was brought regarding the exact same hole approximately two months before this claim. Award of $250.00. p. 22

DEER VS. DIV. OF HIGHWAYS (CC-97-358)

Claimant's vehicle was damaged while traveling on W. Va. Route 10 in Logan County. Respondent negligently sprayed concrete on claimant's vehicle. Award of $500.00. . . . . p. 2

EASTER, SR., and DEBRA SUE EASTER VS WEST VIRGINIA DEPARTMENT OF HIGHWAYS (CC-95-334)

The parties stipulated to this claim in the amount of $500.00. Claimants' retaining wall located near the intersection of Route 8/4 Kanawha County was damaged. The parties agree that the negligence of respondent was one factor in damaging the wall. . . . . p. 6

HARTLEY VS. DIV. OF HIGHWAYS (CC-99-155)

The parties agreed to stipulate this claim for damage done to claimant's vehicle in the amount of $148.39 The parties agreed that respondent failed to maintain Route 2 in Mason County on the date of this incident. . . . . p. 9

HUNDAGEN VS. DIV. OF HIGHWAYS (CC-98-303)

Claimant brought action for vehicle damage caused by a rock fall while traveling U.S. Route 250 also called the "narrows". The Court held that given the length of time which respondent has known of the rock falls, and the frequency of claims brought due to rock falls in the same area that respondent's remedial measures of warning signs, over head lights and frequent patrols are not enough to eradicate this hazard. Award of $1,550.00. . . . . p. 81

JACKSON VS. WEST VIRGINIA DEPARTMENT OF HIGHWAYS (CC-97-418)

The parties agreed to stipulate this claim in the amount of $3,500.00. Parties agreed that respondent was responsible for some but not all of the damage done to claimant's vehicle while traveling on Route 315 in Mingo County. .. p. 7

LOOSEMORE VS. DIV. OF HIGHWAYS (CC-99-92)

Claimant brought two separate claims for vehicle damage caused by vehicle debris being thrown onto her parked car. The two incidents occurred within a two week period when claimant had her car parked on the berm of Route 27, Brooke County. The first incident involved asphalt debris being thrown onto the claimant's car breaking the front windshield, and the second involved her back windshield. The Court held that respondent was on notice that there was a hazard for road debris due to serious drainage problems and heavy truck traffic; and that it failed to take reasonable measures to remedy the hazard. Award of $200.00. *Varner's Adm'n vs. State Road Comm'n* 8 Ct. Cl. 119, 122 (1970); See also *Cole vs. DIV. OF HIGHWAYS*, 21 Ct. Cl. 15 (1995). . . . . p. 87

NOBLE VS. DIV. OF HIGHWAYS (CC-98-326)

Claimant's vehicle was damaged when it struck a manhole depression that had not been made level to the pavement after a paving job was performed by a contractor for the respondent. Respondent asserts that its not responsible for the maintenance of manholes on this route, and that the contractor was responsible for this hazard. The Court held that County Route 52/61 had been grandfathered into the State system and therefore respondent has an obligation to maintain the route in a proper manner. This obligation requires respondent to inspect the road after any paving operation and to ensure that proper warning signs are in place. Award of $500.00. . . . . p. 30

PAXTON VS. DIV. OF HIGHWAYS (CC-98-250)

Claimant brought action for negligent maintenance of a portion of Route 60 in Wayne County. Claimant alleged that respondent failed to erect proper warning signs, failed to place reduction of speed signs for the curve, and for an unprotected embankment. The Court held that although the guardrail was in a state of disrepair and that the curve was sharp, claimant was negligent in the operation of his vehicle by traveling too fast especially given the inclement weather conditions. Claim disallowed. . . . . p. 92

TALBOTT VS. DIV. OF HIGHWAYS (CC-95-308)

A consolidated claim where the driver of a vehicle was killed and the passenger seriously injured in a collision at the intersection of U.S. Route 33/119 and U.S. Route 47. The Court held that the intersection was not negligently designed, constructed, or maintained; and that the degree and angle of the design did not prevent a motorist from having sufficient visibility distances to enter the said roadway in a safe fashion. . . . . p. 55

TALBOTT VS. DIV. OF HIGHWAYS (CC-95-308)

A consolidated claim where the driver of a vehicle was killed and the passenger seriously injured in a collision at the intersection of U.S. Route 33/119 and U.S. Route 47. The Court rejected claimants' theory that respondent negligently failed to place adequate traffic control signal at said location, evidence established that based upon the Manual on Uniform Traffic Control Devices (MUTCD) the criteria to establish the need for a traffic signal was not called for. . . . . p. 55

TALBOTT VS. DIV. OF HIGHWAYS (CC-95-308)

A consolidated claim where the driver of a vehicle was killed and the passenger seriously injured in a collision at the intersection of U.S. Route 33/119 and U.S. Route 47. The Court rejected claimants' theory that the State was negligent for failing to erect a special "limited sight distance"warning sign upon approaching the intersection. The Court held that there were sufficient warning signs to notify drivers of the approaching intersection and that the (MUTCD) does not contain such a sign. . . . . p. 55

TALBOTT VS. DIV. OF HIGHWAYS (CC-95-308)

The Court found, as a matter of fact, that claimants' statistics listing 16 accidents at the said intersection between the dates of October 1, 1983 and January 22, 1990, the year of this incident, did not establish that this was a dangerous intersection. . . . . P. 55

TALBOTT VS. DIV. OF HIGHWAYS (CC-95-308)

The Court held that respondent was not negligent in the design of the intersection, based on the fact that it was designed for a speed limit of 40 M.P.H. and was posted for a 50 M.P.H. The design speed does not control the posting of a speed limit. . . . . p. 55

WEST VS. DIV. OF HIGHWAYS (CC-00-23)

In a claim for damage to a well affected by an infiltration of iron alleged to be caused by blasting by an independent contractor of the respondent, the Court denied the claim as being too speculative to conclude that the blasting was the proximate cause of the damage to the well. . . . . p. 302

WILLIAMS VS. DIV. OF HIGHWAYS (CC-99-95)

Claimant was involved in an accident when he was driving his vehicle on County Route 21 in Marshall County. He alleged negligent maintenance of the road as there was a hole present at the accident scene. The Court determined the claimant was familiar with condition of the road and he should have exercised more care under the circumstances. There was insufficient evidence of negligence on the part of the respondent. . . . . p. 303

NOTICE

ADKINS VS. DIV. OF HIGHWAYS (CC-98-95)

The claimant sought an award for damage done to her vehicle caused by a large hole in the road at the junction of W. Va. Route 61 and County Route 79/3. The respondent's employees had inspected the junction on a regular basis and conducted repair work on numerous occassions. The Court held that respondent had actual notice of the hazard and failed to take reasonable steps to repair it. Award of $145.15. . . . . p. 16

BRAGG VS. DIV. OF HIGHWAYS (CC-97-311)

Claimant's motorcycle struck a hole on Route 21/33 in Fayette County. The Court held respondent had constructive notice of the hole and made an award.

. . . . . p. 1

BAILEY VS. DIV. OF HIGHWAYS (CC-99-119)

Claimant's vehicle struck a large patch of ice with gravel and sand on top of the ice forcing him to lose control of his vehicle. The Court held that the clogged drain near the location as well as a cracked storm drain created a hazard which the respondent knew or should have known existed. Award of $1,000.00. . . . . p. 17

CLUTTER VS. DIV. OF HIGHWAYS (CC-98-157)

Claimant brought action for damage to his vehicle caused by a large hole in Route 2, Mason County. The Court held that respondent was on notice about this hole, especially given the fact that a prior claim was brought regarding the exact same hole approximately two months before this claim. Award of $250.00. p. 22

FOSTER VS. DIV. OF HIGHWAYS (CC-98-120)

The Court held that claimant did not establish that respondent had actual or constructive notice of the hole in the road. Claimant did not present any evidence that respondent did not take reasonable steps to ensure the safety of Route 79/3 in Kanawha County. Pritt vs. Dept. of *Highways*, 16 Ct. Cl. 8 (1985); *Harmon vs. Dept. of Highways*, 16 Ct. Cl. 127 (1986). . . . . p. 24

GREEN VS. DIV. OF HIGHWAYS (CC-98-281)

Where respondent knew that Route 85 in Wharton, Boone County was a problem area for holes in the road due to heavy coal truck use, the Court held that respondent had at least constructive if not actual notice of the hole which damaged claimant's vehicle. Award of $250.00 *Pritt vs. Dept. of Highways*, 16 Ct. Cl. 8 (1985); *Harmon vs. Dept. of Highways*, 16 Ct. Cl. 127 (1986). . . . . p. 76

HUGHART VS. DIV. OF HIGHWAYS (CC-98-430)

Where claimant's vehicle struck a large piece of debris on I-64, near South Charleston, the Court held that respondent was not negligent in its maintenance of the roadway since it had not received notice of the debris, as was demonstrated by the introduction by respondent of their emergency service daily call in records. Claim disallowed. . . . . p. 80

KUTHY VS. DIV. OF HIGHWAYS (CC-99-137)

Where claimant could not establish evidence that respondent had prior notice of a hole on County Route 8 in Ohio County; and no evidence was presented that respondent did not take reasonable steps to ensure the safety of motorists on County Route 8, the Court held that there is insufficient evidence of negligence upon which to base an award. Claim disallowed. *Adkins vs. Simms*, 130 W.Va. 645; 46 S.E.2d 81 (1947). *Pritt vs. Dept. of Highways*, 16 Ct. Cl. 8 (1985); *Harmon vs. Dept. of Highways*, 16 Ct. Cl. 127 (1986). . . . . p. 85

NAPIER VS. DIV. OF HIGHWAYS (CC-98-112)

Claimant brought action for vehicle damage when she struck a hole two feet in length, six-eight inches wide, and three-four inches deep. The Court held that respondent had at least constructive notice of this hole since it had been working on this stretch of road prior to this incident and should have noticed and patched this hole. Award of $244.51. . . . . p. 91

WELLMAN VS. DIV. OF HIGHWAYS (CC-98-29)

An award was made to each of the claimants for personal injuries and property damage where the parties stipulated that respondent was aware that the area of the accident was a known for having rocks fall from the hillside, but respondent failed to mark the area with signs or to otherwise protect the traveling public. . . . . p. 169

PEDESTRIANS

DEAN VS. DIV. OF HIGHWAYS (CC-00-211)

While claimant was walking across a bridge, he stepped into a hole in the walkway causing an injury. The parties stipulated the facts and that respondent was negligent in its maintenance of the bridge. The Court made an award in the amount of the settlement. . . . . p. 245

JONES VS. DIV. OF HIGHWAYS (CC-97-323

Claimant and respondent stipulated that respondent was negligent when it failed to complete a paving project in the proper manner and left a ditch without a

warning sign at the bottom of steps to the roadway. The Court made an award in accordance with the stipulation. . . . . p. 198

O'NEAL VS. DIV. OF HIGHWAYS (CC-99-52)

The facts and circumstances were agreed to by the parties in a claim for physical injuries which occurred when claimant was walking through an underpass and she stepped into a large hole. Respondent was responsible for the maintenance of the area which was in a state of disrepair. The parties also agreed upon an amount of the award which was granted by the Court. . . . . p. 331

WOOTEN VS. DIV. OF HIGHWAYS (CC-97-7)

Where claimant slipped and fell in a hole while walking on Route 3 in Raleigh County, the Court held that respondent did not have any notice, actual or constructive of this road hazard and denied the claim. . . . . p. 4

PRISONS AND PRISONERS

ADKINS VS. DIV. OF CORRECTIONS (CC-00-121)

The Court determined that it did not have jurisdiction over a claim for a missing television set belonging to claimant, an inmate in the custody of respondent, as the claim was not filed within the two year statute of limitations. . . . . p.

ASH VS. DIV. OF CORRECTIONS (CC-00-238)

In a claim for lost clothing, money removed from his account for items he did not receive, and lost paper, the Court denied an award for all counts except for the money removed from his account which appeared to have been removed in error. . . . . p. 307

BARBOUR COUNTY COMM'N VS. DIVISION OF CORRECTIONS (CC-99-202)

Claimant brought this action to recover costs for providing housing and/or medical care to prisoners who have been sentenced to a state penal institution, but who have remained in the custody of claimant. Award of $1,850.00. *County Comm'n of Mineral County vs. Division* of *Corrections*, 18 Ct. Cl. 88 (1990). . . . . p. 8

BOWERS VS. DIV. OF CORRECTIONS (CC-00-270)

Claimant alleged personal property was wrongfully taken from him while he was an inmate. The Court determined that property had been confiscated with policy guidelines for inmates. The principle of *de minimis non curat lex* applied to the remainder of his claim so no award was made. . . . . p. 234

CABELL COUNTY COMM'N. VS. DIV. OF CORRECTIONS (CC-00-335)

Claimant brought this action to recover costs for providing housing and/or medical care to prisoners who have been sentenced to a state penal institution, but who have remained in the custody of claimant. An award was made to the claimant. *County Comm'n of Mineral County vs. Division* of *Corrections*, 18 Ct. Cl. 88 (1990). . . . . p. 224

CUNNINGHAM VS. DIVISION OF CORRECTIONS (CC-98-239)

The Court holds that a Bailment exists where property of an inmate is recorded for an inmate and taken for storage purposes. The respondent has an obligation as the bailee to receive and take proper care of the bailor's property. Respondent breached this obligation by not having satisfactory documentation for management of claimant's trust account. Award of $74.24. . . . . p. 68

EDENS VS. DIV. OF CORRECTIONS (CC-00-204)

Where claimant's personal property was confiscated to be mailed to an address specified by claimant at the facility of the respondent and claimant determined that the items were not received, the Court made an award for the property as a bailment situation existed. . . . . p. 221

GARDNER, JR. VS. DIVISION OF CORRECTIONS (CC-99-291)

Claimant had his personal property recorded and taken for storage purposes by St. Mary's Correctional Center, a facility of respondent's, while an inmate. The Court held that a bailment relationship was established and that respondent, as bailee, failed in its duty to provide satisfactory documentation for return of the property to claimant. Award of $250.00. *Heard vs. Division of Corrections*, 21 Ct. Cl. 151 (1997). . . . . p. 73

GARRISON VS. DIV. OF CORRECTIONS (CC-00-148)

A claim for personal items lost in the prison laundry system was denied by the Court as claimant chose to bring the personal items into the prison and he assumed the risk of loss. . . . . p. 236

HAMPSHIRE COUNTY COMMISSION VS. DIVISION OF CORRECTIONS (CC-99-317)

Claimant brought an action to recover costs for housing prisoners who have been sentenced to a state penal institution, but who have remained in the custody of claimant. Award of $13,813.53. *County Comm'n of Mineral County vs. Division of Corrections*, 18 Ct. Cl. 88 (1990). . . . . p. 39

KING VS. DIVISION OF CORRECTIONS (CC-99-252)

Court denied claim for destruction of personal property. Claimant an inmate at Mt. Olive Correctional Center did not establish sufficient evidence that his personal property was destroyed by respondent's employees during a search of his cell. . . . . p. 84

McDOWELL COUNTY CORRECTIONAL CENTER VS. DIVISION OF CORRECTIONS (CC-99-310)

Claimant brought this action to recover costs for housing prisoners who have been sentenced to a state penal institution, but who have remained in the custody of claimant. Award of $224,690.14. *County Comm'n of Mineral County vs. Division of Corrections,* 18 Ct.Cl. 88 (1990). . . . . p. 41

McDOWELL COUNTY CORRECTIONAL CENTER VS. DIVISION OF CORRECTIONS (CC-00-311)

Claimant brought this action to recover costs for housing prisoners who have been sentenced to a state penal institution, but who have remained in the custody of claimant. Award of $237,039.89. *County Comm'n of Mineral County vs. Division of Corrections,* 18 Ct. Cl. 88 (1990). . . . . p. 227

MONONGALIA COUNTY COMM'N. VS. DIV. OF CORRECTIONS (CC-00-347)

Claimant brought this action to recover costs for housing prisoners who have been sentenced to a state penal institution, but who have remained in the custody of claimant. An award was made to the claimant. *County Comm'n of Mineral County vs. Division of Corrections,* 18 Ct. Cl. 88 (1990). . . . . p. 228

NASSER VS. REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY (CC-00-104)

Where claimant's personal property was kept in a locker at the facility of the respondent and there was damage to the property, the Court will make an award for the damaged property. In the instant claim, claimant was an employee of respondent. . . . . p. 164

PAGE VS. DIV. OF CORRECTIONS (CC-00-414)

Claimant had several items of personal property secured by prison officials while he served time in lock up and the items were missing when he was sent back to the regular cell block. The Court held that a bailment occurred and made an award for the fair value of the items. . . . . p. 238

PHILLIPS VS REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY (CC-00-179)

A bailment situation was created when claimant turned over his watch to respondent's employees when he became an inmate in a facility of the respondent; therefore, the Court made an award to claimant when the watch was not returned to claimant upon his release. . . . . p. 199

PHILLIPS VS. REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY (CC-99-468)

Claimant, formerly an inmate at the Southern Regional Jail, brought this action for the loss of his Gortex Rocky boots, which was allegedly lost by respondent's employees. The parties agreed that $200.00 was a fair and reasonable amount for the value of claimant's boots. Award of $200.00. . . . . p. 114

WALTERS VS. DIVISION OF CORRECTIONS (CC-96-591)

Claimant, an inmate at Mt. Olive Correctional Center, brought this action to recover the value of his stereo system, which he claims was never returned by after claimant sent it out for repairs due to being dropped by an employee of respondent's during a shake-down. The Court held that claimant did not establish a prima facie case of bailment, since he could not establish that respondent ever had receipt or custody of the stereo. However, the Court made an award of $100.00 for the damage done to the stereo when respondent's employees dropped it. Award of $100.00. . . . . p. 106

WARD VS. DIVISION OF CORRECTIONS (CC-98-289)

Claimant, an inmate at Mt. Olive Correctional Center, brought this action for loss of personal property which was taken to the State Shop and inventoried by respondent, while claimant was in lock-up for forty-five. The Court held that claimant established that he did deliver his property to respondent; therefore a bailment existed and respondent failed to adequately care for his property. Award of $32.75. . . . . p. 104

WELCH VS. DIV. OF CORRECTIONS (CC-00-24)

A claim for the loss of tuition in a computer course being taken by claimant as an inmate was denied by the Court as claimant violated prison policy in the use of his computer. . . . . p. 239

WHITE VS. DIVISION OF CORRECTIONS (CC-99-382)

Award of $12.00 for lost clothing while claimant was an inmate. p. 45

WOOD COUNTY COMMISSION VS. DIVISION OF CORRECTIONS (CC-99-328)

Claimant brought this action to recover costs for providing housing and medical services to prisoners who have been sentenced to a state penal institution, but who have remained in the custody of claimant. Award of $30,375.00. *County Comm'n of Mineral County vs. Division of Corrections*, 18 Ct. Cl. (1990). p. 44

WOOD COUNTY COMMISSION VS. DIVISION OF CORRECTIONS (CC-00-486)

Claimant brought this action to recover costs for providing housing and medical services to prisoners who have been sentenced to a state penal institution, but who have remained in the custody of claimant. Award of $30,375.00. *County Comm'n of Mineral County vs. Division of Corrections*, 18 Ct. Cl. (1990). p. 270

WV REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY VS. DIVISION OF CORRECTIONS (CC-99-451)

Claimant provides and maintains the six regional jails in the State as facilities for the incarceration of prisoners who have committed crimes in various counties. Claimant brought this action to recover the costs of housing and providing associated services to prisoners who have been sentenced to a State penal institution , but who have remained in the regional jails for periods of time beyond the dates of the committent orders. Award of $4,017,465.50. *County Comm'n of Mineral County* vs. *Division of Corrections*, 18 Ct. Cl. 88 (1990). . . . . p. 108

PUBLIC EMPLOYEES

BOROWSKI VS. WV SOLID WASTE MANAGEMENT BD. (CC-00-300)

Claimant incurred travel expenses for which she was not reimbursed in the proper fiscal year. The Court made an award. . . . . p. 234

MODESITT VS. DEPT. OF TAX AND REVENUE (CC-01-009)

Claimant made certain on behalf of the State agency for which he was not reimbursed in the proper fiscal year. The Court made an award. . . . . p. 293

TAUCHER VS. DEPT. OF PUBLIC SAFETY (CC-00-51)

When claimant brought an action for reimbursement of contributions deducted in error from his salary for deposit in the Department of Public Safety Retirement Voluntary Pledge Fund, the Court denied the claim as the Fund is not a statutory fund; therefore, the Court has no jurisdiction over the Fund and cannot make an award against the Fund. . . . . p. 208

STATE AGENCIES

CAMERON GAS COMPANY VS. DEPT. OF ADMIN. (CC-99-363 & CC-99-377)

Claimant brought these actions to recover various charges incurred by State agencies when gas was purchased from claimant. The parties entered into a consent decree setting forth an agreement for the basis for the award and the amount of the award upon which the Court made an award. . . . . p. 230

CURREY VS. DEPT. OF EDUCATION (CC-00-355)

A claim for tuition reimbursement sought by a teacher was a denied by the Court where the agency stated that it did not have sufficient funds at the end of the fiscal year in question. See *Airkem*. . . . . p. 267

TAX NET GOVERNMENTAL COMMUNICATIONS CORPORATION VS. DEPARTMENT OF TAX AND REVENUE
(CC-99-224)

Award of $2,124.43 for network services provided to the respondent, there were sufficient funds expired in the proper fiscal year from which the bill could have been paid. . . . . p. 14

STIPULATED CLAIMS

AT&T CORPORATION VS. WEST VIRGINIA DEPARTMENT OF TRANSPORTATION, DIV. OF HIGHWAYS, (CC-98-129)

This claim was submitted to the Court based upon a stipulation. In the course of excavating flood debris, Ground Breaker's Inc. a contractor employed by respondent cut a fiber optic cable owned by claimant. The parties agreed to settle the claim for the total sum of $90,000.00. Award of $90,000.00 . . . . . p. 118

BANIAK VS. DIV. OF HIGHWAYS (CC-96-419)

This claim came before the Court upon a stipulation wherein certain facts and circumstances were agreed to. Respondent completed a construction project in 1977 on Dents Run Road, Monongalia County. The project resulted in flood damage to claimant's property. The Court after reviewing the claim and the stipulation finds that respondent was negligent and that the amount of the damages is fair and reasonable. Award of $5,000.00. . . . . p. 48

BOOKER VS. DIV. OF HIGHWAYS (CC-98-263)

This claim came before the Court upon stipulation entered into by the parties where the facts and circumstances were set forth by the parties. The claimant was walking across the Coal River Bridge, Kanawha County when the concrete on the sidewalk gave way causing him serious injuries. The Court having reviewed the stipulation adopts it as its own and finds respondent negligent in its maintenance of

the bridge and agrees that the amount of the damages is fair and reasonable. Award of $4,000.00. . . . . p. 49

BURKET VS. DIVISION OF MOTOR VEHICLES (CC-99-282)

This claim came before the Court upon a stipulation between the parties. The Court held that respondent was negligent in its production of the certificate of title for claimant's motorcycle and its failure to follow reasonable procedures in the issuance of the certificate of title for claimant's motorcycle causing claimant damages. Award of $2,500.00. . . . . p. 53

BURKIEVICZ VS. DIV. OF HIGHWAYS (CC-99-284)

This claim came before the Court for decision upon a stipulation entered into by the parties. The Court having reviewed the facts and the stipulation finds that the respondent was negligent in not removing a broken sign post from the berm of the highway which caused damage to claimant's vehicle. Award of $216.24. . p. 37

DOTSON, AS GUARDIAN, NATURAL PARENT AND NEXT FRIEND OF AUSTIN RYAN DOTSON, AN INFANT, (CC-97-388)

This claim came before the Court upon a Second Stipulation by the parties, where the issues of liability and damages were agreed upon by the parties. The Court having reviewed the claim and the stipulation of the parties agrees that the settlement of the claims of the said parties for the gross sum of $125,000.00 is fair and reasonable. . . . . p. 36

KUYKENDALL, JR. VS. STATE RAIL AUTHORITY (CC-99-399)

This claim came before the Court based upon the allegations in the Notice of Claim and respondent's Answer. Respondent admitted to the validity and amount of claimant's claim for $2,000.00 for a Black Angus Heifer that was struck and killed by one of respondent's trains. Respondent does not have a fiscal method for paying for claims of this nature, therefore it is submitted to the Court for determination. Award of $2,000.00. . . . . p. 87

MATUSKY VS. DIV. OF HIGHWAYS (CC-99-170)

This claim came before the Court upon a stipulation. The Court having reviewed it adopts it as its own and holds that respondent was negligent in not securing a metal plate covering a hole on a bridge, and said negligence was the proximate cause of claimant's damages. Award of $500.00. . . . . p. 90

RARDON VS. DIV. OF HIGHWAYS (CC-98-345)

This claim was submitted to the Court upon a stipulation entered into by the parties. The Court having reviewed the facts and the stipulation finds that respondent

negligently left a hole in I-79 during a construction project which caused damage to claimant's vehicle. The Court agrees that the amount of the settlement is fair and reasonable. Award of $250.00. . . . . p. 41

THE CONTINENTAL INSURANCE COMPANY VS. WEST VIRGINIA STATE POLICE AND DEPARTMENT OF ADMINISTRATION (CC-98-444)

This claim was submitted to the Court based upon a stipulation. The claimant was a surety on a bond for the lead contractor for a project for the respondent known as the "State Police Headquarters Requisition". The contractor and the principal on the bond failed to complete the work and defaulted on payment obligations to the subcontractors. Claimant, as surety, paid $36,000.00 in liquidated damages to respondent. Claimant then filed a claim to recover the amount it paid, but the parties agreed to settle for $21,255.00. . . . . p. 117

STREETS & HIGHWAYS – See also Comparative Negligence and Negligence

ADKINS VS. DIV. OF HIGHWAYS (CC-98-368)

Claimant's vehicle was totaled when her vehicle went into a dug out area created by respondent in an attempt to resolve a water drainage problem. The Court held that respondent did not use proper care by covering the hole with large metal plates, and should have used more reasonable care until permanent repairs could be made. Award of $500.00. . . . . p. 122

ALVARADO VS. DIV. OF HIGHWAYS (CC-98-73)

The Court made an award where claimant's vehicle was damaged by a large hole in Route 19 which was under construction by a contractor at the time. The Court held that respondent had notice of the hazard. The Court also held that the "save harmless" clause is not applicable because of a lack of privity between claimant and the parties to the construction contract. Award of $260.95. . . p. 123

BENNINGER VS. DIV. OV HIGHWAYS (CC-99-400)

The parties stipulated that claimant's vehicle struck holes in the road surface; that respondent was aware of the condition of the road; and that respondent was negligent. The Court made an award based upon the stipulation. . . . . p. 242

BRAITHEWAITE VS. DIV. OF HIGHWAYS (CC-99-435)

Claimant's wife was operating his vehicle when it struck a hole that was extending from the berm into the roadway. The Court held that a recovery could be made as respondent had actual notice of the defect in the road. . . . . p. 173

BRATTON VS. DIV. OF HIGHWAYS (CC-98-169)

Claimant brought an action for damage done to his 1962 Austin Healy 3000, a short wheel based vehicle, when it struck a crown at an intersection. The Court held that while there is a change in the grade at the intersection in question, it is not unlike any other in the State. Therefore, the intersection was reasonably maintained. Furthermore, the Court held that it would place an undue burden on the State to require it to build all roads to suit specialty vehicles. . . . . p. 52

BURKIEVICZ VS. DIV. OF HIGHWAYS (CC-99-284)

This claim came before the Court for decision upon a stipulation entered into by the parties. The Court having reviewed the facts and the stipulation finds that the respondent was negligent in not removing a broken sign post from the berm of the highway which caused damage to claimant's vehicle, and agrees that the amount of damages as stipulated to is fair and reasonable. . . . . p. 37

CARR VS. DIV. OF HIGHWAYS (CC-00-167)

Claimant's vehicle sustained damage when it struck a large hole on I-70. The Court made an award as respondent had constructive notice, if not actual notice, of a hole that large on an interstate. . . . . p. 244

COMBS VS. DIV. OF HIGHWAYS (CC-99-402)

The unexplained existence of debris on a highway will not, in and of itself, establish negligence on the part of the respondent. The Court will not make an award unless respondent has notice of the debris and sufficient time in which to remedy the situation. . . . . p. 175

COPLEY VS. DIV. OF HIGHWAYS (CC-99-164)

A road known by respondent to be used by heavy coal trucks should be observed more closely for road hazard problems. Respondent had constructive notice of the hole; therefore, the Court respondent liable for the damages to claimant's vehicle which sustained damage when it struck the hole. . . . . p. 196

CORY VS. DIV. OF HIGHWAYS (CC-98-62)

The parties stipulated that claimant's vehicle was damaged when he lost control of his vehicle which then struck a tree and the accident was the result of the state of disrepair of the road surface. The Court reviewed the claim and made an award to claimant based upon the stipulation. . . . . p. 225

DOTSON, AS GUARDIAN, NATURAL PARENT AND NEXT FRIEND OF AUSTIN RYAN DOTSON, AN INFANT, (CC-97-388)

This claim came before the Court upon a Second Stipulation by the parties, where the issues of liability and damages were agreed upon by the parties. The Court

having reviewed the claim and the stipulation of the parties agrees that the settlement of the claims of the said parties for the gross sum of $125,000.00 is fair and reasonable. . . . . p. 36

FERGUSON VS. DIV. OF HIGHWAYS (CC-99-111)

Even though the Court found respondent had constructive notice of a hole in the pavement, the Court denied the claim as claimant was operating his vehicle too fast for the conditions then and there existing. His negligence was equal to or greater than that of the respondent. . . . . p. 275

GETZ VS. DIV. OF HIGHWAYS (CC-99-353)

Claimants' vehicle sustained damage when it struck a hole in the road in Barbour County for which the Court made an award. The evidence established that respondent had constructive notice of the hazardous condition which constituted negligence. Claimants were granted an award. . . . . p. 250

GREEN VS. DIV. OF HIGHWAYS (CC-98-281)

Where respondent knew that Route 85 in Wharton, Boone County was a problem area for holes in the road due to heavy coal truck use, the Court held that respondent had at least constructive if not actual notice of the hole which damaged claimant's vehicle. Award of $250.00 *Pritt vs. Dept. of Highways*, 16 Ct. Cl. 8 (1985); *Harmon vs. Dept. of Highways*, 16 Ct. Cl. 127 (1986). . . . . p. 76

HARLESS VS. DIV. OF HIGHWAYS (CC-98-178)

Stipulated award of $202.11, where claimant's vehicle struck a rock which respondent had forgotten to remove from the road after performing culvert work.

. . . . . p. 27

HILL VS. DIV. OF HIGHWAYS (CC-94-651)

The Court will deny a claim for damage to a vehicle alleged to be caused by respondent's failure to maintain the road in a proper manner where claimant failed to establish that respondent had notice of the condition alleged. The Court relies upon the principle set forth in *Adkins v. Sims*, 130 W.Va. 645; 46 S.E. 2d 81 (1947).

. . . . . p. 163

KEYSER VS. DIV. OF HIGHWAYS (CC-99-233)

The Court denied this claim for damages as the result of loose gravel on the road from placement of gravel on the berm as the Court held that this set of circumstances is insufficient to constitute negligence on the part of the respondent.

. . . . . p. 214

LEWIS VS. DIV. OF HIGHWAYS (CC- 98-106)

Claimant's vehicle struck a hole in the road. Respondent acknowledged that it had prior knowledge of the hole and had filed it approximately eight days prior to this incident with a cold mix asphalt. The Court held respondent did not take reasonable steps to ensure the public safety given that this was a high priority road and that respondent was aware of the hole and the propensity of cold mix to come out of patched holes. Award of $171.72. . . . . p. 28

LINKOUS VS. DIV. OF HIGHWAYS (CC-00-269)

Claimant's vehicle received damages when it struck a low manhole on a street in Webster Springs. The Court made an award to claimant as the evidence established that respondent paved the area but failed to raise the manhole covers to pavement level. Respondent had notice of the condition of the manholes and was negligent in its maintenance of the road. . . . . p. 225

LOOSEMORE VS. DIV. OF HIGHWAYS (CC-99-92)

Claimant brought two separate claims for vehicle damage caused by vehicle debris being thrown onto her parked car. The two incidents occurred within a two week period when claimant had her car parked on the berm of Route 27, Brooke County. The first incident involved asphalt debris being thrown onto the claimant's car breaking the front windshield, and the second involved her back windshield. The Court held that respondent was on notice that there was a hazard for road debris due to serious drainage problems and heavy truck traffic; and that it failed to take reasonable measures to remedy the hazard. Award of $200.00. *Varner's Adm'n vs. State Road Comm'n* 8 Ct. Cl. 119, 122 (1970); See also *Cole vs. DIV. OF HIGHWAYS*, 21 Ct. Cl. 15 (1995). . . . . p. 87

MCDANIEL VS. DIV. HIGHWAYS (CC-00-55)

Claimant alleged damages to his vehicle when he lost control of his vehicle in ice and snow and it slid off the road where it received damages. The Court that claimant was familiar with the road and should have been aware of the potential for ice and snow to be present. There was no negligence established on the part of the respondent. . . . . p. 291

PINKERTON VS. DIV. OF HIGHWAYS (CC-99-175)

Claimant brought action for damage to his vehicle as a result of being stuck in mud while traveling County Road 10/2 in Belmont, Pleasants County, which is a third priority road. The Court held respondent has a duty to maintain third priority roads in a reasonable state of repair. Where respondent was on notice that the road was in a state of disrepair and had been grading it due to ruts and muddy conditions

caused by frequent use by hunters, the Court held respondent failed to maintain it in a reasonable condition. Award of $275.00. . . . . p. 95

PUMPHREY VS. DIV. HIGHWAYS (CC-00-42)

An isolated patch of ice on a road is generally insufficient to establish negligence on the part of the respondent. Therefore, a claim based upon claimant's vehicle sliding on a patch of ice on the road was denied as respondent did not have notice of this condition. . . . . p. 294

RARDON VS. DIV. OF HIGHWAYS (CC-98-345)

This claim was submitted to the Court upon a stipulation entered into by the parties. The Court having reviewed the facts and the stipulation finds that respondent negligently left a hole in I-79 during a construction project which caused damage to claimant's vehicle. The Court agrees that the amount of the settlement is fair and reasonable. Award of $250.00. . . . . p. 41

SAVILLE VS. DIV. HIGHWAYS (CC-99-2)

Claimant received an award for damages to his vehicle when it struck a large hole in the road. Claimant had been forced to drive to his right by traffic passing in the left lane. The Court held that respondent, at the least, had constructive notice of the hazard based upon the size and location of the hole. . . . . p. 190

SHANHOLTZ VS. DIV. HIGHWAYS (CC-00-220)

Where one of the claimants was aware of the hole in the road, the Court denied the claim based upon comparative negligence even though respondent also was aware of the hole in the road. . . . . p. 297

SMITH VS. DIV. HIGHWAYS (CC-99-74)

A claim for damages was denied where the evidence established that respondent did not have notice of the irregularity in the pavement of Route 22 which caused the damages to claimant's vehicle. The principle of law in West Virginia is that the State is not the insurer or guarantor of the safety of the travelers on its highways. In order for respondent to be liable the evidence must establish that respondent had actual or constructive notice of the defective condition. . . . p. 192

STURM VS. DIV. OF HIGHWAYS (CC-99-409)

Claimant's vehicle sustained damage when it struck a piece of concrete on I-64 in Kanawha County. The Court held that since the debris came from a construction site and respondent had a duty to keep the site clear of hazards to the traveling public, claimant was entitled to an award. . . . . p. 263

SUMMERFIELD VS. DIV. OF HIGHWAYS (CC-98-325)

Where respondent had done repair work on Route 60/14 in Kanawha County, and where the evidence was that the hole on Route 60/14 was not a recent occurring condition, the Court held that respondent did have constructive notice of this hole. Award of $200.00. . . . . p. 101

TALBOTT VS. DIV. OF HIGHWAYS (CC-95-308)

A consolidated this claim where the driver of the vehicle was killed and the passenger seriously injured in a collision at the intersection of U.S. Route 33/119 and U.S. Route 47. The Court held that the intersection was not negligently designed, constructed, or maintained; and that the degree and angle of the design did not prevent a motorist from having sufficient visibility distances to enter the said roadway in a safe fashion. . . . . p. 55

TALBOTT VS. DIV. OF HIGHWAYS (CC-95-308)

A consolidated claim where the driver of a vehicle was killed and the passenger seriously injured in a collision at the intersection of U.S. Route 33/119 and U.S. Route 47. The Court rejected claimants' theory that respondent negligently failed to place adequate traffic control signal at said location, evidence established that based upon the Manual on Uniform Traffic Control Devices (MUTCD) the criteria to establish the need for a traffic signal was not called for. . . . . p. 55

TALBOTT VS. DIV. OF HIGHWAYS (CC-95-308)

A consolidated claim where the driver of a vehicle was killed and the passenger seriously injured in a collision at the intersection of U.S. Route 33/119 and U.S. Route 47. The Court rejected claimants' theory that the State was negligent for failing to erect a special "limited sight distance"warning sign upon approaching the intersection. The Court held that there were sufficient warning signs to notify drivers of the approaching intersection and that the (MUTCD) does not contain such a sign. . . . . p. 55

TALBOTT VS. DIV. OF HIGHWAYS (CC-95-308)

The Court found, as a matter of fact, that claimants' statistics listing 16 accidents at the said intersection between the dates of October 1, 1983 and January 22, 1990, the year of this incident, did not establish that this was a dangerous intersection. . . . . p. 55

TALBOTT VS. DIV. OF HIGHWAYS (CC-95-308)

The Court held that respondent was not negligent in the design of the intersection, based on the fact that it was designed for a speed limit of 40 M.P.H. and

was posted for a 50 M.P.H. The design speed does not control the posting of a speed limit. . . . . p. 55

WITTMAN VS. DIV. OF HIGHWAYS (CC-98-244)

Where claimant's vehicle was damaged by striking an exposed drain cover while turning into a store, the Court held that respondent was not responsible for the maintenance of the drain cover due to the fact that it was 12 feet beyond the respondent's right of way. Claim disallowed. . . . . p. 46

YOUNG VS. DIV. OF HIGHWAYS (CC-98-87)

Where claimant was forced to navigate her vehicle close to the berm of the road due to inclement weather and struck a hole causing damage, the Court held that respondent knew or should have known of this hole due to the fact that respondent had an office on an adjacent street and based upon the nature and condition of the hole. . . . . p. 34

TREES and TIMBER

BROWN VS. DIV. OF HIGHWAYS (CC-99-325b)

Where a dead tree fell onto claimant's property during a storm and caused damage, the Court held that respondent did have notice of the condition and failed to take reasonable steps to resolve the hazard. Award of $559.88. *Jones v. DIV. OF HIGHWAYS*, 21 Ct. Cl. 445 (1995). . . . . p. 125

ELSEA VS. DIV. OF HIGHWAYS (CC-99-331)

In a claim for damage to a vehicle when it struck a fallen tree in the roadway, the Court made an award as respondent had constructive notice that the tree posed a hazard to the traveling public. . . . . p. 176

FERANDEZ VS. DIV. HIGHWAYS (CC-96-505)

A claim for damage to a vehicle when it struck a large hole on I-64 was denied as respondent did not have notice of the defect on I-64 and the evidence established that it effected repairs immediately upon notice. . . . . p. 178

GALLOWAY VS. DIV. OF HIGHWAYS (CC-98-211)

The Court disallowed a claim where a dead tree fell and struck claimant's vehicle. Claimant did not present any evidence that the tree was on respondent's right of way. The Court held that respondent can not be responsible for inspection of all trees in the area that may or may not be in the State's right of way. Therefore, respondent did not have notice of this tree's condition or that the tree posed a hazard to the public. See *Jones v. DIV. OF HIGHWAYS*, 21 Ct. Cl. 45 (1995). . . p. 25

MAYS VS. DIV. OF HIGHWAYS (CC-98-138)

Where the claimant struck two different fallen trees in the road on Route 34/8 in Putnam County, the Court held that respondent had no actual or constructive notice of these hazards. . . . . p. 10

QUEEN VS. DIV. OF HIGHWAYS (CC-99-279)

Where a tree limb that was hanging over the roadway fell onto claimant's vehicle causing damage, the Court held that respondent had notice of the hazard since the limb had been there for three years and claimant had called respondent on two occasions prior to this incident. Award of $213.66. . . . . p. 147

THORNTON VS. DIV. OF HIGHWAYS (CC-98-347)

The Court held that respondent was not liable for damages to claimant's car trailer which struck a tree leaning into the roadway because the tree was not on respondent's right of way and the evidence did not establish that respondent had notice that the tree was a hazard to the traveling public. . . . . p. 193

WILEY VS. DIV. OF HIGHWAYS (CC-99-376)

Where respondent was aware of a tree in a precarious position to fall, it has a duty to take affirmative action rather than waiting for it to fall. Thus, claimant was made an award for damage to his residence when a tree fell on his residence and the tree was on the State's right of way. . . . . p. 266

VENDOR

ALLTEL CORPORATION VS. DEPT. OF NATURAL RESOURCES (CC-01-053)

Claimant provided state-wide mobile telephone services to respondent for which it was not paid in the proper fiscal year. The Court made an award for the services. . . . . p. 308

ATTORNEY GENERAL VS. DIV. OF CORRECTIONS (CC-00-487)

Claimant provided professional services to respondent for which it was not paid in the proper fiscal year. The Court made an award in an amount differing from the amount claimed as the parties agreed to a lower amount. . . . . p. 306

BATRA CARDIOLOGY ASSOCIATES, INC. VS. DIVISION OF JUVENILE SERVICES (CC-99-155)

Award of $276.00 for providing medical services to a juvenile inmate at the Northern Regional Juvenile Detention Center a facility of the respondent. The documentation for these services was not processed in the proper fiscal year; there

were sufficient funds expired at the end of the proper fiscal year from which the bill could have been paid. . . . . p. 9

BECKLEY NEWSPAPERS VS. PUBLIC SERVICE COMM'N. (CC-00-83)

Award of $66.64 was made by the Court for advertising services provided to respondent. The documentation for these services was not processed for payment within the appropriate fiscal year; there were sufficient funds expired at the end of the proper fiscal year from which the bill could have been paid. . . . . p. 162

BELL ATLANTIC - WEST VIRGINIA, INC. VS. ADJUTANT GENERAL (CC-99-191)

Award of $1,108.32 for providing telephone services to respondent. The documentation for these services was not processed in the proper fiscal year; there were sufficient funds expired at the end of the proper fiscal year from which the bill could have been paid. . . . . p. 1

BELL ATLANTIC - WEST VIRGINIA, INC. VS. EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD (CC-00-107)

Award of $224.96 was made by the Court for unpaid telephone services provided to respondent. The documentation for these services was not processed for payment within the appropriate fiscal year; there were sufficient funds expired at the end of the proper fiscal year from which the bill could have been paid. . . . p. 162

BILL LEWIS MOTORS, INC. VS. DIV. OF LABOR (CC-00-197)

Claim for automotive repair services was granted by the Court where the documentation for these services was not processed for payment within the appropriate fiscal year; there were sufficient funds expired at the end of the proper fiscal year from which the bill could have been paid. . . . . p. 223

BLUEFIELD REGIONAL MEDICAL CENTER VS. DIVISION OF JUVENILE SERVICES (CC-99-308)

Award of $209.75 for providing medical services to a juvenile at respondent's facility in Bluefield, Mercer County. The documentation for these services was not processed for payment within the appropriate fiscal year; there were sufficient funds expired at the end of the proper fiscal year from which the bill could have been paid. . . . . p. 20

BROWNING FERRIS INDUSTRIES VS. DIVISION OF CORRECTIONS (CC-99-364)

Award of $374.25 for providing waste removal services at several of respondent's facilities. The documentation for these services was not processed

within the appropriate fiscal year. There were sufficient funds expired. Award of $374.25. . . . . p. 112

CAMC DENTAL CENTER VS. DIVISION OF JUVENILE SERVICES (CC-99-374)

Award of $1,159.00 for providing dental services to a juvenile at respondent's West Virginia Industrial Home For Youth. The documentation for these services was not processed within proper fiscal year. There were sufficient funds expired in the appropriate fiscal year. . . . . p. 67

CAMDEN CLARK MEMORIAL HOSPITAL VS. DIVISION OF JUVENILE SERVICES (CC-99-232)

Award of $75.00 for providing medical services to a juvenile at respondent's facility in Parkersburg, Wood County. The documentation for these services was not processed for payment within the appropriate fiscal year; there were sufficient funds expired at the end of the proper fiscal year from which the bill could have been paid. . . . . p. 21

CHARLESTON DEPARTMENT STORE VS. PUBLIC SERVICE COMMISSION (CC-99-373)

Award of $463.79 for work clothing provided to respondent. The documentation was not processed for payment within the appropriate fiscal year; sufficient funds were expired. . . . . p.

CORRECTIONAL FOODSERVICE MANAGEMENT VS. DIVISION OF CORRECTIONS (CC-99-69)

Award of $69,289.25 for providing food services to Mt. Olive Correctional Center, a facility of respondent. The documentation for these services was not processed for payment within appropriate fiscal year; sufficient funds were expired. Award of $69,289.25. . . . . p. 112

DANKA VS. ADJUTANT GENERAL (CC-00-032)

The Court made an award of $303.87 for maintenance services provided. The documentation for these services was not processed for payment within the appropriate fiscal year and there were sufficient funds available. Award of $303.87. . . . . p. 131

DICKINSON FUEL COMPANY, INC. VS. ALCOHOL BEVERAGE CONTROL ADMINISTRATION (CC-99-415)

Award of $508.27 for repairs made to air cooling system at respondent's Charleston office. The documentation for services was not processed in proper fiscal

year. There were sufficient funds expired in the appropriate fiscal year from which the bill could have been paid. Award of $508.27. . . . . p. 113

DIV. OF ENVIRONMENTAL PROTECTION VS. DIV. OF CORRECTIONS (CC-01-178)

A claim for providing a Sludge Land Application Fee as required by law for a facility of the respondent was not paid in the proper fiscal year. The Court made an award for the Fee. . . . . p. 332

EDENS, CCR VS. BOARD OF BARBERS AND COSMETOLOGISTS (CC-99-359)

Award of $209.60 for providing Court reporter services for the respondent. The documentation for the services was not provided within the appropriate fiscal year. Respondent admits the validity of the claim as well as the amount and that there were sufficient funds expired. . . . . p. 39

EMP OF OHIO COUNTY VS. DIVISION OF JUVENILE SERVICES (CC-99-303)

The Court made an award of $135.40 for medical services provided to a juvenile at respondent's facility in Wheeling, Ohio County. The invoice was not processed in the proper fiscal year and sufficient funds were expired from which the bill could have been paid. . . . . p. 23

FERGUSON BROS. PLUMBING AND HEATING COMPANY VS. DIV. OF CORRECTIONS (CC-00-467)

A claim for air conditioner repair services was granted by the Court where the documentation for these services was not processed for payment within the appropriate fiscal year; there were sufficient funds expired at the end of the proper fiscal year from which the bill could have been paid. . . . . p. 268

GREEN ACRES REGIONAL CENTER C/O SHELTERED WORKSHOP OF NICHOLAS COUNTY VS. DIVISION OF CORRECTIONS (CC-99-304)

Award of $468.40 for providing bottled water delivery and services at Mt. Olive Correctional Center. The documentation for these services was not processed for payment within the appropriate fiscal year and sufficient funds were expired from which the bill could have been paid. . . . . p. 26

MASON VS. ALCOHOL BEVERAGE CONTROL ADMIN. (CC-00-435)

Award for providing storage facilities for liquor inventory under a agreement with respondent was made as the documentation for services was not

processed in proper fiscal year. There were sufficient funds expired in the appropriate fiscal year from which the bill could have been paid. Award of $508.27. . . . . p. 289

REVEAL VS. ETHICS COMMISSION (CC-99-339)

Award of $2,706.28 for legal services provided to respondent. The documentation for these services was not processed within the appropriate fiscal year and sufficient funds were expired. . . . . P. 43

TAYLOR & JAMES, PLLC VS. WEST VIRGINIA INSURANCE COMMISSION (CC-99-290)

Award of $4,127.00 for legal services provided to respondent. The documentation for these services was not processed for payment within the appropriate fiscal year and sufficient funds were expired from which the bill could have been paid. . . . . p. 33

THOMAS MEMORIAL HOSPITAL VS. DIVISION OF JUVENILE SERVICES (CC-99-495)

The Court made an award of $10.20 for providing medical services to a juvenile at the South Central Regional Juvenile Detention Center. The invoice was not processed in the proper fiscal year and sufficient funds were expired from which the bill could have been paid. Award of $10.20. . . . . p. 114

UNIVERSITY OF GEORGIA RESEARCH FOUNDATION, INC. VS. DIV. OF NATURAL RESOURCES (CC-00-109)

The Court made an award to claimant in accordance with the terms of its contract for studying wildlife health conditions and it was not paid because the invoice for the services was not processed in the proper fiscal year. . . . . p. 211

VALLEY RADIOLOGISTS, INC. VS. DIVISION OF JUVENILE SERVICES (CC-99-442)

The Court made an award of $226.00 for providing medical services to a juvenile at the Northern Regional Juvenile Detention Center. The documentation for these services was not processed for payment within proper fiscal year and there were sufficient funds available. Award of $226.00. . . . . p. 115

WEST GROUP VS. DIVISION OF CORRECTIONS (CC-99-278)

Award of $5,317.08 for legal publications provided to Mt. Olive Correctional Complex, a facility of the respondent. Documentation for these publications was not received in the proper fiscal year. Respondent admitted the

claim and there were sufficient funds available from which the bill could have been paid. . . . . p. 34

WEST VIRGINIA ASSOCIATION OF REHABILITATION FACILITIES VS. DEPARTMENT OF ADMINISTRATION
(CC-98-395)

Award of $27.62 for providing bulk mailing services to respondent. The documentation for these services was not processed for payment within the appropriate fiscal year; there were sufficient funds expired at the end of the proper fiscal year from which the bill could have been paid. . . . . p. 15

WV REGIONAL JAILS AND CORRECTIONAL FACILITY AUTHORITY VS. DIV. OF CORRECTIONS (CC-00-447)

An award was made to claimant for maintaining prisoners in its facilities that were to be housed in the prisons of the State but for reasons beyond the control of the respondent the prisoners had to be held in facilities of the claimant. The Court made an award in the amount agreed to by the parties. Award of $4,583,896.00.
. . . . . p. 265

VENDOR – Denied because of insufficient funds

CABELL COUNTY COMMISSION VS. SUPREME COURT OF APPEALS (CC-99-476)

Claimant seeks $8,908.00 for home confinement drug testing fees which were inadvertently credited to the wrong account for the fiscal years 1992 through 1998. Respondent admits the validity of the claim, but states that there were insufficient funds expired in the appropriate fiscal year from which the claim could have been paid. *Airkem.* . . . . . p. 120

CHARLESTON AREA MEDICAL CENTER, INC. VS. DIVISION OF CORRECTIONS (CC-99-265)

The Court disallowed a claim for $120,563.33 for medical services provided to an inmate in the custody of respondent. The respondent admitted the validity of the claim but stated there were insufficient funds expired in the appropriate fiscal year from which the claim could have been paid. *Airkem.* . . . . . p. 116

CORRECTIONAL MEDICAL SERVICES, INC. VS. DIVISION OF CORRECTIONS (CC-99-504)

Claimant seeks payment of $322,005.69 for medical services provided to an inmate. Respondent admits the validity of the claim but states the amount is

$315,427.47. There were insufficient funds available in the appropriate fiscal year from which the claim could have been paid. *Airkem.* . . . . . p. 120

CORRECTIONAL MEDICAL SERVICES, INC. VS. DIVISION OF CORRECTIONS (CC-00-474)

Claimant seeks payment of $577,363.04 for medical services provided to an inmate. Respondent admits the validity of the claim but states the amount is $543,957.81. There were insufficient funds available in the appropriate fiscal year from which the claim could have been paid. *Airkem.* . . . . . p. 268

CURREY VS. DEPT. OF EDUCATION (CC-00-355)

A claim for tuition reimbursement sought by a teacher was a denied by the Court where the agency stated that it did not have sufficient funds at the end of the fiscal year in question. See *Airkem*. . . . . p. 267

DAVIS MEMORIAL HOSPITAL VS. DIVISION OF CORRECTIONS (CC-99-486)

The Court disallowed a claim for $34,331.13 for medical services provided to an inmate. Respondent admitted validity of the claim, but states that there were insufficient funds in its appropriation for the fiscal year from which the claim could have been paid. *Airkem.* . . . . . P. 116

HIGHLAND CELLULAR, INC. VS. DIV. OF CORRECTIONS (CC-00-206)

The Court will disallow a claim for services where the State agency did not expire sufficient funds in the appropriate fiscal year with which to pay the invoice for the services. . . . . p. 197

MONTGOMERY GENERAL HOSPITAL VS. DIVISION OF CORRECTIONS (CC-99-212)

The Court disallowed a claim for $9,772.63 for medical services provided to inmates at Mount Olive Correctional Center, as there were insufficient funds expired in the appropriate fiscal year. *Airkem Sales* and *Service, et al. vs. Dept. of Mental Health* 8 Ct. Cl. 180 (1971). . . . . p. 12

MONTGOMERY GENERAL HOSPITAL VS. DIVISION OF CORRECTIONS (CC-00-488)

The Court disallowed a claim for medical services provided to inmates at Mount Olive Correctional Center, as there were insufficient funds expired in the appropriate fiscal year. *Airkem Sales* and *Service, et al. vs. Dept. of Mental Health* 8 Ct. Cl. 180 (1971). . . . . p. 269

OHIO VALLEY MED. CENTER VS. DIV. OF CORRECTIONS (CC-00-436)

Claimant seeks payment for medical services provided to an inmate. Respondent admits the validity of the claim but states that there were insufficient funds available in the appropriate fiscal year from which the claim could have been paid. *Airkem.* . . . . . p. 260

RADIOLOGY, INC. VS. DIVISION OF CORRECTIONS (CC-99-243)

Court disallowed a claim for $33.00 for medical services rendered to a county jail inmate who should have been in custody of respondent. *Airkem Sales and Service, et al. vs. Dept. of Mental Health* 8 Ct. Cl. 180 (1971). . . . . p. 13

STEVENSON VS. ATTORNEY GENERAL (CC-99-256)

The Court disallowed a claim for $11,706.13 for travel expenses incurred by an employee of respondent, as there were insufficient funds expired at the end of the appropriate fiscal year. *Airkem.* . . . . . p. 43

TEAYS RIVER CONSTRUCTION COMPANY VS. DIV. LABOR (CC-00-177)

Claimant seeks payment for electrical services provided to respondent. Respondent admits the validity of the claim but states that there were insufficient funds available in the appropriate fiscal year from which the claim could have been paid. The Court denied the claim based upon its decision in *Airkem.* . . . . p. 211

TYGART VALLEY TOTAL CARE CLINIC VS. DIVISION OF CORRECTIONS (CC-99-195)

The Court disallowed a claim for $625.00 for medical services rendered to an inmate in Pruntytown Correctional Center, as there were insufficient funds expired in the appropriate fiscal year. *Airkem.* . . . . . p. 14

UNIVERSITY HEALTH ASSOCIATES VS. DIVISION OF CORRECTIONS (CC-99-271)

The Court disallowed a claim for $77,5011.75 for medical services provided to inmates at Huttonsville, Pruntytown, and Mt. Olive, as there were insufficient funds expired at the end of the appropriate fiscal year. *Airkem.* . . . . . p. 44

WEST VIRGINIA UNIV. HOSPITALS, INC. VS. DIV. OF CORRECTIONS (CC-00-312)

Claimant seeks payment for medical services provided an inmate in the custody of the respondent. Respondent admits the validity of the claim but states that there were insufficient funds available in the appropriate fiscal year from which the claim could have been paid. The Court denied the claim based upon its decision in *Airkem.* . . . . . p. 229

W.VA. UNIVERSITY

BOARD OF TRUSTEES OF THE UNIVERSITY SYSTEM OF WEST VIRGINIA (CC-99-205)

The Court made an award of $100.00 for damage done to claimant's VCR while electrical work was being done in the apartment which claimant rented from respondent. . . . . p. 33

BALLENGEE VS. BOARD OF TRUSTEES (CC-99-395)

Claimant seeks $53.00 for personal property damaged as a result of water damage caused by a sprinkler system malfunction in her dormitory room at respondent's facility. Award of $53.00. . . . . p. 119

HUGHART VS. HIGHER ED. POLICY COMM'N. (CC-00-137)

Claimant's personal property sustained damage when a hot water valve burst in claimant's dormitory room. Respondent admitted the validity and the amount of the claim. The Court made an award as respondent does not have a fiscal method to pay such a claim. . . . . p. 214

LOGAN MERRITT VS. BOARD OF TRUSTEES OF THE UNIVERSITY SYSTEM OF WV (CC-99-472)

The Court made an award of $339.18 for water damage done to claimant's stereo as a result of a water leak around a window at respondent's facility. Award of $339.18. . . . . p. 121