STATE OF WEST VIRGINIA

Report

of the

Court of Claims

For the Period from July 1, 1987

to June 30, 1989

By

CHERYLE M. HALL

Clerk

Volume XVII

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

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Letter of Transmittal

To: His Excellency
The Honorable Cecil Underwood
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 eighty-seven to June thirty, one thousand nine hundred eighty-nine.

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 8, 1987

SCOTT ADKINS
VS.
DEPARTMENT OF HIGHWAYS

(CC-86-218)

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

PER CURIAM:

On April 5, 1986, the claimant was operating his 1980 Oldsmobile in a westerly direction on West Virginia Secondary Route 42 between Midkiff and Mud River Road, Lincoln County. At this site, on the right-hand side, there is a section of the road which has washed away. An oncoming truck approached claimant's vehicle. The headlights from this truck deterred claimant from seeing the deteriorated section of the road. As a result, claimant's vehicle left the road, went over a bank, and struck a rock cliff. There was damage to the front bumper, the right front fender, and windshield of claimant's vehicle. Claimant seeks $20,000.00 for damage to the vehicle and for personal injuries. Claimant alleges that respondent was negligent for its failure to have warning signs and guardrails at this location.

At the time of this incident it was approximately 9:30 p.m. and dark. claimant was operating his headlights on low beam. The road in question is a two-lane, blacktop highway. The road was dry.

Scott Carl Adkins, Jr. testified that he viewed the accident scene and took photographs on April 8, 1986. He stated "... the berm had gone off into the road, till it met the road, and some of the term was missing." He estimated that four to six inches of the pavement area itself was gone.

Mr. Jackie Weaver, road supervisor in Lincoln County for respondent at the time of this incident, testified that respondent tried several times to stop the slipping of this particular road. He further testified that respondent frequently placed paddle-like signs up right along the edge of this road.

Mr. Roger Lovejoy, county maintenance supervisor in Lincoln County for respondent on April 5, 1986, testified that the road in question is a low priority or secondary road. He stated that prior to this incident, there were safety paddles in the break location on this road.

The evidence in this case reveals that the road in question is a secondary road. The respondent had placed warning paddle signs on several occasions prior to this incident which indicates that respondent did take safety precautions for the travelling public.

The Court is of the opinion that negligence on the part of the respondent has not been established and, therefore, the Court denies this claim.

Claim disallowed.

OPINION ISSUED JULY 8, 1987

ASTORG MOTOR COMPANY, MARION SPRAGG
VS.
DEPARTMENT OF HIGHWAYS

(CC-86-184)

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

PER CURIAM:

Claimant was operating a 1986 Buick Century titled in the name of Astorg Motor Company. This vehicle was involved in an incident which is the subject of this claim. Astorg Motor Company did not sign the claim petition nor did it or its representative appear at the hearing. Claimant seeks $161.43, the cost of the damaged tires.

Claimant Spragg testified that the vehicle in question is a "loaner car". He was utilizing it while his own automobile was being repaired by Astorg Motor Company. He was travelling west in Route 19 returning from Shinnston on March 13, 1986, when the Buick struck a railroad spike in a hole. He was proceeding at approximately 35 miles per hour. He stated that, on the right side of the road, there was a sharp object appearing to be a railroad spike in the hole. This spike damaged the tires of the vehicle when the vehicle struck it.

The Court will not consider the merits of this claim as it has been filed by the proper party. Astorg Motor Company is the proper party claimant. For this reason the Court is of the opinion to, and does, deny the claim.

Claim disallowed.

OPINION ISSUED JULY 8, 1987

ELWIN E. ALIFF CONSTRUCTION
COMPANY, INC.
VS.
DEPARTMENT OF NATURAL RESOURCES

(CC-79-641)

E. Joseph Buffa, Attorney at Law, for claimant.
Robert D. Pollitt, Assistant Attorney General, for respondent.

WALLACE, JUDGE:

This claim arises out of the construction of group camp facilities at Panther State forest, McDowell County, West Virginia. The contract was entered into by claimant Elwin E. Aliff Construction Company, Inc. and respondent Department of Natural Resources on July 11, 1974. The term of the contract was 240 days. The contract completion date was extended to May 28, 1977, by Change Order #7. The actual completion date for the project was September 15, 1977. The parties, by their respective counsel, stipulated that neither the claimant nor the respondent have any of the invoices or itemizations regarding the specific items of damages alleged by the claimant in this claim.

Claimant contends that it performed the following items as extra work for which it should be compensated: Item #2 Extra fill inside and outside buildings, Item #3 extra block and foundation work, Item #4 Removal of stumps, Item #6 Flashing installed under wood band around buildings, Item *7 Filling of beams where lumber cracked, Item *8 Shower stalls which were approved and then rejected, Item #9 Repainting decks and ramps, Item #11 Additional overhead, Item #14 Repair and reflash roof at cabin, Item #15 Adding electrical contractors to protect kitchen equipment, and Item #16 Adding back liquidated damages. Claimant amended the amount of its original claim to $53,920.00 at the hearing.

Claimant contends that the plans for the project did not correlate with the actual contour of the site. The construction site for the project is a long, sloping site. It was necessary for claimant to place fill for the main lodge and the parking lot which was not indicated in the plans and specifications. The fill was necessary to bring the floor levels up to the levels at which the slabs could be poured. Then backfill was placed against the foundations of the buildings. Claimant also alleges that the additional fill includes the fill required for the parking lot.

The respondent contends that the floor elevations of the cabins were adjusted and that although the elevation lines might not be the same, the amount of fill that was used was the same. As the respondent determined that the increases in fill were not substantial increases i the amount of grading performed at the parking lot, the respondent denied claimant additional compensation for the fill and grade work performed on the parking lot.

During construction of the cabins, it was necessary for the walls of the cabins to be compacted as the plans did not allow for backfill. The specification included in the terms of the contract required that the opposite be done, i.e., backfill and then pour the concrete slab. As a result of the specifications, the walls deteriorated. The claimant was then required to patch in and hand fill these areas. This occurred five or six times during construction of the cabins. As a result, extra labor was required. Item #3 is connected with the backfill problem as the breakdown in the foundations of the cabins necessitated additional block, mortar, steel, and labor which constitutes for the amount claimed in Item #3.

Concerning Item #4, claimant contends that it was the responsibility of the respondent to pull the stumps in shaded areas indicated on the plans. As this was not done, the claimant removed the stumps. Claimant alleges extra expense for the removal of the stumps and delay on the project when stumps were not removed in a timely manner.

Respondent agrees that claimant's personnel assisted in the removal of some of the stumps at the project site. However, respondent contends that it removed the majority of the stumps and that at any time its personnel was requested, they removed the stumps as requested.

Item #6 for installation of flashing under the lodge and cabin roofs appears to be indicated on the plans, and, therefore, claimant is not entitled to this item as extra work.

The damages alleged in Item #7 involve extra work performed by claimant in filling cracks in the wood beams placed for the ceilings in the lodge and cabins. Respondent required claimant to fill cracks in the beams in accordance with contract specifications for painting. Claimant stained the beams and contends that stain is not within the specifications. The Court has determined, upon reviewing the specifications, that filling cracks in the beams was unreasonable and a strained interpretation of the specifications.

As to Item #8 relating to the installation of the shower stalls, claimant alleges that shop drawings for the shower stalls were submitted to respondent, approved by the respondent, and the stalls were, in fact, installed by the claimant at the project. However, claimant was then required to remove these shower stalls and replace the same with another set of shower stalls which had to be ordered and then installed. This caused claimant delay in the work being performed and extra work as the new shower stalls had to be installed after removal of the first stalls. Claimant did not receive a credit for the first set of shower stalls from the supplier and was under the impression that respondent would sell the stalls and reimburse the claimant. The claimant has not received any payment for the first set of shower stalls.

Item No. 16 for liquidated damages was charged by the respondent against the claimant for 110 days at $50.00 per day for a total amount of $5,500.00. Claimant alleges that the delays causing the delay in completion of the project were the faulty of the respondent. These delays involved thefts of claimant's materials on the project when the gates to the park were not closed by respondent's personnel; the failure of respondent to remove the stumps in a timely manner; and problems with the approval of range hoods for the kitchens.

Donald Preast, Construction Supervisor for respondent at the time of this construction (from July 21, 1975 through August, 1976), testified that he observed the owner and general manager of claimant corporation, Elwin Aliff, at the construction site approximately five times during the time that he was assigned to the project. He kept a diary of his time at the site. Included in the diary were the number of people who worked on any given day for the duration oft the time during which he was on the project. He testified that there were many good days on which claimant could have worked but did not have personnel on the job. He stated that there were things that claimant's workmen could have been doing to bring the job to completion at an earlier date. He stressed the fact that this job lacked a superintendent, and the specifications required that a competent superintendent be on the job at all times. In addition, the specifications called for a schedule on the job, and there was no schedule to his knowledge. He explained that a number of items included in the claim were subject to force account procedures. The procedures for force account work are set out in the specifications of the contract. The items for which the claimant is entitled to extra compensation based upon change orders included repainting (Item #9), repairing and reflashing (Item #14), and the electrical contractors (Item #15). He stated that for force account, the contractor furnishes the name, labor, time, date, time slips, wage rate, and invoices for materials. The respondent admits the extra work was done although it has not been provided with invoices for labor and materials charged by claimant for these items and, therefore, has not been paid.

As to Item #11 for additional overhead arising out of delays on the project, the Court has determined that these expenses are too speculative in nature. The Court denies this item.

The Court finds from the evidence that claimant should be paid additional monies for this construction project. While claimant was partially at fault for failing to properly supervise this job and may have failed to follow the force account procedures set forth in the contract, it is unconscionable for the State to receive the benefit of the additional work claimant was required to perform without compensation.

The claimant is entitled to $774.00 for filling the beams, $3,600.00 for the extra shower stalls, $747.83 for the additional electrical work. $2,052.47 for the repair and reflashing of the cabin roof, $599.00 for separating the decks and ramps, and $4,300.00 for extra block and foundation work - for a total award of $12,073.30.

Award of $12,073.30.

OPINION ISSUED JULY 8, 1987

GREGORY S. HUFFMAN AND ALICIA HUFFMAN
VS.
DEPARTMENT OF HIGHWAYS

(CC-86-151)

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

PER CURIAM:

This claim was originally styled solely in the name of Gregory S. Huffman, but when the testimony indicated that the vehicle, a 1985 Ford Escort, was titled in the names of Gregory S. Huffman and Alicia Huffman, the Court, on its own motion, amended the style of the claim to reflect that fact.

Claimant Gregory Huffman testified that he was operating the vehicle on March 2, 1986, on Route 114 travelling toward Charleston, when the vehicle struck a pothole. He stated that the incident occurred at approximately 8:00 p.m., and visibility wa poor due to rain. He was travelling at approximately 35 miles per hour. As a result of the incident, a beauty ring and a wheel were damaged in the amount of $73.20

Claimant Gregory Huffman testified that he was familiar with this section of roadway as he had driven it every day for 13 years. He further stated that the hole was approximately 2 1/2 feet in diameter, and 12 to 16 inches deep. He stated, in reference to this hole, "It had been patched. I can only guess that the rain and the traffic over it had caused the patching material to come out os the hole."

The evidence in this record indicates that the defective condition of the pavement appeared suddenly and that the respondent had previously repaired the hole. *Moore vs. Department of Highways*, CC-85-153 (February 19, 1986). *Adkins vs. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947), holds that the State is neither an insurer nor a guarantor of the safety of the motorists on its highways. The Court is of the opinion that negligence on the part of the respondent has not been established, and therefore, the Court denies the claim.

Claim disallowed.

OPINION ISSUED JULY 8, 1987

WILLIAM C. HUNTER
VS.
DEPARTMENT OF HIGHWAYS
(CC-86-188)

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

PER CURIAM:

The claimant's wife, Martha Elizabeth Hunter, was operating her husband's vehicle in a westerly direction on Kanawha Turnpike, Kanawha County when the vehicle struck a pothole. The incident occurred on February 23, 1986, at approximately 12:15 a.m. It was dark and it had been raining earlier in the evening. The vehicle is a 1978 Dodge Omni. As a result of the incident, two rims and a tire on the automobile were damaged in the amount of $98.51.

Claimant's wife testified that she had picked up her daughter and a friend of her daughter at the skating rink in Kanawha City. The girls accompanied her in the vehicle. She stated that she was familiar with that section of the Kanawha Turnpike, and she had observed the pothole previous to the incident. She drove this route daily both at night and during the day. She noted that there were numerous potholes that had been patched. She had not notified respondent of the condition of the road.

Mr. Joseph L. Lilly, employed by the respondent as a foreman for the last six years stated that his duties include maintenance on the Kanawha Turnpike, which has a designation of Route 12. He had receive no complaints regarding this particular pothole.

The law of West Virginia is well established that the State is neither an insurer nor a guarantor of the safety of persons travelling on the highways. *Adkins vs. Sims*, 130 W.Va. 645, 45 S.E.2d 81 (1947); *Parsons vs. State Road Commission*, 8 Ct.Cl. 35 (1969). For the respondent to be found liable for damages caused by road defects of this type, the claimant must prove that the respondent had actual or constructive notice of the defect. *Davis Auto Parts vs. Department of Highways*, 12 Ct.Cl. 31 (1977). Since the claimant brought forth no evidence to that effect and did not meet the burden of proof, this claim is denied.

Claim disallowed.

OPINION ISSUED JULY 10, 1987

HARVEY H. BAUER AND SHIRLEY BAUER
VS.
DEPARTMENT OF HIGHWAYS

(CC-86-331)

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

PER CURIAM:

This claim was originally styled in the name of Shirley Bauer, but the testimony indicated that the vehicle, a 1986 Pontiac Grand AM, was titled in the name of Harvey H. Bauer and Shirley Bauer. The Court, on Ms. Bauer's motion, amended the style to include Harvey H. Bauer as an additional claimant.

Claimant Shirley Bauer testified that she was operating the vehicle in a northerly direction on Route 61 between Crown Hill and East Bank, Kanawha Count, when the vehicle struck a hole in the pavement. She was alone in the vehicle at the time. The incident occurred on August 24, 1986, at approximately 6:00 p.m. The weather was clear. The highway is a two-lane, blacktop road. It was not yet dark at the time of this incident. As a result of striking the hole, it was necessary to replace a wheel and cover and to have the automobile aligned in the amount of $158.70.

Claimant Shirley Bauer testified that the hole was in the travel portion of the highway. It was located in the northbound lane, the lane in which she was travelling. She described the hole as being a three foot by three foot section in the pavement. She estimated that she had been travelling in a straight path for approximately one hundred feet before her vehicle struck the hole. Ms. Bauer alleges that someone was placing a new culvert at this and other locations and had failed to place a warning sign. She admitted that she was not aware whether respondent, a utility, a contractor or some other individual was performing the work. She had not travelled the route recently, at the time of the incident, and had not complained of the defect to the respondent.

James P. Dingess, County Supervisor for the eastern half of Kanawha County with respondent, testified that he reviewed respondent records. Respondent had not been doing any work just immediately prior to the date of this incident. He further stated that on occasion, contractors and utility companies alter the surface of highway in this area.

The law of West Virginia is well established that the State is neither an insurer nor a guarantor of the safety of persons travelling on its highways. *Adkins vs. Sims*, 130 W.Va. 645, 45 S.E.2d 81 (1947); *Parsons vs. State Road Commission*, 8 Ct.Cl. 35 (1969). For the respondent to be found liable for damages caused by road defects of this type, the claimant must prove that the respondent had actual or constructive notice of the defect. *Davis Auto Parts vs. Department of*

Highways, 12 Ct.Cl. 31 (1977). Since the claimant brought forth no evidence to that effect and did not meet the burden of proof, this claim is denied.

Claim disallowed.

OPINION ISSUED JULY 10, 1987

ROY GENE CALDWELL
VS.
DEPARTMENT OF HIGHWAYS

(CC-86-348)

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

PER CURIAM:

On July 9, 1986, the claimant's automobile was parked on the north side of 3rd Street in Wayne, Wayne County, across the street from a Department of Highways' garage building. During a rain and windstorm, a part of the roof of the building became dislodged and struck claimant's automobile. He seeks $716.00 for the resulting damage.

Claimant stated that the roof in question was leaking, inferring that it was in bad condition, subject to being blown off in a windstorm. Claimant had purchased the automobile, a 1977 Volkswagen Sirocco, for $250.00. None of the work necessary for the repair of the automobile had been done at the time of the hearing.

Claimant stated that he has been employed by respondent as an Operator 2 since 1976. He usually parks his vehicle in the same place where he parked it at the time of this incident. He had never experienced problems in the previous occasions when he had parked the vehicle at this location. He had never made a complaint.

Mr. Donald H. Akers, the Wayne County Supervisor for respondent, testified that before this incident, he had not had any problems with the roof at the facility in question. He stated that on July 9, 1986, there was an unusual storm with rain and high winds.

There has not been a showing of any negligence on the part of the respondent. The Court is of the opinion to, and does, deny the claim.

Claim is disallowed.

OPINION ISSUED JULY 10, 1987

AMOS ESTEP
VS.
DEPARTMENT OF HIGHWAYS

(CC-86-359)

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

PER CURIAM:

On August 27, 1986, the claimant was operating his 1983 Chevrolet pickup truck in a northerly direction on Bull Creek, McDowell County, when the vehicle struck some large rocks. Claimant seeks $86.63, which amount represents the damage done to the wheel of the truck.

Claimant testified that he was travelling to Iaeger from his home in Mohawk. The road in question is a one-lane, blacktop highway. It was 2:00 p.m. or 3:00 p.m. and bright daylight. The accident occurred on a straight stretch of the road about 200 to 300 feet in length. Claimant stated that there was a coal truck approaching in the opposite lane. As the road is narrow, he drove his vehicle to the right side of the pavement and struck some rocks laying on the berm. He stated that bulldozing activity had taken place in that area. The equipment was not that of the respondent. The bulldozing operation had cause the rocks to slide onto the berm. He stated that the rocks "... was almost as big as a water bucket, and there was a couple or three of them."

Claimant further stated that he was aware that the rocks were at that location prior to the time which his vehicle struck them. He had alerted respondent to this hazard before this incident.

William A. England, County Supervisor - McDowell County, for respondent, testified that road 3/1 is a State local service road, and there is very little maintenance on it because it is very low priority. There are less than 50 vehicles a day on this highway. Respondent had not been doing any work in the vicinity of this incident immediately prior to August 27, 1986. Mr. England did not take any action when claimant reported the hazard. Priority roads are worked before low priority roads.

This Court has held in the past that if an independent contractor was engaged in the construction work, the respondent cannot be held liable for the negligence, if any, of such independent contractor. (*Harper vs. Dept. of Highways*, 13 Ct.Cl. 274 [1980])

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

Claim disallowed.

OPINION ISSUED JULY 10, 1987

MOORE BUSINESS FORMS
& SYSTEMS DIVISION
VS.
DEPARTMENT OF FINANCE & ADMINISTRATION

(CC-86-212)

James Ruziska, Sales Representative, appeared for claimant.
Robert D. Pollitt, Assistant Attorney General, for respondent.

PER CURIAM:

Claimants company seeks $437.82 for freight charges from the factory to Charleston, return freight, and the restocking charge for paper products ordered by the respondent. There was some confusion concerning this particular order, and this expense resulted from same.

The purchase order, dated October 2, 1984, stated a request for 499,200 8 1/2 x 11 one-part computer forms of green tinted paper for respondent. There was a typographical error on the purchase order as respondent intended to order only 160,000 forms. A credit of $1,800 was issued to respondent to cover the error. Claimant company shipped the number of forms indicated on the purchase order; however, the paper was white computer paper rather than the requested green-tinted paper. To rectify this additional problem, respondent agreed to keep the excess paper and sell it to other agencies. The freight company was supposed to pick up 160,000 forms, but picked up all 499,200 instead. Respondent admits liability in the amount of $176.18 for the original freight on the mistaken order of 499,200 copies.

Ms. Helen Kay Wilson, Manager of Administrative Services for respondent, testified that there was a typographical error made in the State contract order for this claim. She confirmed that the company picked up the entire 499,200 sheets of paper. She stated that respondent would not have incurred the restocking and return freight charges, but for the mistake of claimant company.

Virginia Shelton, Procurement Officer for respondent, testified that she made the arrangements to sell the 399,000 sheets to other agencies. She stated that she did not prepare the bill of lading for the freight company in this instance. The bill of lading determines the amounts of paper to be picked up by the freight company.

There was no explanation as to whether the claimant issued the order to the freight company for the bill of lading. Claimant's sales representative, James Ruziska, has no knowledge whether claimant's factory prepared the bill of lading or whether it was prepared by Overnight, the freight company.

The evidence in this claim is unclear as to the origin of the error and which party was responsible for same. There being no proof that the claimant made this error, the Court grants an award to the claimant company in the amount of $176.18.

Award of $176.18.

OPINION ISSUED JULY 10, 1987

WEST HAMLIN VOLUNTEER
FIRE DEPARTMENT, INC.
VS.
STATE FIRE MARSHAL

(CC-86-349)

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

PER CURIAM:

Claimant, West Hamlin Volunteer Fire Department, Inc., alleges that the respondent, the State Fire Marshal, wrongfully denied it a share of funds distributable from municipal pensions and protection funds for the fiscal year 1985086. Certified similar fire departments had each received $4,575.93. The funds are provided by a State tax on fire and casualty insurance premiums.

In W.Va. Code §33-3-14d (b), the State Fire Marshal, "... Before the first day of August ... of each calendar year ... is required to report to the state treasurer the names and addresses of all volunteer and part volunteer fire companies and departments within the state which meet the eligibility requirements established in W.Va. Code §8-15-8a." One of the requirements therein is that:

> "Each volunteer or part volunteer fire company or department must: (a) Submit and maintain current submission of fire loss data to the state fire marshal, including verification via notary public, if no fire loss has occurred;"

The State Fire Marshal provides forms for the filing of monthly reports for satisfying this requirement and forms for applying for certification. Claimant had timely filed its application for certification.

Walter Smittle III, the State Fire Marshal, testified that he had not certified the claimant for a share of the fund because he had not received reports from the claimant for the months of February, March, April and May of 1986, when he submitted his certification to the State Treasurer on July 30, 1986, for the fiscal year 1985-86. Respondents' exhibits included copies of reminder notices to the claimant that reports had not been filed for (a) the months of July and August of 1985 and (b) the months of September, October, November and December of 1985 and for the month of January 1986. No testimony revealed when either of these notices was sent to the claimant. At some time, the reports for these months were apparently filed. No such reminder notice was apparently sent to claimant by the State fire Marshal with reference to the reports not being on file for February, March, April and May 1986. No such reminder notice was required to be given.

By letter dated August 5, 1986, the State Treasurer had advised the claimant that it had not been certified; that it was not too late to get certified; that a final determination would be made about August 20, 1986. Under the statute [W.Va. Code §33-3-14d (b)], it was then too late, for the first day of August had passed and the certification had been made. Nevertheless, the claimant's Captain Everett Adkins had made a trip to Charleston and hand delivered the missing reports to the office of the State Fire Marshal on August 20, 1986. He testified that the reports then prepared and filed were not prepared from any file copies of reports which had been previously prepared for the missing months.

It is the burden of a claimant to present its case. No witness testified that the reports for the missing months had been timely filed or mailed by the claimant. A claimant's exhibit, computer prepared in the State Fire Marshal's office, for the period January 1, 1986 to September 30, 1986, showed incidents reported by the claimant fore each of the first six months of 1986; but of course the reports filed late by claimant, on August 20, 1986, would be reflected in this exhibit, so it does not establish that the reports for the missing months were timely filed.

Although the Court is aware of the fine service which is provided by volunteer fire departments, such as this claimant, the Court must, upon the testimony and exhibits presented and upon the applicable statutes, deny this claim.

Claim disallowed.

OPINION ISSUED JULY 10, 1987

W. MARSHALL PETTY AND PATRICIA A. PETTY
VS.
DEPARTMENT OF HIGHWAYS

(CC-86-393)

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

PER CURIAM:

Claimants seek an award of $300.00 for damage to the lawn of their residence by respondent's heavy snow removal equipment on February 7, 1985. Claimants' residence is located at the end of a street in the Dunbar area of Union District in Kanawha County, the street being a part of the State highway system.

Upon his arrival at his residence from work on the day in question, claimant W. Marshall Petty had observed that the street, ending at his residence had been plowed by snow removal equipment and had also observed large tire tracks in the snow on the lawn of his residence. Later, when the snow had melted, deep tire track damage to the lawn was apparent as shown in photographs placed in evidence. The claimants had paid $300.00 to a landscaping firm for its repair and restoration of the damaged area.

Paul Little, who was foreman of respondent's North Charleston facility, testified that records showed that snow removal equipment was operating in the area of claimants' residence on the stated day.

There was no witness to the actual plowing of the street. The tire tracks portrayed in the photographs were obviously those of heavy equipment and not those of a truck or passenger vehicle. The Court concludes that the respondent's snow removal equipment did the damage to the claimants' lawn and makes an award in the amount of $300.00.

Award of $300.00.

OPINION ISSUED JULY 10, 1987

VAN VOLUNTEER FIRE DEPARTMENT
VS.
STATE FIRE MARSHAL

(CC-86-353)

Francis M. Curnutte, III, Attorney at Law, for claimant.
Robert D. Pollitt, Assistant Attorney General, for respondent.

GRACEY, JUDGE:

Claimants applied for revenue allocated from the Municipal Policemen's and Firemen's Pension and Relief Funds (W.Va. Code §33-3-14d) in April 1986. It is alleged that the application and the necessary fire reports were not timely received by the State Fire Marshal. Claimant was not certified to the Office of the State Treasurer. The claimant seeks $4,575.93, the amount of funds which it would have received had it been properly certified.

Walter Smittle III, the State Fire Marshal, testified that the Van Volunteer Fire Department was not certified to receive the funds mandated by W.Va. Code Chapter 33. He stated that the Van Volunteer Fire Department failed to supply his office with the necessary information required by W.Va. Code §8-15-8a. The State Fire Marshal's office sent a duplicate application to claimant on June 12, 1986. His office also sent statements indicating that the fire reports were missing in October, 1985 and in February, 1986. The reports for August, 1985 and April and May, 1986 were never received by the State Fire Marshal's office.

Robert J. Jarrell, Assistant Chief of the Van Volunteer Fire Department, testified that he is familiar with the day-to-day activities of the claimant. He stated that he has had problems mailing documents to the State Fire Marshal's office which the Fire Marshal's office claims it has not received. He has personal knowledge concerning the application in question as he saw the receipt from the postal system indicating that the application was sent on April 23, 1986. He stated that a second application was completed and mailed, but he has no record of the mailing. There are no records of the filings of the August, 1985, or April and May, 1986 fire reports.

James Mark Long, recording secretary for the Van Volunteer Fire Department, testified that he fills out the fire reports. He stated that he filled out an application for 1986 and sent it by mail to the State Fire Marshal. After notice was received from the Fire Marshal, he completed a second application and mailed it. However, he has not record of when he mailed the second application. He stated, too, that he completed and sent the fire reports which respondent alleges it did not receive. After notice was received, he mailed the fire reports a second time. Mr. Long has been recording secretary for six years. This is the first instance, to his knowledge, since he has been the recording secretary, that the funds were not received by the claimant.

It is the opinion of the Court that it cannot, in good conscience, deny these funds to the claimant. The claimant has shown that it made a good faith effort to comply with the regulations of W.Va. Code §8-15-8a. The Court, therefore, makes an award to the claimant in the amount of $4,575.93.

Award of $4,575.93.

OPINION ISSUED JULY 21, 1987

ESTA M. ADKINS, ADMINISTRATRIX OF THE
ESTATE OF CECIL ADKINS, JR., DECEASED
VS.
DEPARTMENT OF HIGHWAYS

(CC-77-18)

Robert Losey, Attorney at Law, for claimant.
Andrew Lopez, Attorney at Law, for respondent.

GRACEY, JUDGE:

Claimants Esta M. Adkins brought this action as Administratrix of the Estate of Cecil Adkins, Jr., her husband, who dies in a single-vehicle accident on August 26, 1976.

The accident in which claimant's decedent died occurred on Mud River Road, also known as Little Seven Mile Road. The road is designated as Local Service Route 19 and is located near Huntington, in Cabell County. The vehicle involved in the incident was a 1968 Plymouth automobile owned by claimant and/or the decedent. The evidence is not clear as to whether Cecil Adkins, Jr. or the other individual in the vehicle, Ernest Ball, was operating the vehicle. The vehicle went over an embankment, whereupon it struck an exposed gas line owned by Cumberland Gas Company. The gas line apparently ruptured and ignited with the flames engulfing the interior of the vehicle. Cecil Adkins, Jr. and Ernest Ball were burned beyond recognition and died.

Claimant alleges that the failure of respondent to properly mark this section of Mud River Road, where there was no berm and where an embankment was at the edge of the paved portion of the road, constituted negligence which was the proximate cause of the death of claimant's decedent. Claimant alleges damages in the amount of $500,000.00.

The evidence revealed the following facts. Claimant's decedent, Cecil Adkins, Jr., and a coworker, Ernest Ball, were employees of Tri-State Materials Corporation. Mr. Adkins was the pilot of a tugboat for the corporation. On the day of this accident, Adkins left his home in Huntington, West Virginia, at approximately 5:20 a.m. to go to work in Lesage, West Virginia. He picked up Ernest Ball, and the two of them intended to pick up another coworker, Sam Chapman, who lived on Mud River Road approximately one mile from the site of the accident. Claimant was unfamiliar with this road having last been in the area approximately five or six years previous to 1976. At the scene of the accident there was a section of road which was subject to slide conditions. The ground adjacent to the edge of the pavement had continuously broken away until the edge of the pavement was at the break of the slide area. There was no berm. Weeds had grown up at the edge of the pavement and extended above the pavement approximately eighteen inches. In an attempt to remedy the slide problem, the respondent had widened the road on the left side of the orad by grading along a hillside. This widened portion of the road was also paved. The stretch of road before this particular area was curved and on an upward grade. There were three signs on the stretch of road previous to the side area. One of the signs was a "ONE LANE ROAD AHEAD" sign, one was a reverse curve sign, and one was a 45 mile-per-hour speed limit sign. There was also a small barricade sign before the curve in which the slide was located. There is no evidence as to actual barricade signs or warning paddles at the point of the slide area. A charred paddle was found beneath the vehicle, but it is now known if the paddle was in place at the time of the incident. The Adkins vehicle, for reasons unknown, went off the paved portion of road at the slide area. The gas line which was exposed was struck by the vehicle and ruptured, resulting in the death of the two men.

On the date of the accident, respondent's employee, Ralph Aills, the sign shop supervisor for District Two, was assigned the task of reviewing the signs on Local Service Route 19 at the accident scene. He filed a report which is in evidence in this claim. His report contained a diagram of the signs and the relationship of the signs with the accident site. The first three signs were fairly close together. The first sign is the "One Lane Road Ahead" sign; next is the reverse curve sign; then a 45 mile-per-hour speed limit sign. Approximately 226 feet further towards the accident scene was a small orange and white barricade paddle located at the beginning of the curve and approximately 300 to 500 feet from the slide area. The paved portion of road was 20 to 22 feet wide in the curve where the slide was located. As described previously, the road has been carved out of the hillside on the left side.

It is the opinion of the Court that the respondent fulfilled its duty to maintain the road in the area of the slide by widening the road for the travelling public. There was also evidence that the respondent has placed barricade paddles at the side area although the evidence is unclear as to whether a barricade paddle was present at the time of this accident.

The reason the driver of the vehicle proceed off of the travel portion of the road is unknown. This Court will not resort to speculation. See: *Arthur vs. Dept. of Mental Health*, 12 Ct.Cl. 124 (1978), and *Charles vs. Dept. of Highways*, CC-83-356, (Dec. 12, 1986).

The Court is not unmindful of the tragedy which occurred, nor of the inherent impulse for compassion. However, the Court, for the reasons stated above, is of the opinion to, and does, deny this claim.

Claim disallowed.

OPINION ISSUED JULY 21, 1987

RUTH ANN COOPER
VS.
DEPARTMENT OF HIGHWAYS

(CC-87-14)

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

PER CURIAM:

On December 22, 1986, at approximately 8:00 p.m., claimant was operating her 1986 Buick Regal on Route 3, in Boone County. The vehicle was approximately 10 miles from Racine when it ran through a pothole damaging the rim, hubcap, and tire in the amount $210.81.

Claimant testified that Route 3 is a two-land, blacktop road. It was dark and dry at the time of this incident. She stated that she was operating her headlights. There is a berm of perhaps one and one-half feet at the location of this incident. Mrs. Cooper testified that there was a series of potholes near the berm on the right side of the road, which claimant dodged prior to the vehicle striking the pothole which damaged her automobile. She stated that the pothole was 15-20 inches wide, 25 inches in length, and 8-9 inches deep. She does not travel this route frequently and was unaware of how long this particular hole had been in existence.

This Court has repeatedly held that respondent is neither an insurer nor a guarantor of the safety of travellers on its highways. However, the respondent does have a duty of using reasonable care and diligence in the maintenance of its highways. In the case of a heavily travelled, major highway in this State, the Court has held respondent liable for failure to repair a pothole of this size as it cannot have developed overnight. See: *Stone vs. Dept. of Highways*, 12 Ct.Cl. 259 (1979) and *Bolyard vs. Dept. of Highways*, CC-86-195 (Opinion issued December 12, 1986). The pothole

is of such dimensions that the respondent had constructive notice. The Court, therefore, makes an award to claimants in the amount of $210.81.

Award of $210.81.

OPINION ISSUED AUGUST 10, 1987

ANAWALT WESLEYAN CHURCH,
PASTOR JAMES BARNARD
VS.
DEPARTMENT OF HIGHWAYS

(CC-86-401)

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

PER CURIAM:

This action was filed to recover the cost of repair ($2,810.10) to a rented vehicle, the damage to which occurred as the result of an accident on December 7, 1985. Claimant failed to name the respondent agency when the action was filed. The Court, upon its own motion, amended the style to include the Department of Highways as the proper party respondent.

The Reverend James Barnard, incoming pastor of the Anawalt Wesleyan Church, was moving to Anawalt, McDowell Count, from Cincinnati, Ohio, at the time of the accident. A truck was rented from Budget Rent-A-Truck, Budget Rent-A-Car. He assumes that the contract for this transaction was in the name of Kim E. Dewhurst, his brother-in-law. Mr. Dewhurst was the driver of the truck, but he was not present at the hearing.

Mr. Barnard, driving his own vehicle, and Mr. Dewhurst, driving the rental truck, were travelling in a northwest direction on Jenkin Jones Road, at approximately 11:30 p.m. It was dark. Mr. Barnard was proceeding ahead of the rental truck at a distance of approximately 150 feet. The highway is a blacktop road and is approximately a lane and a half in width. Mr. Barnard drove his vehicle under a railroad underpass without any problems. However, the truck was unable to clear the trestle, and damage occurred to the truck. Negligence is alleged on the part of respondent for its failure to place a warning sign as to the height of the underpass at this location.

Mr. Charles Raymond Lewis II, Planning and Research Engineer for respondent, testified that part of his duties is posting signs on the various State roads. He stated that it is not mandatory that clearance signs be posted on every road. He further stated that signs are posted on

roads such as Jenkin Jones Road, which is McDowell County Route 8, when a specific complaint is received. He has no knowledge of any requests to post this particular underpass. He is unaware of any requirement that all underpasses under a particular height be mandatorily posted.

Adkins vs. Sims, 130 W.Va. 645, 46 S.E.2d 81 (1947) determined that the failure of the State Road Commissioner to provide guardrails, place road markers or danger signals, and paint center lines on paved highways does not provide a moral obligation on the State to compensate a person injured on such highway. For this reason, the Court is of the opinion to, and does, deny the claim.

Claim disallowed.

OPINION ISSUED AUGUST 10, 1987

RONDUS JIVIDEN
VS.
DEPARTMENT OF HIGHWAYS

(CC-86-452)

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

PER CURIAM:

On November 9, 1986, the claimant's daughter, Monica Jividen, was driving the claimant's 1981 Chevette on State Route 35 near Shawnee Estates, Putnam County, when the vehicle struck water standing on the highway. The vehicle overturned and sustained damage. Claimant seeks $2,338,87. The daughter of the claimant originally filed the claim in her name. However, the record reflects that the father, Rondus Jividen, was the titled owner of the vehicle. The Court, upon the motion of Ms. Jividen, has amended the style of the claim to name Rondus Jividen as the proper party claimant.

Claimant's daughter testified that this incident occurred at approximately 5:00 a.m. She was en route from her home in Winfield to her job in Charleston. The roads were wet as it had been raining earlier, and it was dark. The highway in question is blacktop. She had travelled this route daily for a year prior to this incident. She had not observed "real high" water at this location prior tot he accident. She stated that the water covered the entire width of the road and was between five and ten feet long.

Donald Adkins, General Foreman for respondent in Putnam County, testified that he received word of this incident at approximately 8:00 a.m. on the day it occurred. He stated that on the day before this incident, to his knowledge, the road was clear. The first notification he had of a problem at his location was on the day of this incident.

Michael D. Stone, County Maintenance Superintendent for respondent in Putnam County, testified that he did not receive any complaints of high water on Route 35 in Winfield prior to this incident.

The State neither insures nor guarantees the safety of motorists travelling on its highways. *Adkins vs. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). For the respondent to be found liable for road defects of this type, the claimant must prove that the respondent had actual or constructive notice of the defect. *Davis Auto Parts vs. Dept. of Highways*, 12 Ct.Cl. 31 (1977). The claimant did not meet the burden of proof; therefore, this claim must be denied.

Claim disallowed.

OPINION ISSUED AUGUST 10, 1987

SURSHEL C. LACY
VS.
DEPARTMENT OF FINANCE & ADMINISTRATION

(CC-87-111)

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

PER CURIAM:

On November 2, 1985, claimant attended a public auction of the West Virginia Department of Finance and Administration, Surplus Property Division. He bid on a 1976 GMC pickup truck. His bid was accepted, and he paid $725.00 for the vehicle. He drove the truck to his home in Ravenswood on November 13, 1985. subsequently, he determined that the truck had a cracked motor block which he alleges was a defect in the vehicle at the time of purchase. He seeks $1,151.29.

Claimant testified that he is an automobile mechanic. He did not have the opportunity to inspect this vehicle before he bought it. He alleges that respondent attempted to cover the crack in the motor block with epoxy. He used the interstate on the trip back to Ravenswood, and did not experience any problems with the truck. On that day. he changed the oil. In March of 1986 he drove

the truck to and from a motor service garage. Other than these two instances, he has moved the truck only to cut the grass. He stated that he did not put the epoxy on the manifold of the truck.

Mr. Roy Headley, Shop Foreman for Motor Service Garage in Ravenswood, testified that he has been a mechanic for twenty-three years. He inspected claimant's vehicle on March 24, 1986 and observed that someone had use epoxy to seal a crack in the motor block. It appeared to Mr. Headley that the epoxy had been placed there to cover up a crack in the block. He estimated that the cost of putting a rebuilt motor in the GMC truck is $976.80. He was unable to state whether the epoxy substance could have been placed on the motor block for a period of more than four months or five months.

George Afflerbach, Director of the Department of Finance and Administration's Surplus Property Division, testified that during the week prior to an auction, the public is given the opportunity to inspect everything that is for sale. He stated that his staff does not repair vehicles unless somebody demonstrates an interest in a particular vehicle and it would help to sell the vehicle. His agency did not make any repairs to the vehicle in question, such as placing epoxy upon the block.

Anthony Nichols, mechanic with the Surplus Property Agency, testified that it is rare for him to do an inspection or repair of the vehicles for the auctions. He estimates that approximately 800 vehicles a year come through Surplus Property for sale. To his knowledge, he has not repaired any cracked blocks in engines on vehicles placed for sale by Surplus Property.

The Court, in good conscience, cannot deny this claim. although there has been no evidence showing that respondent was aware of the crack in the manifold of the vehicle which it sold, a crack was present at the time of sale. To deny this claim, the Court would permit unjust enrichment. The Court is of the opinion to, and hereby, awards the claimant the amount paid for the vehicle, $725.00.

Award of $725.00.

OPINION ISSUED AUGUST 10, 1987

APRIL LYNN MARTIN
VS.
DEPARTMENT OF HIGHWAYS

(CC-86-304)

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

PER CURIAM:

On February 18, 1986, between 7:00 a.m. and 8:00 a.m., the claimant was operating her 1985 Dodge Omni on Route 60 near Amandaville in St. Albans, West Virginia, when her vehicle struck a pothole. Claimant seeks $134.58, which amount represents the damage to the vehicle. The Court, on its own motion, amended the style of the claim to designate the Department of Highways as the proper party respondent.

The claimant testified that she was travelling to work at approximately 45 miles per hour. She cannot recall the weather conditions at the time of this incident, but does remember that it was not raining. The highway is a four-lane road. She was initially proceeding in the driving lane, but due to the presence of potholes, she drove her vehicle into the left, or passing, lane. It was a this point that her vehicle struck a pothole located in the alternate lane. She did not see the hole before her vehicle struck it. She travels this route daily, but had not observed this hold on previous occasions.

The law of West Virginia is well established that the State is neither an insurer nor a guarantor of the safety of persons travelling on its highways. *Adkins vs. Sims*, 130 W.Va. 645, 45 S.E.2d 81 (1947); *Parsons vs. State Road Comm'n.*, 8 Ct.Cl. 35 (1969). For the respondent to be found liable for damages caused by road defects of this type, the claimant must prove that the respondent had actual or constructive notice of the defect. *Davis Auto Parts vs. Dept. of Highways*, 12 Ct.Cl. 31 (1977). Since the claimant brought forth no evidence to that effect and did not meet the burden of proof, this claim is denied.

Claim disallowed.

OPINION ISSUED AUGUST 10, 1987

LINDA ELAINE MOORE
VS.
DEPARTMENT OF HIGHWAYS
(CC-86-450)

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

PER CURIAM:

Claimant seeks an award of $6,000.00 for damage to her property located at Lick Creek, Boone County, in the vicinity of Danville, West Virginia. Claimant alleges that respondent's negligent installation of a bridge at that location resulted in erosion to her property.

Claimant testified that she owns approximately one acre of property with 45-50 feet of frontage on Lick Creek. A bridge crosses Lick Creek in front of claimant's property. Lick Creek flows between claimant's property and Lick Creek Road. Claimant stated that there is an area on her property of approximately 46 feet in length which has been eroded by the Lick Creek. This eroded area has cut back into her property approximately four feet. She attributed the erosion to the lack of an adequate retaining wall adjacent to the bridge abutment.

Claimant stated that Lick Creek Road is a two-lane, blacktop road. The bridge is one lane and is seven or eight feet long and is made of concrete with steel siding and rails. There are very large stones placed along the bank adjacent to the abutment.

Claimant testified that in November of 1986, when the area had very high water due to torrential rains, the water flowed across the bridge as the space beneath the bridge was not adequate to carry the water. Prior to that time she had not experienced erosion on her property. She stated that debris, limbs and rocks gather under the bridge. The creek is normally approximately ten inches deep and three feet wide.

Claimant stated that the bridge was in the same location in December of 1984 as it is today. She also confirmed the fact that the creek bank has not been altered since December, 1984. She agreed that the eroded section is located on her property and not on respondent's right-of-way. She stated that she entered the creek, took the stone, placed the stone against the bank, and then poured cement on top of this stone. She did this in an attempt to alleviate the erosion to her property.

Dale Edward Blount, Maintenance Assistant in Boone County for respondent, testified that he and David Starcher visited claimant's property on November 18, 1986, at her request. He took photographs and observed the erosion on the bank of claimant's property. He returned later in December with equipment and attempted to clean out debris from under the bridge. However, he was unable to do so due to lack of access to the creek.

He reviewed the bridge inspection reports for the years 1977, 1980, 1983 and 1986. From these reports, he discerned that the house was constructed after the bridge. The 1986 report features the house. He stated that he observed no damage to the bridge from water. He also stated that at the time he inspected claimant's property and took the photographs, the lawn went all the way to the creek bank.

Joseph Thomas Deneault, Assistant District Maintenance Engineer for District 1 for respondent, testified that he is familiar with the bridge which is the subject to this action. He stated that the alignment of the creek is the same today as it was in 1976 when he first observed it. However, he stated that the configuration of the bottom and sides of the creek have changed. In his professional opinion, this bridge is in the correct alignment for the creek. He stated that the stream alignment in October of 1977, when the bridge was inspected, is the same as it is today. He noted that to his knowledge, since 1976, the respondent has done nothing to alter the stream bank or the channel. It is his opinion that the preparation of the property in advance of construction of the house led to the erosion of the bank of claimant's property.

After careful consideration of all of the evidence presented, the Court concludes that the damage to claimant's property did not result from lack of maintenance of the bridge. It is apparent that other factors, including excessive rainfall and the preparation of claimant's property for construction, contributed to the water problems. As there was no negligence established on the part of the respondent, the Court must disallow the claim.

Claim disallowed.

OPINION ISSUED AUGUST 10, 1987

JOHN R. KUSHNER & SHERYL KUSHNER
VS.
DEPARTMENT OF HIGHWAYS

(CC-86-319)

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

PER CURIAM:

On July 20, 1986, at approximately 7:45 p.m., claimant Sheryl Kushner was operating her 1982 Cutlass Cierra on Route 21/38 about 1.4 miles from the Goldtown Exit on Route 21.38 when her vehicle became stuck in gravel and incurred damage in the amount of $177.75. Claimant Sheryl Kushner originally filed the claim in her own name against the West Virginia State Department of Highways. However, the record reflects that the vehicle is titled in the name of both John R. Kushner and Sheryl Kushner. The Court, upon its own motion, amended the style to include John R. Kushner as a party claimant and the Department of Highways as the proper respondent.

Claimant Sheryl Kushner testified that she was alone in the vehicle at the time of the incident. As she was negotiating the turn onto Route 21/38, the vehicle sunk into the gravel on the

road. She was travelling at approximately 20 miles per hour. The gravel extended across the blacktop road which is about 30 feet wide. She stated that heavy equipment had been hauled through his area. Her entire vehicle went into the gravel, and the impact stopped its movement. She contacted respondent's office at Ripley and was informed that respondent had been using Route 21/38 to haul heavy equipment to a dam site. She had driven in this area two weeks previous to this incident, but had not experienced any problems.

Mr. Jackie L. Rhodes, son-in-law of the claimants, testified that he travelled the area on the Friday before claimant's Sunday accident. At that time, he observed respondent's crews working. There were no markings, barricades or identification of the holes. On Sunday evening, the condition of the roadway was essentially the same, but the edges of the road had been graded.

Mr. Dale Casto, respondent's County Maintenance Supervisor for Jackson County, testified that a federal dam was being erected in this location and suppliers of material for that project were using the road in question. Route 21/38 was affected in that its base was lost in a number of spots. The respondent was in this area doing repairs on the road on the 15th and 16th. He was not aware of any complaints until Mr. Rhodes informed him of this incident.

It is the opinion of the Court that respondent was negligent in failing to warn the travelling public of a hazardous condition. See: *Smith vs. Dept. of Highways,* CC-85-320 (April 30, 1986). The Court therefore makes an award to claimant in the amount of $177.75.

Award of $177.75.

OPINION ISSUED AUGUST 10, 1987

WEST VIRGINIA SAFETY COUNCIL, INC.
VS.
DEPARTMENT OF HIGHWAYS

(CC-87-50)

John F. Bennett, Representative, appeared for claimant.
Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

Claimant, by purchase orders dated 12/18/84 and 5/13 85, agreed to provide respondent with materials for the periods of time of January 14, 1985 - March 15, 1985 and May 1, 1985 - December 30, 1985. Included in these materialize were three training films. These films were not returned to claimant, and claimant now seeks $300.00 as reimbursement for the films.

John F. Bennett, Executive Director of the West Virginia Safety Council, Inc., testified that films are not purchased under a training program, but only leased for a one-year period of time. When the initial purchase of a training program kit is made, the one-year lease is included. He submitted a copy of the order form identifying the one-year lease and a page from an NSC catalogue which clearly identifies it as a film lease. He stated that he had supplied these documents to respondent's employee, John Sinfield. Mr. Bennett agreed that respondent paid $16,500.00 for the materialize and instruction which included a postage or freight charge.

Respondent offered no evidence to dispute the fact that the films in question were not returned to the claimant. Respondent failed to prove that the missing films were to a part of the materials and instruction provided the agency and need not be returned to the claimant. The Court therefore makes an award in the amount of $300.00.

Award of $300.00.

OPINION ISSUED SEPTEMBER 24, 1987

FRANK B. BROWN
VS.
DEPARTMENT OF HIGHWAYS

(CC-86-270)

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

PER CURIAM:

Claimants seeks compensation from the respondent for damages sustained in his GS 750 Suzuki motorcycle after striking a pothole.

The claimant lives in Jeffrey, West Virginia. At approximately 12:00 noon on June 8, 1986, he was travelling west on Route 17 in the direction of his home. The pavement was dry. There was a pothole extending approximately 12 inches from the berm into the roadway. The hold was approximately a foot deep. The claimant testified that he was travelling at approximately 50 miles an hour when the motorcycle struck the pothole. The motorcycle sustained damages in the amount of $761.19. The claimant further testified that he travelled the road daily and knew of the existence of the hold. He had not notified respondent of the present of the pothole.

The State is neither an insurer nor guarantor of the safety of persons travelling on its highways. *Adkins vs. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). For negligence of the respondent

to be shown, proof of notice of the defect in the road is required. *Davis Auto Parts vs. Dept. of Highways*, 12 Ct.Cl. 31 (1977). Although the hole, by its size, is indicative of the constructive notice of respondent, the Court is of the opinion that the claimant, with his prior knowledge of the condition of the road, was likewise negligent. He travelled the road daily and knew of the existence and location of this pothole. Under the doctrine of comparative negligence, the Court is of the opinion that the claimant's negligence was equal to or greater than the respondent's and disallows the claim. See also *Edwards vs. Dept. of Highways*, 14 Ct.Cl 354 (1983).

Claim disallowed.

OPINION ISSUED SEPTEMBER 24, 1987

CITY OF FAIRMONT
VS.
DEPARTMENT OF HIGHWAYS

(CC-86-238)

No appearance by claimant.
Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted for decision upon the pleadings and written stipulation. The claimant and respondent agreed to the following facts: The claimant is a municipal corporation furnishing fire protection as an essential municipal service for which it may impose a fee. The claimant property adopted Ordinance Numbers 583 and 636, which provided for the collection of a fire protection service fee. *City of Fairmont vs. Yaneros*, Civil Action No. C-260-M, held that Ordinance 583 was constitutional and enforceable. The claimant has applied its aforesaid ordinances in a constitutional manner. The respondent was a user of the essential municipal service of fire protection and has failed to pay fees. The claimant properly calculated the sum of $1,632.40 as the amount due on Account No. 35-31123440 for the period of July 1, 1984. to June 30, 1986. The parties hereto agree that the amount stipulated as damages is a settlement of all losses arising from or growing out of the matter as referred to in claimant's Notice of Claim. Both parties stipulate that the style of the claim should be amended to City of Fairmont vs. Department of Highways.

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

Award of $1,632.40.

OPINION ISSUED SEPTEMBER 24, 1987

LONNIE EDWARD FARLEY
VS.
DEPARTMENT OF CORRECTIONS

(CC-77-6)

William L. Jacobs, Attorney at Law, for claimant.
Robert D. Pollitt, Assistant Attorney General, for respondent.

WALLACE, JUDGE:

Claimant Lonnie Edward Farley brought this claim to recover damages for personal injuries which he received in an accident which occurred when he was being transported in a van operated by an employee of the respondent. Claimant alleges that the accident occurred due to negligence on the part of the driver of the vehicle.

The accident occurred on April 17, 1975, while claimant was being transported from Moundsville, West Virginia to Huttonsville, West Virginia. At the time of the accident, claimant was incarcerated at Huttonsville Correctional Facility. He was shackled to another inmate, Albert Martin. There were three other inmates in the vehicle and two guards, one of whom was operating the vehicle. The vehicle was described as being a large capacity van with seating available for 12-16 passengers. The seats were arranged similar to a mini-bus, i.e., seats for two individuals on each side with an aisle between the seats. There was a screen partition between the front seat for the driver and the ear seats. Claimant was sitting in the second seat on the left behind the driver of the van. There was two inmates in the first seats. Claimant testified that the driver was operating the van at a high rate of speed. He stated that he requested the driver to slow down. He also indicated that he viewed the speedometer by standing up and looking over two passengers and through the screen partition. The speedometer reading was between 80 and 85 miles per hour. He indicated that the other inmates "were screaming to Mr. Nestor trying to get him to slow down... ." The accident occurred south of Philippi, West Virginia, on W.Va. Route 250, at approximately 5:00 to 5:30 p.m., when a vehicle approaching in the northbound lane veered into the southbound lane striking first a pickup truck and then the van in which claimant was a passenger. The van rolled over and ended up on its top. The claimant and other passengers crawled through a window. Claimant was taken to the hospital for treatment of a broken collarbone.

The testimony of the driver of the van, Robert C. Nestor, indicated that he was operating the van at approximately 45-50 miles per hour when he observed a station wagon approaching in the northbound lane ver suddenly into the southbound lane. It struck a pickup truck and then hit the van which Mr. Nestor stated he had driven partially onto the berm in an attempt to avoid a collision.

The police report prepared by the investigating officer, Stephen B. Cross, was placed into evidence by the parties. This report reveals that the northbound vehicle, for unknown reasons, left the proper lane and struck both the pickup truck and the van in which claimant was a passenger. No improper driving on the part of respondent's employee was noted in the report.

The Court, having reviewed the evidence, is of the opinion that the accident in which claimant was injured was not proximately caused by any negligence on the part of respondent's employee. Therefore, the Court must deny this claim.

Claim disallowed.

OPINION ISSUED SEPTEMBER 24, 1987

MAXINE FRASER
VS.
DEPARTMENT OF HUMAN SERVICES
(CC-86-261)

JOE HOLLAND CHEVROLET, INC.
VS.
DEPARTMENT OF HUMAN SERVICES
(CC-86-344)

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

PER CURIAM:

Claims CC-86-261 and CC-86-344 were consolidated for hearing. During the afternoon of June 26, 1986, a 1986 Chevrolet Nova owned by Joe Holland Chevrolet was unloaded from a tractor-trailer at the car lot which is in the vicinity of "E" Street, South Charleston, West Virginia. Before this vehicle could be moved to another location on the lot, a minor, Warren Johnson, attempted to steal the automobile. In his attempt at theft, the juvenile backed the automobile across a public alley, whereupon the vehicle struck and damaged a fence and garbage cans owned by Maxine Fraser, who resides at 200 - 9th Street. Claimant Joe Holland Chevrolet, Inc. seeks $579.97 for damage to the automobile. Claimant Maxine Fraser weeks $584.40 for damage to her property.

The Court, upon its own motion, amended the style of the claim to reflect the proper party respondent, The Department of Human Services.

The claimants allege that there is liability on the part of the respondent because the minor child, Warren Johnson, was a ward of the State at the time of this accident. Mr. Terry Ballard, a social service worker for respondent, confirmed that the juvenile has been under the agency's custody since 1982. He stated that the juvenile was actually in the custody of Braley and Thompson, a private child care agency under contract with respondent. The juvenile was assigned to a foster care home. Braley and Thompson was responsible for him while he was in that facility.

In order for the Court to make awards in these cases, there must be a showing of negligence on the part of the respondent. See: *The Party Beer Store vs. Dept. of Welfare*, 14 Ct.Cl. 407 (1983). As the record lacks evidence of any such negligence, the Court denies the claims.

Claims disallowed.

OPINION ISSUED SEPTEMBER 24, 1987

EVERETT C. McPHERSON, ADMINISTRATOR DBN
OF THE ESTATE OF LOSSIE J. McPHERSON, EXECUTOR
OF THE ESTATE OF CLYDE McPHERSON
VS.
DEPARTMENT OF HIGHWAYS

(CC-80-229)

J. Robert Rogers, Attorney at Law, for claimant.
Andre Lopez, Attorney at Law, for respondent.

WALLACE, JUDGE:

This claim was originally filed in the name of Clyde McPherson, Administrator of the Estate of Lossie J. McPherson, deceased, and Clyde McPherson, individually. At the hearing, counsel for the claimant informed the Court that Clyde McPherson is now deceased, and counsel requested that the style be amended to reflect Everett C. McPherson as Administrator of the Estate of Clyde McPherson, deceased and Everett C. McPherson as Administrator DBN of the Estate of Lossie J. McPherson. The Court so amended the style of the claim.

The decedents were husband and wife. On June 4, 1978, Clyde and Lossie McPherson had been visiting at the home of their son, Everett C. McPherson. when they left their son's home at 3:00 to 3:30 p.m. to return to their home in Nitro, West Virginia, they proceeded on Manilla Ridge Road, also known as State Route 5, in Putnam County. Clyde McPherson was operating his 1978 Blazer and Lossie McPherson was a passenger. The weather was clear and the road was dry. the McPherson vehicle was being approached by an Oldsmobile in the opposite lane

which was operated by Stephen Lazear. The McPherson vehicle went onto the berm and then dropped off an embankment, whereupon it rolled into pastureland. Lossie J. McPherson died as a result of the accident. Clyde McPherson was injured. He was taken by ambulance to Thomas Memorial Hospital where he remained for four days. This claim is for the alleged damages in the amount of $325,000.00.

Claimant alleges that this accident occurred due to the failure of respondent to maintain the berm and shoulder area of Manilla Ridge Road in a proper manner. Claimant asserts that the term consisted of fly ash material which was unstable and gave way when the McPherson vehicle was driven onto the berm in an attempt to provide room for the approaching vehicle to safety pass.

Testimony in the claim revealed that the paved portion of Manilla Ridge Road at the point of this accident was approximately 15 feet in width. the berm was 18 to 20 inches in width and consisted of fly ash material and tar. There were weeks and grass growing beside the berm area. A crop-off from the berm of approximately 10 feet led to pastureland below.

The witnesses to the accident testified that the driver of the McPherson vehicle appeared to drive the vehicle onto the berm and then the vehicle went over the drop-off and rolled into the pastureland. The reason for the action taken by the driver was not established through the testimony of the witnesses.

The testimony also revealed that the respondent had not received any complaints concerning problems that travelers of Manilla Ridge road may have had with the berm at the location of the accident, which is the subject matter of this claim.

From all of the evidence presented to the Court in this claim, the Court is unable to ascertain the reason for Clyde McPherson to drive his vehicle onto the berm at the accident site. The paved portion of the road was wide enough for two vehicles to pass. This Court has held that it will not resort to speculation in determining liability of the respondent. The Court has also held that a traveler on the State's highways travels at his own risk and uses the berm at his own risk. See: *Sweda vs. Dept. of Highways*, 13 Ct.Cl.249 (1980); *Hedrick vs. Dept of Highways*, 15 Ct. Cl. 288 (1985); and *Cole vs. Dept. of Highways*, CC-82-292, Jan. 17, 1986.

The Court has been unable to determine negligence on the part of the respondent in the maintenance of the berm on Manilla Ridge Road. Whether the berm gave way or whether the driver of the vehicle drove off the berm has not been established by the evidence herein.

Therefore, the Court finds in the claim that there was no apparent reason for the McPherson vehicle to veer onto the berm of Manilla Ridge Road. In accordance with prior decisions of this Court, the claim must be denied.

Claim disallowed.

OPINION ISSUED SEPTEMBER 24, 1987
FREDDIE J. MORRISON AND BARBARA J. MORRISON
VS.
DEPARTMENT OF HIGHWAYS
(CC-86-301)

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

PER CURIAM:

This claim was originally styled solely in the name of Freddie J. Morrison. The evidence revealed that the automobile was titled in the names of both Freddie J. and Barbara J. Morrison. The Court then, upon its own motion, amended the style of the claim to include Barbara J. Morrison as a proper party claimant and to amend the respondent to Department of Highways.

On June 23, 1986, at approximately 4:10 a.m., claimant Freddie Morrison, was operating his 1984 Dodge Caravan on Interstate 64 to 35 miles per hour. The road was being resurfaced. As he attempted to exit at Kenova, his automobile struck an overturned sign. As a result, damage was sustained by the vehicle and claimants seek compensation for same in the amount of $215.25.

Claimant Freddie Morrison testified that he was proceeding east on I-64 and leaving the Interstate at the Kenova exist. The weather conditions were "kind of misty". He stated that the exit was in disarray. He had travelled the same route on the previous evening. At that time, the barrels, etc. were in place.

William A. Holland, project supervisor in the construction division with respondent, testified that he was familiar with the project on I-64 in the vicinity of the Kenova exit. Eight miles of the roadway were being replaced and blacktopped. The independent contractor for the respondent on the project was East Kentucky Paving.

This Court has held previously that the respondent cannot be held liability for the negligence, if any, of an independent contractor. See: *Paul vs. Department of Highways*, 14 Ct.Cl. 479 (1983); *Harper vs. Department of Highways*, 13 Ct.Cl. 274 (1980); *Safeco Insurance Company vs. Department of Highways*, 9 Ct.Cl. 28 (1971). Accordingly, the Court disallows this claim.

Claim disallowed.

OPINION ISSUED NOVEMBER 23, 1987

AIDE'S DISCOUNT STORE, INC.
VS.
DEPARTMENT OF HIGHWAYS

(CC-87-244)

No appearance by claimant.
Robert D. Pollitt, 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 $694.01 for items furnished to respondent pursuant to a valid purchase order. The respondent admits the validity and amount of the claim and states that there were sufficient funds in respondent's budget for the appropriate fiscal year with which the claim could have been paid; however, the respondent was unable to make payment as the State Auditor returned the transmittal to the respondent with the explanation that the Treasury of the State of West Virginia lacked sufficient funds to process the transmittal.

The Court has reviewed the petition and the Answer and finds the State agency had sufficient funds within its appropriated budget to pay the claim and for this reason, the claimant is entitled to an award from the respondent.

The Court has also determined that West Virginia Code Chapter 14, Article 3, Section 1 provides that, where payment upon contracts with State agencies is delayed for more than 90 days, six percent interest shall be awarded on contracts for commodities and printing entered into under Chapter 5A, Article 3, Section 1. The interest rate allowed by the statute is six percent per annum on any unpaid balance beginning on the 91st day after payment is due. The Court finds that the calculation of the 90 days begins July 1, 1987 and shall continue until the beginning of the Legislative Session in 1988, January 13, 1988.

In view of the foregoing, the Court makes an award in the amount sought, $694.01, with interest calculated in the amount of $12.09

Award of $706.10.

OPINION ISSUED NOVEMBER 23, 1987

ALPHA THERAPEUTIC CORPORATION
VS.
DEPARTMENT OF HEALTH

(CC-87-315)

No appearance by claimant.
Robert D. Pollitt, 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 $4,195.80 for items furnished to respondent pursuant to a valid purchase order. The respondent admits the validity and amount of the claim and states that there were sufficient funds in respondent's budget for the appropriate fiscal year with which the claim could have been paid; however, the respondent was unable to make payment as the State Auditor returned the transmittal to the respondent with the explanation that the Treasury of the State of West Virginia lacked sufficient funds to process the transmittal.

The Court has reviewed the petition and the Answer and finds the State agency had sufficient funds within its appropriated budget to pay the claim and for this reason, the claimant is entitled to an award from the respondent.

The Court has also determined that West Virginia Code Chapter 14, Article 3, Section 1 provides that, where payment upon contracts with State agencies is delayed for more than 90 days, six percent interest shall be awarded on contracts for commodities and printing entered into under Chapter 5A, Article 3, Section 1. The interest rate allowed by the statute is six percent per annum on any unpaid balance beginning on the 91st day after payment is due. The Court finds that the calculation of the 90 days begins July 1, 1987, and shall continue until the beginning of the Legislative Session in 1988, January 13, 1988.

In view of the foregoing, the Court makes an award in the amount sought, $4,195.80, with interest calculated in the amount of $73.11.

Award of $4,268.91.

OPINION ISSUED NOVEMBER 23, 1987

HOPE GAS, INC.
VS.
DEPARTMENT OF HEALTH

(CC-87-250)

No appearance by claimant.
Robert D. Pollitt, 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 $10,571.89 for items furnished to respondent pursuant to a valid purchase order. The respondent admits the validity and amount of the claim and states that there were sufficient funds in respondent's budget for the appropriate fiscal year with which the claim could have been paid; however, the respondent was unable to make payment as the State Auditor returned the transmittal to the respondent with the explanation that the Treasury of the State of West Virginia lacked sufficient funds to process the transmittal.

The Court has received the petition and the Answer and finds the State agency had sufficient funds within its appropriated budget to pay the claim and for this reason, the claimant is entitled to an award from the respondent.

The Court has also determined that West Virginia Code Chapter 14, Article 3, Section 1 provides that, where payment upon contracts with State agencies is delayed for more than 90 days, six percent interest shall be awarded on contracts for commodities and printing entered into under Chapter 5A, Article 3, Section 1. The interest rate allowed by the statute is six percent per annum on any unpaid balance beginning on the 91st day after payment is due. The Court finds that the calculation of the 90 days begins July 1, 1987 and shall continue until the beginning of the Legislative Session in 1988, January 13, 1988.

In view of the foregoing, the Court makes an award in the amount sought, $10,571.89, with interest calculated in the amount of $184.21.

Award of $10,756.10.

OPINION ISSUED NOVEMBER 25, 1987

OPAL M. BROWN AND JOHN BROWN

VS.
DEPARTMENT OF HIGHWAYS

(CC-82-279)

Herbert H. Henderson, Attorney at Law, for claimants.
Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

Claimant Opal M. Brown purchased approximately 15 acres of land with a house and a barn on Turkey Camp Road, also known as Route 21/2, Wayne County, in 1973, for $14,000.00. The property lies on both sides of Turkey Camp Road which runs along the base of a hill. She testifies that in 1979 there was a small slip on her property on the south side of the hill. Prior to the first landslide, the claimants had not experienced any problem with flooding. She contact respondent repeatedly, but no efforts were made by respondent to alleviate the problem. In 1979, respondent removed the small slip. This action precipitated a second larger slip.

Claimant testified that she had signed an easement with respondent for the placement of a drain on her bottom land. The drain was never placed. At the time of the second slip, the water ran across the road and into her bottom land. This area has become a "mud hole" when it rains now, according to claimant Opal M. Brown.

The claimants used the acreage in question for a hay crop which they harvested about two or three times during the summer and fall seasons. Due to the flow of water onto the property, the hay crop does not grow as well as prior to the water problems. Claimants allege a loss resulting from the poor hay crop.

Randy Fry, a registered engineer and the County Surveyor of Wayne County, testified that he surveyed this property in September, 1982 and again in June, 1987. Claimants' property lies on both sides of Turkey Camp Road. The land on the northerly side of the road is higher in elevation than the road. The land on the southerly side of the road is lower in elevation that the elevation of the road. He assumed that the right-of-way was 30 feet to begin with, 15 feet on each side of the center line. The center line had shifted the entire right-of-way width, and the travel portion of the highway is still within the original 30 feet. From his survey, he determined that 4/100 of an acre of claimant's land has been affected by the water problem.

Neighbors gave accounts of the work done by respondent. There was agreement among the witnesses that respondent came in with equipment and scraped out the slip in 1979. One individual testified that after the removal of the slip, respondent did not shore it up. There was no evidence indicating that respondent cause the first slip.

There was conflicting evidence concerning the worth of claimants' property. One neighbor stated that bottom land in Wayne Count is generally appraised at $500.00 an acre. Another individual stated that property in this area sells for $4,000.00 - $5,000.00 per acre for bottom land. A third individual testified that his 95 acres of property in the vicinity of claimants' property was appraised for $25,000.00.

Respondent's witnesses included Charles O. Adkins, a surveyor for respondent; Ivan B. Browning, Assistant District Engineer in charge of maintenance with respondent; and Gary Robert Cooper, a geotechnical engineer with respondent.

Mr. Adkins surveyed Local Service Route 21/2 in the vicinity of the claimants' property. He stated that the right-of-way at that location is 30 feet. He measured the distance between the edge of Turkey Camp Road through the bottom land to Turkey Camp Creek. It is 122 1/2 feet to the water. The travel portion of the roadway at the slide location is 14 feet. He stated that there is a super elevation around the slip area. "It's basically a little dip." He agreed that there is presently a slip at the location, and it is impeding the flow of water and doing damage to the Browns' property.

Mr. Browning stated that he determined the right-of-way was 30 feet at the location in question. He stated that Turkey Camp Road was taken into the system in 1932. He examined the property in May, 1986, and the slide was not extending onto the travel portion of Turkey Camp Road.

Mr. Cooper testified that he observed the slide which had occurred on Mrs. Brown's property in April, 1986, and in June, 1987. The slide along Turkey Camp Road extended approximately 125 feet along the side of the road.

After examining all of the evidence submitted in the claim, the Court has determined that claimants' property is inn a slide-prone area. The measures taken by respondent, in attempting to rectify the initial slide have resulted in excess water flowing onto claimants' property. The Court is of the opinion that claimants are entitled to recover for the loss of use of their property based upon the value of the land. The Court has reviewed the evidence with respect to the appraisals rendered by the witnesses. The Court, therefore, makes an award of $263.16 to the claimants.

Award of $263.16.

OPINION ISSUED NOVEMBER 25, 1987

EASTERN ASSOCIATES,
A LIMITED PARTNERSHIP
VS.

BOARD OF REGENTS

(CC-87-156)

H. Thomas Corrie, Representative of Eastern Associates, for claimant.
Robert D. Pollitt, Assistant Attorney General, for respondent.

PER CURIAM:

Claimant and respondent entered into a lease agreement on December 18, 1976 for a building at 950 Kanawha Boulevard, East, in Charleston. Rent was $5,728.00 monthly. Subsequently, claimant and respondent entered into a second lease agreement dated October 29, 1986. Claimant contends that the rent for the month December, 1986 was proffered by respondent under the terms of the 1976 agreement instead of the terms of the second lease agreement. Claimant seeks $6,314.00.

H. Thomas Corrie, general partner of Eastern Associates, testified that respondent paid only partial rent for the month of December, 1986. The amount paid by respondent was $5,728.00, in accordance with the 1976 lease, rather than $12,042.00, the amount of rent under the new lease. Claimant accepted the $5,728.00 as a down payment or partial payment of the December 1986 rent only. He stated that under the terms of the old lease, respondent rented two floors of the building. The new lease gave respondent three floors. The terms of the current lease also provided for renovations to the building to be performed by the claimant. The premises were not ready for occupancy as the renovations were not completed by December 1, 1986.

Dr. K. Edward Grose, Vice-Chancellor for Administrative Affairs for respondent, testified that he was familiar with the agreement for the renovations to the building leased by claimant to the respondent. He stated that the Commissioner of Finance and Administration formalized the new lease, but Dr. Grose was unaware of the date on the new lease as he was not required to sign it.

It is the opinion of the Court that the parties are bound by the provisions of the lease in effect December 1, 1986, which provides the following:

> "This agreement supersedes and rescinds that contract of lease dated December 18, 1976, made by and between the parties hereto, relative to the subject premises, said contract of lease being hereby terminated as of midnight on the 30th day of November, 1986."

The new lease clearly provides that $12,042.00 is the amount of rent to be paid by respondent for December, 1986. Therefore, the Court makes an award to the claimant in the amount of $6,314.00

which is the difference in the amount that claimant actually received from respondent for the December rent and the amount recited in the new lease.

Award of $6,314.00.

OPINION ISSUED NOVEMBER 25, 1987

E.P. FOGLEMAN CONSTRUCTION CO., INC.
VS.
BOARD OF REGENTS

(CC-79-190)

Morton I. Taber and Robert Wolpert, Attorneys at Law, for claimant.
Robert D. Pollitt, Assistant Attorney General, for respondent.

GRACEY, JUDGE:

This claim arises out of construction of the Community Technical College Building at West Virginia Institute of Technology at Montgomery, West Virginia. The contract for construction of the building was dated April 15, 1970, the parties thereto being E.P. Fogleman Construction Company and the West Virginia Board of Regents, the respondent. Claimant was advised by "Notice to Proceed" to commence construction on the project by June 8, 1970. The original completion date of October 6, 1971, was extended by agreement of the parties to January 6, 1972, by Final Change Order #6.

Edgar P. Fogleman, President of the E.P. Fogleman Construction Company, testified that claimant was requested to perform work not specified in the original contract, specifications and plans. Mr. Fogleman stated that the figures contained in Change Order No. 1 do not correspond to those he submitted to the architect, Henry Elden and Associates, and that his signature on them was obtained without his knowledge that the figures did not agree. He also testified that flaws in the original design required claimant to perform extra work not contained on any of the Change Orders which were submitted to the architect but for which no approval was obtained. The architect also made requests for other work which was performed by claimant but for which claimant has not been paid. There were negotiations between the parties on a list of several items which the architect requested be completed but the parties were unable to agree upon a price for these items. Some of the items were completed by claimant and others were not.

Claimant also contends that respondent submitted a series of punch lists of items to be completed on the project. These lists were tendered to the claimant in November of 1971. Claimant alleges that all, or substantially all, items covered by the contract or by Change Orders Nos.

1-5 were fulfilled. Respondent, however, has retained $40,000.00 which amount represents the balance due on the contract and Change Orders. Claimant is seeking the amount retained and compensation in the amount of $40,000.00 for extra work which claimant contends was performed at the architect's request but for which claimant has not been paid.

Respondent contends that a Correction and Completion Contract had to be entered into with another contractor for completion of the building to be constructed by claimant. The total amount of this contract was $64,900.00. Several of the items contained in the contract pertained to correcting moisture problems from the outside which was damaging the interior finishing and correcting problems of pooling water and blistering on the roof. Claimant was responsible for correcting any problems at cost under the terms of the original contract. Furthermore, claimant has not supplied the necessary unconditional release of mechanics' liens for the subcontractors and, therefore, respondent is justified in suspending final payment under the terms of the contract.

Respondent also contends that the prices for work provided for under Change Order Number 1 were agreed to by the contractor as evidenced by Mr. Fogleman's signature on the document. Furthermore, respondent alleges that the contractor was only authorized to perform

extra work which was approved under the procedures outlined in the general terms and conditions of the contract. The specifications under General Conditions Number 17 state, "No changes in the work covered by the approved Contract Documents shall be made without having prior written approval of the Owner... ." The specifications under General Conditions Number 18 provides, " ... and no claims for any extra work or materials shall be allowed unless the work is ordered in writing by the Owner or it's Architect/Engineer, acting officially for the Owner, and the price is stated in such order."

Several specific itemized charges claimed by the claimant were challenged by the respondent. Among these were 6% interest on late payments for missing the schedule periodic payment dates; interest charges of $2,375.73 on a judgment against the claimant by a subcontractor, Dougherty Company; the amount of a judgment for $4,305.00 for extra work performed by the subcontractor; interest of $3,311.25 on the $6,000.00 retained by the claimant from the subcontractor; and $17,069.48 for insurance, utilities and overhead during the period of the contract extension from October 6, 1971 until January 6, 1972. The original contract provided that the contractor would incur these costs. Subsequent Change Orders allowing the extension of time did not contain a provision that the respondent would be responsible for these costs during the extended period for the completion of the contract. Claimant asserts it is due these amounts under the provisions of General Conditions Number 17 of the original contract.

After examining all of the evidence, the Court is of the opinion that the claimant is not entitled to any compensation for extra work performed beyond what was required by the terms of the contract. The terms are quite specific concerning the procedures to be followed for the execution of agreements for the performance of extra work on the project. The exhibits claimant

submits, as evidence that extra work was performed and compensation requested for that extra work, are all dated substantially after the extended completion date of the project.

The Court is of the opinion that the claimant is entitled to $40,000.00 retained as final payment due claimant on the original contract and change orders reduce by $10,000.00 which the Court calculates as that portion of the Correction and Completion Contract for repairing interior damage due to moisture and repairing the blistering on the roof. There shall be no interest due the claimant on the award of $30,000.00 as the respondent properly suspended payment of the retainage until all potential claims of the subcontractors against the claimant were paid, discharged, or waived.

Award of $30,000.00.

Judge Hanlon did not participate in the hearing or decision of this case.

OPINION ISSUED NOVEMBER 25, 1987

PATRICIA and ROGER LIMING
VS.
DEPARTMENT OF HIGHWAYS

(CC-81-424)

James H. Coleman, Attorney at Law, for claimant.
Andrew Lopez, Attorney at Law, for respondent.

WALLACE, JUDGE:

Claimants, Roger and Patricia Liming, brought this action to recover medical expenses, loss of work, damages to a vehicle and loss of consortium, all of which resulted when claimant Patricia Liming was injured in a vehicular accident on November 24, 1979. On that date claimant Patricia Liming was proceeding in a westerly direction on U.S. Route 119, also known as W.Va. Route 10 or Logan Boulevard. She was driving a 1980 Mercury Capri. As she passed a truck, she attempted to return to the "slow" lane when her vehicle struck a manhole cover which was standing upright in a perpendicular manner to the manhole itself. The vehicle struck the manhole cover and flipped over onto its top whereupon Patricia Liming was injured and the vehicle was totalled. Claimants allege damages in the amount of $54,000.00

Counsel stipulated that there was negligence in the maintenance of the manhole. The only question for the Court is the determination of responsibility for the maintenance of the manhole and the manhole cover. Claimant contends that W.Va. Route 10 is a State maintained four-lane highway and, therefore, the respondent is responsible for the condition of the highways. Respondent

contends that the manhole and its cover are the property of the City of Logan; therefore, any negligence with respect to the manhole is the responsibility of the City of Logan. The respondent maintains that it is not liable to claimants for injuries received resulting from the negligent maintenance of the manhole or its cover.

The Court, having considered the record and attendant exhibits, is of the opinion that the respondent is liable for primary negligence in this claim. The highway in question is a four-land, concrete highway. The manhole is located in the middle of the two westbound lanes. The evidence revealed that the manhole cover was defective and that the hazardous condition was known to the respondent. The respondent failed to take measures to warn the travelling public of this hazardous defect on a State maintained highway. The respondent also failed to take corrective action; or, in the alternative, to require the City of Logan to take corrective action to alleviate the defect on the State maintained highway.

The Court is also of the opinion that claimant Patricia Liming was negligent in her operation of the vehicle as she failed to observe the manhole cover in a timely manner to avoid striking it. Therefore, the Court will apply the doctrine of comparative negligence and assess 10% of the negligence to her.

As a result of the accident, claimant Patricia Liming suffered a compression fracture of the first lumbar vertebra and a lumbrosacral strain. A body cast was applied for a period of four weeks after which claimant wore a back brace for six weeks. At the time of this incident she was employed as a nurse in the ICU division of Logan General Hospital. She was able to continue working with limitations placed upon her for lifting no more than ten pounds. At this time she still experiences pain with her lower back. Her loss of work was in the amount of $540.00. Her medical bills were in the amount of $1,270.08. The loss of her vehicle was covered by her insurance carrier. The Court is disposed to and does make an award of $2,810.08 to claimant Patricia Liming, which will be reduced by 10% to $2,529.07.

Claimant Roger Liming alleges loss of consortium for which the Court makes an award to him in the amount of $500.00.

Award of $2,529.07 to Patricia Liming.

Award of $500.00 to Roger Liming.

OPINION ISSUED NOVEMBER 25, 1987

GEORGE R. MAXEY AND SHIRLEY MAXEY
VS.
DEPARTMENT OF HIGHWAYS

(CC-86-323)

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

PER CURIAM:

The claimants filed this claim in the amount of $546.92 for water damage to property located in McArthur, Raleigh Count, for a period commencing in July, 1983. Claimants' property is approximately 300 feet southwest of Route 16, which is a State maintained highway. Claimants allege negligence on the part of respondent for faulty engineering in the construction of the interchange at McArthur with the Interstate 77, also known as the West Virginia Turnpike.

Claimant George Maxey testified that on July 22, 1986, there was a heavy storm and water entered the yard and a storage building. Several items, including a tent, were damaged. The value of these items was estimated to be $199.96.

During construction of the McArthur Interchange of I-77, the respondent widened I-77 from two lanes to four lanes. A tunnel was constructed under the highway adjacent to claimant's property. Claimants experienced excess water on their property after this construction. Mr. Maxey stated that water flows into a mine break. This creates a situation of excess water flowing onto claimants' property.

Thereafter, respondent constructed a ditch from the point where the culvert comes out to the mine break. In August, 1986, respondent also constructed a retaining dam with rocks in an attempt to keep the silt and mud from entering the mine.

Mr. Michael R. Ward, an engineer in Raleigh County for respondent, testified that he is familiar with the specific highway project which is the subject matter of this claim. The West Virginia Turnpike was upgraded from a two-lane highway to a four-lane highway. Prior to and following this project, the water was discharged into an abandoned mine. The same size pipe was used both before and after the project. He stated that here would be a negligible increase in the flow of water onto the claimants property due to another 18-inch pipe installed in the area.

Claimants cannot recover for damages which occurred prior to September 3, 1984. In accordance with West Virginia Code 55-2-12, a claim for damage must have been brought within two years from the date of the damage to the property. This claim was filed on September 3, 1986. The Court, under the provisions of W.Va. Code 14-2-21, does not have jurisdiction over a claim which is not filed within the time specified by the applicable statute of limitations. However, the Court has determined that respondent was made aware of the faulty drainage system and failed to provide a satisfactory remedy. For that reason, the Court is of the opinion that claimants be made an award for water damage to personal property which occurred in 1986. Accordingly, the Court makes an award in the amount of $199.96.

Award of $199.96.

OPINION ISSUED NOVEMBER 25, 1987

JAMES E. MILLER, JR.
VS.
DEPARTMENT OF CORRECTIONS

(CC-84-218)

Jeffrey W. McCamic, Attorney at Law, for claimant.
John Polak, Assistant Attorney General, for respondent.

HANLON, JUDGE:

Claimant James E. Miller, Jr., brought this action to recover damages for injuries he received in a fall at the West Virginia Penitentiary in Moundsville, West Virginia. Claimant alleges that respondent was negligent in allowing excess garbage to flow onto the dining room floor posing a hazard to those individuals using the dining facility at the Penitentiary.

Respondent contends that claimant was aware of the condition of debris on the floor and that claimant was negligent when he walked through the area. Respondent also contends that surgical procedures were available to claimant to correct the injury to his back while he was still incarcerated at the West Virginia Penitentiary or at Huttonsville Correctional Facility and, therefore, claimant may not now recover for medical expenses, loss of wages, and pain and suffering when he declined to have the surgery while in the custody of respondent.

Claimant was incarcerated at the West Virginia Penitentiary from July, 1981, until July, 1984. In 1983, claimant had surgery for a back injury which he had received while lifting weights in a contest at the Penitentiary. Two discs were crushed in the incident. Claimant had surgery to repair the discs. After two weeks in the hospital, claimant returned to the infirmary at the Penitentiary on August 2, 1983. Approximately a week later on August 8, 1983, claimant was required to walk from the infirmary to the dining facility to eat his meals. Claimant proceeded to the dining facility for his lunch. As he was leaving the dining room through the only exit area, he dumped the remains on his tray into a garbage can placed for that purpose. As he proceeded to exit from the dining room he was speaking to a guard. At that moment he slipped on a slice of pickle and ended up on his back on the floor. There as debris in solid and liquid form on the floor of the dining facility at the exit area from the garbage can to the exit door for several feet. Claimant testified that he walked around most of the debris. However, he stated that "... you couldn't walk around the juice. There was just a string of it running, just a pool of it all the way down the hall."

As a result of this fall, claimant suffered another back injury for which he was hospitalized at Reynolds Memorial Hospital. While there as a patient, he was given a CAT scan and a myelogram which revealed that he had a slipped disc and a pinched nerve. This disc was the same one for which claimant had received surgery and for which he was recovering. Fearing further surgical treatment, claimant requested therapy treatment. For the next three months he received this treatment. He was then transferred to Huttonsville Correctional Facility. He was treated for the back injury while at Huttonsville also. He had another CAT scan and myelogram. He was placed in a body cast which was removed after one day. He then received further physical therapy. He was offered surgical treatment but declined that option.

Since his release from Huttonsville Correctional Facility, claimant has received further physical therapy. However, his physician recommends surgery as a permanent cure for the herniated disc.

Claimant's back injury has prevented him from returning to full-time employment in the dry cleaning industry as he is unable to perform heavy lifting duties. He has been generally employed that industry at $5.00 per hour for 20 hours per week.

The Court is of the opinion that the respondent's employees were negligent in allowing garbage to overflow onto the floor of the dining facility at the West Virginia Penitentiary. The testimony revealed that the garbage can had holes in it, no plastic gab liners were used, nor were employees or inmates required to keep the floor free from debris. There was only one exit area and all inmates were required to use the exit. Garbage debris in solid or liquid form on a floor presents a hazardous condition. It is foreseeable that persons could slip in it and sustain an injury. Therefore, the Court holds that the negligence of respondent was the proximate cause of the injury received by the claimant.

However, respondent offered proper surgical treatment to claimant who refused this treatment for a permanent cure of his back injury. Claimant now comes before this Court requesting a monetary award for this same surgery which was offered to him in 1984. The Court, after careful consideration of claimant's testimony concerning his fear of surgery, has determined that claimant may recover for the cost of the surgery which has been estimated to be $3,000.00 an amount to compensate him and for the period of convalescence that can be expected in the amount $2,000.00. He may not recover for any loss of wages or pain and suffering that has resulted from his choice to refuse surgery in 1984.

Award of $5,000.00.

OPINION ISSUED NOVEMBER 25, 1987

TERRY JAMES WITHROW

VS.
DEPARTMENT OF HIGHWAYS

(CC-86-225)

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

PER CURIAM:

On March 20, 1986, the claimant's vehicle was involved in an accident on Martins Branch Road. Claimant alleges that respondent was negligent in its failure to post warning signs or flagmen at a work site at the accident location. He seeks $73.86 for damage to the vehicle.

The claimant testified that he was driving his 1980 Chevrolet Monza south on Martins Branch Road and was proceeding to a dentist's office, at that location, at approximately 38 miles per hour. The weather was clear and dry, and it was approximately 10:45 a.m. at the time of this incident. Claimant's vehicle proceeded around a curve where there was an uncovered area where a cut had been made in the road. The impact of his vehicle with the cut in the road caused damage to his vehicle. The area which was cut out was located in claimant's lane on the right side. He stated that he could not avoid the area by proceeding into the northbound lane, as it was impossible to see whether someone else was in the northbound land. The broken out section was on the right side of the pavement. It was approximately two and one-half feet long and extended out from the right edge of the pavement approximately two and one-half to three feet. Claimant observed two of respondent's employees seated in a marked vehicle close to the accident scene. These employees were inspectors for respondent. According to the claimant, they were at the scene to inspect the cut out area on the road.

The Court is of the opinion that respondent was working in the area and that respondent should have place warning signs or a barrier at the cut out area on the road. For these reasons, the Court makes an award to the claimant in the amount of $73.86.

Award of $73.86.

OPINION ISSUED DECEMBER 3, 1987

HARDEN D. ALFSTAD AND
PHYLLIS L. ALFSTAD
VS.
DEPARTMENT OF HIGHWAYS

(CC-87-92)

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

PER CURIAM:

Claimants seek $381.09 for damage sustained to their automobile, a 1980 Chevrolet Citation, when it struck a hole in the surface of the highway. The claim was originally filed solely in the name of Phyllis L. Alfstad. The evidence revealed that the vehicle was titled jointly in the names of both Harden D. and Phyllis L. Alfstad. The Court, then, upon its own motion, amended the style of the claim to include the proper parties.

The accident occurred August 1986. Claimant Phyllis Alfstad was operating her vehicle in an easterly direction on Route 50 in Parkersburg, Wood County, West Virginia. Her husband accompanied her in the automobile. It was approximately 3:00 p.m. It was raining at the time of the accident. Claimant was unable to avoid the hole as there were automobiles in front of her automobile, behind her automobile, and to the left of her automobile. She was travelling at approximately 30-35 miles per hour. She estimated the hole to be two feet by three feet. She testified that she distinguished the hole which her vehicle struck from a pothole. She alleges that the hole is a "cut out hole," or one cut for the purpose of construction. she travelled this route two to three times weekly. She was unaware of the presence of the hole at the time she struck it, and Phyllis Alfstad did not observe construction at the site of this incident.

Thomas Franklin Badgett, Wood County Road Supervisor for respondent, testified that he is aware of the section of roadway which is the subject to this action. Respondent was not performing construction work in that area in August 1986. He explained that respondent had requested permission for resurfacing this road, and a number of utility companies were cutting out pavement and working on sidewalks during this time.

The testimony reveals that independent contractors were responsible for the hole cut in the pavement. This Court has held in the past that respondent cannot be found liable for torts committed by an independent contractor. *Safeco Insurance Co. vs. Dept. of Highways*, 9 Ct.Cl 28 (1971). For that reason, the Court is of the opinion to, and must, deny this claim.

Claim disallowed.

OPINION ISSUED DECEMBER 3, 1987

LESTER B. ALLEN AND
THELMA M. ALLEN

VS.
DEPARTMENT OF HIGHWAYS

(CC-87-83)

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

PER CURIAM:

On February 26, 1987, the claimants were travelling in their 1985 Delta 88 Oldsmobile on Route 103 when the vehicle struck holes in the road. They seek $106.18 for damages to the vehicle.

Claimant Lester B. Allen testified that he and his wife live in Gary, Mcdowell County, West Virginia. At the time of this incident, they were returning to their home by means of Elkhorn Mountain. It is a two-land, blacktop road, and Mr. Allen was operating his vehicle at approximately 25-30 miles her hour. It had rained heavily and water was standing in the road. As a result, he was unable to see the holes. The impact of the holes with the automobile cause damage to the automobile's tire and rim. He driver this route twice a week, and he was aware of the existence of the holes before the accident. He does not recall whether he complained to respondent about these specific holes.

Proof of actual or constructive notice is a prerequisite to establishing negligence on the part of the respondent. *David Auto Parts vs. Dept. of Highways*, 12 Ct.Cl. 31 (1977). Respondent did not have notice of these particular holes in the road in time to take action to prevent this accident. Since negligence, therefore, is not shown, and since the State is neither an insurer nor a guarantor of the safety of motorists on its highways *Adkins vs. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947), this claim must be denied.

Claim disallowed.

OPINION ISSUED DECEMBER 3, 1987

CARL NEILOUS BAILEY
VS.
DEPARTMENT OF NATURAL RESOURCES

(CC-86-438)

Claimant appeared in person.

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

PER CURIAM:

On November 9, 1986, the claimants was operating his 1976 Ford pickup truck in an easterly direction at North Bend on Route 39. A bear approached his vehicle, and the vehicle struck it. As a result, damages were incurred by claimant's truck, and the claimant seeks compensation in the amount of $837.47.

The claimant testified that he was proceeding at approximately 50 miles per hour at the time of this incident. He was accompanied in the truck by two of his friends. It was about 6:30 p.m. and had just gotten dark. The weather was clear and dry. Claimant's vehicle rounded a curve in the vicinity of a picnic area. The bear was impossible to avoid according to the claimant. The accident site is located in the Monongahela National Forest, a bear sanctuary. Claimant stated that the bear was tagged and had a beeper on it.

The Court finds that the claimant was aware that he was driving in an area where bears may be anticipated to appear on the road. It was foreseeable that an animal such as a bear or deer might attempt to cross the road in the Monongahela National Forest. It is the opinion of the Court that the respondent was not negligent in the instant claim. The Court, therefore, denies the claim.

Claim disallowed.

OPINION ISSUED DECEMBER 3, 1987

STEPHEN GREGG AND EMMA GREGG
VS.
DEPARTMENT OF FINANCE
AND ADMINISTRATION

(CC-79-514)

Allan A. Masinter, Attorney at Law, for claimant.
Robert D. Pollitt and John Polak, Assistant Attorneys General, for respondent.

GRACEY, JUDGE:

This claim was filed by Stephen Gregg and Emma Gregg, who were husband and wife on September 27, 1977, when Stephen Gregg was injured and rendered paraplegic. His claim is for damages incident to his injuries. Her claim is for loss of consortium.

Respondent had entered into a contract with Restoration of Missouri, Inc. for certain renovation work on the state capitol building. The work involved sandblasting, cleaning, caulking, etc. The skilled labor, bricklayers, were hired through a bricklayers' union, Local No. 9. The unskilled labor, laborers, were hired through a laborers' union, Local No. 1353. Both unions had a foreman and steward on the job. Stephen Gregg had been assigned to the job by the laborers' union and served as a bricklayers' tender. As such, his work involved cleaning up after sandblasting, filling sand pots, helping with installation of scaffolding from the ground and helping with the horizontal relocation of suspended scaffolding. He had never had any previous occasion to be on a suspended scaffold, and had had no instruction concerning them or the use of the motors at each end, the safety belts, etc.

As the result of rain on that morning, it had been decided to shut the job down at mid-day. This would include securing the suspended scaffolds well above ground level to avoid unauthorized use and vandalism. Gregg testified that he was told by one of his superiors to go around to the area where he was working that day and do whatever he could to help shut the job down for the day. His recollection was that a Gary Holley, a bricklayer, had asked him to help Mike Crislip, an apprentice bricklayer, raise the suspended scaffold, from which he fell, to a second floor window level. Mike Crislip had been left, by his fellow bricklayers, to raise the scaffold by himself. He testified that he had raised its right end a few feet, and was about to move to its other end to raise that end, when Jerry Holley, a bricklayer, had told Gregg, "Help him do that" and Gregg had jumped up on the scaffold. Gregg may have put on a safety belt, but the evidence was not clear as to whether he had put it on properly, had properly connected it or whether he would have been saved from hitting the ground, when he fell, if the belt was properly worn and connected.

As the scaffold was being raised, some part of it caught at the top of the first window. Crislip told Gregg to "Kick out", and the scaffold started up again. Apparently, it got caught again on a belt course, a cornice type protrusion. Crislip testified that he heard the engine grinding and said to Gregg, "Let go of the engine"; that when he looked back again, Gregg had fallen. Gregg's account of the occurrence is:

> "Well, I got on the scaffold and I can't remember if I put a safety belt on or not. If I did, it wasn't tied on, I didn't know how, but I just didn't see no harm in it. He said just push in on the button when I push in 'til we get to the second floor, so we were pushing simultaneously the buttons and was going up and the next thing I remember, my side was hung up under a ledge or something of the wall and I still had my hand on the motor. He had his hand on his motor and the next thing I knew he said to kick out from the wall a

little bit and at that time the scaffold bumped out I'd say five to eight feet, enough for me to tumble and do a somersault off the building."

Claimants contend that the respondent had failed in a duty to provide a safe work place, citing regulations under the Occupational Safety and Health Act (OSHA). These regulations require, on the open sides of such a scaffold, under certain conditions, a top guard rail, a mid rail, and a toe board. None were in place on the building side of the suspended scaffolds used on this job. Apparently, no complaint was ever made about this by the bricklayers who worked on the scaffolds, by the union foremen or stewards or by Appalachian Engineers, Inc., a company which had been employed by respondent to oversee the work but excluded from safety responsibilities in its contract.

This Court views this claim as one which can be presented only to the Workers' Compensation Fund (W.Va. Code, Chapter 23). (See also W.Va. Code 14-2-14 (2). Assuming a contractor's employees to be employees of the owner, the State in this instance, an employee would have a case of action against the owner only if the injury resulted from the deliberate intention of the employer to produce such injury (See W.Va. Code 23-4-2 as adopted by the 1969 Legislature, Chapter 152). This Court finds no such deliberate intention in the evidence presented.

Claim disallowed.

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

OPINION ISSUED DECEMBER 3, 1987

MARGOT D. GROSE AND CHARLES W. GROSE
VS.
DEPARTMENT OF HIGHWAYS

(CC-86-260)

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

PER CURIAM:

During the first week in June in 1986 a substance, appearing to be tar, was placed on Woodrums Lane, at the location of the claimants' home. The road has an elevation higher than that of claimant's yard, and the substance seeped into the yard. Damage was done to claimants' carpet, among other items. Claimants seek $1,802.42.

Claimant Margot D. Grose testified that their insurance company paid for the replacement of claimants' carpet at a cost of $1,300.00. They have a $200.00 deductible, which claimants paid. She stated that the substance was placed on Woodrums Lane one day and seeped to the surface on the next day. She stated that her home is 35 feet from the road. The tar-like substance seeped about one-half of that distance into her yard. Her two teen-aged grandchildren walked through the year and tracked the substance into her home. Damage was done to the carpeting, to the children's clothing, and to the mats in her automobile.

Mr. Nelson Lee Fowler, Assistance to the District Maintenance Engineer, Kanawha County, for respondent, testified that he was familiar with this particular resurfacing project. The liquid asphalt that was used has been utilized for numerous years. Two days after the finished coat was placed upon the road, respondent attempted to remedy the situation. This was a contract project by West Virginia Paving Company, Inc. He received complaints concerning the work performed under the contract.

It is the general rule that the employer of an independent contractor is not liable for torts committed by the independent contractor. *Safeco Insurance Company vs. Dept. of Highways*, 9 Ct.Cl. 28 (1971). As the evidence revealed that the work was under contract to West Virginia Paving Company, Inc., the Court must deny the claim.

Claim disallowed.

OPINION ISSUED DECEMBER 3, 1987

PAUL P. KNOTT, EXECUTOR OF THE
ESTATE OF DELORES C. KNOTT, DECEASED
VS.
DEPARTMENT OF HIGHWAYS

(CC-85-351)

Ralph W. Haines and George Daugherty, Attorney at Law, for claimant.
Nancy J. Aliff, Attorney at Law, for respondent.

GRACEY, JUDGE:

This claim was filed by Paul P. Knott as Executor of the Estate of his wife, Delores C. Knott, whose death occurred as the result of a single care accident at about 6:45 a.m. on Friday, January 27, 1984, in the vicinity of Ken's Grocery, about 2.7 miles West of Burlington on Route 50, in Mineral County. Mrs. Knott was driving the family car, a 1978 Buick, with new all reason radial tires, westerly on Route 50, on her way to work as an operating room nurse at Potomac Valley

Hospital in Keyser. after rounding a gradual curve to her right, she apparently lost control of her car on a large area of ice on the highway. The car went off the left side of the highway and through a parking area of the store, its right side striking a large tree, and the car coming to rest down over a bank. From the evidence, it appears that the ice on the highway was from water from a drainage ditch on the northerly side of the highway. The temperature was reported as 20 degrees at 7:00 o'clock that morning.

The icy condition had been similar on the previous morning when two other vehicle operators had lost control. Witness Lisa E. Taylor testified about how she had lost control of the vehicle she had been operating in a westerly direction at about 8:20 a.m. She told how the vehicle had turned and proceeded backwards through the store lot and had been stopped by a pile of plowed snow. Shortly afterwards, and having observed other vehicles coming by as he helped her from her car and into his store, Kenneth L. Welch, owner of the store had telephoned the respondent's office:

> "I told them exactly what had happened. I said we're going to have a real bad accident. Not something similar like the one had just happened. The only response I got, 'We are aware of the situation'".

At about 6:10 a.m. on that previous morning, witness Jeffrey S. Pyle had also lost control of his vehicle on the patch of ice as he was traveling westerly. He, too, had gone off the left side of the highway, his vehicle finally coming to rest in the store parking lot. After proceeding to his job, he had telephoned the respondent, describing the patch of ice as "about three car lengths long" and emphasizing its serious nature. On the following morning, he had hit a patch of ice there again and had again, upon arrival at work, telephone the respondent, but the fatal accident had probably then already occurred.

Sergeant (then Trooper) G. A. Armentrout, of the Department of Public Safety, testified about his investigation of the accident resulting in the death of Mrs. Knott. He arrived at the scene at about 8:00 a.m. He had indicated the presence of an "icy area" on his diagram.

Several of respondent's employees testified and several daily record forms of respondent were placed in evidence. There was no testimony or exhibit tot he effect that the subject patch of ice had been dealt with in any manner prior to the accident and death of Mrs. Knott. A work form for the previous day, January 26, did show that a dump truck and spreader had been sent out at some time with two tons of salt (with abrasives) for Route 50 but did not show any application of same to the subject patch of ice. Mr. Pyle said that, in his two telephone reports to the respondent, he had been told that the highway had been treated earlier. He said he had closely examined the patch of ice on the morning on January 27th and that nothing had been applied to it.

At the time of her death Mrs. Knott was the income provider for her family, earning $18,557 from her employment while the family dairy farm had operated at a loss during 1983. In addition to her husband, Mrs. Knott was survived by four daughters. It had been a close family. Ann

Knott, the oldest, was managing a bowling alley in Romney. Linda Knott was a Senior at Salem College. Susan Knott Marks was married and living at Frederick, Maryland. The youngest, Janet Delores Knott (now Bacorn) was a Junior in high school, and plans were being made for her to go to college, plans which had to be abandoned by reason of her mother's death.

The evidence showed that the described icy condition, at that place, was one which had never occurred prior to January 26, 1984. Mrs. Knott had stayed home from work that day, recovering from a cold, and apparently had no forewarning of its presence.

Respondent's ditch work is ordinarily done in warn weather months. But had the respondent appropriately responded to the telephone calls it received from Mr. Welch and Mr. Pyle on January 26, 1984, it is a fair assumption that the ditch would have been cleaned, keeping the water from flowing into the highway, or that the area would have been adequately treated with salt and abrasives during the following freezing temperature night and early morning hours. Neither of these actions was taken, nor were any warning signs placed.

This Court has repeatedly held that the State is not a guarantor of the safety of travelers on its roads, following *Adkins vs. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). Exceptions have been allowed where the Department of Highways had actual or constructive notice of a defect and, having adequate time, had failed to correct the defect or provide warning signs or barriers. Neither can the State be required nor expected to keep its highways absolute free of ice and snow at all times, and the presence of an isolated ice patch on a highway during winter months is generally insufficient to charge the Stat with negligence. See 39 AM. JUR. 2d Highways, Streets and Bridges, par. 506. See also *Woofter vs. State Road Comm'n.*, 2 Ct.Cl. 393 (1944); *Christo vs. Dotson*, 151 W.Va. 696, 155 S.E.2d 571 (1967). However, this Court did find negligence and impost liability on the State, with reference to such an isolated patch of ice where its presence was not due to natural elements, but due to a clogged culvert, the routine maintenance of which was the admitted responsibility of the State, even tough it was unclear whether the State had or should have had actual knowledge of the particular culvert adjacent to the site of the accident, the State being chargeable with a duty to inspect and correct the condition within the limits of funds appropriated by the legislature. Application of salt and cinders was inadequate, it being foreseeable that the continued spread of water onto the road and the drop in temperature after sundown, would result in the reformation of ice. *McDonald vs. Department of Highways*, 13 Ct.Cl. 13 (1979). The facts of the instant case are practically identical except that here a drainage ditch was clogged, and the Department of Highways had actual notice, about twenty-four hours earlier, of the present of the ice. Its failure to take appropriate action to determine and correct the situation requires a finding of negligence on its part.

Accordingly, the Court makes an award in the sum of $152,732.00 to Paul P. Knott, Executor of the Estate of Delores C. Knott, Decease, including:

(A) The sum of $2,723.00 for funeral expenses;

(B) The sum of $50,000.00 to be distributed to Paul P. Knott, surviving husband of Delores C. Knott;

(C) The sum of $23,750.00 to be distributed to Ann Knott, a surviving daughter of Delores C. Knott;

(D) The sum of $23,750.00 to be distributed to Linda Knott, a surviving daughter of Delores C. Knott;

(E) The sum of 23,750.00 to be distributed to Susan Knott Marks, a surviving daughter of Delores C. Knott; and

(F) The sum of $28,750.00 to be distributed to Janet Delores Knott Bacorn, a surviving daughter of Delores C. Knott.

Total Award $152,732.00.

OPINION ISSUED DECEMBER 3, 1987

BONITA M. KOUNS, ADMINISTRATRIX OF
THE ESTATE OF MICHAEL WAYNE KOUNS, DECEASED
VS.
DEPARTMENT OF HIGHWAYS

(CC-86-215)

Larry D. Taylor, Attorney at Law, for claimants.
Nancy J. Aliff, Attorney at Law, for respondent.

HANLON, JUDGE:

Claimant, Bonita M. Kouns, Administratrix of the Estate of Michael Wayne Kouns, filed this claim in the amount of $325,000.00 against the respondent for the wrongful death of her husband, Michael Wayne Kouns, which occurred when the decedent and his uncle were in a single-car accident on January 31, 1985.

At the time of the accident, Michael Wayne Kouns was driving his mother's vehicle from Marmet to Whitesville, on State Route 94. He was accompanied in the automobile by Edgar Stacy, his uncle. The weather was in a freeze-thaw cycle. As he approached Hernshaw, in the

vicinity of Delcie's Tavern, he lost control of the automobile, crossed both lanes of Route 94, and struck trees located across the highway and on the opposite side of Route 94. Mr. Kouns dies as a result of the accident. It is alleged that the automobile struck ice which was on the berm adjacent to Route 94 and that this was the proximate cause of the accident.

The vehicle was proceeding in a southerly direction at a speed in excess of 55 miles per hour. The speed limit at that location is 45 miles per hour. There is a hillside behind Delcie's tavern, the site of the accident. This hillside is not on property which is owned or maintained by respondent. The record revealed that water runs down from the hill and collects in front of the tavern. There is a culvert located about 150-175 feet up Route 94 from Delcie's Tavern. Ice had accumulated at that location in previous winters. The ice was estimated to be approximately 12-18 inches thick on the day of the accident.

There was conflicting evidence concerning whether or not the automobile which the deceased was operating actually struck the ice. One witness to the incident testified that it did. The trooper who investigated the accident testified that he observed no physical evidence showing that the vehicle had struck the ice. More importantly, an individual who was following Mr. Kouns, with the intention of repossessing the Kouns vehicle, testified that he did not observe the Kouns vehicle strike the ice. He stated that Michael Kouns lost control of the automobile before reaching the ice.

Several individuals testified that they had made complaints to respondent concerning the water in the vicinity of Hernshaw. However, when queried, it was learned that the complaints were not specifically related to the accident site, nor were these complaints voiced in 1985 or the previous winter.

The Court finds no reliable evidence that the accumulation of ice on the highway was the proximate cause of the accident. The deceased was travelling at a rate of speed that was excessive for the driving conditions at the time in addition to being about the legally mandated speed limit. There was no credible evidence to support the allegation that claimant's accident was caused by his vehicle striking the ice. To make an award in this case, the Court would be obliged to conclude that respondent's negligence was the sole proximate cause of Michael Kouns' death. There is no credible evidence to support such a conclusion.

Claim disallowed.

OPINION ISSUED DECEMBER 3, 1987

ROBERT AND LYDIA LEFFEW
VS.
DEPARTMENT OF HIGHWAYS

(CC-86-79)

James Barber, Attorney at Law, appeared for claimants.
Nancy J. Aliff, Attorney at Law, appeared for respondent.

HANLON, JUDGE:

The claimants in this action seek recovery of $10,018.00 for damage to their real estate and to their 1970 americana mobile home located on Eskins Avenue in Chelyan, Kanawha County, West Virginia. Claims purchased the lot and mobile home in 1981 or 1982. Claimant Robert Lee Leffew originally filed the claim in his name. When the evidence revealed that the property and mobile home are titled in both the names of Robert Lee and Lydia Leffew, the Court granted the motion of the claimant to include Lydia Leffew as a party claimant.

The claimant's property and mobile home are located below and to the right of the Chelyan Bridge which spans the Kanawha River from Route 61. Eskins Avenue is the street in front of claimants' property. This street is not maintained by respondent. There is a storm sewer under claimants' mobile home which starts on Wilshire Street above Eskins Avenue. The sewer ends at the west side of the Chelyan Bridge, emptying into the Kanawha River. Wilshire Street is parallel to Route 61.

Claimant robert Leffew testified that water damage occurred to the property shortly after the Chelyan Bridge was resurfaced in 1981 - 1982. He experience no water problems prior to the work being done on the bridge. Claimants allege that when the bridge was resurface, the drains were negligently paved over and improperly crowned, and that this resulted in water accumulating and standing in claimants' front yard.

Claimant Robert Leffew alleges that the standing water eventually caused the foundation to sink resulting in a leak in the ceiling of the mobile home. Water leaked from the ceiling, down through the walls, and came into the floor under the carpet. Eventually, the other end of the mobile home started leaking. As the foundation of the mobile home continued to sink, the cement steps located in the front of the mobile home pulled away from the porch.

By instrument dated February 15, 1984, the claimants agreed to permit respondent to place a culvert across the property. At that time, respondent placed a plastic culvert. According to Mr. Leffew, respondent ... "run a line off the ditch line, put an obstacle there to turn the water down into the culvert and run down under the bridge into an open ditch line into a community drain." This action on respondent's part remedied the problem of the water standing in claimants' front yard by diverting it to their back yard. Claimant asserts he was unable to repair the mobile home and that he traded it in October of 1986.

The evidence shows that there were no down spouts on the mobile home to take water away from the foundation, and that the mobile home was held up by 15 concrete block pillars three blocks high. There were no footers beneath the block pillars.

Testifying on behalf of the respondent was Joseph Thomas Deneault, Assistant District Engineer for Maintenance for District 1 for respondent. Mr. Deneault is familiar with the area which is the subject of this claim as it falls within District 1. He described the Chelyan Bridge as a truss bridge with long approach spans. It is a two-lane bridge, built around 1930 and paved with asphalt. He estimates that Route 61 is approximately eight or nine feet higher that the claimants' property. He stated that Eskins Avenue is not maintained by respondent. It is Mr. Deneault's professional opinion that claimants' water problems are caused by the natural surface water that fell onto the property, and also by the fact that property was not sloped properly to drain surface water. He did admit that there had been some increase in drainage as a result of bridge approach run-off. Mr. Deneault stated that he has not visited the property after a heavy rainfall or when there is standing water.

The record in this case fails to support the conclusion that the resurfacing of the bridge was the sole proximate cause of the water damage to claimants' property. While water from heavy rains followed their natural course from the bridge to claimants' property, the evidence revealed that the damaged mobile home lacked a drainage system for water from its roof. To determine that the improper resurfacing of the bridge was the proximate cause of water from the roof leaking into the wall of the mobile home is unwarranted from the evidence.

Accordingly, the Court is of the opinion that the claimants have not shown by a preponderance of the evidence that the damages claimed were the result of actionable negligence on the part of the respondent and hereby disallows the claim.

Claim disallowed.

OPINION ISSUED DECEMBER 3, 1987

TIMMIE J. MCMILLAN
VS.
DEPARTMENT OF HIGHWAYS

(CC-86-322)

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

PER CURIAM:

On July 20, 1986, the claimant was operating his 1979 Honda Gold Wing motorcycle on Route 250 south of Cameron when his motorcycle encountered gravel. As a result, the motorcycle incurred damages. Claimant submitted invoices totalling $410.83 which is the amount he seeks in damages.

The claimant testified that on the day of the incident, he was travelling from his home in Moundsville to Elkins, between 11:00 and 11:30 a.m. Weather conditions were good as it was dry and sunny. The road is a blacktop, two-lane roadway, and it is "crooked" all the way from Cameron. Claimant's speed was approximately 40 miles per hour. There was new patching on the road. As his vehicle approached a small rise i the road and a left-hand turn, the entire turn was covered with very small gravel. Claimant's motorcycle slid on the gravel, whereupon it slid over an embankment and into the woods.

Claimant further stated that the day of this incident was a Sunday. Respondent was not working in the area at that time. Claimant has no personal knowledge as to how the gravel got on the roadway at that location. However, he alleges that respondent's road repair created the gravel, and, therefore, the hazard. He noted that there were patched areas on the left side of the road, and the gravel appeared to have come across the road from the patches.

The Court concludes that respondent had neither actual or constructive notice of the hazard. Respondent cannot be held liable unless notice is established by the claimant. As there was no such evidence presented, the claim must be denied.

Claim disallowed.

OPINION ISSUED DECEMBER 3, 1987

ROGER L. MICHAELSON, INDIVIDUALLY
AND ROGER L. MICHAELSON, AS NEXT FRIEND
OF LYNETTE MICHAELSON, A MINOR,
AND LOIS J. MICHAELSON
VS.
DEPARTMENT OF HIGHWAYS

(CC-85-16)

Joseph C. Cometti, Attorney at Law, for claimant.
Nancy J. Aliff, Attorney at Law, for respondent.

GRACEY, JUDGE:

On September 29, 1983, at about 10:00 o'clock p.m., claimant Lois J. Michaelson was operating a 1982 Ford Escort station wagon, titled in the name of her husband, claimant Roger L. Michaelson, in a southerly direction on Coal River Road, also known as Secondary Route 3, sough of St. albans in Kanawha County. She was accompanied by their young daughter, Lynette. They were on their way to their home, near St. albans, from Marmet. About a mile after passing Indian Head subdivision, the vehicle crossed the center line and struck a northbound old Ford three-quarter ton truck being operated by a Dayton Price. Mrs. Michaelson has no recollection of what happened from the time she passed the Indian Head subdivision until she regained consciousness, pinned in the car, after the accident had occurred. The claimants allege that a defect in the highway surface must have caused her to lose control of the car, thus causing the collision. An award of damages in the total amount of $59,097.61 was requested.

The Michaelson vehicle had passed a small, broken blacktop area, along the westerly side of the pavement, just prior to the occurrence of the collision. Claimants apparently believe that the right front wheel struck, or passed through, this broken blacktop area and that this caused Mrs. Michaelson to lose control.

Trooper N.K. Davis investigated the accident. He had noted the broken blacktop and testified that it extended no more than a foot into the travel portion from the edge of the highway. The vehicles had come to rest generally beside each other, and both headed north. The Michaelson car was on the berm and embankment on the easterly side of the highway. The truck was mostly in the northbound lane. The debris was on the right side of and also immediately behind the truck. The collision had involved the front of the Michaelson car and the right front of the pickup truck. He had measured the distance, diagonally across the southbound lane, from the broken blacktop to the right front of the pickup truck, as 110 feet. Skidmarks behind the pickup truck were 26 feet long. He estimated the pavement width as 24 feet.

Mrs. Michaelson testified that, prior to the accident, she had travelled the subject section of the highway frequently, at least every other day, and she described the highway as being "a hoovy road, dippy." She described the injuries she and her daughter had suffered, their hospitalization and treatment, and the medical expenses incurred.

Dayton Price, the operator of the pickup truck, testified that he was travelling about 47 miles per hour. He was going up a slight grade and was shifting down to a lower gear. He described the oncoming car as apparently being out of control, combing into his lane, then apparently regaining control, then apparently out of control again.

Leo Francis Bodie, an Associate Professor of mechanical engineering at West Virginia Institute of Technology, was presented as a witness by the claimants. His only visit to the accident scene had been o the day prior to his appearance as a witness. He had measured the width of the pavement and said it was just over 20 feet wide. In answer to a hypothetical question, including a number of facts and a number of assumptions, he indicated that the Michaelson car might

have been thrown out of control if it had hit the broken pavement area. He conceded that the car might have been out of control for a different reason.

There was no evidence that the Department of Highways knew or should have known of the broken pavement edge. For the respondent to be held liable for damages caused by such a highway defect, the claimant must prove that the respondent has actual or constructive notice of the existence of the defect, had failed to correct it within a reasonable time, and that the defect was the cause of the damages. The State is neither an insurer nor a guarantor of the safety of travellers on its highways. *Adkins vs. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). The Court cannot base an award on speculation or conjecture. The Court must, therefore, deny this claim.

Claim disallowed.

OPINION ISSUED DECEMBER 3, 1987

ROBERT M. MOORE AND JUANITA MOORE
VS.
DEPARTMENT OF HIGHWAYS

(CC-87-38)

Kenneth E. Kincaid, Attorney at Law, for claimants.
Andrew Lopez, Attorney at Law, for respondent.

GRACEY, JUDGE:

On August 19, 1985, the claimants were travelling south on Route 20 at Lerona when their motor home left the travel portion of the roadway and proceeded onto the berm whereupon the vehicle struck a hole. Claimant Robert M. Moore was driving the motor home. He lost control of the vehicle, and it struck a tree. The claimants allege negligence on the part of respondent for failure to maintain the berm, which constituted a hazardous condition, and seek $31,031.40.

The claimants are husband and wife and were travelling in their 1978 Dodge X-Plorer, 24-foot motor home. Mr. Moore was operating the vehicle and his wife was a passenger. They had visited Pipe Stem State Park and were proceeding toward Princeton at approximately 11:00 a.m. at the time of the incident. Route 20 is a two-land, asphalt highway. The weather was clear and the road was dry. The Moore vehicle was being approached by another vehicle in the opposite lane. To compensate for the narrow width of the highway, Mr. Moore attempted to keep his motor home to the far right. In so doing, the motor home slipped off the paved surface of the road onto the berm and struck a hole located on the berm.

Testimony in the claim revealed that individuals who worked and lived in the vicinity of this accident were award of the existence of the hole. The hold was estimated to be 15 inches in circumference and 7 inches deep. Complaints had been made to respondent concerning the presence of holes in the berm on Route 20. However, no complaints were made with specific reference to this hole.

Corporal Dan Fulknier, a member of the Department of Public Safety, investigated this accident. He testified that the width of Route 20 is approximately 19 feet. There is a double yellow line in the center of the road. The depth of the pavement, from the top of the pavement to the normal berm, was 7 inches. This differential extends the length of the entire berm in that area. Corporal Fulknier stated that he was able to locate an accident report for an incident occurring previous to August 19, 1985. The report documented an accident which may have occurred on or about July 14, 1985, at the same location as the present accident. However, the accident report did not mention a hole in the berm.

The record also revealed that respondent had not received any complaints concerning this area of the road or the berm prior to the accident.

The evidence as presented fails to reveal why claimant Robert M. Moore drove his vehicle off the travel portion of the road and onto the term at the accident site. The paved highway would facilitate the passing of two vehicles. The Court has held that a traveler on the State's highways travels at his own risk and uses the berm at his own risk. See *Cole vs. Dept. of Highways*, CC-82-292, (January 17, 1986).

The Court has been unable to determine negligence on the part of respondent in the maintenance of the berm on Route 20. There was no apparent reason for the Moore vehicle to veer onto the berm. In accordance with previous decisions of the Court, the claim must be denied.

Claim disallowed.

Judge David G. Hanlon did not hear nor participate in the decision of this claim.

OPINION ISSUED DECEMBER 3, 1987

MOTORISTS MUTUAL INSURANCE COMPANY,
AS SUBROGEE OF NOAH THOMAS
VS.
DEPARTMENT OF HIGHWAYS

(CC-87-107)

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

PER CURIAM:

This action was filed to recover the cost of repair to a 1980 Chevrolet Fleetside half-ton pickup truck, which occurred as the result of an accident on August 10, 1986. Claimant insurance company paid Noah Thomas and his wife, Dreama Thomas, its insureds, $3,200.00, for which it presently makes this claim.

Claimant's insured was travelling on Whiteman Ford Road in the vicinity of Elkview, Kanawha County, at approximately 7:00 p.m. The road was wet at the time of the accident. there had been a heavy rain earlier. The highway has a gravel surface and is wide enough for two vehicles to pass each other in opposite lanes of travel. The claimant's insured stated that there were several big holes in the middle of the road. As the vehicle which he was operating passed through the area, the right side of the road collapsed, and the truck went over the bank and flipped on its side. Claimant was travelling at about 7-10 miles per hour at the time of the accident. The bank is six to seven feet high.

Mr. Calvert Mitchell, Supervisor for the Elkview headquarters of respondent, testified that there had been no complaints concerning the imminent collapse of this road. He had been on this highway prior to the accident and had not noticed anything wrong with the road.

Mr. Nelson Fowler, Maintenance Assistant to the District Maintenance Engineer for respondent, testified that he is familiar with the road at the accident site. He had received no complaints prior to the accident that the road wa sin imminent danger of collapsing. He further stated that to his knowledge no one employed by respondent had been contacted regarding the possibility that this roadway might collapse.

The State is neither an insurer nor a guarantor of the safety of persons travelling on its highways. *Adkins vs. Sims*, 130 W.Va. 645 (1947). For negligence of the respondent to be shown, proof of notice of the defect in the road is required. *Davis Auto Parts vs. Dept. of Highways*, 12 Ct.Cl. 31 (1977). In this case, there was no evidence that respondent knew or should have known of the propensity of the road to collapse. The Court must, therefore, disallow the claim.

Claim disallowed.

OPINION ISSUED DECEMBER 3, 1987

MARTHA THAXTON, ADMINISTRATRIX
OF THE ESTATE OF

JOSEPH PHILIP HANCOCK, DECEASED
VS.
DEPARTMENT OF HIGHWAYS

(CC-78-263)

L. Alvin Hunt, Attorney at Law, for claimant.
Robert D. Pollitt, Assistant Attorney General, for respondent.

PER CURIAM:

Claimant Martha Thaxton and Charles Hancock are the parents of six children. In late 1975 and 1976, claimant Martha Thaxton, Charles Hancock, and the children were residing with Dora Dunn, the children's grandmother. In December 1975, Charles Hancock left the home. The claimant also moved from the home, at that time, and left the children temporarily in the custody of their grandmother. On February 18, 1976, temporary custody of the children was awarded by Order of the Juvenile Court of Raleigh County to the Department of Welfare now known as the Department of Human Services, the respondent herein. Subsequently, in October 1976, Joseph Hancock, then 13 years old, was returned to Dora Dunn's home by one of the houseparents at the Beckley Child Care Center where he had been staying. On November 4, 1976, an uncle of the child, Philip Dunn, shot and killed Joseph Hancock. Philip Dunn resided next door to Dora Dunn. Claimant alleges that respondent breached its duty to safeguard her son from foreseeable dangers and hazards to his health, safety, and well-being. She also alleges that the respondent breached its duty to Joseph Hancock by placing him in the home of his grandmother where he had been previously threatened and assaulted by Philip Dunn. Claimant seeks $20,000.00.

Joseph Hancock was placed at the Beckley Child Care Center from February 18, 1976 to October 1976. He was unable to adjust to the center and had disagreements with the houseparents. At one point, he had run away to the grandmother's home. It was at Joseph's request that he was returned to the home of Dora Dunn. Esther Motley, Social Service Worker II, attained assurance from Dora Dunn that she was willing to have Joseph Hancock return to her household before he was placed with her in October, 1976.

The claimant bases her allegation of negligence on a "Social Summary" by Nancy Elkin, Social Service Worker II, West Virginia Department of Welfare. In the "Addendum", Nancy Elkin noted that "On Sunday, February 1, an uncle ran the children off from their home in their barefeet... ." Claimant alleges that this report indicates that respondent had notice that Philip Dunn had violent tendencies. although the claimant had knowledge of threats made by Philip Dunn to her children, she never informed the West Virginia Department of Welfare.

To make an award in this case, the Court would obliged to conclude that it has been shown by a preponderance of the evidence that the respondent was guilty of negligence which proximately caused the death of Joseph Hancock. It is urged that the Court should reach that

conclusion solely upon the evidence of the "Social Summary." The Court cannot agree. There was no proof submitted to the Court that respondent West Virginia Department of Welfare was aware, or that in the exercise of ordinary care should have been aware, that by placing Joseph Hancock in the home of Mrs. Dunn, it was placing him in a dangerous situation. Therefore, there wa no breach of duty and no resulting negligence on the part of the respondent.

Claim disallowed.

OPINION ISSUED DECEMBER 3, 1987

EDWARD S. WELCH
VS.
DEPARTMENT OF HIGHWAYS

(CC-87-82)

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

PER CURIAM:

Claimants seeks $1,212.15 for damages arising out of an automobile accident which occurred on February 11, 1987. The Court, with the approval of the claimant, amended the style of the claim to reflect the Department of Highways as the proper party respondent.

On that day, the claimant was driving his 1971 Chevrolet pickup in a southerly direction on Route 119 on the north side of Mink Shoals. Two rocks fell in front of his vehicle, and the vehicle struck the larger of the two rocks. The automobile was totalled. It was dry and clear at the time of this incident, but it was not yet daylight, since the incident occurred at 5:30 a.m. Route 119 is a two-lane, blacktop highway. The claimant was travelling at between 45 and 50 miles per hour. The two rocks were in the process of falling from the hill when the claimant first observed them. One rock came down in front of his automobile, and the automobile struck it. The claimant's injuries required a trip to the emergency room. Claimant had been travelling this route for four years but had not encountered rocks at this location in the past.

Calvert L. Mitchell, Assistant Supervisor for Kanawha County, for respondent, testified that he was aware of the rock fall in the vicinity of Mink Shoals exit on Route 119 sough, on February 11, 1987. He did receive a telephone call after 5:30 a.m. about this particular incident. He stated that they have had falling rocks there from time to time. However, he was not aware of the rock at the site of the accident before the telephone call of February 11, 1987.

Nelson L. Fowler, Maintenance Assistant for Kanawha County, for respondent, testified that he was aware of the situation which is the subject of this claim. He resides in the area where the accident occurred. Respondent was notified shortly after the rock fall on February 11, 1987, and a crew was dispatched to the scene shortly thereafter. The daily inspector reports showed that no notice was given to respondent immediately prior to February 11, 1987.

The evidence in this record indicates that the dangerous condition appeared suddenly and that the respondent promptly moved to take safety precautions as soon as it became aware of the problem. *Barnhart vs. Dept. of Highways*, 12 Ct.Cl. 236 (1979). *Adkins vs. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947), holds that the State is neither an insurer nor a guarantor of the safety of the motorists on its highways. The Court is of the opinion that negligence on the part of the respondent has not been established, and, therefore, the Court denies this claim.

Claim disallowed.

OPINION ISSUED DECEMBER 3, 1987

ALBERT F. WILSON, SR.
VS.
DEPARTMENT OF HIGHWAYS

(CC-86-431)

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

PER CURIAM:

Claimant seeks $157.88 for damage done to his 1980 Chevrolet truck as the result of an incident which occurred on November 9, 1986.

The claimant testified that he was travelling south on Route 119 in Elkview in the location of the Elk Shopping Plaza. It was approximately 7:15 a.m., and he was proceeding at a speed of 20-25 miles per hour. His automobile encountered standing water and rock. The rock damaged the running board of the automobile. It had been raining heavily previously, but was not raining at the time of this incident. He had not observed the water on prior occasions. He estimated the water to be six inches deep. He did not observe the rock before his vehicle struck it, but his vision was obstructed by the light from the shopping plaza. The accident location is a straight stretch of roadway. He did not report the defect to respondent.

The State is neither an insure nor a guarantor of the safety of travellers on its highways. *Adkins vs. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). For the respondent to be held liable for damages caused by road defects of this type, the claimant must prove that respondent had actual or constructive notice of the existence of the defect and a reasonable amount of time to correct it. *Davis vs. Dept. of Highways*, 11 Ct.Cl. 150 (1976). The evidence indicated that there as no warning of any problems with the water and rock. The Court must, therefore, deny the claim.

Claim disallowed.

OPINION ISSUED DECEMBER 7, 1988

STEPHANIE R. SHORT
VS.
DEPARTMENT OF EDUCATION

(CC-88-253)

No appearance by claimant.
Janet F. Steele, 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 $210.00 for reimbursement of tuition for courses taken by claimant for the renewal of her teaching certificate. The grades for the two courses were necessary for claimant to complete the reimbursement request for tuition grants for certificate renewal. The deadline for reimbursement on classes ending June 30, 1988, was July 15, 1988, but claimant did not receive her grades by the deadline and did not submit the reimbursement request to respondent within the proper fiscal year. Therefore, claimant has not been reimbursed for the tuition expenses. The respondent admits the validity and amount of the claim 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 sought.

Award of $210.00.

OPINION ISSUED DECEMBER 7, 1988

XEROX CORPORATION
VS.
DEPARTMENT OF CORRECTIONS

(CC-88-141)

No appearance by claimant.
Janet F. Steele, 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 $699.35 for supplies for copy machines provided respondent State agency. The respondent admits the validity and amount of the claim and states that there were sufficient funds in respondent's budget for the appropriate fiscal year with which the claim could have been paid; however, the respondent was not able to make payment as the State Auditor returned the transmittal to the respondent with the explanation that the Treasury of the State of West Virginia lacked sufficient funds to process the transmittal.

The Court has reviewed the petition and the answer and finds that the State agency had sufficient funds within its appropriated budget to pay the claim, and, for this reason, the claimant is entitled to an award from the respondent.

In view of the foregoing, the Court makes an award in the amount of $699.35.

Award of $699.35.

OPINION ISSUED DECEMBER 8, 1987

JERRY R. COOPER
VS.
DEPARTMENT OF HIGHWAYS

(CC-84-263)

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

PER CURIAM:

Claimant's son, Gary R. Cooper, was operating claimant's 1978 Ford Fiesta automobile in a westerly direction on Route 60 in front of the East Hills Mall, on September 17, 1984, at approximately 9:00 p.m. when the automobile struck the concrete median at that location. The impact with the median resulted in the car being totalled. Gary R. Cooper originally filed the claim with both himself and his father, Jerry R. Cooper, as claimants. The claimant, Jerry R. Cooper, is the sole owner of the automobile; therefore, the Court, on its own motion, amended the style of the claim designating Jerry R. Cooper as claimant. Claimant seeks $1,176.00, which amount represents the replacement value of the automobile.

Gary R. Cooper testified that, at the time of the incident, it was dark, clear, and dry. He was accompanied by Mike Gwinn, a friend. He was proceeding at between 35 and 40 mph to Huntington. He stated that there is a left turn lane into the east Hills, Mall. The yellow line which is indicative of the left turn lane had not been removed when a new concrete median was erected. The former yellow markings followed into the median. Therefore, the left side of the automobile which Gary R. Cooper was operating struck the median. He described the concrete median as being an island. He indicated that the median is approximately six inches tall and two to three feet wide.

He further testified that he had driver this route three weeks to a month before this incident. At the time of this incident, there were no warning signs. He stated that his vehicle was 25 to 30 feet away from the median when he first noticed the division of the lane. The automobile veered away from the median, but failed to avoid it. He stated that he assumed that respondent erected the new median, although he has no independent knowledge of that fact.

Mr. Barry Warhoftig, a civil engineer with the Traffic Engineering Division of respondent, testified that the change in the traffic median was being constructed by the Red Roof Inn, or Crown American Corporation, under permit with respondent. He stated that he was not familiar with the specific permit, but there is a bond associated with it. He did not prepare the permit.

This Court has held in the past that if the record establishes that n independent contractor was engaged in the construction work, the respondent cannot be held liable for the negligence, if any, of such independent contractor [*Paul vs. Dept. of Highways*, 14 Ct.Cl. 479 (1983); *Harper vs. Dept. of Highways*, 13 Ct.Cl. 274 (1980); *Safeco Ins. Co. vs. Dept. of Highways*, 9 Ct.Cl. 28 (1971)].

Claim disallowed.

ADVISORY OPINION ISSUED DECEMBER 8, 1987

SECRETARY OF STATE

VS.
DEPARTMENT OF EDUCATION

(CC-87-432)

No appearance by claimant.
Robert D. Pollitt, 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 $43.10 for copies of Level IV decisions from the West Virginia Education Employees Grievance Board which were furnished by the Administrative Law Division of the Secretary of State. The invoice for the copies has not been paid. The respondent admits the validity and amount of the claim and states that there were sufficient funds in respondent's budget for the appropriate fiscal year with which the claim could have been paid; however, the respondent was unable to make payment as the State Auditor returned the intra-governmental transmittal to the respondent with the explanation that the Treasury of the State of West Virginia lacks sufficient funds to process the transmittal.

The Court has review the petition and Answer and finds the State agency had sufficient funds within its appropriated budget to pay the claim and, for this reason, the claimant is entitled to an award from the respondent.

As this is a claim between two State agencies, the Court makes an advisory award in the amount of $43.10.

OPINION ISSUED DECEMBER 8, 1987

LARRY C. SPENCE
VS.
DEPARTMENT OF HIGHWAYS

(CC-86-284)

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

PER CURIAM:

Claimant seeks $159.44 for damage to his 1984 Ford Ranger pickup truck. His vehicle struck a hole on I-64 between the Winfield and St. Albans interchanges, at a bridge that goes over Rocky Step Road. The accident occurred on July 15, 1986 at approximately 6:20 a.m.

Claimant testified that at the time of the accident it was dark. He was proceeding at a speed of 50-55 mph. He drives this route five days a week. The hole was not present on the day previous to this accident. He reported the accident at 8:30 a.m. He was informed by respondent';s representative that the hole had been reported between the time claimant had the accident and the time that claimant called. The hole was repaired the next day.

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

Claim disallowed.

OPINION ISSUED JANUARY 15, 1988

THE LANE CONSTRUCTION CORPORATION
VS.
DEPARTMENT OF HIGHWAYS

(CC-82-164)

Thomas E. Potter and Thad S. Huffman, Attorneys at Law, for claimant.
Anthony G. Halkias, Attorney at Law, for respondent.

GRACEY, JUDGE:

Claimant, The Lane Construction Corporation, herein presented a claim against the respondent, the West Virginia Department of Highways, for damages in connection with construction of 6.963 miles of the Highland Scenic Highway, also known as West Virginia Route 150, in Pocahontas County. The alleged damages are generally itemized as follows:

1977 Fill Bench Delay	$814,580.19
1979 Slide Delay	102,577.22
1980 Costs	1,062,187.70
1980 Escalation for Paving	10,116.30

$2,079,461.41

The contract was advertised for bids as a "Federal Aid Project HSH-1(1)." Claimant submitted the lowest bid, in the amount of $11,467,571.20 and was awarded the contract on May 14, 1977. The project was through the Monongahela National Forest, heavily wooded, rugged terrain, all high in the mountains. It ran from its westerly end, about two miles east of the Williams River, at Station 822, to its easterly end at Station 1189 + 59 at Route 219. To the south was the Edray Fish Hatchery. To the north was the headwaters of the Elk River. The climate conditions were variable and severe, much rain and cold, limiting the length of a construction season. The environmental considerations posed limitations. Timber cut in clearing the right of way was required to be hauled out of the project area, not wasted. Under Section 642.3.2 of the contract Supplemental Specifications, limitations as to the area of clearing and grubbing and excavations were clearly spelled out.

> "... To provide a positive guide in this are no more than 750,000 square feet each of erodible soil will be exposed as a result of (1) clearing and grubbing and (2) excavation, embankment, borrow or waste for a maximum cumulative total of 1,500,000 square feet without the approval of the Engineer. Approval to proceed beyond this point will be contingent upon (1) the Engineer's satisfaction, based on performance, as to the Contractor's ability to proceed with his operation and yet maintain pollution control at the level contemplated by this special provision, and (2) Seeding and Mulching of disturbed areas at the Contractor's expense."

The Claimant's Contractor's Proposal, and the resulting contract, called for completion of the project by June 30, 1980. At the pre-construction conference, held on May 3, 1977, the claimant presented its intended schedule for construction. The claimant anticipated completing the project in 1979. Upon cross examination, Byron F. Wetmore, claimant's Executive Vice President, conceded that "... we thought we would have to have relief on that 1,500,000 square feet." The contemplated schedule called for commencement of this work on the project, nearly seven miles, by the end of July, 1977. "We realized there was a restriction in the specification and hoped we could overcome it." What made him think he could overcome such a restriction? "We've had it before and have overcome it." He also admitted that he had learned "... that some of the people that had constructed some of the earlier work had gone broke trying to finish work that took them two or three years longer than they anticipated to do it."

The claimant's intended construction schedule also showed project excavation work to begin June 1, 1977, and the construction work continuing through a 1977 construction season ending November 15. By Stipulation, the parties agreed that project excavation work began June 27, and Wetmore conceded that claimant closed down the job, for the winter, on about October 16th or 17th. "The weather was of such magnitude at that time that we could not work after October 15." Thus, the 1977 construction season was somewhat shorter than the claimant had planned.

Generally, this project was a cut and fill type operation. The respondent had provided the plans showing the levels at which rock might be found. Claimant was required to excavate to the rock level, then fill, over the rock, with select rock material for drainage, and with earth and rock back to the desired grade. Most of these fill benches were in the easterly half of the project. Also, the respondent had indicated the rock quarry location as being just easterly from a forest road which could provide contractor access to the project at about Station 982, early the mid-point of the project. For several reasons, the claimant elected to begin construction at that mid-point. Weight limitations denied use of Route 39 as access to the westerly end of the project. Claimant would need rock, in the fill bench operations, and the rock quarry was shown as being at Stations 980-988, not conveniently accessible had the excavation work been started at Route 219, the easterly end of the project. As it turned out, that rock quarry was not satisfactory, and rock had to be hauled from another quarry further east. The claimant's plan was to do the more difficult easterly half of the project first. Then, as paving was progressing westerly from Route 219, the excavation and grading work would be progressing from that mid-point westerly, to the westerly end of the project, readied for paving when the paving reached that mid-point.

Not long after the excavation work began, the claimant began to find that the rock was not at the elevations shown on the plans, and in some cases, the rock was not a hard, firm rock base, but soft shale. The first such experience was one where the rock was at a higher elevation than shown. Subsequent excavation areas proved rock at lower elevations than shown. There were about six such areas. In each case, when the indicated elevation was reached, and rock was not found, a few more feet were excavated at respondent's direction. Mr. Wetmore conceded that it is not uncommon to run into such circumstances in the field. However, he added, "The normal reaction is that usually it is done on a continuing basis as differences are found. Normally, decisions are made quickly as to where the elevations are to be established and the redesigns are done, if you will, on a piecemeal basis sometimes, which allows the work to be progressed."

Respondent's alleged delay in making decisions and giving the claimant redesigns is the basis for claimant's 1977 Fill Bench Delay claim in the total amount of $814,580.19. Of this total, $709,473.65 appears to be for idled equipment. $72,800.00 is for stockpiling fill bench materials, for having to move such materials twice instead of once. $9,219.00 is for salaried idle supervisory personnel. $32,306.54 is for higher labor cost for work done in the 1978 and 1979 seasons instead of, as planned, in the 1977 season. The evidence was conflicting as to the length of the delays with reference to the problem areas. Mike O'Neil respondent's geologist, was notified on August 4 and came to the sight on August 8. On August 19, respondent began bore drilling under his direction. There was conflicting evidence as to whether the several sites were bore in a progressive order of priority requested by claimant, but it was apparent that the presence of the drilling rig caused problems for the claimant. According to O'Neil, as a solution and redesign was accomplished, in a few days in most instances, the claimant was furnished with a temporary redesign and, within a day or so thereafter, was formally furnished with the redesign plan. Claimant contends that the respondent was not that prompt; that the delays varied from 3.4 weeks to 9.3 weeks; that the redesign on the Station 1090 area, representing 120,000 cubic yards of material, was not presented until April 13, 1978, 35.5 weeks after the respondent was notified of the problem on August 6, 1977,

but one must remember that weather closed down the project for the winter on about October 15, 1977, until claimant resumed work in April of 1978. Of course, the respondent had no control over the kinds and numbers of items of equipment the claimant brought to the job, or kept there from time to time. It seems a fair conclusion that more equipment was on the job site, in the claimant's desire and intention to complete the contract by the end of the 1979 season, that if the claimant had planned for use of the full time allowed for completion, to June 30, 1980.

Claimant contended that, at the end of the 1978 construction season, claimant was near to being back on its own schedule for the project and intended to finish the project by the end of the 1979 construction season.

As the 1979 construction season began, slips and slides over the previous winter months were apparent in the westerly half of the project area. Claimant presented evidence that respondent was dilatory in providing redesigns for these slide areas. One potential slide area, at Station 965, just west from the center of the project, was noted by claimant about May 19 and brought to the respondent's attention. By September 5, when Hurricane David rains caused a "catastrophic slide" there, the respondent had still given no direction. Of course, this slide limited claimant's access westerly. Claimant's listing of its 1979 damages begins as of September 6 and continues through September 29, and is wholly for idled equipment in the amount of $102,577.22. Except for the occurrence of that slide, claimant contends it would have finished the project in six or seven weeks, before the end of the 1979 construction season. A slide design correction was supplied on September 26. Clearing the slide took about five or six weeks, and claimant was paid under force account for that work. The project was closed down for the winter on November 30. Claimant's contention is that the September 5 slide, and the resulting delay, would not have occurred had the respondent taken timely action with reference to how the area at Station 965 was to be stabilized after it was brought to the respondent's attention about May 19.

Thus, the claimant claims the excess of its 1980 costs. At the contract price, claimant was paid $233,396.00 for the contract work done in 1980, this being $1,062,187.70 less than its listing of actual costs.

Also, claimant's paving subcontractor, Pocahontas Construction Company, was only committed to its bid or subcontract prices to June 30, 1980, the date the contract was required to be completed. For paving work after that date, higher prices had to be paid by the claimant in the excess amount of $100,116.30.

Throughout the presentation of this case, it was emphasized that the claimant was fully paid for the expected contract work at the contract prices and was fully paid through change orders and force account, for extra excavation, obtaining rock from an alternate quarry area and for slide correction. No liquidated damages were assessed for the delay in completion, for the period from July 1 to October 9, 1980.

From all of the evidence, it appears to the Court that the claimant did suffer some delay and idling of some equipment while fill benches were being redesigned. With reference to the slide at Station 965, it was under observation and study from May 5, 1979, with a temporary correction for by-pass, until the slide occurred on September 5. The Court refuses to find the respondent responsible for the occurrence or consequences of that slide. The claimant was awarded the additional force account work of correcting the slide and no liquidated damages were assessed for the extra time used to complete the contract.

The Order entered by this Court on February 28, 1983, is hereby set aside.

Upon due consideration of all the evidence presented, and in equity and good conscience, the Court makes an award to the claimant in the amount of $322,241.52

In accordance with the provisions of West Virginia Code §14-3-1, interest at 6% per annum is calculated on this award based on the final acceptance date of the project of October 9, 1980. Interest is allowed from the one hundred and fifty-first day after the date of final acceptance, March 8, 1981, until the issuance date of this opinion, January 15, 1988.

Award of $322,241.52 with interest in the amount
of $132,690.00, for a total award of $454,931.52.

Judge Hanlon did not participate in the hearing or decision of this case.

*The West Virginia Legislature did not include the payment of this claim in the 1988 Claims Bill as the project was a "Federal Aid Project".

OPINION ISSUED JANUARY 18, 1988

LINDA RODEHEAVER AND
VON RODEHEAVER
VS.
DEPARTMENT OF HIGHWAYS

(CC-86-340)

Richard K. Wehner, Attorney at Law, for claimants.
Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

On July 10, 1986, claimant Linda Rodeheaver, accompanied by her husband, Von Rodeheaver, was driving their recently purchased 1986 Mercury Cougar on Route 119/3,Monongalia County, when the vehicle struck a pothole Two wheels, two tires and two beauty rings were damaged in the amount of $601.83.

Claimant Linda Rodeheaver testified that she was travelling at approximately 35 mph at the time of the accident. The road is a two-lane roadway, but it is narrower than normal. She had not observed the hole prior to this accident. The record indicates that the hole extended from the white edge line into the highway. It was located at the end of a driveway of a private residence. She drove this route infrequently. She reported the incident the next day to respondent's office in Kingwood. Respondent's representative at Kingwood admitted that respondent was aware of the existence of this particular hole.

The respondent had actual notice of the defect in the roadway. The respondent failed to adequately maintain the roadway and, the Court, accordingly, finds that respondent was negligent. In view of the foregoing, the Court makes an award in the amount of $601.83.

Award of $601.83.

OPINION ISSUED JANUARY 18, 1988

S. J. GROVES & SONS COMPANY
VS.
DEPARTMENT OF HIGHWAYS
(CC-82-295)

AND

S. J. GROVES & SONS COMPANY, FOR THE BENEFIT
OF ATLAS MACHINE AND IRON WORKS, INC.
VS.
DEPARTMENT OF HIGHWAYS
(CC-83-233)

Stanley E. Deutsch and William W. Lanigan, Attorneys at Law, for claimants.
Robert F. Bible, Attorney at Law, for respondent.

HANLON, JUDGE:

Claimant S. J. Groves and Sons Company (hereinafter referred to as Groves), a Minnesota based general contractor, entered into a contract with respondent on January 10, 1979, for the

construction of two bridges, designated Project Numbers APD-323 (69) and APD-323 (59). Groves also entered into a contract with respondent on March 29, 1979 for the construction of a third bridge, designated Project Number ID-77-2 (49/64). These projects, known as the Mingo County Bridge, the Kanawha County Bridge, and the Fayette County Bridge, respectively, are the subject of these claims. On June 13, 1983, Dallas A. Wolferd, Vice President of Groves, executed an assignment of its rights to pursue the claims before this Court to Atlas Machine and Iron Works, Inc. (hereinafter referred to as Atlas), the structural steel fabricator for these projects. The work on the projects was done in Gainesville, Virginia. The original amount of the claim was amended to $2,440,013.00 at the hearing.

The following documents were placed in evidence by written stipulation of the parties:

Part 2 of the general Plans of Construction.

Standard West Virginia Department of Highways Standard

Specifications Roads and Bridges (1978).

Supplemental Specifications (January 1, 1979).

1973 publication of Steel Structures Painting Manual.

Atlas alleges that due to factors within the control of respondent, it experienced severe cost overruns, substantial increase in the main hours expended on these projects, and that it incurred expenses in excess of the increased costs.

Werner H. Quasebarth, President of Atlas, testified that Atlas is a structural steel fabricator which was founded by his father in 1930. In addition to approximately 30 bridges in West Virginia, it fabricated the steel for projects in Georgia, South Carolina, North Carolina, Virginia, District of Columbia, Maryland, Delaware, New Jersey, Pennsylvania, New York, Connecticut, Massachusetts and Ohio.

There were approximately 300 steel girders to be fabricated by Atlas in the three projects which are the subject of these claims. The typical girder to be fabricated for these projects averaged 100 feet in length, 5 feet deep and weighed approximately 10 tons. One of the major elements in fabricating steel girders involves surface preparation.

During the process of surface preparation, the fabricator removes mill scale that has oxidized on the girder when the steel was rolled into the girder form. To remove the mill scale, the girder is placed in a Wheel-a-brator which propels shot at the girder to remove the mill scale uniformly. The respondent's *Standard Specifications Road and Bridges, Adopted 1978* provides a "near white" surface specification. Atlas was required to achieve a "near white" surface on each girder. Atlas considered the interpretation of "near white" by the respondent to be too stringent. Atlas attempted

to achieve the results desired by the respondent by preblasting and reblasting girders. Quasebarth explained that the reblasting required caused production problems of the Atlas fabrication plant. There was a continual stoppage of steel members in an attempt to satisfy the requirements of respondent's inspectors assigned to these projects.

He stated further that it is normal practice to break the corners on the flanges of the steel girders, but Atlas was required by the inspectors on the project to radius the edges on the flanges. Hackles, which are small spurs of steel that penetrate the coating of the paint, also created a problem, according to Quasebarth. Other problems arose from interpretation by the inspectors of overspray or dry spray. There were difficulties in getting orderly inspection done. All of these problems backed up not only the project that was being completed, but it also created a backlog of steel being stored at the Atlas foundry. The work at Atlas from January 1980 through August 1980 was related to fabricating steel for these projects and comprised 50 percent of Atlas' work during this period of time.

Once the girder has completed the surface preparation process, the girder is then spray painted with an inorganic zinc paint. The girder is inspected at this point for proper thickness of the paint. On this project, a 4 mil thickness of paint was required. Where the inspectors determined that overspray or dry spray occurred on the girder. Atlas was required to either reblast or hand sand the areas of overspray. This became a major problem for Atlas.

Atlas also alleged problems occurred during the process of breaking the edges on the flanges of the steel girders. Normal practice in the industry is to brake the edges. Atlas contends that it was required to grind the edges so that the edges were radiused. This hand work required many man hours of time. The respondent contends that the inspectors on the problems never required Atlas to radius the edges. The respondent did expect the edges to be broken and the burr or sharp edge removed.

Another area which caused considerable concern on the part of Atlas was the requirement to remove mill scale in the snipes. Snipes are areas on the inside corners of the flanges. Atlas contends that it was required to hand blast each snipe area in a girder in order to remove the mill scale. The inspectors were using flashlights, dental mirrors, and magnification glasses to determine if the snipes contained mill scale. It was then necessary to hand blast every snipe area in a girder to achieve the surface preparation being required by the respondent's inspectors. As a result of this problem, there was a meeting held on March 19, 1980.

At that meeting, Bill Shuler, a chemist with respondent, agreed that the snipe mill scale was not detrimental and did not have to be removed. However, personnel at Atlas were not notified until May 1, 1980, that a decision had been made regarding this problem. During the interim period, however, claimant was required to expend extra labor for the removal of the mill scale in all of the snipe areas on the girders.

In order to attempt to maintain a work schedule to meet the respondent's requirements for steel fabrication, Atlas started working weekends, and then a third shift. Atlas paid for the extra work. Men were idle waiting for decisions to be made on inspected items. This resulted in extra costs to Atlas.

Dr. Felix Konstandt, President and Technical Director of Konstandt Laboratories, Inc., testified that his firm is engaged in the testing, evaluation and development of coatings and paints. He stated that he uses the Swedish standard in terms of evaluation and painting and that the Steel Structure Painting Counsel is the American equivalent of the Swedish Academy. Dr. Konstandt explained that there are three separate standards of cleanliness imposed by the Swedish standards. Sa 3 is a white metal blast. Sa 2 1/2 is a near-white blast and Sa 2 is a commercial blast. He stated that a near-white blast permits five percent of impurities to be present on the overall surface of the steel.

He further explained that it is necessary to clean the steel as the paint has to be applied to clean surfaces. Paint is applied to the steel to prevent corrosion of the steel. His definition of "a near white blast" permits 5 percent of impurities to be present on the over all surface. He described hackles or slivers as impurities that are formed on the steel or have been formed on the steel during fabrication and stated that it is practically impossible to achieve 100 percent removal of all mill scale on standard job sites. He testified that he read the West Virginia Specifications. In his opinion the provisions in these Specifications are more stringent than the specifications normally required in the industry.

Common problems which occur during the painting operations include pinholes, sags and overspray or dry spray. Dr. Konstandt indicated that there is no mention made of dry overspray in any painting specification on structural steel. In his opinion the reblasting which results from the removal of the overspray does some injury to the surface of the steel. He also testified that the industry did not consider overspray to be a defect or a flaw in the fabrication of steel girders.

Charles F. Jarrard, Jr., consultant to the fabrication industry, testified as an expert for Atlas. He has been involved with the fabrication of approximately 50,000 tons of steel for the State of West Virginia. He stated that surface preparation of the steel is generally outlined in the State Specifications and that the majority of states today reference the Steel Structures Painting Council. This Council references the Swedish Standard. He testified that if there was a disagreement over what was being produced, hopefully, there would be a meeting of the minds within the plant and the problem would be resolved. He mentioned that generally, the fabricator gives up because he needs the cash flow.

His experience with West Virginia goes back to 1959 or 1960. He stated, "In plain words, cleaning and painting was a bigger problem in West Virginia, than probably any other state that I have worked in,". Jarrard testified that he does not know of any requirement imposed by the specification to remove overspray. "I believe that removal of all overspray is unrealistic and impractical." He also said that regarding hackles, West Virginia took the position that you had to

get the profile back. This did not occur in any other state. A girder is placed back in the blasting unit to create the profile. Then, it is reblasted. A girder could be blasted as many as seven times. In the industry, it is normal and customary to break edges, certainly on flanges.

In discussing the Standard Specifications of West Virginia in comparison with other states, he stated, "I guess because I've done so much West Virginia work, I don't really feel they're that much more stringent than anybody else."

The position of Atlas in this claim is that the inspectors for the respondent, who were assigned to inspect the steel being fabricated for these three projects, imposed standards upon Atlas which were not a part of the Standard Specifications. The standards imposed upon Atlas were alleged to be beyond what custom and usage would normally dictate and were outside the scope of the specifications in the contract.

The consensus of the opinion of respondent's employees was that all mill scale had to be removed from the surface of the steel. This was the standard applied on these projects.

The respondent's *Standard Specifications* provides for surface preparation as follows:

> §615.6.4 - Surface Preparation: All structural steel surfaces shall receive a very thorough blast (near white) cleaning prior to painting. Mill scale, rust, weld spatter and foreign matter shall be removed to the extent that the only traces remaining are slight stains in the form of spots or stripes. The appearance of the steel surface after very thorough blast cleaning shall correspond with the following pictorial standards: A Sa 1 1/2, B Sa 2 1/2, C Sa 2 1/2, or D Sa 2 1/2 of SSPC-Vis 1 ... .
>
> Blast cleaning operations shall be done in such a matter that no damage is done to partially or entirely completed portions of the work. After blast cleaning, any areas which are repaired by welding shall be blast cleaned. Areas repaired by grinding or other means shall have the anchor pattern restored by blast cleaning, or as directed by the Engineer... .

The interpretation of this specification created the problems as to surface preparation of the steel girders. The respondent employed Pennsylvania Testing Laboratories to provide inspectors on the project. The inspectors followed the directions of respondent's employees in requiring the removal of all mill scale on the girders.

The respondent contends that its inspectors applied the Specifications in the same manner as they would have applied them in any fabrication of steel project. The Standard Specifications required a "near white blast." According to the position of Atlas a "near white blast" does not mean

the removal of all "mill scale". The respondent's position is that the interpretation of "near white" means the removal of "all mill scale". The specification provides that "Mill scale...shall be removed to the extent that the only traces remaining are slight stains in the form of spots or stripes."

It is the opinion of the Court that the inspectors were following the dictates of the respondent's Specifications in requiring Atlas to remove all mill scale from the surface of the fabricated steel. Therefore, Atlas is not entitled to the extra costs for work which resulted from this requirement by the respondent's inspectors.

As to the second problem which caused considerable concern on the part of Atlas involving the application of inorganic zinc paint to the fabricated steel, the Court has determined that there is merit to Atlas' contention that the inspectors were unreasonable in interpretation of the project specifications for dry spray or overspray of the paint. The paint was furnished by Mobile in accordance with the respondent's specifications. The specifications required a 4 mil coat. It was necessary for Atlas to reblast steel girders in an attempt to satisfy the inspectors. Atlas also resorted to using manual labor in removing the overspray which resulted in many hours of extra labor costs. The respondent contends that excessive paint overspray must be removed in order to avoid problems with the application of field paint.

While bridge inspectors from West Virginia appear to be more strict in their inspections on projects, the Court considers this adherence to quality standards to be reasonable in light of the failure of the Silver Bridge at Point Pleasant, West Virginia, which occurred in December 1967, and, in finding some liability in this claim, we are in no way inferring criticism of the respondent or its inspection in this regard.

It is the opinion of the Court that respondent's inspectors were conscientious in their interpretation of the Specifications applying to overspray or dry spray of the paint. Accordingly, Atlas was required to perform some extra work for this item. It is the opinion of the Court, however, that Atlas is not entitled compensation for this work.

As to the problem of the radius on the edges versus broken edges on the flanges of the steel girders, the Court is of the opinion to disallow this item. The evidence is clear that Atlas performed this extra work on the edges of the flanges on its own accord rather than at the insistence of respondent's inspectors.

The problem with the removal of mill sale in the snipes of the steel girders did cause Atlas to incur costs for extra work performed in an attempt to satisfy the standards being applied by the respondent's inspectors. The Court is of the opinion that the respondent's employees failed to adequately and timely advise Atlas of its decision regarding the removal of mill scale in the snipes on the steel girders. This failure caused extra labor costs for claimant. Therefore, the Court makes an award in the amount of $217,259.56 for labor costs for the extra work performed during the specific time period as indicated heretofore in the opinion to S. J. Groves and Sons Company, for the benefit of Atlas Machine and Iron Works, Inc.

Award of $217,259.56.

OPINION ISSUED JANUARY 18, 1988

STATE FARM MUTUAL AUTOMOBILE INSURANCE
COMPANY, AS SUBROGEE OF VERNON MARCUM, JR.,
AND VERNON MARCUM, JR., INDIVIDUALLY
VS.
DEPARTMENT OF HIGHWAYS

(CC-86-201)

Robert J. Louderback, Attorney at Law, for claimants.
Nancy J. Aliff, Attorney at Law, for respondent.

HANLON, JUDGE:

On March 24, 1986, at approximately 6:45 a.m., claimant's insured was travelling easterly on Interstate 64 in the vicinity of Kenova, Wayne County, when his vehicle, a 1985 Ford Ranger truck, struck an expansion joint which was sticking up perpendicular to the surface of the highway. Claimant State Farm Mutual Automobile Insurance Company seeks $1,611.25 for the damage to the vehicle. Claimant Vernon Marcum, Jr. seeks $100.00 as his deductible. The claim was initially filed incorrectly, and upon claimant's motion, the Court amended the style of the claim to reflect its status as a subrogation action in part.

Claimant Vernon Marcum, Jr. testified that he had travelled this particular route for approximately eight years on a daily basis. The weather on the day in question was dry and clear, and he was travelling at approximately 55 miles per hour. His vehicle approached the bridge on Interstate 64 and encountered the expansion joint, whereupon the damage occurred to the vehicle. He stated that the joint would "pop up," and that at least two other vehicles had difficulty with the expansion joint at the scene of his accident, in the time span of approximately 30 minutes. He did not report the presence of the broken expansion joint, although he had observed it for approximately three weeks prior to this incident. He stated that his automobile had been making a louder than usual noise when he drove over the expansion joint for that period of time.

Mr. Terry Hazelett, Welding Crew Foreman for respondent at the time of this incident, testified that he was notified of a problem with an expansion joint on March 24, 1986, at approximately 7:30 a.m. He and a crew then went to repair the expansion joint.

Mr. Wilson Braley, District 2 Bridge Engineer for respondent, testified that he is familiar with the particular expansion joint on this bridge. Prior to March 24, 1986, he had not received any

complaints with regards to this particular expansion joint. He had no reason, prior to the date of this incident, to believe that this joint would fail.

Interstate 64 is a heavily travelled, major highway. The evidence in this claim established that the hazardous condition had existed for some time before this accident. See *Davis Auto Parts vs. Dept. of Highways*, 12 Ct.Cl. 31 (1977). The Court finds that there was actual notice on the part of the respondent, and hereby makes the following awards to the claimants.

Award of $1,611.25 to State Farm Mutual Automobile Insurance Company.

Award of $100.00 to Vernon Marcum, Jr.

OPINION ISSUED JANUARY 18, 1988

CLIFFORD B. STOVER, ET AL.
VS.
DEPARTMENT OF LABOR

(CC-86-354)

No appearance by the claimants.
Robert D. Pollitt, Senior Assistant Attorney General, for respondent.

PER CURIAM:

This is a claim by the former employees of Chafe Mining, Inc., to recover certain wages to which they would be entitled under the purview of W.Va. Code Chapter 21, Article 5, Section 14, the "Wage Bond Statute."

The Wage Bond Statute requires certain employers engaged in the production of coal to post a bond equal to the total of the employer's gross payroll for four weeks, plus fifteen percent of said total, with the Commissioner of Labor. In the event that an employee does not receive his or her wages and benefits when due, then that employee may recover amounts owed through an attachment against the wage bond.

On December 1, 1981, Telesystems Management and Technical Service Corporation recorded a Uniform Commercial Code Financing Statement with the Raleigh County Clerk. This document granted Telesystems a security interest in certain mining equipment which it had sold to Chafe. An identical U.C.C. form was filed with the West Virginia Secretary of State on December 2, 1981.

On September 20, 1982, the West Virginia Commissioner of Labor was advised by the Attorney General of West Virginia that W.Va. Code Chapter 21, Article 5, Section 14 prohibits the acceptance of collateral for a wage bond.

On September 23, 1982, the Department of Labor accepted the Chafe Mining equipment as collateral for the wage bond in the amount of $115,000.00.

On March 21, 1985, Chafe Mining filed a Chapter 11 bankruptcy and in November 1985, closed its mining operation in Raleigh County.

The evidence establishes that at the time the Department of Labor accepted the equipment for the wage bond, Telesystem had a perfected security interest in the equipment.

As a result of a settlement agreement dated June 10, 1986, the West Virginia Department of labor received $2,000.00 for its claim on the equipment that was the subject matter of the wage bond. This left $113,000.00 outstanding, which should have been available to the Chafe Mining employees.

It is obvious that the purpose of the wage bond statute has failed in this instance as a direct result of the actions of the State agency charged with enforcing it.

The Department of Labor accepted an equipment bond after being advised that they were improper. More importantly, the Department accepted equipment subject to a superior lien, a lien which had been duly recorded.

The Legislature, in passing W.Va. Code Chapter 21, Article 5, Section 14 was attempting to protect employees from fly-by-night companies who cease business owing employees unpaid wages. It would be unconscionable for the State to allow the neglect and oversight of its employees to thwart the intent of the Act.

It is, accordingly, the opinion of the Court that the negligence of the Department of Labor caused the claimants to lose the benefit of the provisions of W.Va. Code Chapter 21, Article 5, Section 14, and an award in the amount of $113,000.00 is hereby made.

Award of $113,000.00 to be made to the following named persons in amounts indicated:

James Boggs		$1,184.00
Floyd Bowyer	$3,336.00	
Richard Bryant		$2,285.00
Timothy Cook		$41,418.00
Charles Cox		$1,684.00
Raymond Delp		$165.00
Dennis Divers	$4,250.00	

Ronnie Evans		$1,142.00
Charles Fisher		$2,662.00
Walter Fletcher		$1,275.00
James Gray		$7,925.00
Lowery Jennings		$1,634.00
Barry Lilly		$1,618.00
James Martin		$7,414.00
Kenneth Meador		$4,545.00
Archie Milam	$3,690.00	
Jackie Milam		$554.00
Albert McMillion		$2,689.00
Albert Murdock		$1,268.00
Robert Nichols		$1,463.00
Gary Prather		$892.00
Leslie Sadler		$1,676.00
Ronnie Snuffer		$864.00
Clifford Stover		$1,790.00
Lonnie Stover	$605.00	
Ernest Taylor		$731.00
Ronnie Thompso		$4,302.00
Joey Toler		$1,251.00
Mark Tucker		$1,947.00
C. J. Walker		$1,608.00
David Watson	$406.00	
Aubrey Whitt		$1,495.00
Fred Williams	$1,403.00	
Timothy Williams		$1,829.00

OPINION ISSUED JANUARY 18, 1988

LINDA THOMAS, ET AL.
VS.
DEPARTMENT OF HEALTH

CC-87-521 to CC-87-671
CC-87-679 to CC-87-687
CC-87-727 to CC-87-743
CC-88-6 to CC-88-16
CC-88-22, CC-88-25
CC-88-30 to CC-88-32

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

PER CURIAM:

These claims were submitted for decision based upon the allegations in the Notices of Claims and respondent's Answer.

Claimants seek compensation for overtime compensation from Welch Emergency Hospital, a facility of respondent, pursuant to the U.S.Department of Labor Regulations for the time period of April 16, 1986 through April, 1987. The claimants have not been paid for their services. The respondents admits the validity and amount of the claims and states that there were sufficient funds in the appropriate fiscal year upon which the claims could have been paid.

In view of the foregoing, the Court makes awards as follows:

Court of Claims Number	Name of Claimant	Amount of Claim
CC-87-530	Elsie Adams	$267.24
CC-87-658	Karen Addair	$346.39
CC-87-548	Luther Addair	$691.01
CC-87-547	Merry Addair	$610.00
CC-87-549	Nathan Adkins	$705.59
CC-88-31	Mary Akers	$306.44
CC-87-686	Anna Bailey	$591.45
CC-87-550	Ardeen Bailey	$346.44
CC-87-551	Clarissa Bailey	$955.65
CC-87-682	Sylvia Bailey	$3,037.14
CC-88-13	William Bailey	$493.40
CC-87-552	Wilma Bailey	$484.95
CC-87-742	Sylvia Barrett	$220.37
CC-87-536	Barbara Baylor	$284.16
CC-87-655	Virginia Beaman	$626.54
CC-87-553	Cheryl Beavers	$6.16
CC-87-555	Helen Beheler	$927.42
CC-87-532	Cynthia Bell	$742.50
CC-87-554	Ronald Billings	$3,050.51
CC-87-540	Sherri Birchfield	$212.23
CC-87-633	Barbara Bishop	$490.68
CC-87-545	Donald Bishop	$660.99
CC-87-541	Linda Bishop	$456.56
CC-87-556	Jeannie Blankenship	$641.63
CC-87-557	James Blizzard	$292.26

CC-87-735	Martha Boggs	$217.83
CC-87-731	Debra Bolen	$786.51
CC-87-562	Naomi Box	$628.95
CC-88-32	Howard Boyd	$216.80
CC-87-669	Sandra D. Brickey	$114.53
CC-87-542	Mary Browning	$774.98
CC-87-560	Edna Burks	$419.88
CC-87-561	Nathaniel Burroughs	$448.21
CC-87-544	Ethel Bush	$436.71
CC-87-741	Lori Carter	$349.29
CC-87-563	Lucille Carter	$454.36
CC-87-565	Richard Carter	$113.87
CC-87-564	Norma Cartwright	$797.21
CC-87-558	Brenda Chatman	$350.85
CC-87-559	Cheryl Chatman	$572.14
CC-87-566	Alice Church	$364.24
CC-87-569	Bennett Church	$765.59
CC-87-533	Juanita Church	$1,938.66
CC-87-652	Jerlene Coleman	$777.24
CC-87-539	Myrtle Compton	$928.78
CC-87-567	Leah Cook	$568.90
CC-87-522	Patricia Cooper	$911.76
CC-87-650	Helena Cox	$443.83
CC-87-659	Paula Cox	$686.79
CC-87-666	Izallier Dalton	$328.57
CC-87-651	Shirley Dalton	$54.99
CC-87-600	Evelyn Davis	$292.77
CC-87-740	Judy Davis	$185.87
CC-87-568	Helena Dawson	$520.35
CC-87-570	Carol Day	$1,579.75
CC-087-601	Drema Day	$505.89
CC-87-571	Albert Deskins	$175.64
CC-88-12	Andrea Donithan	$389.11
CC-87-572	Charlie Edwards	$320.79
CC-87-573	Robert Edwards	$237.39
CC-87-589	Elizabeth England	$335.25
CC-87-574	Virginia Evans	$458.53
CC-87-526	Albert Falvo	$397.54
CC-87-734	Diane Farmer	$749.74
CC-87-543	Esther Farmer	$465.60
CC-87-534	Beverly Finney	$850.73
CC-87-588	Rita Frasher	$2,626.00
CC-87-575	David Gillenwater	$44.80

CC-87-586	Earline Gillenwater	$574.23
CC-87-587	Carolyn Gillespie	$677.55
CC-87-576	Sylvia Goforth	$507.99
CC-87-585	Sheryl Grant	$160.91
CC-87-577	Loretta Green	$657.20
CC-87-584	Patsy Green	$517.04
CC-87-578	Francoise Guidi	$181.06
CC-87-580	Karen Hale	$126.13
CC-87-581	Henry Hall	$344.38
CC-87-537	Ogie Handshoe	$236.95
CC-87-579	Fred Hardee	$1,199.52
CC-87-656	Janice Haynes	$334.00
CC-87-685	William Heath	$231.66
CC-87-582	Helen Hicks	$289.82
CC-87-583	Barbara Hill	$370.79
CC-87-599	Patricia Holland	$414.96
CC-87-538	Rosetta Hopkins	$422.98
CC-87-592	John Horton	$233.08
CC-87-590	Rita Horton	$1,182.76
CC-87-591	Regina Hudson	$143.64
CC-88-10	Ellen Hurley	$794.60
CC-87-593	Diana Jeffries	$543.80
CC-87-684	Charles Jenks	$387.18
CC-87-598	Nancy Johnson	$342.01
CC-87-730	Thomas Johnson	$262.16
CC-87-683	Vanessa Johnson	$575.42
CC-87-687	John Jones	$573.37
CC-87-733	Sandra Jones	$63.42
CC-87-681	Nanci Jordan	$331.32
CC-87-743	Denise Joyce	$787.42
CC-87-668	Elizabeth Keen	$948.43
CC-87-594	Frank Krajc	$274.40
CC-87-595	Edward Lane	$82.42
CC-87-596	Pamela Lane	$675.48
CC-87-597	Phalanders Law	$110.26
CC-87-529	Patricia Lawson	$209.94
CC-87-612	Paul Ledford	$61.86
CC-87-602	Beatrice Lester	$278.98
CC-87-531	Carol Lester	$670.60
CC-87-606	Carolyn Lester	$603.94
CC-87-603	Darcus Lester	$904.44
CC-87-662	Dennis Lilly	$550.80
CC-87-653	Ruthie Lipscomb	$531.27

CC-87-604	Patricia Lockhart	$229.74
CC-87-729	Virginia Lockhart	$301.53
CC-87-680	Wanda Marcum	$98.26
CC-87-607	Marvin Marsh	$287.92
CC-87-605	Linda Martin	$3.93
CC-87-609	John Mathews	$406.15
CC-88-8	William Mathews	$515.17
CC-87-608	Donald Matney	$219.10
CC-87-610	Jeff Matthews	$882.94
CC-87-611	Margaret May	$402.46
CC-87-613	Martha McBride	$1,280.74
CC-87-727	Rebecca McBride	$538.80
CC-87-614	Bernadette McCoy	$553.74
CC-87-670	Patricia McGrew	$306.98
CC-87-671	William McGrew	$318.79
CC-87-738	Jane McKinney	$1,004.72
CC-87-624	Betty Mikels	$954.38
CC-87-648	April Miller	$15.04
CC-87-665	Peggy Miller	$1,034.71
CC-87-649	Monica Mills	$1,476.06
CC-87-615	Darrell Morgan	$1,100.18
CC-87-623	Ruth Mullens	$449.04
CC-87-546	Barbara Mullins	$655.50
CC-87-617	Charolate Mullins	$372.77
CC-87-663	Ola Mullins	$380.56
CC-87-667	Patricia Mullins	$305.53
CC-87-657	Ellissa Munsey	$358.39
CC-87-616	William Neal	$1,081.55
CC-87-732	Rebecca Sue Neeley	$1,287.94
CC-88-16	Charles Neirman	$1,093.42
CC-87-527	Judy Nystrom	$762.90
CC-87-622	Eugene Paramore	$680.89
CC-87-619	Mary Parker	$262.73
CC-87-620	Sandra Parker	$324.34
CC-87-618	Gail Parks	$439.12
CC-87-621	Ruth Payne	$725.68
CC-88-6	Tina Pittman	$113.55
CC-87-728	Mary Premo	$524.76
CC-87-625	Robin Pruitt	$337.36
CC-88-15	Christina Rakes	$305.51
CC-88-30	Ronald E. Randolph	$957.48
CC-87-739	Mary Redd	$351.74
CC-87-646	Betty Reedy	$534.22

CC-87-524	Alva Reilley	$402.05
CC-87-647	Kathy Rhodes	$1,195.27
CC-88-14	Claude R. Richards	$293.07
CC-88-7	Kim Riffe	$210.18
CC-88-25	Billy Riggs	$1,807.36
CC-87-654	Jo Nell Rose	$581.10
CC-87-626	Deborah Rotenberry	$302.71
CC-87-525	Jerry Rotenberry	$878.18
CC-87-627	Cora Marie Scales	$427.37
CC-87-664	Jessie Shirley	$388.17
CC-87-629	Charles Short	$1,688.53
CC-87-628	Teresa Shrader	$807.94
CC-88-11	Violet Shrewsberry	$291.69
CC-87-630	Connie Sigmon	$511.13
CC-87-631	Wanda Simons	$1,018.18
CC-87-528	Carolyn Slaughter	$5.67
CC-88-9	Dietrich Spencer	$259.95
CC-87-632	Milton Steele	$920.68
CC-87-679	Nellie R. Steele	$376.00
CC-87-523	Martha Stevenson	$1,904.72
CC-87-634	Evelyn Swiney	$477.37
CC-88-22	Helen Terry	$441.50
CC-87-521	Linda Thomas	$194.45
CC-87-645	Garland Tilley	$398.29
CC-87-635	Yvonne Townsend	$476.62
CC-87-636	Casperetta Vance	$412.38
CC-87-644	Laura Vaughn	$376.13
CC-87-642	Charlene Walker	$54.64
CC-87-643	Larry Walker	$196.96
CC-87-635	Marvin Walker	$233.86
CC-87-641	Kathy White	$417.28
CC-87-660	Debra Whited	$576.00
CC-87-640	Alice Whitehead	$497.35
CC-87-661	Carolyn Wolfe	$1,079.85
CC-87-637	Claudia Woody	$481.16
CC-87-639	Deborah Yates	$990.16
CC-87-638	James Young	$674.40
191 claims		$107,889.77

OPINION ISSUED JANUARY 18, 1988

SCOTT A. BROWN, ET AL.
VS.
DEPARTMENT OF EDUCATION

(CC-87-136 - CC-87-144)

William B. McGinley, Attorney at Law, for claimants.
Robert D. Pollitt, Special Assistant Attorney General, for respondent.

PER CURIAM:

These claims were submitted for decision based upon the pleadings, and upon a written stipulation.

The claimants, by their counsel, William B. McGinley, and respondent, by its counsel, Brentz Thompson, entered into a stipulation. The parties, in the stipulation, agreed to the following facts:

The claimants are employed by the West Virginia Department of Education (hereinafter for the Department) as teacher aides assigned to the Special Education Unit of the Colin Anderson Center.

All claimants were employed as teacher aides between March and September 1984 as a result of the respondent assuming educational responsibility for Medley class members in facilities of the Department of Health. Claimants had formerly been employed by the Department of Health as therapy aides, psychiatric aides or houseparents.

When hired by respondent the grievants were allowed prior experience credit for pay purposes only for years worked in the education program of the Department of Health.

Subsequently, five additional aides were hired by the respondent who were granted prior experience pay credit for years worked at the Colin Anderson Center but not in the educational program of the Department of Health.

The State Superintendent of Schools approved the salaries including the additional experience credit granted to the five new aides, and the State Board of Education paid those salaries.

The claimants, as employees of the West Virginia Department of Education, have a grievance procedure available to them that was established by the legislature and set out in WV Code §18-29-1 et seq. The procedure contains four levels, with the last level consisting of a full hearing before a hearing examiner of the Education Employees Grievance Board.

Claimants sought relief through the statutory grievance procedure and received a favorable decision at Level Four written by Hearing Examiner Sue Keller on June 13, 1986. In that decision, Examiner Keller held that:

> The grievants are entitled to salary adjustment granting credit for years of employment earned at the Center, effective as of the date of the policy change.

The respondent adjusted the salaries accordingly following the date of the Hearing Examiner's decision, but has not adjusted the salaries from the date of the change in the "experience credit policy" (i.e. the date of hire for the first additional aide) to the date of the decision.

The Court, having reviewed the pleadings and stipulation filed in this action, is of the opinion that, in equity and good conscience, the following awards should be made:

Scott A. Brown	$ 556.00
Betty Craven	$1641.60
Cindy S. Jeffers	$2736.00
David Lancaster	$820.80
Anthony A. MacFarlane	$556.00
Carol J. McCutcheon	$2736.00
Tamara Sanford	$1504.00
Elizabeth J. Stuart	$3830.40
Elizabeth Anne Wolfe	$2508.00

However, there has been no appropriation of funds from which these claims may be paid. In that respect, these claims bear some similarity to the factual situation in *Airkem Sales and Service, et al. vs. Dept. of Mental Health*, 8 Ct.Cl. 180 (1971) in which an appropriation had been exceeded by expenditures.

Claims Disallowed.

OPINION ISSUED JANUARY 18, 1988

CSX TRANSPORTATION COMPANY
VS.
DEPARTMENT OF HIGHWAYS

(CC-84-180)

B. Jane Myers and Randell Baisden, Attorneys at Law, for claimant.

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

HANLON, JUDGE:

This claim was originally filed in a style that did not reflect the proper party claimant. The Court, upon the claimant's motion, amended the style of the claim to reflect CSX Transportation Company as the claimant.

CSX Transportation Company owns and operates a railroad line in Mineral County. Adjacent to this land is West Virginia State Route 42 which is higher in elevation than the railroad. There is a rock high wall immediately above the railroad tracts. In 1979 and early 1980, there were subsidence problems with the hillside. Slides then occurred in this area identified as "Site B." The respondent took standard corrective measures to minimize the problem. During March 9 - 12, 1982, a major failure of the embankment occurred at another area designated as "Site A."

Although both slides are on State Route 42 above the railroad right of way, "Site B" is approximately 300 feet downgrade from "Site A."

A large portion of Route 42 collapsed and started sliding down toward the railroad's property at the time of the "Site A" failure. Respondent excavated into the hillside to permit the road to remain open. On March 13, 1982, respondent used a 977 Cat track loader to remove some of the material from the hillside to establish a safe, one-lane detour around the "Site A" slip area. When the detour was constructed, respondent maintained the ditch near the hillside so the water that was flowing in the ditch line would not cross the detour and flow into the slip area. Material was placed on the outside edge of the shoulder on either side of "Site A."

The claimants' right-of-way on the Route 421 side is 40 feet; 230 feet on each side of the center line. The "Site A" slide area was inclusive of respondent's right-of-way, but it did not occur totally on respondent's right-of-way.

"Site B" was regularly monitored by respondent and respondent observed no indication of problems with "Site A" during a February 22, 1982 inspection. On March 9, 1982, some movement had appeared and "Site A" was reviewed by respondent. On March 9, 1982, when the area was investigated by Terry R. Kesner, there was no obstruction in either the ditch line or the culvert.

The complaint alleges it was respondent's improper conduct or negligence at "Site B" which caused the slide at "Site A." The evidence fails to establish that respondent was negligent in its maintenance of State Route 42. The slides at "Site B" and "Site A" were two distinct slides. The slide at "Site B" was not relevant to the slide at "Site A." The respondent was unaware of the proclivity of "Site A" to slip. The claim is accordingly denied.

Claim disallowed.

OPINION ISSUED JANUARY 18, 1988

CAPON BRIDGE COMMUNITY AND SENIOR CENTER
VS.
GOVERNOR'S OFFICE OF COMMUNITY
AND INDUSTRIAL DEVELOPMENT

(CC-87-400)

No appearance by claimant.
Robert D. Pollitt, 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 $40,500.00 for payment of invoices which were incurred by claimant pursuant to a contract with the respondent under the Governor's Community Partnership Grant Program. In accordance with the contract, the claimant began a furnace and roof project for the which claimant incurred invoices for services. The respondent admits the validity and amount of the claim and states that there were sufficient funds in respondent's budget for the appropriate fiscal year with which the claim could have been paid; however, the respondent was unable to make payment as the State Auditor returned the transmittal to the respondent with the explanation that the Treasury of the State of West Virginia lacked sufficient funds to process the transmittal.

The Court has reviewed the petition, Answer, and contract and finds the State agency had sufficient funds within its appropriated budget to pay the claim and finds that the claimant is entitled to an award from the respondent. However, respondent indicated in its Answer that claimant is entitled to $8,849.00 as the Governor has awarded claimant a grant to help pay for renovations to the Senior Center.

In view of the foregoing, the Court makes an award in the amount of $8,849.00.

Award of $8,849.00.

OPINION ISSUED JANUARY 18, 1988

CITY OF GLENVILLE

VS.
GOVERNOR'S OFFICE OF COMMUNITY
AND INDUSTRIAL DEVELOPMENT

(CC-87-513)

No appearance by claimant.
Robert D. Pollitt, 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 $33,872.22 for payment of invoices which were incurred by claimant pursuant to a contract with the respondent under the Governor's Community Partnership Grant Program. In accordance with the contract, the claimant began an improvement project to its water system for which claimant incurred invoices for services. The respondent admits the validity and amount of the claim and states that there were sufficient funds in respondent's budget for the appropriate fiscal year with which the claim could have been paid; however, the respondent was unable to make payment as the State Auditor returned the transmittal to the respondent with the explanation that the Treasury of the State of West Virginia lacked sufficient funds to process the transmittal.

The Court has reviewed the petition, Answer, and contract and finds the State agency had sufficient funds within its appropriated budget to pay the claim and finds that the claimant is entitled to an award from the respondent.

In view of the foregoing, the Court makes an award in the amount of $33,872.22.

Award of $33,872.22.

OPINION ISSUED JANUARY 18, 1988

CONSOLIDATED GAS
TRANSMISSION CORPORATION
VS.

DEPARTMENT OF CORRECTIONS

(CC-86-262)

Frederick R. Brooking, Attorney at Law, for claimant.
Robert D. Pollitt, Senior Assistant Attorney General, for respondent.

GRACEY, JUDGE:

Claimant seeks $11,467.99 for damage to its 1985 Dodge truck and for tools in the truck at the time of the incident which were never recovered. Claimant's truck was stolen on April 29, 1987, by three juveniles housed at the Salem Industrial School, a facility of the respondent.

Claimant alleges negligence on the part of respondent for failing to properly secure the juveniles at the Salem Industrial School. Claimant contends that unusual circumstances during that evening should negate the fact that the key was in the ignition of claimant's truck at the time of the theft.

At some time after midnight, one of the three juveniles involved in this incident requested a glass of water from correctional officer, Frank DeMicco, who was in charge of the juveniles housed in Jones Hall, a dormitory at Salem Industrial School. When the officer returned with the water, one of the juveniles struck Mr. DeMicco and took his keys. The juveniles then escaped from Jones Hall and the complex. They proceeded to claimant's parking lot where they stole the truck. The parking lot is located behind claimant's office buildings ;and is surrounded by a fence which is approximately eight to ten feet in height and is topped with barbed wire. The stolen truck was parked approximately 30-40 feet from the main gate which was unlocked at the time of the theft.

Michael Conley, District Superintendent of Salem District for claimant, testified that April 28 and April 29, 1986, were unusual as a brush fire had occurred in the Coal Water area. Several of claimant's employees were dispatched to protect claimant's gas pipe lines in that area. There were several employees going to and from the scene of the fire on the night of the incident. He stated that it is company policy for employees to park a vehicle, leave the key in the ignition or ashtray of the vehicle, and lock the gate to the parking lot.

It is clear from the record that negligence, if any, on the part of the respondent was not the proximate cause of the damages suffered by the claimant. Claimant was negligent in leaving the keys in the parked truck and in leaving the gate to the parking lot unlocked. This negligence was the proximate cause of the theft and any subsequent damage to the vehicle and the loss of the tools. *Edens vs. Dept. of Health*, 15 Ct.Cl. 166 (1984); *Lepara vs. Dept. of Corrections*, 13 Ct.Cl. 49 (1979). Accordingly, the Court is of the opinion to and does deny the claim.

Claim disallowed

OPINION ISSUED JANUARY 18, 1988

ROBERT L. WRIGHT AND
ROBIN L. WRIGHT
VS.
DEPARTMENT OF HIGHWAYS

(CC-87-118)

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

PER CURIAM:

Claimants are the owners of a 1980 Chevrolet Monza which was damaged when it struck a pothole on U.S. Route 19 in Fairmont, Marion County, on April 12, 1981. The claimants seek $261.87 for damage to the vehicle.

Claimant Robert L. Wright testified that he was traveling northbound at approximately 2:00 a.m. It was raining heavily at the time of this accident. He stated that the pothole was located six to eight inches from the edge of the road, and that he was travelling at a speed of 30-35 mph. He drove the road on a daily basis and had contact respondent concerning the holes on this route a week to three days before the accident. The damage to the vehicle consisted of a damaged shock, a cracked A frame, a bent rim and a damaged tire.

Harold E. Beerbower, Marion County Supervisor for respondent, testified that repairs were made to this section of road on March 10, 1987 and on March 17 and 18, 1987. Cold mix was utilized on the former date and hot mix was utilized on the latter dates. He does not recall any complaints immediately prior to April 12, 1987 regarding this particular area.

U.S. Route 19 serves major city-to-city travel and respondent must be held to a high standard of maintenance. The record reveals that this particular section of highway was patched within a month of the date of this incident. A properly patched highway should last longer than one month. There is evidence that the respondent had more than sufficient notice that the hazard had reoccurred. Respondent's failure to adequately maintain the highway constitutes negligence on its part. The Court, therefore, makes an award in the amount sought.

Award of $261.87.

OPINION ISSUED FEBRUARY 19, 1988

JOHN F. BARILE
VS.
DEPARTMENT OF HIGHWAYS

(CC-86-361)

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

PER CURIAM:

On September 19, 1986, the claimant was driving his 1985 Buick on U.S. Route 50 in an easterly direction. Concrete had fallen from the 13th Street Bridge above U.S. Route 50 and claimant's vehicle struck this concrete. The claimant seeks $64.99 for damage done to the tire to his vehicle.

Claimant testified that at the time of the accident, the weather was nice. It was just beginning to get dark. He was travelling at approximately 10-15 miles per hour. The accident occurred at about 7:25 p.m. He travels this route every day, and had travelled it earlier the date of the incident. On his previous trip, the claimant had not observed the concrete debris on the highway. He had no knowledge of when respondent was notified concerning the dangerous condition of U.S. Route 50.

Stephen Randall Harris, a district bridge engineer with respondent in District 4, testified that he was familiar with the bridge in question. He checked respondent's records to ascertain that there was damage to the bridge on the date of this accident and that respondent was notified of this fact at 7:19 p.m. The area was cleared of debris at 7:52 p.m. He found no evidence in the records of any notification to respondent prior to 7:19 p.m. on September 19, 1986.

Francis E. Knight, former supervisor of APD 50, Tunnel Hill for respondent, testified that he arrived at the accident scene at approximately 7:30 p.m. He had been notified by the district of the problem on U.S. Route 50 at 7:19 p.m. He had no knowledge of any damage to the bridge itself or concrete on the roadway below prior to the notification at 7:19 p.m.

The State is neither an insurer nor a guarantor of the safety of motorists on its highways. *Adkins vs. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). In order for the respondent to be found liable for the damages incurred, proof of notice, either actual or constructive, of the defect in question must be shown. The evidence in this record indicates that the dangerous condition appeared suddenly, and that the respondent acted promptly to take safety precautions as soon as it became award of the problem. *Barnhart vs. Department of Highways*, 12 Ct.Cl. 236 (1979), *Moore vs. Department of Highways*, and *Taylor vs. Department of Highways*, CC-85-167 (Opinion issued

February 19, 1986). The Court is of the opinion that negligence on the part of the respondent has not been established and, therefore, the Court denies this claim.

Claim disallowed.

OPINION ISSUED FEBRUARY 19, 1988

FORK RIDGE VOLUNTEER FIRE DEPARTMENT, INC.
VS.
STATE FIRE MARSHAL

(CC-86-384)

James W. Baker, Jr. appeared for claimant.
Robert D. Pollitt, Senior Assistant Attorney General, for respondent.

PER CURIAM:

Claimant, Fork Ridge Volunteer Fire Department, Inc., alleges that the respondent, State Fire Marshal, wrongfully denied it a share of funds distributable from municipal pension and protection funds for the Fiscal Year 1985-1986. Certified similar fire departments had each received $4,575.93. The funds are provided by a State tax on fire and casualty insurance premiums.

In W.Va. Code §33-3-14d (b), The State Fire Marshal, "... Before the first day of August ... of each calendar year ... is required to report to the State Treasurer names nad addresses of all volunteer and part volunteer fire companies and departments within the State which meet the eligibility requirements established in W.Va. Code §8-15-8a." One of the requirements therein is that:

> "Each volunteer or part volunteer fire company or department must:
> (a) Submit and maintain current submission of fire loss data to the state fire marshal, including verification via notary public, if no fire loss has occurred;"

The State Fire Marshal provides forms for the filing of monthly reports for satisfying this requirement and forms for applying for certification. Claimant had timely filed its application for certification.

Walter Smittle, III, the State Fire Marshal, testified that he had not certified the claimant to the Treasurer because he had not received reports from the claimant for the months of September 1985, and February and March of 1986, when he submitted his certification to the State

Treasurer on July 30, 1986, for the fiscal year 1985-1986. He stated that the provisions of the West Virginia Code do not make any provisions for his department to recertify departments after August 1, 1986. He indicated that the September report was received August 11, 1986, and the February and March reports were received August 15, 1986.

No witness on behalf of the claimant was able to establish that the reports from the missing months had been timely filed or mailed by the claimant. Claimant's witness stated that the reports had been mailed, but he could not establish a date for the mailing of the reports.

Although the Court is aware of the fine service provided by volunteer fire departments such as this claimant, the Court must, upon the testimony and exhibits and upon the applicable statutes, deny this claim.

Claim disallowed.

OPINION ISSUED FEBRUARY 19, 1988

WILLIAM I. GLASER
VS.
DEPARTMENT OF HIGHWAYS

(CC-86-373)

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

PER CURIAM:

On October 9, 1984, the claimant was operating his vehicle on Interstate 70 at the Mt. de Chantal Ramp in Wheeling, West Virginia, when his vehicle struck the vehicle preceding him. He seeks to recover $600.00 for damages to his vehicle.

The claimant testified that he was travelling at a very low speed of approximately five miles per hour at the time of the accident. Formerly at the Washington Avenue on ramp and the Oglebay off ramp, there were signs that directed the through traffic in the westbound lane. The signs had been removed prior to claimant's accident. He alleges that the design of the interstate caused his accident. As of September 24 of that year, there had been seven accidents at this particular intersection. He contacted the Governor, who in turn contacted Fred VanKirk, the Acting Commissioner for respondent, who corresponded with the claimant. However, the situation has not been rectified.

Proximate cause is an essential element of a claimant's case, and claimant has the burden of establishing the proximate cause of an incident to justify recovery in any action based on negligence. *Wolverton vs. Dept. of Highways*, 9 Ct.Cl. 223 (1973). The Court has determined that the claimant's actions were the proximate cause of the accident. Accordingly, the Court is of the opinion to and does disallow the claim.

Claim disallowed.

OPINION ISSUED FEBRUARY 19, 1988

DENNIS L. GOODWIN
VS.
DEPARTMENT OF HIGHWAYS

(CC-87-18)

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

PER CURIAM:

Claimant seeks $877.13 for his tools and other personal property which were in respondent's vehicle when the vehicle was stolen on July 23 or July 24, 1986 from respondent's garage.

Claimant alleges negligence on the part of respondent for failing to properly secure its garage. The garage is located in Mudlick, Lewis County.

The claimant testified that he is an Equipment Operator 3 for respondent. Respondent's 1986 Chevrolet half-ton pickup truck was parked in an area enclosed by a six-foot, chain link fence with a lock gate. At the time of the theft, some individual cut the fence, entered the yard, and stole claimant's property with respondent's truck. Claimant stated that it is standard procedure to leave the keys inside the trucks. This was the case during this incident. Claimant stated that he was not required to keep his tools in the pickup truck.

Respondent contends that the gate was locked and that the area was bordered by a chain link fence and that claimant made his own decision as to leaving the keys in the truck. Claimant testified that some employees placed the keys to the trucks in the office. There apparently was no standard policy as to where the keys belonged once the truck was parked inside the gate.

The Court believes that the claimant, by failing to lock the pickup truck and leaving the keys therein, was negligent. The record fails to reveal negligence on the part of the respondent. For that reason the Court denies this claim.

Claim disallowed.

OPINION ISSUED FEBRUARY 19, 1988

JANEY N. QUICK
VS.
DEPARTMENT OF HIGHWAYS

(CC-87-157)

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

PER CURIAM:

The claimant was operating her 1982 Subaru on Route 7/19, Monongalia Boulevard, Monongalia County, when her vehicle struck two rocks. Cost of repair to the vehicle amounted to $257.46. The rocks had rolled from a hill over a retaining wall onto the highway. The incident occurred on May 19, 1987, at approximately 5:00 a.m. The claimant was driving to her place of employment at Internal Medicine Associates in Morgantown. She testified that she was travelling at between 40 and 45 mph. She stated that she had observed rocks on the shoulder of the road on previous occasions, but not on the highway itself. She travelled this route on a daily basis.

William L. Fieldhouse, County Maintenance Superintendent for Monongalia County, testified that he was familiar with the hillside in the area of the roadway in question. He described the roadway as being a four-lane highway with very wide berms. He stated that the hillside is a very steep slope along the edge of the road; it is not a benched cliff. The witness mentioned that the back side of this particular retaining wall is checked regularly. Prior to the claimant's accident, he had not been advised of any complaints of rocks in the roadway itself.

The State is neither an insurer nor a guarantor of the safety of motorists travelling on its roadways. The unexplained falling of a rock or boulder onto a highway, without a positive showing that respondent knew or should have anticipated damage to property is insufficient to justify an award. *Hammond vs. Dept. of Highways*, 11 Ct.Cl. 234 (1977). William L. Fieldhouse, County Maintenance Superintendent for Monongalia County, with respondent, testified that there had been no complaints of rock in the roadway immediately prior to claimant's action. The Court concludes

that claimant has not shown any negligence on the part of respondent to justify an award in this claim.

Claim disallowed.

OPINION ISSUED MARCH 24, 1988

HARRY J. CAPLAN
VS.
DEPARTMENT OF HIGHWAYS

(CC-86-155)

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

PER CURIAM:

On March 22, 1986, the claimant was travelling in a northerly direction on Route 2 in Weirton, West Virginia. Claimant's 1980 Oldsmobile struck a deteriorated area in the roadway. Claimant seeks an award of $97.93 for damages to his vehicle. He alleges that respondent was negligent in its maintenance of the catch basin.

Claimant testified that he was accompanied by a witness, Julius Lurie. He was travelling at a speed of 10-15 mph, and his vehicle had passed the Kroger Store which is located on Route 2. He stated that a catch basin had deteriorated, and the drain was not flush with the curb. The basin is located right at the edge of the curb between the sidewalk and the curb. The plate covering the catch basin was stocking out, but claimant failed to notice the plate. He estimated the width of the hole to be between 10 and 12 inches. He travels this route frequently, but had not observed the deteriorated drain basin previously. Julius Lurie confirmed the testimony of the claimant.

Tony Orecchio, maintenance supervisor for Hancock County for respondent, testified that he was familiar with this particular catch basin. He stated that in March 1986, the catch basin was in good shape, but that the road surface was eroded two to three inches from the opening of the catch basin. He also stated that the City of Weirton had installed new curbs and sidewalks in 1986. The catch basis was located adjacent to the sidewalk. The complaint made by the claimant after his accident was the first complaint which Mr. Orecchio had received concerning this catch basin since he had become maintenance supervisor in the fall of 1985.

After careful review of the evidence presented, the Court can find no basis upon which to find respondent negligent. See *Lynn vs. Dept. of Highways*, 9 Ct.Cl. 127 (1972). The catch basin was maintained in the customary manner and no breach of duty by respondent has been shown. Under the circumstances, the Court is of the opinion to, and does, disallow the claim.

Claim disallowed.

OPINION ISSUED MARCH 24, 1988

VIRGINIA ELLIS
VS.
DEPARTMENT OF HIGHWAYS

(CC-87-180)

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

PER CURIAM:

During June 1987, the claimant was travelling in her 1978 Grand Prix on Whitman Road. The automobile is titled in claimant's name and in that of her deceased husband. She was directly behind respondent's truck which was lining the road with paint. She seeks compensation for the damage to her car when paint was sprayed by respondent's truck.

The claimant testified that she was five or ten feet behind respondent's truck. The paint being sprayed splashed on both the hood and windshield of her vehicle. The paint on the windshield came off after being washed three or four times. She identified the vehicle in front of her as being respondent's vehicle. The paint was orange and the claimant owns a black vehicle. She did not supply the Court with an estimate of her damages nor did she make a claim for a set amount. She stated that it is difficult to pass on the road, but it is a two-lane road. Claimant's friend, Kimberly M. Browning, was present in the vehicle when the accident occurred. She confirmed the fact that there is paint all over the hood of claimant's automobile.

The Court finds that there is negligence on the part of the respondent. However, the claimant, at the time of the hearing on November 13, 1987, nearly five months after the accident, had not had an estimate prepared for the damages. Claimant has failed to submit an estimate. The Court is unable to make an award based on speculation. For that reason, the Court is of the opinion to, and does, deny this claim.

Claim disallowed.

OPINION ISSUED MARCH 24, 1988

NORA HARTWELL
VS.
DEPARTMENT OF HIGHWAYS

(CC-87-145)

James E. Williams, Attorney at Law, for claimant.
Andrew Lopez, Attorney at Law, for respondent.

PER CURIAM:

On April 15, 1987, at approximately 9:00 p.m., claimant's 1982 Mercury Colony Park station wagon operated by claimant's daughter, Carmel Pauley, struck a piece of damaged road on State Route 7/4. Claimant seeks $1,543.22 for the damage to her vehicle.

The claimant's daughter, Carmel Pauley, testified that at the time of the accident she was travelling between Craddocks Fork and Lick Creek, Boone County. Her vehicle was coming off Craddocks Fork hill when it struck and broken up area in the road. The vehicle then went down over the hill. She stated that the road is approximately 20 feet wide at the point of the accident. She alleged that this damaged portion of the road had been in existence for two months prior to this accident. She drove this area every day and was aware of the defective condition of the roadway. She had never personally reported the condition of the road to the respondent.

Claimant testified that she had reported the condition of the road to the respondent. Notice was given by her previous to this accident. She stated that to her knowledge no representative of respondent had checked the area before this accident. She did not have the vehicle repaired and it was repossessed.

The State is neither an insurer nor guarantor of motorists travelling on its highways. *Adkins vs. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). For negligence of the respondent to be shown, proof of notice of the defect in the road is required. *Davis Auto Parts vs. Dept. of Highways*, 12 Ct.Cl. 31 (1977). In this case the claimant testified that she had reported the road condition and no action had been taken. This was not denied by the respondent. However, the Court believes that the driver of the vehicle, with her prior knowledge of the road condition, was likewise negligent. She travelled the road daily and knew of the existence and the location of the damaged section of the roadway. Under the doctrine of comparative negligence, the Court is of the opinion that the negligence of the driver of the vehicle was equal to or greater than that of the respondent and disallows the claim. *Bradley vs. Appalachian Power Co.*, 256 S.E.2d 879 (1979).

Claim disallowed.

OPINION ISSUED MARCH 24, 1988

WALTER M. SOUTH
VS.
DEPARTMENT OF HIGHWAYS

(CC-87-160)

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

PER CURIAM:

On May 19, 1987, at approximately 12:00, noon, claimant was driving on Route 61/5 when his vehicle struck a railroad spike located in the road. His vehicle, a 1984 GMC truck, sustained damages in the amount of $54.60. Claimant seeks an award for the damage done to the tire of his vehicle.

Claimant testified that he was travelling south on 61/5 enroute to his home. He was travelling at approximately 25 mph and stated that the road was wet, due to rain, previous to the accident. He explained that the highway is a one-land road, and he had to exit the travel portion of the road to permit oncoming vehicles to pass. As he left the road for an oncoming vehicle, his vehicle made contact with the railroad spike. Claimant alleges that the respondent had pulled ditches or graded the road approximately a week prior to this accident and ... "threw up these gravel." Claimant's wife, Kathryn F. Sough, confirmed the testimony of claimant. In addition, she stated that she, her husband, and her daughter picked up 25 spikes in the afternoon of the accident or perhaps the next day. She described the spikes as about six, maybe seven, inches in length. The State is neither an insurer or guarantor of the safety of motorists on its roads. *Adkins vs. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). In order for the respondent to be found liable for the damage sustained, proof of actual or constructive notice of the defect must be shown. Since there was no proof in this case that respondent had notice of the defect, the claim must be denied.

Claim disallowed.

OPINION ISSUED MARCH 24, 1988

MAXINE SHREWSBURY

VS.
DEPARTMENT OF HIGHWAYS

(CC-87-179)

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

PER CURIAM:

On June 11, 1987, claimant's vehicle, a 1983 Chrysler Fifth Avenue was damaged when it struck a part of the guardrail on Brick Yard Road in the vicinity of Princeton, West Virginia. Claimant seeks $132.96 which is the cost of repair.

Claimant testified that she was travelling north at approximately ten miles per hour and that the weather was good. The accident occurred at approximately 1:30 p.m. She was driving from Princeton on Brick Yard Road and was attempting to cross a very narrow bridge. The guardrail and the post were bent and were extending into the road about two and one-half feet. The vehicle was caught and damaged. The bridge measures nine fee, six inches. Claimant stated that she was approximately eight feet from the guardrail before she saw it. She admitted that she saw the guardrail sticking out into the paved portion of the roadway, but she attempted to pass it.

There was evidence presented that this condition had been reported to respondent before this incident. This was not denied by the respondent. However, the Court believes the claimant was likewise negligent. She observed the deteriorated guardrail before her vehicle struck it. Under the doctrine of comparative negligence, the Court is of the opinion that the claimant's negligence was equal to or greater than the respondent's and disallows the claim.

Claim disallowed.

OPINION ISSUED MARCH 28, 1988

CLAUDE BARKER, JR., EUGENE BARKER,
RHODEN BARKER, LAURA TAYLOR,
GRACE CLAYMON, AND HELEN NEFF
VS.
DEPARTMENT OF HIGHWAYS

(CC-87-115)

Claimant Claude Barker, Jr. appeared in person.

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

PER CURIAM:

Claimant Claude Barker, Jr., in addition to his five brothers and sisters, own a house and cellar house on County Route 26, Ritchie County, West Virginia, which they inherited from their mother. Claimant is residing in the house at this time. The Court, on its own motion, amended the style of the claim to include the five other heirs in whose names the property is titled. The claimants seek $1,500.00 for damage to the house roof and cellar house as a result of a fallen tree.

The claimants allege that the respondent graded the road approximately one year before the date of this incident and damaged the roots of the tree causing it to fall, and this resulted in the loss. Claimant Claude Barker, Jr. testified that on or about March 14, 1984, a free fell on the house. He stated that it was a living red oak tree. He stated that the house is approximately 10 feet from the highway and the width of the highway is 20 feet. The tree is located on the respondent's right-of-way.

William J. Frederick, a neighbor, confirmed the testimony of the claimant that when the road was graded a tree root was cut and the tree later fell. He was unable to state the date when the tree fell. He testified that the claimants' cellar house was gone, and the corner of his house was gone.

Gene Tanzey, County Highway Department Superintendent for Ritchie County, testified that he supervises the machinery used by the respondent. Oil drilling was being done in the area by individuals not authorized by respondent. Those individuals moved numerous large bulldozers out over the road by claimants' house. The testimony indicated that the respondent did not grade the road or have any equipment on the road that could have damaged the tree root.

The claimants' assertion of liability is based on the theory that respondent was negligent in its grading of the road near claimants' house, which resulted in damage to a tree at that location and subsequent damage to claimants' house. The Court is unable to find negligence on the part of respondent as the record lacks proof that respondent performed any grading. Accordingly, the claim must be denied.

Claim disallowed.

OPINION ISSUED MARCH 28, 1988

ALFRED D. FRIEND, JR.,
AS ADMINISTRATOR OF THE
ESTATE OF KAREN M. FRIEND, DECEASED

VS.
DEPARTMENT OF HIGHWAYS

(CC-85-327)

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

WALLACE, JUDGE:

Claimant brought this action as administrator of his wife's estate. His wife, Karen M. Friend, died in an accident which occurred on Labor Day weekend in 1983. She was operating her vehicle, a Ford Pinto, on Local Service Route 2 in Pendleton County, when the vehicle slid off the road and rolled down a bank. Both Karen Friend and a passenger, Deborah Reall, were thrown from the vehicle. Mrs. Friend died from the injuries which she received.

Claimant alleges that the proximate cause of the accident was the condition of Route 2, basically a one-way dirt road, proceeding through a camping and fishing area along the South Branch of the Potomac River. More specifically, claimant contends that the road wa snot sufficiently wide; that the road was not marked or delineated; and that the respondent was aware of the dangerous condition of the road.

Respondent contends that Route 2 at the location of the accident is basically a dirt road which was taken into the State road system in 1933. It is an unimproved, dirt road leading to a park known as the Big Bend Campground. Respondent alleges that the proximate cause of the accident was not the negligence of the respondent, but was the negligence of the driver of the vehicle.

The facts of the claim are as follows: On September 2, 1983, during Labor Day weekend, claimant's wife, their son, and two friends agreed to go on a fishing trip to Big Bend Campground in West Virginia. They took two vehicles, one of which was a camper truck, and one of which was Karen Friend's Ford Pinto. They left from their homes in Garrett County, Maryland at approximately 5:00 p.m. Mrs. Friend and her passenger, Deborah Reall, proceeded in the Ford Pinto ahead of claimant, who was riding with Stanley McCrobie and the Friends' son, Joe, to Route 2, to look for an areas where the camper truck could be parked along the river bank. It was approximately 9:00 p.m. and dark. As Mrs. Friend drove along the dirt road, the right, front tire of the automobile went off the surface of the road. She attempted to drive back onto the road when the rear, right tire also went off the road. The driver was still attempting to drive the vehicle back onto the orad when the vehicle struck something. According to the testimony of Deborah Reall, "the car was sliding but she (Mrs. Friend) was attempting to negotiate it and bring it back up onto the roadway. The car kind of hung and just sent along 'til the weight pulled it and it started to turn and it rolled down over the hill." The vehicle travelled approximately 57 feet on the edge of the road before it actually went over the hill. Mrs. Friend had not travelled this road prior to the date of the

accident herein. She was unfamiliar with the road. Her passenger, Deborah Reall, had been on the road previously. She testified that she told Karen Friend that "this road is very narrow and twisting, and she (Mrs. Friend) said, 'We'll just go very slow then,' and that's what we did."

Deborah Reall further testified that the vehicle was travelling at about 15 miles per hour. They were driving up a slight incline so the vehicle's headlights were pointing up and not on the road surface. The road narrowed at the accident site.

Measurements taken by the investigating officer, Trooper Richard D. Gillespie, a member of the Department of Public Safety, revealed that the road was 12 feet, 10 inches at the point the vehicle went off the road. The vehicle travelled 57 feet, 5 inches according to tire tracks along the edge of the road before it rolled over the hill.

William Woodrow Hartman, Maintenance Supervisor for District 8, which encompasses Pendleton County, testified that routine maintenance of Route 2 on the dirt section consisted of "taking a grader, pull the ditches, clean out culverts so that you have proper drainage on them, putting a shape back into the orad, filling up the potholes and also stabilizing the road, tailgating material on it so you'll have something to grade so you can fill the potholes." This maintenance was performed twice a year.

Testimony and photographic evidence revealed signs at approximately 2/10 of a mile from the site of the accident. One sign was metal and indicated "Unimproved One Lane Road Next 4 Miles," and the other sign was wooden and indicated "CAUTION Road Narrow, Steep, Hazardous and Subject to Flooding, Drive with Care ... ." The signs were in place on the date of this accident according to Mr. Hartman.

There was also testimony concerning a hazard paddle placed to the edge of the road where the decedent's vehicle went off the road. The testimony did not provide a specific point in time when the paddle was placed there by respondent, but it was after the accident herein. The road varied in width from as wide as 14 feet, 7 inches to as narrow as 11 feet, 5 inches. There is no dispute that the road was a narrow, dirt road. In fact, respondent's witness, Claude Blake, testified, "It is a very hazardous treacherous, one lane road, ..." No one at the hearing disputed this fact.

The Court has reviewed the testimony and evidence in this claim. The scene of the accident was a narrow, dirt road similar to many local service roads in West Virginia. The average daily traffic count was 80 during 1983. This road leads to a camping and fishing area used more in the warmer months of the year and more frequently on weekends. The respondent had placed a warning sign for the travelling public as to the character of the road. i.e., "Unimproved One Lane Road Next 4 Miles." Another sign erected by an agency other than respondent also warned the travelling public as to the character of the road. It is the opinion of the Court that the respondent acted in a responsible manner in posting the metal sign. The respondent maintained Route 2 as it would any other local service road. The maintenance performed was adequate in light of the nature

of the road, i.e., an access road to fishing and camping areas. For these reasons, the Court finds that respondent was not negligent in its maintenance of Local Service Route 2.

The Court is not unmindful of the tragedy of this accident; however, the Court is of the opinion to the does disallow the claim.

Claim disallowed.

OPINION ISSUED MARCH 28, 1988

CARL RAY SNODGRASS and CHRISTINE SNODGRASS,
his wife; JAMES H. TAYLOR and GLADYS TAYLOR,
his wife; OWEN FACEMIRE, JR., and
DELORES FACEMIRE, his wife;
HELEN KING, ADMINISTRATRIX OF THE ESTATE OF
GERALD L. KING, DECEASED; and
JOANN SNODGRASS, ADMINSTRATRIX OF THE
ESTATE OF DANIEL C. SNODGRASS, DECEASED
VS.
DEPARTMENT OF HIGHWAYS

(CC-76-55)

John R. Mitchell, Attorney at Law, for claimants.
Nancy J. Aliff and Andrew Lopez, Attorneys at Law, for respondent.

HANLON, JUDGE:

This claim was filed to recover damages for personal injury and a wrongful death which occurred when claimants were employed in the construction of the New River Gorge Bridge in Fayette County. One of the original claimants has died since the filing of the complaint, and the Court, on its own motion, amended the style of the claim to include Helen King, Adminstratrix of the Estate of Gerald King, deceased, as the proper party claimant.

The claimants allege that respondent failed to comply with regulations of the Department of Labor Occupational Safety and Health Administration. These regulations refer to the use of scaffolds, flooring, overhead lines, excavations and safety nets, among others. In addition, claimants allege that standards mandated by "An Informational Guide on Occupational Safety on Highway Construction Projects" were not followed.

The prime contractor on this job was American Bridge, a Division of the U.S. Steel, Inc. The contract for this project was let on June 26, 1973. Work began in the latter part of August, 1973.

At about 1:00 p.m., on May 17, 1974, an accident occurred in which the husband of one of the claimants was killed and the other claimants were injured. Claimants allege that the respondent project engineer did not fulfill his responsibility of overseeing the safety of employees on this project. It is alleged that the project engineer was advised of certain hazardous conditions which were in violation of safety specifications. It is further alleged that the project engineer was negligent in failing to rectify these conditions, and as a result, the accident occurred.

Arnold Bradshaw, Ironworker Steward from Ironworker's Local 301, described the site of the accident. The accident occurred on the north approach abutment. There was na excavation between this abutment and the north rim of the gorge. The witness explained that there was a working pad or mat in place from the top of the north abutment to the actual north rim. The mat was placed on the ground level extending from the north rim out to the north abutment. The cap portion of the pier was not completed, thereby exposing metal rods which were protruding from the cap to maintain the mat's elevation even with the ground level. The mat was on top of the rods. According to Mr. Bradshaw, the excavation below the mat was at least 25 feet deep.

Mr. Bradshaw testified that the mats were not attached or tied down in any way on the rim side of the gorge. He testified that he complained to the superintendent of U.S. Steel, the project manager of U.S. Steel, and to respondent's engineer about the excavation. He felt that the excavation below the mat should have been filled in to ensure the safety of the men working on the mat. There were no handrails on the mat nor was there a safety net under the mat.

Claimant Owen Facemire, Jr. testified that at the time of this incident the men were in the process of attaching a cable system between towers that were located on each side of the gorge. One cable was in place. The sheaves where the cable was riding had to be jacked apart to place the pins in. The sheaves were laying on the ground as they were being jacked apart. "The cable that was holding the sheaves on the platform was draped out over." The sheave was cabled to the platform, and the cable was not attached to anything. The men were attaching another cable to the trolley system when the platform fell into the excavation below. Mr. Facemire was standing on the platform and scaffold at the edge of the rim side. He stated that the work platform that he was working on "was going in the hole as he was getting off the end of it." The platform had been placed there the week of the accident. It was not attached to anything on the earth side, nor was it attached to anything on the concrete or gorge side. The mat consisted of two platforms on top of each other. He estimated the excavation below the mat as 26 or 27 feet deep. There were no handrails erected on this work platform nor were there any toe boards on it. There were no provisions for safety lines nor was there a safety net provided below the mat.

Earl R. Scyoc, Director of Construction for respondent at the time of this incident, testified that the contract for the construction of this bridge was a contract of design with Michael Baker Company and a contract for construction with American Bridge Company. He stated that "...

it's American Bridge's responsibility as the contractor to provide safety for the workmen that's performing their work in the contract." However, he testified that his department does have the ability to enforce safety regulations on construction projects. He also stated that prior to the time of this accident, he was not made aware of any serious safety violations on this project.

Jesse H. Gravely, Construction Engineer for respondent, testified that his duties concerning the New River Gorge Bridge project were principally those of administrator for the contract. He stated that it has always been his understanding that the contractor is responsible for safety on the projects.

After reviewing the pertinent OSHA regulations, it appears that a number of safety violations were present at the time of the incident. The most obvious appear to be the safety net and guardrail requirements for scaffolds.

While these violations may not have caused the accident, it is reasonable to assume that had the net and guardrails been present, the injuries and death might will have been avoided.

Nevertheless, the Court cannot, in good conscience, find respondent's conduct to be the proximate cause of the accident. Testimony disclosed that a number of supervisory individuals participated in this project. The Court has been unable to discern any omissions or acts on the part of the project engineer, which could be construed to have been the proximate cause of this accident.

The OSHA regulations cited by the claimants provide specific requirements regarding various aspects of construction. The evidence revealed that the prime contractor, American Bridge, had the duty to maintain safety standards and was responsible for complying with the OSHA regulations, not the respondent.

Although the Court sympathizes with the tragedy which occurred on this project, the Court is unable to find that there was negligence on the part of respondent. Construction sites are inherently dangerous. The evidence does not support the contention that there was negligence on the part of the respondent which was the proximate cause of the injuries to the claimants. For these reasons, the Court is of the opinion to, and does, deny this claim.

Claim disallowed.

OPINION ISSUED MAY 3, 1988

STEVEN D. CLOWER
VS.
DEPARTMENT OF HIGHWAYS

(CC-86-146)

Gordon T. Ikner, Attorney at Law, for claimant.
Andrew Lopez, Attorney at Law, for respondent.

GRACEY, JUDGE:

Claimant seeks an award in the amount of $50,000.00 for personal injuries incurred when his 1981 Omni Miser was involved in an accident on West Virginia Route 60/6, Greenbrier County, West Virginia. The accident occurred on February 27, 1986. Claimant alleges that respondent's negligent maintenance of the road was the proximate cause of the accident.

Route 60/6 is also known as Otter Creek Road. It is a dirt and gravel road off of Route 60 and ending at I-64. During wintertime periods of freezing and thawing, ruts develop in the road from use by a school bus and personal vehicles of some 16 families living along the road. Claimant's home, where he had lived for about 11 years, is about 7/10 of a mile from Route 60. Early in the morning, he had taken five school children out to Route 60 to a Christian school bus stop. He was returning to his home, at about 8:30 a.m., when his accident occurred. He described the road as being about 14 feet wide. He said he had rounded a sharp curve and was going up a gentle hill, at a speed of about 15 to 17 miles per hour, staying out of the ruts, when his wheels slipped into the ruts and the front of his car hit a tree which protruded into the side of the roadway. His car was damaged beyond economical repair. His head hit the rearview mirror, and he suffered a severe scalp laceration. On cross examination, he admitted that he might have been going 20 miles per hour. Respondent's investigator, Claude Blake, testified that the claimant had told him, on July 11, 1986, that he had been travelling 25 miles per hour at the time of his accident.

Claimant and his wife testified of making complaints to respondent concerning the condition of the road during the weeks before the accident.

It is obvious to the Court that Route 60/6 is a secondary road; that primary, more heavily travelled roads, must be given priority in maintenance by respondent; that there is hardly anything which the respondent could have done, in view of time, weather and budget limitations, to alleviate the winter condition of Route 60/6. The Court, therefore, cannot find the respondent negligent. The Court is of the opinion that the claimant was negligent in operating his vehicle at a speed greater than was reasonable under the circumstances then and there existing and that this was the circumstances then and there existing and that this was the proximate cause of his accident and injury.

Claim disallowed.

OPINION ISSUED MAY 3, 1988

JOHN KELLISON, ADMINISTRATOR OF THE ESTATE OF
RICHARD ALLEN KELLISON, DECEASED
VS.
DEPARTMENT OF HIGHWAYS

(CC-85-396)

Thomas R. Michael, Attorney at Law, for claimant.
Nancy J. Aliff and Andrew Lopez, Attorneys at Law,
for respondent.

GRACEY, JUDGE:

This claim was filed by John Kellison, as Administrator of the Estate of his son, Richard Allen Kellison, whose death occurred as the result of a single car accident at about 1:00 a.m. on January 3, 1984, on West Virginia Route 7/11, a single-lane roadway, in Harrison County. Richard Allen Kellison was driving his father's automobile, a 1965 Buick. West Virginia Route 7/11 is a dead end road. It proceeds up a hillside to two residences and an elementary school. The decedent had visited Nina Adkins, whose home was at the top of the hill close to the dead end. As decedent left the Adkins' residence, he proceeded on Route 7/11. When he reached a curve near the bottom of a hill, and just before a small bridge, the vehicle did not make the turn onto the bridge, and left the travel portion of the road. The vehicle went off the road at the near end of the bridge, landed on its roof and caught fire. The decedent's body was found in the vehicle.

The claimant contends that the failure of respondent to repair or replace a missing guardrail on the bridge constituted negligence which was the proximate cause of the accident and resulted in the death of the decedent.

Respondent contends that notice of the condition of the guardrail on the bridge was not given until December 28, 1983, which did not provide respondent sufficient time in which to effect repairs to the guardrail. The road has a very low traffic count. The postmortem examination record revealed that the decedent had a blood alcohol level of .21. Respondent contends that the proximate cause of the accident was the fact that claimant left the travel portion of the roadway, probably due to his blood alcohol level.

Trooper Greg W. Lemasters, of the Department of Public Safety, testified about his investigation of the accident. He arrived at the scene at approximately 1:30 a.m. He stated that there was no evidence that the accident vehicle had been moved prior to his arrival. He noted that he had placed tire tracks on his diagram in the investigation of the accident. The tires on the left or driver's side were on the right side of the entrance to the bridge. The tracks of the tires on the right or passenger side of the vehicle did not come close to the actual entrance to the bridge.

Several affidavits were submitted by claimant to establish notice to respondent of the condition of the bridge. The affidavits were by residents ft the area who had informed the respondent concerning the missing guardrail in the months of November or December prior to the accident.

Worthy Devericks, Jr., was employed at Cheers, a local bar in the area. He testified that he had observed the decedent, who was employed at Cheers but was a customer at the time, sitting at the bar on the evening prior to the accident. He stated that the decedent appeared to have been drinking. As a member of the Harrison County Rescue Squad, Mr. Devericks was also involved with the accident scene. He stated that, from the tracks, it appeared as though the decedent's car drove right into the creek.

John V. Onestinghel, Jr., assistant district engineer in charge of maintenance, testified that the respondent had received two telephone calls on December 28, 1983, concerning the guardrails on the bridge. This was the first notice that he had received about the bridge.

A careful review of all the evidence indicates that there is no adequate explanation for why the decedent drove or for other reasons went off the road and into the creek instead of proceeding onto the bridge. For the Court to grant an award, it would necessary for the Court to resort to speculation which this Court will not do. See: *Cassidy vs. Dept. of Highways*, 15 Ct.Cl 177 (1984); *Charles & Allison vs. Dept. of Highways*, CC-83-356 (Opinion issued December 12, 1986) and *Eller vs. Dept. of Highways*, 13 Ct.Cl. 402 (1981).

For the reasons stated hereinabove, the Court is of the opinion to and does deny this claim.

Claim disallowed.

OPINION ISSUED MAY 3, 1988

LEONARD W. SPANGLER, JR.
VS.
DEPARTMENT OF HIGHWAYS

(CC-87-29)

Claimant appeared in his own behalf.
Nancy J. Aliff, Attorney at Law, for respondent.

GRACEY, JUDGE:

Claimant brought this action to recover for personal injuries and for property damage to his truck. On November 19, 1986, at approximately 6:00 a.m., claimant was operating his truck on U.S. Route 35 near Shawnee Estates when he came upon an area of the highway covered with water. He was travelling at approximately 55 miles per hour when the truck went into the water. The truck spun out of control, slipped on its side, and struck a utility pole. Claimant alleges that respondent was negligent in failing to place warning signs that high water was present on the highway.

Keith Arnold Midkiff testified that he watched claimant's accident when it occurred. He stated that he had observed high water at this location on previous occasions. He also testified that he spoke with employees of the respondent concerning the water problem on several occasions during the ten years he lived at his location adjacent to the highway. He further stated that it had been raining all night previous to the accident. He described the highway as "relatively level" at the location of the incident. He also described the drainage in the area. He stated that he had discussed drainage problems in the area with employees of the respondent and was told that the method to correct any problem was too expensive. These conversations took place about two years or more prior to the occurrence of this claim.

Claimant explained that the damages to the truck were paid by his insurance as were his medical bills. He paid $250.00 as his deductible and also lost a topped for the truck valued at $600.00. Claimant's insurance company, American National, requested that claimant reimburse it for amounts which it has paid on his behalf. This the Court cannot do. The insurance company is not a party to this claim. Claimant may receive only those personal losses which he sustained.

A review of the evidence reveals that another individual, Monica Jividen, also experienced problems with the high water at the location of claimant's accident at approximately 5:00 a.m. See: *Jividen vs. Dept. of Highways*, issued by this Court on August 10, 1987. The Court held that the respondent did not have notice of the hazardous water condition on U.S. Route 35 and denied an award to the claimant. Similarly, the claimant before the Court herein has not established that respondent had adequate notice of the high water to place warning signs. Claimant stated that he had, in fact, traversed this same place in the highway at 1:00 p.m. on the day of the accident and did not experience any problems with high water. Claimant failed to establish that respondent had actual or constructive notice of the high water on the highway on this occasion. For this reason, the Court is of the opinion to and does deny this claim.

Claim disallowed.

OPINION ISSUED MAY 13, 1988

JAMES GERL
VS.

HUMAN RIGHTS COMMISSION

(CC-88-103)

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

GRACEY, JUDGE:

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

Claimant seeks $522.78 for travel expenses incurred when he served as a hearing examiner for respondent State agency. The respondent admits the validity and amount of the claim and states that there were sufficient funds in respondent's budget for the appropriate fiscal year with which the claim could have been paid; however, the respondent was unable to make payment as the State Auditor returned the transmittal to the respondent with the explanation that the Treasury of the State of West Virginia lacked sufficient funds to process the transmittal.

The Court has reviewed the petition and the Answer and finds the State agency had sufficient funds within its appropriated budget to pay the claim and for this reason, the claimant is entitled to an award from the respondent.

In view of the foregoing, the Court makes an award in the amount of $522.78.

Award of $522.78.

OPINION ISSUED MAY 20, 1988

LAWRENCE TERRELL
AND SARAH TERRELL
VS.
DEPARTMENT OF HIGHWAYS

(CC-86-271)

Travers R. Harrington, Jr., Attorney at Law, for claimant.
Nancy J. Aliff, Attorney at Law, for respondent.

HANLON, JUDGE:

The claimants are the owners of real estate in Kimberly, Fayette County, West Virginia. Two culverts adjacent to claimants' property are State-maintained culverts. The claimants allege that the culverts were improperly and negligently placed by respondent. In addition, claimants allege that these culverts were not properly maintained by respondent. Claimants property sustained flood damage on two occasions in 1986 and 1987. Claimants seek $12,000.00, which amount represents damages to both real and personal property.

Claimant Lawrence Terrell testified that he purchased the property between the years 1975 and 1976. At that time it was unimproved property. Claimants constructed a house on the property in 1982 or 1983. Railroad tracks are located between 40 to 50 feet from the house at the rear of the property. The tracks are at a higher elevation than that of the foundation of the house. Claimants' house fronts on a State-maintained road. The back of their house is located in the lowest portion of the property.

Mr. Terrell also testified that one of the culverts is 75 to 100 yards from his residence. This culvert is thirty-six inches in diameter but it was blocked and the opinion was reduced to nine inches in diameter. During the weekend of July 4, 1986, there were 18 hours of rain in Kimberly. As the aforementioned culvert was unable to handle the water, the water ran across the road and surrounded claimants' house. This resulted in 15 to 18 inches of water in claimants' home. Furniture and other personal property was damaged. Subsequently, in April of 1987, there was another heavy rain, and flooding again occurred. As a result of the first experience in 1986, claimants acted quickly at the onset of this second storm and did not sustain much damage during the second flooding which occurred. Claimant Lawrence Terrell stated that the property had not experienced any flooding during the first 15 years in which he resided in Kimberly.

He described his house. The lower block was waterproofed and caulked. The waterproofing is at ground level and extends three feet above ground level. There are no down spouts located on the back of the house. The only down spouts are those which are located on the front corners of the house. There are footer drains at the base of the walls of the house.

Robert E. Kelly, a contractor, described the culvert as a circular culvert. Water passes through only the upper one-eighth of the culvert. He observed the property a week prior to this hearing. At that time, there was no evidence that this culvert had been cleaned. He testified that the whole lower level of the Terrell house was ruined. There was extensive damage to the doors, walls, floors and carpet. He estimated that the total repair would cost $11,947.00.

James Absher, county road supervisor for respondent, Fayette County, testified that he did not recall any complaints concerning the area in the vicinity of claimants' property prior to 1986. Neither did he have knowledge of any complaints between January 1, 1986 and July 2, 1986. He stated that the ditch line and the external end of the thirty-six-inch culvert have been cleaned out, but not the inlet end. He confirmed that his records do not show that his employees ever cleaned this culvert.

Bobby Wardrep, maintenance assistant for District 9 for respondent, testified that he was familiar with this area. He stated that the benefit of opening up the exit end of the pipe, but not the inlet end, is that often the force of the water and the hydraulics on a pipe that size and the water coming off the mountain will grab clean the pipe out. He admitted that during heavy rain if the culvert had been cleaned out and 36 inches of it were free, the water would have run off more freely.

After careful review of the evidence presented, the Court is of the opinion that the damage to claimants' property resulted from several factors. The unusual amount of rain at the time of the floodings contributed to the drainage problem. The fact that claimants' house lacks down spouts may have contributed to the amount of water which flooded the property. In addition, the house is located in a low-lying, natural drainage area. However, it is the opinion of the Court that respondent was negligent in its maintenance of the thirty-six-inch culvert. The respondent had not cleaned out the inlet end of the thirty-six-inch culvert. The lack of proper maintenance resulted in a blocked culvert which was the proximate cause of the damage to claimants' home and property. However, this block culvert was not the only factor which caused the flooding and resultant damage; therefore, the Court is disposed to grant an award to claimants in the amount of $9,000.00.

Award of $9,000.00.

OPINION ISSUED JUNE 27, 1988

BARBOURSVILLE BRIDGE CO.
VS.
DEPARTMENT OF HIGHWAYS

(CC-84-201)

C. Robert Schaub, Attorney at Law, for claimant.
Robert F. Bible, Attorney at Law, for respondent.

HANLON, JUDGE:

This claim arises out of a construction project in Cabell County designated as Project X306-106-0.00, C-S/BRF-106(001)3 and commonly referred to as the East Huntington Bridge project. The parties are Barboursville Bridge Co., a West Virginia-based company and the West Virginia Department of Highways, the respondent. As part of the contract, claimant contractor, hereinafter referred to as Barboursville Bridge, was required to submit design computations and working drawings for the construction of cofferdams. On July 17, 1981, one of the cofferdams constructed by Barboursville Bridge collapsed, resulting in extra labor and costs. Claimant contends that he design approved by respondent was faulty and seeks an award f $272,852.88

Respondent alleges that claimant did not comply with the design specifications. More specifically, at the time of the cofferdam failure, the cofferdam wa snot in its final design configuration. The piling was not adequately keyed into the rock, and the rings were not at the proper elevations.

The East Huntington Bridge has four approach ramps that cross the Guyandotte River. To construct the approach ramps, it was necessary to erect four piers and subpiers. To erect the aforementioned bridge structures, Barboursville Bridge was required to construct four steel sheet piling cofferdams.

David Roberts, project superintendent for claimant as well as the designer of the failed cofferdam, described the method of constructing cofferdams. The outside sheet piling must be driven into the ground to a depth sufficient to provide support and prevent lateral movement. The water is pumped out, the overburden of dirt is excavated, and steel rings are placed inside the outer perimeter of the cofferdam's interior. After the rings are placed and the excavation is completed, the subfooter for the bridge pier is poured. After the subfooter is poured, the cofferdam wall is braced off against the bottom of the subfooter. At the time of the collapse, the riverside wall of the cofferdam gave way when digging operations for the pouring of the subfooter were in progress.

Barboursville Bridge submitted the originally designed cofferdam structure to respondent for approval by letter dated January 10, 1981. Respondent found this design to be unacceptable. Two subsequent designs were submitted March 14, 1981 and April 10, 1981, respectively. The last design, which raised the bottom ring six feet above the original proposal, to comply with respondent's objections, was accepted, subject to a minor change.

Mr. Roberts stated that in designing these cofferdams the following were considered: "... the area which we had to encase to do our work, the material which we had to go down through, and the height of the materials and so forth to get our design pressures." although the four cofferdams had differing conditions, Mr. Roberts stated that the initial design was for the worst conditions to be encountered. The sheet piling was to be driven through all riverbed materials to a depth required to prevent any lateral displacement of the sheeting. However, the riverbed material was red shale, which is very unstable when exposed to air or water, rather than undisturbed rock. Barboursville drove the piling to a depth sufficient to prevent water from coming into the cofferdam. This is necessary to "key the rock", i.e., to provide sufficient lateral support for the piling. Roberts admitted that it is possible to drive into the piling to the point where the water is sealed off, yet insufficient to prevent lateral movement. Roberts also admitted he had no personal knowledge as to the exact elevation of the bottom ring at the time the cofferdam collapsed, nor could he confirm that the piling was adequately keyed into the rock at the time of the collapse.

Louis Koshar, an engineer with E. Lionel Pavlo Engineering Company, the consultant company, testified concerning Special Provision 212.5 which was written by Pavlo. He stated that this provision requires the claimant to build an internally braced cofferdam and to drive the sheet piling through all riverbed materials to a depth sufficient to prevent any lateral displacement of the

sheeting. He explained that attachment A, the original design, was returned to claimant because the design as submitted was not representative of Piers, A3, A4, and B4. It was only representative of Pier B3. By returning it, Pavlo was permitting the contractor to submit separate designs for the other piers. Comment 7 required the claimant to submit its procedure for excavating, installing, dewatering the cofferdam, and pouring the concrete in the dry. Koshar stated that "... if you went to the support at elevation 495, which was the original design elevation, you might have gotten a displacement that might have been in the range of three-eighths of an inch ..." He testified that the provision calls for no lateral displacement. He admitted that if one keyed into the rock and got three-eighths of an inch displacement, that would be acceptable. Mr. Koshar has no experience working on cofferdams in the dry nor had he every been inside a cofferdam. He also stated that the contractor must assume that the materials into which the cofferdam is to be keyed will support it.

James Sothen, Supervisor in charge of the Consultant Review Section of the Structures Division of respondent, testified concerning keying into the rock. He stated that shale material "... is a very unpredictable material." It is a fair assumption to say that nobody can really predict what the material might do. "Well, this particular rock, generally the top surface once it's exposed to water and air, generally decomposes quite rapidly." He stated that to reach to a much harder type of shale, it would have been necessary to drive the sheet piling eleven additional feet. "At 11 feet, the farther you go, the more resistance on the rock you get," the witness stated.

The respondent contends that Barboursville Bridge's actions in the week preceding the collapse of the cofferdam caused the collapse. Barboursville Bridge performed blasting operations inside of the cofferdam to prepare a surface for the subfooter. Employees also were utilizing an 80-ton crane to construct cofferdam A4 (the cofferdam which collapsed) within 25-30 feet of the land side of the nearest wall of the cofferdam. It was assumed that all construction would be done from equipment on the river side of the cofferdams. The aforementioned crane was on the land side of the nearest wall of the cofferdam. In addition, the day before the failure, respondent's records revealed that a "blow in" had occurred on cofferdam A4 requiring water to be pumped out. This should have provided Barboursville Bridge with notice that the walls were not sufficiently supported and that precautionary measures should have been taken to strengthen the support.

The Court, having reviewed all of the evidence, has determined that the major factor in the collapse of the cofferdam was the design requirement that the sheet piling be driven into material on the river bottom sufficiently to "key" into the rock, and that this was to be considered another ring for the support of the structure, rather than providing the support within the cofferdam structure itself. This appears to have been an impractical requirement considering the depth of hard shale material necessary for the sheet piling to reach in order to attain the desired support. However, the Court is also of the opinion that actions on the part of Barboursville Bridge contributed to the failure of the cofferdam and that Barboursville Bridge should have been more vocal in its objection to the design changes. Therefore, the Court is of the opinion to grant an award to Barboursville Bridge in the amount of $136,426.00.

Award of $136,426.00.

OPINION ISSUED JUNE 27, 1988

BRADFORD R. CUNNINGHAM
VS.
DEPARTMENT OF HIGHWAYS

(CC-87-229)

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

PER CURIAM:

This claim was originally styled incorrectly, and the Court, on its own motion, amended the style of the claim to reflect the Department of Highways as the proper party respondent.

On July 27, 1987, at approximately 1:00 p.m., claimant was travelling north on I-79 at Exit 79 when his 1984 Chrysler Fifth Avenue struck a piece of angle iron in the road. The claimant was travelling 55-60 miles per hour. As a result of the mishap, a tire on the vehicle was replaced in the amount of $65.57.

Claimant testified that he was travelling in the left land passing another vehicle at the time of this accident. He attempted to straddle the piece of angle iron, but it punctured the vehicle's left, rear tire. He stated that it had been six months since he had driven this route prior to the accident.

Claimant's son, David Cunningham, was in the vehicle following claimant's vehicle. He testified that he observed his father's vehicle strike an object in the road. He stated that the object appeared to be a piece of iron measuring approximately eight feet in length. He could not say how long the object had been in the road.

Elmer Wine, Interstate Supervisor of I-79 for respondent, testified that on July 27, 1987, his crews would have travelled this portion of I-79 about 8:00 a.m. He stated that he would have travelled the area between 9:00 and 10:00 a.m. He received no phone calls concerning the presence of the angle iron on the highway prior to this accident.

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

Claim disallowed.

OPINION ISSUED JUNE 27, 1988
THOMAS E. HUZZEY
VS.
DEPARTMENT OF MINES
(CC-83-119)

Eugene R. Hoyer, Attorney at Law, for claimant.
Henry C. Bias, Jr., Deputy Attorney General, for respondent.

WALLACE, JUDGE:

Thomas E. Huzzey, present Commissioner of the West Virginia Oil and Gas conservation Commission, brought this action to recover $38,789.99. He acted in a dual capacity, from July 1, 1980 through June 30, 1982, as Commissioner and also as Administrator for the Office of Oil and Gas which is under the Department of Mines. He was not paid for the latter position and, therefore, seeks $28,000.00. The additional amount of the claim, $10,789.99, represents salary increase requests which were denied him in his capacity as Commissioner. Claimant alleges that W.Va. Code §22-4-11a, the statute in effect at the time, supports his theory for the basis of his claim.

James B. Gehr, Chairman of the West Virginia Oil and Gas Conservation Commission, testified that he received a letter from Walter M. Miller, Director of the ten Department of Mines, on June 1, 1981. It requested permission from the Oil and Gas conservation Commission to permit the temporary appointment of the Oil and Gas Conservation Commissioner, as Acting Administrator of the Office of Oil and Gas. The only discussion he remembers was that the salary of the former administrator was $28,000.00. A letter of June 5, 1981, delineated the salary to be paid to the claimant in his new capacity. Within a month, he received a letter from the administration indicating that the salary could not be paid. An opinion of the Attorney General stated that if claimant was paid, the salary had to be paid from funds of the Department of Mines.

Claimant testified that he assumed the position of Administrator of the Office of Oil and Gas on a volunteer basis at the request of Walter Miller, Director of the Department of Mines. He admitted that neither before he was appointed by Mr. Miller nor after he was appointed by Mr. Miller was he ever told that he would be paid by the Department of Mines for assuming the position of Acting Administrator of the Office of Oil and Gas.

Walter Miller, Director of the Department of Mines, testified that the administrator position is a full-time position. He stated that in July, 1980, the Mine Inspectors Examining Board contacted him with reference to the administrator or deputy
director position. As he knew of no one other than the claimant who had the proper qualifications, he discussed the position with the claimant. He asked the claimant to assist him in the position temporarily until a qualified person was found to fill the position. He cannot remember any discussion concerning compensation for the claimant. Mr. Miller stated that he had no intention of compensating the claimant as the Acting Administrator.

Arnold Margolin, Commissioner of the Department of Finance and Administration at the time of this incident, testified that he is familiar with the various agencies and the budgetary procedures of the State of West Virginia. The Office of Oil and Gas is a special revenue, non-appropriated agency. It is necessary when this agency hires an administrator or an acting administrator to submit the payment schedule for that person's salary through channels as required. The department (then Finance and Administration) would then approve the payment of the salary to that individual. This is also the procedure for hiring an employee of the Oil and Gas Conservation Commission. The request for paying a salary to claimant in his temporary capacity as Acting Administrator of the Office of Oil and Gas was denied. Margolin explained the reasoning of this decision. The two positions inherently had overlapping areas of responsibility, and it was his opinion that payment for the second job was permissive, not mandatory. Secondly, the Governor had imposed expenditure reductions which prohibited th approval of a second salary for claimant. Additionally, it is not unique for other department heads to assume additional responsibilities in administering other programs and other offices without being compensated. He stated too, that he never wrote a letter to the Oil and Gas Conservation Commission, the claimant, or Mr. Miller denying the salary request as the salary was never requested.

After carefully reviewing all of the evidence presented, the Court finds that the claimant has not substantiated his position. W.Va. Code §22-4-11a with the language "The director of the department of mines ... may employ the oil and gas conservation commissioner as acting administrator of the office of oil and gas ... and pay him an additional amount ... ." provides a discretionary, rather than a mandatory, duty. For this reason, the Court is unable to find any evidence or statutory authority for awarding this claim. Therefore, the Court is of the opinion to, and does, deny the claim.

Claim disallowed.

OPINION ISSUED JUNE 27, 1988

JO ELLEN LAGOWSKI
VS.
DEPARTMENT OF HIGHWAYS

(CC-87-240)

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

PER CURIAM:

On August 22, 1987, claimant's son was operating her car in a westerly direction at approximately 1:00 p.m. on Route 307 in Beaver, Raleigh County, when the 1981 Ford Escort struck a tree on the road. The claimant seeks $275.00, which represents the cost of the damages to the vehicle.

Claimant's son, Randall Lagowski, testified that he was travelling from his house in Grandview to Beaver at about 30 miles per hour. It was a clear day, but the wind was blowing very hard. The tree was located on the right-hand side of the road about five feet from the edge of the road. The tree blew into the road at the same time the vehicle which he was operating arrived at the same spot. The tree had been partially cut. Two days previous to this, respondent had been cutting down trees in this area. He stated that the whole tree, rather than a limb, damaged the vehicle.

Emerson Stover, County Supervisor, Raleigh County, for respondent, testified that he was award of the aforementioned accident. He was notified on the 20th and 21st days of August. Respondent's crews had been cutting and grinding up the trees in this area prior to this incident.

After a careful review of the record presented in this claim, the Court is of the opinion that this particular tree was close enough to the road to present a hazard to the travelling public. Respondent's witness admitted that respondent's crew was aware of this hazard two days prior to this incident. Therefore, the Court makes an award in the amount of $275.00 for the damages to claimant's vehicle.

Award of $275.00.

OPINION ISSUED JUNE 27, 1988

KIM P. SHAFFER
VS.
DEPARTMENT OF HIGHWAYS

(CC-87-186)

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

PER CURIAM:

On December 17, 1986, at approximately 10:0 a.m., claimant was operating her 1981 Plymouth reliant in a southerly direction on I-77 when her automobile struck an expansion joint. Claimant originally filed the claim in both her name and that of her husband, Daniel J. Shaffer. The car is titled solely in the name of Kim P. Shaffer. The Court, upon its own motion, amended the style of the claim to dismiss Daniel J. Shaffer as a claimant.

Claimant was travelling from her home in Elkview to Charleston. It was cloudy, and the road was dry. She observed a police automobile on the side of the road with its flashing blue lights in operation. She also observed an expansion joint extended perpendicular to the highway surface approximately 12-18 inches above the highway. She was proceeding in the center lane of the three-lane highway, and the joint was blocking most of two lanes. She swerved her vehicle to the right, and the automobile struck the joint. She testified that she was travelling at a speed of 35-40 miles per hour. Damage to the Reliant included bent rims on two tires, among other damages. She seeks $1,091.06.

Mrs. Shaffer is unaware how long this condition existed. She does not know if it was reported to respondent previous to her accident.

Herbert C. Boggs, Interstate Maintenance Assistant for respondent, testified that he was involved with the accident site's location at the time of the accident. He had not received notice prior to the date of the accident. He was notified approximately 30 minutes before the accident. He stated that it is impossible to anticipate problems with expansion joints present on the highway.

For the respondent to be liable for damages caused by road defects of this type, the claimant must prove that the respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Davis vs. Department of Highways*, 12 Ct.Cl. 31 (1977); *Hoskins vs. Department of Highways*, 12 Ct.Cl. 60 (1977); and *Hicks vs. Department of Highways*, 13 Ct.Cl. 310 (1980). It is the opinion of the Court that, although respondent did have actual notice in this case, the respondent lacked the time to effect repairs. This claim must be denied.

Claim disallowed.

OPINION ISSUED AUGUST 8, 1988

CHERYL A. BOGGAN
VS.
BOARD OF REGENTS

(CC-87-474)

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

PER CURIAM:

On October 21, 1987, claimant was walking on Fayette Pike behind the General Classrooms Building of West Virginia Institute of Technology. She is employed by the school. She was forced to go around an illegally parked vehicle and as she did, she tripped. She made contact with a rusty, sharp pipe. The pipe damaged claimant's boots, and she seeks $83.99.

Claimant testified that the pipe was located on school property in a grassy area. She contacted the school authorities, and the pipe was removed. She was accompanied by Clay McGara and admitted that she may have been in a conversation with him at the time of the incident. She indicated that the sidewalk in this area is approximately 4-4 1/2 feet wide. She walks this route approximately once a day and had not observed the pipe prior to this incident.

The record does not support a finding of negligence on the part of the respondent. The hazard was not located on the sidewalk. There is no indication that respondent had either actual or constructive notice of the defect. For that reason, the Court must deny the claim.

Claim disallowed.

OPINION ISSUED AUGUST 8, 1988

KENNETH DALE BROWNING
VS.
DEPARTMENT OF HIGHWAYS

(CC-87-506)

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

PER CURIAM:

This claim was originally styled with respondent party as the State of West Virginia. The Court, upon its own motion, amended the style of the claim to reflect the Department of Highways as the proper party respondent.

On November 11, 1987, the claimant was operating his 1980 Ford Thunderbird on Route 10 in Harts, West Virginia. He was travelling north from Chapmanville to Harts. A tree limb struck his vehicle. He seeks $2,400.00 for damage to his vehicle.

Claimant testified that on the day of the incident it was about 4:00 p.m. It was raining, and there was a slight wind. He was travelling at approximately 50 miles per hour. The tree was located adjacent to the road. The tree limb hit the windshield of his automobile and impaired his vision, whereupon he lost control of the car and drove into the hillside. He had seen the tree on prior occasions and it was his opinion that it was a dead tree. He travels the route every day, but had not submitted a complaint to respondent concerning the tree.

Larry P. Pauley, the county supervisor of Lincoln County for respondent, testified that he is familiar with the tree in question. The reason the tree was not cut by respondent was that there was uncertainly about its location on respondent's right of way. He had not received any complaints prior to November 11, 1987.

Billy Dale Topping, respondent's maintenance crew head for the Harts Creek area, stated that the top of the tree was handing over the highway. He stated that the neighbor on the adjacent property had requested that respondent's crew cut the tree. When the request was made, he did not consider the tree to be a hazard. It is the policy of respondent to cut trees only if they are hazards and there is permission from the landowner.

There has been no concrete evidence that the tree is on respondent's right of way. In addition, there are contradictory views about whether the tree was alive or dead. After careful review of the evidence, the Court is unable to find negligence on the part of the respondent. For that reason, the Court if of the opinion to, and does, deny the claim.

Claim disallowed.

OPINION ISSUED AUGUST 8, 1988

SHEILA HUNT
VS.
DEPARTMENT OF HIGHWAYS

(CC-87-429)

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

PER CURIAM:

Claimant has property and a home on State Route 1 in Raleigh County. From October of 1986 through May of 1987, there was heavy rain in the area. Claimant's yard was damaged, and she alleges that this resulted from respondent's failure to maintain a ditch line. She seeks $1,000.00.

Claimant testified that she purchased the aforementioned property in October 1984. Her house faces Route 1 south. There is a culvert which goes under Route 1, and a branch of a creek on the lower side of the house. The water flows from south to north in a natural drain. She stated that she talked with employees of respondent concerning the problem. She expended $1,000.00 to have a ditch dug and topsoil replaced.

Bill Wilcox, with the Department of Highways, testified that he is familiar with the claimant's property. A utility company placed a water line in respondent's ditch. After the heavy rain, respondent's ditch was "completely away." Prior to the heavy rain, there was a ditch line on West Virginia Route 1 in the vicinity of claimant's property. It is sough of claimant's property, up the hill. The ditch which claimant had dug is not located on respondent's right of way. The ditch line which washed out is approximately 400 feet in length. He explained that the respondent's policy is that water, which is in a natural drain, "... goes where it goes." He is unable to say whether in the 30 or 40 years of the ditch line's existence it has been maintained by respondent.

After examining all the evidence submitted in this claim, the Court has determined that claimant's property is in a natural drainage area. With the exception of October of 1986 through May of 1987, the claimant had no problems with her property. The unusual amount of rainfall in that time period was instrumental in the damage to claimant's property. There is no evidence of any negligence on the part of respondent, and for that reason, the Court is of the opinion to, and does, deny the claim.

Claim disallowed.

OPINION ISSUED AUGUST 8, 1988

EDWARD R. ISON AND SHARON G. ISON
VS.
DEPARTMENT OF HIGHWAYS

(CC-88-61)

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

PER CURIAM:

On December 25, 1987, claimant Edward R. Ison was operating his 1983 Chevette on Ferndale Road, near Kenova, Cabell County. At approximately 300 yards from Route 52, the vehicle struck a tree blocking the roadway. The vehicle was totalled, and the claimants seek $1,500.00.

Claimant Edward R. Ison testified that it was about 9:00 p.m. at the time of the accident, and it was raining. He was travelling at approximately 20-30 miles per hour. He had travelled this route 15 minutes to a half hour before this accident, and he had not observed the tree then. He described the tree as a "... Locust tree at least 12 inches in diameter all the way across the road." It was up an embankment.

Earnest Tracy Ison, a passenger in the vehicle, confirmed the testimony of claimant Edward R. Ison. Samuel C. Workman, who resides near the accident scene, testified that he had contacted respondent in reference to problem trees in this vicinity before this incident.

Donald H. Akers, Wayne County Maintenance Superintendent on December 25, 1987, testified that he is familiar with this particular section of highway. He was called on the night in question, and his crew removed the tree. He had not had any complaints concerning this tree prior to claimant's accident.

Proof of actual or constructive notice is required for a showing of negligence. The evidence in this record indicates that the dangerous condition appeared suddenly and that the respondent promptly moved to take safety precautions as soon as it became aware of the problem. *Moore vs. Dept. of Highways*, (Opinion issued February 19, 1986), and *Taylor vs. Dept. of Highways*, (Opinion issued February 19, 1986). The State is neither an insurer nor a guarantor of the safety of the motorists on its highways. The Court is of the opinion that negligence on the part of the respondent has not been established and, therefore, the Court denies this claim.

Claim disallowed.

OPINION ISSUED AUGUST 8, 1988

ROLANDO UGALDE LAYOS
VS.
DEPARTMENT OF HUMAN SERVICES

(CC-85-413)

Jennifer F. Bailey, Attorney at Law, for claimant.
Robert D. Pollitt, Senior Assistant Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision after a hearing on June 22, 1988 and upon a written stipulation.

The claimant and respondent entered into a stipulation. The parties, in the stipulation, agreed to the following facts:

Prior to June 13, 1983, the claimant was enrolled as a provider of medical services to eligible recipients of Medicaid services, as administered by the respondent.

On or about June 13, 1983, the respondent terminated the approved status of the claimant as a qualified provider of such services and refused to continue his enrollment in the program on the ground that the claimant possessed only a temporary permit to practice medicine as opposed to an unrestricted license to practice, and upon the belief, that by reason of such temporary permit, claimant was not a qualified provider within the meaning of the applicable federal and state laws, rules and regulations.

On or about March 13, 1984, the respondent reinstated the claimant as a qualified provider of such services pursuant to a directive of the Health Care Finance Administration of the United States Department of Health and Human Services.

The claimant incurred damage to the extent of $33,700.00 as a minimum, by reason of loss of income for the period June 13, 1983 through April 2, 1984.

All matters in controversy between the claimant and the respondent therein having been agreed, compromised and settled for the sum of $32,000.00, and the respondent, in open Court, having admitted its actions were wrong, the Court is of the opinion that claimant is entitled to an award in the agreed amount.

In view of the foregoing, the Court makes an award in the amount of $32,000.00.

Award of $32,000.00.

OPINION ISSUED AUGUST 8, 1988

LEO LONG
VS.
STATE AUDITOR'S OFFICE

(CC-88-135)

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

PER CURIAM:

This claim was filed incorrectly. The Court, upon its own motion, amended the style of the claim to reflect the State Auditor's Office as the proper party respondent.

On December 19, 1986, the claimant bought property from the Deputy Commissioner of Forfeited Land for $165.00 in Raleigh County. Subsequent to the purchase of the property, it was determined that H.G. Farmer owned the property and claimant seeks $165.00.

The transfer of the property occurred on January 28, 1987. The deed is recorded in Raleigh County Deed Book 719 at page 23.

West Virginia Code §11A-4-25 states the following:

> "Whenever, after sale and before confirmation thereof, it is discovered that the land sold was nonexistent, or that it had been the subject of a duplicate or improper assessment, or was transferred to others under the provisions of section 3, article XIII of the Constitution, the purchase shall be entitled to a return of the purchase money. Upon request of a purchaser so entitled, it shall be the duty of the deputy commissioner to apply to the circuit court for an order directing the sheriff to return the purchase money. If satisfied that the application is proper, the court shall enter the order applied for, but no costs shall be taxed in connection with such an application. If the ground for entering the order was that the land was nonexistent or the subject of a duplicate assessment, the order shall also direct the assessor to drop the erroneous entry of such lands from the land books." (1947, c. 160.).

The aforementioned statute clearly provides a legal remedy to claimant. For those reasons as mandated by West Virginia Code §14-2-14(5), the Court lacks jurisdiction of this claim. Therefore, the Court is of the opinion to, and does, deny the claim.

Claim disallowed.

OPINION ISSUED AUGUST 8, 1988

ORVILLE GLEN LUSK
VS.
DEPARTMENT OF HIGHWAYS

(CC-88-58)

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

PER CURIAM:

On January 30, 1988, claimant's daughter, Marsha Lusk, was operating her father's vehicle, a 1983 Ford EXP, on Route 99 in Bolt, West Virginia. The vehicle struck loose cinders located on the roadway and extending into the berm, and entered a pothole. The vehicle was totalled, and claimant seeks $3,000.00.

Marsha Lusk testified that she was travelling between 40 and 45 miles per hour. It was 8:30 p.m., and "hazy". She was proceeding from Oceana to Beckley, and was accompanied by two of her friends. As she started around a curve, the automobile struck loose cinders, and entered a pothole. She lost control of the vehicle. The vehicle landed on its side between a tree and a fence post. She had driven this route the week before this incident, but she had not noticed the problem then.

Deputy Sheriff Eric Rogers testified he had investigated the accident. He observed cinders and salt on the roadway. He stated that it was normal snow removal material. It was foggy, the road surface was wet, and ice had formed over the hole. The accident vehicle travelled, from the time it left the roadway, between 120 and 125 feet.

Mr. Dale R. Wooten, foreman at the Bolt Outpost for respondent, testified that he was familiar with the location of the accident. The records indicate that this area was treated with normal ice removal treatment on January 28, 1988.

The claimant's daughter was operating the vehicle at 40-45 miles per hour, an excessive rate of speed for the conditions then and there existing. Negligence on respondent's part, therefore, has not been shown. Since the State is neither an insurer nor a guarantor of the safety of motorists on its highways [*Adkins vs. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947)], this claim must be denied.

Claim disallowed.

OPINION ISSUED AUGUST 8, 1988

ALBERTA D. O'DONNELL AND
JOHN G. O'DONNELL
VS.
DEPARTMENT OF FINANCE
AND ADMINISTRATION

(CC-82-248)

James T. Cooper, Attorney at Law, for claimants.
Robert D. Pollitt, Assistant Attorney General, for respondent.

WALLACE, JUDGE:

Claimant Alberta D. O'Donnell received injuries when she fell on a sidewalk on the Kanawha Boulevard side of the State Capitol in Charleston, West Virginia. The incident occurred on November 1, 1980. Mrs. O'Donnell was walking on the inside of the sidewalk. Her husband, claimant John G. O'Donnell, was walking on the outside of the sidewalk. Behind the claimants were Mrs. O'Donnell's mother, Mary Gallagher Doyle, and her aunt. The group was proceeding from California Avenue to the front steps of the Capitol to hear a band concert by the Marshall University band. Mrs. O'Donnell tripped over a raised portion of the sidewalk. She sustained a broken arm in the fall, for which she and her husband seek damages in the amount of $100,000.00.

Mrs. O'Donnell testified that the weather was cool, but it was a nice day. It was approximately 20 minutes before noon. The sidewalk appeared to be in good condition. She was wearing low-heeled, sandal-type shoes. She stated that she caught her foot on the sidewalk and fell face down. After the fall, she and the others proceeded to the concert, but left when her right arm began to swell and became painful. It was necessary for her to have surgery on her arm several days later. She was incapacitated for one month after the surgery. She has experienced pain and suffering and problems with her left arm since the accident, which she attributes to the injuries received in this fall.

Claimant John G. O'Donnell testified that there appeared to be a gap of approximately one inch at the seam of the sidewalk where claimant Alberta O'Donnell fell.

The Court, having examined the record in this claim, is constrained to find that there was no evidence as to negligence on the part of the respondent which would justify an award to the claimants. The sidewalk was not in a state of disrepair. It was uneven at the place of claimant's fall, but sidewalks are more often than not uneven at the seams. Therefore, the Court is of the opinion to, and does, deny the claim.

Claim disallowed.

OPINION ISSUED AUGUST 8, 1988

GEORGE C. OFFUTT
VS.
DEPARTMENT OF HIGHWAYS

(CC-87-427)

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

PER CURIAM:

On June 10, 1987, the claimant was operating his 1986 Saab vehicle in a northwesterly direction on Route 45/1, Jefferson County. The vehicle struck a "rock formation" in the road. Claimant seeks $75.55. This amount represents the cost of a replacement tire.

The claimant testified that at the time of the accident, he was travelling at approximately 30 miles per hour at 7:45 a.m. He was proceeding to work. The weather was good. These rocks were located on the berm, or "false shoulder" of the road. The rock which claimant's vehicle struck was approximately two inches from the blacktop surface of the road. It was protruding approximately six inches above the surface of the road through the blacktop. Vegetation covered the rock. Claimant travels this route daily. He had not made any complaints concerning this hazard to respondent.

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

Claim disallowed.

OPINION ISSUED AUGUST 8, 1988

CONNIE J. McDOWELL
VS.
DEPARTMENT OF HIGHWAYS

(CC-87-242)

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

PER CURIAM:

On August 17, 1987, claimant was operating her 1987 Dodge Shadow on I-77, near Pocatalico in Kanawha County, in the southbound lanes, at approximately 7:30 a.m. The left lane was closed to the travelling public. Claimant's vehicle struck a hole located in the left lane and extending approximately one foot into the right lane. Claimant seeks $226.47 for damages to the automobile's left front tire and strut.

Claimant testified that respondent had been working on this portion of I-77 highway during the summer of 1987. There were barrels located at the areas where respondent was working, but not at the particular location of the accident. She had travelled this route several weeks prior to the incident. The construction workers had been moving from section to section on the highway while working during the summer months of 1987.

Herbert C. Boggs, Interstate Maintenance Assistant for respondent, testified that he was aware of work being bone on August 17, 1987. West Virginia Paving was the contractor for the work being performed. Respondent had inspectors at the job site who were responsible for seeing that proper traffic control was maintained and barriers were erected. If barrels are missing, it is the inspector's duty to see that the contractor replaces them.

It is the opinion of the Court that there was a breach of duty owed to the travelling public by respondent to oversee proper safety controls on a project. However, the claimant was travelling on the interstate highway during the daylight hours. She also was in a position to observe the cut areas of the highway. The Court is of the opinion that the claimant was also negligent, and her negligence was equal to or greater than that of the respondent. The Court therefore denies the claim based upon the comparative negligence of the claimant.

Claim disallowed.

OPINION ISSUED AUGUST 8, 1988

FRED MATTHEY
VS.
DEPARTMENT OF CORRECTIONS

(CC-87-9)

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

PER CURIAM:

The claimant seeks $2,494.11 for expenses and personal property which was stolen by juveniles who had escaped from Salem Industrial Home, a facility of the respondent. On November 6, 1986, claimant was hunting. For that reason, he left his automobile keys under a cushion, on the back porch of his home. That evening, as he was preparing to retire, he discovered that his automobile and other items of property were missing. Two weeks following this incident, after claimant had changed the locks on his home, it was broken into again. He alleges that respondent was negligent for permitting the juveniles to escape from the Home.

Claimant described his expenses which included the towing and the storage of his automobile. The automobile was recovered in Huntington, West Virginia. It had been damaged. He also described the missing items, among which were guns, knives, and carpenter tools.

Trooper C.R. Hupp testified that he investigate this incident. Two juveniles escaped from the Salem Industrial Home in Harrison County, entered claimant's home, and stole property. Claimant's home is approximately two miles southwest of Salem.

The Court cannot concur with the claimant's contention. The damage to claimant's automobile and the theft would not have occurred had the claimant not left the keys in an accessible location outside of his home.

Claim disallowed.

OPINION ISSUED AUGUST 8, 1988

OTIS MOLLOHAN
VS.
STATE AUDITOR'S OFFICE

(CC-87-392)

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

PER CURIAM:

On December 3, 1981, claimant bought a parcel of delinquent and forfeited land in Clay, West Virginia, for $2,050.00. This property belongs to another party, and claimant seeks $2,050.00.

Claimant testified that this was the first time he has made a purchase at a tax sale or a sale of delinquent and forfeited land. He did not go to the sale for the purpose of purchasing the particular plot. After he was supplied a map of the property which he purchased, he discovered that this property belonged to another party. The Order confirming the sale of the property was entered on December 8, 1981. It is recorded in Clay County in Deed Book 131 at page 159.

West Virginia Code §11A-4-25 states the following:

> "Whenever, after sale and before confirmation thereof, it is discovered that the land sold was nonexistent, or that it had been the subject of a duplicate or improper assessment, or was transferred to others under the provisions of section 3, article XIII of the Constitution, the purchase shall be entitled to a return of the purchase money. Upon request of a purchaser so entitled, it shall be the duty of the deputy commissioner to apply to the circuit court for an order directing the sheriff to return the purchase money. If satisfied that the application is proper, the court shall enter the order applied for, but no costs shall be taxed in connection with such an application. If the ground for entering the order was that the land was nonexistent or the subject of a duplicate assessment, the order shall also direct the assessor to drop the erroneous entry of such lands from the land books." (1947, c. 160.).

The aforementioned statute clearly provides a legal remedy. For those reasons as mandated by West Virginia Code §14-2-14(5), the Court lacks jurisdiction of this claim. Therefore, the Court is of the opinion to, and does, deny the claim.

Claim disallowed.

OPINION ISSUED AUGUST 8, 1988

JOHN R. SHANK
VS.

DEPARTMENT OF HIGHWAYS
(CC-88-21)

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

PER CURIAM:

On November 5, 1987, claimant, accompanied by his wife, was walking on the sidewalk in the vicinity of Kanawha Terrace and Washington Street in St. Albans. Claimant struck his head on a street sign at the aforementioned location. He alleges negligence on the part of the respondent, and seeks $124.99 for the cost of his medical expense.

As testimony indicated that the claim had not been filed against the proper respondent, the Court, on its own motion, amended the style of the claim to reflect the Department of Highways as the proper party respondent.

Claimant testified that he had walked in this area the night before the accident, but he had not observed a sign on that occasion. Claimant's impact with the sign resulted in a head injury which required stitches. He has not paid his medical bills, and is unaware whether or not Medicare will cover them. There was nothing to obscure claimant's vision.

The Court finds that claimant was negligent in failing to maintain an adequate lookout upon the sidewalk where he was walking. The record does not substantiate a finding of negligence on respondent's part. The Court, therefore, disallows the claim.

Claim disallowed.

OPINION ISSUED OCTOBER 12, 1988
JOHN M. PRATT
VS.
DEPARTMENT OF HIGHWAYS
(CC-88-109)

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

PER CURIAM:

On March 12, 1988, the claimant was operating his 1987 Nissan Maxima in a southerly direction on U.S. Route 119 in Clarksburg. His vehicle struck a hole in the highway, and he seeks $258.86 for damage to the vehicle.

Claimant testified that on the day of the accident it was dry and clear. There was considerable traffic on the road, and he was travelling at approximately 25 miles per hour. The incident occurred at 8:00 in the evening. The hole was located in the right side of the road. He estimated that the hole was between 10 and 14 inches deep. Claimant had travelled this route three weeks prior to the incident and had not observed this hole. He is unaware how long it had been in existence prior to his accident.

Ronald Cork, Harrison County Maintenance Superintendent for respondent, testified concerning the hole. He stated that he received no complaints in the two to three week period prior to March 12, 1988. This hole was patched on March 7, 1988, according to respondent's records. He admitted that a hole that size could have been present on March 10, 1988. He explained that a truck could have knocked a patch out of the hole.

This Court has repeatedly held that respondent is neither an insurer nor a guarantor of the safety of travellers on its highways. However, the respondent does have a duty of using reasonable care in the maintenance of its highways. In the case of a heavily travelled major highway in this State, the Court has held respondent liable for failure to repair a hole of this size, as it could not have developed overnight. See: *Lohan vs. Dept. of Highways*, 11 Ct.Cl. 39 (1975); *Baker vs. Dept. of Highways*, 11 Ct.Cl. 48 (1975); *Stone vs. Dept. of Highways*, 12 Ct.Cl. 259 (1979); *Bailey vs. Dept of Highways*, 13 Ct.Cl. 144 (1980); *Snodgrass vs. Dept. of Highways*, 13 Ct.Cl. 246 (1980); and *Poole vs. Dept. of Highways*, 15 Ct.Cl. 65 (1983). The Court, therefore, makes an award to the claimant in the amount of $258.86.

Award of $258.86.

OPINION ISSUED NOVEMBER 23, 1988

ALICE HOPE BOMBOY AND
DAVID LYNN BOMBOY
VS.
DEPARTMENT OF HIGHWAYS

(CC-85-298)

Clyde M. See, Jr., Attorney at Law, for claimant.
Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

The claimants, Alice Hope Bomboy and David Lynn Bomboy, filed this claim in the amount of $3,500.00 for water damage to their personal property situate at their residence in the vicinity of Route 90 in Bayard, Grant County. Testimony, during the hearing revealed that the amount of damage claimed is $4,301.00. This amount included replacement costs of a three-year-old hot water tank, a ten-year-old washing machine and a six-year-old freezer. The claimants purchased their residence on September 3, 1969. They allege that the negligence of respondent for failure to properly maintain a culvert on State Route 90 opposite their property resulted in the basement being flooded and damage to their personal property.

Claimant David Bomboy testified that, until the time of a flood in May, 1985, he experienced no water problems on his property. He does not know the dimensions of the Department of Highways culvert which runs under State Route 90. He stated that a terra cotta drainpipe was present on the property when it was purchased. While the claimant stated he is unaware whether the terra cotta pipe ties into the respondent's drainage structure, the evidence tends to establish that it does. The claimant installed an eight-inch plastic pipe at this location sometime in the 1970's, which replaced part of the terra cotta pipe on 100 feet of the claimants' property.

On May 31, 1985, there was approximately five inches of rain over a 12-hour period. Claimant David Bomboy testified that a plastic mild jug and some large rocks had gotten into the pipe leading from the culvert. He stated that the culvert is the only opening in the pipe, and that the water backed up and flooded the basement of his home with approximately 30 inches of water. Claimant notified respondent of the problem and was able to unclog the pipe with the assistance of the town council and the volunteer fire department.

In order to correct the problem, claimant David Bomboy dug ditches under the foundation of his home, tore up the basement floor, and installed floor drains and a new drain out of the house. Although claimant removed a plastic milk jug at that time, he cannot say from which pipe it was removed. The drain from his washer located in the basement did hook into the eight-inch plastic pipe. His washing machine, kitchen sink, and the sink in the basement are also hooked into this line.

Terry Kesner, Maintenance Engineer for respondent in Grant and Mineral Counties, testified that he is familiar with the drainage on Route 90 at the location in question. He, along with several other of respondent's employees, visited the property on July 12, 1985. He had not received any complaints prior to July 12, but considerable damage had been done to the streets of Bayard from the extensive rainfall of May, 1985. The storm was a "100 year storm," and was considered to be a "catastrophe." He stated that none of the drainage structures on the primary roads are designed to carry more than a 50-year frequency storm. He reviewed a set of plans from 1929 and determined that 44 lineal feet of reinforced concrete pipe, 18 inches in diameter, was placed underneath State Route 90 with a standard concrete head wall on the inlet.

Kesner explained that there was no grate located over respondent's pipe as there has not been a major construction program or project in Bayard since 1929. In his opinion, the water problem is a direct cause of the fact that claimants' basement floor level is lower than the inlet elevation of the 18-inch pipe on State Route 90, and with claimants' drain entering into this eight-inch pipe and with the eight-inch pipe obstructed, the water would be forced back up into claimants' basement. He could not say of his own knowledge that claimants' eight-inch pipe is connected to the State's culvert.

From the record in this case, it is difficult for the Court to believe that the diversion of surface water, caused by a stopped culvert, was the sole cause of the damages claimed. The extensive rainfall was a significant factor in the water problem. To hold that a diversion of water from a stopped culvert was the sole, direct, and proximate cause of the damage, is unwarranted from the evidence. However, it is clear that the absence of a grate on the culvert was certainly a contributing factor in the flooding.

Claimants' damages included 60 hours of labor for himself and his son at $1200.00 as well as $997.00 for the freezer, washing machine and hot water tank. After considering all of the evidence, the Court is of the opinion that the most the claimants could recover, if all of the damages were the result of the respondent's negligence, would be $2084.00. The Court is further of the opinion that the respondent was at most 33% negligent, and, accordingly, the Court makes an award in the amount of $694.67.

Award of $694.67.

OPINION ISSUED NOVEMBER 23, 1988

WILLIAM C. EDENS, JR.
VS.
STATE OF WEST VIRGINIA

(CC-87-218)

John M. Hedges, Attorney at Law, for claimant.
Robert D. Pollitt, Senior Assistant Attorney General, for respondent.

PER CURIAM:

The claimant brought this action under West Virginia Code §14-2-13a, claims for unjust arrest and imprisonment or conviction and imprisonment. This is a case of first impression for the Court.

In accordance with the provisions of the aforementioned section of the West Virginia Code, the following facts were established at a hearing of this claim.

Claimant William C. Edens, Jr. was arrested, charged by warrant and imprisoned in Kanawha County for the November 17, 1983 first degree murder of Vincent Tyree on December 16, 1983. His confinement lasted from December 16, 1983 through December 22, 1983, when he was released on bond.

On January 2, 1984, Gregory C. Burdette was arrested for the November 17, 1983 first degree murder of Vincent Tyree. On April 11, 1986, term of Kanawha County Court, Gregory C. Burdette was convicted of, among other charges, the first degree murder of Vincent Tyree, he was subsequently sentenced, upon the murder count of the indictment, to life imprisonment with mercy.

By Kanawha County Circuit Court Order of January 4, 1984, it was determined that the State would not present the murder charge against Edens to the Kanawha County Grand Jury. William Edens, Jr. was released and discharged from his $50,000.00 bond.

Claimant was questioned by the police approximately one month prior to his arrest. On December 16, 1983, when the deputy sheriffs took his son to jail, William C. Edens, Sr. engaged the services of an attorney. In addition, Mr. Edens paid $2,000.00 to an investigator. He borrowed $12,000.00 on an existing bank loan and paid the attorney $10,000.00 by check dated December 19, 1983. The $12,000.00 borrowed cost $6,101.41 in interest from December 1983 through May 1988.

William C. Edens, Jr. testified that his earnings for the two to three months prior to his arrest amounted to approximately $600.00 per month. He was then self-employed and performing automobile repair work. It was difficult for him to procure automobile body repair jobs after the murder charge against him was dropped. He did some free-lance painting. At the time of his hearing, he was employed by Baker Equipment Engineering Company. He stated that he considers the money which his father expended on his behalf a debt that he owes to his father and to his family.

It is within the Court's discretion to determine the amount of compensation to be awarded to the claimant. Therefore, the Court makes an award of $20,000.00 to the claimant, it being the opinion of the Court that such amount will fairly and reasonably compensate him, including his repayment to his father of moneys expended by his father in his behalf.

Award of $20,000.00.

OPINION ISSUED DECEMBER 2, 1988

BARRY M. DOSS AND KATHY L. DOSS

VS.
DEPARTMENT OF HIGHWAYS

(CC-88-98)

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

PER CURIAM:

In the third week of May of 1987, claimant Kathy L. Doss was operating her 1987 Colt Vista automobile on McJunkin Road in Nitro. Gravel and a tar-like substance was present on the road. This material splashed onto claimants' automobile. Claimants seek $915.00, which includes $315.00 as the cost of cleaning the car and punitive damages.

Claimant Kathy L. Doss testified that she was returning home from work at approximately 5:00 p.m on the day of the incident. She had observed crews in respondent's trucks placing material on the road earlier. At the date of hearing, the claimants had not had the substance cleaned off the vehicle.

Claimant Barry Doss testified that he had observed respondent's vehicles placing the tar substance on the road and then returning to place gravel. At the time of this incident, he remembered that the weather was very warm.

Andrew Morgan Allen, maintenance assistant with respondent, for an area including Putnam and Boone Counties and Corridor G. testified that the location of the accident is included in his area. Tar was applied at that location on April 20, 1987. At that time, respondent patched holes in the road by spraying asphalt and placing chips in the holes. Between April 20, 1987, and the third week in May, 1987, he stated that he did not have any complaints concerning the tar. He was notified of a problem on May 21, 1987. On that occasion, the asphalt bled. Bleeding is not a problem which normally occurs after tar is applied. From his experience with this procedure, it is his opinion that the high temperature caused the problem. He and his crew only "chipped" the holes in the road.

It is the opinion of the Court that the tar was placed on the road by respondent and the damage to claimants' automobile occurred when the substance bled through the road surface which did not have a sufficient amount of chips to protect vehicles from the splashing of tar. For this reason, the Court was disposed to make an award to claimants in the amount of $315.00. The Court disallows that portion of the claim for punitive damages claim.

Subsequent to the hearing, the claimants advised the Clerk of the Court that their automobile damage claim had been paid to them by their automobile insurance company, except for the deductible amount of $100.00

Award of $100.00.

OPINION ISSUED DECEMBER 2, 1988

JARVEY G. MARCUM
(CC-87-78a)
AND
ROY PAUL MESSER
(CC-87-78b)
VS.
DEPARTMENT OF HIGHWAYS

Larry D. Taylor, Attorney at Law, for claimants.
Nancy J. Aliff, Attorney at Law, for respondent.

GRACEY, JUDGE:

On April 28, 1986, claimants Jarvy G. Marcum and Roy Paul Messer were travelling on County Route 41 through Cabwaylingo State Park in Wayne County. Claimant Marcum was operating his 1980 Ford Tempo and approached a bridge which was a steel structure with a double planked wooden deck. As the automobile proceeded onto the bridge, it suddenly stopped. Both claimants sustained injuries and the automobile was damaged. Claimant Marcum seeks an award of $25,000.00 for his injuries, medical expenses, pain and suffering, and the amount of his insurance deductible with reference to the damage to his automobile. Claimant Messer seeks an award of $50,000.00 for his injuries, medical expenses, pain and suffering, and for loss of earnings.

Claimants determined that the automobile was brought to a stop on the bridge when a timber, which was a part of the bridge deck, split and came up through the floorboard of the automobile, extending approximately 18 inches into the automobile. The timbers were placed on the deck parallel with the bridge. Each timber was approximately eight inches wide and two and one-half to three inches thick. Claimants allege that respondent was negligent in its maintenance of the bridge.

Respondent contends that the bridge in question is a small, one-lane bridge on a secondary road which is considered a local service road. The average daily traffic count at that time was 350 vehicles per day. The respondent also contends that it did not have notice that there was any problem with the bridge prior to the claimants' accident. Respondent's last inspection of the bridge, prior to the accident, was in September 1984, and several timbers were replaced on November 30, 1984.

Claimant Marcum testified that he frequently travelled over County Route 41 as he lived approximately one mile from this particular bridge. He had noticed that the floor boards on the bridge decks of the bridges along this route would split with the exception of the bridges which had been replaced with steel mesh, cement and steel. Although he had seen the condition of the boards, he state that it had not occurred to him that a board would split and come up through the floorboard of his automobile. He also testified that about a year before the incident herein he had made a complaint to employees of the respondent concerning the condition of the bridges; however, the complaint was general in nature and was not specifically about the bridge, which is the subject matter of this claim.

The State is neither an insurer nor a guarantor of the safety of travellers on its highways. *Adkins vs. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to charge respondent with negligence, actual or constructive notice of the defect is required. This Court has held in prior claims that respondent's failure to discover the condition of a bridge may constitute negligence. *White vs. Dept. of Highways*, 15 Ct.Cl. 269 (1985); *Eller vs. Dept. of Highways*, 13 Ct.Cl. 155 (1980); and *Williams vs. Dept. of Highways*, 11 Ct.Cl. 263 (1977).

It is reasonable to assume that a wooden bridge deck may deteriorate with the result that timbers split and then pose a hazard to the travelling public. Respondent is responsible for inspecting and maintaining bridges in the State such that the bridges do not pose a problem for the travelling public.

The travelling public proceeding on the State's bridges is not expected to assume that the bridge is unsafe. Rather, the public assumes that the bridges are safe unless barricades or other warning devices are present. Claimants reasonably anticipated that they would cross the bridge safely even though the bridge was not in the best state of repair. They could not anticipate that a loose timber would suddenly pierce the floorboard of the automobile in which they were crossing the bridge.

Claimant Marcum was transported to St. Mary's Hospital in Huntington where he remained through April 30, 1986. He wore a soft collar for six days. He also underwent dental work at the Huntington Veteran's Hospital which was necessitated by reason of the accident. His medical expenses were $1,960.62. He had a deductible which he paid for the damages to his automobile which he estimated to be $200.00 or $500.00.

Claimant Messer sustained injuries to the right side of his head and to his shoulder. He was transported to the emergency room of St. Mary's Hospital in Huntington. He wore a neck collar for 25 to 30 days. He received follow-up medical care from Dr. Hossein Sakhai. He was returned to work for approximately two weeks but was unable to perform as needed due to pain. He attempted several other jobs, but he has been unable to work due to the pain which he experiences when he does physical labor. His medical expenses were $3,321.11.

The Court is of the opinion that the respondent was negligent in the maintenance of the bridge. Therefore, the Court is disposed to make awards to the claimants as follows: award of $7,200.00 to claimant Jarvy G. Marcum and award of $10,000.00 to claimant Roy Paul Messer.

Award of $7,200.00 to Jarvy G. Marcum.

Award of $10,000.00 to Roy Paul Messer.

OPINION ISSUED DECEMBER 2, 1988

PEGGY STOVER
VS.
DEPARTMENT OF HIGHWAYS

(CC-88-156)

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

PER CURIAM:

On May 1, 1988, claimant's husband was operating her vehicle, a 1979 AMC Concord, in an easterly direction on the Fifth Avenue Bridge in Huntington. As he proceeded across the bridge, the automobile struck an expansion joint, and sustained damage in the amount of $270.60.

Richard Stover testified that the accident occurred at approximately 7:30 in the evening. It was light and clear. He was accompanied in the automobile by his daughter. The highways is a one-way street proceeding east. There was heavy traffic at the time of this accident. Claimant described a "steel plate" which protected the area where the bridge joins to the asphalt had become dislodged. The "steel plate" stuck the manifold and the exhaust pipe of the automobile. The "steel plate" was actually a loose expansion joint. The steel was three or four inches above the ground. He had driven this route the day prior to this incident, and, at that time, the expansion joint was not in a hazardous condition.

Wilson Braley, District 2 Bridge Engineer for respondent, testified that he is familiar with the Fifth Avenue Bridge. He explained that an expansion joint in this type of bridge is to allow for thermal expansion of the bridge or movement of the bridge due to changes in temperature. He did not become aware of the problem with the joint until he received a cable from the City of Huntington on May 4, 1988. The city had been notified of the complaint by claimant's husband after his accident. Mr. Braley had received no complaints prior to May 1, 1988 concerning the problem.

The bridge where the accident occurred is a well-travelled bridge. This Court has previously granted awards to claimants for damages which were incurred as a result of hazardous expansion joints. *State Farm Ins. Co., as Subrogee of Vernon Marcum, Jr., Individually vs. Dept. of Highways*, (Opinion issued January 18, 1988); *Gregory A Harrison vs. Dept. of Highways*, 13 Ct.Cl. 229 (1980); and *Bubar vs. Dept. of Highways*, 12 Ct.Cl. 204 (1978). The Court is of the opinion that respondent was negligent in the maintenance of the expansion joint and grants an award to claimant for damages incurred by her vehicle.

Award of $270.60.

OPINION ISSUED DECEMBER 13, 1988

VECELLIO & GROGAN, INC.

VS.
DEPARTMENT OF HIGHWAYS

(CC-83-207 and CC-83-208)

Cordell M. Parvin and Jim H. Guynn, Jr., Attorneys at Law, for claimant.
Robert F. Bible, Attorney at Law, for respondent.

HANLON, JUDGE:

These claims arise out of two separate projects on Interstate 79 designated as Project No. 1-79-1(16)29 and Project No. 1-79-1(15)25. The projects will hereinafter be referred to as Projects (16)29 and (15)25, respectively. These projects entailed the construction of three bridges, excavation and grading, and providing drainage for Interstate 79. The two projects are adjacent to each other with Project 15(25) as the southerly project. Claimant contends that there were differing site conditions and that errors in the plans caused claimant to incur extra costs in construction of the projects in the amount of $5,994,353.74.

Claimant also alleges that it is entitled to recover $9,000.00 in liquidated damages assessed by respondent on project (15)25 for 90 days at $300 per day as claimant did not complete the project in accordance with the contract completion date. Claimant asserts that the Court previously determined this issue in *J. F. Allen Co. vs. Dept. of Highways*, 12 Ct.Cl. 364 (1981). In that claim, the Court made an award for liquidated damages based upon the application of the liquidated damage clause in the contract as being unjustifiable. The Court indicated that "Irrespective of Governor Moore's oral proclamation...granting a ninety-day extension to the various contractors, the Court...is of the opinion that enforcement of the liquidated damage clause in the contract was unjustifiable." Claimant herein asserts that the proclamation applies to it also and should substantiate an award for the liquidated damages assessed. The Court will treat the issue of liquidated damages in this claim *de novo*.

Claimant bid on the northern project designated (16)29 in March 1970 and was awarded the project. In May 1970, claimant bid on the southern project designated (15)25. Claimant desired to construct both projects as the projects were adjacent to each other. Prior to bidding the projects, representatives of the claimant walked the job sites to examine the terrain and conditions then and there existing. Claimant reviewed the mass diagram and grading summary prepared by respondent which accompanied the plans in order to determine the excavation and fills which constituted the major portion of the work. The plans indicated that these projects were waste projects meaning that there would be sufficient material in the cuts to provide the embankment material for the fills. In particular, claimant noted that the mass diagrams for the projects indicated that the projects were balanced i.e. waste equalled fill. The plans also indicated the shrink/swell factors for the material to be excavated. Claimant used these factors in calculating the amount of material necessary for the fills to be constructed.

The northern project provided for the construction of two bridges with a major cut of one million cubic yards between the bridges. There was also a major fill north of the bridges and the remainder of the construction involved channel changes to the northern end of the project.

The southern project provided for the construction of a major interchange known as the Amma Interchange. There was a large cut which contained one million cubic yards of material which appeared to be an amount which would be wasted. North of this interchange, claimant was to relocate local service route 29 and relocate a creek which involved several channel changes. The plans contained a note that the topsoil was unsuitable material which meant it would be wasted. Claimant's representatives determined that the topsoil was suitable and could be used as embankment material. When claimant bid the projects, the bids were base upon the premise that claimant would not have a borrow item as there would not be a necessity for borrow.

On the northern project, claimant proceeded with the construction of the two bridges which were in close proximity to one another but separated by a large cut. The material in the cut between Bridge 2681 and Bridge 2682 had to be transported north to an area known as the "million yard fill." Temporary access areas were constructed to facilitate the moving from the excavation between the bridges. North of the million yard fill was an area known as the cemetery fill. It was impossible to haul material up into that fill due to the high elevation of the rock. Therefore, the approximately 15,000 cubic years at that location was wasted.

The projects progressed without major problems until spring of 1972. At that time, claimant began to suspect that there would not be sufficient material to complete the embankments on either project with the material that remained to be removed in the cuts. Claimant instructed its employees to calculate the amount of fill needed as compared with material in the cuts by taking cross sections of the project. In June 1982, claimant informed respondent that it would need to borrow material to complete the projects. Respondent allowed the borrowing of material, but informed claimant that respondent would not pay for this item.

The southern project was started at the Amma Interchange as claimant determined that the area was accessible and claimant could work through the winter on excavation which could be wasted. At the pre-construction conference for this job. respondent's representative noted that claimant needed to submit waste areas for approval in order to claimant to waste material. This was done and claimant proceeded to waste both suitable and unsuitable material in a large waste site north of the bridge being constructed at the Amma Interchange. Claimant was able to use approximately 250,000 cubic yards of the cut for the construction of the interchange.

Claimant continued with the projects and did, in fact, borrow material to complete the embankments. Claimant excavated approximately 300,000 cubic yards of material at the common cut which claimant used on project (15)25 although the material came from project (16)29. This action was permitted by respondent, but claimant was not paid for the borrow on project (15)25. There was also material borrowed at the site of the office. However, claimant had wasted material at this site, and then found it necessary to remove the wasted material to another location in order

to excavate borrow material. The work entailed additional blasting and excavation. The claimant also borrowed material at the northern end of project (16)29 where there was a shortage of material.

Claimant contends that the shortage of materials was the direct result of an error in the plans which indicated the shrink-swell factors. It is claimant's position there were errors in the shrink/swell factor of more than 10% on project (15)25 and 5% or more on project (16)29. Although permission was granted by respondent to use material excavated from the cut common with the adjoining project at stations 1510 - 1517 as borrow material to complete this project, the fills were still short, and claimant required additional borrow. Borrow material was drilled and blasted, then excavated and hauled to the construction area to satisfy the embankment shortage.

Claimant relied upon these factors in calculating the amount of material needed for the embankments. Claimant also contends that the channel change material which was indicated as suitable material on the plans could not be used as it was too wet. This material was wasted. Claimant asserts that borrow would not have been needed if the plans had been correct. As a result, claimant alleges that respondent breached an implied warranty.

Respondent contends that claimant elected to waste material unnecessarily on these projects. Respondent referred to Section 207.3.4.2 of the Contract Specifications which provides: "If the contractor elects to waste rather than dry suitable replacement material, if needed to complete embankments or otherwise fulfill the intent of the plans, shall be furnished and placed by the contractor at his expense... ." Respondent alleges that sufficient material existed within the project limits to fulfill the necessary embankment quantities without requiring borrowing material from some other site. Respondent contends that claimant's overwasting, rather than an error in the shrink/swell factor, resulted in the need for borrow.

The instant case falls squarely within the reasoning of *Ideker, Inc. vs. Missouri State Highway Comm'n.*, 654 S.W.2d 617 (1963). In *Ideker*, the Missouri State Highway Commission prepared plans and specifications which indicated a particular project would be a balanced job and the contractor made his bid in reliance on their representations. After the project began, the plans shrinkage factor proved incorrect and the project became a waste job.

The Court, after reviewing the cased on the subject of claims against governmental bodies involving contracts, concluded that a contractor should recover against the government entity on a cause of action ex contractu in the nature of a breach of warranty when these six elements are present:

(1) A positive representation by a governmental entity,

(2) Of a material fact,

(3) Which is false or incorrect,

(4) Lack of knowledge by a contractor that the positive representation of the material fact is false or incorrect,

(5) Reliance by a contractor on the positive representation of a material fact made by the governmental entity, and

(6) Damages sustained by a contractor as a direct result of the positive representation of a material fact made by the governmental entity.

The Court, on page 621, reasoned as follows:

> Courts subscribing to the theory of a cause of action ex contractu in the nature of a breach of warranty apparently were motivated by concepts of fundamental fairness. To avoid an unjust result, they refused to be circumscribed by the harshness of the doctrine of sovereign immunity and the principle of contract law that if performance is possible one is not entitled to extra compensation for unforeseen difficulties encountered. Syllogistically, where a governmental entity makes a *positive* representation of a material fact relied upon by a contractor in calculating its bid, which turns out to be false or incorrect after work is commenced and occasions additional expense, the contractor finds himself in the position of one who undertakes one contract but is confronted with performance of another. The governmental entity pragmatically speaking, gets the benefit of another contract. If performance thereof by the contractor entails more expense than was calculated in submitting its bid, the governmental entity should bear the added cost rather than the contractor because the former is the beneficiary of necessary but unbargained for work resulting from its positive representation of a material fact which turned out to be false or incorrect.

The claimant herein relied upon the mass diagram and the grading summary provided by the respondent as part of the bid documents. The time frame for letting bids on these particular contracts was such that a contractor would necessarily rely upon the information provided. This is certainly realistic. More importantly, the claimant relief upon the shrink-swell factors stated in the plans and these factors were inaccurate. The Court is of the opinion that the claimant has established that it is entitled to recover damages for certain of the borrow material which it placed in the construction of these projects.

Claimant borrowed material originally wasted on project (16)29 for project (15)25 in the areas of the channel changes. The material was needed as claimant had wasted the material from the creek in the channel changes. These projects were to be completed in a two year time frame. Claimant used that portion of the channel change material which was suitable. However, claimant would have had to dry the material from the channel changes and then determine its suitability for the embankments. The Court is of the opinion that the claimant chose the most expeditious method, both for itself and respondent of completing the embankments. Therefore, claimant should be paid for this material as borrow on project (15)25. Claimant is also entitled to recover for the borrow

placed on (16)29 at the north end where channel changes occurred from station 1645 to the end of the project.

There was a slide on project (15)25 which claimant contends was caused by an overload of material on an unstable area. The Court denies any recovery for work performed on the slide as the claimant also had the same knowledge concerning the instability of the area.

The Court has also determined that claimant is entitled to recover the $9,000.00 in liquidated damages assessed on project (15)25. The respondent did not establish that the failure to complete this project within the contract period damaged respondent. The amount of $9,000.00 shall be included by the parties in the documentation of damages.

This claim was bifurcated upon the issues of liability and damages. The Court directs the parties to submit documentation and a stipulation for damages incurred by the claimant in accordance with the provisions of this opinion.

OPINION ISSUED DECEMBER 15, 1988

HELEN HANSON AND HOWARD HANSON
VS.
DEPARTMENT OF HIGHWAYS

(CC-87-703)

David K. Liberati, Attorney at Law, for claimants.
Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

On September 4, 1987, claimant Helen Hanson was walking across the Aetnaville Bridge in Wheeling, Ohio County. As she proceeded down the steps located at end of the bridge, she lost her balance and fell. As a result of the mishap, claimant Helen Hanson broke her foot. Claimant seeks $9,500.00 for medical expenses, loss of work, and paid and suffering.

Claimants contend that the absence of a handrail and the disrepair of the steps constitutes negligence on the part of respondent. Respondent contends that it did not have notice of the hazardous condition.

Claimant Helen Hanson testified that she had not descended these steps in forty years. Although she drove over the bridge frequently, she had not observed the disrepair of the steps. She explained that she was walking across the bridge on the day of this incident because she had

experienced difficulty getting her car started. She and a friend had been shopping at the nearby Kroger Supermarket. After purchasing the gas, claimant's vehicle failed to start, and she left it at the gas station. She walked across the bridge because that was the easiest route to reach her home. Her friend remained with the groceries in the vehicle. She estimated that it was approximately a one-half mile walk from the gas station to her home.

Claimant Helen Hanson described the spot on the steps where she feel as being "... like a gully in it." She was unable to get up after her fall and was assisted by some passing motorists. Her foot was broken in three places, and she was required to wear a cast from September 4, 1987 to November 11, 1987. She did not suffer lost wages as she is retired. However, claimant Howard Hanson took a week off from his employment to stay home to assist his wife. To this day, claimant experiences pain as a result of her injury.

Both Dorothy Joyce, who accompanied Helen Hanson in her vehicle, and claimant Howard Hanson testified that the step area was overgrown with weeds and grass. During the summers, claimant Howard Hanson observed that a group of teenagers employed by the State normally cleared the weeds away from the steps.

Alan Behr, District 6 Bridge Engineer, testified that prior to September 4, 1987, he was not familiar with the steps where this incident occurred. The complaint made on September 9, 1987, regarding the Hanson incident was the first complaint which he had received about the area. Alan Behr explained that the Aetnaville Bridge is inspected at least every two years and that it had been inspected in the two years preceding this incident. The inspectors do not inspect steps.

This Court has held in the past that the State is negligent for failing to discover and correct a hazard on a bridge which a casual inspection would have revealed. *Randall vs. Dept. of Highways*, 8 Ct.Cl. 147 (1970). *Nicola vs. Dept. of Highways*, (Opinion issued January 6, 1987). For this reason, the Court is disposed to make an award in the amount of $2,500.00.

Award of $2,500.00

OPINION ISSUED DECEMBER 15, 1988

DAVE MINCH AND BARBARA MINCH
VS.
DEPARTMENT OF HIGHWAYS

(CC-88-127)

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

PER CURIAM:

On April 4, 1988, at approximately 8:00 p.m. claimant was traveling on Interstate 70 in the vicinity of Moundsville, Marshall County, when her 1981 Ford Escort station wagon struck a hole. She seeks $85.21 for replacement of one tire which was damaged in this incident and lost wages in the amount of $15.75.

Claimant Barbara Jean Minch testified that it was daylight, and the weather was good at the time of the accident. She described the hole as deep enough to expose the reinforcing rods in the concrete of the road. The hole was in the right hand lane approximately two feet from the white line at the edge of the road. She had travelled this route on the morning of April 4, 1988, but had not observed the hole. After he accident, she observed other vehicles hit the hole.

This Court has repeatedly held that respondent is neither an insurer nor a guarantor of the safety of travellers on its highways. However, the respondent does have the duty of using reasonable care in the maintenance of its highways. In the case of a heavily travelled major highway in this State, the Court has held respondent liable for failure to repair a hole of this size, as it could not have developed overnight. See *Pratt vs. Dept. of Highways*, (Opinion issued October 12, 1988); *Poole vs. Dept. of Highways*, 15 Ct.Cl. 65 (1983); *Snodgrass vs. Dept. of Highways*, 13 Ct.Cl. 246 (1980); *Bailey vs. Dept. of Highways*, 13 Ct.Cl. 144 (1980); *Stone vs. Dept. of Highways*; 12 Ct.Cl. 259 (1979); *Baker vs. Dept. of Highways*, 11 Ct.Cl. 48 (1975); and *Lohan vs. Dept. of Highways*, 11 Ct.Cl. 39 (1975). The Court is of the opinion to, and does, make an award to claimants in the amount of $100.96.

Award of $100.96.

OPINION ISSUED DECEMBER 15, 1988

R. L. BANKS & ASSOCIATES, INC.
VS.
PUBLIC SERVICE COMMISSION

(CC-88-302)

No appearance by claimant.
Janet F. Steele, 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 $4,799.00 plus interest for professional services provided respondent in connection with U. S. Court proceedings on the closure of CSX facilities at Hinton, West Virginia. There was no written contract between the parties; however, there was an oral agreement for the services. Claimant failed to submit an invoice for the services rendered in the proper fiscal year; therefore, claimant has not been paid. The respondent admits the validity and amount of the claim itself, but denies the interest amount being claimed.

West Virginia Code Chapter 5A, Article 3, Section 1 provides for the payment of interest upon contracts with State agencies for printing or commodities if payment is delayed for more than 90 days. This is not a claim for commodities or printing; therefore, the interest provision of the statute is not applicable.

In view of the foregoing, the Court makes an award in the amount of $4,799.00 and denies the portion of the claim for interest.

Award of $4,799.00

OPINION ISSUED DECEMBER 15, 1988

CHRISTOPHER LEE UMBERGER
VS.
DEPARTMENT OF CORRECTIONS

(CC-86-411)

Claimant appeared in person.
Timothy Murphy, Special Assistant Attorney General, for respondent.

PER CURIAM:

Claimant was transferred from the Moundsville institution to the Martinsburg institution on July 10, 1986. At that time his personal property was inventoried and placed in a holding cell. Upon his return on July 11, 1986, he discovered that a number of items were missing. He seeks $356.44 which amount represents the value of the lost property.

Claimant testified that the missing items included: NuBalance sneakers, Stetson eye glasses, two Reebok sweat pants, and two Reebok sweat tops, and two pairs of Nike shorts. Respondent's counsel admits that the value of the property equals $270.00. Claimant was unable to submit receipts or cancelled checks for confirmation of the worth of the items. He stated that he lost everything at the time of his arrest.

Respondent's counsel asserted that the value of the eye glasses was less than the amount stated. The clothing is at least four months old, and the value of the clothing should be reduced accordingly due to its age.

It is the opinion of the Court that respondent's counsel failed to present evidence of the value of the disputed items, with the exception of the statement concerning the age of the items. The Court finds that the fair value of the items is $300.00; therefore, the Court makes an award to claimant in the amount of $300.00.

Award of $300.00.

OPINION ISSUED DECEMBER 19, 1988

RANDY CLINE AND LEONA KAY CLINE
VS.
DEPARTMENT OF HIGHWAYS

(CC-87-69)

Warren R. McGraw, Attorney at Law, for claimants.
Nancy J. Aliff, Attorney at Law, for respondent.

HANLON, JUDGE:

Claimants were travelling in a northerly direction on W.Va. Route 10, Wyoming County, approximately five miles from Oceana. Claimant Leona Kay Cline was operating claimants' 1980 AMC, and her husband, Randy Cline, was a passenger in the vehicle.

Claimants' vehicle left the right hand or travel lane of the highway, skidded, slid around, and struck a 1974 Oldsmobile 442 which was proceeding south on W.Va. Route 10. Following the impact with the automobile travelling in the opposite direction, claimants' vehicle proceeded over an embankment. Claimants allege negligence on the part of respondent for its failure to maintain this section of roadway. Claimants contend that respondent's employees had left dirt in the road while maintaining the ditch line. Claimants view the alleged dirt or debris on the roadway as a hazard and seek compensation of $25,000.00 for the loss of their automobile and for permanent disabling injuries to claimant Leona Cline.

Respondent asserts that ditching operations were performed by respondent three days prior to this accident, on June 24, 1986, by means of accepted engineering practice, and that material was not left on the highway by its ditching crew.

Claimant Leona Kay Cline was travelling at a speed of approximately 35-45 miles per hour. She had successfully completed her driving test at Jesse, and was returning home. The roadway was damp as it had been raining. Both claimants admitted that they had no personal knowledge as to how the alleged material came to be on the roadway surface as they had not observed respondent's men working at the scene. The claimants' vehicle was a total loss, and they gave it to another party. Therefore, claimants did not receive any salvage value for the vehicle.

Ezra Watson Keyser testified that he was the driver of the other automobile involved in this accident. He was travelling alone from his home in Lincoln County to Princeton. He estimated that the accident occurred between 2:00 and 3:00 in the afternoon. He stated that he did not observe any dirt on his side of the roadway. He mentioned that photographic evidence revealed debris on his automobile. He was unable to discern whether it was debris from the roadway or debris from his automobile.

Respondent's employees provided details concerning the area of the accident. At the time of this accident, the average daily traffic count was 5,100. The Uniform Traffic Accident reports and operators' reports were reviewed, and it was determined that the Cline accident was the only one within the two-mile stretch checked during June 24, 1986, on Route 10 at the accident site. The individual who operated the 40137, or back grader, confirmed the existence of the ditching operations and remembered that a broom had been utilized. The Supervisor for Wyoming County did not receive any complaints concerning the ditching operation. Testimony revealed that it is impossible to determine the points where crews start and finish maintenance operations from the pertinent records regarding ditching operations by respondent.

To make a determination of respondent's negligence would require speculation on the part of the Court. This Court has consistently held that the State is neither an insurer nor a guarantor of the safety of persons travelling its highways. *Adkins vs. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). There was no evidence presented that respondent was negligent in its maintenance of this roadway. In order to find respondent liable, the Court would be required to speculate, which it will not do. The Court, therefore, is of the opinion to and does deny the claim.

Claim disallowed.

OPINION ISSUED DECEMBER 19, 1988

ANITA ANN ERWIN AND
CRAIG SCOTT ERWIN
VS.
DEPARTMENT OF HIGHWAYS

(CC-88-154)

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

PER CURIAM:

This claim was originally styled in the name of Anita Ann Erwin; however, testimony indicated that the vehicle, a 1982 Chevrolet Celebrity, was titled in the names of Anita Ann Erwin and Craig Scott Erwin, and the Court, on its own motion, amended the style to include Craig Scott Erwin as a party claimant.

Claimant Anita Ann Erwin testified that the vehicle struck "a hooved up piece of asphalt" on Corridor G (U.S. Route 119) while she was travelling from Logan and proceeding toward Williamson. The incident occurred on April 21, 1988, between 1:00 and 1:30 p.m. It was dry and sunny. The oil pan and the transmission of the vehicle were damaged in the amount of $645.51. Claimant Anita Erwin is unaware when this damage to the roadway occurred.

Mike Kolota, Jr., Acting Supervisor of Logan and Mingo Counties for the respondent at the time of this incident, stated that he is familiar with the accident site. He travelled on U.S. Route 119 at approximately 9:00 the morning of April 21, 1988, and the roadway was "... cracked a little bit." He returned between 1:30 and 2:00 p.m. At that time, he observed the hazard and dispatched men as flagmen and to place signs. This was the first notice he had of the hazard.

John M. Sammons, Supervisor of Corridor G for respondent, testified that he reviewed the pertinent records regarding complaints. He checked with the clerks and reviewed the telephone logs. Respondent had received neither calls nor complaint forms pertaining to that location.

John M. Sammons, Supervisor of Corridor G for respondent, testified that he reviewed the pertinent records regarding complaints. He checked with the clerks and reviewed the telephone logs. Respondent had received neither calls nor complaint forms pertaining to that location.

The State is neither an insurer nor a guarantor of the safety of motorists on its highways. *Adkins vs. Sims*, 130 W.Va. 645, S.E.2d 81 (1947). In order for the respondent to be found liable for the damages incurred, proof of notice, either actual or constructive, of the defect in question must be shown. The evidence in this record indicates that the dangerous condition appeared suddenly and that the respondent acted promptly to take safety precautions as soon as it became aware of the problem. *Barnhart vs. Dept. of Highways,* 12 Ct.Cl. 236 (1979), *Moore vs. Dept. of Highways,* and *Taylor vs. Dept of Highways*, CC-85-167 (Opinion issued February 19, 1986). The Court is of the opinion that negligence on the part of the respondent has not been established, and, therefore, the Court denies this claim.

Claim disallowed.

OPINION ISSUED DECEMBER 19, 1988

CHARLES R. WELCH, SR.
AND PHYLLIS J. WELCH
VS.
DEPARTMENT OF HIGHWAYS

(CC-88-96)

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

PER CURIAM:

On February 6, 1980, at about 9:30 p.m., claimants and their son were returning home from church in their 1980 Chevette. Claimant Charles R. Welch was travelling on Route 13/2 into Kanawha Falls, the place of their residence. Travelling at a low speed, he encountered ice on the roadway at the location of a hairpin turn. He lost control of his vehicle on the ice and slid into a retaining wall. Claimants seek $441.90, which amount represents the damages to their automobile.

Claimant Charles R. Welch testified that he travelled this route practically every day as he lives four tenths of a mile from the accident site. He had observed the water on the roadway the evening of this accident when he and his family were driving to church. The weather conditions were clear and cold. Evidently, ice formed during the time of claimants' stay in church.

Brady N. Workman, foreman at respondent's Glen Ferris Garage, testified that he is familiar with the area of the accident. This road had been treated prior to February 6, 1988. He stated that he had not received any complaints concerning ice at the place of the accident on the night it occurred. He explained that there is a small area of ditch line at that location because it is difficult to get in there to make a ditch line.

Roads in this State, in the winter months, frequently accumulate frost. An isolated patch of ice on a highway is generally insufficient to establish negligence on the part of respondent. *Cole vs. Dept. of Highways*, 14 Ct.Cl. 350 (1983). It is well established that the State neither insures nor guarantees the safety of travelers on its highways. *Adkins vs. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). For these reasons, the Court is of the opinion to, and does, disallow this claim.

Claim disallowed.

OPINION ISSUED DECEMBER 29, 1988

JACK S. HORNER, D/B/A
JADALEE STABLES
VS.
DEPARTMENT OF COMMERCE

(CC-88-164)

Claimant appeared in person.

J. Bradley Russell, Assistant Attorney General, for respondent.

PER CURIAM:

Claimant has a five-year contract with the Department of Commerce to provide horses to tourists at Watoga State Park, a facility of the respondent. On December 22, 2987, the barn at Watoga State Park was destroyed by fire, apparently set by an arsonist. Claimant seeks $5,827.00 for personal items and equipment which were damaged in the fire.

Claimant testified that he had formerly maintained insurance coverage on his horses and equipment. However, at the time of this incident, claimant had discontinued his insurance coverage, allegedly at the suggestion of Craig Ackerman, Superintendent of Watoga State Park. He said he had been informed that the State's insurance policy was adequate to cover the items in the barn.

The contract, or License Agreement, between Watoga State Park and Jack S. Horner is dated October 28, 1981. The pertinent provisions of the agreement are the following:

> "2. The Licensee under this agreement shall be deemed an independent contractor and as such shall be solely responsible for all debts and other liabilities incurred in the operation of his business under this license agreement.
>
> 8. The Licensee assumes all risk in the operation of this license and shall be solely responsible and answerable in damages for all accidents or injuries to persons or property and hereby covenants and agrees to indemnify and keep harmless the State of West Virginia, the Department and its officers and employees from any and all claims, suits, losses, damage or injury to persons or property of whatsoever kind and nature, whether direct or indirect, arising out of the operation of this license or the carelessness, negligence or improper conduct of the Licensee or any servant, agent or employee which responsibility shall not be limited to the insurance coverage herein provided for.

18. This instrument contains the entire agreement and all representations of the parties hereto, and no modifications or additions shall be valid and binding on the Department unless in writing and signed by an officer thereof, subsequent to the date of this license."

It is clear from the terms of the lease agreement that claimant, as an independent contractor, assumed all risk in the operation of business, and that the contract represents the complete agreement. The Court finds that the terms of the lease agreement are clear as to the absence of liability on the part of respondent. Therefore, the Court is of the opinion to, and must, deny this claim.

Claim disallowed.

OPINION ISSUED DECEMBER 29, 1988

RALPH W. PALMER
VS.
DEPARTMENT OF HIGHWAYS

(CC-88-137)

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

PER CURIAM:

On February 1, 1988 claimant was traveling south on Route 2, in his 1978 Ford Fairmont. The vehicle struck a rock and incurred damage. Claimant seeks $650.00 for the damage.

Claimant testified that the location of his accident was approximately two miles from Wilson Park. The rock, which was a "... good bit larger than a bushel basket," had come from the hillside. It was almost in the center of the double lane of the highway. It was dark and raining at the time of the incident and he was traveling at a speed of approximately 40-45 miles per hour. Apparently, the rock had fallen only a minute or two before his vehicle struck the rock. There is a "falling rock" sign at the location of the accident. He paid $600.00 for the automobile a month and a half prior to the accident. He admitted that he had observed rocks in that area on previous occasions. He travels the route approximately five times a week.

The State is neither an insurer nor a guarantor of the safety of motorists on its highways. *Adkins vs. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). The Court has held on numerous occasions that the unexpected falling of rocks onto a highway without a positive showing that respondent knew

or should have known of a dangerous condition is insufficient to justify an award. *Hammond vs. Dept. of Highways*, 11 Ct.Cl 234 (1977), *Adkins vs. Dept. of Highways*, 13 Ct.Cl. 307 (1980) and *Hatfield vs. Dept. of Highways*, 15 Ct.Cl. 168 (1984). As no evidence was presented to establish notice of the rock in the road, the Court must deny the claim.

Claim disallowed.

OPINION ISSUED DECEMBER 29, 1988

SUZANNE STEINMAN
VS.
DEPARTMENT OF HIGHWAYS

(CC-87-717)

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

PER CURIAM:

On December 8, 1987, at approximately 9:00 p.m. claimant was operating her 1987 Mazda on Route 88 near Bethlehem, Ohio County, when her vehicle struck a hole. A rim had to be replaced at a cost of $250.00 and one tire replaced at a cost of $110.00.

Claimant testified that at the time of the incident it was dark, rainy and foggy. The highway had several holes. She estimated the hole to be six to eight inches deep and as wide as a tire. The hole extended for at least six inches form the berm into the travel portion of the highway. The claimant travels this route two to three times a week, but she had not observed the hole when she last travelled it.

The State is neither an insurer nor a guarantor of the safety of motorists travelling on its highways. *Adkins vs. Sims*, 130 W.Va. 645 (1947). In order for the respondent to be found liable, it must be shown that the respondent had notice, either actual or constructive, of the defect in the road. As no evidence was presented that the respondent had notice, the claim must be denied.

Claim disallowed.

OPINION ISSUED DECEMBER 29, 1988

THOMAS TREADWAY
VS.
DEPARTMENT OF HIGHWAYS

(CC-87-417)

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

PER CURIAM:

Claimant is the former owner of a 1981 Chevy truck which was damaged when it stuck an uncovered hole on the Dawes Bridge, Cabin Creek, Kanawha County, on September 20, 1987. The hole had been covered with a metal plate which was missing on the day of this incident. The automobile required two new tires and an alignment job in the amount of $175.77.

Claimant testified that it was dry and that he was travelling at 35-40 miles per hour. He travels this route frequently and had contracted respondent three days prior to this incident concerning the missing plate. The day following his complaint, the plate was replaced. Claimant was following a coal truck at the time of this incident, and he stated that coal trucks knock the plate off the hole. Although the respondent may have had actual notice of the existence of the missing plate, the claimant was operating his vehicle at a speed which was excessive for the known hazardous condition of the road. (*Jarrell vs. Dept. of Highways*, Opinion issued January 15, 1986)

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

Claim disallowed.

OPINION ISSUED FEBRUARY 3, 1989

CAROL J. BAKER
VS.
DEPARTMENT OF HIGHWAYS

(CC-88-146)

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

PER CURIAM:

Claimant brought this action to recover damages sustained to her automobile, a 1983 Oldsmobile, when it struck a hole in Route 50 near Parkersburg, West Virginia.

The claimant, Carol J. Baker, testified that she was travelling towards Parkersburg in her 1983 Oldsmobile, on Route 50 in Wood County. The incident occurred on April 26, 1988, at approximately 6:00 p.m. The weather was clear. Claimant explained that she heard a siren from an emergency vehicle. She was travelling at approximately 30-35 miles per hour. She pulled her automobile off the travel portion of the road onto the berm. The automobile struck a hole in the berm causing damages to her automobile. The wheel and rim were replaced for a total cost of $90.00.

The claimant travelled the road infrequently prior to her accident. The hole was located at the edge of the road on the berm. The claimant's vehicle struck the hole before she noticed it. Claimant described the hole as being approximately six inches deep. There were vehicles travelling in front of claimant. These vehicles also pulled off the road for the emergency vehicles, but were beyond the point at which claimant drove onto the berm.

This Court has previously considered the issue of claims involving damages to vehicles where the berm of the road is in a defective condition. The Court has generally held that,where the respondent provides a road which is too narrow for the passage of two vehicles, the respondent will be held liable for damages which occur when claimants must use the berm of the road and that berm is in a defective condition. See *White vs. Dept. of Highways*, 11 Ct.Cl. 138 (1976) and *Conn vs. Dept. of Highways*, 13 Ct.Cl. 194 (1980).

The Court has also held that a claimant who has not been forced onto the berm will not recover for damages sustained from a defect in the berm. *Sweda vs. Dept. of Highways*, 13 Ct.Cl. 249 (1980).

It is the opinion of the Court that the claimant herein was not negligent in proceeding onto the berm for an emergency vehicle but was placed in a position of having to use the berm, and the berm should have been in usable condition. Photographic evidence reveals that the berm was defective. The Court has determined that the respondent was negligent in its maintenance of the berm at the site of this accident. Therefore, the Court is of the opinion that claimant is entitled to an award for damages to her vehicle in the amount of $90.00.

Award of $90.00.

OPINION ISSUED FEBRUARY 3, 1989

THE BOARD OF EDUCATION OF THE
COUNTY OF McDOWELL, A CORPORATION,
TONY J. ROMERO, AS PRESIDENT, AND
BENNY J. CASSADY, LEONARD H. NESTER,
NOAH DELL'ORSO, AND TED OSBORNE,
AS MEMBERS OF SAID THE BOARD OF
EDUCATION OF THE COUNTY OF McDOWELL,
A CORPORATION
VS.
THE WEST VIRGINIA BOARD OF EDUCATION
(CC-84-128)

AND

THE BOARD OF EDUCATION OF THE
COUNTY OF McDOWELL, A CORPORATION,
BENNY J. CASSADY, AS PRESIDENT, AND
J. CURTIS HARMON, LINDA K. DOUGLAS,
HOBERT F. MUNCEY AND TED D. OSBORNE, AS
MEMBERS OF SAID THE BOARD OF EDUCATION
OF THE COUNTY OF McDOWELL, A CORPORATION
VS.
THE WEST VIRGINIA BOARD OF EDUCATION
(CC-85-114)

David Allen Barnette, Attorney at Law, for claimant.
Robert D. Pollitt, Senior Assistant Attorney General, for respondent.

PER CURIAM:

Claimants brought this action to recover funds which it expended to satisfy judgements rendered by the McDowell County Circuit Court. The claims was submitted to the Court upon a written Stipulation of Facts and Memorandum of Law. The facts of the claims are as follows:

In 1973, a Special Levy Election in McDowell County provided a supplement of $55.00 to all non-teaching personnel for five years, commencing with the 1974-75 fiscal year.

In 1975, the West Virginia Legislature passed Senate Bill 121 which provided a minimum pay schedule for non-teaching personnel and teaching personnel which became effective July 1, 1975.

The McDowell County Board of Education requested an interpretation of the application of the Special Levy Election provisions and Senate Bill 121. More specifically, the Board wished to determine whether the $55.00 supplement was in addition to the minimum pay schedule in Senate Bill No. 121 or was included as a part of the minimum pay schedule.

The Superintendent of the State Board of Education advised the McDowell County Board of Education to include the $55.00 supplement as part of the minimum salary schedule.

The McDowell County Board of Education was then challenged by the McDowell County Non-teaching Employees Association in McDowell County Circuit Court.

The McDowell County Circuit Court issued a decision supporting the position of the McDowell County Board of Education. However, on December 11, 1979, the West Virginia Supreme Court of Appeals held that the McDowell County Board of Education failed to properly pay the non-teaching employees the supplement required to be paid under the provisions of the Special Levy Election.

The McDowell County Circuit Court thereafter granted a judgement against the McDowell County Board of Education in the amount of $1,355,936.97, which judgement has been satisfied.

A second Special Levy Election was also instituted and a judgement was rendered against the Board in the amount of $949,879.63 to satisfy the pronouncement of the Supreme Court in the original case.

The McDowell County Board of Education attempted to recover these two judgements in an action against the State Board of Education in the Kanawha County Circuit Court. However, the complaint was dismissed based upon the provision of immunity in Article VI, Section 35 of the West Virginia Constitution. The West Virginia Supreme Court denied a petition to review the Kanawha County Circuit Court decision, thus upholding the immunity provision.

It is the claimants' position that the McDowell County Board of Education was required to follow the advice of the West Virginia Board of Education. Therefore, there is a moral obligation on the part of the State Board of Education to reimburse the McDowell County Board of Education for the monies expended to satisfy the judgements rendered against it.

The respondent contends that the McDowell County Board of Education made a conscientious decision in its adherence to the advice from the West Virginia Board of Education. The McDowell County Board of Education paid its professional personnel the supplement provided in the Special Levy Election or $105.00 over and above the minimum salary schedule provided by the State formula. However, the McDowell County Board of Education included the supplement of the special Levy Election as part of the minimum salaries for its non-teaching personnel.

Not only was this decision based upon information furnished by the West Virginia Board of Education, the West Virginia Legislature in enacting Senate Bill No. 121 specifically based its own fiscal calculations on the inclusion of the local salary supplement in meeting the minimum pay scales.[1]

The West Virginia Supreme Court in *Thomas, et al. vs. McDowell County Board of Education*, 261 S.E.2d 66 (1979) was either unaware of this specific legislative intent or chose to give it no weight.[2]

The Legislature gave the State Board of Education no alternative but to include the special levy funds in the minimum salary requirements. The State Board in turn placed the same burden on the claimant, McDowell County Board of Education.

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[1] The affidavit of Willis W. Moore which is a part of the stipulation in this matter makes this clear.

"On this day there appeared before me the undersigned authority, one WILLIS W. MOORE, who, being first duly sworn, deposes and says that is employed by the West Virginia Department of Education in the Bureau of Finance and Services as Assistant Bureau Chief in charge of School Finances. The affiant further avers that:

1. He was employed by the West Virginia Department of Education in the Bureau of Finance at the time the Legislature of the State of West Virginia enacted Engrossed Senate Bill No. 121, establishing minimum pay scales for nonteaching personnel of the West Virginia public schools in 1975.

2. Several counties, including McDowell County, had authorized adoption of excess school levies at special levy elections to continue supplements to state basic salaries of, among others, regularly employed full-time nonteaching employees in certain amounts specified in the levy calls.

3. Prior to the enactment of engrossed Senate Bill No. 121, the Senate Finance Committee requested a fiscal note from the West Virginia Department of Education, describing the fiscal impact of the establishment of state minimum pay scales for nonteaching personnel in the public schools, including the amounts of local funds already being paid by the county boards of education to such personnel (now described as service personnel) and the corresponding amounts which would have to be appropriated by the Legislature to bring their salaries up to the state minimum pay scales.

4. The affiant assisted in preparation of the fiscal note which, when first submitted to the Legislature, described the fiscal impact, using the base salaries paid to nonteaching personnel and not including the county salary supplements as part of the local funds in arriving at the amount of state funds which must be appropriated to bring the salaries of such employees up to the state minimum pay scales which would be established in Senate Bill No. 121.

5. The West Virginia Department of Education was then requested to amend the fiscal note to provide the fiscal impact of establishing the state minimum pay scales for nonteaching public school employees, using as a base all local funds already paid to such personnel, including county salary supplements funded through local excess levies. The affiant assisted in the preparation of the amended fiscal note, as requested.

6. The amended fiscal note describing a lesser fiscal impact upon the State of West Virginia and county boards of education was used by the 1975 Legislature in appropriating revenues in support of Engrossed Senate Bill No. 121, effective 1 July 1975, and a similar formula was used in subsequent sessions of the Legislature of the State of West Virginia until entry of the decision of the West Virginia Supreme Court in *Thomas vs. Board of Education, et al.*, 164 W.Va. 84 (1979), on December 11, 1979."

[2] "We think the overall intent of the Legislature in this regard (the use of special levy funds) is to preserve the integrity of special or excess levy funds. This intent may not be defeated by a contrary construction of one provision of a statute without regard to the general purpose of the Legislature with respect to special levies." *Thomas, et al. vs. McDowell Cty. Bd. of Ed.*, 261 S.E.2d 66 (1979).

The Court, having reviewed the stipulation and memorandum of law, is of the opinion that the McDowell County Board of Education acted in good faith throughout this controversy, has been diligent in attempting to seek redress, and is the innocent victim of the Legislature's attempt to reduce the cost of the minimum non-teaching personnel salaries to the State's general revenue.

Under such circumstances, the Court is of the opinion that there is a clear moral obligation on the part of the respondent to rectify this situation, and an award in the amount of the judgements entered by the Circuit Court of McDowell County of $2,305,816.60 is accordingly made.

Award of $2,305,816.60.

OPINION ISSUED FEBRUARY 3, 1989

PAUL T. CAMILLETTI
VS.
ATTORNEY GENERAL
(CC-89-18)

Claimant represents self.
Janet F. Steele, 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 Answer.

Claimant brought this action to recover reimbursement for services rendered as a Special Assistant Attorney General. Claimant was appointed by respondent to assist the Prosecuting Attorney for Marshall County in the prosecution of inmates for the prison uprising which occurred during the period of January 1 through January 3, 1986. Claimant alleges a balance due and owing in the amount of $5,600.50. The invoice of these services was not processed for payment in the proper fiscal year.

Respondent filed an Answer stating that this claim is valid and that the amount is fair and reasonable for the services rendered. Respondent also stated that there were sufficient funds available within the proper fiscal year with which the claim could have been paid.

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

Award of $5,600.50.

OPINION ISSUED FEBRUARY 3, 1989

SANFORD CLEGG, III
VS.
DEPARTMENT OF CORRECTIONS

(CC-86-456)

Vincent J. King, Attorney at Law, for claimant.
Robert F. Pollitt, Senior Assistant Attorney General, for respondent

PER CURIAM:

Claimant brought this action to recover attorney fees incurred when he brought a civil action against respondent in United States District Court for the Southern District of West Virginia to recover back wages to which he was entitled under provisions of the Veterans Re-employment Rights Act. His attorney fees and expenses were in the amount of $6,289.50. This amount represents the difference in the agreed settlement of $22,500 and the back wages of $16,210.50 which claimant has received from respondent.

The parties submitted a stipulation of facts which set forth the following:

Claimant was employed by respondent on February 1, 1980, until September 29, 1980, when he resigned to enlist in the United States Navy.

He was honorably discharged on December 16, 1983, whereupon he applied for re-employment with respondent.

He was denied re-employment on the basis that he was a probationary employee and not covered by the Veterans Re-employment Right Statute.

An opinion of the Attorney General rendered to the Civil Service Commission indicated claimant was covered by the statute. Claimant was reinstated on November 11, 1985.

A dispute arose as to the issue of back wages due claimant for the period during which he was not employed by respondent.

A compromise settlement in the amount of $15,000 was reached by claimant and respondent. However, the settlement could not be paid as the State Auditor refused to make payment without a court order.

Respondent suggested that claimant file suit in the United States District Court in order to obtain a court order to satisfy the State Auditor.

Claimant consulted with the United States Attorney's Office as he was entitled to representation by that office under the provisions of the Veterans Re-employment Rights Statute. He was advised that there was a backlog and it would be some time before his claim could be filed. He was further advised of his right to independent counsel. He then employed counsel to bring the action in United States District Court for Southern West Virginia.

On November 10, 1986, a petition was filed in the United States District Court for the Southern District of West Virginia seeking $29,000.

Respondent filed an Answer asserting defenses and demands. Thereafter, the parties negotiated a settlement as heretofore indicated and provided that claimant seek attorney fees before the Court of Claims.

The parties submitted the claim to this Court upon the stipulations and briefs.

The issue before the Court is the award of attorney fees. Respondent contends that claimant is not entitled to attorney fees as he could have had the United States Attorney represent him without cost. Respondent also contends claimant filed the action in the United States District Court for more than $15,000, the original agreed upon amount, and, therefore, claimant breached the agreement.

Claimant asserts respondent filed an Answer defending the action in United States District Court denying any amount was due claimant. Claimant also contends entitlement to attorney fees as respondent filed a defense to claimant's action in United States District Court which should have been and, eventually, was settled in September 1987.

It appears to the Court that neither party has "clean hands." Claimant filed the action in the United States District Court in excess of the amount agreed to by the parties originally. However, the respondent then denied the action in its entirety in its answer. Both parties "muddied the waters" in the United States District Court action. However, the Court is of the opinion that claimant is entitled to reasonable attorney fees. Claimant knew that he was entitled to back wages as did the respondent. He should not have had to wait until such time as his statutory attorney was able to bring the action necessary to obtain the back wages. He was advised of his right to independent counsel and he chose to proceed with independent counsel. The Court is of the opinion that this claim is one which certainly, in equity and good conscience, should be paid. Therefore, the Court has determined that claimant may recover his reasonable attorney fees and expenses incurred in bringing the action to recover back wages to which he was entitled. The Court calculates the reasonable attorney fees as $3,712.50. The expenses incurred by claimant in bringing the case in federal court were $1,248.70. Therefore, the Court is of the opinion to, and does, does award claimant the amount of $4,961.20 for reasonable attorney fees and expenses.

Award of $4,691.20.

OPINION ISSUED FEBRUARY 3, 1989

WILLIAM RAY FITZWATER
VS.
DEPARTMENT OF HIGHWAYS

(CC-86-263)

J. Michael Anderson, Attorney at Law, for claimant.
Nancy J. Aliff, Attorney at Law, for respondent.

HANLON, JUDGE:

On August 29, 1984, claimant was operating an automobile, titled in his father's name, on State Route 92 at Callison Curve, Greenbrier County. He was travelling in the northbound lane. His vehicle apparently struck gravel, whereupon he lost control, and the vehicle crossed the southbound lane and proceeded over a hill and dropped approximately 50 feet into a field. Claimant seeks $55,000.00 for damage to the vehicle, lost wages, and pain and suffering.

Claimant alleges that the site of the accident was not identified by signs or other warning devises, that there was no guardrail, and that respondent's failure to maintain the same constitutes negligence. Respondent contends that the proximate cause of the accident was claimant's negligence and that the erection of guardrails is discretionary rather than mandatory.

Claimant testified that it was foggy and dark when he left his home in Lewisburg, at about 4:45 a.m., to travel to Vepco in Bath County, Virginia. He was an employee of Allis-Chalmers. He admitted that he was familiar with this route as he had been travelling it to work for four and one-half months. He estimated his speed to be 25 to 30 miles per hour at the time of the accident. Although the vehicle was titled in his father's name, claimant had possession of the vehicle and drove it daily. At the time of this incident, he was unaware of any defects in the automobile. He was 20 to 21 miles from his home when the accident occurred. He was in the right-hand, northbound travel lane when he heard the gravel. He remembers only the sound of the gravel, and no other specific details of the accident. He stated, "... since it was light fog, I could probably see a couple of car lengths or so ahead of me."

Ira Young, who lives about twelve miles up Route 92 beyond Alvon, in Greenbrier County, testified regarding the accident site. He stated that he formerly drove a school bus for 28 years. He experienced sliding at the curve, and, in fact, testified, "Well, when you're going north and go around the curve, it elevates to just throw you over the hill. I've been going south on that curve on that side

and there's been wrecks there and you have to stop and like ice on the road, your school bus will just slip right over just setting still. I've done that lots of times." He indicated that he had contacted respondent concerning the lack of guardrails in that particular curve.

Claude Blake, an investigator for respondent, testified that he had no personal knowledge as to which signs were present at the site of the accident in August, 1984. He agreed that the guardrails currently in placed were not present at the time of the accident, and he confirmed that it is a 50-foot drop from the road to the field where the claimant and the automobile came to rest.

Two certified engineers with respondent agency testified that notice had been given to respondent. Charles Raymond Lewis, III, Planning and Research Engineer for respondent, stated that the respondent was aware that there had been accidents prior to August 1984 at Callison Curve which involved vehicles going over the embankment. The respondent was also aware that petitions had been filed and letters of complaint had been written to the respondent concerning the Callison Curve. Robert C. Ware, an engineer for respondent in District 9, stated that the respondent's office in Lewisburg was aware, prior to August, 1984, that complaints were made concerning the safety of Callison Curve.

The Court finds that the particular facts of this claim establish negligence on the part of the respondent. Respondent failed to eliminate an unusual hazard which had existed over a period of years. This hazard caused injury and damages to persons and vehicles lawfully using the highway. This failure constitutes a moral obligation upon which this claim should be allowed. *Spradling vs. State Road Comm'n.*, 5 Ct.Cl. 77 (1949). However, claimant, by his own testimony, was travelling at a rate of 25 to 30 miles per hour. In the opinion of the Court, this speed was too fast for the conditions then and there existing. Therefore, the Court finds that claimant was comparatively negligent. The Court will reduce the award to claimant by ten per cent to reflect this negligence.

Dorinda Fitzwater, claimant's wife, testified concerning claimant's injuries. He spent 19 days in the hospital. He missed four and one-half months of work. For the first two months, he remained completely bedfast, and was unable to do anything without assistance. He was able to walk with a walker when he became ambulatory. He then progressed from the walker to the use of a cane. His injuries included, among others, a pelvis broken in several places, a collapsed lung, an injured rib, and a ruptured bladder. He required a large number of stitches. Therapy treatment assisted him in learning to walk again.

Claimant testified that he was trained as an electrician, but he is no longer able to pursue that livelihood as he cannot carry the necessary tools. He is currently employed as a foreman on projects, but he pointed out that if a foreman's position is not available, it is his opinion that he would be unable to perform as an electrician. He is presently employed as a construction foreman. Claimant also testified that his recreational activities at present are limited. He is unable to romp and play with his two sons, nor is he able to hunt or pursue other sports.

Claimant's evidence as to damages indicated medical expenses in the amount of $22,476.58 of which claimant is making a claim for $1,100.00. Claimant testified that his work loss was in the amount of $14,500.00. The Court is of the opinion that claimant's damages are in the amount of $35,600.00 which will be reduced by ten per cent for comparative negligence. The Court, therefore, makes an award to claimant in the amount of $32,040.00.

Award of $32,040.00.

OPINION ISSUED FEBRUARY 3, 1989

TIMOTHY PAUL HIVELY
VS.
DEPARTMENT OF CORRECTIONS

(CC-88-48)

No appearance by claimant.
Timothy Murphy, Special Assistant Attorney General, and Janet F. Steele, Assistant General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and the respondent Answer. The Court observed that Lieutenant Colonel Eisenhower and A.V. Dodrill, Commissioner of the Department of Corrections, were included in the style. Counsel for the respondent mad a motion to amend the style of the claim to dismiss the individual respondents, leaving the Department of Corrections as the proper party respondent. The Court sustained this motion.

Claimant seeks $142.00 for a pair of prescription glasses purchased for him by his mother. The glasses were either lost, stolen, or destroyed when claimant was transported from the West Virginia State Penitentiary in Moundsville to the Ohio County correctional facility on December 11, 1986.

The respondent admits the validity and amount of the claim and states that there were sufficient funds expired in the appropriate fiscal year with which the claim could have been paid.

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

Award of $142.00.

OPINION ISSUED FEBRUARY 3, 1989

MICHAEL P. KING
VS.
STATE BOARD OF REHABILITATION

(CC-88-197)

Paul R. Goode, Jr., Attorney at Law, for claimant.
Janet F. Steele, 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 $2,616.50 for reimbursement of tuition for several semesters of study at West Virginia University. Claimant was denied rehabilitation services by respondent in July, 1986. Claimant was diagnosed as having 20/300 vision in the left eye due to amblyopia on June 20, 1986. The Rehabilitation Services Section of the Division of Vocational Rehabilitation, now known as the Division of Rehabilitation Services, a facility of the respondent, determined that claimant was ineligible for services. It was its opinion that claimant had no functional limitations as a result of his disability. Claimant filed for an Administrative Review of the ineligibility decision. The initial decision was found to be in error and it was determined that claimant was, in fact, eligible for rehabilitation services under State and Federal Regulations on March 11, 1988. The respondent admits the validity and amount of this claim and states that there were sufficient funds expired in the appropriate fiscal year upon which the claim could have been paid.

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

Award of $2,616.50.

OPINION ISSUED FEBRUARY 3, 1989

THE LANE CONSTRUCTION CORPORATION
VS.
DEPARTMENT OF HIGHWAYS

(CC-83-172)

James R. Snyder and Thad Huffman, Attorney at Law, for claimant.
Robert F. Bible, Attorney at Law, for respondent.

WALLACE, JUDGE:

This claim arises out of a construction project in Kanawha County designated as Project No. I-IG-77-2(39)89, (320-77-82.20 C-I), dated June 1, 1978. The parties to the contract are The Lane Construction Corporation, hereinafter referred to as Lane, and the Department of Highways. The contract completion date was October 31, 1980. The project consisted of the construction of approximately 4,730 linear feet of a four-lane, concrete paved, divided highway (West Virginia Turnpike I-77), 4,300 linear feet of relocated U.S. Route 119, eight bridges, four interchange ramps, and various other incidental items. Lane contends that various delays were incurred as a result of plan errors, changed site conditions, and respondent's failure to timely approve rock borrow sources as well as extra work necessitated by various design changes. Lane also included three additional claims for particular costs which it incurred in the construction of this project. The actual completion date for the project was in October 1981.

Lane alleges the following items of damages:

(1) Increased unclassified excavation		$1,735,482.00
(2) Increased rock borrow excavation		$154,413.00
(3) Increased Portland cement costs	$26,269.00	
(4) Increased concrete production costs		$18,964.00
(5) Increased structures costs		$148,396.00
(6) Increased traffic maintenance costs		$65,853.00
(7) Increased indirect costs		$187,922.00
(8) Increased project layout costs	$23,868.00	
(9) Increased property tax costs		$17,974.00
(10) Increased home office overhead costs		$73,278.00
TOTAL OF DELAY CLAIM		$2,452,419.00

The extra work portion of the claim consists of the following items:

(1) Temporary concrete median barrier		$16,278.00
(2) Relocation of waterline		$1,200.00
(3) Rebuilding shoulder at toll plaza	$6,349.00	
TOTAL OF EXTRA WORK ITEMS		$23,827.00

The first phase of the contract required Lane to fill a swamp area for the relocation of Route 119. The plans indicated that Lane would need approximately 94,989 cu yds. of select rock for this swamp area. This item was critical as the contract required that the area be allowed to settle for 450

days before completion of the area. Phase I also included construction of two access ramps and a portion of the northbound lane of the interstate. The plans indicated that the cuts in the area of relocated Route 119 would yield sufficient rock to complete the fills and leave a surplus of rock of 17,235 cu. yds. There were also supposed to be approximately 152,000 cu. yds. of rock available in the cuts adjacent to access road three. Only a portion of the rock would be needed for the embankments for Route 61. According to the plans, Lane would need to "borrow" 143,730 cu. yds. of select rock during the first phase of the project.

Lane submitted requests for rock borrow in early July 1978 in anticipation of the needed rock for Phase I construction. The request to borrow rock from Rock Borrow Areas 1 and 2 was made July 5, 1978, and the request for Rock Borrow Area 3 was made July 8, 1978. The respondent denied permission to borrow rock in these areas but the actual denial was not forthcoming until mid-August 1978. Lane alleges that its failure to offer a royalty for the rock in these areas which were within the project limits was the reason that it was not permitted to borrow from these areas. In early August 1978 Lane submitted requests to borrow rock from Rock Borrow Areas 4, 5, and 6. These requests were acted upon in a timely manner by respondent and Lane was permitted to borrow rock from Rock Borrow Area 4 when it was approved in early September 1978. The requests for areas 5 and 6 were denied. Borrow requests for Areas 7 and 8 were made on August 31, 1978. Area No. 7 was approved on September 28, 1978. Rock was available almost immediately from Area 7 an Lane was able to develop the rock from Area 4 shortly thereafter.

By this point in the project, Lane recognized that the rock indicated in the original plans was not present on the project. It was anticipated by both parties that this project would be a "borrow" job. However, Lane needed a significantly greater amount of select embankment in the swamp area than indicated in the plans. Lane alleges that respondent measured the swamp area from the top of the water in the swamp rather than from the bottom of the swamp. This area required 140,000 cu. yds. of select embankment. The plans indicated 94,000 cu. yds. would be needed.

During this time Lane was completing excavation operations in the area that was to have produced the major portion of rock and the rock was absent. In these areas Lane was stockpiling unclassified material from the cuts where the plans indicated rock would be found. For example, one cut on the plans indicated 38,000 cu. yds. of available rock, but the cut contained no rock borrow. In another cut, the plans indicated 150,000 cu. yds. of rock, but contained only 150 cu. yds. This set of circumstances placed Lane in the position of stockpiling unclassified material which was not contemplated by the original plans. At the same time, Lane was in the construction phase in which select embankment requirements were increased. As a result, Lane was thirteen weeks behind schedule by the end of the 1978 construction season. Lane alleges the delay was due to respondent's delay in approving and disapproving borrow site requests.

The problem of lack of select rock on the project continued into the 1979 construction season. An extension for borrow from Rock Borrow Area 9 was requested on April 27, 1979, and approved May 17, 1979. The respondent authorized the borrowing of 48,000 cu. yds. of rock as it believed that sufficient rock was still present in the other cuts to be developed within the project

limits. As the project progressed, lane actually ended up borrowing another 46,000 cu. yds. of rock. At each juncture of the project when rock was necessary Lane's progress was delayed by a lack of rock. In fact, during Phase I, Lane actually placed 140,000 cubic yards of rock. During Phase I, it was necessary for Lane to borrow 49,952 cu. yds. more rock than the contract quantity of borrow indicated for the project.

Respondent contends that it does not approve borrow sites within project right of ways. According to respondent, Lane was well aware of the normal policies regarding rock borrow areas and knew prior to the construction of this interchange that borrow areas would have to be found off the project site. Respondent also indicated its position with regard to the rejection of the borrow areas. The reason for rejecting borrow from areas 1, 2, 5, and 6 was that these were located within the State's right of way of the project limits. Areas 2 and 3 were rejected as respondent was of the opinion that these areas had unstable soil conditions. There was no explanation for the immediate answer provided to Lane for areas 5 and 6. Furthermore, respondent asserts that the delays in the approval, if any, were not unreasonable given their potential impact on the design of the project. Respondent also contends that there were a number of delays which were solely attributable to Lane.

A project which was calculated to be a borrow job, in that the respondent had estimated that the project limits contained approximately 160,000 yards of select sandstone borrow, and that the job would require approximately 48,000 yards of common borrow ended up being a waste job. Robert J. Richards, formerly with Lane as a district manager, stated that "... the job ended up not being a borrow job, but a waste job ... ." Timothy M. Rush, District Manager with Lane, confirmed Mr. Richards' opinion that what was termed a borrow job turned into a waste job.

The contractor's progress reports for the months of July, August, and September 1978 reflected the fact that work was delayed due to a lack of availability of rock borrow. The total deficit of rock on the project was approximately 140,000 cu. yds.

In terms of a borrow job, the speed with which the contractor is able to obtain the borrow, and the amount of borrow which can be obtained, are of obvious importance. The ratio of select rock to common material was likewise important in order to expedite the project's construction and to meet the contract requirements. The amount of common material in the cuts was considerably more than that specified on the contract drawings. Should the amount of select embankment required to make this embankment increase, then an amount of select sandstone is also needed and must be obtained from some other source. This material may be obtained from the prescribed cuts or from rock borrow. It was impossible for the contractor to complete this job within the time period provided unless rock was borrowed early in the construction phase. If the material in the amount needed for the embankments could not be obtained from the cuts, the only to obtain it was to stockpile all the unclassified excavation until the select rock could be removed from the cuts.

Due to the large quantity of borrow listed in the plans, it appeared that there would be a minimal stockpiling of material necessary during the construction of the project. Lane planned to gradually work the earth work back on top of the rock fills as the fills were constructed. Instead of

a cut-stockpile-fill operation, Lane was in a position of stockpiling much more unclassified material. Stockpiling doubles the cost of unclassified excavation as the contractor is loading, hauling, and placing the material twice; however, the contractor is being paid only once.

The problem of having sufficient rock on the project continued until May 1980 when the parties agreed that Lane could borrow another 10,000 cu. yds. of rock and respondent deleted 20,000 cu. yds. of select embankment which eliminated the need for additional borrow. Lane was able to maintain anticipated level of production for the duration of the project. Lane completed the project approximately one year after the original contract completion date.

The delays occasioned by the rock borrow problems impacted and slowed the entire project. The cost of items contemplated to be purchased within the time frame of the contract increased. These increases are alleged to have been incurred by Lane as increased costs for which Lane has not received adequate compensation.

The respondent's position is that Lane was paid for all rock borrow at a price agreed to in a change order and that delays were occasioned by Lane's actions during construction. Respondent takes the position that the borrow areas were approved in a timely manner considering the impact the areas had on the project as a whole.

Lane contends that it is entitled to an equitable adjustment of the contract in accordance with Section 104.2 of the Standard Specifications.[3] Lane also contends that respondent breached its duty not to delay or hinder Lane's performance of the contract. The respondent allegedly hindered Lane by refusing to approve early borrow requests and by failing to timely reject or accept requested borrow areas.

A complete discussion of changed conditions on a project may be found in the claim of *A.J. Baltes, Inc. vs. Dept. of Highways*, 13 Ct.Cl. 1 (1979). The circumstances herein constitute a changed condition. The plans indicated that the contractor would have sufficient rock within the project limits to complete the major portion of select embankments. This contractor was faced with site conditions which not only delayed construction of the project, but created extra costs which could not have been contemplated at the time the contract was bid. Therefore, the Court finds that the changed condition on the project caused Lane to incur costs for which it should be compensated.

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

The Court, having examined the record in this claim, is of the opinion that Lane is entitled to an award for the delays which resulted from the lack of rock borrow on the project. Lane established that payment for the rock borrow at the contract bid price did not fully compensate Lane for the problem with the common material which had to be moved within the project limits. In attempting to satisfy the respondent as to the availability of rock within the project cuts, Lane expended time and effort in removing common material from the cuts. The rock was not there. In addition, Lane stockpiled wet, unsuitable embankment for later use on the project. However, the project ended up as a waste job. Lane had bid the job as a borrow job and the circumstances which occurred doubled the cost of unclassified excavation.

The Court agrees with the respondent that Lane has been paid for the rock borrow at the contract bid price. Lane could have negotiated for an increase at the time of the change order entered into by the parties. Therefore, the Court is of opinion to deny the claim for increased rock borrow excavation costs.

The bid item for unclassified excavation was $5.50 per cu. yd., whereas Lane claims that the actual cost was $7.13 per cu. yd. when the handling of the material is considered. The Court is of the opinion that Lane did in fact incur costs which were attributable to the extra handling of the unclassified excavation. It is the opinion of the Court that respondent's failure to timely approve borrow areas in light of this item's critical import on the progress of the construction did, in fact, delay Lane. While the time period for the delay is difficult to ascertain, it is clear that Lane is entitled to an award. However, the costs for indirect items, property taxes, and home office overhead are denied as being too speculative in nature.

A review of the three additional claims which are a part of this claim follows. The first claim involves extra cost for concrete median barriers which resulted from a change in the plans which required an additional amount of barrier at a later date and the price had increased during the interim. The difference in price of the barrier and overhead costs was $16,228.00. The Court is of the opinion that Lane is entitled to recover $16,228.00.

The second additional claim consists of the cost for a water line which Lane was required to lay twice due to an error in the plans. The claim represents the difference in the contract bid price and the actual cost of the water line at the time of the second installation in the amount of $1,200.00. The claimant is entitled to recover $1,200.00 for this item.

The third claim in the amount of $6,349.00 represents the cost to Lane for rebuilding a shoulder area at a toll plaza which was constructed by another contractor. The respondent contends that Lane did not coordinate the construction of this area with the second contractor as required by the contract, specifically Section 105.7 of the Standard Specifications. The Court agrees with this contention of the respondent and denies this claim.

The Court makes an award in the amount of $517,478.00, which includes the $16,228.00 and $1,200.00 discussed herein.

Award of $517,478.00.

OPINION ISSUED FEBRUARY 3, 1989

OTIS ELEVATOR COMPANY
VS.
DEPARTMENT OF HEALTH

(CC-89-7)

No appearance by claimant.
Janet F. Steele, 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 $971.84 for elevator repairs performed for Weston State Hospital, a facility of the respondent. The respondent admits the validity and amount of the claim and states that there were sufficient funds in respondent's budget for the appropriate year with which the claim could have been paid; however, the respondent was unable to make payment as the State Auditor returned the transmittal to the respondent with the explanation that the Treasury of the State of West Virginia lacked sufficient funds to process the transmittal.

The Court has reviewed the petition and Answer and finds that the State agency had sufficient funds within its appropriated budget to pay the claim, and, for this reason, the claimant is entitled to an award from the respondent.

In view of the foregoing, the Court makes an award in the amount of $971.84.

Award of $971.84.

OPINION ISSUED FEBRUARY 3, 1989

H. JOHN ROGERS
VS.
STATE TREASURER

(CC-88-297)

No appearance by claimant.
Janet F. Steele, 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 filed this claim in the amount of $3,671.25 for legal services rendered to respondent. The Answer filed by respondent admits the claim in the amount of $2,937.00 based upon approval by the Office of the Attorney General for respondent to employ claimant at the rate of $60.00 per hour. Claimant's invoice indicates that he performed legal services for 48 hours. The original invoice for the legal services was not processed for payment before the close of the proper fiscal year; therefore, the claimant has not been paid. The respondent admits the validity of the claim and that there were sufficient funds expired in the appropriate fiscal year with which the claim could have been paid.

In view of the foregoing, the Court makes an award in the amount of $2,937.00.

Award of $2,937.00.

OPINION ISSUED FEBRUARY 3, 1989

LUCY SNYDER
VS.
DEPARTMENT OF EDUCATION

(CC-88-324)

No appearance by claimant.
Janet F. Steele, 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 compensation of $2,032.00 which represents the difference in the amount of salary she actually received and the amount of salary she should have received based upon her four years of experience in previous employment with the Department of Health. Her experience was not reflected in her salary as an employee at Colin Anderson Center. Claimant filed a Level II grievance in accordance with the State Employees Grievance procedures. She was granted an increase in salary. However, respondent was unable to make payment to claimant for services rendered prior to the decision which granted the increase retroactive to the beginning of her employment with respondent.

The respondent admits the validity and amount of the claim and states that there were sufficient funds expired in the appropriate fiscal year upon which the claim could have been paid.

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

Award of $2,032.00.

OPINION ISSUED FEBRUARY 3, 1989

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
AS SUBROGEE OF PAMELA REID AND HOWARD REID
VS.
DEPARTMENT OF HIGHWAYS

(CC-88-120)

R. Gregory McDermott, Attorney at Law, for claimant.
Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

On April 3, 1986, claimant Howard Reid was operating his 1979 Pontiac Sunbird on Cherry Hill Road, Ohio County, when the vehicle struck a pothole. Claimants seek $389.22 for the damage to the vehicle which resulted from this incident.

Claimant Pamela L. Reid testified that she was a passenger in the 1979 Pontiac Sunbird owned by her husband, Howard Reid, and herself. They were proceeding to Warwood from Short Creek. Her husband was operating their vehicle. This incident occurred at between 5:00 and 6:00 in the morning and there was daylight present at the time. She described the road as being a very

steep hill. He was proceeding up a steep incline in a curve when the vehicle struck a large hole in the road. She stated that her husband was unable to avoid the hole due to an oncoming vehicle. The road had a large number of holes in it of which the claimants were aware. When the vehicle struck the hole, it came to a stop in the hole. It was necessary for the vehicle to be removed from the hole by a tow truck. The hole was estimated to be two feet wide and eight inches deep. The hole was located on the right side of the right lane and extended two feet into the travel portion of the roadway.

Prior to the accident, claimant Howard Reid travelled this route frequently. Claimant Pamela L. Reid stated that she thought that they had observed this hole in the past. The road had several holes. She testified that this particular hole had been previously patched by respondent, but she could not recall the date; the patching had been performed prior to April 3, 1986, the date of this incident. She also stated that neither she nor her husband had made complaints to respondent concerning the existence of this hole in the road.

This Court has repeatedly held that respondent is neither an insurer nor a guarantor of the safety of travellers on its highways. However, the respondent does have a duty of using reasonable care in the maintenance of its highways. In the case of a heavily travelled major highway in this State, the Court has held respondent liable for failure to repair a hole of this size, as it could not have developed overnight. See: *Lohan vs. Dept. of Highways*, 11 Ct.Cl. 39 (1975); *Baker vs. Dept. of Highways*, 11 Ct.Cl. 48 (1975); *Stone vs. Dept. of Highways*, 12 Ct.Cl. 259 (1979); *Bailey vs. Dept. of Highways*, 13 Ct.Cl. 144 (1980); *Snodgrass vs. Dept. of Highways*, 13 Ct.Cl. 144 (1980); and *Poole vs. Dept of Highways*, 15 Ct.Cl. 65 (1983). The record established that the claimant was familiar with the road and its condition, and therefore was also negligent. For that reason, the Court reduces recovery by ten per cent and makes an award in the amount of $350.30.

Award of $350.30.

OPINION ISSUED FEBRUARY 3, 1989

JEANETTE E. STRAW
VS.
DEPARTMENT OF HIGHWAYS

(CC-88-145)

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

PER CURIAM:

This claim was originally filed in the name of Peter E. and Jeanette E. Straw. However, when the record revealed that the automobile was titled solely in the name of Jeanette E. Straw, the Court, upon its own motion, amended the style to reflect that fact. On April 4, 1988, Peter E. Straw was operating his wife's 1987 Chevrolet Spectrum when the automobile struck a hole in the road. Two tires were damaged on the right side of the automobile, and claimant seeks $388.66 for the repair of the tires.

Peter E. Straw testified that he was enroute to Chambersburg, Pennsylvania. He was travelling eastbound on Interstate 70. He was coming from St. Louis, Missouri. He was accompanied in the automobile by his wife and his sister and her two children. He was in Ohio County when this incident occurred. He was travelling at a speed of between 60 and 65 miles per hours. and he was in the right lane of eastbound traffic. It was 9:00 p.m. and dark. He estimated the hole to be sixteen inches wide and three feet deep. He stated that he did not see the hole before he struck it, because he was "... coming up a hill on the bridge and the hole was on top of the bridge." He explained that there were several other vehicles parked on the side of the highway with a similar problem. He said, "There were at least about seven or eight." When he returned to the scene after being driven to an Amoco station, the wrecker service was going down the line and repairing the other vehicles.

While the respondent is not an insurer of the safety of motorists on its highways, it does owe a duty of exercising reasonable care in the maintenance of the highways. Interstate 70 is a heavily travelled, major thoroughfare. This Court has previously held that a heavily travelled road deserves greater attention than some lesser roadways. *Lohan vs. Department of Highways*, 11 Ct.Cl. 39 (1975), *Pratt vs. Department of Highways*, (Opinion issued October 12, 1988). A pothole of the size described by claimant could not have developed quickly, and the respondent should have discovered its existence. The Court makes an award in the amount of $388.66.

Award of $388.66.

OPINION ISSUED FEBRUARY 3, 1989

VIRGIE MAE VARNEY AND
WILLIAM ERNEST VARNEY
VS.
DEPARTMENT OF HIGHWAYS

(CC-82-195)

Francis M. Curnutte, III, Attorney at Law, for claimants.
Nancy J. Aliff, Attorney at Law, for respondent.

GRACEY, JUDGE:

Claimant Virgie Maw Varney asked for an award in the amount of $150,000.00. Her husband, claimant William Ernest Varney, asked for an award in the amount of $25,000.00. Their claims arise from an automobile accident which occurred at about 8:00 p.m., on September 14, 1981, on Route 52, near Nolan, in Mingo County. The claimants' vehicle, a 1980 Chevrolet Malibu, then being driven by Mrs. Varney, ran into standing water and debris in the southbound lane of the highway, hydroplaned into the northbound lane as she lost control, and collided head-on with a northbound truck.

She had left their home, at Pinson Fork, Kentucky, at about 6:30 a.m. that day, to keep a 9:30 a.m. doctor's appointment in Huntington. She was accompanied by her two little daughters and at Crum, she picked up her mother. Her physician removed several moles from her nose and back, using only local anesthesia. After lunch and shopping, they returned to Crum where several hours were spent visiting and having supper. She left there, to drive home, at about 7:00 p.m., again accompanied by her two little daughters and sister.

In her testimony, she recounted that it was dark and raining; that the road was wet, and that she was going about 35 to 40 miles per hour when she drove into the standing water; that she had not seen it, even though her vehicle's headlights were on and the windshield wipers were working, before running into it. She said she had driven over this section of highway on numerous previous occasions, but never when it was raining. As a result of the collision, she suffered some facial injuries and injuries to both knees, the most serious injury being a fractured patella of her right knee, ultimately requiring arthroscopic surgery on June 29, 1983. She described the wearing of a brace for some weeks after the accident, the long course of medical treatment, the attendant pain and suffering, and her continued inability to do many things she had been able to do before the accident. Her medical expenses were in the total amount of $2,909.00, all paid by insurance. Additional surgery is anticipated for the removal of bone splinters. She made no claim for lost earnings, for she was unemployed.

Mr. Varney also testified with reference to his wife's inability to do things she had previously done, her medical treatment and convalescence. He estimated that he had lost earnings of $100.00 per shift for about ten shifts as a coal miner, losing work at times he had to take his wife for medical care.

Witnesses for the claimant included two Mingo County Deputy Sheriffs and a lifelong resident of the area where the accident occurred. Generally, they described the low-lying area of the highway, a long history of the blockage of a drain and accumulation of water and debris there during long or heavy periods of rainfall, other previous accidents caused by water standing on the highway, and of numerous telephone complaints to the respondent Department of Highways. Although the respondent would send a crew to open the drain upon such complaints, nothing appears to have been done to permanently alleviate the problem nor to warn the motorists.

The State is neither an insurer nor a guarantor of the safety of travellers on its highways. *Adkins vs. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to charge respondent with negligence, actual or constructive notice of the highway defect is required. The Court is of the

opinion that the claimants have established, by a preponderance of the evidence, that respondent was aware of the recurring hazardous condition; that respondent's failure to take appropriate action to eliminate the problem or to warn motorists constituted a failure to maintain the highway in a reasonably safe condition; that this negligence was the proximate cause of the subject accident. The Court finds no negligence on the part of Mrs. Varney in her operation of the vehicle.

Accordingly, the Court grants an award in the amount of $15,000.00 to Virgie Mae Varney and grants an award in the amount of $5,000.00 to William Ernest Varney.

Award of $15,000.00 to Virgie Mae Varney.

Award of $5,000.00 to William Ernest Varney.

OPINION ISSUED FEBRUARY 14, 1989

DEMOTTO PEERLESS COAL COMPANY, INC.
VS.
COAL-WORKERS' PNEUMOCONIOSIS FUND
(CC-88-73)

AND

LEADER COAL COMPANY, INC.
VS.
COAL-WORKERS' PNEUMOCONIOSIS FUND
(CC-88-74)

Michael E. Hooper, Attorney at Law, for claimants.
Robert D. Pollitt, Senior Assistant Attorney General, for respondent.

PER CURIAM:

These claims were consolidated for submission to the Court. The claims were brought by claimants to recover attorney's fees expended in the defense of a civil action brought by trustees for the United Mine Workers' of America 1950 Benefit Plan and Trust (hereinafter referred to as the U.M.W.A.) against claimants, in the United States District Court for the Northern District of West Virginia, for reimbursement of medical expense payments it made for treatment of union members for pneumoconiosis-related illnesses. The U.M.W.A. contended that medical services rendered to miners and paid for by the U.M.W.A. were attributable to Black Lung disease. The miners were entitled to have their employers pay for the medical services rather than the U.M.W.A.. However, the U.M.W.A. demanded reimbursement for these bills against hundreds of coal companies and their insurers.

The claimants herein were two defendants named in a civil action filed on October 31, 1986, in United States District Court by the U.M.W.A. against forty-four coal companies. Claimants, as subscribers to the West Virginia Coal Workers' Pneumoconiosis Fund, filed a third party complaint against respondent herein for indemnification of any liability as respondent is their insurer under the Black Lung Benefits Act. Respondent answered the third party complaint and claimed to be without sufficient knowledge to affirm or deny whether it would be responsible to claimants for indemnification of any liability resulting from the federal court case.

On May 22, 1987, correspondence from claimants made a demand for respondent to issue an assurance that the respondent would pay any liability incurred by claimants in the pending federal litigation. Claimants also demanded that respondent indemnify and hold claimants harmless for any and all liability, and, that as a result of its failure to acknowledge this duty, respondent was also responsible for all reasonable attorneys' fees.

On November 19, 1987, respondent assured claimants by letter than respondent would indemnify claimants for any medical expense benefits determined to be owing to the U.M.W.A. from claimants in the pending federal litigation. However, respondent also informed claimants that respondent would not assume the legal defense of the claimants or reimburse claimants for their attorneys' fees incurred in defending the pending litigation.

Respondent entered into negotiations with the U.M.W.A. to settle the federal action on behalf of claimants and the other coal companies named as party defendants. On December 12, 1987, a settlement was reached by the parties. Thereupon, the federal litigation against claimants was dismissed with prejudice on January 20, 1988.

Claimants allege that respondent is liable for their attorneys' fees under the doctrine of equitable subrogation and for the reason that respondent breached its duty of good faith and fair dealing and has likewise acted contrary to law and in bad faith.

The respondent contends that the demands in the federal litigation against claimants were not supported by sufficient documentation to assure that their payments met the requirements for reimbursement as Black Lung medical expenses. These claims should be denied as there is no provision of law which allows the payment of attorneys' fees by respondent; there was no contract between the parties which requires such a payment; and respondent did not willfully fail to obey the law.

The Court is of the opinion that claimants are not entitled to recover attorney fees in these particular claims. There is no statutory authority for the payment of attorney fees by respondent to claimants. The traditional rule in this State is that without an express statutory authority the litigants bear their respective fees and costs. The West Virginia Supreme Court case of *Nelson vs. W.Va. Public Employees Ins. Bd.*, 300 S.E.2d 86 (1982) reviews the law of West Virginia regarding attorney fees. In *Nelson*, the Supreme Court ordered the payment of attorney fees by a State agency when it was determined that the actions of the respondents therein evidenced a deliberate disregard of mandatory provisions in the West Virginia Code. The Supreme Court held that "A well

established exception to the general rule prohibiting the award of attorney fees in the absence of statutory authorization, allows the assessment of fees against a losing party who has acted in bad faith, vexatiously, wantonly or for oppressive reasons." The reasoning in the *Nelson* case does not apply to the claims before this Court. The respondent was negotiating with the U.M.W.A. for settlement of the pending federal case. Substantial dollars were in question. The respondent may have been remiss in failing to answer correspondence in a timely manner to assure claimants of its intentions to represent them in the federal case; however, there were extenuating circumstances for respondent during the time frame, i.e., change of counsel and change in Commissioners.

For these reasons, the Court is of the opinion to, and does, disallow these claims.

Claims disallowed.

OPINION ISSUED FEBRUARY 14, 1989

DONNA EDDY
VS.
DEPARTMENT OF HIGHWAYS

(CC-87-488)

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

PER CURIAM:

On October 24, 1987, claimant was travelling south on Route 19 on the Osage Bridge in Monongalia County when her vehicle struck debris on the bridge. She seeks $56.69 for the cost of a new tire as her tire was damaged in this incident.

Claimant testified that she was proceeding in her 1984 Buick Skyhawk at the time of this incident. She was coming from her home in Fairview and travelling to her place of work at West Virginia University Hospital in Morgantown. She is a registered nurse in the intensive care unit at the hospital. This is her regular route, but she had not driven it in a week. She stated that Route 19 is a two-lane highway. At the time of this incident one lane was barricaded. It was 6:40 a.m. and it was dark.

As she approached the bridge, there were two cars in front of her which had stopped. She started around a barricade that had been hit previously. There were pieces of debris scattered over the bridge on both sides. She attempted to avoid these, but her right rear tire caught a piece of the debris. She described the debris as being "... wood but it was white and shiny ... ." After the accident, she did not go back and examine the debris.

William F. Fieldhouse, Maintenance Supervisor for Monongalia County for respondent, stated that he was familiar with the accident site. There was construction work being performed by respondent in that area. The witness thought that the work was with the bridge expansion joints at each end of the bridge. During the day signs and flagmen were utilized. At night signs and flashing lights were utilized. He called sometime after midnight on the day of this incident and alerted to the fact that the barricades had been damaged. He dispatched a crew to the bridge site, and, to his knowledge, it was repaired between 2:00 and 3:00 a.m. Prior to claimant's accident, he was unaware that there was any difficulty with the way that the signs and barricades were set up.

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

Claim disallowed.

OPINION ISSUED FEBRUARY 14, 1989

DARLENE S. FEDERER
VS.
DEPARTMENT OF HIGHWAYS

(CC-88-204)

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

PER CURIAM:

On June 24, 1988, claimant was travelling on Route 14 in the vicinity of Clarksburg, Harrison County. As she drove across railroad tracks which were raised above the normal level of the road, her vehicle was damaged. She seeks $168.40 which is the expense of the cost of repair to claimant's vehicle.

Claimant testified that the automobile which she was operating was a 1977 Plymouth Volare which is titled in her name. She explained that she was accompanied in the vehicle by her children. They had been swimming at Sycamore Lake and were returning home to Clarksburg. The railroad tracks were approximately a quarter of a mile from old Route 50. She had travelled to Sycamore Lake by means of Route 50, but she returned by an alternate route as it was more scenic. She had

been on this route two years before the incident and, therefore, she was not aware of the condition of the railroad crossing. She was travelling at 30 to 35 miles per hour.

Her automobile required alignment and welding to the muffler. She also replaced the hubcaps and bought two retread tires to replace two tires which had been damaged. Claimant alleges that there had been construction work going on in the area of the accident site and the railroad track had been removed. She also contends that respondent was negligent for failure to erect warning devices at this area.

Ronald Cook, Harrison County Maintenance Supervisor for respondent, testified that he is familiar with the accident site. There was a contractor hired by CSX to remove the track, and CSX Railroad was responsible for providing signs and maintaining the railroad track and the crossing at this location at the time of claimant's accident. If respondent is aware of a complaint, it refers that complaint to CSX. Respondent had not received any complaints regarding this particular track prior to claimant's accident.

This Court finds that an independent contractor of CSX was engaged in construction work, and the respondent is not liable for negligence, if any, of such independent contractor. Therefore, the Court is of the opinion to, and does, disallow this claim.

Claim disallowed.

OPINION ISSUED FEBRUARY 14, 1989

RONALD K. FIELDS
VS.
DEPARTMENT OF CORRECTIONS

(CC-87-215)

Claimant appeared in person.
Timothy Murphy, Special Assistant Attorney General, for respondent.

PER CURIAM:

Claimant brought this action to recover damages for his loss of clothing. On June 23, 1987, claimant sent his clothes to the penitentiary laundry to be washed, and the clothing was not returned to him. He filed a grievance relating to this matter with the warden of the penitentiary on June 24, 1987. He seeks $128.00. This amount represents his estimate of the value of his personal items.

Claimant testified that inmates are not charged for the cost of laundering their clothes. He explained that the inmates set their laundry outside of their cells in laundry bags and it is picked up

by laundry personnel (inmates). The guards return the clean laundry by placing the laundry bags outside of the cell doors. He stated that "... sometimes you'll get it back the next day. They've got different days how they do it and they've got different hours when they bring it back. They bring it back when they get good and ready."

He listed the following items as being lost: two pair of Nike shorts, one Nike tank top, two pair of McGregor sweat pants, six pair of tube socks, one windbreaker jacket, and one pair of shoes. The claimant presented to the Court one accurate copy of an Inmate Property Form which listed the items and dates that these items were received by claimant. Respondent stipulated to the list. Claimant's property form listed only three pairs of socks, but he claimed that he lost six pairs. He explained that he actually did have six pairs of tube socks. He testified that he lacked the sales receipts for his missing items of clothing. The clothing did not have any identifying marks. He admitted that if he had requested that the guards mark his clothing for him, they would have done so.

James Harold Kirby, an officer at the penitentiary, testified regarding the policy with regard to laundry at the penitentiary. When laundry is lost, there is a form which the inmates fill out to be turned into the hall captain. The inmate's cell is then searched to ascertain that the items are not in the inmate's cell. The personal property loss form is given to the laundry officer and then delivered to Officer Kirby. He then attempts to locate the lost property items for the inmate. He indicated that he has no way of knowing whether the property listed as lost by the inmate was sent to the laundry. Claimant herein did not complete the property loss form at the time that he allegedly lost his personal property. The penitentiary was unable to attempt a reconciliation with the claimant as the property form was not completed in a timely manner.

The Court is of the opinion that the State is not an insurer of clothing or other articles which inmates choose to bring into any State facility. Therefore, the Court is of the opinion to and does disallow this claim.

Claim disallowed.

OPINION ISSUED FEBRUARY 14, 1989

RICHARD M. GREENE
VS.
DEPARTMENT OF CORRECTIONS

(CC-88-131)

Claimant appeared in person.

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

PER CURIAM:

Claimant is currently incarcerated in Pruntytown Correctional Center and was formerly incarcerated in the West Virginia Penitentiary. He contends that he earned both overtime pay and extra earned good time while serving his sentence. He has not received compensation for the overtime pay, and so brings this claim for $550.00.

Respondent alleges that claimant is in error. The applicable Policy Directive mandates that prisoners shall be paid or shall be granted overtime or good time credit; that the claimant was granted good time credit and this credit was applicable against his sentence.

Claimant testified that he performed overtime work during his incarceration. He was sent to the West Virginia Penitentiary on June 19, 1980. His sentence is life with mercy. He has three years, eight months, and twenty-nine days of overtime. He submitted a letter to the Court which allegedly granted him good time as the result of an appeal before a special hearing officer.

John F. Massie, Records Clerk at the West Virginia State Penitentiary, testified with regard to this claim. He stated that the files he maintains include the records for the claimant. He indicated that claimant is serving a life sentence. He stated, "Inmates with life sentences really do not earn good time... ." He does not take overtime or good time from a life sentence. As those with life sentences have no definite discharge date, Mr. Massie is unable to calculate these time periods for life sentences. The three years, eight months, and twenty-nine days are "on account" on claimant's record. Should claimant have a sentence reduction, Mr. Massie explained, he would deduct the time from his prison term and release him that much earlier. Mr. Massie further stated that only good time was awarded to prisoners serving definite time periods as their sentences. He stated that there are over 200 inmates in the life category, and none of these inmates received any direct compensation for overtime. Claimant is not in a unique position.

It is the opinion of the Court that the issue in this case has already been resolved by respondent as explained hereinabove. For that reason the Court is of the opinion to, and must deny this claim.

Claim disallowed.

OPINION ISSUED FEBRUARY 14, 1989

VELMA D. LAYNE, III AND ROBBIE LAYNE
VS.
DEPARTMENT OF HIGHWAYS

(CC-86-45)

Claimant, Velma D. Layne, III, appeared in person.
Nancy J. Aliff, Attorney at Law, for respondent.

GRACEY, JUDGE:

Claimants seek $20,000.00 for damages to real property resulting from water drainage on the property. After it was determined that the property is titled in the names of claimant and his wife, the Court amended the style of the claim to reflect that fact.

Claimant Velma Layne testified that his property is located on Woodville Drive, a State-maintained road. Sometime after his house was built in the early part of 1985, a campground was installed near claimants' property. There was also a secondary road located at the intersection of the two campground roads. Claimant alleges that respondent constructed a bank adjacent to the road leading to the entrance and exit of the campground. Water from all three roads was then discharged directly onto claimants' property. Claimants contend that the damage to their property was caused by this action on the part of respondent.

Respondent contends that one of the reasons for the damages to claimants' property is the construction of the campground road by a private party. Respondent also contends that claimants' property is in a low-lying, natural drainage area. The drainage from the surrounding area drains onto claimants' property.

Claimant Velma Layne testified that very soon after he built his home in January 1984, the campground was built. Claimants' property fronts on Woodville Drive. The culvert which goes underneath Woodville Drive has remained open during the time that he and his wife have resided on the property. Claimants experienced no problems with water until the construction of the campground and the campground roadway. Water began to wash away gravel from claimants' driveway, and claimants have incurred the expense of replacing the gravel. The water has also caused the center of claimants' garage floor to settle in the middle. There is a depression of three inches in the concrete floor. Claimants have had to place three extra loads of gravel at a cost of $300.00 due to the drainage problem. Claimant Velma D. Layne, III did not provide an estimate for the cost of repair of the garage floor. He did agree that it would be beneficial to construct a concrete catch basin across the top of the driveway to divert the water. He plans to construct this basin at some future date, but he had not constructed the basin as of the date of this hearing.

Claude C. Blake, Chief Claim's Investigator for respondent, testified regarding his investigation of claimants' property. He stated that he had seen the property several times. He did not observe claimants' property during rain.

Thomas Footo, Design Engineer for respondent, testified that he is familiar with the Layne property. After he inspected the property, he was unable to determine anything that could be the

cause of the drainage problem. In his opinion, claimants' lot was not graded to facilitate drainage away from the house.

John Sammons, Area Maintenance Assistant for respondent in Cabell and Lincoln counties in 1984 through 1986, discussed the Layne property. He checked the drainage ditches and drainpipes on the State-maintained roads and found that these were open and providing the intended drainage.

James Campbell, District Engineer for respondent, stated that he was not familiar with claimants' property, but had viewed it recently. He stated that there are no provisions for drainage on the claimants' house. This fact adversely affects the drainage at the base of the house.

It is the opinion of the Court that claimants' damage is the result of construction of the campground road by a third party and the location of the claimants' property in a natural drainage area without provision for protection from such drainage. The Court finds no negligence on the part of the respondent. Accordingly, the claim must be denied.

Claim disallowed.

OPINION ISSUED FEBRUARY 14, 1989

RALPH W. MASTER, JR.
VS.
DEPARTMENT OF HIGHWAYS

(CC-88-66)

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

PER CURIAM:

Claimant was travelling in his 1973 pickup truck on U.S. 50, which is also known as Main Street, in Grafton, when his vehicle struck a hole. Claimant seeks $279.03 for the repair the automobile required as a result of this incident.

Claimant testified that on the day in question it was about 6:30 a.m., and dark and raining. He was travelling east at approximately 25 to 30 miles per hour. The highway is a two-lane, black top road. He was travelling from his home to his place of employment. The hole was located in front of the left wheel and was almost in the center of the road. An automobile preceding claimant's automobile also pulled off with a flat tire. Claimant had a flat tire, damage to the rim of the wheel, and the truck was out of alignment. Claimant stated that he had travelled the same route on the previous morning and the hole which the truck hit was not present at that time.

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

Claim disallowed.

OPINION ISSUED FEBRUARY 14, 1989

DEBRA LYNNE MORTON AND KENNETH PAUL MORTON
VS.
DEPARTMENT OF HIGHWAYS

(CC-88-254)

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

PER CURIAM:

On October 24, 1987, claimant Debra Lynne Morton was driving a 1986 Renault Alliance on U.S. Route 220 near Keyser, Mineral County, when the automobile struck a hole. As the automobile is titled in both claimant Debra Lynne Morton's name and that of her husband, the Court upon its own motion amended the style of the claim to include the name of Kenneth Paul Morton.

Claimant testified that she had gone to pick up her mother in Keyser, West Virginia, and was returning to her residence in McCoole, Maryland, when the incident occurred. It was clear weather and the road is a two-lane, hard surfaced highway. It had been a week since she travelled this route. She was aware of the presence of the hole, but she was not certain of its exact location. She was travelling at approximately 30 miles per hour. She stated that the hole was located on a bridge. She determined that the hole is approximately eight inches deep and as big "... as a manhole ..." The right front wheels of her vehicle ran through the hole. She indicated that she had been reimbursed by her insurance company in the amount of $259.22. Claimants paid the first $100.00 of the damages as their deductible.

The law of West Virginia is well established that the State neither insures nor guarantees the safety of motorists on its highways. *Adkins vs. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). For the respondent to be found liable for damages caused by road defects of this type, the claimants must prove that the respondent had actual or constructive notice of the defect and a reasonable amount of

time to take corrective action. *Davis vs. Dept. of Highways*, 12 Ct.Cl. 31 (1977); *Hoskins vs. Dept. of Highways*, 12 Ct.Cl. 60 (1977); *Hicks vs. Dept. of Highways*, 13 Ct.Cl. 310 (1980). As there was no such evidence presented, this claim must be denied.

Claim disallowed.

OPINION ISSUED FEBRUARY 14, 1989

STANLEY D. SATTERFIELD
VS.
DEPARTMENT OF CORRECTIONS

(CC-86-382)

Claimant appeared in person.
Timothy Murphy, Special Assistant Attorney General, for respondent.

PER CURIAM:

In July 1986, claimant, an inmate of the West Virginia Penitentiary, a facility of the respondent, followed the procedure set forth for having his clothing laundered. The clothing was not returned to him and he seeks $144.00 for his property loss.

Claimant explained that inmates serve as the laundry personnel. The clothing is placed in bags and taken to be laundered. The guards then deliver the laundered clothing by placing the laundry bags on the outside of the cells of the inmates.

James Kirby, Property Officer for the Penitentiary, testified that a staff notice dated January 17, 1985 was applicable at the time of this incident. It provided as follow: "The West Virginia Penitentiary will not be responsible for loss, damage or theft of any personal property received by an inmate." Officer Kirby stated that once an inmate signs for laundry, thereby assuming responsibility for it, there is no method to account for its loss. Inmates are issued an adequate amount of clothing from the State. However, claimant's lost clothing was not State-issued clothing.

The Court is of the opinion that the State is not an insurer of the personal clothing which inmates choose to keep in their possession in a State facility. Therefore, the Court is of the opinion to, and does, disallow this claim.

Claim disallowed.

OPINION ISSUED FEBRUARY 27, 1989

JOHN P. BAILEY, ET AL.
VS.
BOARD OF REGENTS

(CC-88-19)

J. Thomas Madden, Attorney at Law, for claimants.
Janet F. Steele, Assistant Attorney General, for respondent.

PER CURIAM:

These claims were submitted for decision based upon the allegations in the Notice of Claim and the respondent's Answer.

Claimants seek reimbursement for services rendered as Special Prosecuting Attorneys. Each was appointed by the Governor to assist the Prosecuting Attorney of Marshall County in the prosecution of inmates as a result of the prison uprising of January 1 through January 3, 1986. Each claimant was owed a balance for the services rendered, but the invoices were not processed for payment in the proper fiscal year, so no payments were made.

The respondent admits the validity of the claims and states that the amount alleged to be due each of the claimants is fair and reasonable. Respondent also states that there were sufficient funds expired in the appropriate fiscal year upon which the invoices could have been paid.

In view of the foregoing, the Court makes awards in the amounts indicated below.

Award of $2,036.25 to John P. Bailey.
Award of $2,532.50 to Frederick E. Gardner.
Award of $5,615.00 to Robert W. Kagler.
Award of $7,599.50 to Michael E. Kelly.
Award of $12,390.00 to Jeffrey V. Kessler.
Award of $5,229.20 to J. Thomas Madden.
Award of $6,065.00 to Michael W. McGuane.

OPINION ISSUED FEBRUARY 27, 1989

CASTO TECHNICAL SERVICES, INC.
VS.
BOARD OF REGENTS

(CC-88-354)

No appearance by claimant.
Janet F. Steele, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $3,208.00 for maintenance on heating and cooling units provided respondent during the months of March 1987 and July 1987 at West Virginia University - Charleston Area Medical Center Complex. The invoice for the month of March was not processed for payment in the proper fiscal year; therefore, the claimant has not been paid. The respondent admits the validity and the amount of $1,604.00 for the month of March and states that there were sufficient funds expired tin the appropriate fiscal year with which that invoice could have been paid. Respondent denies the amount of $1,604.00 for the amount of July as a change order was issued in December 1986 which excluded the month of July from the contract. Claimant indicated that it agrees to accept $1,604.00 as full settlement of the claim.

In view of the foregoing, the Court makes an award in the amount of $1,604.00.

Award of $1,604.00.

OPINION ISSUED MARCH 3, 1989

WARREN E. FORTNEY AND MARY ANN FORTNEY
VS.
DEPARTMENT OF HIGHWAYS

(CC-88-157)

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

PER CURIAM:

On January 19, 1988, claimant Warren E. Fortney was travelling on State Route 21, Marshall County, in the vicinity of Moundsville. His 1983 Chevette struck ice, left the road, and went over an embankment. The vehicle was a total loss. Claimants seek $8,000.00 for personal injuries, work loss and loss of the vehicle. It was brought to the attention of the Court by counsel for respondent that the vehicle in question was titled in both the names of Warren E. Fortney and Mary Ann

Fortney. For that reason the Court amended the style of the claim to include Mary Ann Fortney as a party claimant.

Claimant Warren E. Fortney stated that on the morning of this incident he was travelling to work from Proctor, West Virginia. He travels this road everyday. He had observed ice at this location previously. He estimated his speed to be no more than twenty miles per hour. His vehicle turned around in the road and went over an embankment on the right side. It is a two-lane road with neither berm nor shoulder. Claimants had liability insurance only, and were not reimbursed for the damage to the vehicle. The book value of the 1983 Chevette was $2,250.00. Claimant Warren Fortney missed three weeks of work and incurred hospital bills, but he did not submit the bills to the Court. The hospital bills were covered by insurance. He stated that he did not have an out-of-pocket loss.

Kenneth Davidson, respondent Maintenance Supervisor for District 6, which includes Marshall County, testified regarding State Route 21. He stated that it is a State and local service route, and therefore is one of respondent lowest priority routes "... as far as maintenance and funding go."

Roads in this State, in the winter months, frequently accumulate frost. An isolated patch of ice on a highway is generally insufficient to establish negligence on the part of respondent. *Cole vs. Dept. of Highways*, 14 Ct.Cl. 350 (1983); *Welch vs. Dept of Highways*, CC-88-96 (Opinion issued December 29, 1988). It is well established that the State neither insures nor guarantees the safety of travelers on its highways. *Adkins vs. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). For these reasons, the Court is of the opinion to, and does, disallow this claim.

Claim disallowed.

OPINION ISSUED MARCH 3, 1989

NILA MCGRAW
VS.
DEPARTMENT OF HIGHWAYS

(CC-88-198)

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

PER CURIAM:

Claimant brought this action to recover for damage to her automobile when it struck a hole. She seeks $615.07 as compensation for the damages.

On or about June 12, 1988, claimant was travelling on the Dunbar Toll Bridge in Kanawha County. It was approximately 9:15 a.m. She was on her way to church and was alone in her vehicle, a 1982 Oldsmobile Omega, at the time of this incident. She was proceeding from Route 60 in St. Albans to Dunbar. The weather was clear. The surface of the bridge is blacktop, and claimant's speed was approximately 35 miles per hour. She was operating her vehicle in the right-hand lane when her automobile encountered a hole on the bridge. She did not see the hole until her vehicle was upon it. The vehicle struck the hole with the left front tire. Claimant travels this route three or four times a month. She was unaware how long this particular hole had been in existence.

She noticed some irregularity in her vehicle after the accident. Approximately a month following the incident, she took her vehicle to have it checked. At that time, it was estimated that the cost of repair was $615.07, which is the amount she seeks.

Roger Lee Higginbotham, Supervisor for the North Charleston Section of Kanawha County for respondent, testified that the bridge is a State-maintained bridge on Route 25/47. He checked his records from May 15, 1988, to June 15, 1988, to determine if any complaints had been reported concerning the accident site, and whether any work had been done by the respondent in that area. He determined that there was no record of work being done, nor was there a record of complaints made regarding the area in question.

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

Claim disallowed.

OPINION ISSUED MARCH 3, 1989

JAMES H. STURGEON
VS.
DEPARTMENT OF HIGHWAYS

(CC-88-296)

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

PER CURIAM:

Claimant, accompanied by his wife in his automobile, had turned left from MacCorkle Avenue southwest onto Riheldaffer Avenue on June 14, 1988, at approximately 7:00 p.m. There was a drain with a grate located to the right side of the lane, and claimant's vehicle went into the hole created by the drain. The beauty rings on his 1984 Ford Tempo required replacement for which he seeks $31.04.

Claimant testified that it was a clear day, and that visibility was approximately one hundred yards. He stated that the grate was recessed about six inches and that it was a the right edge of Riheldaffer Avenue. It is a narrow street. His speed was approximately ten mile per hour. He had not seen the drain hole before his automobile struck it. At the time the automobile struck the hole, there were no vehicles approaching claimant's vehicle on Riheldaffer Avenue.

After the accident, claimant found the beauty ring from his automobile "... off to the side." He did not know how the beauty ring became damaged. It is possible that he or another driver ran over the ring, and it was damaged in that manner.

The Court has consistently held that the State is neither an insurer nor a guarantor of the safety of motorists travelling on its highways. *Adkins vs. Sims*, 130 W.Va. 645 (1947). Respondent has been charged with the qualified duty of reasonable care and diligence in the maintenance of the highway under all circumstances. *Parsons vs. State Road Comm'n*, 8 Ct.Cl. 35 (1969). The Court has concluded that the claimant has not established by a preponderance of the evidence that respondent has failed in this duty of reasonable care and diligence. It would be speculation on the part of the Court to hold that the recessed grate was the proximate cause of the damage to claimant's automobile. The Court is therefore of the opinion to deny the claim.

Claim disallowed.

OPINION ISSUED MARCH 3, 1989

FREAL THOMPSON, JR.
VS.
DEPARTMENT OF HIGHWAYS

(CC-88-283)

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

PER CURIAM:

On September 18, 1988, claimant was travelling north on U.S. Route 19 near Princeton, Mercer County. His 1978 Ford Fairmont station wagon struck a tree which was covering the road. The automobile was a total loss, and claimant seeks $2,704.47.

Claimant testified that it was approximately 4:35 a.m., and he was proceeding at a speed of thirty-five miles per hour. It was dark and foggy. The road is a two-lane asphalt highway. His headlights were in operation on low beam. The tree was a large White Oak tree, and the diameter of the trunk was approximately thirty-six inches. He could see between thirty and fifty yards in front of him. He alleges that respondent's crew had performed some work in this area bout a week before the incident. He observed a crew cutting brush, but did not see them specifically cutting brush in the exact location of his accident.

William R. Bennett, Assistant District Engineer for Maintenance with respondent, testified that he reviewed Foreman's Reports and learned that respondent was notified of the presence of the tree on the highway on the actual day of claimant's accident. A crew was sent out to remove it. He checked for complaints and found no complaints from January, 1988, through September 26, 1988.

Proof of actual or constructive notice is required for a showing of negligence. The evidence in this record indicates that the dangerous condition appeared suddenly and that the respondent promptly moved to take safety precautions as soon as it became aware of the problem. *Moore vs. Dept. of Highways*, (Opinion issued February 19, 1986); *Taylor vs. Dept. of Highways*, (Opinion issued February 19, 1986) and *Ison vs. Dept of Highways*, (Opinion issued August 8, 1988). The State is neither an insurer nor a guarantor of the safety of the motorists on its highways. The Court is of the opinion that negligence on the part of the respondent has not been established, and, therefore, the Court denies this claim.

Claim disallowed.

OPINION ISSUED MARCH 3, 1989

GEORGE O. WINEMILLER AND MARILYN R. WINEMILLER, HIS WIFE,
WILLIAM HAMILTON AND CAROLYN S. HAMILTON, HIS WIFE, AND
AETNA INSURANCE COMPANY, NATIONAL BENEFIT ADMINISTRATORS,
INC., SUBROGATEES
VS.
DEPARTMENT OF HIGHWAYS

(CC-86-213)

Robert R. Sowa, Attorney at Law, for claimants.
Nancy J. Aliff, Attorney at Law, for respondent.

WALLACE, JUDGE:

Claimants brought this action to recover monetary damages which resulted when claimant George O. Winemiller was in an accident which came about when he drove a vehicle into a large hole caused by a slide. The vehicle belonged to William Hamilton and Carolyn S. Hamilton, the brother-in-law and sister of claimant George O. Winemiller.

Claimant Winemiller was travelling north on West Virginia Route 4, Braxton County, in a 1982 Eagle station wagon on November 29, 1985, at approximately 3:15 a.m. At that time he was involved in a single vehicle accident which occurred when he drove the vehicle into a deteriorated section of the roadway where a slide had occurred. The exact time of the slide has not been established, but it was estimated to be between 2:30 and 3:30 in the morning. Claimant Winemiller sustained injuries to his person and damages to the vehicle for which claimants seek $500,000 as compensation.

It is claimants' position that respondent was negligent in failing to take action to rectify the hazard or to provide warning devices to alert the travelling public of the existence of the hazard created by the slide. Claimants also allege that construction of the Sutton dam, which was completed in this area over twenty years ago, contributed to the slide. Claimants contend that the way in which the dam was controlled caused the earth beneath the road to erode due to the raising and lowering of the water in the Elk River. Therefore, claimants contend that the respondent knew or should have known that erosion would occur to the earth beneath the road which would eventually cause a slide such as the one that did occur in the claim herein. The hole created by the slide was approximately 20 feet long, 250 feet wide, and 30 feet deep.

In order to establish liability on the part of the respondent, there must be either actual or constructive notice and sufficient time for respondent to take precautionary measures. Respondent contends that its employees acted in an expeditious manner to warn the travelling public of the hazard created by the slide and that it did not have prior knowledge that such a slide would occur.

Testimony from Linda Pardue, the Braxton County dispatcher on November 29, 1985, revealed that she first received information from an employee of the Storck Baking Company concerning the slide on Route 4 at 3:11 a.m. She immediately called William Tucker, respondents' Maintenance Supervisor for Braxton County, also at approximately 3:11 a.m. or shortly thereafter.

Mr. Tucker drove to the area of the slide. He estimated that he arrived at the slide at approximately 3:20 to 3:25 a.m. Upon his arrival, he saw a vehicle in the hole created by the slide but could not see if anyone was in the vehicle. There were two unidentified people at the slide. He gave them a flashlight and directed them to block the road. He then proceeded to the Sutton Go-Mart for help and returned to the scene. The EMS squad arrived shortly thereafter. He testified that there had been no problems in the slide area prior to November 29, 1985, and that there are neither weight restriction signs nor falling rock signs posted.

Jack Bowen, Assistant Chief Deputy for Braxton County, testified that he had driven over this particular section of the road at approximately 2:30 a.m. At that time, the slide had not yet occurred.

Joseph Denault, respondent's Assistant District Engineer for Maintenance, testified that he had travelled this route often, but he had never personally observed any problems at the slide location.

Lydia Dorko, respondent's District One Design Engineer, testified that she had not received any complaints about the area of milepost 22.42 (the slide area) prior to December 2, 1985, when she inspected this particular area of Route 4.

It is the opinion of the Court that claimants have failed to establish negligence on the part of the respondent in this claim. The respondent did not have sufficient time to reach the scene of the slide to place warning devices prior to the time at which claimant came upon the slide. Respondent's employee proceeded to the slide area as soon as he was notified of the hazard and took steps to protect the traveling public to the best of his ability. The Court further finds that respondent could not have predicted the occurrence of this slide. In a similar case, (*Motorists Mutual Ins. Co. vs. Dept. of Highways*, Opinion issued December 3, 1988), the Court found that "there was no evidence that respondent knew or should have known of the propensity of the road to collapse." In the instant claim, there was no evidence that respondent had knowledge of the propensity of this area of the road to collapse. Although the Court is not unmindful of the seriousness of the injuries received by claimant George O. Winemiller, the Court must deny this claim.

Claim disallowed.

OPINION ISSUED MARCH 21, 1989
NANCY C. DUTY AND DONALD E. DUTY
VS.
DEPARTMENT OF HIGHWAYS

(CC-87-169)

George E. Lantz, Attorney at Law, for claimant.
Nancy J. Aliff, Attorney at Law, for respondent.

HANLON, JUDGE:

On June 23, 1985, claimant Nancy C. Duty was travelling in claimant Donald E. Duty's 1982 Honda Prelude, on Route 2, in Jackson County. The vehicle encountered loose gravel. Claimant Nancy Duty lost control of the vehicle on loose gravel present at the accident site. Claimant's now seek $50,000.00 for damage to the vehicle and for personal injuries received by Nancy Duty.

Claimant Nancy C. Duty testified that she had driven to Huntington on Friday evening preceding the accident to visit her daughter. She was returning to Parkersburg on the following Sunday. She left Huntington at approximately 7:30 a.m. Her speed was approximately 50 miles per hour. The weather was clear and dry. She regularly operates the Honda Prelude and considers it to be "her car," although the vehicle is titled in claimant Donald E. Duty's name. She observed a "Tar" sign tossed to the side of the road about a mile to a mile and one-half before the vehicle struck the gravel. The vehicle then swerved to the right, proceeded to the opposite side of the road, hit an embankment, and turned over. As a result of the accident, she sustained a broken vertebrate and crushed or compressed vertebras. She is a registered nurse and, as a result of this accident, she lost six weeks of work without pay. Her rate of pay was $7.15 per hour. She still experiences back discomfort.

Claimant Donald E. Duty testified that he drove from Parkersburg to the accident site on the morning of this incident. He felt that the road was "slippery," but he did not attribute the status of the road to gravel until he was informed of same. He had owned the Prelude for only three months. He paid $6,000.00 for it. In addition, he traded in a vehicle worth $1,000.00 to $2,000.00. The accident vehicle was beyond repair. He sold the damaged vehicle for $500.00.

Raymond Daniel Bush, who has a residence near the accident scene, assisted Mrs. Duty after the incident. Her vehicle came to rest across from his home. He testified that respondent had performed work on the roadway on the Saturday prior to this incident. He described the gravel on the road as being "pea gravel." "... they put tar and I call it pea gravel from just north of Millwood to the intersection of Mt. Alto on Saturday." This is about a four-mile stretch. After claimant's accident, Mr. Bush travelled this stretch of Route 2 on his way to church. He described the surface of Route 2 as follows: "I would explain it if you threw a bunch of marbles on the floor and stepped on them, you're going to scoot, aren't you?" He also stated, "There was a 40-mile-an-hour speed limit sign, I would say, halfway between the end of my driveway and where her car stopped going south on 2, and coming north on 2 there is a 40 mile an hour speed limit sign what, 150 yards beyond the intersection, something like that."

Employees of respondent also testified. Harry Robert Miller, Jr. stated that respondent worked on Route 2 on June 22, 1985. Surface treating was performed. There was a slight amount of excess gravel left on the road, but had brooms were utilized to remove the excess gravel before respondent's crew departed. He stated that the speed limit through the area of the accident was 40 mile per hour on June 23, 1985. Claude Blake, Chief Investigator for respondent, visited the site on July 8, 1987. He stated that there was a 40 mile per hour speed limit prior to the intersection, and a 55 mile per hour speed limit beyond the location of Mrs. Duty's accident. Mr. Blake could not personally confirm that these speed limit signs were present at the time of this accident.

The record reveals that gravel was removed from this area of Route 2 prior to the day of Nancy Duty's accident. The Court is of the opinion that the speed of the vehicle was the proximate cause of the accident and the resulting injuries to Nancy Duty. The Court is of the opinion to, and accordingly must, deny this claim.

Claim disallowed.

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

OPINION ISSUED MARCH 21, 1989

SAFECO INSURANCE, AS SUBROGEE
FOR GEORGE GUTHRIE
VS.
DEPARTMENT OF HIGHWAYS

(CC-87-96)

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

PER CURIAM:

On October 12, 1985, at approximately 2:00 a.m., claimant's insured, George Guthrie, was operating his 1983 Cadillac El Dorado on Secondary Route 81 in the vicinity of Mammoth, Kanawha County. As he approached a bridge, he observed a motorcycle coming toward his vehicle in the opposite direction. He drove to the right off of the paved portion of the road. As he came back onto the road and drove onto the bridge, his vehicle left the bridge, turned over, and landed in Kelly's Creek. Claimant seeks $15,440.40. This amount includes claimants' insured's $200.00 deductible, his hospital bills for personal injuries which resulted from the accident, and damage to the automobile.

Claimant's insured testified that he was returning to his home from a private residence. He was travelling in the direction of Route 60. It was dark, but clear. He observed no street lights and few other lights. Prior to the date of this incident, he had not driven on this particular route. However, he had travelled over this particular bridge three times earlier on the evening of the accident.

Claimant explained that as one enters the bridge from both ends, the ends may be compared to an "S." When he first observed the motorcycle, he felt that it was going to have contact with the left fender of his vehicle, and he drove his vehicle off of the road. He stated that it was a "swiveling effect." He returned to the road after the motorcycle had passed his vehicle. He was attempting to line his vehicle up with what he assumed was the center of the bridge. Thereupon, the left front wheel of claimant's vehicle went off of the highway, and the vehicle ended up in the creek.

Corporal George F. Bearfield was the investigating officer. He arrived at the scene at 2:26 a.m. He testified that there was a dangerous curve before the bridge. There were no signs indicating

the narrowing of the road. The guardrail at the upper end of the bridge was down at the time of this incident. Although he did not observe Mr. Guthrie operating his automobile, he did write "exceeding safe speed" as a contributing circumstance on the accident report which he had prepared in his investigation of the accident. He testified that "In looking at the accident, I considered it to be that Mr. Guthrie was not familiar with the road, the oncoming traffic blinded him and he was just moving too fast for the road. It's just the type of road you need to slow down on. If you're familiar with it, you need to slow down, and with oncoming traffic, he needed to slow down even more but, you know, I didn't see any skid marks so I'm saying, well, he was running a little too fast."

Claude Blake, Chief Investigator for respondent, testified that this is a one-lane bridge and the road follows the creek. He stated that the speed limit was 35 miles per hour in this area at the time of the incident.

Steve Campbell, bridge engineer for respondent, checked respondent's records and found no record of complaints for this area prior to October 12, 1985. This bridge is inspected every two years. It is standard practice of the respondent to have hazard paddles on all four corners of a bridge, but there were only two paddles located on the driver's right side of the bridge at the time of the incident. The hazard paddles were not up on the left corners of the bridge.

After carefully reviewing the evidence, the Court is of the opinion that the failure on the part of the respondent to maintain the guardrail and hazard paddles on the bridge was not the proximate cause of this accident. It is the opinion of the Court that the insured's speed was the proximate cause of this accident. For this reason, the claim must be denied.

Claim disallowed.

OPINION ISSUED MARCH 21, 1989

WESTVACO CORPORATION
VS.
DEPARTMENT OF HIGHWAYS

(CC-88-285)

Deborah Y. VanDervort, Attorney at Law, for claimant.
Nancy J. Aliff, Attorney at Law, for respondent.

PER CURIAM:

On July 26, 1987, at approximately 2:30 p.m., Richard D. Persinger and his family were travelling in his employer, Westvaco's, 1986 Ford Bronco. Westvaco leases the vehicle through D. L. Peterson. They approached the intersection of Bluestone (Route 4) and Dry Hill Road, (Route

11), Raleigh County. Mr. Persinger attempted to make a left-hand turn. There were over-hanging rhododendron and white pine at the edge of the road. He was unable to see a motorcycle approaching, and an accident occurred when the motorcycle struck the Bronco. The operator of the motorcycle sued claimant. The case was settled for $25,000.00 and claimant now seeks $25,000.00 from respondent.

The day was one of bright sunshine. Mr. Persinger was towing a Datsun trailer behind the Ford Bronco. At the intersection he said he could only see approximately twenty feet up the road to the left. The motorcycle was headed toward Beckley on Dry Hill Road and Mr. Persinger's vehicle entered the highway in front of the motorcycle. He was not familiar with the accident site. He had visited this site only once and this was approximately two years prior to this incident. As he approached Dry Hill Road (Route 11), he was travelling on Bluestone (Route 4) and came to a stop sign. This was 10 to 15 feet back from where Route 11 and Route 4 intersect. Mr. Persinger was able to see the motorcycle 50 to 60 feet before the accident. He explained that the flaring on the motorcycle struck the Bronco. Bluestone (Route 4) is a two-lane, asphalt highway, and the speed limit was forty miles per hour.

Mrs. Betty L. Treadway, who travels this route everyday, testified that one's visibility on Routes 11 and 4 is affected by the growth of vegetation. The vegetation has been present for the time in which she has lived in the area, which is several years.

Emerson Stover, Supervisor of Raleigh County for respondent, testified that he lived near the site of the accident. He received a complaint several summers before the time of the incident, but he could not give the exact date. He took the call himself. He observed the intersection on the day on which he received the complaint. He felt that no corrective action was necessary and he did not take any action. According to Mr. Stover, all of the vegetation is on private property. If he felt that there was a hazard on private property, he was the individual responsible for initiating the corrective action in Raleigh County.

Victor Carl Fitzwater, acting Assistant Supervisor in Raleigh County for respondent, testified that Routes 11 and 4 are State and local service roads. He had never received any complaints prior to this accident regarding this intersection. He visited this site on December 14, 1988. He observed at that time that 100 to 110 feet up the intersection an individual was putting in a driveway and that a few rhododendron bushes had been removed. He also observed that the pine trees had been topped "... apparently by the power company or someone like that." The rhododendron bushes were, at some placed, within four, eight inches of the paved portion of the highway.

There is disagreement over whether or not the vegetation posed a hazard. It borders State and local service routes which are not respondent's priority maintenance roads. The sole complaint received by respondent was investigated by a representative of the respondent, the county supervisor. For these reasons the Court is of the opinion to, and must, deny the claim.

Claim disallowed.

OPINION ISSUED APRIL 26, 1989

WILLIAM O. COEN
VS.
DEPARTMENT OF HIGHWAYS

(CC-87-236)

Jeffrey V. Kessler, Attorney at Law, for claimant.
Nancy J. Aliff, Attorney at Law, for respondent.

WALLACE, JUDGE:

On August 25, 1986, the claimant was travelling on Fish Creek Road (County Road 74), in Marshall County, in his 1976 Dodge van. The road gave way underneath the van. As a result, the van was totalled. Claimant seeks $15,000.00.

Claimant testified that he was travelling from Moundsville to his home in Marshall County. He left Moundsville between 3:30 and 4:00 p.m. He drove this route two to three times per week and was aware that there was a "bad spot" on the left side of the road. He stated that the road had been "semi-repaired... ." His speed was 15 to 20 miles per hour. The right front wheel of the van went down into a place where a piece of the asphalt road had broken off under the wheel of the van. The van turned over and ended up in the creek. Claimant crawled back up to the highway and received assistance. County Route 74 is supposed to be a two-lane road, but parts of it are not, according to the claimant. There were no warning signs nor road markings present at the time of claimant's accident. The piece of the road which broke off was approximately afoot wide. The claimant had observed problems in this area of the road in the past. The dirt beneath the pavement had washed away, and there was no support for the asphalt. His van was a width of a tire from the edge of the road at the time of this incident. The van was five or six yards from the highway when it landed in the creek, and the van was right in against the bank on the roadside of the creek. The claimant was transported to Reynolds Memorial Hospital, and he remained there one night. He suffered bruises on his legs and an infection in his scalp.

Gordon Scott Peake, Area Maintenance Engineer with respondent, testified concerning the area of the accident. The road is 12 feet wide at the narrowest point and 14 feet wide at the widest point. The accident site is an old slip area which has been present for at least 10 years. It is relatively level and in a right-hand curve. On January 12, 1989, Mr. Peake was at the site and noted that there was a "one Lane Road" sign 1,000 feet south of the slip. He stated that the slip has not been repaired because it is located out in the country, and it is 14 miles from Route 2. The average daily traffic county on this road is very low. He admitted that it is a slip area and is saturated with water due to an abandoned creek. He explained that the surrounding area "... picks up a lot of ground water." He could not say if the warning sign was present on the day of the accident.

It is the opinion of the Court that the record does not support a showing of negligence on the part of respondent. Respondent had neither actual nor constructive notice of this hazard. The Court has previously held that where there was no evidence that respondent knew or should have known of the propensity of the road to collapse, there will be no recovery on the part of the claimant. See *Motorists Mutual Ins. Co. vs. Dept. of Highways*, (Opinion issued December 3, 1988); *Winemiller vs. Dept. of Highways*, (Opinion issued March 3, 1989). Therefore, the Court must deny this claim.

Claim disallowed.

OPINION ISSUED APRIL 26, 1989

ROBERT DARRAH, ADMINISTRATION OF THE ESTATE OF
BRYAN DEAN DARRAH
VS.
DEPARTMENT OF HUMAN SERVICES

(CC-86-102)

Anthony J. Mohan and Leonard Z. Alpert, Attorneys at Law, for claimant.
Robert D. Pollitt, Deputy Attorney General, for respondent.

HANLON, JUDGE:

Claimant brought this action upon the death of his son, Bryan Dean Darrah, on March 16, 1984. Bryan Darrah, age 23, was the victim of a violent act on the part of Roy Workman, Jr., a foster child of the Darrah family who was 14 years of age at the time of the incident. As a result of the violent act, Bryan Darrah lost his life.

Claimant alleges negligence on the part of the respondent. Roy Workman, Jr., was placed with the Darrah family in May 1970 when he was approximately two years of age. From the age of three to five years on, he exhibited a propensity for fabricating false stories, for overeating, and for stealing from other family members. His behavioral problems became more apparent as he grew older. Claimant alleges that social workers from the respondent agency were aware of Roy's behavioral problems, but that they did nothing to resolve them. Claimant and his wife requested psychological evaluations which were never performed.

Jean Spear, a social worker employed as a Case Worker II with respondent and assigned to the foster family situation for Roy Workman, Jr., testified that she prepared a written service plan for Roy Workman, Jr., on April 20, 1982. Under the heading "Tasks" she wrote, "... See about having a psychological done." Under the heading Monitor - there was the notation, "... Also carry through on judicial review." She admitted that she did not discuss the need for the psychological testing with her supervisor, Fred Kurse. However, Mr. Kurse signed the service plan on April 22,

1983. Mrs. Spear testified that the request for a psychological evaluation of Roy was made by the Darrahs in 182. She does not recall that the Darrahs made subsequent requests for psychological testing after October, 1982.

Frankie Darrah, mother of the deceased, testified concerning the psychological tests. She stated that these tests were requested by her and her husband for Roy in April, 1982. When queried concerning subsequent requests for the tests, she stated, "Yes. I requested them over the years, some kind of help for Roy." She and her husband did not have the authority to have a psychological evaluation performed for Roy because they were not his legal guardians.

After carefully reviewing the evidence in this claim, the Court is of the opinion that respondent was not negligent in the handling of the Workman review process. Although the foster parents did communicate to the agency the need for psychological testing for Roy Workman, Jr., this communication was made in 1982, and the homicide occurred in 1984. The Court would have to resort to speculation to determine that had the psychological testing and evaluation been performed, the tests would have revealed this foster child's propensity for violence. The evidence herein does not establish that respondent was aware of or should have been aware that permitting Roy to remain in his long-term foster care setting placed the members of the foster family in a dangerous environment. *Martha Thaxton, Admin. of the Estate of Joseph Philip Hancock, dec., vs. Dept. of Human Services*, CC-78-263, (Opinion issued December 3, 1987). Although the Court sympathizes with the loss experienced by the Darrah family, the Court finds that there was no breach of duty on the part of the respondent, and, therefore, no resulting negligence. This claim must be, and is hereby, denied.

Claim disallowed.

OPINION ISSUED APRIL 26, 1989

HARRY ALLAN WHITE, INDIVIDUALLY, AND AS
ADMINISTRATOR OF THE ESTATE OF GEORGIA M. WHITE
VS.
DEPARTMENT OF HIGHWAYS

(CC-86-287a)

A.J. Ryan and Randy G. Clark, Attorneys at Law, for claimant.
Nancy J. Aliff, Attorney at Law, for respondent.

GRACEY, JUDGE:

On or about January 6, 1985, claimant's wife, Georgia White, was travelling on State Route 49 near Matewan, Mingo County, in a 1983 Chevrolet pickup truck. The vehicle which Georgia

White was operating slid on a patch of ice on the highway. She lost control of the vehicle which struck a wall. She died in the accident. Claimant seeks $175,000.00 for the wrongful death of his wife.

Claimant alleges that the area where the accident occurred is improperly ditched. In addition, this defective condition has existed for a long period of time, and respondent had constructive notice of said defect, and, therefore, is negligent.

Deborah Kay Scott, daughter of the deceased, was following her mother's vehicle in another vehicle on the night of the incident. She testified that she left her home at approximately 8:30 p.m. accompanied by Georgia White and Shirley Johnson. They went to Doug's Lounge and then to the Silver Dollar. These are social establishments. She thought that her mother had a single drink at Doug's, and she did not stay with her at the Silver Dollar. She was unable to state whether her mother had a drink at the second bar. They left the second bar between 3:00 a.m. and 3:30 a.m. Georgia was driving the pickup truck. Yvonne Montgomery was driving the vehicle in which Deborah Scott was a passenger. She estimated that the speed of the Montgomery vehicle was approximately 25-30 miles per hour. The truck operated by Georgia White passed the Montgomery vehicle. There was a double yellow line present according to Deborah Scott. She estimated that the speed of the White truck was approximately 40-45 miles per hour. When Georgia White attempted to drive back into her lane of travel, the vehicle slid on the ice. It then slid into a wall adjacent to the left side of the road and bounced back across the road to the other side of the road. Georgia White and Donnie were laying "... like up agin the brick wall and Shirley, she was laying over in those people's yard." She further testified that on the trip from Doug's Lounge to the Silver Dollar, they passed the area of the accident site for the second time. When they passed the accident site for the third time that evening, the accident occurred. She also indicated that 25 miles per hour speed limit signs were present on the night in question on Route 49 South and Route 49 North.

Nora Talbert has lived in a residence adjacent to State Route 49, near Matewan, since 1940. She stated that it is in a low lying area. After the flood in 1977, her house was raised six feet. Presently, the house is level with the highway. There is a concrete wall between her property and State Route 49. She testified that there has been a problem with drainage. "... we have no where for the water to go except out on the highway." She stated that there is frequently standing water in that location. None of the road is ditched. She further testified that before the 1977 flood, the respondent constructed a ditch line near Sulfur Creek. This ditch is no longer present, but she could not confirm whether it was present at the time of Georgia White's accident. Mrs. Talbert stated that the White accident occurred where Sulfur Creek Road intersects with State Route 49.

Wendell B. Mullins, County Maintenance Superintendent for Mingo County with respondent, checked records maintained by respondent to determine if there were any complaints regarding this particular section of Route 49 prior to January 6, 1985. He did not find any complaints about this section of Route 49. Charles R. Lewis, II, Planning and Research Engineer with respondent, testified that he reviewed the accident reports from January 1, 1987 through the date of the accident. He found no reports of accidents for that time period. He did find a report of an accident which had occurred prior to 1981. It occurred on November 10, 1980.

This Court has repeatedly held that the State is not a guarantor of the safety of travelers on its highways. *Adkins vs. Sims*, 130 W.Va 645, 46 S.E.2d 81 (1947). Exceptions have been made where it has been established that respondent had actual or constructive notice of a defect, and, having adequate time, failed to correct the defect or provide warning signs or barriers. The Court has also held that the State will not be required nor expected to keep it highways free of ice and snow at all times. The presence of an isolated ice patch on a highway during winter months is generally insufficient to charge the State with negligence. See 39 AM. JUR. 2d *Highways, Streets and Bridges,* §506. See also *Woofter vs. State Road Comm'n.*, 2 Ct.Cl. 393 (1944); *Christo vs. Dotson*, 151 W.Va. 696, 155 S.E.2d 571 (1967).

The Court is of the opinion that Georgia White, having travelled Route 49 frequently, was aware of the potential hazard of ice at this location. This road is marked in the area of the accident site with a double yellow line indicating a no passing area. The evidence established that she was operating her vehicle at a speed which was not safe for the conditions then and there existing. It is the opinion of the Court that these factors were the proximate cause of this accident. For these reasons, the Court is of the opinion to, and must, deny this claim.

Claim disallowed.

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

OPINION ISSUED JUNE 6, 1989

ARLISS JONES AND JENNIFER WILLIAMS
VS.
DEPARTMENT OF HIGHWAYS

(CC-88-303)

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

WALLACE, JUDGE:

Claimants seek $18,800.00 for damage to an automobile and also personal injuries arising out of an automobile accident which occurred on December 10, 1986. Claimant, Jennifer Williams, was a passenger in the 1983 Chevrolet Cavalier titled in claimant Arliss Jones' name. At the time of the incident, the Cavalier was driven by Jeffrey Todd Williams, present husband of claimant Williams.

Jeffrey Todd Williams was operating the automobile in a southerly direction toward Alderson on West Virginia Route 12. The highways is a two-lane road, and its surface was dry at

approximately 10:00 p.m., when this incident occurred. Mr. Williams testified that his speed was approximately fifty-seven miles per hour. The headlights of the automobile which he was operating were on low beam. He is familiar with this route as he had driven it to and from his place of employment for a period of four-to-six months prior to the accident. He stated that the weather was clear and dry. He was on a straight section of the road when his vehicle encountered rocks. He was of the opinion that the rocks came from a hillside to the right of the highway. He was unable to maneuver the automobile to avoid striking the rocks which were in the automobile's path.

Claimant Arliss Jones testified that she had operated a vehicle on West Virginia Route 12 on the evening of the accident. She stated that when she travelled the roadway at approximately 9:00 p.m., she did not observe any fallen rocks. She had purchased the automobile involved in the accident as a used vehicle for $3,600.00 six months before the accident occurred. The automobile was totalled and claimant Jones received approximately $400.00 as salvage for her automobile.

Claimant Jennifer Williams testified that she has reoccurring headaches and back pain as a result of the accident. She has not seen a physician since April, 1988, due to the expense of medical treatment.

Two employees of the respondent, Eugene Ray Tuckwiller and Charles Raymond Lewis, II, testified. Mr. Tuckwiller stated that the accident area had not been brought to his attention as a falling rock problem area. Mr. Lewis' records of the respondent revealed that there have not been any other fallen rock accidents reported in this area for a three-year period prior to December 10, 1986.

The State is neither an insurer nor a guarantor of the safety of motorists on its highways. *Adkins vs. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1941). This Court has held on numerous occasions that the unexplained falling of rock onto a highway without a positive showing that respondent knew or should have known of a dangerous condition is insufficient to justify an award. *Hammond vs. Dept. of Highways*, 11 Ct.Cl. 234 (1977); *Adkins vs. Dept. of Highways*, 13 Ct.Cl. 307 (1980); *Hatfield vs. Dept. of Highways*, 15 Ct.Cl. 168 (1984); and *Baron vs. Dept. of Highways*, CC-87-73 (Opinion issued March 24, 1988). As the claimants herein have not presented evidence to establish notice on the part of the respondent of the rocks in the road or that the respondent knew or should have known of the propensity of rocks to fall in this particular area of West Virginia Route 12, the Court must deny this claim.

Claim disallowed.

REFERENCES

- ADVISORY OPINION
- ATTORNEY FEES
- BERMS
- BRIDGES
- BUILDING CONTRACTS
- COLLEGES and UNIVERSITIES
- CONTRACTS
- CONSTRUCTION CONTRACTS
- DRAINS and DRAINAGE
- EXPENDITURES
- JURISDICTION
- NEGILIGENCE
- NOTICE
- PARKS and RECREATIONAL AREAS
- PEDESTRIANS
- PRISONS AND PRISONERS
- REAL PROPERTY
- ROCKFALLS
- STATE AGENCY
- STREETS and HIGHWAYS
- TAXES and TAXATION
- TREES
- OTHER

ADVISORY OPINION

SECRETARY OF STATE VS. DEPARTMENT OF EDUCATION (CC-87-432)
The Court reviewed a claim between two State agencies and determined that the respondent State agency did owe funds to the claimant State agency for which the Court advised an award . . . . . p. 71

ATTORNEY FEES

SANFORD CLEGG, III VS. DEPARTMENT OF CORRECTIONS (CC-86-456)
The Court made an award for reasonable attorney fees and expenses incurred by the claimant when he had to bring an action in U.S. District Court to recover back wages due him by the respondent State agency. . . . . p. 174

BERMS

CAROL BAKER VS. DEPARTMENT OF HIGHWAYS (CC-88-146)
Where claimant drove onto the berm of the road to move over for an emergency vehicle, the Court held that the claimant was not negligent in the maintenance of the berm which was in defective condition. . . . . p. 169

COOPER VS. DIVISION OF HIGHWAYS (CC-87-14)
The Court made an award where claimant established respondent failed to report a large hole near the berm of the road. The Court held that respondent had constructive notice based upon the size of the hole. . . . . p. 18

WILLIAM RAY FITZWATER VS. DEPARTMENT OF HIGHWAYS (CC-86-263)
The Court found respondent negligent for failure to place guardrails on a dangerous curve as respondent was aware of the unusual hazard which existed. The Court also found claimant was comparatively negligent as he was operating his vehicle at an excessive rate of speed for the conditions then and there existing. Claimant's damages were reduced by ten percent. . . . . p. 176

MCPHERSON, ET AL. VS. DIVISION OF HIGHWAYS (CC-80-229)
Where claimants failed to establish a reason for the driver of a vehicle to proceed onto a berm, the Court held that it will not resort to speculation. The Court is unable to establish negligence on the part of the respondent for neglect of the berm. The Court denied the claim. . . . . p. 31

MOORE VS. DIVISION OF HIGHWAYS (CC-87-38)
Claimant's motor home struck a hole located on the berm for which claimants alleged respondent was negligent in failing to provide a safe berm. The Court held that a traveler on the State's highways at its own risk uses the berm at its own risk. . . . . p. 63

OFFUTT VS. DIVISION OF HIGHWAYS (CC-87-427)

A claim for damage to a vehicle which struck a rock on the berm of the road was denied by the Court as there was no notice to respondent of the defect on the berm. . . . . p. 139

MCDOWELL COUNTY BOARD OF EDUCATION VS. DEPARTMENT OF EDUCATION (CC-85-114), THE BOARD OF EDUCATION OF THE COUNTY OF MCDOWELL A CORP., ET AL. VS. BOARD OF REGENTS (CC-84-128)

Claimant county brought an action to recover the amount of a judgment rendered against it by the McDowell County Circuit Court which occurred as the result of advice which it received from the respondent as to the interpretation of the application of levy monies and the salaries paid by the county to its school service employees. The Court determined that respondent was liable for the judgments rendered against claimant as claimant acted upon the advice of respondent in good faith. p. 170

BRIDGES

BARBOURSVILLE BRIDGE CO. VS. DIVISION OF HIGHWAYS (CC-84-201)

Respondent provided the design for a cofferdam to be used on the project and the cofferdam failed. The Court granted an award for the extra labor and costs to the contractor. . . . . p. 123

BARILE VS. DIVISION OF HIGHWAYS (CC-86-361)

The respondent acted promptly to take safety precautions for concrete debris on a bridge. The Court determined that there was no negligence on the part of the respondent for damage to claimant's vehicle which struck the debris. . . . . p. 99

HANSON VS. DIVISION OF HIGHWAYS (CC-87-703)

Claimant fell on steps adjacent to a bridge and the Court determined respondent was negligent for failing to discover and correct the hazardous condition of the steps. . . . . p. 157

KELLISON, ET AL. VS. DIVISION OF HIGHWAYS (CC-85-396)

Although a guardrail on a bridge was missing, the Court could find no adequate explanation for why the decedent drove off the road rather than proceeding onto a bridge. . . . . p. 117

MATTHEY VS. DEPARTMENT OF CORRECTIONS (CC-87-9)

The Court determined respondent had constructive notice of a hole in a bridge where the deterioration of the bridge was extensive. . . . . p. 141

MARCUM AND MESSER VS. DIVISION OF HIGHWAYS (CC-87-78a&b)

Claimant's vehicle was stopped suddenly on a bridge where the wooden bridge deck deteriorated and a timber came up through the floor board of the vehicle. The Court found respondent negligent in its maintenance of the bridge. . . . . p. 149

SHREWSBURY VS. DIVISION OF HIGHWAYS (CC-87-179)

The Court denied a claim for damage to a vehicle from a guardrail on a bridge, as the claimant observed the guardrail and her negligence was equal to or greater than the respondent's. . . p. 109

SPENCE VS. DIVISION OF HIGHWAYS (CC-86-284)

Where a hole appeared suddenly and respondent took the necessary safety precautions as it was aware of the hazard, the Court determined that the respondent was negligent. . . . . p. 72

STATE FARM MUTUAL, ET AL. VS. DIVISION OF HIGHWAYS (CC-86-210)

The Court made an award for damages to a vehicle where the vehicle struck an expansion joint on the bridge, and respondent was held liable for a hazardous condition which had existed for some time prior to claimant's accident. . . . . p. 83

STOVER VS. DIVISION OF HIGHWAYS (CC-88-156)

The Court found respondent negligent in its maintenance of a bridge when an expansion joint caused damage to claimant's vehicle. . . . . p. 151

BUILDING CONTRACTS

ALIFF CONSTRUCTION VS. DEPT. OF NATURAL RESOURCES (CC-79-641)

Where claimant contractor established that it performed extra work in the construction of a project. The Court made an award for certain of the items established by the claimant. . . . . p. 3

BARBOURSVILLE BRIDGE CO VS. DIVISION OF HIGHWAYS (CC-84-201)

Where respondent provided the design for a cofferdam to be used on the project and the cofferdam failed. The Court granted for the extra labor and costs to the contractor. . . . . p. 123

CAPON BRIDGE CO. AND SENIOR CENTER VS. G.O.C.I.D. GLENVILLE VS. G.O.C.I.D. (CC-87-400 & CC-87-513)

Claimant had a contract under the Governor's Community Partnership Grant Program but the grant money was not forthcoming when the Treasury lacked sufficient funds to satisfy the grant. The Court made an award for that portion of the grant which the claimant failed to receive in the proper fiscal year. . . . . p. 96

E.P. FOGLEMAN CONSTRUCTION VS. BOARD OF REGENTS (CC-79-190)

Claimant alleged that respondent failed to pay extra for work required on a construction project, but the Court made an award for an amount retained by respondent reduced by repairs made by respondent after claimant completed the project. 40

GREGG VS. DEPARTMENT OF FINANCE AND ADMINISTRATION (CC-79-514)

Claimant sustained severe injuries while employed by an independent contractor performing renovation work on the State Capitol Building. Claimant alleged that respondent failed to provide a safe work place in accordance with OSHA regulations. The Court held that this is a claim under the Worker's Compensation Fund as deliberate intent was not established on the part of the respondent. . . . . p. 51

LANE CONSTRUCTION VS. DIVISION OF HIGHWAYS (CC-82-164)

Claimant constructed several miles of the Highland Scenic Highways under the supervision and under a contract with the respondent State agency. The Court determined that the claimant suffered delay on the project when a slide occurred and redesign of the project by necessary. The Court made an award for costs incurred by claimant as result of the delay. . . . . p. 73

S.J. GROVES, ET AL. VS. DIVISION OF HIGHWAYS (CC-82-295 and CC-83-233)

The Court made an award for extra work performed in preparing steel girders for respondent where the standards imposed were more stringent than normally required. . . . . p. 78

SNODGRASS ET AL. VS. DIVISION OF HIGHWAYS (CC-76-55)

The Court denied a claim even though OSHA regulations were violated by a contractor engaged by the respondent to construct a bridge as the Court found the respondent's construction was not the proximate cause of the accident. . . . . p. 113

V & G, INC. VS. DIVISION OF HIGHWAYS (CC-83-207 and CC-83-208)

The Court made an award for the liquidated damages assessed on a project as respondent was not damaged by the failure of claimant to complete the project within the contract period. The Court determined claimant contractor was entitled to an award for extra work on a project where the claimant had to "borrow" matter on a project wherein the contract indicated there would be substantial matter at the site. Respondent did not contemplate the need to "borrow" matter in a project. . . . . p. 153

COLLEGES AND UNIVERSITIES

BOGGAN VS. BOARD OF REGENTS (CC-87-474)

Where a pedestrian walked into a sharp pipe which was not on the sidewalk. The Court denied the claim as there was no notice of the defect. . . . . p. 130

BROWN VS. DIVISION OF HIGHWAYS (CC-86-270)

Although claimant established notice on the part of the respondent and that it was negligent in failing to maintain a road, claimant also had knowledge of the condition of the road and was negligent. The Court denied the claim. . . . . p. 27

HARTWELL VS. DIVISION OF HIGHWAYS (CC-87-145)

Where the claimant was aware of the defective condition in the road and she had reported this condition, the Court denied the claim as the negligence of the driver was equal to or greater than that of the respondent. . . . . p. 107

MCDOWELL VS. DIVISION OF HIGHWAYS (CC-87-242)

Respondent was negligent in its placement of barrels in a construction area; however, the Court found that the claimant was also negligent as she was in a position to observe the cut areas in the highway. . . . . p. 140

CONTRACTS

EASTERN ASSOCIATES VS. BOARD OF REGENTS (CC-87-156)

The Court upheld the provisions of a lease entered into by the parties and made an award to the claimant for the amount of rent respondent failed to pay claimant. . . . . p. 39

JADALEE STABLES, JACK S. HORNER VS. DEPARTMENT OF COMMERCE (CC-88-164)

Where the lease agreement between claimant and respondent provided that claimant lessee assumed all risk in the operation of his business at Watoga State Park, the Court determined that respondent was not liable for personal property lost by lessee in a fire of the horse facility. . . . . p. 165

R.L. BANKS & ASSOC., INC. VS. PUBLIC SERVICE COMMISSION (CC-88-302)

An award for professional services rendered to a State Agency under a contract with the agency was made by the Court, but the interest claimed was denied as it did not come within the provision of W.Va. Code §5A-3-1. . . . . p. 159

CONSTRUCTION CONTRACTS

THE LANE CONSTRUCTION CORPORATION VS. DIVISION OF HIGHWAYS (CC-83-172)

Claimant contractor constructed a portion of I-77 in Kanawha County and it incurred additional costs as a result of plan errors, changed site conditions, and respondent's failure to timely approve rock borrow sources. Claimant experienced problems on the project as a result of rock borrow and the project became a "waste project." The Court found that the facts established a changed condition which caused the claimant to incur additional costs for which the Court made an award. . p. 180

ELLIS VS. DIVISION OF HIGHWAYS (CC-87-180)

Where claimant's vehicle was splashed with paint, but she failed to submit an estimate for the damage, the Court will not base an award upon speculation and the Court denied the claim. . . . . p. 106

DRAINS AND DRAINAGE

BOMBOY VS. DIVISION OF HIGHWAYS (CC-85-298)

Where a stopped up culvert caused flooding on claimant's property the Court made an award as the lack of a grate on the culvert contributed to the flooding on the claimant's property. . . . . p. 144

HUNT VS. DIVISION OF HIGHWAYS (CC-87-429)

Where the claimant's property is in a natural drainage area but an unusual rainfall caused flooding, the Court determined that there was no negligence on the part of respondent. . . . p. 132

KNOTT, ET AL. VS. DIVISION OF HIGHWAYS (CC-85-351)

The Court made an award to the claimant where his wife was fatally injured in an accident caused by respondent's failure to properly maintain a drain ditch on the side of a highway. Ice formed creating a hazardous condition on the road for which respondent was negligent. . . . p. 54

KOUNS, ET AL. VS. DIVISION OF HIGHWAYS (CC-86-215)

Claimant alleged that her husband died in an accident which was caused when his automobile struck ice adjacent to the berm of the road. The Court denied liability as the evidence established that the decedent was traveling at an excessive rate of speed for the conditions on the road. . p. 57

LEFFEW VS. DIVISION OF HIGHWAYS (CC-86-79)

Claimants alleged water damage to their property caused by the resurfacing of the Chelyan Bridge. The Court determined that the resurfacing of the bridge was not the sole proximate cause for the water problems. . . . . p. 58

MAXEY VS. DIVISION OF HIGHWAYS (CC-86-323)

Claimant's property was damaged by excess water which occurred after respondent performed construction on an interstate adjacent to claimant's property. . . . . p. 44

TERRELL VS. DIVISION OF HIGHWAYS (CC-86-271)

As a result of negligent maintenance of a culvert, claimants' property sustained flooding and the Court made an award for the damage to claimants' home and property. Where there were many factors, including an unusual amount of rain at the time of a flood and a lack of down spouts on the house, the Court recommended an award be made to claimants for flooding their property. . . . . p. 121

EXPENDITURES

AIDE'S DISCOUNT VS. DEPARTMENT OF HEALTH (CC-87-244)

Claimant furnished items to respondent pursuant to a valid purchase order. Although respondent's budget had sufficient funds, the State Auditor was unable to make payment as the Treasury lacked sufficient funds to process the transmittal. The Court made an award to the claimant which included interest in accordance with W.Va. Code §14-3-1. . . . . p. 34

ALPHA THERAPEUTIC CORPORATION VS. DEPARTMENT OF HEALTH (CC-87-315)

Claimant furnished items to respondent pursuant to a valid purchase order. Although respondent's budget had sufficient funds, the State Auditor was unable to make payment as the Treasury lacked sufficient funds to process the transmittal. The Court made an award to claimant which included interest in accordance with W.Va. Code §14-3-1. . . . . p. 35

PAUL T. CAMILLETTI VS. OFFICE OF THE ATTORNEY GENERAL (CC-89-18)

The Court made an award to the claimant for services rendered to respondent as a Special Assistant Attorney General as the invoice for claimant's services was not processed for payment in the proper fiscal year. Respondent admitted that the claim was valid and the amount of the claim was fair and reasonable. . . . . p. 173

GERL VS. HUMAN RIGHTS COMMISSION (CC-88-103)

Claimant served as a hearing examiner for a State agency but was not paid as there were insufficient funds in the Treasury of the State. The Court made an award to the claimant. . p. 120

HOPE GAS, INC. VS. DEPARTMENT OF HEALTH (CC-87-250)

Claimant was made an award by the Court for furnishing gas to a facility of the respondent but the respondent failed to pay the claim as the treasury of the State lacked sufficient. The Court included interest in its award. . . . . p. 36

MOORE BUSINESS FORMS & SYSTEMS DIVISION VS. DEPARTMENT OF F&A (CC-86-212)

A claim for a bill of lading was awarded by the Court where claimant was not the party that made the error. . . . . p. 11

SHORT VS. DEPARTMENT OF EDUCATION (CC-88-253)

The Court made an award for tuition expenses which claimant incurred to renew her teaching certificate and respondent failed to reimburse claimant in the proper fiscal year. . . . . p. 69

ALFSTAD VS. DIVISION OF HIGHWAYS (CC-87-92)

Where an independent contractor for respondent created a hole in the pavement causing damage to claimants' vehicle, the Court held that respondent cannot be found liable for torts committed by an independent contractor. . . . . p. 48

COOPER VS. DIVISION OF HIGHWAYS (CC-84-263)

Where the record established that an independent contractor was performing construction in the area of claimant's accident, the Court held that respondent can not e held liable for any negligence. p. 70

ESTEP VS. DIVISION OF HIGHWAYS (CC-86-359)

When an independent contractor is performing work on a State road respondent will not be held liable for negligence of the individual contractor where rocks in the road caused damage to claimant's vehicle. . . . . p. 10

GROSE VS. DIVISION OF HIGHWAYS (CC-86-260)

The general rule is that the employer of an independent contractor is not liable for torts committed by the independent contractor. The Court denied a claim as the resurfacing project was performed by an independent contractor of the respondent. . . . . p. 53

MORRISON VS. DIVISION OF HIGHWAYS (CC-86-301)

Where an independent contractor was performing work for the respondent, and claimants' incident was alleged to be caused by the negligence of the independent contractor. . . . . p. 33

JURISDICTION

LONG VS. STATE AUDITOR'S OFFICE (CC-88-135)
Where the claimant had a legal remedy through a statutory process the Court lacked jurisdiction over the subject matter of the claim for property bought from the Deputy Commissioner of Forfeited Land. . . . . p. 135

MOLLOHAN VS. STATE AUDITOR'S OFFICE (CC-87-392)
The Court of Claims lacks jurisdiction over a tax sale where claimant purchased property which belonged to another individual. There is a statutory remedy available to the claimant. . . . . p. 141

SHANK VS. DIVISION OF HIGHWAYS (CC-88-21)
Where claimant walked into a sign on a sidewalk the Court denied the claim as there was no negligence on the part of the respondent. . . . . p. 143

BROWN VS. DIVISION OF HIGHWAYS (CC-82-279)
Claimant's property was damaged by a slip from a State road and the Court made an award as claimants established that measures taken by the respondent to rectify an initial slide which caused excess water to flow onto claimant's property. . . . . p. 37

CSX TRANSPORTATION CO. VS. DIVISION OF HIGHWAYS (CC-84-180)
The Court denied a claim for damage to claimant's property as the result of a landslide as the claimant failed to establish that respondent was negligent in its maintenance of State Route 42 at the slide area. . . . . p. 94

NEGLIGENCE

RANDY CLINE AND KAY CLINE VS. DIVISION OF HIGHWAYS (CC-87-69)
Claimants were involved in an accident alleged to be caused by debris left on the road surface by employees of the respondent; however, the Court denied the claim as there was no evidence of negligent maintenance of the road and the Court will not speculate as to negligence on the part of the respondent. . . . . p. 161

CALDWELL VS. DIVISION OF HIGHWAYS (CC-86-348)
Damage to a vehicle which occurred when a wind storm dislodged a portion of the roof of claimant's building and struck claimant's automobile. The Court denied the claim as there was no negligence. . . . . p. 9

GOODWIN VS. DIVISION OF HIGHWAYS (CC-87-18)
Claimant's tools were stolen from respondent's truck but the Court determined that the claimant left the keys in the truck. The Court found the claimant negligent and denied his claim. . . . . p. 103

MCDOWELL VS. DIVISION OF HIGHWAYS (CC-87-242)

Respondent was negligent in its placement of barrels in a construction area; however, the Court found that the claimant was also negligent as she was in a position to observe the cut areas in the highway. . . . . p. 140

QUICK VS. DIVISION OF HIGHWAYS (CC-87-157)

Claimant's vehicle was damaged when it struck rocks on the road. The Court denied the claim as respondent is not negligent without a positive showing that it knew or should have anticipated damage in an unexplained rockfall. . . . . p. 104

THOMAS TREADWAY VS. DIVISION OF HIGHWAYS (CC-87-417)

Although respondent may have been negligent in its maintenance of a steel plate over a hole in the road, claimant was also aware of the hazardous condition and his own negligence in driving at an excessive rate of speed was equal to or greater than that of respondent. . . . . p. 168

NOTICE

CUNNINGHAM VS. DIVISION OF HIGHWAYS (CC-87-229)

The claimant's vehicle sustained damage when it struck an angle iron on the highway, but the Court denied the claim as there was no notice to respondent that an object was on the highway. . . . . p. 125

ANITA ANN ERWIN VS. DIVISION OF HIGHWAYS (CC-88-154)

Where the hazardous condition on the roadway (a piece of concrete which had hooved up from the surface of Corridor G) appeared suddenly and respondent acted promptly to warn the traveling public, the Court will not find negligence on the part of the respondent. . . . . p. 163

MINCH VS. DIVISION OF HIGHWAYS (CC-88-127)

The Court based an award upon constructive notice of a hole in the road which was deep enough to expose reinforcing rods in the concrete as the hole could not have developed overnight. . . . . p. 158

PRATT VS. DIVISION OF HIGHWAYS (CC-88-109)

The Court made an award to the claimant for damage to his vehicle which struck a hole in the road as the Court held respondent liable for failure to repair a very large hole which could not have developed overnight. . . . . p. 143

RODEHEAVER VS. DIVISION OF HIGHWAYS (CC-86-340)

Where respondent had actual notice of a defect in the road and failed to adequately maintain the road, the Court found respondent negligent for the damage to claimant's vehicle. . . . . p. 77

SHAFFER VS. DIVISION OF HIGHWAYS (CC-87-186)

A claim for damage to a vehicle which struck an expansion joint was denied as respondent did not have actual or constructive notice of the defect in the road. p.129

SPANGLER VS. DIVISION OF HIGHWAYS (CC-87-29)
Claimant's vehicle came onto an area of high water on a highway and alleged respondent was negligent in failing to place warning signs. The Court determined that the claimant failed to establish that respondent had actual or constructive notice of the high water on the highway. . . . . p. 119

PARKS AND RECREATION AREAS

BAILEY VS. DEPARTMENT OF NATURAL RESOURCES (CC-86-438)
Claimant's vehicle was damaged when it struck a beam on a road in a national park and the Court held that respondent was negligent. It was foreseeable that an animal such as a bear or deer might attempt to cross the road. . . . . p. 50

PEDESTRIANS

BOGGAN VS. BOARD OF REGENTS (CC-87-474)
Where a pedestrian walked into a sharp pipe which was not on the sidewalk. The Court denied the claim as there was no notice of the defect. . . . . p. 130

PRISONS AND PRISONERS

CONSOLIDATED GAS TRANS. CORP. VS. DEPARTMENT OF CORRECTIONS (CC-86-262)
Claimant's truck was stolen by three juveniles housed at the Salem Industrial School, a facility of the respondent. The Court denied the claim as the negligence of respondent was not the proximate cause. Claimant was negligent in leaving the keys in the truck and the gate to the park unlocked. . . . . p. 97

FARLEY VS. DIVISION OF CORRECTIONS (CC-77-6)
Claimant, an inmate and ward of the State, was being transported in a van with other inmates, when an accident happened. Claimant claimed negligence on the part of the operator of the van. The evidence established that there was no negligence on the part of the respondent's employee and the Court denied the claim. . . . . p. 29

TIMOTHY PAUL HIVELY VS. DIVISION OF CORRECTIONS (CC-88-48)
Claimant was granted an award for eye glasses which were lost, stolen, or destroyed at a facility of the respondent when he was transferred from the State Penitentiary to a facility in Ohio County.
p. 178

MATTHEY VS. DIVISION OF CORRECTIONS (CC-87-9)
A claim for damage to claimant's home and vehicle by escaped juveniles was denied as the claimant left keys in an accessible location outside of his home. . . . . p. 141

MILLER VS. DIVISION OF CORRECTIONS (CC-84-218)

The Court made an award to the claimant who had received a back injury while incarcerated at a facility of the respondent and claimant established that employees were negligent in allowing an overflow of garbage on the floor of the dining facility. Claimant fell when he slipped in the area. p. 45

CHRISTOPHER LEE UMBERGER VS. DEPARTMENT OF CORRECTIONS (CC-86-411)

An award was granted to claimant inmate for personal property which was lost or stolen while he was in a holding cell. . . . . p. 160

REAL PROPERTY

MOORE VS. DIVISION OF HIGHWAYS (CC-86-450)

Claimant alleged damage to real property as a result of a lack of maintenance of a bridge; however, the Court determined that there were many contributing factors and negligence on the part of the respondent was not established. . . . . p. 23

ROCKFALLS

ESTEP VS. DIVISION OF HIGHWAYS (CC-86-359)

When an independent contractor is performing work on a State road, respondent will not be held liable for negligence of the individual contractor where rocks in the road caused damage to claimant's vehicle. . . . . p. 10

RALPH W. PALMER VS. DIVISION OF HIGHWAYS (CC-88-137)

The Court reaffirmed its holding in previous claims that the unexpected falling of rocks onto a highway without a positive showing that respondent knew or should have known of a dangerous condition is insufficient to justify an award. Claimant's claim for damages to his vehicle which struck a rock in the road was denied. . . . . p. 166

STATE AGENCY

ADKINS VS. DIVISION OF HIGHWAYS (CC-77-18)

Where the evidence established that respondent fulfilled its duty to maintain the road at a slide area and placed warning paddles. The Court denied a wrongful death action where a vehicle went over an embankment and struck an exposed gas line. . . . . p. 16

BROWN, ET AL. VS. DEPARTMENT OF EDUCATION (CC-87-136 to CC-87-144)

Claimant teacher aides sought relief through the grievance procedure for adjusted salaries and it was determined that claimants were entitled to the adjustments. The Court determined that claimants were entitled to the additional compensation for a period of time not included in the

grievance procedure; however, there was no appropriation for the claims and the Court denied the claims based upon the similarity to Airkem. Airkem Sales and Service, et al. vs. Department of Mental Health, 8 Ct. Cl. 180 (1971). . . . . p. 92

CAPON BRIDGE CO. AND SENIOR CENTER VS. G.O.C.I.D. (CC-87-400) See also, GLENVILLE VS. G.O.C.I.D. (CC-87-513)

Claimant had a contract under the Governor's Community Partnership Grant Program but the grant money was not forthcoming when the Treasury lacked sufficient funds to satisfy the grant. The Court made an award for that portion of the grant which claimant failed to receive in the proper fiscal year. . . . . p. 96

CLOWER VS. DIVISION OF HIGHWAYS (CC-86-146)

The Court denied a claim for damage to a vehicle which struck ruts in a road, as the Court determined that respondent was not negligent in its maintenance of the road. . . . . p. 116

FORK RIDGE VS. STATE FIRE MARSHAL (CC-86-384)

The Court denied a claim for volunteer fire departments where the respondent established that the claimant had not timely filed reports required by statute. . . . . p. 101

GLASER VS. DIVISION OF HIGHWAYS (CC-86-373)

Where the Court determined that claimant's own actions were the proximate cause of the accident, the Court disallowed damages to claimant's vehicle when it struck a vehicle at an intersection. . . . . p. 102

HUZZEY VS. DEPARTMENT OF MINES (CC-83-119)

Claimant alleged that he did not receive the proper salary while he served in two positions for the same State Agency. The Court denied the claim as payment of the additional salary was discretionary with the agency. . . . . p. 126

FRASER VS. DEPARTMENT OF HEALTH AND HUMAN RESOURCES, AND JOE HOLLAND CHEVROLET, INC. VS. DEPARTMENT OF HEALTH AND HUMAN RESOURCES (CC-86-261 AND CC-86-344)

An automobile agency, owned a vehicle which was stolen by a minor who was a ward of the respondent. This vehicle caused damage to the second claimant's property. The inmate was actually in custody of an independent contractor with respondent. The Court found no showing of negligence on the part of the respondent and denied the claims. . . . . p. 30

LACY VS. DEPARTMENT OF F&A (CC-87-111)

The Court granted an award where the claimant purchased a vehicle from respondent which was determined to be defective at the time of purchase. . . . . p. 21

LONG VS. STATE AUDITOR'S OFFICE (CC-88-135)

Where the claimant had a legal remedy through a statutory process the Court lacked jurisdiction over the subject matter of the claim of property bought from the Deputy Commissioner of forfeited land. . . . . p. 135

SNODGRASS, ET AL. VS. DIVISION OF HIGHWAYS (CC-76-55)

The Court denied a claim even though OSHA regulations were violated by a contractor engaged by the respondent to construct a bridge as the Court found the respondent's construction was not the proximate cause of the accident. . . . . p. 113

STOVER, ET AL. VS. DEPARTMENT OF LABOR (CC-86-354)

The Court determined that the wage bond statute requiring collateral for mine employees failed to protect certain employees where the equipment for the wage bond had a superior lean upon it. The Court made an award for unpaid wages. . . . . p. 85

THAXTON, ET AL. VS. DEPARTMENT OF HEALTH AND HUMAN SERVICES (CC-78-263)

Claimant's child was killed while he was in custody of the State and the State placed the child with a grandparent. The evidence established that the child requested to be placed with the grandmother but respondent was unaware of the violent tendencies of an uncle living at the residence. As there was no breach of duty on the part of the respondent, the Court denied the claim. p. 65

THOMAS, ET AL. VS. DEPARTMENT OF HEALTH (CC-87-521, and related claims)

The Court made an award for overtime compensation due respondent's employees pursuant to the U.S. Department of Labor regulations. . . . . p. 87

VAN VFD VS. STATE FIRE MARSHAL (CC-86-353)

The Court made an award for funds which the Treasurer did not allocate to the claimant as necessary fire reports were not timely received. The claimant established that it made a good faith effort to comply with the proper statute. . . . . p. 15

WEST HAMLIN VFD, INC. VS. STATE FIRE MARSHAL (CC-86-349)

The Court denied a claim to a volunteer fire department as the claimant had failed to file proper documents with the State Fire Marshal's Office. . . . . p. 12

WEST VIRGINIA SAFETY COUNCIL, INC. VS. DIVISION OF HIGHWAYS (CC-87-50)

The Court made an award for film which respondent failed to return to claimant as part of a lease agreement. . . . . p. 26

STREETS AND HIGHWAYS

ADKINS VS. DIVISION OF HIGHWAYS (CC-86-218)

A claim for vehicular damage where negligence on the part of the respondent is not established by the claimant will be denied by the Court. A portion of the road had washed away but respondent established that it had placed warning paddles for the traveling public. . . . . p. 1

ALLEN VS. DIVISION OF HIGHWAYS (CC-87-83)
The Court denied a claim for damage to claimant's vehicle where the claimant was aware of the holes in the pavement, but claimant failed to establish actual or constructive notice on the part of the respondent. . . . . p. 49

ANAWALT WESLEYAN CHURCH VS. DIVISION OF HIGHWAYS (CC-86-401)
Respondent had not placed a clearance sign on a railroad underpass as this is not mandatory; therefore, claimant's action for damages to a truck which struck the underpass is denied. . . . p. 19

ASTORG MOTOR COMPANY VS. DIVISION OF HIGHWAYS (CC-86-184)
A claim for damage to a vehicle where the owner of the vehicle is not the named claimant will be denied by the Court. . . . . p. 2

BAUER VS. DIVISION OF HIGHWAYS (CC-86-331)
Claimants' vehicle sustained damage when it struck a large section of road but respondent established that it had not been performing work. A utility or independent contractor may have been doing work for which respondent is not liable. . . . . p. 8

CAPLAN VS. DIVISION OF HIGHWAYS (CC-86-155)
Damage to the claimant's vehicle occurred when it struck a catch basin which had deteriorated. The Court found that the catch basin was maintained in the customary manner and no breach of duty by respondent was shown. . . . . p. 105

RANDY CLINE AND LEONA KAY CLINE VS. DIVISION OF HIGHWAYS (CC-87-69)
Claimants were involved in an accident alleged to be caused by debris left on the road surface by employees of the respondent; however, the Court denied the claim as there was no evidence of negligent maintenance of the road and the Court will not speculate as to the negligence on the part of the respondent. . . . . p. 161

CUNNINGHAM VS. DIVISION OF HIGHWAYS (CC-87-229)
Claimant's vehicle sustained damage when it struck an angle iron on the highway, but the Court denied the claim as there was no notice to respondent that an object was on the highway. . . . . p. 125

DOSS VS. DIVISION OF HIGHWAYS (CC-88-98)
Claimant's vehicle was damaged by a tar-like substance. The Court made an award as the road surface did not have sufficient chips to protect vehicles from splashing tar. . . . . p. 148

ANITA ANN ERWIN VS. DIVISION OF HIGHWAYS (CC-88-154)

Where the hazardous condition on the roadway (a piece of concrete which had hooved up from the surface of Corridor G) appeared suddenly and respondent acted promptly to warn the traveling public, the Court will not find negligence on the part of the respondent. . . . . p. 163

FRIEND, ET AL. VS. DIVISION OF HIGHWAYS (CC-85-327)

Where respondent maintained a local service road by posting a warning sign for the traveling public as to the character of the road. The Court denied a wrongful death claim where the decedent drove off of a narrow dirt road. . . . . p. 111

HUFFMAN VS. DIVISION OF HIGHWAYS (CC-86-151)

A claim wherein respondent had repaired a defective condition in the road and it suddenly reappeared due to rain. The Court denied the claim as the State is neither an insurer nor a guarantor of the safety of the motorists on its highways. . . . . p. 6

HUNTER VS. DIVISION OF HIGHWAYS (CC-86-188)

A claimant must prove that respondent had actual or constructive notice of a defect in the road which caused damage to a vehicle in order for the Court to make an award. . . . . p. 7

JIVIDEN VS. DIVISION OF HIGHWAYS (CC-86-452)

The Court denied a claim based upon high water at the location of claimant's accident as the claimant failed to prove respondent had actual or constructive notice of the high water problem. . . . . p. 20

KNOTT, ET AL. VS. DIVISION OF HIGHWAYS (CC-85-351)

The Court made an award to claimant where his wife was fatally injured in an accident caused by respondent's failure to properly maintain a drain ditch on the side of a highway. Ice formed creating a hazardous condition on the road for which respondent was negligent. . . . . p. 54

KOUNS, ET AL. VS. DIVISION OF HIGHWAYS (CC-86-215)

Claimant alleged that her husband died in an accident which was caused when his automobile struck ice adjacent to the berm of the road. The Court denied liability as the evidence established that the decedent was traveling at an excessive rate of speed for the condition on the road. . p.57

KUSHNER VS. DIVISION OF HIGHWAYS (CC-86-319)

Claimants' vehicle sustained damage when it sank into gravel placed by the respondent on a portion of the road. Respondent failed to warn the traveling public of the hazardous condition and the Court made an award. . . . . p. 25

LIMING VS. DIVISION OF HIGHWAYS (CC-81-424)

Claimants vehicle struck a man hole cover causing injury to her. The Court made an award as it determined that the man hole cover was defective and presented a hazardous condition which was known to the respondent. . . . . p. 43

LUSK VS. DIVISION OF HIGHWAYS (CC-88-58)

Where the driver of the vehicle was operating a vehicle at an excessive rate of speed for the conditions then and there existing. The Court denied a claim when the vehicle was damaged after sliding on the snow removal material. . . . . p. 137

MARTIN VS. DIVISION OF HIGHWAYS (CC-86-304)

Claimant was denied an award for damage to her vehicle which struck a hole in the road as claimant failed to establish notice on the part of the respondent. . . . . p. 23

MCMILLAN VS. DIVISION OF HIGHWAYS (CC-86-322)

Claimant alleged his motorcycle slid on gravel caused by respondent's repairs to the road. The Court concluded that respondent did not have actual or constructive notice of the hazard and denied the claim. . . . . p. 60

MICHAELSON, ET AL. VS. DIVISION OF HIGHWAYS (CC-85-16)

Claimants alleged a defective condition on the road causing a vehicular accident but respondent had notice and reasonable time in which to correct the defect. The Court will not base an award on conjecture or speculation. . . . . p. 61

MOTORISTS MUTUAL VS. DIVISION OF HIGHWAYS (CC-87-107)

Claimant's vehicle was damaged when the road collapsed and his vehicle flipped over the bank. The Court denied the claim as respondent was unaware that the road was in imminent danger of collapsing. . . . . p. 64

O'DONNELL VS. DEPARTMENT OF FINANCE (CC-82-248)

Claimant fell on a sidewalk but the Court disallowed the claim as there was no negligence in the maintenance of the sidewalk. . . . . p. 138

PETTY VS. DIVISION OF HIGHWAYS (CC-86-393)

The Court made an award for damages to claimants' lawn where snow removal equipment caused the damage. . . . . p. 14

PRATT VS. DIVISION OF HIGHWAYS (CC-88-109)

The Court made an award to claimant for damage to his vehicle which struck a hole in the road as the Court held respondent liable for failure to repair a very large hole which could not have developed overnight. . . . . p. 143

SOUTH VS. DIVISION OF HIGHWAYS (CC-87-160)

Claimant's vehicle was damaged by a railroad spike on the road. The Court determined that respondent had no notice of the condition and denied the claim. . . . . p. 108

SPANGLER VS. DIVISION OF HIGHWAYS (CC-87-29)

Claimant's vehicle came onto an area of high water on a highway and alleged respondent was negligent in failing to place warning signs. The Court determined that the claimant failed to establish that respondent had actual or constructive notice of the high water on the highway. p.119

SUZANNE STEINMAN VS. DIVISION OF HIGHWAYS (CC-87-717)

The Court denied a claim for damage to claimant's vehicle which struck a hole at the edge of the road surface as no evidence was presented that respondent had notice of the defect in the road. . . . . p. 167

CHARLES R. WELCH, SR. AND PHYLLIS J. WELCH VS. DIVISION OF HIGHWAYS (CC-88-96)

A claim for damage to a vehicle which occurred due to ice on the road surface was denied by the Court which held that an isolated patch of ice on a highway is generally insufficient to establish negligence on the part of the respondent. . . . . p. 164

WITHROW VS. DIVISION OF HIGHWAYS (CC-86-225)

Respondent failed to place warning signs or a barrier where a portion of the pavement on a road was cut out of a work location. The Court determined that respondent was negligent. . . . . p. 47

WRIGHT VS. DIVISION OF HIGHWAYS (CC-87-118)

Claimant's vehicle was damaged when it struck a hole in the road. The Court held that respondent failed to adequately maintain the highway as respondent was aware of the defect on a major highway. . . . . p. 98

TAXES AND TAXATION

FAIRMONT VS. DIVISION OF HIGHWAYS (CC-86-238)

A municipal corporation furnished fire protection to respondent and respondent failed to pay the fire service fee. The Court made an award to the claimant. . . . . p. 78

TREES

BARKER, ET AL. VS. DIVISION OF HIGHWAYS (CC-87-115)

Claimants alleged that respondent performed a grading operation which caused a tree to fall upon their house. The Court was unable to find negligence upon the respondent as the record failed to establish respondent performed any grading in the area. . . . . p. 110

BROWNING VS. DIVISION OF HIGHWAYS (CC-87-506)

The Court denied a claim where the tree which caused damage to claimant's vehicle was not established to be on the respondent's right of way. . . . . p. 131

ISON VS. DIVISION OF HIGHWAYS (CC-88-61)

Where respondent did not have actual or constructive notice that a tree was blocking the road. The Court denied a claim for damage to a vehicle which struck a tree. . . . . p. 133

LAGOWSKI VS. DIVISION OF HIGHWAYS (CC-87-240)

The Court made an award for damage to the vehicle when a tree was blown onto the vehicle and the Court found that the tree was close enough to the road to present a hazard to the traveling public. p. 128

OTHER

EDENS VS. STATE OF WEST VIRGINIA (CC-87-218)

Claimant established that he was unjustly arrested and imprisoned and the Court made an award which in its discretion fairly and reasonably compensated the claimant under West Virginia Code §14-2A-13a. . . . . p. 146

GREGG VS. DEPARTMENT OF FINANCE AND ADMINISTRATION (CC-79-514)

Claimant sustained severe injuries while employed by an independent contractor performing renovation work on the State Capitol Building. Claimant alleged that respondent failed to provide a safe work place in accordance with OSHA regulations. The Court held that this is a claim under the Workers' Compensation Fund as deliberate intent was not established on the part of the respondent. . . . . p. 51