STATE OF WEST VIRGINIA

Report

of the

Court of Claims

1973-1975

Volume

10

STATE OF WEST VIRGINIA

REPORT

OF THE

COURT OF CLAIMS

For the Period from July 1, 1973
to June 30, 1975

By
CHERYLE M. HALL
Clerk

VOLUME X

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LETTER OF TRANSMITTAL

To His Excellency

The Honorable Arch Alfred Moore, Jr.

Governor of West Virginia

Sir:

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

Respectfully submitted,

CHERYLE M. HALL,

Clerk

TERMS OF COURT

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

STATE COURT OF CLAIMS LAW

CHAPTER 14 CODE

Article 2. Claims Against the State.

§14-2-1. Purpose.

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

§14-2-2. Venue for certain suits limited to Kanawha county.

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

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

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

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

§14-2-3. Definitions.

For the purpose of this article:

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

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

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

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

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

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

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

The "court of claims" is hereby created. It shall consist of three judges, to be appointed by the president of the senate and the speaker

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

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

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

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

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

§14-2-6. Terms of court.

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

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

§14-2-7. Meeting place of the court.

The regular meeting place of the court shall be at the state capitol, and the joint committee on government and finance shall provide

adequate quarters therefor. When deemed advisable, in order to facilitate the full hearing of claims arising elsewhere in the State, the court may convene at any county seat.

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

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

§14-2-9. Oath of office.

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

§14-2-10. Qualifications of judges.

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

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

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

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

The court shall, in accordance with this article, consider claims which, but for the constitutional immunity of the State from suit, or

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

Except as is otherwise provided in this article, a claim shall be instituted by the filing of notice with the clerk. Each claim shall be considered by the court and if, after consideration, the court finds that a claim is just and proper, it shall so determine and shall file with the clerk a brief statement of its reasons. A claim so filed shall be an approved claim. The court shall also determine the amount that should be paid to the claimant, and shall itemize this amount as an award, with the reasons therefor, in its statement filed with the clerk. In determining the amount of a claim, interest shall not be allowed unless the claim is based upon a contract which specifically provides for the payment of interest.

§14-2-13. Jurisdiction of the court.

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

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

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

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

§14-2-14. Claims excluded.

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

1. For loss, damage, or destruction of property or for injury or

death incurred by a member of the militia or national guard when in the service of the State.

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

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

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

5. With respect to which a proceeding may be maintained against the State, by or on behalf of the claimant in the courts of the State.

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

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

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

§14-2-16. Regular procedure.

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

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

2. The clerk shall transmit a copy of the notice to the state agency concerned. The state agency may deny the claim, or may request a postponement of proceedings to permit negotiations with the claimant. If the court finds that a claim is prima facie within its jurisdic-

tion, it shall order the claim to be placed upon its regular docket for hearing.

3. During the period of negotiations and pending hearing, the state agency, represented by the attorney general, shall, if possible, reach an agreement with the claimant regarding the facts upon which the claim is based so as to avoid the necessity for the introduction of evidence at the hearing. If the parties are unable to agree upon the facts an attempt shall be made to stipulate the questions of fact in issue.

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

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

§14-2-17. Shortened procedure.

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

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

2. The state agency concerned concurs in the claim.

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

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

The state agency concerned shall prepare the record of the claim consisting of all papers, stipulations and evidential documents required by the rules of the court and file the same with the clerk. The court shall consider the claim informally upon the record submitted. If the court determines that the claim should be entered as an approved claim and an award made, it shall so order and shall file its statement with the clerk. If the court finds that the record is inade-

quate, or that the claim should not be paid, it shall reject the claim. The rejection of a claim under this section shall not bar its resubmission under the regular procedure.

§14-2-18. Advisory determination procedure.

The governor or the head of a state agency may refer to the court for an advisory determination the question of the legal or equitable status, or both, of a claim against the State or a state agency. This procedure shall apply only to such claims as are within the jurisdiction of the court. The procedure shall be substantially as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The court shall not take jurisdiction of any claim, whether accruing before or after the effective date of this article [July 1, 1967], unless notice of such claim be filed with the clerk within such period of

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

§14-2-22. Compulsory process.

In all hearings and proceedings before the court, the evidence and testimony of witnesses and the production of documentary evidence may be required. Subpoenas may be issued by the court for appearance at any designated place of hearing. In case of disobedience to a subpoena or other process, the court may invoke the aid of any circuit court in requiring the evidence and testimony of witnesses, and the production of books, papers and documents. Upon proper showing, the circuit court shall issue an order requiring witnesses to appear before the court of claims; produce books, papers and other evidence; and give testimony touching the matter in question. A person failing to obey the order may be punished by the circuit court as for contempt.

§14-2-23. Inclusion of awards in budget.

The clerk shall certify to the department of finance and administration, on or before the twentieth day of November of each year, a list of all awards recommended by the court to the legislature for appropriation. The clerk may certify supplementary lists to the governor to include subsequent awards made by the court. The governor shall include all awards so certified in his proposed budget bill transmitted to the legislature.

§14-2-24. Records to be preserved.

The record of each claim considered by the court, including all documents, papers, briefs, transcripts of testimony and other materials, shall be preserved by the clerk and shall be made available to the legislature or any committee thereof for the reexamination of the claim.

§14-2-25. Reports of the court.

The clerk shall be the official reporter of the court. He shall collect and edit the approved claims, awards and statements, shall prepare them for submission to the legislature in the form of an annual report and shall prepare them for publication.

Claims and awards shall be separately classified as follows:

1. Approved claims and awards not satisfied but referred to the legislature for final consideration and appropriation.

2. Approved claims and awards satisfied by payments out of regular appropriations.

3. Approved claims and awards satisfied by payment out of a special appropriation made by the legislature to pay claims arising during the fiscal year.

4. Claims rejected by the court with the reasons therefor.

5. Advisory determinations made at the request of the governor or the head of a state agency.

The court may include any other information or recommendations pertaining to the performance of its duties.

The court shall transmit its annual report to the presiding officer of each house of the legislature, and a copy shall be made available to any member of the legislature upon request therefor. The reports of the court shall be published biennially by the clerk as a public document. The biennial report shall be filed with the clerk of each house of the legislature, the governor and the attorney general.

§14-2-26. Fraudulent claims.

A person who knowingly and wilfully presents or attempts to present a false or fraudulent claim, or a state officer or employee who

knowingly and wilfully participates or assists in the preparation or presentation of a false or fraudulent claim, shall be guilty of a misdemeanor. A person convicted, in a court of competent jurisdiction, of violation of this section shall be fined not more than one thousand dollars or imprisoned for not more than one year, or both, in the discretion of such court. If the convicted person is a state officer or employee, he shall, in addition, forfeit his office or position of employment, as the case may be.

§14-2-27. Conclusiveness of determination.

Any final determination against the claimant on any claim presented as provided in this article shall forever bar any further claim in the court arising out of the rejected claim.

§14-2-28. Award as condition precedent to appropriation.

It is the policy of the legislature to make no appropriation to pay any claims against the State, cognizable by the court, unless the claim has first been passed upon by the court.

§14-2-29. Severability.

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

Rules of Practice and Procedure of the STATE COURT OF CLAIMS

(Adopted by the Court

September 11, 1967.

Amended February 18, 1970

Amended February 23, 1972.)

TABLE OF RULES

Rules of Practice and Procedure

RULES OF PRACTICE AND PROCEDURE

OF THE

COURT OF CLAIMS

STATE OF WEST VIRGINIA

RULE 1. CLERK, CUSTODIAN OF PAPERS, ETC.

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

RULE 2. FILING PAPERS.

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

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

(c) No paper, exclusive of exhibits, shall be filed in any action or proceeding or be accepted by the Clerk for filing nor any brief, deposition, pleading, order, decree, reporter's transcript or other paper to be made a part of the record in any claim be received except that the same be upon paper measuring 8-1/2 inches in width and 11 inches in length.

RULE 3. RECORDS.

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

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

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

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

RULE 4. FORM OF CLAIMS.

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

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

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

RULE 6. PREPARATION OF HEARING DOCKET.

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

RULE 7. PROOF AND RULES GOVERNING PROCEDURE.

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

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

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

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

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

RULE 8. APPEARANCES.

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

RULE 9. BRIEFS.

(a) Claimants or their counsel, and the Attorney General, may

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

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

RULE 10. CONTINUANCES: DISMISSAL FOR FAILURE TO PROSECUTE.

(a) After claims have been set for hearing, continuances are looked upon by the Court with disfavor, but may be allowed when good cause is shown.

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

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

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

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

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

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

RULE 12. WITHDRAWAL OF CLAIM.

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

(b) Any department or state agency, having filed a claim for the Court's consideration, under either the advisory determination procedure or the shortened procedure provision of the Court Act, may withdraw the claim without prejudice to the right of the claimant involved to file the claim under the regular procedure.

RULE 13. WITNESSES.

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

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

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

RULE 14. DEPOSITIONS.

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

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

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

RULE 15. RE-HEARINGS.

A re-hearing shall not be allowed except where good cause is shown. A motion for re-hearing may be entertained and considered ex parte, unless the Court otherwise directs, upon the petition and brief filed by the party seeking the re-hearing. Such petition and brief shall be filed within thirty days after notice of the Court's determination of the claim unless good cause be shown why the time should be extended.

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

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

(a) The claimant did not through neglect, default or lack of

reasonable care, cause the damage of which he complains. It should appear he was innocent and without fault in the matter.

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

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

RULE 17. APPLICATION OF RULES OF CIVIL PROCEDURE.

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

Adopted by Order of the Court of Claims, September 11, 1967.

Amended February 18, 1970.

Amended February 23, 1972.

CHERYLE M. HALL,
Clerk

REPORT OF THE COURT OF CLAIMS

For the Period July 1, 1973 to June 30, 1975

(1) Approved claims and awards not satisfied but to be referred to the Legislature, 1976, for final consideration and appropriation:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
D-679	Burch, Geneva Marie	Rehabilitation Environmental Action Program	$ 550.00	$ 150.00	January 8, 1975
D-761	Carney, Dana H.	Department of Highways	67.61	67.61	October 9, 1974
D-752	Casdorph, L. M.	Department of Highways	61.29	61.29	June 18, 1974
D-698	Coal River Public Service District	Department of Highways	90.00	90.00	June 18, 1974
D-699	Coal River Public Service District	Department of Highways	111.00	111.00	June 18, 1974
D-787	Cooper, John L.	Department of Highways	25.00	25.00	January 16, 1975
D-778	Corzine, Velva K.	Department of Highways	221.98	221.98	December 9, 1974
D-682	Deitz, David R.	Department of Highways	82.40	82.40	June 26, 1974
D-738	Duffy, James M.	Department of Highways	50.00	25.00	January 16, 1975
D-788	Ellison, Clyde M.	Department of Highways	25.00	25.00	January 16, 1975
D-575	Galyean, T. A., Jr. and Ann T. Galyean, his wife, John G. Anderson, Trustee, & Huntington Federal Savings and Loan Association	Department of Hiighways	25,000.00	7,500.00	October 22, 1974
D-687	Greene, Clarke W.	Department of Highways	183.95	183.95	November 14, 1974
D-655	Harris, H. Ronald	Department of Highways	78.92	78.92	October 21, 1974
D-332	Henderson, Harry C.	Department of Highways	85,000.00	6,600.00	January 16, 1975
D-647	Lantz, James R.	Department of Highways	43.30	43.30	December 9, 1974
D-797	Leonard Johnson Funeral Home, Inc.	Workmen's Compensation Fund	1,200.00	1,200.00	May 28, 1975
D-656	Maryland Casualty Co.	Alcohol Beverage Control Commission	2,500.00	2,500.00	March 26, 1975

REPORT OF THE COURT OF CLAIMS (Continued)

(1) Approved claims and awards not satisfied but to be referred to the Legislature, 1976, for final consideration and appropriation:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
D-888	Miller, Samuel	Department of Highways	123.60	123.60	January 16, 1975
D-709	Monongahela Power Company	Department of Highways	82.94	82.94	January 16, 1975
D-739	Norfolk & Western Railway Company	Department of Highways	1,258.29	1,258.29	February 6, 1975
D-677	Reed, Mr. & Mrs. T. E.	Department of Highways	800.00	600.00	June 26, 1974
D-734	Solomon, Lena	Rehabilitation Environmental Action Program	3,500.00	500.00	October 9, 1974
D-730	Stanley, Edward H.	Rehabilitation Environmental Action Program	1,045.00	200.00	October 9, 1974
D-307	Thomas, Opal Baker and Elsey	Department of Highways	150,000.00	1,920.00	March 26, 1975
D-779	Tygart Valley Telephone Company	Department of Highways	109.79	109.79	September 24, 1974
D-822	Via, Mrs. W. G.	Department of Highways	55.10	55.10	January 8, 1975
	TOTALS		$ 272,265.17	$ 23,815.17	

REPORT OF THE COURT OF CLAIMS (Continued)

For the Period July 1, 1973 to June 30, 1975

(2) Approved claims and awards satisfied by payments out of appropriations made by the Legislature for the period July 1, 1973, to June 30, 1975:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
D-633	Amburgey, F. B., Trustee for Hensley Heights Maintenance Fund	Adjutant General	$ 1,308.47	$ 1,308.47	February 7, 1974
D-623	Bacon, John A.	Department of Highways	241.83	145.83	November 8, 1973
D-510	Baltimore Contractors, Inc.	Department of Natural Resources	712,105.36	200,000.00	January 8, 1975
D-907	Bateman, Mildred Mitchell, M. D.	Department of Mental Health	2,500.00	2,500.00	February 6, 1975
D-626	Blackwell, Donald E.	Department of Highways	50.83	50.83	December 3, 1973
D-720	Bradfield, Walter E., Jr.	Department of Public Safety	705.59	100.00	November 8, 1974
*D-585b	Buckeye Union Insurance Company	Department of Highways	22,180.50	11,000.00	February 7, 1974
*D-741	Calvert Fire Insurance Company, subrogee of Cody Mullins	Department of Highways	89.87	89.87	August 14, 1974
D-664	Cantley, Robert, Jr.	Department of Highways	250.00	250.00	February 13, 1974
D-740	Central Investment Corporation	Nonintoxicating Beer Commission	7,805.83	7,777.37	February 6, 1975
D-731	Cleveland Clinic	Board of Vocational Education, Division of Vocational Rehabilitation	805.88	805.88	August 14, 1974
D-695	Eaton Laboratories	Department of Mental Health	47.81	47.81	February 7, 1974

*Subrogation claims were omitted from the Claims Bills by the 1974 and 1975 Legislature and, therefore, have not been satisfied.

REPORT OF THE COURT OF CLAIMS (Continued)

(2) Approved claims and awards satisfied by payments out of appropriations made by the Legislature for the period July 1, 1973, to June 30, 1975:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
D-657a	Exxon Company, U.S.A.	Department of Mental Health	134.65	134.65	January 14, 1974
*D-585a	Federal Insurance Company	Department of Highways	302.81	302.81	February 7, 1974
*D-585b	Federal Insurance Company	Department of Highways	22,180.50	11,000.00	February 7, 1974
D-506	Forney, Helen	Department of Finance & Administration	10,000.00	1,593.24	October 15, 1973
D-506	Forney, Richard M., Jr.	Department of Natural Resources	200,000.00	14,900.00	October 15, 1973
D-616	General Telephone Company of the Southeast	Department of Highways	235.40	235.40	October 15, 1973
*D-585b	Globe Indemnity Company	Department of Highways	22,180.50	11,000.00	February 7, 1974
D-665	Hodge, James	Department of Highways	172.00	162.20	February 7, 1974
D-902	Hoffman La Roche, Inc.	Department of Mental Health	275.94	275.94	February 6, 1975
D-603	House, Ronald E., Administrator of the Estate of Edward P. House, deceased	Department of Mental Health	112,000.00	12,000.00	January 10, 1974
D-619	Joe L. Smith, Jr., Inc. d/b/a Biggs-Johnston-Withrow	Office of the Governor	27,180.96	27,180.96	December 6, 1973
D-676	John H. Brunetti Hardware & Painting	Department of Mental Health	2,264.43	2,264.43	June 26, 1974
D-624	McGuffey, John G.	Board of Regents	360.00	269.00	December 3, 1973
D-548	McIver, William C. & Wilma L.	Department of Highways	3,000.00	1,000.00	October 19, 1973
*D-585c	Monarch Insurance Company	Department of Highways	146.25	146.25	February 7, 1974
D-645a	Monongahela Power Company	Department of Highways	200.66	200.66	December 3, 1973
D-645b	Monongahela Power Company	Department of Highways	26.63	26.63	December 3, 1973

REPORT OF THE COURT OF CLAIMS (Continued)

(2) Approved claims and awards satisfied by payments out of appropriations made by the Legislature for the period July 1, 1973, to June 30, 1975:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
D-645c	Monongahela Power Company	Department of Highways	128.71	128.71	December 3, 1973
D-645d	Monongahela Power Company	Department of Highways	65.04	65.04	December 3, 1975
D-719	Moore, John	Adjutant General	416.38	416.38	June 18, 1974
D-507	Moss, Hans Peter	Department of Natural Resources	300,000.00	21,500.00	October 15, 1973
D-507	Moss, Lenwood J.	Department of Finance & Administration	20,000.00	3,508.43	October 15, 1973
*D-720	Nationwide Mutual Insurance Company	Department of Public Safety	705.59	605.59	November 8, 1974
*D-713	Nationwide Mutual Insurance Company, subrogee of William H. Wright	Department of Highways	272.99	272.99	February 11, 1974
D-579 & D-634	Osborne, Laura	Department of Highways	3,833.05	2,163.00	February 11, 1974
D-681b	Physician Accounts Department, Albert B. Chandler Medical Center, University Hospital, University of Kentucky	Board of Vocational Education, Division of Vocational Rehabilitation	1,375.00	1,375.00	January 24, 1974
D-743	Raines Piano & Organ Center, Inc.	Board of Regents	399.50	399.50	November 14, 1974
D-615	Russell Transfer, Inc.	Department of Finance & Administration	183,496.00	44,825.17	December 4, 1973
*D-599	State Farm Fire & Casualty Company, as subrogee of Sydney C. Bias	Department of Highways	1,809.44	1,500.00	December 5, 1973

REPORT OF THE COURT OF CLAIMS (Continued)

(2) Approved claims and awards satisfied by payments out of appropriations made by the Legislature for the period July 1, 1973, to June 30, 1975:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
*D-768	State Farm Mutual Automobile Insurance Co., subrogee of Robert & Sharon Myles	Department of Highways	105.06	105.06	October 9, 1974
D-662	Swift & Company, Inc.	Department of Highways	633.30	633.30	January 9, 1974
*D-747	Travelers Indemnity Co., subrogee of Catherine M. Belcastro	Department of Highways	122.06	122.06	June 18, 1974
*D-585b	United States Fidelity & Guaranty Company	Department of Highways	22,180.50	11,000.00	February 7, 1974
D-681a	University Hospital, Albert B. Chandler Medical Center, University of Kentucky	Board of Vocational Education, Division of Vocational Rehabilitation	2,029.06	2,029.06	January 24, 1974
D-774	Ware, Jerry W.	Adjutant General	3,015.00	2,060.00	March 26, 1975
D-552	White, Earnest R. and Jo Ann	Department of Highways	15,000.00	7,500.00	October 19, 1973
D-625	Young, Ruth	Department of Highways	8,248.00	7,300.00	January 18, 1974
	TOTALS		$1,712,587.38	$ 414,277.52	

REPORT OF THE COURT OF CLAIMS (Continued)

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

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

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
D-516	Baltimore Contractors, Inc.	Department of Natural Resources	$ 45,778.86	Disallowed	January 8, 1975
D-528	Baltimore Contractors, Inc.	Department of Natural Resources	54,061.75	Disallowed	January 8, 1975
D-722	Bartz, William A. III	Department of Highways	65,000.00	Disallowed	January 16, 1975
D-493	Black Rock Contracting, Inc.	Department of Highways	48,722.46	Disallowed	October 11, 1973
D-613	Boehm, Clinton and Hester	Department of Highways	15,000.00	Disallowed	October 21, 1974
D-613	Boehm, Clinton and Hester	Department of Highways	Petition for Rehearing	Disallowed	November 20, 1974
D-661	Casdorph, Sandra Miller	Department of Public Safety	500.00	Disallowed	May 24, 1974
D-714	Dairyland Insurance Company, subrogee of Stanford T. Allen	Department of Highways	1,151.03	Disallowed	January 16, 1975
D-628	DuPont, Jo Ann Rose	Department of Public Institutions	50,000.00	Disallowed	October 22, 1974
D-630a & b	Edgell, James Dewey & Wilma R.	Department of Highways	25,000.00	Disallowed	January 8, 1975
D-549a	Hopson, Drema Gail, Administratrix of the Estates of Nancy Ann, Angela Jean, deceased, and Dannie Hopson	Department of Natural Resources	25,000.00	Disallowed	August 6, 1973
D-666	McArthur, D. Mae	Department of Highways	500.00	Disallowed	November 14, 1974
D-754	Newcome, Bertha A.	Civil Service System	1,119.00	Disallowed	December 9, 1974
D-660	Runion, Cecil A.	Department of Highways	75,000.00	Disallowed	November 19, 1974

REPORT OF THE COURT OF CLAIMS (Continued)

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

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
D-735	Sanitary Board (The) of the City of Wheeling	Department of Highways	8,544.52	Disallowed	April 2, 1975
D-724	Stevens, Kenneth R.	Workmen's Compensation Fund	1,455.00	Disallowed	June 10, 1974
D-517	Swartzmiller, Clair & Margaret	Department of Highways	900.00	Disallowed	November 8, 1973
D-723	Vance, Oather T.	Department of Highways	600.00	Disallowed	March 26, 1975
D-618	Walker, Charles M.	Department of Highways	211.35	Disallowed	November 8, 1973
D-727	Zain, Emily	Department of Highways	350.00	Disallowed	October 9, 1974
	TOTALS		$ 418,893.97		

REPORT OF THE COURT OF CLAIMS (Continued)

(5) Advisory determinations made at the request of the Governor or the head of a State agency:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
D-705	Dean, E. Keith	Board of Architects	$ 338.36	$ 338.36	February 11, 1974
D-703	Elden, Henry T.	Board of Architects	434.26	434.26	February 11, 1974
D-617	Fairfax County Hospital	W.Va. Racing Commission	4,539.64	4,539.64	October 21, 1974
D-707	Franzheim, L. W., Jr.	Board of Architects	87.46	87.46	February 11, 1974
D-658	Hardesty, Milford, d/b/a Hillsview Floral Co.	Board of Regents	2,500.00	2,500.00	December 12, 1973
D-704	Hunter, G. Cameron	Board of Architects	668.20	668.20	February 11, 1974
D-706	Shaw, Ray A.	Board of Architects	134.04	134.04	February 11, 1974
	TOTALS		$ 8,701.96	$ 8,701.96	

REPORT OF THE COURT OF CLAIMS (Continued)

(6) Claims rejected by the Court but payments made by special appropriation by the Legislature in the 1974 and 1975 Legislative sessions:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
D-827	A. H. Robins Company	Department of Public Institutions	$ 320.00	$ 320.00	January 15, 1975
D-855	Alling & Cory	Department of Public Institutions	72.45	72.45	January 15, 1975
D-878a & b	Ambulatory Care Associates, Inc.	Department of Public Institutions	20.00	20.00	January 15, 1975
D-834	American Can Company	Department of Public Institutions	565.00	565.00	January 15, 1975
D-850	C & P Telephone Co. of West Virginia	Department of Public Institutions	39.76	39.76	January 15, 1975
D-889	The City of Moundsville Water Department	Department of Public Institutions	2,464.19	2,464.19	January 15, 1975
D-830	Columbia Gas of West Virginia, Inc.	Department of Public Institutions	7,283.91	7,283.91	January 15, 1975
D-871	Consolidated Midland Corporation	Department of Public Institutions	210.00	210.00	January 15, 1975
D-805	Cook Motor Lines, Inc.	Department of Public Institutions	9.36	9.36	January 15, 1975
D-890	Crescent Print Shop	Department of Public Institutions	42.97	42.97	January 15, 1975
D-789a	Currence, Wilda F.	Alcohol Beverage Control Commission	775.00	775.00	January 15, 1975
D-826	Dermatology Service, Inc.	Department of Public Institutions	40.00	40.00	January 15, 1975
D-873	Doctors Asaad, Inc.	Department of Public Institutions	100.00	100.00	January 15, 1975

REPORT OF THE COURT OF CLAIMS (Continued)

(6) Claims rejected by the Court but payments made by special appropriation by the Legislature in the 1974 and 1975 Legislative sessions:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
D-877	Doctors Barger and Gordon, Inc.	Department of Public Institutions	1,035.19	1,035.19	January 15, 1975
D-872	Durig, Robert E., O. D.	Department of Public Institutions	801.00	801.00	January 15, 1975
D-863	Economics Laboratory, Inc.	Department of Public Institutions	3,396.00	3,396.00	January 15, 1975
D-806	Electronic Materials Corporation	Department of Public Institutions	62.38	62.38	January 15, 1975
D-657b	Exxon Company, U.S.A.	Department of Mental Health	48.73	48.73	January 14, 1974
D-841a & b	Exxon Company, U.S.A.	Department of Public Institutions	219.71	219.71	January 15, 1975
D-775	Freed, Helen L.	Alcohol Beverage Control Commission	850.00	850.00	January 15, 1975
*D-890	Goldsmit-Black, Inc.	Department of Public Institutions	1,407.75	1,407.75	January 15, 1975
D-789f	Harper, Louise H.	Alcohol Beverage Control Commission	625.00	625.00	January 15, 1975
D-776	Harris, W. M.	Alcohol Beverage Control Commission	850.00	850.00	January 15, 1975
D-869	Hillandale Farms, Inc.	Department of Public Institutions	318.75	318.75	January 15, 1975
D-849	Hoffman-La Roche, Inc.	Department of Public Institutions	526.50	526.50	January 15, 1975
D-887	IBM Corporation	Department of Public Institutions	218.75	218.75	January 15, 1975

*Claim has not been satisfied.

REPORT OF THE COURT OF CLAIMS (Continued)

(6) Claims rejected by the Court but payments made by special appropriation by the Legislature in the 1974 and 1975 Legislative sessions:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
D-803	Independent Dressed Beef Company, Inc.	Department of Public Institutions	369.60	369.60	January 15, 1975
D-817	Industrious Blind Enterprise	Department of Public Institutions	402.12	402.12	January 15, 1975
D-839	Kellogg Sales Company	Department of Public Institutions	1,840.00	1,840.00	January 15, 1975
D-789a	Kimble, Shirley Ann	Alcohol Beverage Control Commission	625.00	625.00	January 15, 1975
D-789k	Kirby, James F.	Alcohol Beverage Control Commission	850.00	850.00	January 21, 1975
*D-846	Kirk's Photo-Art Center	Department of Public Institutions	1,015.08	1,015.08	January 15, 1975
D-858	The Kroger Company	Department of Public Institutions	31.86	31.86	January 15, 1975
D-815	Lever Brothers Company	Department of Public Institutions	1,160.60	1,160.60	January 15, 1975
D-833	Louis Anthony Co., Inc.	Department of Public Institutions	1,545.70	1,545.70	January 15, 1975
D-819	M & W Distributors, Inc.	Department of Public Institutions	46.94	46.94	January 15, 1975
D-789e	Main, Wayne L.	Alcohol Beverage Control Commission	1,000.00	1,000.00	January 15, 1975
D-840	Marion Paper, Inc.	Department of Public Institutions	4,366.74	4,366.74	January 15, 1975
D-857	Marshall County Co-operative, Inc.	Department of Public Institutions	82.13	82.13	January 15, 1975
D-828	McNinch, William, d/b/a McNinch Hardware	Department of Public Institutions	19.10	19.10	January 15, 1975

REPORT OF THE COURT OF CLAIMS (Continued)

(6) Claims rejected by the Court but payments made by special appropriation by the Legislature in the 1974 and 1975 Legislative sessions:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
D-802	Medical Supply Company, Inc.	Department of Public Institutions	13.50	13.50	January 15, 1975
D-835	Merck, Sharp & Dohme	Department of Public Institutions	694.36	694.36	January 15, 1975
D-799	Midland Wholesale Grocery Company	Department of Public Institutions	151.23	151.23	January 15, 1975
D-847	Monroe, Division of Litton Business Systems, Inc.	Department of Public Institutions	32.00	32.00	January 15, 1975
D-814	Mt. Clare Provision Company	Department of Public Institutions	4,459.14	4,459.14	January 15, 1975
D-836	Mutual Wholesalers of Wheeling, Inc.	Department of Public Institutions	5.76	5.76	January 15, 1975
D-854	Myers Drug Store, Inc.	Department of Public Institutions	83.00	83.00	January 15, 1975
D-829	The National Colloid Company	Department of Public Institutions	220.00	220.00	January 15, 1975
D-804	Norteman Packing Co.	Department of Public Institutions	5,652.11	5,652.11	January 15, 1975
D-789b	Norton, Barbara Rae	Alcohol Beverage Control Commission	700.00	700.00	January 15, 1975
D-886	Ohio Valley Drug Company	Department of Public Institutions	30.00	30.00	January 15, 1975
D-860	Ohio Valley Medical Center, Inc.	Department of Public Institutions	32.00	32.00	January 15, 1975
D-818	Pepsi-Cola Bottling Co. of Moundsville, Inc.	Department of Public Institutions	1,057.20	1,057.20	January 15, 1975

REPORT OF THE COURT OF CLAIMS (Continued)

(6) Claims rejected by the Court but payments made by special appropriation by the Legislature in the 1974 and 1975 Legislative sessions:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
D-897	Pfizer Inc.	Department of Public Institutions	3,788.52	3,788.52	January 15, 1975
D-816a, b, c, d & f	Physicians Fee Office	Department of Public Institutions	109.85	109.85	January 15, 1975
D-813	Polis Brothers	Department of Public Institutions	672.80	672.80	January 15, 1975
D-845	Proctor & Gamble Distributing Co.	Department of Public Institutions	266.50	266.50	January 15, 1975
D-832	Rabanal, Aristotle A., M.D.	Department of Public Institutions	15.00	15.00	January 15, 1975
D-825	Reynolds Memorial Hospital	Department of Public Institutions	1,289.07	1,289.07	January 15, 1975
D-789j	Ruddell, Cecile H.	Alcohol Beverage Control Commission	850.00	850.00	January 8, 1975
D-808	Ruttenberg, Oscar, d/b/a Ruttenberg's Store	Department of Public Institutions	149.61	149.61	January 15, 1975
D-807	Schering Corporation	Department of Public Institutions	419.05	419.05	January 15, 1975
D-856a & b	Seung, Hong I., M.D.	Department of Public Institutions	40.00	40.00	January 15, 1975
D-789d	Singleton, Mary Louise	Alcohol Beverage Control Commission	550.00	550.00	January 15, 1975
D-789i	Smith, Donal L.	Alcohol Beverage Control Commission	775.00	775.00	January 15, 1975
D-821	Southern Chemical Company, a Division of Southern Machinery Company	Department of Public Institutions	4,090.78	4,090.78	January 15, 1975

REPORT OF THE COURT OF CLAIMS (Continued)

(6) Claims rejected by the Court but payments made by special appropriation by the Legislature in the 1974 and 1975 Legislative sessions:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
D-861	Standard Brands Incorporated	Department of Public Institutions	948.00	948.00	January 15, 1975
D-824	Standard Brush & Broom Company	Department of Public Institutions	175.98	175.98	January 15, 1975
D-800	State Food Stores, Inc.	Department of Public Instituutions	80.00	80.00	January 15, 1975
D-812	Storck Baking Company, Inc.	Department of Public Institutions	1,699.24	1,699.24	January 15, 1975
D-823	Tri-State Drug Company	Department of Public Institutions	131.46	131.46	January 15, 1975
D-848	The Upjohn Company	Department of Public Institutions	79.05	79.05	January 15, 1975
D-911	Valley Animal Clinic	Department of Public Institutions	89.00	89.00	January 28, 1975
D-820a	Valley Welding Supply Company	Department of Public Institutions	98.58	98.58	January 15, 1975
D-789c	Ware, Aluna J.	Alcohol Beverage Control Commission	550.00	550.00	January 15, 1975
D-789h	Watson, Leonard D.	Alcohol Beverage Control Commission	775.00	775.00	January 15, 1975
D-837	West Virginia Newspaper Publishing Company	Department of Public Institutions	98.70	98.70	January 15, 1975
D-811a	West Virginia State Industries	Department of Public Institutions	25,071.62	25,071.62	January 15, 1975
D-838	Wheeling Electric Company	Department of Public Institutions	1,219.36	1,219.36	January 15, 1975

REPORT OF THE COURT OF CLAIMS (Continued)

(6) Claims rejected by the Court but payments made by special appropriation by the Legislature in the 1974 and 1975 Legislative sessions:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
D-801	Wheeling Hospital, Inc.	Department of Public Institutions	864.20	864.20	January 15, 1975
D-844	Wheeling Wholesale Grocery Co.	Department of Public Institutions	445.00	445.00	January 15, 1975
D-870	Winans Sanitary Supply Company, Inc.	Department of Public Institutions	46.80	46.80	January 15, 1975
D-867	Wyeth Laboratories, Division of American Home Products Corp	Department of Public Institutions	176.00	176.00	January 15, 1975
	TOTALS		$ 94,351.74	$ 94,351.74	

(7) Approved claims and awards satisfied by payment by the State agency through an opinion decided by the Court under the Shortened Procedure: (None).

OPINIONS

TABLE OF CASES REPORTED

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

Opinion issued February 16, 1972

THE FIRESTONE TIRE & RUBBER COMPANY, et al

vs.

DEPARTMENT OF HIGHWAYS

(No. D-227)

T. D. Kauffelt, Counsel for Claimant in Claim No. D-227, *Louis R. Tabit,* Counsel for Claimants in Claims No. D-228 A-M, *George L. Vickers,* Counsel for Claimants in Claims No. D-229 A-N, *Gordon Billheimer,* Counsel for Claimants in Claims No. D-230 A-D, *Thomas C. Sheppard, Jr.,* Counsel for claimants in Claim No. D-232, and *Charles E. Hurt,* Counsel for Claimant in Claim No. D-233.

Thomas P. O'Brien, Jr., Assistant Attorney General, and *Claude Vencill,* Attorney at Law, for the Respondent.

DUCKER, JUDGE:

*These cases are claims for damages to personal property occasioned by flooding when water which was impounded in an old coal mine broke loose and flowed into the business district of Montgomery, West Virginia, on October 11, 1967, and these cases have by agreement of counsel been consolidated for hearing on the legal question of liability.

All of the pertinent and relevant facts are stipulated by the claimants and respondent and they are the same as those contained

* This opinion was inadvertently omitted from Volume 9 of the Court of Claims Reports.

in the opinion of the Supreme Court of Appeals case of *State ex. rel. Firestone Tire & Rubber Co. v. William S. Ritchie, Jr., State Road Commissioner of West Virginia (W. Va.),* 168 S.E. (2d) 287, and further incorporated by reference in *State ex. rel., Phoenix Insurance Co. v. William S. Ritchie, Jr., State Road Commissioner, etc., (W. Va.),* 175 S.E. (2d) 428, and for the convenience of the parties hereto, in more easily understanding the facts upon which our decision is based, these stipulations are inserted totally and verbatum herein as follows:

> On December 28, 1966 the State Road Commission of West Virginia entered into a written agreement with the Mountain State Construction Company, an independent contractor of South Charleston, West Virginia, to do certain highway construction described as "Montgomery-Morris Creek relocation" which involved the relocation of a portion of West Virginia Highway No. 61 and the construction of a ramp extending from relocated highway 61 to the new highway bridge over the C & O Railroad in the City of Montgomery. The ramp was located on or near the foot of a hillside and was part of a tract of land containing about 97.2 acres owned by Woodrow Wilson Jacobs over which portion surface easements or rights of way were being acquired by the State Road Commission in an eminent domain proceeding pending at that time in the Circuit Court of Fayette County. Construction of the ramp required some excavation near the foot of the hillside and some sloping and benching on the hillside. The contractor had completed the work of sloping and benching the hillside and the sub-grade of the ramp when it appeared that wet conditions or seepage of water could cause the base of the ramp to become unstable.
>
> Before the construction of this project was started extensive soil investigations of the hillside and ramp approach area were conducted by the State Road Commission and many core drillings were made. The investigation and core drillings did not indicate any impoundment of water in the hillside in that area and the respondent and no person in connection with this construction had any knowledge indicating that there was any large volume of water located in the abandoned mine entry where some of the core drillings were made.
>
> Several weeks before October 11, 1967 when the claimants'

property was damaged by the large flow of water, the contractor, at the request of the State Road Commission, dug a "test hole" in the area indicated on State Road Commission map as the most northerly "old mine caved in." The purpose of the test hole was to determine where the water was coming from that was seeping into the ramp area. Old mine timbers were found in the bottom of the test hole. Water was found also in the test hole but there were no signs of any pressure and no unusual increase in the amount of water was observed after it was first veiwed and apparently accumulated from seepage through the soil. The hole eventually filled with water but this may have been caused by heavy rains during that period.

It was decided by engineers that the seepage found in the test hole caused the instability of the ramp sub-grade and that at least a 12 inch underdrain should be installed from the test hole area to a drop inlet marked D-5 and located some distance left or north of ramp centerline station 7+75 to carry off the seepage of water and permit stability of the ramp base. A ditch in which to place underdrain pipe was started from the drop inlet to proceed south and across the ramp a total of about 120 feet to reach the test hole. This ditch in the process of construction encountered an old mine entry and timbers near the left edge of the ramp.

All of the work in connection with the excavation or ditching and the test hole was extra work not specifically referred to in the original contract but was taken care of under general terms of the agreement or contract by an "extra work order." The ditch or excavation had proceeded 75 feet to the ramp and across it 35 feet more toward the hillside before the contractor's employees quit work for the day on October 11, 1967. Approximately two and one-half hours later large volumes of water broke loose at some point inside the mountain, came out through one or more of the mine entries and along the ditch and overflowed certain areas of the City of Montgomery, including claimants' property. Claimants' property does not abut or adjoin the Jacobs' property or the State Road Commission's right of way but is located several hundred feet distant from said right of way with two or more city streets and the C & O Railroad lying between the mine entry and claimants' property.

No property was taken from the claimants or claimants' lessors for the right of way or easement in the building of the ramp or relocation of Route 61.

Neither the respondent nor the contractor had any information or knowledge that would indicate in any way that the abandoned mine entry or hillside contained large volumes of water. The abandoned mine entry had been completely covered prior to the excavation and could not be seen from the surface area. The large volume of water that came out of the mine entry on the night of October 11, 1967 was impounded somewhere inside the mountain beyond the area of the construction. Other mine entries were uncovered during the construction in connection with the relocation and building of the ramp without any problems with regard to the flow of water whatsoever. After this extraordinary flow started, several hours of effort were required to stem it by pushing dirt into the hole.

The respondent did not attempt to condemn the mine or minerals in connection with this construction nor did it receive any benefit from the mine or minerals underlying the mine in question. The title to the tract of land wherein the mine was located was owned by Jacobs and only a right of way or easement was obtained from him by the respondent. A right of entry on the land owned by Jacobs had been obtained in an eminent domain proceeding instituted by the respondent and the excavation of the ditch in question was being done by the contractor on the right of way of the respondent.

With all such facts agreed upon, our present consideration is to pass upon the respondent's written motion to dismiss the claims, the points of which motion are as follows:

1. Claimants have failed to show that respondent should in equity or good conscience pay or discharge said claims.

2. The statutory jurisdiction of the Court of Claims is limited to claims against the State of West Virginia and its agencies but does not extend to or embrace claims against State officials such as respondent, William S. Ritchie, Jr.

3. William S. Ritchie, Jr., as State Road Commissioner of West Virginia, named as respondent in the first group of the

above-styled claims, is not the State of West Virginia, nor is he an agency of said State as defined in Section 3, Article 2, Chapter 14, of the Official Code of West Virginia, 1931, as amended, and is not, therefore, subject to the jurisdiction of this Court.

4. The agreed statement of facts clearly shows that the State and its independent contractor, Mountain State Construction Company, were lawfully engaged in a public improvement and that neither was guilty of any unlawful or wrongful acts.

5. The evidence does not show any acts or omissions on the part of the State Road Commissioner, the State Road Commission, the contractor, or their agents or employees that would constitute actionable negligence or ground for a civil action against the respondent.

6. The evidence does not show any act or omission on the part of respondent, or their agents or employees, which a person of ordinary prudence could reasonably foresee might naturally or probably produce an injury or damages such as mentioned in the claims filed in this proceeding.

7. The evidence does not show any act or omission on the part of the respondent, their predecessors, or their agents or employees, contemplated under Code, 14-2-13, as amended.

8. The provision in Section 9, Article III, of the West Virginia Constitution, that private property shall not be taken or damaged for public use without just compensation, does not render the State Road Commission or the State Road Commissioner liable for damages to property from unknown sub-surface bodies of water impounded inside a mountain in an abandoned mine entry unless such sub-surface bodies of water are ascertainable or discoverable from surface indications or other means without sub-surface excavations for that purpose.

9. The respondent is not liable to third persons for damages resulting from negligent acts or omissions of an independent contractor, its servants, agents or employees occurring while performing highway construction work, lawful in itself and not intrinsically dangerous, according to plans and specifications of the State Road Commission.

10. Neither the State Road Commissioner nor the State Road Commission of West Virginia is an insurer against unforeseeable accidents occurring in the area of highway construction.

11. There is no procedure prescribed by general law for compensation for personal property damaged for public use referred to in Section 9, Article III, of the West Virginia Constitution.

12. The evidence clearly shows that the damages complained of in the above-styled claims resulted from an intervening cause not connected in anywise with respondent or the contractor but resulted from the wrongful acts or omissions of the coal mine operator or the owner of the land who caused or permitted the dangerous impoundment of large volumes of water inside said mountain and failed to warn respondent or the contractor of said dangerous impoundment.

Point 1 of the motion is decided by our conclusion as to the other points, except that points 2 and 3 are not, in our opinion, of sufficient merit to be allowed as technical objections to the claims, as it is apparent that the State Road Commission is the real respondent, and not William S. Ritchie, Jr., personally, and further the amendment by claimants of their claims sufficiently eliminates this technicality.

As to points 4 and 5 of the motion, this Court is of the opinion that neither the State nor its independent contractor, Mountain State Construction Company, was guilty of any act which standing alone would be considered unlawful or wrongful, or of any act of negligence but nevertheless, their acts amounted to a trespass which resulted in damage to the claimants and rendered the case actionable.

The questions raised in points 6 and 7 are based upon facts which are true but which are, in our opinion, improper conclusions as to the law.

As to point 8 of the motion, the Supreme Court of Appeals, in the two cases first herein referred to has answered this question when it awarded a writ of mandamus to compel the State Road Commission to institute condemnation proceedings against the owners of the land damaged by the flooding waters from the abandoned mine.

Points 9 and 10 of the motion are wholly inapplicable to the cases in hand.

Point 11 of the motion asserts that there is no statutory law in West Virginia for compensation for personal property damaged for public use referred to in Section 9, Article III of the West Virginia Constitution, which statement is correct, but that does not determine the law applicable in this case. The Supreme Court cases hereinbefore cited granted writs of mandamus to enforce the initiation of condemnation suits to determine compensation for land taken for public use but refused to make the same applicable to personal property because the Constitution was not "self executing," as there was no statute of the State prescribing the procedure for such purpose. Those cases cited, and the Firestone Rubber Company quoted, with approval, the doctrine as stated in *Johnson v. City of Parkersburg,* 16 W. Va. 402, to the effect that the Constitution "forbids damage to private property and if no remedy is provided by the Constitution or by statute, the common law which gives a remedy for every wrong will furnish the appropriate action." In *Mason v. Harper's Ferry Bridge Co.,* 17 W. Va. 396, 106 S.E. 644, the Court held that an injunction was permissible to enforce the payment of damages suffered by reason of the lessening in value of a ferry franchise. From these decisions, it seems that the questions turned upon the nature of the relief sought, namely, a mandamus to compel the parties to resort to the remedy of eminent domain proceedings provided by statute as to land, but not as to damage to personal property because there was no such statutory procedure. These decisions do not overrule the earlier decisions to the effect that the common law in its usual procedure provides for actions of trespass and treaspass on the case. Of course, an action of trespass against the State cannot be maintained by the claimants herein in any other courts of the State because of the State's constitutional immunity, but such defense of constitutional immunity is not available in this Court. It would seem to appear that the Supreme Court has practically said in the majority and dissenting opinions in the cases first cited herein that this Court is the proper place of jurisdiction in these cases. These claims are clearly in tort, ex delicto, and as such are within our jurisdiction. Accordingly, point 11 of the motion is not well taken.

Point 12 of the motion to the effect that the damages resulted from the wrongful acts or omissions of the coal mine operator or the

owner of land who caused or permitted the dangerous impoundment of large volumes of water inside the mountain and failed to warn respondent or the contractor thereof could possibly under some circumstances be well taken except for the fact that here there was no damage occasioned by the impoundment, which was not in itself unlawful; the direct and proximate cause of the damages here was the acts which caused the release of the water.

The real answer to all the points raised by the motion is that respondent's acts amounted to a trespass causing the damages alleged by the claimants, and although there was no negligence on the part of the respondent and the consequences were not reasonably foreseeable, the damages were done as a consequence of the work done by the respondent, and this case is not one of damnum absque injuria, but is one that is compensable as being the result of an act done by the respondent and as being one which was the proximate cause of the resulting damage.

In accordance with the foregoing, we are of the opinion to, and do hereby overrule in its entirety the motion of the respondent, and order the above designated claims for separate hearings upon the facts and merits of each case.

Motion to dismiss overruled.

Opinion issued August 6, 1973

DREMA GAIL HOPSON, ADMINISTRATRIX OF THE ESTATES OF NANCY ANN HOPSON AND ANGELA JEAN HOPSON, DECEASED, AND DANNIE HOPSON, INDIVIDUALLY,

vs.

DEPARTMENT OF NATURAL RESOURCES

(No. D-549-a)

Glen Dial Ellis for the claimants.

Thomas P. O'Brien, Jr., and *Henry C. Bias, Jr.*, Assistant Attorneys General, for the respondent.

JONES, JUDGE:

This is a claim by Drema Gail Hopson, Administratrix of the

Estates of Nancy Ann Hopson and Angela Jean Hopson, deceased, and Dannie Hopson, individually, against the West Virginia Department of Natural Resources for the wrongful deaths of two infant children, as well as for damages "in their wages, property and persons", all in the amount of $25,000.00. The claim arises out of the Buffalo Creek Flood Disaster of February 26, 1972, in Logan County, West Virginia; and the claimants contend that the deaths were the proximate result of the wanton and willful negligence of the respondent resulting in the rupture of a water impoundment known as the Buffalo Creek Dam. The issue before the Court for decision was raised by a motion on behalf of the respondent to dismiss this claim as being barred by two releases executed by the claimants.

The death claim release recites that the claimants "* * * for the sole consideration of Twenty Thousand Four Hundred Eighty-Three Dollars and Two Cents ($20,483.02) in hand paid, the receipt and sufficiency of which is hereby acknowledged, do * * * release, acquit and forever discharge Buffalo Mining Company, The Pittston Company, Pardee Land Company, * * * and *as well all other persons, firms and corporations whatsoever,* of and from any and all claims, demands, damages, injuries, losses, expenses, suits, actions or causes of actions and any and every other matter or thing related to, associated with, or in any manner arising out of the death of said decedents as a result of that certain happening or event which took place on or about February 26, 1972, in the watershed of Buffalo Creek * * * generally known and referred to as the Buffalo Creek Flood Disaster, all to the end that *all claims* which the undersigned now has or have, has or have had, or may in the future have in the premises by reason of the death of the aforesaid decedents, whether arising under the Wrongful Death Statutes of the State of West Virginia, or otherwise, *shall be, as they are hereby specifically declared to be, extinguished now and forever.* * * * The undersigned do(es) further declare that he, she or they is or are each over the age of twenty-one (21) years, and *that this release is executed* by him, her or them *upon the express understanding that the same shall operate to extinguish, and the undersigned hereby declare(s) extinguished, now and forever, any and all claims* which the undersigned now has or have, have had, or may in the future have in the premises." (Emphasis supplied.) The other release, which recites a consideration of $2,100.00, employs substantially the same

wording except that it is made to apply to personal property.

The claimants rely first upon Section 12, Article 7, Chapter 55 of the official Code of West Virginia of 1931, as amended, which reads as follows:

> "A release to, or an accord and satisfaction with, one or more joint trespassers, or tort feasors, shall not inure to the benefit of another such trespasser, or tort feasor, and shall be no bar to an action or suit against such other joint trespasser or tort feasor, for the same cause of action to which the release or accord and satisfaction relates."

and further, the claimants contend that the words in the release "and as well all other persons, firms and corporations whatsoever," do not apply in this case for the reason that the State is not a person, firm or corporation.

There appearing to be some confusion in the minds of counsel about this Court's position upon an aspect of this case, it may be well at this time to point out that where payments have been made by one or more joint tort-feasors, other joint tort-feasors will be given credit for such payments in satisfaction of the claim. There are a number of decisions of the Supreme Court of Appeals of West Virginia supporting this position, the latest being the case of *Rose A. Tennant, Guardian, et al. v. Craig,* ..... W.Va. ....., 195 S.E.2d 727 (1973). In that case the Court said: "As noted by the defendant, the plaintiffs are entitled to only one satisfaction for the injuries suffered as a result of the accident. The compromise settlement with Spitznogle is a part of such satisfaction. This Court said in Point 2 of the Syllabus of *Hardin v. New York Central Railroad Company,* 145 W.Va. 676, 116 S.E.2d 697, "Where a payment is made, and release obtained, by one joint tort-feasor, other joint tort-feasors shall be given credit for the amount of such payment in the satisfaction of the wrong. In other words, payment by one joint tort-feasor under a compromise settlement is satisfaction *pro tanto* as to all." (Citations omitted.) In this case, the claimants were paid $20,483.02 for the death claims and $2,100.00 for damages to household goods and other personal property, a total of $22,583.02, leaving $2,416.98 of the amount claimed in controversy.

In our opinion Code 55-7-12 does not apply in this case as the writings signed by the claimants clearly were intended to and did release the specifically named tort-feasors and others descriptively

named by the words "all other persons, firms or corporations whatsoever". In the context of this case the State of West Virginia may either be a person or a corporation. The prime purpose of the statute creating the Court of Claims was to permit the State to be sued as a private person or corporation within this limited jurisdiction. Plainly it follows that if the State may be sued as a person, it may be released as a person. In *Whitney v. State Board of Education et al.,* 8 Ct. Cl 45, this Court said: "To constitute a moral obligation of the State justifying the appropriation of public funds, it is necessary that an obligation or duty be imposed on the State, by Statute or contract, or that wrongful conduct be shown, which would be judicially recognized as legal or equitable in cases between private persons. *State ex rel. Cashman v. Sims,* 130 W.Va. 430, 43 S.E.2d 805."

The Supreme Court of the United States has defined a State as a political corporate body which can act only through agents, and can command only by laws. *Poindexter v. Greenhow,* Va. 5 St.Ct. 903, 114 U.S. 27, 29 L.Ed. 185 (1884). The Supreme Court in the case of *Chisholm v. Georgia,* 2 Dall. 419, 447, 1 L.Ed. 440, 452 (1793), stated "* * * any body politic (sole or aggregate) whether its power be restricted or transcendent, is in this sense a 'corporation'. The King, accordingly, in England is called a corporation. 10 Co. 29 B. So also, by a very respectable author (Shepard, in his abridgment, 1 Vol. 431) is the Parliament itself. In this extensive sense, not only each State singly, but even the United States may without impropriety be termed 'corporations' * * *". At page 455 of that opinion the Court further described a State to be "* * * a complete body of free people united together for their common benefit, to enjoy peacefully what is their own, and to do justice to others. *It is an 'artificial' person.* (Emphasis added.) It has its affairs and its interests: It has its rules: It has its rights; And it has its obligations . . . ."

In the mandamus proceeding of *State ex rel. Myrtle Prince et al v. West Virginia Department of Highways,* ____ W.Va. ____, 195 S.E.2d 160 (1972) in which three separate releases were executed and delivered to three separate contractors releasing all claims for damages to real estate resulting from the construction of a highway and forever discharging these defendants, their servants, agents, successors and assignees *and any and all other persons, firms, associations and corporations* from any and all actions, causes of action, claims and demands, damages, costs, expenses and compensation on

account of or in any way growing out of any injuries or property damage resulting from the construction of such highway, the Court held that the petitioners were not entitled to a Writ of Mandamus even though the defendant, West Virginia Department of Highways, was not specifically named in any of said releases, for the reason that the releases disclosed a full satisfaction of all the petitioners' claims. While the question was not discussed in the opinion, the Court obviously included the West Virginia Department of Highways within the description "any and all other persons, firms, associations and corporations".

In view of the broad and inclusive language of the releases executed by the claimants and the authorities cited herein, the Court is of opinion to sustain the respondent's motion to dismiss this claim. The releases acknowledge the "sufficiency" of the consideration, release the named joint tort-feasors "and as well all other persons, firms and corporations whatsoever", recite the express understanding that the releases "shall operate to extinguish" all claims and include a declaration by the claimants that all claims are thereby "extinguished, now and forever". The language of these releases clearly shows the intention of the parties to release all of their claims arising out of the Buffalo Creek Flood Disaster, for all damages against all beings or entities whatsoever, for all times, and that such releases should inure to the benefit of the State of West Virginia.

Accordingly, the motion of the respondent to dismiss this claim is hereby sustained, and the claim is hereby dismissed.

Judge Petroplus did not participate in the consideration or decision of this case.

Claim dismissed.

Opinion issued October 11, 1973

BLACK ROCK CONTRACTING, INC.

vs.

DEPARTMENT OF HIGHWAYS

(No. D-493)

Stephen A. Weber for the claimant.

Dewey B. Jones for the respondent.

JONES, JUDGE:

The claimant, Black Rock Contracting, Inc., formerly Andersons'-Black Rock, Inc., filed this claim for extra compensation in the

amount of $48,722.46 arising out of highway construction under a contract with the respondent, Department of Highways, formerly State Road Commission. The project embraced the Camden Avenue approach to Interstate 77 in the City of Parkersburg, 2.133 miles in length, with the controversy bearing mainly on the western end of the eastbound lane for a distance of about 825 feet, which required the removal of the old Camden Avenue pavement. The overall construction was estimated to cost $2,196,951.80, including 333,800 cubic yards of unclassified excavation at $1.25 per cubic yard, amounting to $417,250.00. The prime contract was entered into on May 20, 1966, and work was to be completed by April 1, 1968. The concrete paving, estimated to cost $759,746.88, was subcontracted by the claimant to Chapin & Chapin, Inc.

The claim is in two parts: One for additional compensation in the amount of $5,152.50 for unclassified excavation on a portion of the project where an unstable condition was found under the old Camden Avenue pavement, requiring undercutting approximately five feet below the grade shown on the original plans; and the other for damages in the amount of $42,463.42 allegedly resulting from delays caused by the failure of the respondent to make test beams for the purpose of determining the readiness of the new pavement to support traffic and the requirement of the extra undercutting.

The subcontractor, Chapin & Chapin, installed a central concrete batch plant on the project, and started its paving operation on the westbound lane on April 29, 1968. The claimant also was on the job but excessive rains made practically all of the month of May unfit for either grading or paving. About the end of May or the first of June it became apparent that the material under old Camden Avenue was unsuitable and that undercutting would be necessary. The parties being in agreement, the undercutting was commenced by the claimant on June 3. Their agreement was reduced to writing under date of June 6, 1968, and a supplemental contract was signed by the parties. Estimates set out in the contract were for 1,900 cubic yards of unclassified excavation and 1,900 cubic yards of borrow excavation, both at the unit price of $1.25. By letter dated June 24, 1968, the claimant requested the respondent to cancel and not process further the executed supplemental agreement on the ground that conditions were much more difficult than anticipated. The respondent refused to reconsider the matter. The undercut excavation

was completed on June 21, 1968, but while it is not made clear in the record, it is apparent that this part of the project still required extensive preparation for paving as on June 20, 1968, Chapin & Chapin poured its last central or batch mix concrete and started removal of its batch plant. The paving subcontractor no longer had continuous work for the equipment, the undercut area not being ready, and the equipment was needed elsewhere. The paving was completed with ready-mix concrete purchased from a local supplier. The project was not completed until June, 1969, more than a year beyond the completion time specified in the contract, but no penalty was assessed against the claimant.

The claimant contends that the undercutting required by the respondent constituted a "changed condition" sufficient to entitle the claimant to additional compensation. Undercutting (excavation below the level specified in the original plans, usually required because of an unstable condition not anticipated) is not uncommon, and on this project there were a number of small undercuts besides the substantial one in question. Under the terms of Section 1.4.2. of the Standard Specifications for Roads and Bridges, if this undercut did not increase the quantity of unclassified excavation, a major contract item, by 25%, the claimant was not entitled to any alteration of the contract. In this case the additional excavation, 2061 cubic yards, slightly above the estimate of 1,900 cubic yards, amounted to less than 1% of the total; and if borrow material had not been required, a supplemental agreement would not have been necessary. There was no provision for borrow material in the original contract, so a supplemental agreement was prepared, including both excavation and borrow, and the same was executed and remained in effect, despite protests by the claimant.

The Court is constrained to believe that the claimant's letter of June 24, 1968, written after completion of the undercut and asking for cancellation of the supplemental agreement, was triggered by two things, Chapin & Chapin's decision on or about June 20, 1968, to disassemble and remove its batch plant, and the break in a water line at about the same time. The water line previously had been relocated by the claimant under the terms of the contract. The break flooded the area and resulted in considerable expense and delay. The claimant complains that this would not have happened if the undercut had not been required, but the claimant knew the exact

location of the line, and the Court believes that the break would not have occurred but for the negligent operation of the claimant's equipment. The claimant complains of delay caused by other utility lines during the undercut, but there is nothing in the record to prove delay attributable to any utility lines except the water line and there is no adequate proof that the claimant ever did anything more with regard to utility lines than it was required to do under the terms of its contract.

With respect to test beams, the respondent perhaps could have been more flexible and accommodating, but there is absolutely nothing in the contract which would require test beams, and the respondent chose to hold the claimant to the 14 days' curing time provided by Section 2.36.3 (S) of the Plans and Specifications. We find no assurance in the record that test beams would have permitted traffic to move over the pavement within three to five days as asserted by the claimant, nor that such a speed-up, if accomplished, would have meant that the central batch plant would have remained on the job.

The claimant attempts to make a point of the fact that the subject undercut was not provided for in the contract. Obviously, it was not; had the required excavation been shown on the original plans it would not have been an undercut. While the undercut was not contemplated at the time the contract was executed, we learn from the record that unstable material frequently is found under old pavement. The extra work did delay the project, but it did not result from a "changed condition" for which the respondent was accountable. Bad weather disrupted the claimant's plans; and the claimant's inability to adapt its schedule to unavoidable delays was an important factor. The Court recognizes that some excavation is more expensive than other and that ready-mix concrete is more expensive than batch mix, but the State does not guarantee a profit or the indemnification of a loss, and such additional costs do not justify additional compensation to this claimant unless there is a breach of contract or wrongful delay on the part of the respondent.

All complaints of any consequence in this case arise from the undercut, which was work required to be done by the claimant and not brought about or aggravated by anything done by the respondent. All work was paid for under the terms of the contract documents. The burden of proof in this case is on the claimant, and careful study

and consideration of the evidence does not pursuade the Court that there is sufficient proof in the record to support an award.

CLAIM DISALLOWED.

Opinion issued October 15, 1973

RICHARD M. FORNEY, JR., an infant,
who sues by Helen Forney,
and HELEN FORNEY, individually.

vs.

DEPARTMENT OF FINANCE & ADMINISTRATION
and DEPARTMENT OF NATURAL RESOURCES

(No. D-506)

HANS PETER MOSS, an infant,
who sues by Lenwood J. Moss, his parent,
and LENWOOD J. MOSS

vs.

DEPARTMENT OF FINANCE & ADMINISTRATION
and DEPARTMENT OF NATURAL RESOURCES

(No. D-507)

W. Dale Greene, Preiser & Wilson, Attorneys for the Claimants.

Henry C. Bias, Jr., Assistant Attorney General for the Respondents.

DUCKER, JUDGE:

The Claimants, Hans Peter Moss and Lenwood J. Moss, Richard Madison Forney, Jr. and Helen Forney, all of Berkeley Springs, West Virginia, allege damages in the amounts of $300,000, $20,000, $200,000, and $10,000, respectively, against the Department of Finance and Administration, the Department of Natural Resources of

the State of West Virginia, as damages resulting from a collision of a 1965 Honda motorcycle owned and operated by Forney, having Moss as a passenger, with a 1967 Plymouth Sedan automobile owned by the State of West Virginia and operated by Arthur Hadley as an agent of the Department of Natural Resources, on September 13, 1969 at about four o'clock in the afternoon on State Route 9, approximately two miles east of Berkeley Springs, in Morgan County, West Virginia. The damages alleged are almost entirely for personal injuries temporary and permanent with the amount of damages to the wrecked motorcycle.

These claims, having arisen in the same accident and being based upon the same facts as to liability, have been heard and considered together as consented to by all the parties.

The accident occurred on a straight stretch of the road at a point where there was a driveway entrance to the home and property of Thomas Maconaughey on State Route 9, the driveway entrance being approximately 175 yards easterly from the top of a low hill curve in the road and about the same distance from the point where the car driven by Arthur Hadley entered Route 9 from a side road easterly of the Maconaughey driveway, that is to say the place of the accident at the Maconaughey driveway was practically at the middle point in a straight-away part of Route 9 between the curve at the west and the side road at the east, affording the riders on the motorcycle and the driver of the Plymouth automobile about the same viewable distances on the road as they approached the point of entrance to the Maconaughey driveway.

The testimony of Hans Peter Moss, age 21, is primarily to the effect that after the motorcycle rounded the curve at the top of the hill and proceeded down along the straightway of the road he noticed a car coming up the road toward the motorcycle and then suddenly turn into the east lane of the road in which the motorcycle was traveling, to enter the Maconaughey driveway; that Forney "hit his brakes" and "swerved to the left to avoid the car but struck the back part of the (Hadley) car behind the right wheel"; that he didn't see any sign of an intended turn by the Plymouth driver; that the speed of the motorcycle was between 40 and 50 miles an hour; and that he was thrown from the motorcycle to the gravel on the opposite side of the road.

The testimony of Richard Forney, age 21, is substantially the same as Moss. He said he saw the Plymouth car approaching him and the driver look to the left and then he, Forney, "left off the gas to drift because I (he) didn't know what he (Hadley) was going to do; I thought maybe he might be going to make a left hand turn, so I left off and then he looked back up the hill, so I just kept drifting; as I got down closer, the car just made a left-hand turn in front of me". Forney said he was "looking right at the vehicle" and no warning signal was given or any left turn signal light operating on the Plymouth before it turned across the road to enter the driveway about forty feet in front of the motorcycle.

Arthur Hadley, of Berkeley Springs, West Virginia, a conservation officer in the Department of Natural Resources for twenty years, the driver of the Plymouth automobile involved in the accident, testified substantially as follows: that on the date of the accident he was returning to Berkeley Springs on State Route 9 from a fire that had been reported to him, and, after having come out of Price Ridge Road about an eighth of a mile east of the Maconaughey farm, he was traveling about thirty miles an hour up a moderate incline westerly toward the Maconaughey farm and put on the signal to turn left and when he got to the lane east of the Maconaughey house he looked up the road and then back through the car mirror but didn't see any vehicles of any kind and made his turn to go into the Maconaughey driveway; that when he was 300 feet away he activated his directional signals which he said were working and made the left turn into the driveway; that after he got into the driveway with the front part of his car he saw a "blur and something coming to my right" and "I felt a thud"; that he was traveling ten miles an hour when he turned toward the driveway, the car was almost completely in the driveway when struck by the motorcycle; that three wheels were off the driveway as the collision knocked the car sideways; that it was a "real bright sunny day" and the sun was "right square in my eyes" and that he was wearing sun glasses and that he saw nothing before making the turn, no traffic in front or back; and that he didn't move the car after it was struck.

Lt. Woodrow W. Parsons, a conservation officer whose headquarters were at Romney, West Virginia, testified that he saw the motorcycle at Spiach's Garage, Berkeley Springs, the day after the accident and that he saw the needle on the speedometer stuck at 65

miles per hour, but he didn't know what could have happened to the needle as the glass of the speedometer was intact.

Robert Workman, a cycle shop mechanic, testified that a Honda motorcycle has a free-floating speedometer with no real accuracy because it knocks up and down when jolted, and that the needle will break loose from its gear on an impact. On cross examination the witness admitted that if there were something to block the needle of the speedometer and prevent it from returning to the proper speed, the needle may have indicated the speed at the time of impact. Except for such weight as may be given to the evidence as to the needle of the speedometer, there is no contradiction of the evidence of the claimants that the speed of the motorcycle was between forty and fifty miles an hour in a 55 miles an hour speed zone. The only witness to the collision other than the claimants and Hadley was Thomas Leo Maconaughey, who was 13 years old at the time of the accident and who testified that he was 30 to 35 yards away from the road in the Maconaughey yard helping his father saw wood, and that he saw the Hadley car turning into the driveway and the motorcycle strike the right rear end of the car; that the motorcycle was traveling south of the center of the eastbound lane of the road; that the car was not moved until the State Police arrived; that the front part of the Hadley car was in the driveway, the right rear bumper was out on the highway; and that the car "was knocked sideways".

From the foregoing recital of the testimony and the facts ascertained or ascertainable therefrom, we must first determine whether there is or is not liability on the part of the respondents. Unfortunately, for the respondents, the only substantial testimony in support of the defense is the testimony of the driver of the Plymouth automobile and the substantiality of the evidence as to the speedometer needle. As to the latter, we cannot consider it of sufficient certainty to be of real value. So the real question is whether the testimony of Hadley is sufficient to overcome or disprove the evidence of Moss and Forney. The testimony of Moss and Forney is positive while the testimony of Hadley opens serious questions. While Hadley testified he gave the signals indicating that he was going to turn to the left, he said that it was "a real bright sunny day" and "the sun was right square in my (his) eyes" even though he had on sun glasses, and that he looked up and down the road and saw nothing coming. He couldn't verify

whether the signals were working outside the car. It must be remembered that both the motorcycle and the car first entered the 350 yard straightaway stretch of Route 9 at about the same distance from the place of the collision, and that with 175 yards for the Hadley car to travel before turning into the driveway, it seems reasonable to the Court that Hadley could have seen the motorcycle coming toward him at most any rate of speed, certainly at a lawful rate. We do not doubt the fact that Mr. Hadley didn't actually see the approaching motorcycle, but the bright sunlight must have been a major factor in preventing him from seeing the oncoming motorcycle. The fact that he didn't see is not sufficient to release him of responsibility, because he was obligated, according to the law, to see that the road was clear for a turn from his line of traffic into and across the opposite line of traffic to enter a private driveway.

We think the law as stated in *Brake* v. *Cerra,* 145 W.Va. 76, 112 SE 2d 466, is clearly applicable to this case where the Court said:

> "Whether the plaintiff did look as he testified he did or whether he did not look as the witness testified he did not, before he started to cross the street, the undisputed evidence is that he did not look *effectively,* for if he had he would have seen the headlights of the approaching automobile. . .".

There is no substantial evidence that the motorcycle was out of its proper line of traffic. While motorcycle traffic is often undesirable and quite jeopardizing and annoying to other traffic, travel by such means is not unlawful, and there does not appear here any substantial evidence to suggest that the claimants were not operating their motorcycle within legal requirements and in a reasonable manner.

The law especially applicable in such matters is contained in Chapter 17C, Article 8, Section 8, which provides as follows:

> "No person shall . . . . . turn a vehicle to enter a private road or driveway or otherwise turn a vehicle from a direct course or move right or left upon a roadway unless and until such movement can be made with reasonable safety. No person shall so turn any vehicle without giving an appropriate signal in the manner hereinafter provided in the event any other traffic may be affected by such movement."

From all the evidence we must conclude that the respondents' agent, Hadley, did not make the turn into the Maconaughey driveway in a reasonably safe manner, and that the claimants are entitled to recover substantial damages resulting from such negligence.

The evidence shows that the claimant, Forney, suffered severe injuries which included a compound fragmented fracture of the right tibia and fibula, an extensive evulsed large laceration of the thigh and right knee, and a fracture of his right collarbone (clavicle). He spent twenty-eight days in the hospital and four or more weeks in a wheelchair and then on crutches. While the extent of his impairment is not entirely calculable, nevertheless it constitutes permanent injury. His physician's charges amount to $355.00, his hospital expenses $1238.24, and the loss of his motorcycle $450.00, making a total of $2,043.24. The evidence shows that the claimant, Moss, suffered severe injuries which included a fracture of the midshift of the right femur, a comminuted fracture of the right tibia and fibula, and multiple lacerations of the right lower extremity, heel and scalp. Likewise the extent of his impairment while not entirely calculable, it amounts to some permanent injury. His physician's charges were $1156.00, less a $25.00 unrelated charge, or $1131.00, his hospital expenses $1489.54, $34.00, $239.69, and $614.20, making a total of $3508.43.

Accordingly, we award Helen Forney, mother of Richard M. Forney, Jr. the amount she incurred of the doctor's and hospital expenses of Richard M. Forney, Jr., namely $1593.24; Lenwood J. Moss, father of Hans Peter Moss, the amount he incurred of the doctor's and hospital expenses, namely, $3508.43; Richard M. Forney Jr., who is now of age, $14,900.00, which includes $450.00 for his motorcycle; and Hans Peter Moss, who is now of age, $21,500.00.

Awards: Helen Forney: $1593.24

Lenwood J. Moss: $3508.43

Richard M. Forney: $14,900.00

Hans Peter Moss: $21,500.00

Opinion issued October 15, 1973

GENERAL TELEPHONE COMPANY
OF THE SOUTHEAST

vs.

WEST VIRGINIA DEPARTMENT OF HIGHWAYS

(No. D-616)

Michael J. Mulligan, Attorney at Law For the Claimant.

Donald L. Hall, Attorney For the Respondent.

DUCKER, JUDGE:

General Telephone Company of the Southeast, a corporation, claims damages to its property in the amount of $235.40 against the West Virginia Department of Highways on account of the latter's blasting work to widen the state road at the intersection of Routes Nos. 15 and 15/1 at Charles Town, West Virginia, on October 30, 1972.

The facts alleged by the Claimant are admitted by the Respondent, such facts being that the blasting necessitated the replacement of 233 feet of telephone cable which with the labor costs incurred in placing, repairing and removal amounted to the amount alleged.

As the admitted facts show the damages were caused by the negligence of the respondent in the matter, we are of the opinion to and do hereby award the claimant the sum of $235.40.

Award of $235.40

Opinion issued October 19, 1973

WILLIAM C. McIVER and
WILMA L. McIVER

vs.

DEPARTMENT OF HIGHWAYS

(No. D-548)

EARNEST R. WHITE and
JO ANN WHITE

vs.

DEPARTMENT OF HIGHWAYS

(No. D-552)

Richard K. Swartling, Attorney at Law, *Ronald R. Hassig,* Attorney at Law for the Claimants.

Donald L. Hall, Attorney at Law, Department of Highways, for the Respondent.

DUCKER, JUDGE:

Claimants, William C. McIver and Wilma L. McIver, husband and wife respectively, and Earnest R. White and Jo Ann White, husband and wife respectively, owners of adjoining parcels of land situate on the west side of State Route No. 2, approximately 1½ miles south of the City limits of New Martinsville, West Virginia, allege damages in amounts of $3000.00 to the McIver property, and $15,000.00 to the White property, resulting from slippage of their properties in 1971 allegedly caused by negligence of the respondent in the latter's maintenance of Route No. 2 adjoining claimants' property, in that during prior years the respondent placed layer upon layer of asphalt and other road materials on the highway to keep the highway in a level and passable condition and that by so doing the weight of the road caused the land of the claimants to slide and destroy the houses of the claimants.

The respondent moved to dismiss the claims on the grounds that condemnation proceedings were the only proper remedy, and by its

answer it denied any negligence on its part and alleged that the slide was not caused by it but was due to a vein of "gumbo" in the land.

As the same factual situation, except as to the respective amounts of damages, existed as to both of these claims, it was agreed that they could be, and they were, heard together by the Court.

As to the motion to dismiss on the ground that claimants have an adequate remedy at law by way of mandamus to compel the respondent to initiate condemnation proceedings, we are of the opinion to, and do overrule the same, because the damages were in effect the result of a single trespass which is not a continuing one but one which can be definitely determined as to damages and does not amount to a "taking" of the land, as is required for condemnation.

The evidence in the cases consists of the testimony of the two male claimants and five former employees of the respondent, namely Berner Phillips, Lester Kennedy, Edward Loehr, Yonsell Eller and Victor Pyles. The testimony of all five of the former employees were substantially, in varying degrees, to the same effect, that during their employment with the Department of Highways, there was constant need of repair of the road at the place in question, even as much as four or five times some years, building it up with tar and gravel and sometimes asphalt; that at one time there was at that location a street car track; that the road would keep breaking down and in a "pretty wet season" before the filling was put in, the road had gotten so bad there were several accidents over it; and that several times material had to be put in two or three times a week. The testimony as to the accumulated thickness of the asphalt and other paving material put in from time to time varied from eleven to twenty feet. After the slide which damaged the claimants' houses, the respondent drove heavy piling all along the area where the slide had occurred, and since then there has been no further movement of the land.

The respondents' evidence consists entirely of the testimony of George P. Sovick who for the past eleven years has been chief engineer of the right-of-way department of the respondent, and his opinion was that the slide which damaged the claimants' properties was caused by a two inch streak or seam of gumbo underlying the lands of the claimants. He discovered the gumbo cropping out along the ditch adjacent to the railroad track along the back side of the property, and he concluded that with the natural drainage down

upon and affecting the property, the gumbo, a fine loose material, which, when it gets wet, is slick as grease and causes most of the slides, was the proximate cause of the slide which damaged the claimants' premises. Mr. Sovick also testified as to the various phases of the damages done to the building of the claimants.

On the day of the hearing of this case the Court with counsel for the parties personally viewed the lands and houses involved in these claims, so that evidence of the claimants and respondent could be better understood.

From the evidence of the claimants and the view taken it appears to the Court the claimants have clearly proved that the highway at that place required most unusually extra maintenance and repair because of its base being upon unstable terrain and foundation, and that the cause of the cracking to the extent of ten to twelve inches wide, disintegrating, the slipping and breaking should have been ascertained long before the occurrence of the slide which affected claimants' property occurred. The testimony of Mr. Sovick is most credible and the gumbo may have been the underlying cause of the sliding characteristic of the land at that place and if the probability of a slide had not been forseeable for a long time before it occurred, we could accept Mr. Sovick's theory and conclusion. The instability of the land embraced in the right of way should not have been overlooked by the respondent, and it is our conclusion that the respondent has been negligent in its maintenance of the road by continuing to make insufficient additions to the surface of the roadway instead of timely correcting the road structure to avoid the pressure of the hillside down upon and against the claimants' properties. As evidenced by the fact that the condition was corrected by the installation of piling in 1971, the correction should have been considered necessary and done before the damage to claimants' property was done. We are of the opinion that the respondent should have forseen the probability of the result which occurred and was negligent in not providing against such result and the claimants are entitled to recover such reasonable damages they have suffered.

The evidence is not very satisfactory as to the values of the properties damaged. The McIver property damage was testified to as being $2500 to $3000 and the White property damages as being $7250 at normal market value in 1968. These values include the

land which may or may not retain their original values. The Court is of the opinion that there is little left of value in the houses or improvements. Having viewed the premises as well as considered the evidence, we can only estimate what would be reasonable amounts to allow the claimants as their damages.

The Court is of the opinion to and does hereby award the claimants William C. McIver and Wilma L. McIver the sum of $1000, and the claimants Earnest R. White and Jo Ann White the sum of $7500.

Award to William C. McIver and Wilma L. McIver $1000.

Award to Earnest R. White and Jo Ann White $7500.

Opinion issued November 8, 1973.

JOHN A. BACON

vs.

DEPARTMENT OF HIGHWAYS

(No. D-623)

Claimant appeared in person, without counsel.

Donald L. Hall, Esq. for respondent.

PETROPOLUS, JUDGE:

The claimant, John A. Bacon, formerly employed by the State Road Commission of the State of West Virginia, now the Department of Highways, respondent, as a construction engineer, seeks to recover the sum of $241.83, for living expenses incurred during the months of July and August, 1969, while he was living in Huntington, West Virginia, and performing his duties there under an assignment by the State Road Commission.

The following factual situation, as revealed by the record, gives rise to this claim. On July 1, 1969, the claimant was permanently transferred from the Wheeling Office of the State Road Commission to Huntington. His family remained in Wheeling until some time in

September of 1969 because of difficulties encountered by the claimant in locating a suitable place to live in Huntington because of a housing shortage. It had been the practice of the State Road Commissioner to allow a transferred employee temporary living expenses for a period of thirty days after a permanent transfer notwithstanding that certain travel rules and regulations promulgated by the Governor's office stated that no expenses will be allowed which are incurred at the official station of any official or employee of the State. The administrative practice of allowing expenses for a period of thirty days in addition to paying the reasonable expenses incurred by an employee in moving his household furniture, effects, and immediate family as a result of the reassignment, apparently was not specifically authorized by the statute providing for payment of reasonable traveling expenses and moving expenses of transferred employees (W. Va. Code, Chapter 17, Article 2-A, Section 4a). The legality of the payment of rent and board by the State for a period of thirty days after reassignment has not been raised in this case by the State and this Court has not been requested to render an opinion thereon, both parties having tried the case on the assumption that said payment is within the purview of the statute and advantageous to and for the best interest of the State. In any event, it has been a long established practice of the Department of Highways to make this allowance.

The problem arises in this case because of the difficulty of the State employee to find a permanent home for his family in an area where there was a critical housing shortage. The claimant seeks reimbursement in the amount of $145.83 for a period extending from June 27, 1969, to July 18, 1969, and an additional sum of $96.00 as reimbursement for a period extending from August 13, 1969, to August 31, 1969. The District Engineer in Huntington, aware of the situation, requested and recommended that the claimant's expenses be paid through the month of August, 1969, and approved said payment by letter. Later an additional request was made by the District Engineer to extend the payment of temporary expenses to September 1, 1969, at which time housing would be available to the claimant. Notwithstanding these approvals and recommendations, the business manager of the respondent refused payment of both requisitions, and asserted a counterclaim against the claimant in the amount of $341.00, which the State paid to Stone Lodge in Huntington for the claimant's lodging during the month of August, 1969. It was con-

tended that this payment for lodging was made by the State in error, and that the mistake should be rectified by treating said payment as a set-off against any amount that might be owing to the claimant for the 30-day period of July, 1969.

James R. Campbell, the District Engineer, testified that the expenses claimed were very reasonable, and that the claimant had made a sincere effort to keep expenses to a minimum by depriving himself of comfortable lodging and the ordinary charges for food.

It is the opinion of the Court that under the evidence submitted in this case that the claimant is entitled to the reimbursement of $145.83 for expenses incurred from June 27, 1969, until July 18, 1969, but is not entitled for expenses incurred in August, 1969, even though the District Engineer approved and recommended the payment of the August expenses. To make an allowance of expenses for the month of August would be in violation of the Governor's regulations and also a variance from the established administrative procedure of the Department. Since the State voluntarily paid the item of lodging at the Stone Lodge in the amount of $341.00 incurred in the month of August, 1969, after approval of the voucher, the contention that the voucher was paid by mistake and constitutes a set-off to any amount owing to the claimant is without merit particularly when no evidence was submitted on this item. Furthermore, this Court has no jurisdiction to render a judgment against the claimant for the amount paid on his behalf in excess of the claim. If it had been clearly established that the payment to the Stone Lodge was an illegal payment of State funds, for the benefit of the claimant, the set-off might be considered for the purpose of disallowing the claim in its entirety.

An award will be made to the claimant in the amount of $145.83 for temporary expenses incurred prior to his permanent assignment to Huntington and within the 30-day period after his permanent assignment as a moral obligation which the State in equity and good conscience should pay.

Claim allowed in the amount of $145.83.

Opinion issued November 8, 1973

CLAIR SWARTZMILLER and MARGARET SWARTZMILLER

vs.

DEPARTMENT OF HIGHWAYS

(No. D-517)

Frank A. Pietranton, Esq., for Claimants.

Donald L. Hall, Esq., for Respondent.

PETROPLUS, JUDGE:

The claimants have filed a claim for personal injuries, medical expenses, loss of earnings and damage to an automobile resulting from an accident that took place on November 2, 1969, at about 9:30 A.M. in the morning, on West Virginia Route 8 about one-quarter of a mile north of the junction of said Route 8 and State Route 2 in Hancock County, West Virginia. The claim is based on the alleged negligence of the West Virginia Department of Highways in the paving and maintenance of the hard-surfaced roadway of Route 8. Some time in 1967 or 1968, the travelled width of the road, which was 18 feet, was widened to approximately 24 feet by adding a macadam strip on each side of the road. The road improvement was made by a general contractor who added a three inch slag base or aggregate, compacted it, and covered the extended width with a layer or layers of bituminous coated aggregate. The old road which was a concrete road before the improvement was also coated with bituminous. This type of road improvement leaves a crack where the widening takes place, and because of inadequate compaction or different methods of compaction, as time goes on through wear and tear on the road and weather the crack or seam where the widening takes place separates and the elevation of the old road surface varies from the elevation of the widened portion because of settling. In the testimony of the respondent's maintenance engineer it was admitted that widening process creates hazards when the separation between the old and new pavement extends to 2 or 4 inches, particularly where there may be a difference in elevation.

At the place of the accident, according to the testimony of the claimants, a seam or gap had developed varying from 2 or 3 inches in width, which trapped the right front wheel of the automobile, which Margaret Swartzmiller was driving at approximately 30 miles per hour, causing it go out of control. The steering wheel was momentarfily wrested out of her hands, and the car was driven into the guardrail on the side of the road two or three times and eventually brought under control about a block or a block and a half from the alleged road defect. Mrs. Swartzmiller suffered personal injuries and damages to the automobile in the amount of $296.18. It was further developed in the testimony that the respondent had been notified of the hazard prior to the accident and had neglected to take proper measures to repair the road so that it would be safe for ordinary travel.

Whether the road defect constituted an unreasonable hazard, or whether the State was guilty of negligence in failing to keep the road in proper repair is an issue that need not be decided under all the circumstances of this accident. It appeared from the testimony that the claimant was not exercising ordinary and reasonable care in the operation of her motor vehicle at the time of the accident. The accident occurred in the daytime on a roadway that she had travelled many times in the vicinity of her home over a period of five years. She must have been thoroughly familiar with the condition of the road. It was a wet day and the seams in the added portions of the roadway, indicating that its width had been extended were visible, and she must have been aware that they existed. After she lost control of her automobile by reason of the tire striking the break in the blacktop of the pavement, according to her testimony, the car hit and bounced off the guardrail a number of times and traveled about a block and half before it could be brought under control and stopped. The road was apparently slick and upon questioning by the Court Mrs. Swartzmiller repeatedly stated that the automobile travelled about 750 feet after she lost control, and before it could be brought to a stop. This testimony is not consistent with her former testimony that she was travelling at approximately 30 miles an hour. A vehicle travelling at that rate of speed, even on a wet pavement, should be brought to a stop much sooner, allowing for reaction time and the shock of striking the guardrail. It is the finding of the Court that the physical facts of this case create an inescapable inference that

the claimant was travelling at an excessive rate of speed, taking into consideration the condition of the highway, the existence of a crease where the road had been widened, the wet surface and all other circumstances relating to the accident.

Having failed to exercise ordinary care for her safety in the operation of her automobile, we are constrained to find that even if we assume that the respondent was guilty of negligence in the maintenance of the roadway, the contributory negligence of the driver was the proximate cause of her accident. It is well settled law that no recovery will be allowed for injuries where it appears that the person injured was guilty of contributory negligence, or even where the injury was the result of the concurring negligence of the parties. This principle has been applied in many cases involving injuries while driving motor vehicles. Persons using the highways must be reasonably alert to perceive any warning of danger and must exercise reasonable care for their safety considering the surrounding hazards. Budget limitations and other exigencies make it impossible for the State to maintain its highways in a safe condition for high speed travel at all times under all circumstances, and many roads in our State are unsafe for travel at speeds that are not commensurate with the conditions of the road. To operate a motor vehicle in disregard of visible hazards, such as potholes or breaks in the pavement, of which a driver is aware or in the exercise of reasonable care should be aware, constitutes assumption of a known risk which bars recovery.

Under the facts of this case it is the finding of the Court that the claimant had knowledge of the specific defect or dangerous condition of the road and that she failed to use the care for her own safety which an ordinary and reasonably prudent person would have used under the circumstances.

For the reasons stated herein, the claim is disallowed.

Claim disallowed.

Opinion issued November 8, 1973

CHARLES M. WALKER

vs.

DEPARTMENT OF HIGHWAYS

(No. D-618)

The claimant appeared in person.

Donald L. Hall for the respondent.

JONES, JUDGE:

On February 20, 1973, Patrick Thomas, stepson of the claimant, Charles M. Walker, was driving the claimant's 1968 Chevrolet automobile on Greenbrier Street in the City of Charleston about 50 yards north of Piedmont Road when a large rock or boulder, approximately 18 inches in diameter, rolled down from the steep cliff along the highway and struck the right side of the claimant's vehicle. There is nothing in the record to indicate that the accident could have been avoided by the driver. The claim is for damages in the amount of $211.35, which the respondent, Department of Highways, has agreed to be fair and reasonable.

The driver of the claimant's car had lived in the area for about ten years and had driven over Greenbrier Street along the same cliff frequently over a long period of time. He had seen some large rocks on the approximately 5-foot wide berm of the thoroughfare and some smaller rocks and dirt which had washed onto the traveled portion of the highway. There were no signs warning travelers to beware of falling rocks, and the claimant contends that the respondent's failure to erect warning signs was such negligence as would create liability in this case.

This Court has decided several "falling rock" and "falling tree" cases involving the use and care of our highways, some adverse to the claimants and some in favor of claimants where the Court found proof of sufficient negligence to constitute the proximate cause of an injury. One of the adverse cases is *Mullins v. Department of Highways,* 9 Ct. Cl. 221, which is so similar to this case that the Court quotes a portion of the opinion as follows:

"The claimant says that there were no 'Falling Rocks' signs to warn motorists of the hazards of the roadside terrain, and charges that the failure to erect such signs constituted negligence on the part of the respondent. However, from the claimant's own description and a number of photographs made part of the record in this case it appears to the Court that a prudent driver would not need a sign to impress upon him the possibility of falling rocks in the area. This is especially true in light of the fact that the claimant was well acquainted with the road and its inherent dangers.

This Court consistently has held that the State is not a guarantor of the safety of travelers on its highways and that its duty to travelers is a qualified one, namely, reasonable care and diligence in the maintenance of a highway under all the circumstances. *Parsons v. State Road Commission,* 8 Ct. Cl. 210; and *Lowe v. Department of Highways,* 8 Ct. Cl. 175. In this case it does not appear that the failure of the respondent to provide 'Falling Rocks' signs was a contributing factor in the circumstances surrounding the accident, and in the Court's opinion, the claimant has not proved such a positive neglect of duty on the part of the respondent as would impose a moral obligation upon the State to compensate him for his unfortunate loss."

Applying the reasoning in the *Mullins* case, this claim is disallowed for failure to prove negligence on the part of the respondent.

Claim disallowed.

Opinion issued December 3, 1973

DONALD E. BLACKWELL

vs.

DEPARTMENT OF HIGHWAYS

(No. D-626)

The claimant appeared in person.

Donald L. Hall for the respondent.

JONES, JUDGE:

On or about the 1st day of March, 1973, Mrs. Donald E. Black-

well, wife of the claimant in this case, was driving her husband's 1971 Oldsmobile automobile at the intersection of United States Route No. 19 and State Route No. 4 in Clendenin. Having crossed the Clendenin bridge, Mrs. Blackwell turned towards a parking space in front of the Ace Hardware and Furniture Store and her car struck a storm sewer drop inlet located in the paved shoulder of the highway. Because of the slope and right hand turn coming off of the bridge, Mrs. Blackwell could not see the drop inlet over the hood and right front fender of the car and she could not say whether the iron grating was in place or not. However, immediately after the accident the grating was standing on its side and the right front wheel of the car was thus permitted to drop into the opening. The claim for damages to the oil pan and under portion of the vehicle in the amount of Fifty Dollars and Eighty-three Cents ($50.83) was admitted in the answer of the respondent, Department of Highways, to be fair and reasonable.

The deteriorated, dangerous condition of the drop inlet is not denied by the respondent, but its defense is that it did not have notice of the condition. However, certain photographs filed as exhibits in this case clearly show that the pavement around the drop inlet was so broken and deteriorated that a casual inspection would have disclosed that the iron grating was likely to fall through the opening, that the condition had existed for a long time and that injury to the traveling public should have been anticipated.

We hold that the negligence of the respondent was the proximate cause of this claimant's damages and therefore an award is hereby made to the claimant, Donald E. Blackwell, in the amount of $50.83.

Award: $50.83.

Opinion issued December 3, 1973

JOHN G. McGUFFEY

vs.

BOARD OF REGENTS (WEST VIRGINIA UNIVERSITY)

(No. D-624)

Claimant appeared in person, without counsel.

Henry C. Bias, Jr., Assistant Attorney General, for Respondent.

PETROPLUS, JUDGE:

John G. McGuffey, claimant, purchased a Ford truck, 1970 model, on November 30, 1972, from the Board of Regents, West Virginia University, as high bidder on submission of sealed bids, for the sum of $502.02. On a purchase order dated November 29, 1972, issued by Ben E. Rubrecht, Director of the Division of Purchases of the Department of Finance and Administration, appears the following language:

TO SELL

for the sale of the following vehicle:

1 Ford Truck, 1970, Weight Cap, 4000 lbs; Serial No. E16AHJ51602 Title No. D992429, W.V.U. Inv. Tag: OA94210. $502.02

Condition of vehicle: Truck caught on fire and burned. Seat burned, dash board and motor wiring. Windshield broken and right side glass broken, one head light broken, front end caved in on right side, right mirror gone, and needs paint job in front.

The above vehicle located at the State 4-H Camp, Weston, W. Va.

At the hearing it was developed by the evidence that the truck had been damaged by a fire and was sold in its damaged condition as described in the purchase order. The claimant made an inspection of

the truck before purchase and accepted it in its apparent damaged condition. The visible damage was that caused by the fire and since the wiring in the carburator had been burned it was not possible for him to road-test the truck because it was not in an operating condition.

After the purchase of the truck, it was taken to a shop for repairs where it was discovered that the motor had been irreparably damaged when a broken connecting rod had cracked the block, and it became necessary to replace the motor at a cost of $269.00. This was a defect of a latent nature and could not be discovered by an inspection of the truck before purchase.

The only issue in the case is whether there was an implied warranty at the time of sale that the truck was fit for the particular purpose for which it was sold, other than the damage that was stated on the purchase order.

There is no doubt that the seller had reason to know that the truck was purchased for the particular purpose of being operated. Under Chapter 46, Article 2, Section 315, Uniform Commercial Code, West Virginia Code, there is an implied warranty that goods are fit for the particular purpose for which they are sold. The statutory provision providing for an implied warranty of merchantability modifies the common law of "caveat emptor," (let the buyer beware).

It is the finding of the Court that the truck was not sold in an "as is" condition, as contended by the respondent. If that were the intention of the parties, the purchase order should have so stated. The buyer's attention was called to the specific damages caused by the fire, and other than the damage so stated, there was an implied warranty that the truck was in a serviceable condition. Factually the respondent sold a truck without a motor, as the cracked block even though concealed made the motor inoperable. The course of dealing between the parties did not exclude or modify the implied warranty.

For the foregoing reasons, an award will be made to the claimant for the cost of replacing the worthless motor with a used motor in the amount of $269.00.

Claim allowed in the amount of $269.00.

Opinion issued December 3, 1973

MONONGAHELA POWER COMPANY

vs.

DEPARTMENT OF HIGHWAYS

(No. D-645a)

L. Eugene Dickinson for the claimant.

Donald L. Hall for the respondent.

JONES, JUDGE:

It appears from the notice of claim of the Monongahela Power Company, the answer of the respondent, Department of Highways, and the statements of two of the respondent's employees that on December 7, 1972, the respondent's crew from Calhoun County cut a tree along State Route No. 16/19 at Minnora, and carelessly and negligently permitted the tree to fall into lines of the claimant. The claimant's petition describes the damage as "primary and neutral down, one span and service, and entrance pulled loose from one house".

The claim in the amount of $200.66 is admitted by the respondent to be fair and reasonable. Accordingly, an award hereby is made to the claimant, Monongahela Power Company, in the amount of $200.66.

Award: $200.66.

Opinion issued December 3, 1973

MONONGAHELA POWER COMPANY

vs.

DEPARTMENT OF HIGHWAYS

(No. D-645b)

L. Eugene Dickinson for the claimant.

Donald L. Hall for the respondent.

JONES, JUDGE:

This claim was submitted upon the notice of claim of Monon-

gahela Power Company and the answer of the respondent, Department of Highways, supported by the statement of one of the respondent's employees. On August 31, 1971, the employee negligently backed one of the respondent's trucks into a pole belonging to the claimant, located on State Route No. 5 near Cherry, West Virginia, damaging a cross arm and causing a phase wire to fall.

Damages in the amount of $26.63 are found by the Court to be fair and reasonable, and an award is made to the claimant, Monongahela Power Company, in that amount.

Award: $26.63.

Opinion issued December 3, 1973

MONONGAHELA POWER COMPANY

vs.

DEPARTMENT OF HIGHWAYS

(No. D-645c)

L. Eugene Dickinson for the claimant.

Donald L. Hall for the respondent.

JONES, JUDGE:

Monongahela Power Company claims $128.71 from the respondent, Department of Highways, for repairs to Company property damaged by the respondent's employees while blasting on State Route No. 47 near Walker. A rock was thrown about 100 feet, striking an insulator on a pole and setting the cross arm afire. The line had to be repaired and the insulator replaced.

Upon consideration of the petition, answer and a statement of one of the respondent's employees, the Court finds that the respondent is liable and awards the claimant, Monongahela Power Company, the sum of $128.71.

Award: $128.71.

Opinion issued December 3, 1973

MONONGAHELA POWER COMPANY

vs.

DEPARTMENT OF HIGHWAYYS

(No. D-645d)

L. Eugene Dickinson for the claimant.

Donald L. Hall for the respondent.

JONES, JUDGE:

This claim in the amount of $65.04 is for damage to property of the claimant, Monongahela Power Company, while the respondent, Department of Highways, was cutting right of way on March 21, 1972, at Windyville Road, State Secondary Route No. 24/3. It appears from the statements of two of the respondent's employees that a tree was cut and permitted to fall into the claimant's power lines, resulting in a fire. A 7200 volt primary line was broken.

Having read and considered the claimant's petition, the respondent's answer thereto, and statements of witnesses, the Court is of opinion that the claimant's damages are the result of the respondent's negligence, and that the amount claimed is fair and reasonable.

Award: $65.04.

Opinion issued December 4, 1973

RUSSELL TRANSFER, INC.

vs.

DEPARTMENT OF FINANCE AND ADMINISTRATION

(No. D-615)

Robert G. Perry, Esq., and *Robert E. Douglas, Esq.,* for the claimant.

Henry C. Bias, Jr., Assistant Attorney General, for the respondents.

PETROPLUS, JUDGE:

This is a claim by Russell Transfer, Inc., a non-resident common carrier corporation, duly authorized to do business within the State of West Virginia, and also authorized as a carrier in interstate commerce under the authority of the Interstate Commerce Commission, against the Commissioner of Finance and Administration, the Director of the Division of Purchases, and the Governor of the State of West Virginia, for damages in the amount of $183,496.00. The issue is whether a binding contract was executed between the claimant and the respondents obligating the State of West Virginia, acting through its responsible officers, to pay for services for the transportation and warehousing of all alcoholic beverages throughout the State for a period of one year beginning July 1, 1972. The contract which was introduced in evidence is dated May 31, 1972, and was signed by Russell Transfer, Inc., a corporation, with the signatures of its President and Secretary-Treasurer, with corporate seal attached, and with the signature of the West Virginia Alcohol Beverage Control Commissioner, J. Richard Barber. The contract was stamped approved as to its provisions and terms by signatures of Ben E. Rubrecht, Director of the Purchasing Division, and John M. Gates, Commissioner of Finance and Administration. The contract

was also approved as to form by Chauncey H. Browning, Jr., Attorney General, by T. O'Brien, Assistant Attorney General. From all indications it is a completely executed contract complying with all of the requirements and provisions of Chapter 5A, Article 3, of the West Virginia Code, applying to the purchase of commodities and printing by the departments of the State government through a process of requisition by a spending agency, solicitation of bids after publication of notices based on specifications, submission of sealed bid proposals, and awarding of the contract to the lowest responsible bidder, after taking into consideration the conformity of the bids to standard and special specifications and the requirements of the State government. The so-called "liquor hauling contract" for the previous year (1971-1972) had been awarded to a West Virginia carrier known as Tower Lines, Inc., by following the same bidding procedures. After the Division of Purchases advertised for bid proposals for the transportation of alcoholic liquors, store supplies and equipment, and the issuance of bid forms and copies of the blank contract to eleven motor frieight carriers, only two bids were received, one from Tower Lines, Inc., a West Virginia corporation, offering a rate of 20.42 cents per standard case, and one from the claimant, a non-resident corporation, at a rate of 19.6 cents per standard case. The claimant submitted one signed copy of the contract with its bid.

The claimant is aggrieved because the State, after submission of the claimant's low bid and execution of the contract as previously stated, and after the claimant had fully complied with all the terms and conditions of its bid in preparation for the performance of the contract, and its execution by J. Richard Barber, ABC Commissioner, the Department of Finance and Administration wrongfully refused to release a purchase order and permit the claimant to perform its contract, notwithstanding the contract had been signed and approved by Ben E. Rubrecht, Director of the Purchasing Division, John M. Gates, Commissioner of Finance and Administration, and Chauncey H. Browning, Jr., Attorney General. No executed copy of the contract was ever delivered to the claimant. It appeared that the refusal to honor the alleged contract was attributable to the intervention of William Loy, Administrative Assistant to Arch A. Moore, Jr., Governor of the State of West Virginia. The Governor had previously established an administrative policy that in weighing

bids for the purchase of commodities and services consideration should be given to the fact that West Virginia bidders were adding to the tax base by employing West Virginia people, and paying West Virginia income and business and occupation taxes. He had suggested that a scale be followed in weighing the relative advantages of an in-state bid as opposed to an out-of-state bid, although no definite formula had been devised. Governor Moore testified that the public policy so articulated had not been implemented by statute as it had been in other states, some of which by law prohibited out-of-state bidders on certain types of contracts. He also testified he had requested the legislature to adopt such a policy by statute in the public interest affording a degree of priority to West Virginia residents over out-of-state bidders, but the legislature had neglected to take any action on this matter. The Governor was also of the opinion that the statute which provided for competitive bidding and award of a contract to the lowest responsible bidder was flexible enough to permit that some preference be given to West Virginia vendors and that his policy was reasonably within the framework of existing law. No rules or regulations were reduced to writing in articulating the preferential treatment to be given to West Virginia vendors. This policy had not been formally communicated to John M. Gates, the Commissioner of Finance and Administration, when he took office, although his predecessor was aware of it. The Governor's subordinates were aware of this policy and were given full discretion to see that the policy was carried out.

Pursuant to the aforesaid policy, the Department of Finance and Administration on intervention after the complete execution of the contract, refused to honor the contract, destroyed a purchase order issued and signed by the Director of Purchases, and requested new bids to be submitted on July 6, 1972, with no change in the specifications or the contract, with one exception, —the phrase "All labor must be union organized" was inserted in the specifications inviting new bids, and the contract was awarded to Tower Lines, Inc., as the only eligible bidder. The claimant alleges that such action on the part of the State violated the legislative intent of the bidding statutes, unreasonably discriminating against the claimant who was not union-organized, and that the citizens of this State were deprived of transportation at the lowest cost and that public revenues were being expended to purchase services generated exclu-

sively by union labor. The Governor's office was charged with frustrating the contract and the Division of Purchases and the Alcohol Beverage Control Commissioner have taken the position that the performance of the contract is beyond their control. Commissioner Gates and Director Rubrecht are charged with arbitrary refusal to release a purchase order in clear violation of Chapter 5A, Article 3, of the West Virginia Code.

As the successful low bidder the claimant took all of the necessary steps to qualify for vendor registration, undertook a thorough investigation of all the services contemplated, engaged in conferences with J. Richard Barber, Commissioner, and after the opening of the bids in reasonable anticipation of securing the contract as the lowest responsible bidder, the claimant applied for and received a permit from the Public Service Commission of the State of West Virginia to operate as a contract carrier with temporary authority, obtained insurance coverage and subscribed to the West Virginia Workmen's Compensation Fund, furnished a performance bond and coverage under the West Virginia Unemployment Compensation Law and acquired ten trailers and two tractors of specialized equipment, uniquely adapted to the performance of the contract, and otherwise incurred expenses in the aggregate amount of $83,496.00, as well as procured a lease for a building in Charleston to be used as a warehouse. The total amount of damages including loss of earnings on the contract, allegedly caused by the default on the contract, are in the amount of $183,496.00.

A copy of the executed contract was not delivered to the claimant and although it made numerous inquiries concerning the same, it appeared that the State's agents refused to furnish an executed copy for the reasons heretofore mentioned. A blank copy of the contract was delivered to the claimant on June 5, 1972, by a letter from the Department of Finance and Administration confirming conversations relating to a performance bond, insurance coverage, and workmen's compensation. The witnesses for the claimant, all State employees, testified that as the apparent low bidder, the claimant fully complied with all of the laws of the State of West Virginia and all the procedures and regulations and requirements of the ABC Commission and furnished to the appropriate State agencies all of the documents required to be furnished in contemplation of performing the contract. They also testified that they were satis-

fied with the capability and competence of the claimant to perform the services contracted for. It was further brought out that in the bidding and re-bidding procedures, notices were sent to carriers incorporated in Ohio, Pennsylvania, and other states and that the Purchasing Division personnel were not aware of the Governor's policy to accord preference to West Virginia vendors and that in handling approximately five hundred purchases for the State of West Virginia the Division never endeavored to give the slightest preference to West Virginia vendors or to vendors who utilized union labor. It was further developed there was no written memoranda or directives implementing the Governor's policy.

The State's position reduces this claim to a simple issue, the State taking the position that notwithstanding the claimant's performances, the contract had never been fully executed, and that something remained to be done before the contract would be legally effective, namely, the issuance of a purchase order and delivery of a copy of the executed contract to the claimant. At this point comment will be made on the testimony of the buyer in the Division of Purchases, namely Donald D. Karle, who testified that a purchase order had been issued on the contract in question and had been destroyed as a piece of paper that shouldn't be in the file. Mr. Karle stated no one instructed him to destroy the purchase order which had been signed by the Director of Purchasing, Ben E. Rubrecht, the Commissioner of Finance and Administration, John Gates, and approved by the Attorney General. It is apparent that the purchase order was destroyed after William Loy, the Senior Administrative Assistant of Governor Moore, interceded and requested that the contract be held up because of the Governor's policy favoring resident vendors over non-resident vendors, and union labor over non-union labor. The testimony of William Loy on this matter was quite vague and in effect indicated that mistakes had been made which were subject to correction because the contract had not been finalized by the issuance of a purchase order. Mr. Loy was quite hazy as to whom he contacted in the Division of Purchases in his efforts to hold up the contract and had no recollection who called him and complained about the contract award to a non-resident non-union vendor. Mr. Loy had difficulty in explaining why he undertook on his own initiative to hold up the issuance of a purchase order. He did testify, however, that he assumed respon-

sibility to hold up the contract because of an existing State policy as articulated by the Governor favoring West Virginia vendors and union labor. He was not aware that the contract had been completely executed, or even that a contract was in existence.

Donald D. Karle, an employee of the State in the Purchasing Division of the Department of Finance and Administration, testified that at no time did he discourage the claimant from expending substantial funds to procure equipment required in the performance of the contract and that in his negotiations with the claimant assumed that the contract had been awarded until he was advised by the Director of the Department, Ben E. Rubrecht, verbally, that no purchase order would be released at this time because the specifications were to be changed. This notifiication came approximately a month after the sealed bids had been opened. In searching his memory, Mr. Karle testified this was the only contract of which he was aware that once executed by an apparent low bidder, who had taken all of the interim steps necessary to perform, was cancelled or held up by the refusal to issue a purchase order. On June 21, 1972, Mr. Barber, the ABC Commissioner, requested the cancellation of the contract. The Russell Transfer, Inc., claimant, was not notified of the cancellation and continued to make preparations and to spend money until the notice of re-bidding on July 6, 1972.

At the re-bidding procedure, Russell Transfer, Inc., submitted a bid of 18.9 cents per standard case and Tower Lines, Inc., submitted a bid of 20.4 cents per standard case. Tower Lines, Inc., was permitted to continue furnishing services to the Liquor Commissioner at a higher cost without a contract for a number of months although Russell Transfer had submitted a lower bid the second time the State advertised for bid proposals. On the second bidding the State solicited non-resident common carriers to bid because witness Karle had not been advised that the original contract with Russell Transfer, Inc., had been cancelled for the purpose of preferring West Virginia vendors.

The above explicit review of the evidence has been made because of the importance of this case and the effect it may have on future business practices of the State. The evidence is uncontradicted in this unusual situation and clearly brings us to a legal conclusion that a valid contract was executed between the parties, enforceable

in any Court of law, signed and approved in compliance with the statutes of the State of West Virginia and freely admitted by witnesses for the State to have complied with the standard purchasing practices of the State under Chapter 5A, Article 3, of the Code. The only matter remaining for determination by the Court is whether a contract once executed after a meeting of the minds may be cancelled by the State and re-bid with a slight modification in order to comply with a directive from the Governor's office. We find under the circumstances of this case that the issue of the purchase order is a ministerial act, and the destruction of it was arbitrary and capricious and in no manner nullified a written and legally enforceable contract between the parties. The evidence shows that the State arbitrarily refused to perform a valid contract because of a directive from the Governor's office which has no basis of law, statutory or otherwise. Commendable as the Governor's policy may be to give preference to West Virginia vendors, it appears that such a policy cannot be permitted to impair the obligations of a valid contract and particularly when the authorized agents of the State who negotiated the contract were not aware of such a policy. There are many pitfalls in contracting with a governmental agency, and to permit nullification of contracts on the ground of administrative policy would make it unsafe for any vendor to enter into contractual arrangements with the State. The intention of the parties under such circumstances would never be clearly expressed in the contract and legal rights and responsibilities under the contract could not be defined. Contracts should be administered and complied with in good faith and once all requirements are complied with, parol and extrinsic evidence should not be introduced to impair vested contractual rights.

The Supreme Court of Appeals in the case of *Wysong v. Walden,* 120 W.Va. 122, 196 S.E. 573, 52 S.E. (2d) 392, held that where the lowest bidder is financially and morally responsible, if his bid is rejected through fraud or corruption by a Board of Education, such rejection constitutes a violation of official duties, justifying the removal of officers guilty thereof. This Court on the evidence before it, of course, is making no finding of fraud or corruption on the part of the purchasing agents of the states, but is citing the above case in support of its holding that the State has a limited discretion in rejecting the bid of the lowest responsible bidder who is able to

efficiently perform the terms of a contract. Although financial responsibility alone may not be sufficient to meet the qualifications of the "lowest responsible bidder," as provided by the West Virginia statute, the public interest requires the State agencies to accept the lowest bid when eligibility has been established in all other respects. The Governor's policy of giving preferential treatment to resident vendors because they contribute to our tax base, or to union labor in order to avoid labor strife, may be well grounded but it is difficult for this court to hold that such a policy will justify the cancellation of a legally executed contract or the destruction of a purchase order duly signed and approved, without implementation of that policy by legislative enactment. Our legislature has not seen fit to incorporate this policy in its bidding and contract awarding procedures, although the Governor has made recommendations along that line. We are constrained to hold that administrative policy of the Governor cannot override the legislative intent as it now appears in our statutes. (Chapter 5A, Article 3, Code).

Inasmuch as the claimant has no remedy against the State in a legal action because of sovereign immunity of the State from suit, the Court of Claims was created to enforce contracts which should be binding upon the State. The maxim "for every wrong there is a remedy" is now applicable to the State where injury results from the breach of a contract. The State had a moral obligation to perform its duly executed contract when the legislature declares the existence of a contractual obligation, incurred by following the regular purchasing procedures set forth in the statutes. Discrimination and preferences, however well-intentioned, cannot be permitted to nullify duly executed contracts by taking advantage of technical defenses such as withholding the issuance of a departmental purchase order or destroying such an order, after it has been signed and approved, in order to get it out of the file.

In an original mandamus proceeding, *State ex rel. Bache & Co. vs. Gainer,* 177 S.E.2d 10 (1970), our appellate court held in an opinion written by Judge Haymond that Chapter 5A, Article 3, of the Code, related only to the *purchase of commodities and printing* of the departments of the State government, and not to contractual services furnished by a financial advisor on a road bond issue. This decision casts some doubt on whether the purchasing practices of the State have application to a so-called liquor hauling contract.

Since this Court has made a finding that even under the regular purchasing procedures, a valid contract had been made between the parties, it is not necessary to decide whether this type of contract is within the purview of Chapter 5A, Article 3, of the Code that relates to purchase of commodities and printing. If the express mention of commodities and printing in that statute impliedly excludes contracts for the transportation of liquor, then the approval of the Commissioner of Finance and Administration, the Director of Purchasing, and the issuance and deliver of a purchase order presumably would not be required in a contract of this nature.

Having resolved the liability of the State of West Virginia for damages resulting from breach of a legal contract that had been executed and consummated (except for delivery of an executed copy of the contract to the claimant and the administrative issuance of a purchase order), the next question before the Court is the award of damages proximately resulting from the default of the State. The evidence discloses that the claimant carefully computerized its anticipated expenses and gross revenues, based on the Liquor Commission's record for the preceding year, and included an anticipated profit of 8 per cent of said revenues before taxes, said profit amounting to $40,000.00, and thereby arrived at a price of 19.6 cents per case. The latter figure was the amount submitted in its bid proposal. In addition thereto, ten trailers were purchased and adapted with specialized equipment at a cost of $4,995.00 each. One of said trailers was returned to the dealer and full credit was received, and four additional trailers were sold without loss. The company has retained five trailers but has been unsuccessful in its endeavors to sell the same. Because of the alterations made in the trailers to adapt them to the particular specifications required in making delivery of liquor to the various State Stores, there is no ready market for the same. It was testified that eventually approximately 50 per cent of their original cost would be recovered via sale. In addition to the losses incurred in disposing of the equipment represented by capital expenditures, the claimant sustained many incidental expenses in the preparation for making deliveries beginning July 1, 1972, for painting the trailers, titling them, license fees, registering the equipment with the Public Service Commission, securing temporary authority as a common carrier, performance bond, insurance premiums, installing an alarm system as required

by the Liquor Commission on the trucks, computer rental, personnel charges, salaries, and other miscellaneous items which aggregate $7,825.17 insofar as they are allowable and directly related to the breach of contract. The party who is not in default is entitled to restitution for the losses sustained and the expenditures which it made in its preparation for the performance of the contract. It is the finding of this Court that an award should be made in the amount of $7,825.17 as compensation for the expenditures made by the claimant, $12,000.00 for the loss that will be sustained on the sale of the equipment purchased and adapted for use on the contract, and the sum of $25,000.00 for a reasonable anticipated gain to the claimant had the contract been performed. Although the testimony of an officer of the claimant was to the effect that the anticipated profit would be $40,000.00 computed on an 8 per cent return, trucking companies ordinarily make a profit of between 5 and 8 per cent on their hauling contracts. It would appear that an allowance of profits on the minimum percentage would be a reasonable certainty under the facts of this case, even after allowance for breakdowns and contingencies.

Before concluding, it is deemed advisable to respond to the able argument of the State as presented in the Attorney General's brief.

The argument recapitulated is as follows:

1) Any bid on a State purchasing contract may be rejected.

2) Before a contract is effective, a purchase order must be transmitted to the Director of the Budget so that the proper account may be encumbered.

3) A contract contrary to the provisions of Chapter 5A, Article 3, of the West Virginia Code, is void and of no effect.

4) A contract executed under the authority of a statute must comply with the statutory requirements or it is not binding upon the State.

5) Delivery is essential to the binding effects of every contract.

6) One who deals with an agent has the burden of determining the agent's authority; or he acts at his peril.

7) Claimant should have waited until it received the properly executed contract and purchase order before proceeding to make

expenditures, as the State could have procured transportation under emergency authorization.

Unfortunately a review of the evidence does not support the State's position but militates against it. It discloses no rejection of the claimant's apparent low bid, and no communication from the State of any intent to reject. On the contrary, claimant was kept in limbo up to the scheduled date of performance. The State officials were aware of the claimant's extensive preparations to perform the contract, and the expenditures being made, and cooperated to enable the claimant to qualify for performance.

The transmittal of a purchase order to the Director of the Budget for encumbrance of funds is intended for protection from overspending by government agencies. Funds in this case were appropriated and available and approval would have followed as a matter of routine had the signed and approved purchase order been transmitted. Instead it was removed from the file and dstroyed by Mr. Karle who stated that he felt it should not be in the file after Mr. Loy objected that the contract contravened executive policy. We consider the action by the Budget Director to be a condition subsequent which voids each and every purchase contract in excess of appropriated or available funds, and not a condition precedent to the binding effect of a contract. It is an administrative function that establishes a contract to be within limits and designed to protect the State against overspending units.

The contract was executed in accordance with all provisions of Chapter 5A, Article 3, except for the budget account encumbrance which was not essential to its validity.

Delivery of a contract is evidentiary of the meeting of the minds, and although necessary and often essential, may be constructive rather than actual. In this case delivery is excused because claimant endeavored to procure a copy and was thwarted. Eventually it did receive a copy with the last page missing (the page containing the requisite signatures). The secretary in the Purchasing Division was instructed to deliver the contract to the claimant but withhold the "signature page".

The evidence clearly showed that all of the State agents acted within the scope of their statutory authority in the negotiation and

signing of the contract, and but for the belated interceding of the Governor's Assistant the contract would have been performed rather than repudiated.

The availability of emergency transportation, it would seem, is irrelevant to the fundamental issue in this case — whether there was a binding and legal contract between the claimant and the State of West Virginia.

For the reasons hereinbefore stated, an award in the aggregate amount of $44,825.17 is made to the claimant. It is the opinion of the Court that this amount would fairly compensate the claimant for the defaults of the State under the special circumstances of this case and that in equity and in good conscience the State should pay said damages as a result of its failure to permit the claimant to perform its contract. Said award affords no compensation to the claimant for the time and effort expended by its officers in preparing to bid or negotiating the contract, meeting all requirements, securing the necessary permits and otherwise preparing to perform.

Claim allowed in the amount of $44,825.17.

Opinion issued December 5, 1973

STATE FARM FIRE & CASUALTY COMPANY,
as subrogee of SYDNEY C. BIAS, its insured

vs.

DEPARTMENT OF HIGHWAYS

(No. D-599)

Robert J. Louderback, Attorney at Law for the Claimant.

George D. Blizzard, II, Attorney at Law for the Respondent.

DUCKER, JUDGE:

State Farm Fire & Casualty Company, as subrogee of its insured, Sydney C. Bias, claims damages in the sum of $1809.44 occasioned by blasting work done on or about September 8, 1972, to the residence and water well of Sydney C. Bias on Crooked Run Road

in Putnam County, West Virginia, in connection with respondent's rock quarry operations near the Bias property.

The damages alleged were that the dynamite and other explosive blasting caused damages to the bricks in the kitchen wall of the Bias residence, and the destruction of the well and water reservoir of Sydney C. Bias. The distances from the quarry site to the kitchen wall, the well and the reservoir were 650 feet and 550 feet respectively. By stipulation, the respondent has admitted the above facts, that the proximate cause of the damages was the negligence of the respondent in the blasting work and that the amount of the damages sustained by Bias was $1500.00.

Accordingly, the claimant is hereby awarded the sum of $1500.00.

Award of $1500.00.

Opinion issued December 6, 1973

JOE L. SMITH, JR., INC. D/B/A
BIGGS-JOHNSTON-WITHROW

vs.

OFFICE OF THE GOVERNOR

(No. D-619)

W. M. Houchins, Vice President for the claimant.

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

DUCKER, JUDGE:

Claimant, Joe L. Smith, Jr., Inc. doing business as Biggs-Johnston-Withrow, alleges that the State of West Virginia, by negotiations with the Office of the Governor, is indebted to the claimant in the sum of $27,180.96 for work done by the claimant in the printing, binding and production of 2000 copies of "The State Papers and Public Addresses of Governor Hulett C. Smith" pursuant to and in accordance with a contract entered into on July 1,

1968 between the claimant and the Department of Finance and Administration and a subsequent work order dated May 15, 1969.

At the end of the 1968-69 fiscal year, the claimant pursuant to the request of the respondent submitted an invoice for the work done prior to June 30, 1969, in the amount of $14,255.96, which was not paid, apparently because there were not sufficient funds remaining in the budget item which provided for such expenditure. However, claimant continued into the next fiscal year the remaining work to be done on the contract, and upon the conclusion of the work submitted its bill for a total amount of $27,180.96, none of which has been paid.

The respondent admits that the contract entered into with claimant was let to the lowest bidder on a definite item printing basis and processed in the regular and legal manner, that the work was done without default and apparently done correctly and satisfactorily. The time period between the work order and the end of the fiscal year was too short for completion, and necessarily the work had to extend over into the next fiscal year. Respondent also admits that there was an item in the State Budget for the fiscal year 1968-1969 in the amount of $50,000 to cover "inauguration and printing expenses", and that $37,881.00 of such item was expended for such or other purposes, leaving only $12,119.00 remaining for the debt due or to become due to the claimant as herein stated. Respondent suggests that the reason claimant's first invoice was not paid was because the invoice could not be paid in its entirety but there is no evidence in the case as to actually why no part of that invoice was paid. However, it appears that there had been made a notation on the Requisition for Supplies dated March 7, 1969 attached to Work Order No. 39, that the cost of the work was estimated to be $15,000, reference to which is also shown on a note from the office of former Governor Hulett C. Smith to the office of the present Governor. There is not only a denial by claimant of having made any such estimate or any estimate of such cost, but also there is no evidence showing who made such an estimate, the claimant saying that because it had no knowledge in advance of what the contracts or the amount of work done it could not possibly have been able to make an estimate and that it could not be bound by what someone else may have done.

The work of claimant was done in good faith as was a similar work done in connection with the papers and public addresses of former Governor, Cecil H. Underwood, and although a better plan of processing such a contract is now in force, the processing of this contract was done in the then existing procedure for such matters.

In view of all the facts, none of the essential ones being in dispute, there is in reality only one legal question involved, and that is whether the lack of sufficient funds at the end of the fiscal year justified the respondent in refusing to pay the debt and to consider the contract as not binding upon the State because when the State had spent for other purposes so much of the appropriated fund that it could not pay this debt.

The claimant had no control whatsoever or any knowledge as to the expenditure of the fund allocated. That was entirely an administrative matter. The fact that there was a budget item in the fiscal year budget for the payment of the contract work rendered the contract which had been properly processed a binding contract of the State, and the claimant had the right to rely upon such facts, it is inconceivable that the return to the general funds for the next fiscal year the unspent portion of the budgetary amount affects the question of legality or liability.

It was certainly without justification that the administration transferred to the general fund for the next fiscal year the unspent $12,119.00 remaining in the budget appropriation when the bill of the claimant for $14,255.96 for work done prior to June 30, 1968 remained unpaid. There certainly can be no question as to validity of that part of claim. Nor can we see any invalidity in the claim for the balance because there is a proper contract and budgetary provision for the payment of the whole claim.

We are of the opinion that the claimant had a legal contract with the State which it performed properly and timely, and that it is entitled morally and legally to payment, and, accordingly, we award the claimant the sum of $27,180.96.

Award of $27,180.96.

Opinion issued December 12, 1973

MILFORD HARDESTY
Doing Business as
HILLSVIEW FLORAL CO.

vs.

BOARD OF REGENTS
(WEST VIRGINIA UNIVERSITY)

(No. D-658)

Claimant — without Counsel submitted on Stipulation.

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

DUCKER, JUDGE:

Claimant, Milford Hardesty, doing business as Hillsview Floral Co., at 114 Chestnut Avenue, Kingwood, West Virginia, alleges non-payment by the West Virginia Board of Regents of rent for ten months, June 1, 1972 to April 1, 1973, of greenhouse space furnished to West Virginia University for use in conjunction with a research grant in horticulture.

The University had obtained approval of the renting of the greenhouse space by grant project authorities and a rental allotment was provided for in the project budget, but no formal lease agreement was prepared or signed. However, the premises were accepted and used by the University for such purpose. A formal lease agreement was later to be effective April 1, 1973, but it was not allowed to be predated or previously effective. Consequently the previous ten months' rent of $250 per month was not paid simply because a proper lease had not been processed.

All of the facts alleged are admitted by the respondent and payment recommended. As budgetary requirements were met and the University received the full benefit and use of the property involved, we are of the opinion to, and do hereby award the petitioner the sum of $2500.

The clerk of the Court is hereby directed to transmit a copy of

this opinion to the respondent State agency in order that this claim may be paid under the advisory procedure of Chapter 14, Article 2, Section 18 of the Code of West Virginia.

Award of $2500.

Opinion issued January 9, 1974

SWIFT & COMPANY, INC.

vs.

DEPARTMENT OF HIGHWAYS

(No. D-662)

Robert Irving Price, appeared for the claimant.

Dan Blizzard, II, Esquire, for the respondent.

PETROPLUS, JUDGE:

Swift & Company, Inc., claimant, has filed a claim in the amount of $633.30 against the Department of Highways, respondent, for damages to a motor vehicle owned by it, which was being driven by Robert Irving Price, its salesman, on U. S. Route 50 within the corporate limits of the City of Romney, West Virginia, on March 4, 1973. Mr. Price was driving at a speed of approximately 20 miles per hour through the City of Romney about 6:00 P.M. on the day of the accident, while it was still daylight, and as he approached a large tree, situate on the right of way to the right of the paved portion of the road, a large limb approximately eight inches in diameter broke from the tree and fell on top of his car, crushing the roof, windshield and trunk of the car causing damages in the amount of $633.30 as shown by an estimate filed as an exhibit in this case. The trunk of the tree was located between the paved portion of the road and a paved sidewalk and its overhead branches extended almost entirely across the width of the paved road.

The defense was based on:

(1) The claim is damnum absque injuria

(2) The accident resulted from an Act of God.

(3) The respondent had no notice of any hazard to the travelling public.

(4) The respondent is not an insurer of the safety of travelers on the highway.

The evidence at the hearing established that a large deteriorated tree limb which fell upon the car and crushed it was a big and heavy dead branch without foliage, and after it hit the car a lot of rotten wood, brown and decayed, was observed in the roadway. There was no evidence that the appearance of the tree gave any indication that the tree was decayed or rotting. Nor was any evidence introduced by the State to indicate that the condition of the tree had been inspected by the State as part of its routine maintenance service of the highway.

It is a finding of fact of this Court that the tree with its extended branches over the highway was in a decaying condition rendering public travel on the highway unsafe. It is also a finding of fact that the public authority did not have actual notice of the hazard. The State has a duty to keep its highways in repair and reasonably safe for public travel and when injury is sustained by a traveler coming in contact with overhanging limbs of trees growing at the side of a road, outside the paved portion, a question arises whether the State exercised due and ordinary care in permitting the tree to remain, or whether it had a duty to trim and remove the tree. Liability for injury due to the presence of a tree within the boundaries of a highway is not absolute but depends upon negligence or whether the tree constituted a nuisance reasonably likely to render the highway unsafe for public travel.

While the authorities are not in full accord on the liability of a public authority for damages caused by falling trees, or limbs, the majority view is that a decayed tree on the side of a highway constitutes a public nuisance, and that a public authority may be held liable for injuries sustained by travelers as a result of the fall of the tree because of natural decay.

It appeared from the evidence in this case that this tree was located in a well traveled residential section of the City of Romney, and that even though the State had no notice of the decay of the tree,

by the exercise of reasonable care the condition of the tree could have been ascertained.

For the foregoing reasons it is the opinion of the Court that an award should be made to the claimant for the full amount of its damages.

Claim allowed in the amount of $633.30.

Opinion issued January 10, 1974

RONALD E. HOUSE, Administrator of the
Estate of Edward P. House, deceased

vs.

DEPARTMENT OF MENTAL HEALTH

(No. (D-603)

John Anetakis and *Carl N. Frankovitch* for the claimant.

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

JONES, JUDGE:

This is a claim for damages for the alleged wrongful death of Edward P. House, the 37-year old son of Mr. and Mrs. Ronald E. House, residents of Hancock County. On July 1, 1972, the claimant's son was committed to Weston State Hospital as an inebriate by the Mental Hygiene Commission of Hancock County upon the petition of his mother. On July 9, 1972, while a patient in Ward C, Unit 6, of said hospital, House was stabbed to death by another patient, Curtis Renforth. The assault took place in the bathroom and the victim was repeatedly stabbed with a kitchen knife which was sharpened and the handle wrapped with adhesive tape. There were no witnesses in the bathroom and the principals were first seen when House ran into the corridor pursued by Renforth with the bloody knife in his hand. House ran from one end of the ward to the door at the other end where he fell and died. Some of the 25

to 30 patients housed in the ward were attending Chapel services in another part of the hospital at the time and one male nurse was on duty. This was a "closed" ward, the doors being kept locked and the patients not being free to come and go as they were in "open" wards. Inebriates were required by Court order to be kept in the hospital for a minimum of 30 days and that apparently accounts for the assignment of House to a "closed" ward.

The claimant contends that the respondent was negligent in failing to exercise ordinary and reasonable care to protect the decedent from Renforth, the respondent well knowing Renforth to be "homicidal", "assaultive", "unpredictable" and "dangerous", with a penchant for knives. The claimant seeks damages under Code 55-7-6 in the amount of $10,000.00, an additional award of $100,000.00 for financial and pecuniary loss claimed to have been sustained by dependent distributees and the sum of $2,000.00 for funeral expenses.

A recital of Renforth's record both as a criminal and a mental patient is necessary to a proper appraisal of this case. His first admission to Weston State Hospital was from the Moundsville Penitentiary on April 1, 1953. The record of his admission shows him to be "suicidal and homicidal". He was returned to the penitentiary on May 15, 1953. Renforth was readmitted to Weston State Hospital in May, 1957 and discharged therefrom in June, 1957 because his sentence had terminated. He was readmitted in January, 1963 and discharged to "criminal authorities" in December, 1963. In June, 1967, he was readmitted and in October, 1967 was "returned to Court".

On April 16, 1969, an order was entered in the Intermediate Court of Ohio County, West Virginia by which it was ordered that "the said defendant, Curtis O. Renforth, be confined to the Weston State Hospital in the Division for the Criminally Insane ***** until the further order of this Court". On May 23, 1969, Dr. M. Aviles, Staff Physician, wrote a letter to Judge Thomas P. O'Brien, which letter also was signed by Dr. J. E. Lazaro, Acting Superintendent, with a copy to Dr. Bateman, Director of Mental Health, in which letter he pointed out that Renforth had a history of being very hostile, impulsive and showing homicidal tendencies and ended his letter with the following two paragraphs:

"Considering the above, it is the consensus of opinion of the

staff of this hospital that at the present time the patient is considered a threat to the security of the ward in which he is hospialized, and he has been known to threaten escape and strong evidence points out the possibility of a weapon in his possession at the present time.

Since the patient does not show any psychotic symptomatology, we strongly recommend his transfer back to the West Virginia Penitentiary at your earliest convenience."

This letter was written while the hospital still had a separate security unit for the criminally insane. On June 9, 1970, Judge O'Brien ordered that Renforth be conveyed from Weston State Hospital to confinement at the West Virginia Penitentiary at Moundsville under the sentence theretofore imposed.

In the early part of the year 1970 the Maximum Security Unit for the Criminally Insane was discontinued at Weston State Hospital and thereafter all patients were intermingled unless the hospital authorities saw fit to place certain of them in seclusion. Despite the fact that there was no longer a separate unit for the criminally insane, Renforth was readmitted to the hospital on May 6, 1971. There is nothing in the record to show why Renforth was readmitted to the hospital after he had been transferred back to the penitentiary by the Intermediate Court of Ohio County at the urgent request of the hospital authorities and upon their insistence that he was "a threat to the security of the ward in which he is hospitalized". The Court independently has examined the records of the Intermediate Court of Ohio County and the final order entered therein was that of June 9, 1970 ordering Renforth's transfer to the penitentiary, so we may only conclude that the arrangement was made between the penitentiary and the hospital.

On September 20, 1971, Dr. A. J. DeLiz, Acting Superintendent of Weston State Hospital, wrote to the Department of Mental Health in Charleston with reference to Curtis Renforth in part as follows:

"During his stay in the hospital, he has been housed on Unit Six. The Unit Six team has examined this patient and on May 15, 1971, they recommended he be returned to Moundsville; however, he still remains in the hospital. It is the feeling of the Unit Team that the continued stay of this patient en-

dangers the lives of the aides and other patients and also they cannot satisfactorily program all their plans because of his presence. The Unit Team submitted the following as evidence of the behavior of Mr. Renforth on the ward:

" '1. Put a blanket around a patient's face and got his money,

2. Terrorizes other patients and because of it, the patients give him their money, cigarettes, and have homosexual relations with him,

3. Hit a patient on the head which resulted in a fracture,

4. Has been carrying threats to our aides,

5. Has been found receiving matches, razor blades, in his mail,

6. Has been found with a foot-long piece of metal in his room,

7. Found to be hiding a cache of razor blades, can opener, and matches in the bathroom.

We (Unit VI Team) feel that not enough is being done for the transfer of this patient. We have waited too long already.'

"It is quite evident that this patient offender cannot be helped in this hospital. It is also evident that this patient represents an imminent risk toward everyone concerned in this team.

* * * * * * *

"May we respectfully request again, that this patient be removed from this hospital."

We fully realize that the charges against Renforth listed in Dr. DeLiz's letter have not been proved and are not evidence in this case, but the letter clearly shows that the respondent knew or at least strongly believed that Renforth was extremely dangerous and unfit to be housed with non-offender mental patients. The record in this case is replete with reports of psychiatric examinations of Renforth, taken from the hospital files, which confirm the dangerous character of this man. It appears that sundry telephone calls were made as a result of Dr. DeLiz's letter but nothing was done to solve the problem. Almost fourteen months were permitted to go by with

a letter and a few telephone calls as the sole effort to obtain the admittedly necessary removal of Renforth from a State institution which was no longer equipped to take care of him and at the same time protect others from his assaultive and homicidal tendencies. Renforth remained in the hospital, being treated as a mental patient, and not as a felon convicted of malicious wounding and under sentence to the penitentiary by the Intermediate Court of Ohio County.

The Court concludes that the State of West Virginia failed to fulfill its moral and legal obligations to protect the claimant's decedent from a convict-patient well-known to the hospital authorities and officials of the Department of Mental Health to be a dangerous schizophrenia-paranoid with homicidal tendencies, that the respondent's acts and omissions constitute negligence, and that such negligence was the proximate cause of the death of the claimant's decedent.

We cannot agree with the claimant's contention that the decedent's mother and father were dependent distributees as contemplated by Code 55-7-6. There can be no doubt of the concern of the decedent's parents for their son during his lifetime, nor of their bereavement at his death, but upon review of the evidence the Court is constrained to the opinion that in this case the son was the dependent and not the parents.

Accordingly, the Court is of opinion to and does hereby award the claimant, Ronald E. House, Administrator of the Estate of Edward P. House, deceased, the sum of $10,000.00, together with the additional sum of $2,000.00 for funeral expenses, a total award of $12,000.00, against the respondent, Department of Mental Health.

Award of $12,000.00.

Opinion issued January 14, 1974

EXXON COMPANY, U.S.A.

vs.

DEPARTMENT OF MENTAL HEALTH

(No. D-657 a & b)

Paul Bowles for the claimant.

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

JONES, JUDGE:

This claim in the amount of $183.38 is for unpaid invoices of the claimant, Exxon Company, U.S.A., against the credit card account of Colin Anderson Center, an institution operated by the respondent, Department of Mental Health. The case was submitted upon the claimant's petition, certain exhibits, the respondent's answer and statements of counsel.

Upon consideration of the record, it appears that two items of the claim aggregating $48.73 involved purchases made in the fiscal year 1969-70 when sufficient funds had not been appropriated for the payment thereof, and therefore this portion of the claim is invalidated by this Court's decision in *Airkem Sales & Service v. Department of Mental Health,* 8 Court of Claims 180, and is disallowed.

The remainder of the petitioner's claim in the amount of $134.65 arose from purchases made during the fiscal year 1970-71, when sufficient funds were available to pay the same, but due to confusion in the handling of respondent's financial affairs, the invoices were not paid before the fiscal year appropriation had expired.

The Court is of opinion that the 1970-71 invoices in the amount of $134.65 should be paid and, accordingly, an award in that amount is hereby made to the claimant, Exxon Company, U.S.A.

Award: $134.65.

Opinion issued January 18, 1974

RUTH YOUNG

vs.

DEPARTMENT OF HIGHWAYS

(No. D-625)

John L. Boettner, Esq., for the claimant.

Donald L. Hall, Esq., for the respondent.

PETROPLUS, JUDGE:

Ruth Young, claimant, as the owner of a parcel of real estate upon which two residential dwellings and several sheds had been erected, seeks damages in the amount of $8248.00 to her property in Lester, West Virginia, allegedly caused by the negligence of the Department of Highways, respondent, when it designed and constructed in the year 1964 what is known as West Virginia Route 54. The old route 54, on the side of a mountainous slope, was raised in elevation and a number of culverts were installed providing openings under the road for the drainage of water from the upper slope and the paved road down the hillside towards the claimant's property and a small creek known as Surveyor Branch. The water so drained into Surveyor Branch passed under a secondary road known as Delta Route 145 through two oil drums which had never been quite adequate to carry the water during the wet seasons. Delta Route 145 was an access road to Route 54 and was taken into the road system of the State only for what has been termed "routine maintenance". Claimant's property abutted Delta 145 about 300 feet from where it intersected and joined Route 54. It was on the lower level of the slope, surrounded by a swampy area, and even before the upgrading of Route 54 was frequently flooded but never enough to cause substantial damage to the dwellings.

The new culverts under the new roadway discharged water on the upper slope about 200 or 300 feet from the claimant's property. The water so discharged, seeking a lower level, eroded portions of the Delta Road and formed ditches leading to Surveyor Branch. One of the ditches formed by the front gate of the Young property.

After the construction of the new road the flooding problem, particularly in times of heavy rain, became accentuated, and the claimant was frequently inconvenienced by large pools of water on her property. The State was notified about the conditions but disclaimed any responsibility for the natural flow of the water after its discharge from the culverts. The respondent's investigation placed the blame for the flooding on the inadequate oil drums under the Delta Road, through which the Surveyor Branch passed, rather than on the culverts of the new road.

On August 12, 1972, the runoff of water after a particularly hard rain damaged the foundation of the main house, causing a bulge in the lower wall, sagging floors, warped doors, and other incidental damage to the dwelling. Water, sand and debris also damaged items of furniture, clothing and furnishings. Prior to this flood damage, after a heavy rain in March, 1972, about 90% of the topsoil on the Young property was eroded and washed away, and flooding occurred in another building owned by Mrs. Young.

In its Answer, the respondent admitted the flood damage was caused by inadequate drainage, but denied liability on the ground that the claimant had a perennial flooding problem even before Route 54 had been improved and upgraded. The respondent further takes the position that surface water is a common enemy, and flowing naturally, does not create any responsibility on the State for damages to lands adjacent to the flow.

At the hearing the evidence disclosed the State's position to be untenable. The upgrading of Route 54 increased the flow of accumulated water substantially, throwing it towards the Young property and aggravating the preexisting condition. Numerous complaints were made by the neighbors concerning the inadequacy of the culverts, eventually reaching the top level of government, the Governor. The problem was ameliorated considerably by the State eventually installing a larger culvert under the Delta Road, which apparently has now solved the more serious aspects of the problem.

It is a finding of fact by this Court that the evidence preponderates in favor of the claimant and that in equity and good conscience she should be compensated for the damages to her property. It is the further finding of the Court that the Young property was located at a low point in a 300 acre drainage basin, and that the Surveyor Branch

formerly carried the natural flow of water under the Delta Road adjacent to the Young property through two oil drums 15 and 18 inches in diameter, which served their purpose with a minimum of flooding. After the upgrading of Route 54, and the installation of a series of culverts incidental to the improvement, the concentrated flow of water from the hillside and the new road increased substantially, and was directed in its flow towards the claimant's property.

The construction of the belated improvement, which solved the problem, should have been foreseeable by the State Engineers when the drainage for the new Route 54 was designed. However, it appears that the State proceeded with the new construction in total disregard of the consequences it might have to the Young property. This, in the Court's opinion, constituted negligence and a violation of the claimant's property rights.

Appraisals were introduced as exhibits showing the market value of Mrs. Young's property before and after the flood damage by both parties, with wide disparity in values.

We hold that the common enemy doctrine is not applicable to the facts of this case. The claimant is not complaining about the natural diffusion of surface water as the result of rainfall or melting snows. The respondent interfered with the natural flow of surface water by diverting, channeling and accelerating its flow with increased volume. The State in making public improvements has no more right than an individual to collect surface water into an artificial channel and precipitate it upon a neighbor to his substantial injury.

After the consideration of all the evidence, the conflicts in the testimony on the market value of the property before and after its damage, and all the circumstances relating to the culvert construction, it is the finding of this Court that the claimant is entitled to an award of $7300.00.

Award of $7300.00.

Opinion issued January 24, 1974

UNIVERSITY HOSPITAL
ALBERT B. CHANDLER MEDICAL CENTER,
UNIVERSITY OF KENTUCKY

vs.

BOARD OF VOCATIONAL EDUCATION,
DIVISION OF VOCATIONAL REHABILITATION

(No. D-681a)

Bruce Lankford, Esq., appeared for the claimant.

Henry C. Bias, Jr., appeared for the respondents.

PETROPLUS, JUDGE:

A claim was filed in the amount of $2,029.06, against the respondents for medical services rendered by the claimant to Mrs. Loretta E. Cornwell, a patient who was referred to the hospital by the respondents and treated therein from November 14, 1971, until July 26, 1972.

The claim was submitted on stipulation of facts wherein it appears that the agreement of the respondents was to pay the hospital the difference between the charges for medical services rendered and the amount received from Mrs. Cornwell's insurance coverage. The difference between the total charge of hospitalization and the amount so received from the Nationwide Insurance Company was $2,029.06. Funds were available to pay the claim before the end of the fiscal year ending June 30, 1972, but inasmuch as payment had not been received from the insurance company, payment was not made from the available funds.

The respondents admit that they authorized admission, confinement and treatment of Mrs. Cornwell and agreed to pay the amount of her hospital and medical treatment not covered by her insurance, and that funds were available for payment of the claim during the fiscal year, but that payment was deferred pending negotiations with the insurance company. Liability is admitted by the respondents in the amount of $2,029.06 and payment is recommended.

It is the finding of the Court that a valid contract existed between

the parties and that in equity and good conscience this claim should be paid as a contractual obligation of the State. An award will accordingly be made in favor of the claimant.

Claim allowed in the amount of $2,029.06.

Opinion issued January 24, 1974

PHYSICIAN ACCOUNTS DEPARTMENT,
ALBERT B. CHANDLER MEDICAL CENTER,
UNIVERSITY HOSPITAL, UNIVERSITY OF KENTUCKY

vs.

BOARD OF VOCATIONAL EDUCATION,
DIVISION OF VOCATIONAL REHABILITATION

(No. 681b)

Bruce Lankford, Esq., appeared for the claimant.

Henry C. Bias, Jr., appeared for the respondents.

PETROPLUS, JUDGE:

This claim in the amount of $1,375.00, relates to medical services performed by the physicians of the claimant on behalf of Mrs. Loretta E. Cornwell, of Prichard, West Virginia, which were authorized by the West Virginia Division of Rehabilitation, respondent. The claim was submitted by stipulation upon petition and answer.

The Vocational Rehabilitation Division obligated itself to pay for all charges not covered by the patient's insurance coverage.

The State by stipulation has agreed that medical services were authorized by the respondent and that the admission, confinement, and treatment of the patient in the claimant's hospital was approved. The respondent further agreed to pay for all medical services not covered by the patient's insurance. The services were rendered from August 19, 1971, to July 16, 1972. Funds were available for the respondent to pay for the aforementioned services but the fees were

not paid during the fiscal year that ended in 1972, because of negotiations with the patient's insurance carrier, which extended beyond June 30, 1972. The respondent admits liability in the sum of $1,375.00, as set forth in the claimant's petition and recommend that the sum be paid.

It appearing to this Court that this claim was duly authorized and that the State incurred a contractual obligation that should in equity and good conscience be paid for medical services rendered to a patient, referred to the claimant for treatment, and that the contract was valid in every respect, there being sufficient funds available for the payment of the services, it is accordingly the opinion of the Court that an award should be made to the claimant in the amount of $1,375.00.

Claim allowed in the amount of $1,375.00.

Opinion issued February 7, 1974

F. B. AMBURGEY, TRUSTEE FOR HENSLEY HEIGHTS MAINTENANCE FUND

vs.

ADJUTANT GENERAL

(No. D-633)

F. B. Amburgey, Trustee, claimant in person.

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

DUCKER, JUDGE:

F. B. Amburgey, as Trustee for fifteen owners of residence lots in Hensley Heights, an unincorporated suburb of the town of Man, West Virginia, claims damages in the amount of $1308.47, the cost of replacing a sidewalk and sewer line serving the residences in that subdivision. Claimant alleges that the sidewalks and sewer line were broken by motor trucks of the West Virginia National Guard when guardsmen moved victims and their personal effects to the Man High School, adjacent to the subdivision, for temporary housing immed-

iately after what is known as the "Buffalo Creek Flood" of February 26, 1972.

The evidence is to the effect that the subdivision property owners had an eight inch terra cotta pipe sewer line under a five inch concrete surface sidewalk along the side of the residence of John White, one of lot owners in the subdivision; that the sewer was approximately thirty inches below the sidewalk at the place where it was broken; and that the National Guard had at that time parked at that location some fifty or more heavy, double dual wheel trucks, some of them being 2½ ton trucks. Upon the question raised by the respondent as to whether the damages alleged by claimant could have been done by the trucks, the Court requested that the respondent have its engineers investigate the matter and report their conclusion to the Court. This was done by the respondent and the Court has received such report which admits that the damage could have resulted from the weight of the trucks.

In response to a question by the Court as to the authority of the claimant as trustee to make this claim in behalf of all the property owners in the subdivision, the claimant has filed, and the Court accepts, a Power of Attorney, in its original form, authorizing the claimant to act for the property owners in bringing and maintaining this claim and to receive for them any award which may be made herein.

As the facts as alleged by the claimant have been satisfactorily proved, and negligence on the part of the respondent is necessarily inferred from the consequences of its acts, we are of the opinion to, and do hereby award the claimant the sum of $1308.47.

Award of $1308.47.

Opinion issued February 7, 1974

BUCKEYE UNION INSURANCE COMPANY
FEDERAL INSURANCE COMPANY
GLOBE INDEMNITY COMPANY
UNITED STATES FIDELITY AND GUARANTY COMPANY

vs.

THE WEST VIRGINIA DEPARTMENT OF HIGHWAYS

(No. D-585b)

Frank E. Jolliffe, Attorney at Law, McHale, Jolliffe & Riffe, Lewisburg, West Virginia for the claimants.

Donald L. Hall, Attorney at Law; *Dan Blizzard,* Attorney at Law, for the respondent.

DUCKER, JUDGE:

Claimants, insurers against fire, paid the County Court of Greenbrier County, West Virginia the sum of $88,722.00 as the loss in a fire totally destroying on November 23, 1970 a building owned by the County Court and known as the "old jail" building in Lewisburg, West Virginia, such insurance loss payments having been in four separate amounts of $22,180.50 each by the four claimants herein. Claimants now, by way of subrogation to the rights of the County Court under the several insurance policies, seek reimbursement from the respondent, the West Virginia Department of Highways, alleging that the fire was caused by the negligence of the respondent in its operation of its garage or shop building which first caught fire, then spreading to and consuming the insured old jail building adjacent to the garage building.

The evidence as to the cause of the fire was the testimony of two employees of Department of Highways, namely, Henry Butler and Ghaile Shortridge, who were at the scene of the fire when it originated. Butler was cleaning with gasoline a "center lining machine", a machine with which white lines are painted on roads. The machine had been brought inside the shop or garage building to be cleaned because it had, as the witness said, "froze up" in the then ten degree weather and couldn't be cleaned outside, and Shortridge was the

"night gas man and radio man", who was in the front part of the shop building to see if anyone was on the two-way radio or phone when he heard a slight "poof" and looked back at the center line machine and saw it was on fire.

Butler testified that at about six o'clock in the afternoon of the day of the fire he proceeded to clean with gasoline the "guns" of the machine and had cleaned two guns and had started out a little side door of the garage with the buckets containing some of the gasoline he had used when Shortridge called and said there was a fire there. Butler said he "dropped or throwed the buckets down and ran back in there and at that time it was burning", and further that he got the machine out of the shop the best he could and "grabbed a fire extinguisher and it wouldn't work and grabbed another one and couldn't get it to work".

Shortridge testified that the machine was usually cleaned outside but as it was a cold night it was brought inside to clean. He also testified that the fire was first back of the guns on the striping machine and on the floor and the hoses around the guns, and that there was a gas heater in the bathroom located "between five and eight feet" from the machine, and that in his opinion gasoline on the floor back of the machine was ignited by the bathroom hot water heater. There was no contradiction of the testimony of Butler and Shortridge and the Court sees no basis for any contradiction thereof.

From the evidence the Court can only conclude that the fire was the result of the negligence of the respondent. The cleaning of the paint striper machine in the shop or garage with the gasoline so close to a fire in the gas heater only a short distance away, and the failure to have workable fire extinguishers available are facts which show that reasonable care was not taken to do the work at hand in a safe manner.

The first question raised by the respondent is that it is not liable because the claimants as subrogees have no greater rights than their subrogor, the County Court, has, and that the County Court as a subdivision of the State cannot sue the respondent, an agency of the State, and therefore the claimants have no right to maintain a suit in this Court. While it is true that a subrogee has no greater right than

his subrogor, the resulting question is whether the County Court could have maintained this action.

In the case of *City of Morgantown v. Board of Governors of West Virginia University,* 8 Ct. Cl. 41, this Court was required by the Supreme Court of Appeals of West Virginia to take jurisdiction of a claim of a municipal corporation against a State agency, and the claimant City was held not to be such a State agency as would prevent it from suing the State in this Court. Although a County Court may be considered in many respects as just a geographical or political subdivision of the State with many of the functions and sovereignty of the State, nevertheless, it lays its own levies for taxes, has its own funds, conducts its own fiscal and contractual affairs, and as a corporation is especially authorized to sue and be sued, to contract and be contracted with, and to handle its own financial affairs. So we must conclude that like cities, County Courts can maintain actions in this Court under the statutory jurisdictional provisions relating to this Court. And thus the claim which inured to the County Court of Greenbrier County and which passed to the claimants is within the jurisdiction of this Court.

Inasmuch as we conclude there is liability on the part of the respondent, the question of the amount of damages must now be determined. The claimants seek recovery of the total amounts paid by them in their settlement of the loss, while the respondent says the market value of the property destroyed was only approximately $22,370.

The claimants, insurers, base their claim upon the value fixed by appraisers who determined in 1969 their values for blanket insurance policies issued upon the County Court and all county buildings, of which the old jail was one, and which valuations were based upon replacement values approved by the West Virginia Inspection Bureau. The respondent relies on an appraisement made by D. K. Hammond, a real estate broker and appraiser, as to the market or sale value of the building destroyed. The Hammond appraisal was made from information furnished him after the fire. He testified that there were three methods of appraisal in fixing values, namely, the market appraisal to the entirety which in this instance couldn't be done because the entirety was not existing, the cost appraisal which also could not be done, and the income approach which he did. On cross

examination Mr. Hammond admitted that there was approximately 3800 square feet of space, but not necessarily usable space, in the building which he had not included in the $18,000 total figure, and that he had used $1.15 per square foot as the basis of his rental value figure. So $4370 for the additional footage could be added to $18,000, making total of $22,370, on an income approach basis, which he said "usually indicates what a prudent buyer is willing to pay for an income piece of property, regardless of what it costs to build". The appraisers for the claimants have based their figures on what they consider the sound value basis, that is reproduction new at $136,946 less thirty-five percent depreciation, resulting in the sum of $88,722.00. Claimants have in no way shown what the value was on the basis of a sale by a willing seller to a willing buyer both free of any compulsion. And while respondent's evidence on the question is closer to the rule, yet it is limited to the basis of rental value. So from the evidence the question is left quite open and conjectural.

The fact that the building was insured on the basis of the cost of reproduction does not determine what it could have been sold for in the market. Neither does the rental value quite meet the rule applicable, although it more nearly approaches the rule.

Buildings in different locations, though costing the same to build, bring different prices upon sales. Likewise old buildings are very often not worth rebuilding when better locations are available. Here we have an old building which has been completely destroyed. It was not being used for the purpose for which it was built, although after alterations and interior remodeling it had been used by the Welfare Department. There were no comparables in sales to furnish any help in arriving at a market value of the property. The testimony is to the effect that appraisers for the insurance companies, the claimants herein, determined the value of the building to be $88,720 after deducting thirty-five percent depreciation from a valuation of $136,496.00, which they said was a sound value. Such valuation was submitted to and approved by the County Court, and filed with the West Virginia Inspection Bureau which promulgated the fire insurance premium rate on such figures for policies to be written on a special form for public institutions and property. Although there is some testimony to the effect that sound value is not reproduction new less depreciation, yet the witness, Phillips, stated the building had a "re-

placement cost of $136,496.00 and a suggested sound value of $88,722.00". Whatever may be the difference in terminology as to the method of determining the value, it is immaterial as such valuation is not according to market value.

Furthermore, the element of contractual liability enters into the consideration in this case. Here the insured paid premiums on the basis of the valuation of $88,722.00 agreed to by the claimants and the insured, and there was a total loss of the property. The value of the property was fixed by the parties and the claimants were bound by their contracts, and they honored, by payment without question, their liability in the matter. But this fact cannot be the basis for their recovery by way of subrogation here, as the County Court could not have recovered on that basis against the respondent. The County Court had no such or any contract with the respondent and it could recover only the fair market value of the building determined on the willing seller and willing buyer basis.

In view of the lack of evidence as to market value and the practical impossibility of procuring any such evidence because the building was totally destroyed, we can only attempt by way of compromise to arrive at what we consider some fair estimate of the market value, and thus try to do justice and render an equitable decision in the matter. Accordingly, we are, therefore, of the opinion to and do make the following awards to:

(1) Buckeye Union Insurance Company	$11,000.00
(2) Federal Insurance Company	$11,000.00
(3) Globe Indemnity Company	$11,000.00
(4) United States Fidelity & Guaranty Co.	$11,000.00

Opinion issued February 7, 1974

EATON LABORATORIES

vs.

WEST VIRGINIA DEPARTMENT OF MENTAL HEALTH

(No. D-695)

No appearance by claimant.

Henry Bias, Attorney at Law, Assistant Attorney General for the respondent.

DUCKER, JUDGE:

Claimant, Eaton Laboratories of Norwich, New York, sold and delivered certain medicinal supplies to the Colin Anderson Center of the West Virginia Department of Mental Health, in accordance with orders therefor from the respondent, and after some payments on the account, there remained unpaid the sum of $47.81. It appears that the budget appropriation for the fiscal year which covered said account expired before full payment of the account was made, and payment of the balance of the account was not made because of oversight on the part of the respondent. Respondent admits that the allegations are true that the claim is reasonable, and that the account should be paid.

The Court, therefore, awards the claimant the sum of $47.81.

Award of $47.81.

Opinion issued February 7, 1974

FEDERAL INSURANCE COMPANY

vs.

THE WEST VIRGINIA DEPARTMENT OF HIGHWAYS

(No. D-585a)

Frank E. Jolliffe, Attorney at Law, McHale, Jolliffe & Riffe, for the claimant.

Donald L. Hall, Attorney at Law, *Dan Blizzard,* Attorney at Law, Department of Highways for the respondent.

DUCKER, JUDGE:

Claimant, as the insurer against fire and as subrogee of John R. Dawkins who owned property across the street from property known as the old jail in Lewisburg, West Virginia, owned by the County Court of Greenbrier County, West Virginia, claims damages in the sum of $302.81 resulting from a fire on November 23, 1970, which broke a window in the front part of the Dawkins property, the fire having totally destroyed the old jail building.

The facts as to the fire are fully set forth in an opinion of this Court in Claim No. D-585b*, and rather than repeat the same here, reference is made to that opinion. In accordance with that opinion in which this Court held that the fire resulted from the negligence of the respondent, we likewise hold in this claim, and do hereby award the claimant the sum of $302.81.

Award of $302.81.

*See *Buckeye Union Insurance Company et al v. Department of Highways,* No. D-585b in this Volume.

Opinion issued February 7, 1974

JAMES HODGE

vs.

WEST VIRGINIA DEPARTMENT OF HIGHWAYS

(No. D-665)

No appearance for claimant.

Gregory W. Evers, Attorney at Law, Department of Highways for the respondent.

DUCKER, JUDGE:

Claimant, James Hodge, a resident of Alderson, West Virginia, alleges that on or about June 22, 1973 the respondent sprayed its right of way in the general area of claimant's vegetable garden with a herbicide known as Dupont Hyvar XL and on June 28th and 29th, 1973 it sprayed that right of way with a herbicide known as Herbicide 2-4D, and that in doing so various kinds of vegetables in claimant's garden wilted and died. The facts alleged by claimant are by stipulation of the parties admitted and the damages agreed upon as amounting to $162.20.

Accordingly, the Court, finding that the loss has been caused by the acts of the respondent and that the estimate of the loss is fair and reasonable, hereby awards the claimant the sum of $162.20.

Award of $162.20.

Opinion issued February 7, 1974

MONARCH INSURANCE COMPANY

vs.

THE WEST VIRGINIA DEPARTMENT OF HIGHWAYS

(No. D-585c)

Frank E. Jolliffe, Attorney at Law, McHale, Jolliffe & Riffe, for the claimant.

Donald L. Hall, Attorney at Law, *Dan Blizzard,* Attorney at Law, Department of Highways for the respondent.

DUCKER, JUDGE:

Claimant, as the insurer against fire and as subrogee of Greenbrier Cable Corporation, lessee of property owned by the County Court of Greenbrier County, West Virginia, claims damages in the sum of $146.25, resulting from a fire on November 23, 1970, which burned a suspension and messenger wire cable used as a television transmission cable strung on utility poles near the building leased by claimant, the fire having totally destroyed the old jail building owned by the Greenbrier County Court.

The facts as to the fire are fully set forth in an opinion of this Court in Claim No. D-585b*, and rather than repeat the same here, reference is made to that opinion. In accordance with that opinion in which this Court held that the fire resulted from the negligence of the respondent, we likewise hold in this claim, and do hereby award the claimant the sum of $146.25.

Award of $146.25.

*See *Buckeye Union Insurance Company et al v. Department of Highways,* No. D-585b in this Volume.

Opinion issued February 11, 1974

HENRY T. ELDEN

vs.

BOARD OF ARCHITECTS

(No. D-703)

G. CAMERON HUNTER

vs.

BOARD OF ARCHITECTS

(No. D-704)

E. KEITH DEAN

vs.

BOARD OF ARCHITECTS

(No. D-705)

RAY A. SHAW

vs.

BOARD OF ARCHITECTS

(No. D-706)

L. W. FRANZHEIM, JR.

vs.

BOARD OF ARCHITECTS

(No. D-707)

PETROPLUS, JUDGE:

The Board of Architects, a State agency, has requested that the above styled claims be referred to this Court for an advisory determination concerning the legal or equitable status of the claims against the State of West Virginia. Since the facts relating to these claims are identical and relate to travelling expenses incurred by the members of the West Virginia Board of Architects during the fiscal year of 1972-1973, the claims have been consolidated for the purpose of securing

an advisory opinion from this Court.

The claims have been filed with the Clerk with a full statement of the facts and vouchers supporting the travel expenses of the Board members both for in-state as well as out-of-state travel accompany the petition for an advisory determination. The Attorney General's Office filed an answer admitting that the claimants under Claims Numbered D-703, D-704, and D-705 represent in part expenditures made by members of the Board in attending a meeting of the National Council of Architectural Boards in Atlanta, Georgia. The trip did not end until July 1, 1973, and it was impossible for the claimants to submit vouchers for payment of their expenses until after the 1st day of July, 1973, although the expenditures were made during the preceding fiscal year. No effort was made to encumber the funds of the Board during the fiscal year which ended June 30, 1973. It is admitted by the respondents that the claims were lawfully incurred, were reasonable and necessary and that they should be paid as petitioned by the claimants. The portion of the claims representing travel expense incurred within the State of West Virginia is admitted to have been properly authorized and that funds were available in the appropriate accounts for the payment in satisfaction of the claims. The Board has sufficient funds representing collections of fees for the payment of these expenses and the general revenue of the State is not involved in the payment and discharge of the claims.

Upon an informal consideration of the claims without a hearing, the Court makes an advisory determination that the claims are valid and enforceable obligations of the West Virginia Board of Architects and as such should be paid.

A copy of this Opinion shall be transmitted to the officer who referred the claim to the Court for an advisory opinion.

The Court determines that all of the claims representing both in-state and out-of-state travel are proper, and legal obligations of the West Virginia Board of Architects.

Claim No. D-703 is allowed in the amount of $434.26.

Claim No. D-704 is allowed in the amount of $668.20.

Claim No. D-705 is allowed in the amount of $338.36.

Claim No. D-706 is allowed in the amount of $134.04.

Claim No. D-707 is allowed in the amount of $87.46.

Opinion issued February 11, 1974

NATIONWIDE MUTUAL INSURANCE CO.
SUBROGEE OF WILLIAM H. WRIGHT

vs.

WEST VIRGINIA DEPARTMENT OF HIGHWAYS

(No. D-713)

Charles N. Talbott for the claimant.

Gregory W. Evers, Attorney at Law, West Virginia Department of Highways for the respondent.

DUCKER, JUDGE:

Claimant as subrogee under a policy of insurance issued by it to William H. Wright, alleges that while the respondent was cleaning a bridge on State Route 16 which crosses over Highway L. S. Route 27 between Mt. Hope, W. Va. and Pax, W. Va., an employee of the respondent threw a shovel full of gravel over the side of the bridge and the gravel landed on the front part of the 1968 pickup truck of the said William H. Wright while the truck was passing under the bridge, damaging the windshield, hood and fenders of the truck.

The parties have stipulated that the damages in the amount of $272.99 were caused by the act of the respondent and that the amount of damages claimed and stipulated is reasonable.

Accordingly, the Court awards the claimant the sum of $272.99.

Award of $272.99.

Opinion issued February 11, 1974

LAURA OSBORNE

vs.

WEST VIRGINIA DEPARTMENT OF HIGHWAYS

(No. D-579)

LAURA OSBORNE

vs.

WEST VIRGINIA DEPARTMENT OF HIGHWAYS

(No. D-634)

William Garrett, Esq., for the claimant.

Dan Blizzard, Esq., for the respondent.

PETROPLUS, JUDGE:

The above captioned claims have been consolidated and represent claims for damages to real estate in Webster Springs, Webster County, West Virginia, allegedly resulting from the negligence of the respondent in designing, constructing, and maintaining the drainage system in the improvement of a State highway described as Route 20, running from Webster Springs to Buckhannon. The road ran through a mountainside known as Miller Mountain and the claimant's property consisted of two dwellings erected on the side of the road on land that was on a lower elevation of the hillside slope than the land opposite from the property affected. For many years the drainage of water from the mountainside found its way through a ditch on the other side of the road, to the lower level of the mountain eventually reaching a fork of what is known as Elk River.

At the time the road was widened and improved the ditch on the opposite side of the road from the claimant's property appeared to provide adequate drainage of surface water which emptied through a culvert under the road on to the property of the claimant with a minimum amount of erosion as the water passed through the claimant's land. After the State made the improvements the ditch was

removed and open drainage was provided on the side of the road over the paved portion. A number of heavy rainfalls in the spring and summer of 1972 caused an overflow of water from the hillside and the road surface, to be directed in heavy volume on to the claimant's property with attendant debris and rocks resulting in damages.

On the evidence submitted it was established by the claimant by a preponderance of the evidence that inadequate drainage and failure to provide culverts for the new road was the proximate cause of the flooding of the property. Windows were broken, the foundation was undermined, doors were twisted, and a porch on one of the dwellings started to sag.

It is a finding of fact by this Court that the respondent failed to design and provide adequate drainage for the road improvement, and that a reasonably prudent contractor should have foreseen that the removal of the old ditch line without replacing it with another form of suitable drainage would subject the property of the claimant to overflows, carrying debris and thrusting it towards the property.

Having made a finding of negligence and proximate cause, the next question before the Court was proper compensation for the damages to the property. Some of the damage was repaired and repair bills were submitted aggregating approximately $833.00 for labor and materials that were used in the repair of the property. A substantial part of the damage to one of the dwellings had not been repaired at the time the claim was filed. Photographs were offered as exhibits depicting the condition of the property. An estimate was submitted prepared by a contractor indicating that an amount of $1,469.20 would be required to restore the property to a tenantable condition. This Court has repeatedly held that where damages to real estate are involved the Court will follow the rule adopted in West Virginia for the measure of damages set forth in various decisions of the Supreme Court of Appeals. The measure of damages is the difference between the fair market value of the property immediately before the mishap compared to its fair market value after the mishap. The cost of repairing the property is admissible in order to assist the Court to evaluate the damage and support the difference in market values which is a true measure of damages. No appraisals of the property before and after the damage were presented, and in order to do justice the case was kept open and the claimant was given the op-

portunity to submit this evidence by deposition at a later date. A deposition was filed, made by a licensed real estate agent from Webster County. Although the deposition was not as satisfactory as it should be, it did have sufficient probative value to be considered by the Court on the issue of damages. Compensatory damages for the injury to the property caused by the omission of the State will be measured by the diminution in the market value of the property and not exclusively on the cost of repairing or restoring the property to its former condition with new and better materials.

On the evidence before the Court relating to damages an award in the amount of $2,163.00 will be made to the claimant for both the repaired and unrepaired dwellings.

Claims are allowed in the amount of $2,163.00.

Opinion issued February 13, 1974

ROBERT CANTLEY, JR.

vs.

WEST VIRGINIA DEPARTMENT OF HIGHWAYS

(No. D-664)

No appearance for claimant.

Gregory W. Evers, Attorney at Law, West Virginia Department of Highways for the respondent.

DUCKER, JUDGE:

Claimant alleges that on or about June 22, 1973, the respondent sprayed its right of way on Route 3, Alderson, West Virginia, adjacent to claimant's vegetable garden, with a herbicide known as Dupont Hyvar XL, and again on or about June 28 and 29, 1973 with a herbicide known as Herbicide 2-4D which caused the vegetables in the garden to wilt and die, resulting in a loss to the claimant in the amount of $250.00.

As the parties have stipulated that the alleged facts are true, that

the amount claimed is reasonable and that the cause of the damage was the result of negligence on the part of the respondent, the Court is of the opinion to, and does hereby award the claimant the sum of $250.00.

Award of $250.00.

Opinion issued May 24, 1974

SANDRA MILLER CASDORPH

vs.

DEPARTMENT OF PUBLIC SAFETY

(No. D-661)

J. Stephen Max for the claimant.

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

JONES, JUDGE:

The claimant, Sandra Miller Casdorph, a typist for the respondent, Department of Public Safety, contends that she was employed by the respondent to perform extra work on her own time in the preparation of a West Virginia Uniform Reporting Guide, a project authorized and directed by the Legislature and financed by a Federal grant of $31,500.00. Lieutenant J. B. Hilliard was Director of the Criminal Identification Bureau to which the project was assigned, and Sergeant O. S. Neely was at that time the Assistant Director of the Bureau and Project Director. Claimant says that Lieutenant Hilliard and Sergeant O. S. Neely asked her to do the extra work and told her that there was an item in the project budget of $500.00 for typing. It was her understanding that she was to be paid the $500.00 for whatever extra work was required on a lump-sum basis. She testified that she worked a couple nights a week and on Saturdays from about the middle of May until July 1, 1970. She kept no record of time but approximated it to be 40 to 50 hours. She used a typewriter furnished her by the respondent. She testified that after the work was done, Sergeant Neely presented her a consulting contract form and asked her to fill it out and sign it, which she did. She was

later told that the Attorney General would not approve the contract because it was signed after the work was done.

William David Martin, Assistant Project Director, put the Guidebook together with the assistance of a Mr. Fannin. Typed and printed material was put in a looseleaf book for submission to a printing firm employed to do the composition work. Most of the material for the book was made up of photocopies of pages taken from Reporting Guides of the States of Florida and New Jersey. Of approximately 150 pages in the book 23 were typed, 13 by the claimant and 10 by a Miss Giles, a typist also regularly employed by respondent. Martin said it was possible that the claimant typed some pages over and agreed that the language was somewhat technical and the typing more difficult than average. He thought the retyped pages would not be more than 50% of the work. He knew that she took some of the work home and that 13 pages of the finished work were used in the book, but he had no knowledge of any offer of extra compensation.

Sergeant Neely testified that the claimant was furnished for home use a typewriter and Stenorette tape recorder to catch up on her work when she got behind by reason of illness or other causes. According to Sergeant Neely there was considerable discussion with the claimant and others in the office concerning the allotment of $500.00 for typing, but this was before the Florida and New Jersey books were available and permission was obtained to copy them. He further testified that after it was determined that only a limited amount of typing would be required, there was no discussion or agreement with respect to the portion of the work done by the claimant. Sergeant Neely admits that before the work was finished a form contract was presented to the claimant for her signature and then was submitted to the Attorney General's Office. He does not remember what, if any, amount of compensation was filled in on the form, but, in any event, the Attorney General's Office concluded that the contract was not proper and could not be approved.

The mere fact that $500.00 was budgeted in the Federal grant for typing a manual of approximately 150 pages was not authority for anyone to pay out or receive that sum regardless of whether the work was done or not. Considering all of the testimony in this case, there is a strong inference that because there was a $500.00 item in the project for typing, the respondent's employees agreed to make every

effort to obtain that amount of Federal money for the claimant, even after typing outside of regular hours was reduced to less than nine percent of the contemplated amount.

The claimant's theory of this case is that she and the respondent entered into a contract under which she is entitled to $500.00 from the Federal grant for any amount of extra typing done by her in the preparation of the Uniform Reporting Guide. She may have been misled by statements made to her, but giving due consideration to all of the evidence in this case, the Court is of opinion that such a contract was not made and entered into by the parties. Furthermore, there never was any understanding or agreement that the claimant would be paid out of State appropriations for personal services. Neither is there any evidence of the value of the alleged extra services on a quantum meruit basis; and considering the fact that the claimant was a regular salaried employee of the respondent, we choose not to speculate further in that direction.

In view of all the facts and circumstances developed in this case, the Court is of opinion that the claimant has not proved her claim by a preponderance of evidence, and, accordingly, her claim is disallowed.

Claim disallowed.

Opinion issued June 10, 1974

KENNETH R. STEVENS

vs.

WORKMEN'S COMPENSATION FUND

(No. D-724)

Menis E. Ketchum, Esq., for the claimant.

David L. Shuman, Esq., for the respondent.

PETROPLUS, JUDGE:

The failure of the Workmen's Compensation Fund of West Virginia to pay the claimant on an award made by the Fund on June 11, 1973, in the amount of $1,455.00 is the basis of this claim.

It appears from the pleadings that a check was issued in this amount and mailed to the claimant on March 8, 1974, at his last known address. The claimant's attorney on making inquiry was advised by the Fund that the employer had received the check but had failed to forward it to the claimant. The employees of the Fund promised counsel after numerous inquiries that the check would be voided and a new check would be issued. The Fund has failed to take any action to rectify the failure of delivering a check to the claimant.

The respondent's answer raises a question of jurisdiction, citing Chapter 14, Article 2, Section 14, of the West Virginia Code, as amended which states:

> "The jurisdiction of the Court shall not extend to any claim . . .
>
> 2. For a disability or death benefit under Chapter 23 of this Code."

Chapter 23 deals with the payment of benefits under the West Virginia Workmen's Compensation law.

It is quite obvious that this Court does not have jurisdiction to make an award if a claim is against the Workmen's Compensation Fund. If the claimant was awarded a sum as compensation for his permanent partial disability and assuming that neither party has taken an appeal from said award, the claimant has an adequate remedy at law in the courts of this State. The payment of an award after it has become final is purely a ministerial act and not judicial or discretionary. Mandamus is the proper remedy for the claimant, if the refusal to pay is arbitrary or capricious.

For the foregoing reasons it is the judgment of this Court that the claim should be dismissed for want of jurisdiction.

Claim dismissed.

Opinion issued June 18, 1974

L. M. CASDORPH

vs.

WEST VIRGINIA DEPARTMENT OF HIGHWAYS

(No. D-752)

No appearance for the claimant.

Gregory W. Evers, Esq., for the respondent.

PETROPLUS, JUDGE:

This claim was submitted for determination on the pleadings and an agreed statement of facts, in the amount of $61.29. On April 25, 1974, while claimant's truck was parked in a parking place, adjacent to a loading dock of the respondent's Materials, Control and Testing Laboratory on Michigan Avenue, in Charleston, West Virginia, a trash can full of concrete was struck by a high-lift operated by the respondent's employee, causing the trash can to fall off the dock and on to the claimant's truck, damaging it in the amount of $61.29. The State has admitted all of the material facts in its answer.

It appearing that the high-lift was operated without due care, and that the State is responsible for the negligence of its operator, the Court is of the opinion to make an award in the amount of the claim.

Claim allowed in the amount of $61.29.

Opinion issued June 18, 1974

COAL RIVER PUBLIC SERVICE DISTRICT

vs.

WEST VIRGINIA DEPARTMENT OF HIGHWAYS

(No. D-698)

J. Robert Rogers, Esq., for the claimant.

Gregory W. Evers, Esq., for the respondent.

PETROPLUS, JUDGE:

On February 6, 1974, while the respondent's employees were operating a backhoe in Boone County, they uncovered and damaged a drain line owned by the Coal River Public Service District. The backhoe was attempting to clear debris from the opening to the drain line, splitting a joint which made emergency repairs necessary. The investigator for the State has admitted that the line was punctured by the negligent operation of the backhoe, and that the damages claimed in the amount of $90.00 for the repairs of the line are reasonable.

It appears to the Court from the pleadings and stipulation of facts that the water main was severed through the negligent operation of the State's equipment, and the claim is accordingly allowed in the amount of $90.00.

Claim allowed in the amount of $90.00.

Opinion issued June 18, 1974

COAL RIVER PUBLIC SERVICE DISTRICT

vs.

WEST VIRGINIA DEPARTMENT OF HIGHWAYS

(No. D-699)

J. Robert Rogers, Esq., for the claimant.

Gregory W. Evers, Esq., for the respondent.

PETROPLUS, JUDGE:

It appears from the pleadings and agreed statement of facts that the respondent's work crew was making a cut on a public road on Lick Creek Mountain in Boone County. While engaged in making the cut it became necessary to drill through a shelf of rock and blast. The blasting operation broke the service line in two places making repairs necessary in the amount of $111.00. It was admitted by the respondent that the blasting damaged the service line while digging and shovelling in the area of the service line.

This Court has invariably held that blasting is a dangerous operation, and if a trespass on private property results, the respondent is absolutely liable for the damages sustained by a complainant, regardless of the degree of care exercised in the blasting operation.

An award is accordingly made to the claimant in the amount of $111.00, agreed to by the parties as the cost of repairing the service line.

Claim allowed in the amount of $111.00.

Opinion issued June 18, 1974

JOHN MOORE

vs.

ADJUTANT GENERAL

(No. D-719)

Claimant present in person.

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

DUCKER, JUDGE:

John Moore, who resides on State Route 65 and conducts a used car business on said Route, in the vicinity of his residence also located closely thereby on said Route, as it parallels Trace Fork of Island Creek between Logan and Holden in Logan County, West Virginia, claims damages in the amount of $416.38 allegedly caused by a West Virginia National Guard army truck operated by the respondent forcing accumulated flood water from the highway against the doors of the business building of the claimant, breaking the doors and glass sections thereof.

The evidence is to the effect that on and about January 10th, 1974, the Guyandotte River was in flood stage and the water therefrom had backed up into Trace Fork, a tributary thereof, and had covered a distance of approximately 450 feet on Route 65 adjacent to the business buildings of the claimant, which flooded part of the road reached a depth of approximately three and a half feet at its deepest part and eighteen to twenty inches at the claimant's buildings at the time the damage was inflicted. Between 11:00 p.m. and midnight on January 11th, an army two and a half ton truck, which had been dispatched to the area to evacuate some persons from the flood, was driven through that portion of Route 65 adjacent to claimant's property forcing the flood water against the claimant's garage doors and the glass portions thereof. The testimony of the son of the claimant, who was called by his father to help clean up the property as the water was receding, was to the effect that he was there when the truck

went through the water and that he saw the water break the doors, and that the truck was traveling thirty to thiry-five miles an hour, but his testimony was contradicted by Capt. Noble Lanham who stated that he did not believe that the truck in question "would be capable of going through three or three and a half feet of water at speeds of thirty to thirty-five miles an hour" but "it could go through the water but not nearly at that speed". Reports of the investigation made by the respondent indicated that the driver said he was traveling about two miles an hour, and that the Department had not considered there was negligence in the matter.

The army truck was headed south on the highway and after having left a part of the road which was not flooded entered the water covered roadway approximately one hundred fifty to one hundred seventy-five feet before reaching a point adjacent to the claimant's property, which makes it seem reasonable for the son's testimony as to speed that some greater speed could have been developed before reaching the water, thereby effecting an increased impact with the water and the resulting water impact with the doors of claimant's buildings. Here we have the testimony of claimant's son who was on the scene and saw the damage inflicted, and his testimony is not contradicted by any other witness, but only in a department report to the effect that the truck was traveling at a rate of two miles an hour, which at that rate of speed could not have caused an impact on the water sufficient to cause the damage alleged. Such reported statement is not sufficient to overcome the claimant's evidence in that regard.

We are of the opinion that the respondent's truck was negligently operated and the damages suffered by claimant are the result of such negligence, and we, therefore, award the claimant the sum of $416.38.

Award of $416.38.

Opinion issued June 18, 1974

TRAVELERS INDEMNITY CO., as subrogee of
CATHERINE M. BELCASTRO

vs.

WEST VIRGINIA DEPARTMENT OF HIGHWAYS

(No. D-747)

R. F. Hart, Jr., Claims Supervisor, for the claimant.

Gregory W. Evers, Esq., for the respondent.

PETROPLUS, JUDGE:

The claim in the amount of $122.06, was submitted upon the pleadings and agreed stipulation of facts, which briefly are as follows:

Catherine M. Belcastro on August 21, 1972, while driving her automobile over a public highway in a work area, where employees of the respondent were engaged in road work, was directed by an employee of the West Virginia Department of Highways to pass. The respondent was engaged in paving a public road near Morgantown, West Virginia, and a dump truck loaded with asphalt was parked off the left side of the road. A flagman directed the claimant to proceed, and as she started forward respondent's agent threw a shovel full of asphalt against her car striking the hood, windows, and left side thereof. The damage was repaired by a body shop in Clarksburg, West Virginia, at a cost of $122.06. The Monongalia County Maintenance Superintendent in his report admitted that the asphalt of hot mix was accordingly thrown against the claimant's automobile.

It is the finding of the Court from the pleadings and stipulations that the respondent failed to exercise ordinary care under the circumstances, and an award is made to the claimant in the amount of $122.06.

Claim allowed in the amount of $122.06.

Opinion issued June 26, 1974

JOHN H. BRUNETTI HARDWARE & PAINTING

vs.

WEST VIRGINIA DEPARTMENT OF MENTAL HEALTH

(No. D-676)

Hobby Spaulding, Attorney at Law, and *John McCuskey,* Attorney at Law, for the claimant.

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

DUCKER, JUDGE:

Claimant, John H. Brunetti, a painting contractor, of Clarksburg, West Virginia, became a subcontractor to Paul Mullins doing business as Security Products, who had been awarded a contract by the West Virginia Department of Mental Health for the painting of the clock tower of the Weston State Hospital at Weston, West Virginia, at the contract price of $6300.00. The claimant's contract with Mullins was at the price of $5000.00 to be paid $2500.00 when the work was half done, which was so paid, and $2500.00 when the work was done, which was not paid though Mullins was paid the full amount of $6300.00 by the State. As no bond was required by the State, claimant was not protected against Mullin's debt to claimant. Shortly after claimant undertook the work, he discovered that the steel in the cornice of the tower was "completely eaten out", that the windows were loose and needed glazing, that the screens which were in storage needed repair and painting, that caulking was necessary to hold the windows in place, and that other incidental repair work was necessary before a satisfactory painting job could be performed. The evidence was that such repair work could not be considered as a part of the work described in or contemplated by either the original or subcontract. Claimant alleges that when he discovered the need for all the extra work he notified the business manager of the hospital, W. J. Murphy, of such facts, and that Murphy told claimant to go ahead with such special work and to send him the bill. An itemized statement of the charges for the materials and labor furnished by the claimant for the alleged extra work shows a total

amount of $2264.43, which is the sum now alleged by claimant as due him from the State in this action.

The respondent in denying liability on the part of the State relies chiefly on the regulations issued pursuant to the provisions of Chapter 5A, Article 3 of the Code of West Virginia relating to the purchasing procedures of the State, and it says that the law was not complied with and that consequently no valid contract was made with claimant in that the acts of W. J. Murphy which were not in accordance with the provisions of the Code were not binding on the State. However, respondent did question, but without satisfactory contradiction or proof, the accuracy of the rates and hours of labor charged by claimant. It is admitted that the statutory provisions requiring the publication of notice and the submission of three bids before the awarding of any contract were not complied with. The complainant, who testified that during the forty-nine years he has engaged in business he had not previously done any business with the State and did not know of any statutory or other legal provisions relating to business with the State.

The claimant makes no claim against the State for the $2500.00 which he failed to collect from Mullins under the contract, although the respondent failed in its duty to obtain a bond from Mullins which may have protected claimant as to that part of the debt. Here the claim is for extra work not embraced in his subcontract with Mullins, but which was ordered by Murphy as the State's agent at the Weston State Hospital. That the extra work was performed and that the amount claimed is reasonable have been satisfactorily proven. Nor has there been any evidence to the effect that there was no sufficient budgetary appropriations to cover the expenditure. The only question for determination is whether despite the statutory regulations referred to, claimant should be paid for the work he performed in good faith and in reliance upon the action of the agent of the respondent. The failure of the respondent in the matter of the bond demonstrates to some degree how loosely regulatory rules are applied by the State's agents who should know better than the ordinary citizen as to such statutory provisions.

The jurisdiction of this Court is created primarily to waive the constitutional immunity of the State, and the law specifically provides for awards in claims which "in equity and good conscience" the State should pay.

We are of the opinion that where the application of the provisions of such a statute as is here involved is not necessary to protect the State against unjust and otherwise illegal claims, the provision should not be strictly applied to deprive a citizen of the State of his just and equitable rights, that it would be unjust enrichment on the part of the State if the claim was not paid, and that the doctrine of quantum meruit is applicable. Accordingly, being of the opinion that the claimant has established an equitable and just claim, we hereby award the claimant the sum of $2264.43.

Award of $2264.43.

Opinion issued June 26, 1974

DAVID R. DIETZ

vs.

DEPARTMENT OF HIGHWAYS

(No. D-682)

No appearance for the claimant.

Gregory W. Evers for the respondent.

JONES, JUDGE:

The claimant, David R. Dietz, alleges in his petition that on April 25, 1973, while his 1967 Volkswagen automobile was parked in the driveway of his home in Berkeley County, West Virginia, the respondent, Department of Highways, through its employees, set off a dynamite blast in the public road right of way about 400 feet from the claimant's property, throwing a rock upon and against the top of the claimant's vehicle and causing damage thereto in the amount of $82.40.

Based upon the report of investigation by the Berkeley County Maintenance Supervisor, the answer of the respondent admits the allegations of the claimant's petition and says that the amount of the claim is reasonable.

This claim was submitted upon the pleadings; and in line with prior holdings in similar blasting cases, the Court is of opinion that the respondent is liable for the trespass upon the claimant's

property, and therefore awards the claimant, David R. Dietz, the sum of $82.40.

Award of $82.40.

Opinion issued June 26, 1974

MR. AND MRS. T. E. REED

vs.

DEPARTMENT OF HIGHWAYS

(No. D-677)

No appearance for the claimants.

Gregory W. Evers for the respondent.

JONES, JUDGE:

The claimants, Mr. and Mrs. T. E. Reed, and the respondent, Department of Highways, have filed a stipulation in the case substantially as follows: That in late May or early June, 1973, the respondent's employees sprayed a herbicide known as Dupont Hy-Var XL in the area of a highway sign near the claimants' property in Nitro, West Virginia; that immediately after the spraying operation and as a result thereof, a healthy, 20-year old, yellow transparent apple tree, theretofore producing 20 to 25 bushels of apples each year, started to wilt and eventually died; and that the fair and reasonable value of the tree was $600.00 (the original claim was for $800.00).

It appears to the Court that this claim has been carefully investigated by the respondent and that the facts have been fairly stipulated by the parties. The Court finds that the respondent was negligent in its spraying operation, proximately causing injury to the claimants' property, and that the respondent is liable to the claimants for damages in the amount stipulated. Accordingly, an award is made to the claimants, Mr. and Mrs. T. E. Reed, in the amount of $600.00.

Award of $600.00.

Opinion issued August 14, 1974

CALVERT FIRE INSURANCE COMPANY,
AS SUBROGEE OF CODY MULLINS

vs.

WEST VIRGINIA DEPARTMENT OF HIGHWAYS

(No. D-741)

No appearance for the claimant.

Gregory W. Evers and *Emerson Salisbury* for the respondent.

DUCKER, JUDGE:

The facts as stipulated by and agreed to by the parties are that on September 12, 1973 in the widening of the State Highway Route No. 7 in McDowell County by the crew of the West Virginia Department of Highways, it was necessary where a slip had occurred to drill into solid rock and "shoot it off" to widen the road, and in doing so a rock about three inches in diameter flew loose and went down over the bank and through the roof of the trailer home of the claimant's insured, Cody Mullins. The resulting damage in the amount of $89.87 is admitted by respondent as having been so caused by it as well as being fair and reasonable.

As the claim is based on respondent's negligence, the Court awards the claimant the amount alleged.

Award of $89.87.

Opinion issued August 14, 1974

CLEVELAND CLINIC

vs.

BOARD OF VOCATIONAL EDUCATION,
DIVISION OF VOCATIONAL REHABILITATION

(No. D-731)

No appearance for the claimant.

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

JONES, JUDGE:

In September, 1971, the respondent, Board of Vocational Education, Division of Vocational Rehabilitation, sent a client from the Mullens District to Cleveland Clinic, the claimant in this case, for physical restoration services because of a cardiac condition. The services were performed but the claimant erroneously billed the patient instead of the respondent. As the confusion in billing continued, the fiscal year 1971-72 ended, and when the bill in the amount of $805.88 was properly submitted to the respondent, funds which were available during said fiscal year wherein the obligation arose had expired and payment legally could not be made.

By its answer the respondent admits that the services were performed upon its request and in its behalf, that the charges are reasonable and that the claim should be paid.

It appearing that the amount of the claim is due and owing and in good conscience should be paid, an award in the amount of $805.88 is hereby made to the claimant, Cleveland Clinic.

Award of $805.88.

Opinion issued September 24, 1974

TYGART VALLEY TELEPHONE COMPANY

vs.

WEST VIRGINIA DEPARTMENT OF HIGHWAYS

(No. D-779)

No appearance for the claimant.

Emerson Salisbury for the respondent.

GARDEN, JUDGE:

The respondent has presented and filed a stipulation, approved by John L. Sutton, President of Tygart Valley Telephone Company, the claimant herein, establishing the facts in this claim as follows:

1. That on or about the 9th day of May, 1974, members of a work crew under the supervision and control of the West Virginia Department of Highways personnel, while engaged in the blasting of a ditch line on County Route 15/3, being commonly known as the Brady Gate Road, located in Monterville, Randolph County, West Virginia, did damage to cables belonging to the claimant in the amount of $109.79.

2. That a statement of Henry N. Hannah, foreman of the above mentioned crew, and filed with the stipulation, establishes that the cables were damaged as a result of the dynamiting of a ditch by one Donald Shaffer, a member of the crew.

3. That the claimant was free from any fault or negligence in the matter.

4. That the Department of Highways is of the opinion that the claimed damages of $109.79 are just and equitable.

Based on the foregoing stipulation, as presented by respondent, this Court is of opinion to and does allow an award of $109.79.

Award of $109.79.

Opinion issued October 9, 1974

DANA H. CARNEY

vs.

WEST VIRGINIA DEPARTMENT OF HIGHWAYS

(No. D-761)

Dana H. Carney, claimant by stipulation.

Emerson Salisbury for the respondent.

DUCKER, JUDGE:

The stipulated facts are that on May 15, 1974, the claimant while driving her 1967 Chevrolet automobile across the St. Albans-Nitro Bridge across the Kanawha River sustained damages to the automobile when the car struck a piece of iron approximately three-fourths of an inch thick, two inches wide and ten inches long which had come loose from the center section of the bridge and was lying in the pathway of claimant's automobile, the iron bar having bounced against the gas tank of the automobile, puncturing the tank, and necessitating repair at a cost of $67.61. The respondent admits in the stipulation that the damage done was the result of its negligence, and that there was no negligence on the part of the claimant.

Accordingly, we are of the opinion to, and do hereby award the claimant the sum of $67.61.

Award of $67.61.

Opinion issued October 9, 1974

LENA SOLOMON

vs.

REHABILITATION ENVIRONMENTAL ACTION PROGRAM

(No. D-734)

Brent Beveridge for the claimant.

Edgar E. Bibb III and *William D. Highland,* Assistant Attorneys General, for the respondent.

JONES, JUDGE:

The claim of Lena Solomon arose when the respondent, Rehabilitation Environmental Action Program, also popularly known as REAP, a State agency created under the executive authority of the Governor of West Virginia and acting under a contract with the Appalachian Regional Commission, destroyed a building, formerly a residence, owned by the claimant. The property upon which the building was located, being 4.88 acres in Clinton District, Monongalia County, West Virginia, was purchased by the claimant from the Sheriff of Monongalia County in the month of October, 1970 for taxes delinquent thereon for the year 1969, in the name of California Hobbies, Inc., for the sum of $85.00.

In the summer of 1973, a section of Interstate 79 was opened and a ceremony was held near the Monongalia-Marion County line. The subject structure was in plain view of the dignitaries and others attending the ceremony and the "eyesore" was so offensive to the view of A. James Manchin, State Director of the respondent, that he vowed he would remove it as a part of the program of the agency. Some effort was made to locate the owner but no search was made in the Monongalia County Clerk's office where the claimant's deed had been recorded on May 15, 1972. While there was considerable publicity, probably in excess of what a legal notice would have engendered, no official notice of any kind was given to the claimant. In August, 1973, a foreman and three boys of high school age, all

employees of the respondent, went upon the claimant's land and with sledge-hammers and crowbars proceeded to tear down the structure. The work continued into the third day when an attempt was made to burn out a bumblebee's nest, resulting in the remaining walls being burned to the ground. After the fire, the crew left the site and did not return. Photographs taken after their departure showed a basement, a brick chimney, and many loose boards strewn about the area.

While the Court approves the purpose of the respondent's program and its salutary accomplishments, we cannot condone the violation of the claimant's rights in the ownership of her property. Photographs exhibited in evidence depict a dilapidated, unsightly structure, and testimony described the roof as falling in, no floor in the living room, walls deteriorated and damaged, and the weight of the evidence indicates rather strongly that elimination of the structure might be considered a worthy goal. However, the end may not justify the means, and in this case, the actions of the respondent were not justified.

The evidence in this case reveals a wide divergence of views as to the amount of damages sustained by the claimant. The notice of claim sets a value on the building prior to its destruction of $3,000.00 and claims damages to trees in the amount of $500.00. The respondent considers the structure to have been a worthless nuisance and damage to trees to have been negligible. The Court takes the view that the building had some value and that at least one large tree was injured by fire resulting from the respondent's carelessness. The Court is of opinion that the claimant is entitled to recover a portion of the damages claimed and that a fair appraisal of the claimant's loss, including clean-up, is the sum of $500.00.

Accordingly, an award is hereby made to the claimant, Lena Solomon, in the amount of $500.00.

Award of $500.00.

Opinion issued October 9, 1974

EDWARD H. STANLEY

vs.

REHABILITATION ENVIRONMENTAL ACTION PROGRAM

(No. D-730)

James A. McMillion, Attorney at Law for the claimant.

William D. Highland and *Edgar Bibb,* Assistant Attorneys General for the respondent.

DUCKER, JUDGE:

Claimant, Edward H. Stanley, a former resident of Glade District, Webster County, West Virginia, alleges damages in the amount of $1045.00 against the respondent, Rehabilitation Environmental Action Program, popularly known as REAP, a State agency created under the Executive authority of the Governor of West Virginia and acting under a contract with the Appalachian Regional Commission. The claim is based upon the respondent's taking from claimant's property near Cowen, West Virginia and destroying a 1963 Dodge automobile and a 1964 Plymouth automobile without legal notice of the respondent's intention so to do, as well as several items of personal property claimed to have been left by claimant in the Plymouth car.

The evidence is to the effect that claimant, who had previously lived in a trailer on the premises owned by him, had sold the trailer in 1972 and moved to Cumberland, Maryland on account of his health, and that he left the two automobiles in question on the lot in the care of the trailer purchaser who apparently failed to do so, and when he came back in July, 1973, the two cars were gone and claimant then learned that the respondent had taken the cars and had them crushed. That no notice had been given to claimant by the respondent is admitted by the respondent. The driver of the truck of the respondent testified that he had received numerous complaints by people in Cowen to the effect that the automobiles were a nuisance, that a young boy who had been drinking had been sleeping in one of the cars and that children on their way to school were afraid to go by the cars. The driver further stated that after such complaints he was

directed by the Mayor of Cowen to pick up the cars for delivery to a crusher for their destruction, but that although he was an employee of the respondent he had had no instructions in the matter. Besides the cars, claimant said he lost articles of personal property which he had left in the Plymouth car, namely, a leathe rsuitcase worth $35.00, an electric razor worth $20.00, clothing worth $20.00, tools and tool box worth $75.00, a foot locker worth $5.00, and a set of dentures worth $300.00. Respondent's witness testified that he didn't see the items of personal property in the car when the car was taken although he didn't look in the glove compartment or in the back end, but that both cars had been stripped. Claimant, who had left in September, 1972 did not discover his loss until he returned in July, 1973 with a mechanic to help him start the Plymouth.

Without quoting the sections of Chapter 17, Article 24 of the Code, pertaining to abandoned vehicles, Section 6 of that article expressly provides that when an abandoned vehicle is taken by a law enforcement agency it must give notice to the owner within fourteen days after the taking so that the owner may within ten days reclaim the property. The respondent's action without such notice was not legal and without question created liability in the matter.

The claimant says he paid $100.00 for the Dodge and $500.00 for the Plymouth, but there is no evidence as to what they were worth when taken by the respondent; the driver of the respondent's truck said they were junk. The fact that there had been no protection of the automobiles against thievery or other destruction for nine or ten months certainly leads us to believe that the condition of the cars was not good and their value greatly depreciated. Nor is there any evidence that the personal property was in the Plymouth car at the time respondent took it.

The testimony that people in the neighborhood classified the cars as nuisances enhances the belief that the cars were of little value, if any, but this is counteracted by the testimony that the claimant believed the cars were still valuable as he came back to his property with a mechanic to start the Plymouth car for which the previous year he had paid $500.00 and as to which he had arranged custody thereof with the trailer purchaser.

Although we are of the opinion that the respondent is liable for its unlawful act in taking and destroying the claimant's property, we

find it extremely difficult to accurately assess damages because of the lack of evidence as to the real value of the property. The property was destroyed and evidence as to what it was worth at the time of its destruction is not satisfactory. Respondent says it didn't have the funds with which to pay mileage and fees to witnesses who could testify in its behalf but wouldn't do so without such payment. Claimant cannot be penalized for such a situation. So this Court, in order to do justice as best it can, must reach, similarly to a jury finding, some reasonably fair amount, by estimation or conjecture, which will compensate claimant for his loss. In doing so, the Court awards the claimant the sum of $200.00.

Award of $200.00.

Opinion issued October 9, 1974

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, AS SUBROGEE OF ROBERT MYLES AND SHARON MYLES

vs.

DEPARTMENT OF HIGHWAYS

(No. D-768)

Robert J. Louderback for the claimant.

Emerson Salisbury for the respondent.

JONES, JUDGE:

The respondent, Department of Highways, has presented a stipulation, approved by counsel for the claimant, State Farm Mutual Automobile Insurance Company, as subrogee of Robert Myles and Sharon Myles, its insureds, confirming the facts and circumstances giving rise to this claim, based upon an investigation and report by the respondent's Chief of Claims, substantially as follows:

That on July 21, 1972, on a public street known as Pennsylvania Avenue, in the City of St. Albans, in Kanawha County, West Virginia, Sharon Myles was driving a 1974 Oldsmobile automobile, owned by her and her husband, Robert Myles, and in passing a

vehicle owned by the respondent and operated by respondent's employees who were preparing the street for the painting of a centerline by dropping sports of paint as the vehicle progressed, one of the employees of the respondent carelessly and negligently splashed paint on the left side of the Myles automobile; that the said Sharon Myles was free from fault or negligence; and that the repainting of said automobile was necessary, and the cost thereof in the amount of $105.06 was reasonable.

The Court approves said stipulation and awards the claimant, State Farm Mutual Automobile Insurance Company, the sum of $105.06.

Award of $105.06.

Opinion issued October 9, 1974

EMILY ZAIN

vs.

WEST VIRGINIA DEPARTMENT OF HIGHWAYS

(No. D-727)

Claimant appears in person.

Gregory W. Evers, Attorney at Law for the respondent.

DUCKER, JUDGE:

Claimant, Emily Zain, a resident of Charleston, West Virginia, alleges that at about 6:15 o'clock in the evening of September 25, 1973, she suffered injuries in the nature of a fracture of her left foot when in alighting from a bus on Washington and Thompson Streets, Charleston, she tripped and fell in the street when her foot struck a manhole which with the paving around was left with a small ridge around it. She claims damages in the amount of $350.00.

The only evidence for the claimant was her own testimony and a photograph of the manhole. The respondent alleges contributory negligence on the part of the claimant as well as non-liability otherwise.

From the evidence it clearly appears that the manhole was a regu-

lar metal covering apparently level with the surface of the highway, with only a slightly rising ring of tar or asphalt filling between the circular metal plate and the surrounding surface of the highway, and there was nothing else which could be considered as a dangerous or hazardous condition existing in connection with the construction or maintenance of the highway at that place. The evidence further shows that the claimant used the bus every day and that she alighted at the same place, except that on the day of her accident the bus stopped several feet from the curb because of a car parked at that point. The accident occurred in full daylight with no other witnesses present.

From the description of the manhole and the photograph of it, we are of the opinion that it was not a dangerous hazard but was one that was easily discernible and should have been seen by the claimant had she exercised reasonable care in leaving the bus to go to the sidewalk, and that she was guilty of contributory negligence in her resulting fall.

Accordingly, we are of the opinion to, and do deny the claim.

No award.

Opinion issued October 21, 1974

CLINTON BOEHM and HESTER BOEHM

vs.

DEPARTMENT OF HIGHWAYS*

(No. D-613)

John Troelstrup, Esq., for the claimants.

Donald L. Hall, Esq., for the respondent.

PETROPLUS, JUDGE:

This claim arose as a result of the displacement and relocation of the claimants with the assistance of Dale Thomas, a right-of-way agent of the West Virginia Department of Highways.

*See also *Boehm v. Highways*, 10 Ct. Cl. 140 for petition for rehearing.

The Boehms formerly lived in a rented house along a State highway in Boone County, West Virginia, designated Corridor G. It was necessary for them to secure other living quarters because of the improvement and relocation of the highway undertaken by the West Virginia Department of Highways. With the assistance of the right-of-way agent, they inspected several other properties in the area and eventually decided to purchase a dwelling house situate on a parcel of land which also bordered on the highway, and a portion of which had been taken by eminent domain proceedings for the improvement of the highway. On January 29, 1971, upon the recommendation of the right-of-way agent, the claimants made the purchase and received a deed from Jenny Opal Drake for a consideration of $5,000.00. Mrs. Drake received a payment of $2,000.00 and a note secured by a deed of trust on the property for the deferred balance, payable in monthly installments of $50.00 each until the purchase price had been paid in full. The Boehms were paid approximately $4,550.00 by the West Virginia Department of Highways for dislocation allowance, moving costs, and damages. This payment was applied to the purchase and improvement of the property. Being aware that the property they were purchasing was land-locked and that Corridor G was a controlled access highway, a provision was made in the deed for a right of way over an adjoining parcel of thirty acres, allegedly owned by one Oza M. Drake who conveyed said right of way to Jenny Opal Drake by deed dated September 14, 1970.

The Boehms were not represented by counsel during the negotiations for the purchase of Mrs. Drake's property, and the deed and deed of trust were prepared by an attorney named P. W. Hendricks who was representing Mrs. Drake. No title search was made to determine the validity of title to the land and other right of way appurtenant thereto.

Upon the death of Oza M. Drake who had conveyed the right of way over his land to Jenny Opal Drake, who in turn had included the right of way in the deed to the Boehms, it was determined that Oza M. Drake had only a life estate in the property and that Edward L. Burton, who lived in Charleston, West Virginia, was the owner of the fee. Mr. Burton testified as a witness and stated that he was not aware that Oza M. Drake, the life tenant, had made the conveyance of the right of way to Jenny Opal Drake.

Having taken title to a right of way from a grantor who had a terminable interest, the Boehms found themselves with a land-locked parcel of ground after the death of Mr. Drake and in a position of having no access to the highway either through their property or over the property of Mr. Burton.

The theory of the claimants' case is that the right-of-way agent had promised the claimants a direct access to the road and induced them to purchase the Drake parcel by representations that access to the road would be furnished by the State. The testimony of the right-of-way agent was in direct conflict with that of the Boehms, although he did admit that he had recommended the purchase of the property and that it was his function to assist in relocating persons displaced by the highway and explain to them the benefits that they were eligible to receive by reason of the displacement. The agent's participation in negotiating the sale was minimal, and other than furnishing Mrs. Boehm with transportation to the attorney's office, he took no part in the transaction. Further testimony was introduced that at one time stakes were placed on the Boehm property by the road contractor indicating a proposed access road to the highway.

The deed of trust executed by the Boehms to P. W. Hendricks, Trustee, after describing the parcels conveyed, refers to the right of way over the Oza M. Drake adjoining parcel, and excepts two tracts which were conveyed to the Department of Highways prior to the time Jenny Opal Drake sold the residue of her property to the Boehms.

A search of the title, of course, would have disclosed the terminable nature of the right-of-way over the Burton parcel, but unfortunately the Boehms were not aware of the necessity of a title search and relied entirely on the assurances of Mrs. Drake that they did have ingress and egress to their property over the Burton parcel.

It is incredible that a right-of-way agent would promise a property owner access to a road that he knew was a controlled access highway, and even if he did so, such promises were clearly beyond the scope of his authority and in direct violation of the regulations and plans of the West Virginia Department of Highways. If he made such representations in his zeal to relocate the Boehms, it would be the perpetration of a fraud for which the Boehms would have a civil remedy against him personally. Such representation, so clearly out

of the scope of his authority, actual and apparent, would not be binding upon the State of West Virginia.

It is the factual finding of the Court that the respondent has incurred no liability in this matter, contractual or otherwise. The right-of-way agent was not aware that the right of way in the Boehm deed had been granted by a life tenant, and consequently neither he nor the State could be responsible for any assurances that he may have made to the Boehms that they had a means of ingress and egress over an adjoining parcel. Promises and representations of a right-of-way agent which exceed the scope of his limited authority do not create a contractual obligation on behalf of the State. The State is not bound by the unauthorized or illegal acts of its officers, and all persons who deal with such officers do so at their peril in all matters wherein such officers exceed their legitimate powers. *Armstrong Products Corp. v. Martin,* 119 W.Va. 50, 192 S.E. 125. Neither would any promises or assurances given by the road contractor or his employees that an access road would be provided create any obligation binding on the State.

The Court is not without sympathy for the position in which the claimants now find themselves, but a ruling cannot be made in their favor solely on the basis of sympathy, when the law is so well established on the principles hereinbefore set forth. Even with their limited knowledge and education, we must hold that the Boehms were negligent in purchasing property without making some inquiry as to the soundness of the title and the appurtenant right of way to their property, which was of importance to them, when they knew full well that a controlled access highway did not provide ingress and egress to every parcel of land adjoining the highway.

For the foregoing reasons, the claim is disallowed.

Claim disallowed.

Opinion issued October 21, 1974

FAIRFAX COUNTY HOSPITAL

vs.

WEST VIRGINIA RACING COMMISSION

(No. D-617)

Gala Tolliver, Financial Secretary, appeared on behalf of the claimant, without counsel.

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

PETROPLUS, JUDGE:

The facts of this claim are as follows:

On April 20, 1968, Lewis R. Ramey, a licensed horse trainer at the Charles Town Race Track, fell from a horse and sustained a fracture of his neck. He was hospitalized at the Fairfax County Hospital in Fairfax, Virginia, and incurred expenses in the amount of $4,539.64 for hospitalization and medical services. Although he had a hospitalization policy with the Horsemen's Mutual Insurance Company, it was disclosed by the evidence that no benefits were payable under said policy.

The payment of the bill was recommended by the West Virginia Racing Commission in July, 1970, from a Special Fund established by the West Virginia racing law. The State Auditor refused to approve the bill for payment as it exceeded the limit imposed by the budget law, and an effort to collect the bill was again refused for the subsequent fiscal year for the same reason. The Special Fund represents license fees and fines collected under the racing laws of the State of West Virginia, and the funds available for payment are included in the budget bills passed by the Legislature and are treated as an appropriation. It appeared from a letter, dated March 1, 1972, signed by Harry L. Buch, Chairman of the West Virginia Racing Commission, that the Special Fund for the year in which the bill was incurred was transferred to the General Revenue Fund of the State, and

had the bill been submitted in a timely manner, funds would have been available for its payment.

The respondent has filed an answer joining in the prayer of the claimant for the allowance of the claim.

At the hearing it developed that under the State law any amount over $5,000.00 remaining in the Fund for any fiscal year was to be transferred to the State Treasury.

The West Virginia racing law, Chapter 19, Article 23, Section 1, et seq., requires permits and licenses for race track employees and creates a Special Fund consisting of permit fees, registration fees, and fines imposed by the racing officials. Section 14 of the Act designates said Fund as a relief fund which shall be disbursed on the order of the Racing Commission for hospitalization, medical care and funeral expenses occasioned by injuries or death resulting from accidents sustained by any permit holder while in the discharge of his duties under the jurisdiction of the Racing Commission. No payment from the Fund shall be made if the permit holder is covered under Workmen's Compensation or any insurance policy. Any balance remaining in the relief fund in excess of $5,000.00 shall be transferred by the Racing Commission to the State Treasurer for deposit to the General Revenue Fund of the State.

Since the State has received the benefit of the excess relief funds, which should have been applied to the payment of this claim, and the Special Fund is pledged for the payment of hospitalization for the relief of race track personnel, it is the conclusion of this Court that the State has a moral obligation to make payment to the claimant in this case. In legal effect, the claim is not paid from State funds but from fees paid into the Fund by the horsemen themselves, although the Fund is under the supervision of the State Auditor and the State Treasurer.

The claim is approved for payment under the advisory determination procedure of the Claims Act (Code, Chapter 14), or as a claim against the State of West Virginia to be paid from the next appropriation of funds by the Legislature for payment of moral obligations of the State.

Claim allowed in the amount of $4,539.64.

Opinion issued October 21, 1974

H. RONALD HARRIS

vs.

DEPARTMENT OF HIGHWAYS

(No. D-655)

Claimant appeared in person without counsel.

Gregory W. Evers, Esq., for the respondent.

PETROPLUS, JUDGE:

The claimant's wife, while driving and parking his 1968 Buick Skylark automobile on Seventh Avenue, a designated State route in the City of Charleston, West Virginia, on June 25, 1973, without noticing that a storm sewer drain had sunk or settled approximately eighteen inches, dropped the front right wheel in the above-mentioned drain, causing damage to the wheel and tire in the amount of $78.92. The accident was reported to the respondent, and on the evening of that date, the drain was covered by a metal sheet and has since been repaired.

At the hearing, the only witness, claimant's wife, testified that she did not observe the drain opening as her attention was directed to traffic and the parking of her automobile. The drain was alongside the curb and was not visible to her. The respondent offered no evidence to controvert the facts as related by the driver.

The only issue before the Court is whether the driver of the vehicle was guilty of contributory negligence, in failing to observe the drain while parking her car. It is the finding of the Court from the evidence that she was not guilty of contributory negligence, and that it was impossible for her to observe the sunken drain while engaged in the parking of her car. The road being out of repair in a congested traffic area of the City of Charleston constitutes negligence, and although no evidence was offered as to the length of time this condition existed, it is inferred from the evidence that the drain had been out of repair

for a sufficient length of time to make the respondent aware of the hazard.

For the foregoing reasons, the claim is allowed and an award is made to the claimant in the amount of $78.92.

Claim allowed in the amount of $78.92.

Opinion issued October 22, 1974

JOANN ROSE DUPONT

vs.

WEST VIRGINIA DEPARTMENT OF PUBLIC INSTITUTIONS

(No. D-628)

Clark Frame and Darwin Johnson, Attorney at Law, for the claimant.

Gene Hal Williams and *Edgar E. Bibb III,* Deputy and Assistant Attorneys General for the Respondent.

DUCKER, JUDGE:

Claimant, Joann Rose DuPont, an employee of Hopemont State Hospital, formerly known as Hopemont Sanitarium, a hospital operated at Hopemont, West Virginia, by the respondent, a State agency, claims damages in the amount of $50,000 for injuries to her left eye resulting in the loss thereof and injuries to her face as the result of her face falling against a hot radiator pipe when she suffered an epileptic seizure in her room in Morgan Hall of the hospital, at about nine o'clock in the evening of March 10, 1972.

The claimant was employed as a food service helper at the hospital in September 1968 upon her employment application which indicated she had no physical defects, but later in order to qualify under the civil service system she filed an application indicating she had "seizures but not frequent". The testimony was to the effect that she had epileptic seizures three or four times a month, and although claimant was not required to live on the hospital premises, she was

permitted to do so, and when she requested to be assigned to a room with other women on the second floor, she was given a room on the first floor to avoid the possibility, in the event of a seizure, of her falling down any steps. The room to which she was assigned was twelve by twelve feet in size with a walk-in closet, lavatory, night stand, big chair and bed. Also, there was a four foot long heat radiator, three feet high with a control knob a short distance up on the heat pipe from the floor. Claimant testified that it was very warm in the room that night but not hotter than ordinary and that she had turned the heat down.

On the evening of the accident, claimant had gone to her room and while there, had an epileptic seizure, fell to floor and remained unconscious for a short period. Alma Fretwell, the occupant of the room adjoining that of claimant heard a "thud", the sound of claimant falling to floor, and, knowing that the claimant was subject to such seizures, the witness Fretwell rushed into claimant's room to help her. She found her unconscious lying on her back on the floor with her arms outstretched and with her face "just sort of rolled over and touched that pipe", which was that part of the heat pipe extending from the floor to the control knob of the radiator. Another girl was called and they called a doctor and put claimant to bed. Doctor Hsang Lee and a nurse were called and a salve was prescribed and applied to claimant's eye and surrounding face area, and two pain pills given and they advised claimant to see her own doctor. Claimant didn't call for any help that night and said she felt "pretty good" the next morning, but her eye was closed on Sunday and she sought medical advice and finally received medical services at West Virginia University Hospital and in Pittsburgh, but lost the sight in her left eye with severe face scarring in that area.

Claimant alleges liability on the part of the respondent primarily on the basis of alleged negligence on the part of respondent in not providing a safe place for the claimant to live in view of the respondent's knowledge of the claimant's epileptic condition and necessity of extra requirements for her safety. Respondent denies liability on the basis that the circumstances did not require it to provide any safer place than was furnished and that the accident could not reasonably have been foreseen or anticipated. The case has been heard solely on the question of liability subject to the right of the claimant to

later prove damages, if the Court decided that here is liability on the part of the respondent.

Counsel for the parties have submitted excellent and helpful briefs of the law which they consider pertinent to the issues of the case. Many cases are cited as authority for the well settled doctrine that an employer must furnish an employee with a reasonably safe place in which to work and that such obligation was increased where a person with a handicap is the employee. However, such rule of a safe place to work does not extend to a safe place to live, unless the employee is required to live on the work premises. Here the claimant was not required to live at the hospital, but was afforded such accommodations for her own convenience. In our opinion the safe place to work is not the issue, but there is applicable the principle that the employee who was known to be subject to epileptic seizures was entitled to such protection against danger on the premises of the hospital as could be reasonably foreseen or anticipated. In order for the claimant to be entitled to recover, her case must be based on what amounted to negligence on the part of the respondent, and in this connection the rule is set forth in the cases of *Puffer v. Hub Cigar Store, Inc.,* 140 W. Va. 327, 84 S.E. 2d 145, and *Griffin v. Baltimore & O. RR.,* 98 W.Va. 168, 126 S.E. 571, 40 ALR 1326, and the Court in the Griffin case stated such rule in the following language:

> "The master is not compelled to foresee and guarantee against an accident which reasonable and prudent men would not expect to happen, nor to warn his servants of dangers not reasonably to be anticipated."

The primary question, if not the sole question, in this case is whether the failure of the hospital authorities to provide complete protection for the claimant against injuries she might sustain in regard to the radiator and the pipe leading to the radiator control from the floor, constituted actionable negligence on the part of the respondent.

In reaching a conclusion in this matter, it is well to consider several facts relating to the situation, namely: Claimant is 37 years of age, a high school graduate, a victim of epileptic seizures since she was eleven years of age, and an employee of the hospital for approximately four years; she was employed by the hospital through some assistance by the Sheriff of her county, denying on her first employment application having any physical disability, although almost two years later

on her second application, she specified such fact; her work was not hazardous but only in regard to the kitchen preparation of food service trays; she was given a private room on the first floor so that she would have no danger on steps, and she was given immediate aid when she fell in her room the night of the accident; the radiator had been turned off and apparently only the small pipe extending from the floor to the radiator control knob remained hot; there was only the usual and minimum amount of furniture in the room; claimant had occupied the room for about four years; and there has been no evidence to show that the medical aid furnished her was insufficient or improper at the time according to the circumstances and conditions then existing.

The claimant's case is based upon alleged negligence, and particularly upon the assertion that the respondent should have had the radiator and pipe adequately covered or protected so that the claimant would have been protected against injury from the heated radiator and pipe in the event of a fall against it by claimant in one of her epileptic seizures. As has been shown the claimant was furnished a room adequate for her purpose with nothing therein which could be considered dangerous to her, unless it was the radiator. There is no evidence to indicate that the room was not satisfactory to her who is an adult fully capable of judging such fact and of complaining if justified. She is 37 years of age, had been subject to seizures since she was eleven years of age, had occupied the room for four years, and on this occasion had turned off the radiator prior to her fall. The law only required the employer respondent to foresee and anticipate what might be reasonably expected to happen, not guarantee an employee safety against all possible hazards. A further reason for concluding there is no liability is the fact that the place of the accident was not in her work but in her room, which she was not required to occupy as a part of her employment.

The evidence in the case does not support the theory that an injury such as is involved here was one which could have been reasonably foreseen or anticipated by anyone. That the claimant would have fallen, even in an epileptic seizure, where her face would come in contact with a small section of pipe extending from the floor only a short distance to the radiator control knob, can hardly be considered probable.

While it is not an aspect affecting the question of liability, the Court is not unmindful of the kindness of its officials in eliminating unemployment by the employment of a handicapped person as in this case, and feels there is a certain amount of lack of gratitude when such handicapped person so employed seeks recompense for such an unusual accident as is here involved. Although this Court naturally has the greatest sympathy for the claimant in this matter, it must follow the law as it interprets it and conclude that what happened in this case was not a reasonably or anticipatively foreseeable result of the lack of safety precautions required of the respondent. Accordingly, the Court is of the opinion to, and so holds that the respondent is not liable and makes no award to the claimant herein.

No award.

Opinion issued October 22, 1974

T. A. GALYEAN, JR., AND ANN T. GALYEAN, HIS WIFE, JOHN G. ANDERSON, TRUSTEE, AND HUNTINGTON FEDERAL SAVINGS AND LOAN ASSOCIATION

vs.

DEPARTMENT OF HIGHWAYS

(No. D-575)

George S. Sharp for the claimants.

Gregory W. Evers and *Emerson Salisbury* for the respondent.

JONES, JUDGE:

The claimants, T. A. Galyean, Jr., and Ann T. Galyean, are the owners of property located on Crooked Creek Road, Scott Depot, in Putnam County, West Virginia. Mr. Galyean is a licensed architect practicing his profession in the Charleston area. The claimant, John G. Anderson, is the Trustee and Huntington Federal Savings and Loan Association is the Beneficiary of a certain deed of trust securing a loan against said property. For the purposes of this opinion, reference to the claimants, unless otherwise apparent, will apply only to Mr. and Mrs. Galyean. At the time this claim arose, the

respondent, Department of Highways, was operating a rock quarry in the vicinity of the claimants' property.

In June, 1970, the claimants purchased the subject property, being 72 acres of land with a dwelling house and barn, from Otis Wells, a building contractor, for $114,000.00. Mr. Wells built the single family three bedroom dwelling house, of masonry veneer construction with approximately 2,000 square feet of finished living area, in 1964, and lived there until he sold the property to the claimants. He described the house at that time as being "in top shape, just near perfect condition". As of the time this claim arose, Mr. Galyean described the house as "in immaculate condition and had been recently very well cleaned and painted". He testified further that between the time he acquired the house and April 27, 1971, there never was any visible damage or cracks in the plaster, foundation, brick work, bathroom tile or any other parts of the structure. The house is located approximately 1,000 feet in a northwesterly direction from the respondent's quarry at about the same elevation above sea level.

During the early afternoon of April 27, 1971, the respondent's employees set off a heavy blast at the quarry, vibrations from which severely shook the claimants' house. Mrs. Galyean was so alarmed that she took her two small children and drove her automobile to the foot of the hill in the direction of the quarry, where she met employees of the respondent who assured her that no further blasts would be set off that day. She was further told that there would be a blast on the following day, but with the charge reduced by one-half the force of that day's blast. An attempt was made by the claimants to delay further blasting until an investigation could be made, and on the following day while it was thought that a moratorium was in effect and Mr. Galyean was talking on the telephone with the Commissioner of the Department of Highways about having representatives of the respondent on hand as observers during the next blast, another large blast was detonated and the claimants' home again was shaken. Blasting continued through the summer and fall, but without noticeable effect until December, 1971, when the claimants felt vibrations in the house which they attributed to respondent's operations.

Mrs, Elaine Bias, whose residence was approximately 600 feet northeast of the respondent's quarry, testified that in the early after-

noon of April 27, 1971, a worker at the quarry came to her home and told her that she should leave because a blast was about to be set off. When she refused to leave, the employee said, "Well, go inside and get in a safe place, sit by a middle partition, * * *". She obeyed instructions and testified that when the blast went off it "shook pictures off the wall, knocked things off the table and some dishes out of the china, off the top of the china, and whatnots off the T.V.". Mrs. Bias further testified that other than cracks in ceramic tile, no serious damage was sustained until the quarry workings moved nearer to her home in September, 1971, when her water well caved in and the concrete water reservoir was cracked in two places. She was compensated by the respondent for a new well and other damages.

Mr. Galyean outlined the major items of damage to his property as follows: Cracks in exterior brick veneer, crack between the fire box and the walls in the chimney structure, crack above window in the living room, crack in concrete sill at the living room window, break in the garage ceiling, cracks in concrete wall in the garage, tile joint fractures in children's and master bathroom, and other finer and less noticeable cracks in the interior dry wall. An inspection of the damage on behalf of the respondent was made by E. T. Jarrett, II, and Harold Wolfe on April 28, 1971, and Mr. Jarrett's report to the respondent described the property damage as "small cracks in walls, ceilings and floors on the inside of the house and cracks in the mortar on the outside of the house". The Court undertook a view of the premises on June 25, 1974, and a number of items of damage were pointed out. Other alleged damage was no longer subject to view for the reason that certain patching, papering and painting had been done as well as tile in the bathroom replaced.

Mr. Otis Wells, a building contractor for twenty-five years, who built this house and sold it to the claimants, made an inspection of the premises on April 29, 1971, and testified that at that time the cost of replacement of the damaged house was $16,570.00. Mr. Granville Samuel Elliott, a building contractor for twenty-two years, accompanied the Court on its view during the hearing of this case and thereafter prepared estimates and testified concerning the damages. He used the listing of damages on Mr. Wells' estimate and countered with a cost of replacement of each item, arriving at a total damage of $3,600.00. The greatest disparity in their estimates

had to do with the removing and rebuilding the chimney and the installation of new exterior brick veneer.

The respondent does not deny that the blasting took place and did not produce any evidence directly refuting the claimants' allegations that the blasting was the proximate cause of at least a portion of the damages complained of. Except for a witness who testified regarding insurance coverage, a matter of little, if any, relevance which will be referred to later in this opinion, the respondent presented only one witness, Mr. Elliott, who testified that most of the alleged damages were minor in nature and that the cracks in brick, ceramic tile, cinder block and dry wall construction which he observed were similar in appearance to those which in his experience he knew to have been caused by natural settlement of a building. Investigators and other employees of the respondent who observed conditions at the claimants' residence after the blasting were not produced as witnesses.

In the case of *Whitney v. Ralph Myers Contracting Corporation,* 146 W.Va. 130, 118 S.E. 2d 130, the Supreme Court of Appeals of West Virginia established the rule of absolute liability in blasting cases involving damage by vibrations as well as by casting rocks or other debris. In that case, the Court further approved the language of a Connecticut decision wherein the Court said, "* * * The finding that the blast in question was followed immediately by a marked and noticeable shaking of the plaintiff's buildings and that cracks then appeared in the exterior and interior plaster is ample under the circumstances to justify the conclusion that the cracks resulted from the blast." This Court is satisfied that the blasts occurring on April 27 and 28, 1971, and probably subsequent blasts, proximately caused damage to the claimants' property.

The Court is concerned about the state of the record as regards proof of damages. The law of this State is summarized in Syllabus 3 of the opinion in the case of *Joe Konchesky, et al., v. S. J. Groves and Sons Co., Inc.,* 148 W.Va. 411, 135 S.E. 2d 299, as follows:

> "The general rule in determining the amount of damages for injury to real property in a case of this kind is to allow the difference between the market value of the plaintiff's premises before the injury happened and the market value immdiately after the injury, taking into account only the damage which has re-

sulted from the defendant's acts. The reasonable cost of repairs, if properly proved, can be considered as evidence in determining the market value of property after it has been damaged."

While evidence of damages in this case falls short of that strict requirement, no objection was made during the hearing nor has the point been raised in the respondent's brief. Realizing the difficulty of strict proof in this case, the Court is inclined to be liberal, and based on its own view of the premises and testimony of construction experts for both the claimants and the respondent with regard to the cost of restoring the property to its value immediately prior to blasting, it is our judgement that the difference in value immediately before and immediately after the blasting occurred may be determined by the Court.

We have considered the respondent's argument that a compromise settlement between the claimants and their insurance company should reduce or bar recovery in this case. Whatever was done between the claimants and their insurance company was based upon the contract between them. The insurance company is not a joint tort-feasor in this case, and we see no connection between the claimants' right to recover for injuries inflicted by the respondent and any claim that the claimants may have against a third party by virtue of a contract between them.

The Court has given particular attention to the claimants' contention that the condition of the chimney is so dangerous as to require removal and rebuilding thereof at a total cost of $4,135.00, and the further claim that it is necessary to remove all exterior brick veneer and replace it with new brick veneer at a total cost of $6,260.00. The respondent's witness, Mr. Elliott, estimated the cost of the chimney work at $1,600.00, and the brick work at $600.00. The Court is of opinion that the claimants did not prove by a preponderance of the evidence that the complete replacement of the chimney and the exterior brick veneer were necessary to restore the claimants' property to a reasonably comparable condition existing immediately before the injury.

The Court has given careful consideration to the rights of both parties in this difficult case, and in its opinion, the claimants are entitled to recover the fair amount of their damages. As to the amount, the Court has arrived at a figure which it believes to be

fair and equitable; and the Court does hereby award to the claimants, T. A. Galyean, Jr. and Ann T. Galyean, John G. Anderson, Trustee, and Huntington Federal Savings and Loan Association the sum of $7,500.00.

Judge Petroplus participated in the decision of this case, but his resignation from the Court was effective before this opinion was prepared and approved.

Judge Garden did not participate in the decision of this case.

Award of $7,500.00.

Opinion issued October 22, 1974

MARYLAND CASUALTY COMPANY

vs.

ALCOHOL BEVERAGE CONTROL COMMISSION

(No. D-656)

John F. Wood, Jr., Attorney at Law, for claimant.

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

GARDEN, JUDGE:

*This claim was submitted for decision on the basis of the pleadings, two exhibits introduced by the claimant and nine exhibits introduced jointly by the claimant and respondent. From the pleadings and the exhibits it would appear that the controlling facts are as follows:

On July 1, 1971 the Alcohol Beverage Control Commissioner issued a Class C license to 314 Club, Incorporated, 314 Bridge Street, Guyandotte, Cabell County for the fiscal year commencing July 1, 1971. This license was issued pursuant to Code 60-7-40 and as required by said section, 314 Club, Incorporated furnished a bond

*See also *Maryland Casualty Company vs. Alcohol Beverage Control Comm'n.,* Claim No. D-656, 10 Ct. Cl. 186 wherein this decision is reversed on rehearing

in the penal amount of $2,500.00 conditioned on the payment of all fees and on the faithful performance of and compliance with the provisions of Chapter 60, Article 7. The bond was dated July 1, 1971 and was executed on behalf of 314 Club, Incorporated by David Poston, as principal, and by the claimant, as corporate surety (Joint Exhibit 9).

While it is not clear from the exhibits, it would appear that on either January 22, 1972 or January 25, 1972, Sgt. Don Norris of the Huntington Police Department arrested David Poston for permitting a gaming table (a blackjack table) to be kept on his premises at the 314 Club in violation of Code 61-10-6. David Poston was taken before Justice of the Peace James S. McNeill where an appearance bond was posted. Thereafter on January 27, 1972 he appeared and entered a plea of guilty to the charge and was fined $50.00 and costs (claimant's Exhibit 2).

The transcript of the docket further reflects that on March 28, 1972 James E. Chambers, Attorney at Law, appeared and moved to set aside the guilty plea and to enter a plea of nolo contendre on the ground that the said David Poston was not fully informed as to the consequences of his plea of guilty. The transcript reflects that the motion was taken under advisement and further that on May 19, 1972 on Court Order from Judge Conaty, Judge of the Common Pleas Court of Cabell County, West Virginia, a new trial was held at which the said David Poston was found not guilty. While there was filed as part of Joint Exhibit 6 an unsigned copy of a petition praying for the issuance of a writ of mandamus from the Common Pleas Court of Cabell County, counsel for the claimant advised this Court that he could find no evidence in the Clerk's office of the Common Pleas Court that such a proceeding had actually been instituted.

On February 4, 1972 the Alcohol Beverage Control Commissioner, as required by Code 60-7-13, revoked the Private Club Liquor License issued to 314 Club, Incorporated (Joint Exhibit 2). Code 60-7-13 provides in part:

> "... Upon final conviction of a licensee, or any employee thereof acting within the scope of his employment, of any violation of any municipal ordinance or statute of the State of West Virginia relating to the regulation and control of alcoholic

liquors, gambling, prostitution, or the sale, possession or distribution of narcotics or dangerous drugs, before any justice of the peace, municipal court or court of record, the commissioner shall forthwith revoke the licensee's license . . ."

The Commissioner, also as required by law, wrote to claimant under date of February 4, 1972 (Joint Exhibit 2) and advised the claimant of the revocation, declared a forfeiture of the bond and requested payment of the face amount of the bond. This action was taken pursuant to Code 60-7-14 which reads as follows:

"On conviction of a violation of any provision of this article or upon the revocation of a license in accordance with section thirteen [§60-7-13] of this article, which conviction or revocation has become final, the licensee or former licensee, as the case may be, shall forfeit his bond required by section four [§60-7-4] of this article. The penal sum of said bond shall forthwith be paid to the State treasurer to be credited to the general revenue fund of this State. Such sum may be collected by an actoin at law or other appropriate remedy."

After an interchange of correspondence the claimant by check dated May 8, 1972 paid the face amount of the bond to the State of West Virginia, (Joint Exhibit 7). Claimant is now seeking a return or repayment of the $3,500.00, and in its Notice of Claim and Complaint alleges that the Commissioner wrongfully, unlawfully and without reason forfeited the bond of 314 Club, Incorporated on February 4, 1972. Claimant contends that the plea of guilty entered by its principal, David Poston, on January 27, 1972, did not constitute a "final conviction" within the meaning of Code 60-7-13 in view of the later finding of not guilty on May 19, 1972.

While we have been unable to find a decision from our Supreme Court of Appeals precisely defining the term "final conviction", we are of the opinion that a conviction becomes final when a defendant has exhausted all of his appellate remedies. Support for this conclusion can be found in the following decisions from other jurisdictions:

" 'Final conviction', as used in statutes dealing with revocation of driver's license following second conviction on charge of drunk driving within 24-month period, is judgment of conviction

from which a motorist has exhausted his right to appeal." *Campbell v. Superior Court In and For Maricopa County,* 462 P2d 801, 804, 105 Ariz. 252.

"Term 'final conviction', when used in relation to doctrine of retrospective application of a judicial ruling, means a conviction in which the accused has exhausted all his appellate remedies or as to which the time for appeal as of right has expired." *State v. Lynn,* 214 N.E.2d 226, 229.5 Ohio St2d 108.

"Under statute directing that license of operator, commercial operator or chauffeur, shall be automatically suspended for certain period of time upon final conviction under statute prohibiting driving motor vehicle while intoxicated, 'final conviction' is judgment of conviction from which motorist has exhausted right to appeal." *Allen v. Texas Dept. of Public Safety,* Tex. Civ. App., 411 S.W.2d 644, 646.

"Issue of whether a new rule should be applied retroactively arises only when a conviction has become final, and 'final conviction' means a conviction in which the accused has exhausted all his appellate remedies." *State v. Evans,* 291 N.E.2d 466, 469, 32 Ohio St.2d 185.

No formal appeal was perfected from the guilty plea entered on January 27, 1972, and ordinarily in West Virginia an appeal does not lie in a criminal case from a judgment of conviction rendered upon a plea of guilty. *Nicely v. Butcher,* 81 W.Va. 247, 94 S.E. 147 (1917). *Nicely* did hold, however, that if a plea of guilty is entered by a defendant and that it later appears that the plea was not entered freely and voluntarily and that the defendant did not fully understand the nature and effect of the plea, that an appeal will be allowed if perfected within a reasonable time. No appeal was perfected within a reasonable time in the instant case.

Consequently, we are of opinion that when the claimant's principal, David Poston, entered his plea of guilty on January 27, 1972 before Justice of the Peace James S. McNeill, and there being no attempt to perfect an appeal within a reasonable time thereafter, that a final conviction resulted and justified the bond forfeiture.

For the foregoing reasons the claim is denied.

No award.

Opinion issued November 8, 1974

WALTER E. BRADFIELD, JR., AND NATIONWIDE MUTUAL INSURANCE COMPANY

vs.

DEPARTMENT OF PUBLIC SAFETY

(No. D-720)

Claimant, *Walter E. Bradfield, Jr.*, appeared in person.

William D. Highland and *Edgar Bibb*, Assistant Attorneys General, for the respondent.

JONES, JUDGE:

The claimant, Walter E. Bradfield, Jr., is a resident of Sistersville, in Tyler County, West Virginia, and is employed in the Security Department of Mobay Chemical Company near Moundsville, in Marshall County, West Virginia. He also is a Constable for Tyler County and a part-time policeman in Sistersville. The claimant is interested in police work and has kept in touch with the City and County police through a short-wave radio installed in his automobile, a 1973 four door Plymouth Fury. Before leaving for work on the evening of Sunday, August 26, 1973, he called the Sistersville police department and was informed that there had been an armed robbery in the Wheeling area and possibly a kidnapping and stolen car. On his way to work the claimant heard on the radio that the kidnappers were being pursued south on State Route No. 2, south of Moundsville. When he arrived at Mobay, he telephoned the Marshall County Sheriff's office and was informed that a family had been kidnapped and their car stolen. He further learned that a roadblock was being set up at New Martinsville and that all possible help, including his, was needed. Being about one-half hour before his shift began at midnight, the claimant went to the site of the roadblock and his car was positioned along with others by a State Policeman, Corporal B. E. Kirtley. At the hearing Corporal Kirtley testified that he was glad to have the claimant's help and so told him at the time.

Earlier the same evening two escapees from the Junction City Treatment Center in Ohio had taken hostage George Dunn, his wife

and four small children, of Valley Grove, West Virginia. One of them held a knife at the side of Mr. Dunn while he was made to drive his Pontiac automobile; the wife and children were crouched on the back seat and floor; and the second escapee flourished a revolver as he watched out the rear window. Fearing for his life and the lives of his family, Mr. Dunn obeyed instructions during the harrowing experience which followed.

When the kidnappers' vehicle neared the New Martinsville roadblock, it suddenly turned and headed back north. All police cars joined in the chase, and Trooper W. M. Fox, who was off duty and arrived at the roadblock in civilian clothes and on foot, got into the claimant's car and they took off in pursuit. Trooper Fox manned the radio, and while he could not communicate with other State Policemen, whose radio was on another frequency, he was able to keep in touch with County and City police. Another roadblock was set up at the Mobay Chemical Plant, but the fleeing car was able to swerve onto the Mobay property and around the roadblock in the center of the intersection. At a third roadblock south of Moundsville, the Dunn's Pontiac car left the highway, crossed the median strip and proceeded the wrong way on the south-bound lanes. At this point the claimant's car was right behind the Dunn car, and he and Trooper Fox had seen the brandished gun in the back window. The claimant had tried several times to pass the Dunn car, but it would go to the center of the highway and he could not pass. When the Dunn car crossed the median strip, the claimant took the same course and continued to stay close as the speeding cars came into Moundsville. At this time State Police Car No. 166, driven by Corporal J. K. Gabbert, passed the claimant's car, and on a bridge near Eleventh Street in Moundsville it was able to force the Dunn car into the right-hand curb, ramming into the left front of the car and just cutting it off from turning right into Eleventh Street. Almost simultaneously the claimant's car rammed into the rear of the Dunn car. A moment later the car of Vincent A. Church, a New Martinsville police officer, slammed into the rear of the claimant's car. This sudden blow caused the claimant's pistol to accidentally discharge, shattering the windshield. Corporal Taylor's Vehicle No. 151 was struck in the rear. Officer Church sustained a bullet wound in the left ankle, and a bullet grazed the left arm of George Dunn.

Trooper Fox testified that during much of the chase the claimant

was driving at speeds between 80 and 90 miles per hour. Shots were fired at each of the roadblocks, and tension and excitement had risen to a high pitch as the end of the chase came with considerable suddenness. The pursuers were dealing with armed and dangerous men and the final confrontation was no place for studied deliberation. The claimant testified that as they approached the bridge and Eleventh Street, Trooper Fox said, "Ram him, Skip. That's the only way we're going to get him. Go ahead and ram him now." Officer Church confirms this testimony, testifying that he heard over the radio somebody say, "Ram him, Skip." When asked whether he had used those words, Trooper Fox testified, "The only thing I might have said was, 'He's going to ram him, Skip,' when 166 come around and hit him from the front." That answer was followed by this:

Q. "Do you think Constable Bradfield could have stopped his car without hitting the suspect?"

A. "Not really. He was too close on him."

Counsel for the respondent takes the position that the claimant was a volunteer and not acting under the direction or command of anyone in the Department of Public Safety. The powers of a State Police Officer as set out in Section 11, Article 2, Chapter 15 of the Code of West Virginia, including the right to command the assistance of any able-bodied citizen of the United States, appear not strictly to apply to this situation. However, there appears to be a great weight of authority that a police officer may summon to his assistance any person where he deems it necessary to effect an arrest. 70 *Am. Jur. 2d* 152. Quoting from the same page of that text: "Instead of organizing a formal posse comitatus, any police officer may summon to his assistance any bystander, or any number of bystanders, when he deems it necessary to effect an arrest or to recapture an escaped prisoner, and such summons invests those called upon with full authority to render him all needed assistance." Regardless of Officer Fox's intention or belief as to his authority or the claimant's duty to obey, the Court believes that there was such a strong appearance of authority in the commandeering and direction of the claimant and his automobile that the claimant was justified in believing that he was legally required to render assistance to the extent of his ability. In other words, the Court believes that the claimant should not be required to judge the legality of his rendering assistance, and then act upon his own responsibility.

The Court further finds that the claimant's damages proximately resulted from the helpful and hazardous assistance which he rendered to the respondent's officers in effecting capture of the fugitives. The original estimate of repairs to the claimant's vehicle was Eight Hundred Eighty Dollars Forty Cents ($880.40). The final repair bill was Seven Hundred Five Dollars Fifty-nine Cents ($705.59), which appears to the Court to be fair and reasonable. This claim was assigned by claimant Bradfield to claimant Insurance Company, reserving the $100.00 deductible portion of the claim, by a release and subrogation agreement between the parties dated October 9, 1973, which assignment is a part of the record in this case.

Based on its findings and its understanding of the law as set out hereinabove, the Court is of opinion that the claimants are entitled to recover, and awards are hereby made as follows: To the claimant, Walter E. Bradfield, Jr., $100.00; and to the claimant, Nationwide Mutual Insurance Company, $605.59.

Judge Petroplus participated in the decision of this case, but his resignation from the Court was effective before this opinion was prepared and approved.

Judge Garden did not participate in the decision of this case.

Awards: Walter E. Bradfield, Jr. — $100.00. Nationwide Mutual Insurance Company — $605.59.

Opinion issued November 14, 1974

CLARKE W. GREENE

vs.

DEPARTMENT OF HIGHWAYS

(No. D-687)

Paul Zakaib, Jr., for the claimant.

Emerson Salisbury for the respondent.

JONES, JUDGE:

On October 6, 1973, in the daytime, the claimant, Clarke W. Greene, was driving his 1969 Chevrolet pick-up truck on MacCorkle

Avenue in South Charleston. He was traveling east on the 4-lane State highway as he reached a point where Jefferson Road joins the highway from the south, and an extra traffic lane is provided for those desiring to turn south on Jefferson Road. The Owens Motel and parking lot is located on the north side of MacCorkle Avenue, with a driveway into the parking lot approximately 30 feet wide, about 10 feet of which lies west of an extension of the western line of Jefferson Road. Traffic at the junction is controlled by traffic lights, and as the claimant pulled into the right-turn lane, east and west-bound traffic on MacCorkle Avenue was stopped by red signal lights, with a green arrow indicating "go" for the right-turn lane. A van-type truck was stopped in the east-bound lane nearest the claimant, waiting for the red light to change, and unknown to the claimant, a green light was signaling "go" from the motel parking lot. As the claimant had about half turned the Jefferson Road corner, his car and a car driven by M. W. Kirk, of Hopewell, Virginia, collided, causing damage to the front end of both vehicles. The view of both drivers was obstructed by the van-type truck heading east, as it appears that the Kirk car was crossing MacCorkle Avenue on a slanting course from a part of the motel driveway west of the front end of the truck. Neither driver saw the other in time to avoid the accident. The claimant contends that the respondent was negligent in permitting and maintaining traffic control devices so timed as to allow vehicles both with green lights in their favor to proceed to collision.

An engineer employed by the respondent and with special knowledge of traffic control devices, testified that the lights were properly installed and maintained under regulations laid down by the United States Department of Commerce and adopted by the State Road Commissioner, and that they were functioning properly at the time of the accident.

The traffic-control signal legend applicable to the drivers of vehicles is promulgated in West Virginia Code 17C-3-5. Subsections thereof read as follows:

"(d) Red and green arrow:

(1) Vehicular traffic facing such signal may cautiously enter the intersection only to make the movement indicated by such

> arrow but shall yield the right-of-way to pedestrians lawfully within a crosswalk and to other traffic lawfully using the intersection.
>
> (2) * * *
>
> (e) In the event an official traffic-control signal is erected and maintained at a place other than an intersection, the provisions of this section shall be applicable except as to those provisions which by their nature can have no application. * * *."

In *Bolling v. Clay,* 150 W.Va. 249, 144 S.E.2d 682, a case involving a collision at the intersection of Sixteenth Street and Fifth Avenue in the City of Huntington, with a factual situation very similar to this case, except that the Huntington streets make a true intersection by crossing each other, the Court termed the collision "an unavoidable accident". Syllabus 3 of that case is as follows:

> "There can be no recovery of damages for personal injuries or property damage resulting from a collision of two motor vehicles upon a public highway if it appears that both drivers of such vehicles, in the circumstances leading to the collision, exercised the care which a reasonably prudent person would have exercised in the same or a like situation and that neither driver, therefore, was guilty of negligence which proximately caused, or which concurred proximately with the negligence of the other to cause, the collision."

In view of the Court's decision in the *Bolling v. Clay* case and the similarity of facts and circumstances involved, this Court perceives that the collision in this case was an unavoidable accident insofar as the two drivers are concerned, wherein neither party could recover against the other. As to the respondent's responsibility for this accident, we are inclined not to strictly apply Code 17C-3-5. This is not a true intersection, but, mistakenly, we believe, was regulated as such by the respondent. The American College Dictionary defines an intersection as a "place of intersecting", and intersect as meaning "to cut or divide by passing through or lying across: *one road intersects another.*" Aside from the general observation of the respondent's engineer, the correctness of the installation was not further verified or explained. Assuming the installation was in accordance with Federal and State specifications, the fact remains that the attempt to control

traffic as if this were an ordinary intersection did create a dangerous condition which was not likely to be foreseen or recognized by the traveling public. We recognize the difficulty in the attainment of a foolproof traffic control system under the circumstances, but we feel that the respondent must accept responsibility for the plaintiff's damages in this case.

The amount of the claimant's damages was not questioned by the respondent, and the Court finds that the amount claimed is fair and reasonable. Accordingly, an award hereby is made to the claimant, Clarke W. Greene, in the amount of $183.95.

Award of $183.95.

Opinion issued November 14, 1974

D. MAE McARTHUR

vs.

DEPARTMENT OF HIGHWAYS

(No. D-666)

Guy R. Bucci, Attorney at Law, for the claimant.

Greg Evers, Attorney at Law, for the respondent.

GARDEN, JUDGE:

On March 8, 1973, the respondent was conducting a ditch lining operation on the east side of State Route 214 near South Charleston in Kanawha County, West Virginia. In the instant case, ditch lining consisted of removing mud and debris from the ditch along the east side of the road and pushing the same with a road grader across the highway for disposition. It was admitted by respondent that during this operation a certain amount of the mud and debris was left on the surface of the road creating a slippery condition. This ditch lining operation was being conducted over a 300-foot section of the highway. While State Route 214 runs in a general north-south direction, the accident occurred in a rather sweeping curve to the right for a motorist proceeding in a northerly direction. The roadway

in the area of the accident was level, the weather was good and visibility clear. Respondent had positioned a flagman at each end of the ditch lining operation to control traffic, and respondent's foreman, Lewis Caruthers, had positioned himself in the curve where he could observe and control the activities of the two flagmen and thus the flow of traffic.

The claimant testified that she was driving her 1968 Dodge Polara automobile in a northerly direction on State Route 214 and was proceeding to her place of employment in Charleston from her home in Alum Creek, a distance of some 17 miles; that as she approached the ditch lining operation she was the middle car of three cars that were directed by the flagman to proceed through the work area; that while she may have come to a rolling stop, none of the three vehicles were actually stopped by the flagman; that after she had proceeded some 25 to 30 yards over the road covered by debris, the driver of the car in front of her, a red medium sized compact car, applied his brakes and started skidding; that claimant was some two to three car lengths behind this car, and upon observing it skidding, she applied her brakes and likewise went into a skid and ultimately skidded off the road into the ditch and hillside on the east side of the road damaging the front end of her car; that before applying her brakes she was traveling between 10 to 15 miles per hour, although on cross examination she indicated that her speed could have been between 15 to 20 miles per hour.

The respondent's foreman, Lewis Caruthers, and its road grader operator, Harold E. Songer, Jr., testified on behalf of the Department of Highways. Their testimony was in sharp conflict with that of the claimant. Caruthers testified that he observed the flagman stationed at the south end of the operation cause the claimant to bring her automobile to a complete stop, and that he, Caruthers, motioned to the flagman to allow traffic to come through; that the claimant's vehicle was the lead car of two that proceeded north through the work area. Witness Songer, who was operating the grader either in the south bound lane or on the berm of the west side of the road in the immediate area of the accident, testified that as claimant proceeded through the work area there were no cars in front of her. In respect to the speed of the claimant's car, both of these witnesses, although being unable to express an opinion as to speed in miles per

hour, did opine that claimant was going too fast for the prevailing road conditions and faster than the 15 miles per hour limit which was posted on signs at each end of the work area.

Counsel for claimant contends that the respondent was negligent in causing the road at the point of the accident to become slippery and in failing to remove the mud and debris from the same. On the other side of the coin, the respondent, while admitting the slippery condition of the road, contends that it was conducting its ditch lining operation in a reasonable manner and was taking all necessary steps to warn and safeguard motorists passing through the work area. Respondent further contends that claimant was negligent in operating her automobile too fast through the work area and that this negligence was the proximate cause of the accident.

While this Court agrees that respondent is under a legal duty to keep the highways of this State in a reasonably safe condition for the use of the traveling public, it is also aware that in fulfilling this duty it becomes necessary, during ditch lining operations and in other instances, for the respondent to create temporarily hazardous conditions. When this occurs, it then becomes respondent's duty to fully and adequately warn the traveling public of these temporary conditions.

We believe, as triers of fact, that the preponderance of the evidence clearly demonstrates that respondent fully met and complied with this legal duty. We are of the further opinion that the weight of the evidence establishes that the claimant was operating her automobile at a speed that was too fast for the prevailing road conditions, and that the accident and damage to her car resulted from her own negligence. We are thus of the opinion to make no award.

No award.

Opinion issued November 14, 1974

RAINES PIANO & ORGAN CENTER, INC.

vs.

BOARD OF REGENTS

(No. D-743)

Fred Raines, President of the claimant Company, appeared in person.

Henry C. Bias, Jr., for the respondent.

JONES, JUDGE:

On December 8, 1973, the Division of Music of Bluefield State College borrowed a public address system from the claimant, Raines Piano & Organ Center, Inc., for a public performance of the Bluefield State College Jazz Ensemble. When the claimant requested return of the equipment, it was informed that it had been stolen sometime later in the same month during the Christmas recess. The claimant has asked that it be reimbursed for its damages in the amount of $399.50, being the wholesale price of the equipment at the time of the loss.

In its answer the respondent admitted all of the allegations of the claimant's petition except as to the amount of damages. At the hearing of this case and after adequate proof of value, the respondent further admitted that the amount claimed was fair and reasonable and recommended that the same be paid.

The Court believes that the respondent did not take proper precautions to care for and protect the claimant's property, so generously made available without charge, and therefore an award hereby is made to the claimant, Raines Piano & Organ Center, Inc., in the amount of $399.50.

Award of $399.50.

Opinion issued November 20, 1974

CLINTON BOEHM and HESTER BOEHM

vs.

DEPARTMENT OF HIGHWAYS

(No. D-613)

John Troelstrup, Esq., Attorney at Law, for the claimants.

Donald L. Hall, Esq., Attorney at Law, for the respondent.

PER CURIAM:

*The claimants have filed a petition for a rehearing and a reconsideration of the Court's decision denying this claim.

Granting that the testimony of the petitioners was uncontrodicted with reference to the actions, inducements and assurances of the right-of-way agent, which promised the petitioners a roadway to a controlled access highway definitively established by the plans and specifications of the West Virginia Department of Highways, which plans required the approval of the agencies of the Federal Government and were not subject to change by minor officials of the Department of Highways, the promises made by the right-of-way agent, if true, were tantamount to fraud and misconduct and beyond the scope of his limited authority as a right-of-way agent. Assuming these promises to be true, the Court is unable to find any law that holds the State responsible for the fraud or misconduct of its agent. The agent undoubtedly incurred a personal liability for exceeding the scope of his authority and making promises that he knew or should have known were clearly impossible to fulfill. Torts committed by a Government official in the performance of his duties are not binding upon a Governmental agency. If the petitioners can cite any law to the Court to the contrary, by brief or otherwise, this Court will gladly give further consideration to its opinion. The compelling sympathy for the position in which the claimants find themselves cannot

*See *Boehm v. Highways,* 10 Ct. Cl. 110 for first opinion.

control the decision of this Court, which is required to decide cases on legal principles that would be applied in a Court of record.

Petitioners' contention that the Court's opinion gives insufficient weight to the placement of stakes on the petitioners' property, indicating a proposed access road to the highway, even if we assume that the contractor placed those stakes under the supervision of the respondent, is without merit, for the same reasons heretofore assigned. The unauthorized conduct of an independent road contractor, even if approved by the supervisory personnel of the respondent, does not create a binding contractual obligation upon the State.

Respondent's contract, plans and specifications for the building of a highway cannot be modified or changed by the agents in the field who deviate from the contract, plans and specifications on their own initiative and without the approval of the chief engineer and commissioner of the Department of Highways.

Even though the petitioners were too unsophisticated and inexperienced to understand the meaning of a limited access controlled highway, a contrary opinion by this Court would open a Pandora's Box of litigation for the State where employees of the Department of Highways exceed the scope of their authority in making representations to persons affected by highway construction.

The petition for rehearing is denied.

Petition for rehearing denied.

Opinion issued November 20, 1974

CECIL A. RUNION

vs.

WEST VIRGINIA DEPARTMENT OF HIGHWAYS

(No. D-660)

John S. Sibray, Attorney at Law, for the claimant.

Gregory W. Evers, Attorney at Law, for the respondent.

DUCKER, JUDGE:

Claimant, Cecil A. Runion, of Charleston, West Virginia, suffered

personal injuries to his knee and legs and sustained damages to his automobile resulting from a fall into a creek from over a wingwall of a bridge at the intersection of what is known as John Bryan Run and Secondary State Route 16/2 which is known as Otter Lick Road, in Otter District of Clay County, West Virginia, on September 27th, 1971, at approximately 3:00 o'clock in the morning, alleging damages on account thereof in a total amount of $75,000.00.

The evidence is to the effect that claimant on the evening before the accident went from his home in Charleston to visit and aid his uncle, who lived on Otter Lick Road north of and beyond the place of the accident, and upon his proceeding to return home and seeing a light in his cousin's home located just a short distance up John Bryan Run, he turned up that road a distance of about 110 feet to a small bridge located close to his cousin's house without proceeding any farther in his car. After his latter visit with his cousin, he proceeded to back his car down the John Bryan Run road toward the Otter Lick Road. Upon reaching a point near the intersection of the public road and the private road, his car "came to a stall and met resistance" as claimant described it, and claimant stepped out placing one foot on something solid described as either concrete or hard ground, and when he brought his other foot out of the car and put it down he found nothing to stand on and so fell into the adjacent creek. There appears to be no question but that the left rear wheel of his automobile was upon part of the wingwall of the bridge on Route 16/2 over John Bryan Run and that when the claimant stepped out of his car his first step was on the wingwall of Otter Lick Road bridge, because he then fell into the creek below. The weather at the time of the accident was described as "raining and wet and sloppy", "dark and raining", with "visibility obscured". In backing his car down the John Bryan Run Road, claimant stated he had "the door open looking back and what visibility I (he) had there was just from my (his) tail lights" with no back-up lights.

There is specific evidence as to the roads, bridge and wingwall involved. The only substantial testimony is that of George P. Sovick, Chief Engineer of the Right-of-Way Department of the West Virginia Department of Highways, whose testimony was in no way substantially contradicted. He stated that the John Bryan Run Road was a private road and was not a part of the State system of highways, and accordingly it was not entitled to State maintenance, that six feet of the wingwall of the bridge over John Bryan Run was on private prop-

erty, that the construction and use of John Bryan Run Road was permitted by the adjoining land owners for both the benefit of the State and such owners, and that from the photographic exhibits and the other evidence in the case the claimant's car was not, at the place of the accident within the right of way of Route 16/2 when claimant stepped from it into the creek. The photographs show quite a wide level space at the intersection of the public road and the private road involved in the case. While there were rather high weeds adjoining the wingwall and the paved or hard surface of the roads, the weeds were not in the hard surface part of the roads. The State route had a 30-foot right of way for a two lane road, but the private road was one lane only.

Claimant submitted medical and hospital bills amounting to over fifteen hundred dollars together with a claim of substantial amount for loss of wages for thirty days while disabled from the accident, the amount of such claims being uncontested except the respondent reserved the right to have claimant examined by a physician of respondent's choice, but no such examination is necessary in the light of our decision herein.

In order to recover in this case it was incumbent upon the claimant to prove that the accident occurred on a road which the State was required to maintain and that the State had failed to properly maintain it, and that such failure was the proximate cause of the accident without contributory negligence on the part of the claimant.

Even if the John Bryan Run Road was to be considered as one entitled to maintenance by the State, that road was fully traversible for one-way traffic in the traveled part thereof despite weeds along the sides of it, but the claimant backed his car down the road at night in rainy bad weather with only tail lights and no back-up lights on his car, depending entirely on the car tail lights and what he could see by the car with his door open. That cannot be considered reasonably careful conduct on the part of the claimant.

In the light of all the evidence, we must conclude that claimant's failure to take proper precautionary steps to avoid the accident amounted to contributory negligence, and that such failure was the sole cause of the accident, and accordingly we hold that the respondent is not liable, and so deny the claimant's claim and make no award to him herein.

Claim disallowed.

Opinion issued December 9, 1974

VELVA K. CORZINE

vs.

DEPARTMENT OF HIGHWAYS

(No. D-778)

No appearance for the claimant.

Emerson W. Salisbury, Esq., for the respondent.

GARDEN, JUDGE:

The facts of this claim were stipulated by the parties as follows:

"1. That on or about the ——— day of August, 1973, the claimant was the owner of a certain house and lot located in the Village of Kenna, Jackson County, West Virginia; that on said date there was a water well located on said property which provided a good and sufficient amount of water for the tenants living in said property.

2. Respondent further says that on or about the ——— day of August, 1973, employees of the respondent, acting under terms of an agreement of lease dated August 26, 1973, blasted sandstone rock and other rock from a quarry on said property and that as a proximate result of said blasting, said well on the property caved in and was completely destroyed; that it was impossible to repair said well and that the claimant was compelled to have another well drilled which cost claimant the amount of $221.98 and respondent further says that said amount of money was reasonable and just.

3. Respondent further says that the claimant was free from any fault or negligence in the premises."

It appearing from the foregoing stipulation that the claimant was damaged in the amount of $221.98 as the result of respondent's blasting activities, it is the opinion of this Court that an award should be made to the claimant.

Award of $221.98.

Opinion issued December 9, 1974

JAMES R. LANTZ

vs.

DEPARTMENT OF HIGHWAYS

(No. D-647)

Claimant appeared in person.

Gregory W. Evers, Esq., for the respondent.

GARDEN, JUDGE:

This claim has been submitted on a written stipulation of the claimant and respondent, said stipulation being as follows:

"1. On or about May 22, 1973, at approximately 7:50 A.M., the claimant was lawfully operating his 1969 Chevrolet in a westerly direction on and over the Fort Henry Bridge, designated as Interstate 70 Bridge, which said bridge spans the Ohio River at Wheeling, West Virginia, connecting the States of West Virginia and Ohio.

2. That the Fort Henry Bridge is owned and maintained by the State of West Virginia.

3. The claimant's automobile, while being operated in the left most lane provided for westerly traffic, was suddenly and without warning struck by a section of non-glare metal fence which was situated between the east and west bound lanes, said fencing also being owned and maintained by the respondent.

4. That said section of non-glare metal fencing was in a state of disrepair in that it was loose.

5. That as a direct and proximate result of said fencing being in a loose condition the same swung out and into claimant's automobile damaging the same.

6. The parties hereto stipulate that the sum of Forty-three and 30/100 Dollars ($43.30) is a fair and equitable estimate of the damages sustained by claimant.

7. That the parties hereto agree that the amount stipulated as damages is a settlement of all losses and damages arising from or grow-

ing out of the incident as mentioned or referred to in claimant's Notice of Claim filed herein."

The Court has reviewed the notice of claim, the respondent's answer and, of course, the foregoing stipulation which contains an admission of liability, and the Court being of opinion that the damages are reasonable, an award is hereby made to the claimant, James R. Lantz, in the amount of $43.30.

Award of $43.30.

Opinion issued December 9, 1974

BERTHA A. NEWCOME

vs.

CIVIL SERVICE SYSTEM

(No. D-754)

Laverne Sweeney, Esq., for the claimant.

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

GARDEN, JUDGE:

The claimant prior to December 31, 1972, had been an employee of the West Virginia Industrial School for Boys at Pruntytown, West Virginia. On the aforementioned date, she retired. In her notice of claim she alleges that she was not paid annual leave for the years 1970 and 1971 in a total amount of $819.00, and that she failed to receive a merit increase of $50.00 per month on July 1, 1972, and that as a result, the sum of $300.00 is due her for the six-month period preceding her retirement on December 31, 1972. Her testimony at the hearing conformed substantially to the allegations contained in her notice of claim.

From the testimony and the exhibits introduced into evidence at the hearing, it appeared that the claimant was first employed at the school on May 21, 1962, as a temporary employee (relief cook). Thereafter, she was designated as either extra help, cook, or janitor, but she continued at all times to be classified as a temporary em-

ployee except during the period from May 1, 1968 to September 15, 1968, when she was classified as a permanent employee (cottage parent).

Pursuant to statute a State agency can become subject to the Civil Service System either by Act of the Legislature or by Executive Order. On January 11, 1969, then Governor Hullett Smith issued such an order in respect to the Industrial School for Boys of Grafton. On that date the claimant was classified as a temporary employee (extra help) and was being paid on a per diem basis of $11.00. As required by law, she, as did all employees at the school, took the civil service qualifying examination and passed the same with a score on the cook examination of 72.50. The claimant resigned on August 20, 1969, but was re-employed as a temporary employee (cook) at a wage rate of $12.00 per day on December 17, 1969. Her wages were increased to $13.00 per day on July 1, 1971, and then to $13.65 per day on July 1, 1972.

In respect to claimant's contention that she was not paid a merit increase of $50.00 per month beginning July 1, 1972, we are of the opinion that there is no merit in such contention. It is true that raises were extended on July 1, 1972, but the testimony of the claimant's own witness, Betty Hayhurst, the school's audit clerk, established that the raises were of a cost-of-living nature and not of merit. The audit clerk's testimony further reflected that the claimant did in fact receive this cost-of-living raise on July 1, 1972, when her daily wage rate was increased five per cent from $13.00 to $13.65.

A considerable amount of testimony was introduced in establishing the number of days that claimant worked during the years 1969, 1970, 1971 and 1972, and, in particular, during the usual vacation summer months. While the claimant's work records do reflect that she worked on an almost regular basis during the summer months, the testimony and exhibits clearly reflect that she was always classified during her last four years of employment as a temporary employee. More importantly, the Rules & Regulations of the Civil Service System, a copy of which was introduced by respondent as an exhibit, and, in particular, Section 3(2) of Appendix A relating to annual leave provides as follows:

"2. Annual leave *shall not* be accorded *emergency, hourly,* or

per diem employees, and irregular part-time employees."

During the years 1970 and 1971, the claimant was being paid a daily wage of either $12.00 or $13.00 per day or per diem. Consequently, it is this Court's opinion that any payment of annual leave to her for those years would have been illegal pursuant to the above-quoted section of the Rules & Regulations. For the reasons expressed, this Court is of the opinion to make no award.

No award.

Opinion issued January 8, 1975

BALTIMORE CONTRACTORS, INC.

vs.

DEPARTMENT OF NATURAL RESOURCES

(Nos. D-510, D-516, D-528)

Steptoe & Johnson, Stanley C. Morris, Jr. and *James V. Dolan* for the claimant.

Chauncey H. Browning, Jr., Attorney General, *Henry C. Bias, Jr.,* Deputy Attorney General, and *Arden J. Curry,* Special Assistant Attorney General, for the respondent.

JONES, JUDGE:

Sometime in the early 1960's the Economic Development Administration (EDA) of the United States Department of Commerce announced the availability of federal funds for the construction of recreational facilities in the State of West Virginia. The State's responsibility for this program was assigned to the respondent, Department of Natural Resources (DNR), and DNR retained the services of The Architects Collaborative (TAC), a well-known and highly regarded architectural firm of Cambridge, Massachusetts, for purposes of preliminary studies of the feasibility of several proposed State Park projects. It was finally determined that the State would build what now have become widely known and popular State Parks, namely, Hawks Nest State Park, Canaan Valley State Park, Pipestem State Park and Twin Falls State Park. TAC was employed by DNR

to serve as architect engineer for all of the projects. TAC sub-contracted the detailed design work and construction supervision to Irving Bowman & Associates (IBA), an architectural and engineering firm in Charleston, West Virginia. The claim of Baltimore Contractors, Inc., hereinafter referred to as Baltimore, involves only the Pipestem and Twin Falls projects.

In an effort to help West Virginia contractors, the two projects were divided into numerous smaller projects and individual plans and specifications were prepared by TAC. A satisfactory bidder was found for the golf courses, but otherwise the multi-package plan proved unproductive. Then, with encouragement from Baltimore and other large contractors, the Pipestem and Twin Falls projects, minus golf courses, were consolidated. This was done by modification of the bid proposal and by eight addenda, tying the numerous contracts together into one large contract, upon which bids were asked and received. While there was tacit approval of this procedure by all bidders, who presumably knew what they were bidding on, the language employed in the consolidation did result in troublesome questions of interpretation, particularly as regards Addendum No. 4 pertaining to the Pipestem project, which will be alluded to further herein.

A site inspection was held at Pipestem sometime in August, 1967. The meeting was attended by representatives of TAC, DNR, two contractors who later bid on the contract and a road contractor interested in the separate contract for construction of a road into Pipestem. While a notice of the meeting was sent to Baltimore, it did not attend. The group inspected the site on foot and by automobile, and also examined models of both Pipestem and Twin Falls. Jay Henry, Chief Engineer for State Parks of DNR, testified that bidders at the pre-bid inspection were told that they took the roads "as is". With specific reference to Twin Falls, Mr. Henry further testified as follows: "I told them there was the road at one end that was temporary and a road at the other end which was going to be re-built, but that's about the only extent that I can recall on the discussion at Twin Falls."

A site inspection was made by Dale Willey, an employee in the Estimating Department of Baltimore. On September 6, 1967, he met with Sam Flournoy, an employee of DNR, in Charleston and was

driven by Mr. Flournoy to Pipestem and, according to Mr. Willey's testimony, on to Twin Falls and back to Charleston. Mr. Flourney has no recollection of taking Mr. Willey to Twin Falls but instead recalls stopping at Hawks Nest. In any event, Mr. Willey kept no records and made no written reports of his inspection; and subsequent events would indicate that nothing he saw or learned posed any problem or required any explanation or action so far as Baltimore was concerned.

On October 20, 1967, Baltimore submitted a bid for the construction of certain buildings and related structures and facilities at Pipestem State Park, Summers County, West Virginia, and Twin Falls State Park, Wyoming County, West Virginia. The bid was accepted and the contract in the total amount of $11,576,300 was awarded to Baltimore, and entered into by the parties on February 19, 1968. On February 27, 1968, a Notice to Proceed directed Baltimore to commence work on April 1, 1968. The contract called for completion within 460 calendar days, and provided for the assessment of liquidated damages in the amount of $150 "for each consecutive calendar day after the above established completion date that the work remains incomplete".

Early in April, 1968, DNR, having become disenchanted with TAC by reason of a lack of communication and cooperation in the correction of design errors and other disagreements, canceled its contract with TAC, thereby also terminating the services of IBA, and employed Zando, Martin & Milstead (ZMM), Architects and Engineers, of Charleston, West Virginia.

Baltimore has filed three separate claims, aggregating $1,191,-944.54, arising out of its contract with DNR, as follows:

1. For failure to provide and maintain access roads for the Pipestem and Twin Falls projects, Baltimore's petition claims damages for direct expenses of providing access, additional overhead expenses due to delay, additional heating expense due to delay, and loss of efficiency at Pipestem, in the amount of $506,353.08, and for labor and truck rental expense for transporting workers from highway to job site, labor, equipment, utilities attributable to delay and other additional expenses at Twin Falls in the amount of $98,151.67, a total of $681,733.82. Baltimore now claims a larger sum "as adjusted in accordance with the testimony introduced at trial" in the new total amount of $712,105.36.

2. For delays resulting from errors in design of window walls and failure to timely approve window wall shop drawings, Baltimore's petition alleges damages in the amount of $313,697.57. Eliminating the overall delay expense in connection with the alleged failure of DNR to furnish road access to both projects, and further eliminating certain items which were withdrawn during the course of the hearings, this claim has been reduced by Baltimore to $45,778.86.

3. For additional unanticipated expenses in drilling jack holes for the two main lodge passenger elevators at Pipestem, Baltimore's petition claims damages in the amount of $54,061.75, and indirect expense due to delay in the amount of $142,451.40, a total of $196,513.15. Counsel for Baltimore have withdrawn the claim for delay, leaving an alleged loss of $54,061.75.

Baltimore's claim in this case, as modified, is for damages in the total amount of $811,945.97.

Much testimony was heard and many of Baltimore's exhibits were admitted over objections of DNR, subject to later determination by the Court as to relevance and materiality. All testimony and exhibits pertaining to design errors and inaccuracies in surveys noted prior to bidding but not confirmed thereafter, are considered by the Court not to be material to the issues and will have no bearing on the Court's decision in this case.

This case is complicated by a number of "errors and omissions" attributable in considerable degree to both the claimant and the respondent. It is clear that Baltimore hurried into this contract, bidding with knowledge of uncertainties and apparently counting on change orders to make up for any substantial misunderstandings. Anyone knowing anything about the weather and winter road conditions in the Pipestem and Twin Falls areas should have been put on notice by even a casual site inspection that questions should be asked and answers obtained regarding the relative silence of the contract documents so far as access was concerned. Both parks were located in isolated, hard-to-reach areas, Pipestem alone covering 4,000 acres. Delays in April and May, 1968, were almost entirely attributable to harsh winter weather. Attendance at the pre-bid site inspection arranged by TAC was not a requirement, but the failure of Baltimore to attend was nonetheless a mistake. The "Country Access Roads" shown on the maps furnished by DNR were never intended to carry

the loads in wintertime to which they were subjected. The burdensome and expensive efforts to haul materials to the sites in the bad winter weather could better have been avoided by shutting down the job temporarily or by improvement of the roads by Baltimore in mitigation of its losses. If Baltimore had been more careful in its site investigation, and had given more attention to the study and interpretation of the road access provisions in the contract documents, obvious and pressing inquiries would have been prompted and later trials and tribulations may have been avoided. "Information For Bidders", which was one of the bid documents furnished Baltimore, contains these two pertinent paragraphs:

> "11. *Addenda and Interpretations.* No interpretation of the meaning of the plans, specifications or other pre-bid documents will be made to any bidder orally.
>
> Every request for such interpretation should be in writing, addressed to:
>
> *Irving Bowman and Associates* at 910 *Quarrier Street, Charleston, West Virginia,* and to be given consideration must be received at least five (5) days prior to the date fixed for the opening of bids. Any and all such interpretations and any supplemental instructions will be in the form of written addenda to the specifications which, if issued, will be mailed by certified mail with return receipt requested to all prospective bidders (at the respective addresses furnished for such purposes), not later than three days prior to the date fixed for the opening of bids. Failure of any bidder to receive any such addendum or interpretation shall not relieve such bidder from any obligation under his bid as submitted. All addenda so issued shall become part of the contract documents.
>
> "17. *Obligation of Bidder.* At the time of the opening of bids, each bidder will be presumed to have inspected the site and to have read and to be thoroughly familiar with the plans and contract documents (including all addenda). The failure or omission of any bidder to examine any form, instrument or document shall in no way relieve any bidder from any obligation in respect of his bid."

Where maps furnished Baltimore by DNR showed State highways leading to and through the Parks, such as 18/2 at Pipestem and

10/15 at Twin Falls, Baltimore had reason to believe that *some* maintenance by the State of West Virginia would be provided. This premise is not changed by the fact that after DNR took over the Park areas, the Department of Highways abandoned all roads within the Parks and thereby divested itself of any responsibility for maintaining these roads. With DNR's superior knowledge of the problem and with the basic necessity of road access to the work sites, DNR should have been more concerned that a clear understanding of the road access problem could be had through examination and study of the bid proposal. The aerial surveys furnished Baltimore by DNR, through TAC, were deemed unsatisfactory by both DNR and Baltimore, and when survey stakes locating the road through Pipestem could not be found, Baltimore was forced to employ Ted Ponds, the engineer who had laid out the road. It was Baltimore's responsibility to "stake out" the buildings but the necessary starting points were not there. Baltimore's request for a ground survey should have been granted. In several instances DNR refused additional compensation or change orders where it appears it would have been more amenable if sufficient funds had been available. DNR's judgment necessarily was influenced by the control of funds by the federal agencies. In our opinion, both parties erred in "stonewalling" the road access problem; but the Court is constrained to say that it cannot accept the charges of fraud, bad faith, concealment, entrapment, deceit, conspiracy of silence, etc. appearing in Baltimore's brief. DNR may have been short on money, but never in its desire to get the job done with all the cooperation it could muster from its limited personnel. DNR's Chief Engineer, Jay Henry, throughout the construction period and on the stand as a witness for both parties, displayed a very high degree of fairness and cooperation.

Addendum No. 4, relating to Specifications for the Pipestem project, is a good example of contract language which needed interpretation before the bid letting. The original contract for the construction of the river lodge at Pipestem contained a Stated Allowance of $10,000 for "Improvement of the access road leading to river lodge for Contract Package No. 12". Addendum No. 4 provided in part the following:

> "1) Stated allowances listed in this paragraph shall apply to base bids. References to stated allowance in individual contracts, technical specification volumes, shall be ignored.

2) * * *

3) Allowance for improvement of access roads is for repairing existing roads as required to provide access for construction purposes. Bidders are informed that an additional suitable access road, requiring some improvement, exists, connecting construction areas of the park with river facilities, intersecting river road at Mountain Creek."

DNR contends that the purpose of this provision was to inform prospective bidders that the $10,000 stated allowance appearing in the original Supplemental General Conditions applicable to River Lodge could be used either for improvement of the road leading to the River Lodge from the town of Dunns or for improvement of the newly discovered road leading down the mountain from the main lodge area to the river lodge facility. On its fact this addendum applies only to "Pipestem State Park Project Contract Nos. 5, 7, 10, 11, 12, 13 and 14", but Baltimore strongly contends that it applies not only to the entire Pipestem project, but to Twin Falls as well. Baltimore further points out that DNR personnel gave pre-bid assurances to contractors that the rock base of the permanent road at Twin Falls would be completed prior to or soon after commencement of the building construction work, later promising that it would be completed by October, 1968. While these "assurances" were never reduced to writing, they clearly were intended to be and were relied upon by Baltimore. However, the road was not ready for use during the winter of 1968-69, and Baltimore was put to large extraordinary expense in transporting both labor and materials. Interference in the use of the main access road into Pipestem by the independent construction of a new road, which involved tearing up portions of the old road while Baltimore was trying to use it, was a factor in delaying Baltimore and in causing it to have to construct temporary access roads to construction areas. The road under construction passed in front of every building on the job, and, according to one witness, "The only way we could get there was to interfere with and be interfered by the road contractor".

The original contract completion date was July 4, 1969, and the extension of 142 days, allowed by change order, expired November 23, 1969. Beneficial occupancy of the parks was delayed until December 31, 1969, and the project was finally accepted in June, 1970.

There is no indication that any liquidated damages were charged against Baltimore. Acceptance of the change order extending the time for completion of the project did not waive nor prejudice Baltimore's claims for damages due to delays attributable to DNR.

Recommending approval of change order 25A, extending for 142 days the time for completion of the contract, DNR's Chief Engineer wrote department memoranda attributing delays in construction to a number of factors. At Pipestem as follows: (1) DNR's unsuccessful efforts to work out a change order deleting the Visitors' Center, Upper Tram Station, Aerial Tram, Lower Tram Station, River Lodges (30 rooms), Stable and Corral, and required facilities; (2) Indecision of DNR concerning plans to construct the access road to the Bluestone River Complex; (3) Unsuitable foundations and excess water encountered by Baltimore in excavating for the "core" of the Earth Dam; (4) TAC error in design of window walls; (5) Redesign of Upper and Lower Tram Stations; and (6) Revisions in design of Cabins, Golf Clubhouse and Recreational Building. At Twin Falls as follows: (1) Road access, complicated by the bankruptcy of the original road contractor; (2) State Road Commission's imposition of a 15 ton maximum load limit on the Maben-Saulsville Road, necessitating unloading from "over the road trucks" to smaller trucks; (3) Redesigning window walls; (4) Failure of TAC as-built drawings to show accurate location of irrigation cable, resulting in same being cut by pile driver; and (5) Inaccurate information for location of Cabins and Archery Course. Referring to both Parks, one of the memoranda avers that "certain delays were the result of inadequate plan information, site surveys, etc., all of which delayed the construction program of the entire work at Pipestem and Twin Falls", and that, "The change of architect/engineer from TAC to ZMM in 1968 resulted in delays in the progress of the work". By its own memoranda, DNR accepted responsibility for the delay factors therein mentioned, and agreed that Baltimore was entitled to 142 additional days to complete its contract.

A brief summary of Baltimore's claim for damages resulting from road access and other general delays is as follows:

1. Pipestem direct costs	$ 9,390.33
2. Pipestem extended overhead (142 days)	108,423.31
3. Pipestem winter heating (1969-70)	124,927.61

4. Twin Falls costs	56,760.60
5. Twin Falls winter heating (1969-70)	68,762.63
6. Extra engineering cost (Ted Ponds)	11,200.00
7. Loss of labor efficiency	255,596.00
Total	$635,420.48
Less duplications	16,198.42
	$619,222.06
Home office overhead (7.4%)	45,822.43
Profit (15% — 7.4%)	47,060.87
Grand Total	$712,105.36

The Court hereinabove has said that Baltimore is entitled to the Ted Ponds cost for extra engineering in the amount of $11,200.00; and the Court now further finds that Baltimore is entitled to recover damages for unwarranted delays brought about by the actions and omissions of DNR and its architects. However, the Court will make no allowance for damages beyond the contract extension of 142 days, including alleged damages for 1969-70 winter heating. As triers of the facts and arbiters of the amount of damages, the Court has weighed all of the evidence (14 volumes of testimony and 305 exhibits), and has endeavored to assess damages in a fair and just manner, considering all of the facts and circumstances, ambiguous and otherwise. Accordingly, it is the Court's opinion that Baltimore has sustained damages by reason of delays effectively caused by DNR, and proved by a preponderance of the evidence, in the amount of $200,000.00.

Baltimore submitted its first window wall drawing for approval of ZMM on June 24, 1968. Thereafter it became apparent that there was a design error by TAC in that the design called for exposed glass areas in excess of 50 square feet, which exceeded standard wind load and thermal requirements. Two types of window units, aluminum frame windows and wooden frame windows, were required by the specifications. Final shop drawings were not approved by ZMM until October 3, 1968. While some delay was occasioned by the necessity of re-designing the window walls, the Court does not believe that this delay was critical to Baltimore's schedule. The substitution of

Polarpane for Anderson windows, requested by Baltimore, consumed considerable time, probably more than it should have, but with that fault about equally divided. The use of standard wood windows and standard hardware, both requested by Baltimore, in the place of custom windows and custom hardware as shown on the drawings took additional time. The latter substitution was reluctantly agreed to by DNR for the express purpose of saving time, which it undoubtedly did. Two other questions having to do with warranties and a rather flimsy difference of opinion about what was or was not a proper acceptable color of the glass, involved much correspondence and seemingly unnecessary delay, which Baltimore did little or nothing effectively to prevent. Moreover, in view of the status of Baltimore's work schedule at both Pipestem and Twin Falls, the Court cannot say that Baltimore could have gained any advantage in time or otherwise if an earlier approval of the drawings had been obtained. On the contrary, it appears to the Court that before they finally were ordered and delivered to the sites, Baltimore was not ready to install the window walls. The Court is of opinion not to allow Baltimore's claim for direct cost allegedly incurred as a result of TAC's design error, and delayed approval of shop drawings by ZMM; and as compensation for general delays is covered in the road access allowance, no award will be made to Baltimore for its separate window wall claim.

Baltimore has dropped the delay portion of its jack hole claim, but urges that under Section 21 of the Contract's General Conditions ("Subsurface Conditions Found Different"), it is entitled to compensation for additional and reasonably unanticipated expenses incurred in drilling jack holes for the two main lodge elevators at Pipestem. The contract section referred to reads as follows:

> "Should the Contractor encounter subsurface and/or latent conditions at the site materially differing from those shown on the Plans or indicated in the Specifications, he shall immediately give notice to the Architect/Engineer of such conditions before they are disturbed. The Architect/Engineer will thereupon promptly investigate the conditions, and if he finds that they materially differ from those shown on the Plans or indicated in the Specifications, he will at once make such changes in the Plans and/or Specifications as he may find necessary, and any increase or decrease of cost resulting from such changes to be

adjusted in the manner provided in Paragraph 17 of the General Conditions."

Baltimore, through its drilling subcontractor, Keyser Drilling Company, had successfully drilled four jack holes, 25 to 40 feet in depth, when it ran into difficulty in the drilling of the north passenger elevator jack hole at the main lodge. At about 40 feet there was a deflection of the drill bit, causing improper shaft alignment. Corrections were made but again at a depth of about 55 feet the same thing occurred. Failing to correct the deflection of the bit, this hole was filled to approximately 30 feet with concrete, and while the concrete was allowed to cure, drilling was started on the north jack hole. Again at approximately 40 feet a similar deflection of the bit was encountered. Going back to the north hole, drilling was resumed through the concrete, but alignment again was lost at about 40 feet. Samples taken from the holes indicated that an extremely hard conglomerate, slanting rock stratum was causing the drilling bit to bounce or slip off, departing from a true vertical line and the required true alignment. At this point another drilling contractor was brought to the job and although he tried other drilling techniques he, too, was unsuccessful. In January, 1969, Baltimore employed an expert drilling consultant, Dunbar Drilling of Dayton, Ohio, and in February, approximately a month later, the drilling of both jack holes had been successfully completed. It appears that Dunbar cut out one side of a steel pipe and then inserted it as a casing for the hole, so that the drill bit would be confined on the sloping side of the rock stratum and free to drill in the direction of the hole in the pipe, thereby retaining alignment.

While Baltimore undoubtedly encountered an unexpected condition in the drilling of these jack holes, it was not a subsurface condition materially differing from those shown on the Plans or indicated in the Specifications, as there was no reference anywhere in the contract documents to depths of 40 feet or more. The only pertinent reference to subsurface conditions is found in information for bidders under the heading "Test Borings". Bidders are informed that a report of test borings is available, that the information is furnished for the convenience of the bidder and is not a part of the contract documents nor is the information guaranteed, and that any bid submitted must be based on the bidders own risk. In any event these test borings were only to a depth of about 20 feet and would not have been helpful in solving this problem. The Court is of opinion that the extra expense

incurred by Baltimore in this connection was not attributable to any act or omission of DNR, but on the contrary, was the probable and direct result of the failure of Baltimore to utilize a known, practical and correct drilling procedure which would have nullified the excessive costs which did occur.

In consideration of its findings, hereinbefore set out, the Court awards to the claimant, Baltimore Contractors, Inc., the sum of $200,000.00.

Judge Petroplus participated in the decision of this case, but his resignation from the Court was effective before this opinion was prepared and approved.

Judge Garden did not participate in the decision of this case.

Award of $200,000.00.

Opinion issued January 8, 1975

GENEVA MARIE BURCH

vs.

REHABILITATION ENVIRONMENTAL ACTION PROGRAM

(No. D-679)

Claimant appeared in person.

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

GARDEN, JUDGE:

On September 17, 1973, agents or employees of the Rehabilitation Environmental Action Program, commonly referred to as REAP, removed and confiscated a 1963 Ford Galaxie automobile from private property in the Town of Glendale, Marshall County, West Virginia. This automobile was owned by the claimant, Geneva Marie Burch, having been purchased by her on January 11, 1972, for the sum of $400.00. The automobile had been damaged in an accident sometime prior to September of 1973, and pending repairs, it had been parked on property owned by Mr. and Mrs. William Kinkes and with their permission. Mrs. Kinkes, who testified on behalf of the

claimant, indicated that it had been parked there for some eight or nine months before its removal.

REAP is a State agency created by the executive authority of the Governor of West Virginia pursuant to a contract with the Appalachian Regional Commission, a Federal Agency. The accomplishments of this agency since its inception in improving the environment in this State have been most noteworthy. However, we are constrained to point out that these noteworthy objectives must not and cannot be accomplished by taking private property without due process of law. If this automobile was an abandoned vehicle and was creating an environmental eyesore, REAP should have brought the matter to the attention of the law enforcement officials of the Town of Glendale or Marshall County, who, in turn, could have effected the automobile's removal by following the provisions of Article 24, Chapter 17 of the Code-Disposal of Junk and Abandoned Vehicles. No representative of REAP appeared at the hearing to explain or justify the agency's action in respect to this automobile, and we are of the opinion that an award should be made to the claimant.

The real problem presented in this claim is the determination of the proper amount of the award. No testimony was presented as to the fair market value of the automobile on the date of its conversion. However, under our Rules of Practice and Procedure, claimants are permitted to appear in this Court without counsel, and as a consequence, we have been liberal as to requiring proper proof of damages. The claimant in her Notice of Claim requested damages in the amount of $550.00 even though she paid only $400.00 for the automobile in January of 1972. Thereafter, she drove the automobile for about a year at which time it was damaged when the claimant lost control of the automobile, and it struck a retaining wall. It was thereafter removed to the Kinkes property where it remained for some eight or nine months until its demise on September 17, 1973. In further support of her damage claim, the claimant testified that certain parts for the repair of the automobile were in its trunk when the conversion took place, and that these parts had been purchased at a cost of $43.00.

After reviewing all of the evidence and the exhibits introduced at the hearing, we are of the opinion that an award of $150.00 will

adequately compensate the claimant for her loss.

Award of $150.00.

Opinion issued January 8, 1975

JAMES DEWEY EDGELL

vs.

DEPARTMENT OF HIGHWAYS

(No. D-630a)

WILMA R. EDGELL

vs.

DEPARTMENT OF HIGHWAYS

(No. D-630b)

Edward A. Zagula and Leonard Z. Alpert, Attorneys at Law, for the claimants.

Gregory W. Evers, Attorney at Law, for the respondent.

JONES, JUDGE:

The claims of James Dewey Edgell (No. D-630a) and Wilma R. Edgell (No. D-630b) against the respondent, Department of Highways, were consolidated for hearing and decision.

On February 26, 1973, the claimant, James Dewey Edgell, then temporarily unemployed, had driven his father to work at Weirton Steel Company in Weirton, West Virginia, and was returning to their home in New Cumberland, West Virginia, when he became involved in an accident. He was driving a 1965 Buick station wagon, owned by his mother, the claimant, Wilma R. Edgell, on West Virginia Route No. 2, in the right-hand or curb lane of two north-bound lanes. At 6:00 o'clock a.m. it was still near-dark and the station wagon lights were on. Mr. Edgell estimated that he was travelling at a speed of about 30 m.p.h. when he heard a loud "rumble" and a large boulder weighing approximately four tons fell on the front bumper and

hood of the station wagon, bringing it to a sudden stop and throwing Mr. Edgell against the rear view mirror and the steering wheel. Mrs. Edgell's car was badly damaged, and Mr. Edgell sustained injuries resulting in the loss of all of his teeth, as well as painful and persistent injuries to his mouth and chest.

This accident occurred in a "falling rocks" area similar to hundreds of others along the highways of West Virginia. "Falling Rocks" signs were in place both north and south of the scene of the accident. Slides have occurred with some frequency between the signs, and there was testimony relating to slides in the immediate area of "two or three" and "three or four" times a year. In 1966 or 1967 the highway at this location was widened by the respondent to accomodate an additional lane of traffic, but there is no direct satisfactory evidence as to how much, if any, the hillside was displaced or disturbed. Counsel for the claimants contend that the widening of the highway created a more dangerous condition, thus requiring a higher degree of care on the part of the respondent. However, there is nothing in the record to show that the hillside was either more or less susceptible to slides before and after the highway was widened.

In many similar cases this Court has cited and followed the case of *Adkins v. Sims,* 130 W.Va. 645, 46 S.E. (2d) 81, which holds that the user of the highway travels at his own risk, and that the State does not and cannot assure him a safe journey. *Parsons v. State Road Commission,* 8 Ct. Cl. 35; *Criss v. Department of Highways,* 8 Ct. Cl. 210; *Lowe v. Department of Highways,* 8 Ct. Cl. 175; and *Mullins v. Department of Highways,* 9 Ct. Cl. 221.

The Court is unable to distinguish this case from the cases heretofore decided by the Court and cited herein; and the Court is of opinion that the claimants have not proved by a preponderance of the evidence that the respondent has been guilty of negligence. Therefore, it is the judgment of the Court that the claims of James Dewey Edgell and Wilma R. Edgell be and they are hereby disallowed.

Claims disallowed.

Opinion issued January 8, 1975

CECILE H. RUDDELL

vs.

ALCOHOL BEVERAGE CONTROL COMMISSION

(No. D-789J)

Grover Jones, Jr., Esq., for claimant.

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

GARDEN, JUDGE:

In January of 1973 the Alcohol Beverage Control Commission, hereinafter referred to as ABC, opened an agency in the Town of Union, West Virginia, and employed the claimant, Cecile H. Ruddell, to operate and manage the same. At the time of her employment, managers of agencies were paid on the basis of the number of bottles of alcoholic beverages that were sold during a given month, but not in excess of $300 per month or $3,600 per year. Legislation was introduced and passed during the 1973 session which increased the $3,600 per year maximum to $6,000. With the discretion vested in him by the Legislature, the Commissioner of the ABC, J. Richard Barber, in July of 1973 revised the manner of compensating agency managers from the per bottle formula to a dollar volume of sales formula. During the months of May and June, 1974, the volume of sales at the Union agency was sufficient to entitle the claimant to a salary of $425 per month. Her salary was not paid to her for these months, and she thus presents her claim in the total amount of $850.

Commissioner Barber testified at the hearing, not for the purpose of resisting the claim, but in order to explain its non-payment. While the 1973 Legislature, as explained by the Commissioner, authorized the increases in salary for the agency managers, it failed to appropriate any funds to meet these increases in the 1973-74 fiscal budget. Realizing that this had occurred, an attempt was made to pass a special appropriation during the 1974 Legislative Session but this, likewise, was not accomplished.

As a result of the foregoing, the Commissioner on May 1, 1974, did not have sufficient funds in his personal services account to pay the salaries of the thirteen (13) agency managers for the last two

months of the fiscal year. The Commissioner testified that while he ended the year with an overall surplus of some $74,000.00, he was prohibited by law from transferring a portion of that surplus to his personal services account in order to pay the agency managers, and this Court agrees with this conclusion. Commissioner Barber did testify that he did have $2,538.52 in his personal services account at the close of the fiscal year 1973-74, but because this amount was insufficient to pay all agency managers in full for the last two months of the fiscal year, he included the same in his $74,000.00 surplus and returned it to the State Treasury.

We believe that the case of *Airkem Sales & Service vs. Department of Mental Health,* 8 Ct. Cl. 180, is controlling here. In *Airkem,* the Department of Mental Health had purchased or contracted for supplies, expendable commodities or services in excess of the amount appropriated for such purposes by the Legislature. While this Court in that case felt that there was a moral obligation on the part of the State to pay these obligations, it also felt that it could not authorize an award of an illegal claim in view of the fact that the spending unit had violated Code 12-3-17 in incurring liabilities in excess of the then current appropriation.

We feel that the facts of this claim present a similar situation. When the 1973 Legislature failed to appropriate sufficient funds to effect the salary increases authorized by them, it was probably unwise for Commissioner Barber to place the raises into effect on July 1, 1973, but his action can be justified for as he indicated in his testimony, the Speaker of the House advised him that additional funds would be forthcoming from the 1974 Legislature in the form of a supplemental appropriation. As indicated earlier, these funds were not forthcoming and, consequently, when Commissioner Barber retained the services of this claimant and the other agency managers during May and June of 1974, when funds were not available, his action in that respect was unlawful as set forth in Code 12-3-17.

This decision to make no award shall be binding and control the disposition of the additional claims filed by other agency managers and those that may be filed in the future involving unpaid salaries for the months of May and June, 1974.

No award.

Opinion issued January 8, 1975

MRS. W. G. VIA

vs.

DEPARTMENT OF HIGHWAYS

(No. D-822)

No appearance for the claimant.

Emerson Salisbury, Esq., for the respondent.

GARDEN, JUDGE:

No testimony was taken in this claim, but in lieu thereof a written stipulation executed by the claimant and respondent was submitted, said stipulation being as follows:

"1. That employees of the respondent negligently placed a large piece of steel on the travelled portion of a bridge across Coal River near the village of Alum Creek in Kanawha County, State of West Virginia.

2. That claimant, in driving her 1973 model Pontiac across said bridge, struck said piece of steel with her car causing damage thereto in the amount of $55.10.

3. That claimant was free from any fault or negligence in the premises.

4. That respondent feels that the sum of $55.10 claimed is fair and equitable."

In view of respondent's admitted negligence, the claimant's freedom from negligence and the reasonable amount of the damages, an award is hereby made to the claimant, Mrs. W. G. Via, in an amount of $55.10.

Award of $55.10.

Opinion issued January 15, 1975

HELEN L. FREED, No. D-775

W. M. HARRIS, No. D-776

WILDA F. CURRENCE, No. D-789 A

BARBARA RAE NORTON, No. D-789 B

ALUNA J. WARE, No. D-789 C

MARY LOUISE SINGLETON, No. D-789 D

WAYNE L. MAIN, No. D-789 E

LOUISE H. HARPER, No. D-789 F

SHIRLEY ANN KIMBLE, No. D-789 G

LEONARD D. WATSON, No. D-789 H

DONAL L. SMITH, No. D-789 I

vs.

ALCOHOL BEVERAGE CONTROL COMMISSION

PER CURIAM:

The foregoing claims are disallowed for the reasons set forth in the Opinion of this Court heretofore filed in deciding the claim of Cecile H. Ruddell, Claimant v. ABC Commission*, Respondent, Claim No. D-789j, the factual situations and the law applicable thereto being the same as that involved in the foregoing decision of this Court.

Claims disallowed.

* 10 Ct. Cl. 163.

Opinion issued January 15, 1975

MIDLAND WHOLESALE GROCERY COMPANY, No. D-799

STATE FOOD STORES, INC., No. D-800

WHEELING HOSPITAL, INC., No. D-801

MEDICAL SUPPLY COMPANY, INC., No. D-802

INDEPENDENT DRESSED BEEF COMPANY, INC., No. D-803

NORTEMAN PACKING CO., No. D-804

COOK MOTOR LINES, INC., No. D-805

ELECTRONIC MATERIALS CORPORATION, No. D-806

SCHERING CORPORATION, No. D-807

OSCAR RUTTENBERG, D/B/A RUTTENBERG'S STORE, No. D-808

WEST VIRGINIA STATE INDUSTRIES, No. D-811 A

STORCK BAKING COMPANY, INC., No. D-812

POLIS BROTHERS, No. D-813

MT. CLARE PROVISION COMPANY, No. D-814

LEVER BROTHERS COMPANY, No. D-815

PHYSICIANS FEE OFFICE, No. D-816 A, B, C, D & F

INDUSTRIOUS BLIND ENTERPRISE, No. D-817

PEPSI-COLA BOTTLING CO. OF MOUNDSVILLE, INC., No. D-818

M & W DISTRIBUTORS, INC., No. D-819

VALLEY WELDING SUPPLY COMPANY, No. D-820 A

SOUTHERN CHEMICAL COMPANY, A DIVISION OF SOUTHERN MACHINERY COMPANY, No. D-821

vs.

DEPARTMENT OF PUBLIC INSTITUTIONS

TRI-STATE DRUG COMPANY, No. D-823

STANDARD BRUSH & BROOM COMPANY, No. D-824

REYNOLDS MEMORIAL HOSPITAL, No. D-825

DERMATOLOGY SERVICE, INC., No. D-826

A. H. ROBINS COMPANY, No. D-827

MCNINCH HARDWARE, No. D-828

THE NATIONAL COLLOID COMPANY, No. D-829

COLUMBIA GAS OF WEST VIRGINIA, INC., No. D-830

ARISTOTLE A. RABANAL, M.D., No. D-832

LOUIS ANTHONY CO., INC., No. D-833

AMERICAN CAN COMPANY, No. D-834

MERCK, SHARP & DOHME, No. D-835

MUTUAL WHOLESALERS OF WHEELING, INC., No. D-836

WEST VIRGINIA NEWSPAPER PUBLISHING COMPANY, No. D-837

WHEELING ELECTRIC COMPANY, No. D-838

KELLOGG SALES COMPANY, No. D-839

MARION PAPER, INC., No. D-840

EXXON COMPANY, U.S.A., No. D-841 A&B

WHEELING WHOLESALE GROCERY CO., No. D-844

PROCTOR & GAMBLE DISTRIBUTING CO., No. D-845

KIRK'S PHOTO ART CENTER, No. D-846

MONROE, DIVISION OF LITTON BUSINESS SYSTEMS, INC., No. D-847

THE UPJOHN COMPANY, No. D-848

vs.

DEPARTMENT OF PUBLIC INSTITUTIONS

HOFFMAN-LA ROCHE, INC., No. D-849

C & P TELEPHONE CO. OF W. VA., No. D-850

MYERS DRUG STORE, INC., No. D-854

ALLING & CORY, No. D-855

HONG I. SEUNG, M.D., No. D-856 A&B

MARSHALL COUNTY CO-OPERATIVE, INC., No. D-857

THE KROGER COMPANY, No. D-858

OHIO VALLEY MEDICAL CENTER, INC., No. D-860

STANDARD BRANDS INCORPORATED, No. D-861

ECONOMICS LABORATORY, INC., No. D-863

WYETH LABORATORIES, DIVISION OF AMERICAN HOME PRODUCTS CORPORATION, No. D-867

HILLANDALE FARMS, INC., No. D-869

WINANS SANITARY SUPPLY COMPANY, INC., No. D-870

CONSOLIDATED MIDLAND CORPORATION, No. D-871

ROBERT E. DURIG, O.D., No. D-872

DOCTORS ASAAD, INC., No. D-873

DOCTORS BARGER AND GORDON, INC., No. D-877

AMBULATORY CARE ASSOCIATES, INC., No. D-878 A&B

OHIO VALLEY DRUG COMPANY, No. D-886

IBM CORPORATION, No. D-887

THE CITY OF MOUNDSVILLE WATER DEPARTMENT, No. D-889

GOLDSMIT-BLACK, INC., No. D-890

CRESCENT PRINT SHOP, No. D-894

PFIZER INC., No. D-897

vs.

DEPARTMENT OF PUBLIC INSTITUTIONS

PER CURIAM:

The foregoing claims are disallowed for the reason set forth in the Opinion of this Court heretofore filed in deciding the claims of *Airkem Sales and Service, et al v. Department of Mental Health,* 8 Ct. Cl. 180, the factual situations and the law applicable thereto being the same as that involved in the foregoing decision of this Court.

Claims disallowed.

Opinion issued January 16, 1975

WILLIAM A. BARTZ III

vs.

WEST VIRGINIA DEPARTMENT OF HIGHWAYS

(No. D-722)

John W. Cooper, Attorney at Law and *Frank Cuomo, Jr.,* Attorney at Law, for the claimant.

Gregory W. Evers, Attorney at Law for the respondent.

DUCKER, JUDGE:

William A. Bartz III of Windsor Heights, Brooke County, West Virginia, suffered serious back and other injuries on May 26, 1973 as the result of an accident in which he was thrown from a motorcycle he was riding on the Windsor Heights Road, County Route 30, south of Wellsburg in Brooke County, West Virginia. He alleges that the road was in a bad state of repair and when the wheels of the motorcycle struck rocks, dirt, mud clods and other debris approaching a blind curve, he lost control of the motorcycle and was thrown over an embankment at the side of the road curve, suffering damages in the amount of $65,000.00.

There were no witnesses to the accident except the claimant himself. The case rests upon the question of negligence of the respondent in failure to properly maintain the road and negligence of the claimant, either wholly or as contributory. A determination of the

extent of the injuries and the medical expenses is not necessary in view of our decision herein of the question of liability.

According to the testimony of the claimant, he had gone to the Windsor Heights Firemen's Club the afternoon of the day of the accident, and upon meeting his brother-in-law, he was asked if he wanted to go for a ride on the bike, meaning the "66 DSA" motorcycle which was in joint ownership between them but which had been ridden by the claimant "only a couple of times". He had previously owned a lighter "350 Yamaha" motorcycle, which he stated that when he had his bike "he rode across that road all the time". He left the Firemen's Club and rode the 66 DSA motorcycle to a field a mile and a half away from the Club, turned to head back to the Club and when he came to a point forty to fifty feet before the curve he began gearing it down from 30 miles an hour to second gear at 25 and 20 miles respectively and holding to the right hand lane of the road because of the curve. He said he struck several potholes, swung around to miss one, hit some clods of dirt and then lost control of the motorcycle and was thrown from it and injured. In his trip from the Club to the field which was a mile and a half from the Club and about 800 to 1000 feet from the place of the accident, he passed the site of the accident. He admitted seeing potholes, ridges, slag and rocks in the road on both sides of the road, "but more so on the right hand side". He couldn't use the left hand lane because of the curve. The accident happened in good daylight, sunshiny weather.

The witness, John Dado, Deputy Sheriff of Brooke County, testified to the effect that the Windsor Heights Road was a macadam road with no berm and which was bad and had lots of chuckholes and ruts and had poor drainage with no guardrails, arrows or signs as to condition. He said he traveled the road frequently. Another witness testified to the same effect but admitted that a lot of people traveled that way but he hadn't seen any accidents on it.

The respondent relied chiefly on the testimony of John Chuchiak, Jr., the maintenance superintendent of the respondent in Brooke County, who frequently traveled the portion of the road in question and who was in charge of the road's maintenance. He stated that there had been no special maintenance of this road since the accident, as it had been resurfaced twice in the past ten years, that the ditch

along the inner lane at the curve carries the water off as the road slanted toward the ditch, that he did not consider a depression of one and a half to two inches a pothole, and that there were no potholes in the road in the area of the place of the accident. In support of his testimony the respondent introduced seven photograph exhibits portraying the road in the immediate area and of the place of the accident. These exhibits are very clear, and to the Court they support fully the testimony of the witness to the effect that there are no depressions which really amount to potholes, although there is one depression which appears slightly deeper than some of the rougher places of the road but not of the size testified to by claimant as the one he apparently thought he struck causing him to lose control of his motorcycle.

Much stress was laid by counsel as to the testimony of the witness, Chuchiak, as to the repair and maintenance work done by the respondent on the road, as not being proven by the records of the respondent, which would have been the best evidence. As the witness testified according to his own personal knowledge, we have considered that as admissible such evidence to such extent, omitting all that was not so proven. Certainly the photographs were not so subject to objection or exception.

The Windsor Heights Road is a secondary road which was apparently of the same construction and maintenance requirements as all secondary roads in the State. It was an average local service road and had to be accepted as such with the usual maintenance requirements of such class of road, and not the maintenance of a first class highway. So far as the record shows there had been no previous accidents, although the road was constantly used by the claimant himself. The road was reasonably safe for ordinary vehicular traffic. Furthermore, the accident occurred in daylight and good weather, and with previous and present full knowledge on the part of the claimant of the condition of the road, as he had just shortly before the accident ridden the motorcycle over it at the very place of the accident. We don't know whether or not claimant's knowledge or a lack of the operation of the motorcycle he was riding contributed to his loss of control of it, and it is not necessary for us to consider such possibility in our decision.

We are of the opinion that the respondent has not failed in its

duty to properly maintain this road, as there appear to be no defects or obstructions of such magnitude as to have been the proximate cause of the accident. A motorcycle with only two wheels is a more hazardous vehicle to operate than an ordinary automobile with four wheels, and when a motorcycle is ridden on a secondary road more care on the part of the rider is required. It appears to us that the claimant knowing the condition of the road, which he said contained lots of potholes, did not exercise due care or caution for his own safety, and his accident was the result of his own negligence, and if there was any negligence on the part of the respondent, then the claimant was guilty of contributory negligence.

Accordingly, we are of the opinion to, and do hereby, make no award to claimant in this matter.

No award.

Opinion issued January 16, 1975

JOHN L. COOPER

vs.

WEST VIRGINIA DEPARTMENT OF HIGHWAYS

(No. D-787)

No appearance for claimant.

Emerson W. Salisbury, Attorney at Law for the respondent.

DUCKER, JUDGE:

Claimant, John L. Cooper, of Rock, West Virginia, and respondent stipulate that on or about May 7, 1972 claimant's truck was sprayed with red lead paint by agents of the respondent while the latter were engaged in the painting of the respondent's shed located at the laboratory of Mercer County District Headquarters, and that the reasonable cost of removing the paint was $25.00.

Accordingly, we award the claimant the sum of $25.00.

Award of $25.00.

Opinion issued January 16, 1975

DAIRYLAND INSURANCE COMPANY,
SUBROGEE OF STANFORD T. ALLEN

vs.

WEST VIRGINIA DEPARTMENT OF HIGHWAYS

(No. D-714)

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

Gregory W. Evers, Attorney at Law for the respondent.

DUCKER, JUDGE:

Dairyland Insurance Company, as subrogee of Stanford T. Allen, alleges that it is entitled to recover damages in the amount of $1151.03, the cost of repairs to the automobile of said Allen as the result of a collision with a loaded coal truck owned by one Harry M. Morehead and operated by Edward Lee Morehead on Secondary State Road No. 15/1 near that road's intersection with State Route 102, at Skydusty, in McDowell County, West Virginia on June 22, 1972.

Claimant's witness, State Trooper H. C. Ryan, investigated the accident after it was reported to the office. He did not see it. According to his report and testimony of James B. Jackson, a State Road employee who witnessed the accident, the collision occurred on a practically level, two lane highway, twenty feet three inches where some road work was in progress. There was no machinery on the road except a tractor which extended some 14 to 16 inches on the highway on the side of the south bound traffic lane, a short distance south of the place of the collision. There was a curve bearing to the left as one proceeded south, the direction in which Allen was proceeding, and the accident occurred a comparatively short distance north of northerly end of the curve which the truck traveling north had negotiated prior to colliding with the car. The witness' report and his testimony confirmed the fact that both the truck and car were in the north bound lane of the road, the one in which the truck had the right of way.

The only witness who saw the accident was the said James B. Jack-

son, who had been working with a grader filling in a hole in the road about three tenths of a mile south of the place of the accident. He testified that he had removed the grader from the road except for 14 to 16 inches of it remaining on the road, that there were caution signs at both ends of the construction area, that Allen had already passed the immediate area of construction and stopped and asked for some road directions which witness said he could not give Allen, whereupon witness called for the road flagman to come over to the south bound lane. When the flagman didn't come, "Allen pulled across the center line" into the south bound lane and then talked to the flagman on that side of the road, the flagman then being on the south end of the construction area where there was a "men working" sign. When Allen saw the coal truck coming he tried to back over into the south bound lane but there was not enough time to avoid the collision. The witness stated that as the road had been cleared of the tractor there was no need for the flagman for traffic in the south bound lane.

The testimony given by the State Trooper, who could only report what he could see and learn after the accident, does not only refute to a substantial degree the testimony of Jackson, who saw the collision, but it substantially confirms the latter's testimony. There was no obstruction of any consequence in the road as the grader did not extend into the road enough to create a hazard and there was no need of the flagman by Allen. There is no fact upon which negligence on the part of the respondent can be based.

We are of the opinion, therefore, that the accident was caused solely by the fault of Allen in driving over from the south bound lane of traffic to the north bound lane and stopping there too long for clearance by the coal truck, which was properly proceeding in the north bound traffic lane and consequently we make no award herein.

No award.

Opinion issued January 16, 1975

JAMES M. DUFFY

vs.

WEST VIRGINIA DEPARTMENT OF HIGHWAYS

(No. D-738)

No appearance for claimant.

Emerson W. Salisbury, Attorney at Law for the respondent.

DUCKER, JUDGE:

The facts as stipulated by claimant, James M. Duffy, of Greenland Circle, South Charleston, West Virginia, and respondent are that on November 29th, 1973 the claimant was driving his automobile in an easterly direction on old U. S. Route 60 in South Charleston, West Virginia, a short distance east of the junction of Jefferson Road, when the front end of his car fell into a hole in the travelled portion of the road, damaging one tire and the wheel rim. The stipulation admits that the claimant was driving at a lawful rate of speed and at that speed he could not see the hole in time to avoid striking it; and furthermore there were no warning signs to warn motorists of the defective condition of the street. Claimant claims damages in the amount of $50.00, but the parties agreed that the sum of $25.00 is the reasonable cost of repairs. Accordingly, we award the claimant the sum of $25.00.

Award of $25.00.

Opinion issued January 16, 1975

CLYDE M. ELLISON

vs.

WEST VIRGINIA DEPARTMENT OF HIGHWAYS

(No. D-788)

No appearance by claimant.

Emerson W. Salisbury, Attorney at Law for the respondent.

DUCKER, JUDGE:

Claimant, Clyde M. Ellison, of Princeton, West Virginia, and respondent have stipulated the claimant's 1972 Pinto automobile was sprayed with paint by respondent's workmen while the latter were painting a department shed located at the laboratory of Mercer County District Headquarters on or about May 7, 1974, and that the sum of $25.00 is a fair and reasonable cost of necessary repair. Accordingly, we award the claimant $25.00.

Award of $25.00.

Opinion issued January 16, 1975

HARRY C. HENDERSON

vs.

DEPARTMENT OF HIGHWAYS

(No. D-332)

William J. Oates, Esquire, for claimant.

Gregory W. Evers, Esquire, for respondent.

PETROPLUS, JUDGE:

This case was formerly tried before the Court as Claim No. D-332.* The claimant alleged in the former hearing that applications of calcium chloride, sodium chloride, rock sale, and other chemical solutions to U.S. Route 50 on the Allegheny Front, near the intersection of Route 50 and Route 5 in Mineral County, West Virginia, over

* See *Henderson v. Department of Highways,* 9 Ct. Cl. 183.

a period of time destroyed his water supply, which came from a well, making the water unusable for human consumption and other domestic uses. The claimant also contended that the pollution of his well destroyed his tourist stop business as well as his health and that of his wife, resulting from the drinking of contaminated water from the well. The respondent denied all of the allegations except that calcium chloride and other chemicals were applied to the road surface in reasonable amounts to impede freezing and make travel safe in the mountainous area of the Allegheny Front.

The case was tried on the claim of negligence and excessive and unreasonable use of chemicals on the roadway surface. The Court concluded in the former hearing that the claimant had not sustained the burden of proof required of him by law and had not established that his property rights and the reasonable enjoyment of his property had been invaded by any wrongful act of the respondent. The Court also ruled that the claimant had made little or no effort to mitigate damages but continued to use the contaminated water until he was forced to suspend his business and seek medical treatment for the health problems.

Admitting that it was well settled law that adjoining property owners have correlative rights and must use their property in a reasonable manner so as not to injure the property of their neighbors, the Court made a finding that in balancing the conflicting interests of the traveling public and the protection of adjacent private property, the interest of the traveling public should prevail in this case, and further that a reasonable use of deicing chemicals on a public road is not actionable. The Court further found that the damages for loss of business, illness and medical expenses were consequential and not proximately caused by the deicing procedures.

The claim was kept open for additional proof on whether the contamination and pollution of the claimant's water supply came from the improper and haphazard storage of chemicals in open bins on a higher elevation of about 600 feet from the claimant's property.

On May 20, 1974, a rehearing was held and the plaintiff proceeded on the theory that the pollution of his water supply was directly and proximately caused by the improper storage of chemicals in open bins in the proximity of the claimant's property.

Sufficient and persuasive evidence was introduced that large quan-

tities of salt were stored on the respondent's land in such a manner that the action of rain and melting snows would cause the salt to impregnate the surrounding land, and that the improper storage methods of the State were responsible for the pollution of the claimant's well. Photographs were introduced by the claimant depicting a most haphazard storage of chemicals in bins exposed to the weather and showing a spreading of the salt solution over a wide area surrounding the bins. As the record now stands, the method of storage depicted in said photographs does establish a causal connection with the claimant's damages.

A neighbor of the claimant who had a similar pollution problem was able to rectify it by purchasing water purification equipment for the sum of approximately $1900.00. The equipment improved the quality of the water but not its taste.

The claimant testified that he drilled a new well on the property which gave an unsatisfactory quantity and quality of water unfit for use, and that water was hauled to the site of his property in order to keep the business operating. The cost of drilling the new well was $621.00 and the water, although not palatable, was sufficient for the restrooms and other purposes.

After considering all of the evidence on damages, the cost of purification equipment which might have remedied the situation, and the expense incurred in efforts to secure another water supply, it is the opinion of the Court that an award of $6,600.00 should fairly compensate the claimant for the damages incurred as the result of the State's negligence. The Court finds it most difficult to treat the property as a total loss for business and dwelling purposes, and the claim for loss of business during a period of four years is disallowed as consequential damage. The claims for sickness and medical expenses incurred as a result of drinking polluted water are also disallowed as consequential, and proof adduced that this sickness resulted from drinking the polluted and contaminated water is unsatisfactory. Further, being aware of the bad condition of the water, the claimant assumed the risk of physical consequences that would result from drinking the unpalatable water.

For the foregoing reasons, the Court recommends an award in the amount heretofore stated.

Award of $6,600.00.

Opinion issued January 16, 1975

SAMUEL MILLER

vs.

DEPARTMENT OF HIGHWAYS

(No. D-888)

PER CURIAM:

Claimant's automobile, parked in driveway at his residence, was damaged by blasting operations of respondent. Liability and damages are stipulated.

Award of $123.60.

Opinion issued January 16, 1975

MONONGAHELA POWER COMPANY

vs.

WEST VIRGINIA DEPARTMENT OF HIGHWAYS

(No. D-709)

L. Eugene Dickinson, Attorney at Law for the claimant.

Gregory W. Evers, Attorney at Law for the respondent.

DUCKER, JUDGE:

Claimant, Monongahela Power Company, alleges damages caused by respondent's blasting on April 6, 1973 at a rock quarry along State Route 15 between Valley Head and Monterville, in Randolph County, West Virginia, rocks from which damaged 12 KV conductors, the cost of repairing which amounted to $82.94.

The facts are stipulated to the effect that the damages were caused by the conduct of the respondent and that the amount of the cost of repairs is fair and reasonable. Accordingly the Court finds liability on the part of the respondent and awards the claimant the sum of $82.94.

Award of $82.94.

Opinion issued January 21, 1975

JAMES F. KIRBY

vs.

ALCOHOL BEVERAGE CONTROL COMMISSION

(No. D-789k)

PER CURIAM:

The foregoing claim is disallowed for the reasons set forth in the Opinion of this Court heretofore filed in deciding the claim of *Cecile H. Ruddell v. ABC Commission,* Claim No. D-789j, the factual situations and the law applicable thereto being the same as that involved in the foregoing decision of this Court.

Claim disallowed.

Opinion issued January 28, 1975

VALLEY ANIMAL CLINIC

vs.

DEPARTMENT OF PUBLIC INSTITUTIONS

(No. D-911)

PER CURIAM:

The foregoing claim is disallowed for the reasons set forth in the Opinion of this Court heretofore filed in deciding the claims of *Airkem Sales and Service, et al v. Department of Mental Health,* 8 Ct. Cl. 180, the factual situations and the law applicable thereto being the same as that involved in the foregoing decision of this Court.

Claim disallowed.

Opinion issued February 6, 1975

MILDRED MITCHELL-BATEMAN, M.D.

vs.

WEST VIRGINIA DEPARTMENT OF MENTAL HEALTH

(No. D-907)

PER CURIAM:

Claimant, Mildred Mitchell-Bateman, M.D., Director of the West Virginia Department of Mental Health, alleges that she is entitled to receive the sum of $2500.00 by reason of an increase of her salary from $22,500 to $25,000 a year for her services as Director for the fiscal year July 1, 1973 to June 30, 1974, pursuant to the amendment of Chapter 6, Article 7, Section 2a by the 1973 Legislature, effective July 1, 1973.

As the facts alleged and the amount claimed are stipulated as true and correct by both claimant and counsel for the respondent, the claimant is hereby awarded the sum of $2500.00.

Award of $2500.00.

Opinion issued February 6, 1975

CENTRAL INVESTMENT CORPORATION
Successor in business to BURGER BREWING COMPANY

vs.

NONINTOXICATING BEER COMMISSION

(No. D-740)

Dennis R. Vaughan, Jr., Attorney at Law for the claimant.

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

DUCKER, JUDGE:

Burger Brewing Company, during the period from February, 1971, to January, 1973, purchased various tax paid crowns, lids and half

barrel stamps from the respondent for use by the brewery in future distribution of and sales of "out of state manufactured" beer within the State of West Virginia, and before all of the crowns, lids and half barrel stamps could be used by the Burger Brewing Company a sale of the brewery was consummated with the Hudepohl Brewing Company of Cincinnati, Ohio, whereby the latter company took over all the inventory of the Burger Brewing Company except the unused crowns, lids and half barrel stamps which, according to Regulation No. 9 of the Beer Commission, were not transferable or usable by anyone other than Burger Brewing Company. Claimant herein, Central Investment Company, as successor in business to the Burger Brewing Company, but not as an operator of the brewery, retained title to the Burger Brewing Company real estate and the unused crowns, lids and half barrel stamps, amounting to a total sum of $7,777.37. Claimant applied to the Nonintoxicating Beer Commissioner for a refund but its claim was denied. Claimant now seeks a refund in that amount, basing its claim upon the fact that Burger Brewing Company has ceased to do business, cannot use the crowns, lids and stamps and cannot under the law or regulations transfer the same to anyone else. The factual circumstances involved in the matter are uncontroverted, and the crowns, lids and half barrel stamps have been cancelled or destroyed and the value thereof has been fixed by a stipulation of counsel for both claimant and respondent.

The brewery company was required by Article 16 of Chapter 11 of the Code to pay the tax evidenced by the crowns, etc. before it could sell or distribute in West Virginia beer manufactured out of the State and necessarily it had to purchase in advance and possess the tax stamps, etc. at the time of the bottling and barreling of the beer. Because of the higher cost of buying the crowns, etc. in small quantities, the brewing company purchased and paid the tax on larger quantities of them, evidently being of the opinion that it would be able to use the larger quantities.

In this case, we must consider the validity and application of Regulation No. 9 of the respondent, which reads as follows:

> "Tax paid crowns and lids shall not be transferable from one purchaser to another or reused without the consent, in writing, of the Commissioner."

Counsel for claimant cite the case in this Court of *General Foods*

Corporation v. Charles H. Haden II, State Tax Commissioner, Claim D-540, wherein the claimant was awarded the value of soft drink tax stamps which claimant was unable to use because of a later adopted Federal Regulation prohibiting the use of them. In that case the use of the tax paid stamps was prevented by a law enacted after the stamps were purchased. In the case at bar the use of the stamps was occasioned by the economic or financial status or position of the purchaser which rendered the purchaser unable to use the stamps which it had purchased.

The payment of the tax in advance was entirely anticipatory and somewhat conjectural as to the needs of the brewing company for its future business. While it may be argued that this case is similar to other license taxes which are not refundable as to the amount of the unexpired portion of the time for which the tax was paid, those cases in some instances permit assignment so that an assignee can use the remaining portion of the period covered by the tax.

The Regulation quoted above, while quite positive in form, does not close the door completely in the matter, in that it states the crowns, etc., are not transferable to another "without the consent, in writing, of the Commissioner". Evidently there was some discretion in such matters left to the Commissioner as to when he could or should consent to a transfer or reuse. Ordinarily where a matter is left to the discretion of an officer all that can be enforced legally is that he exercise his discretion. But where a purely equitable right is involved we feel constrained to consider the fairness of the Commissioner's exercise of discretion. We are not aware of any statute under which claimant can demand a refund. The regulation pertains only to transfer which might be construed as prohibiting, by inference only, any refund.

Here, the State has required and received the payment in advance of its license taxes in an amount which the taxpayer considered would be the amount of beer which it would manufacture for sale and sell and distribute in West Virginia within some reasonable period in the near future. There was convenience to the State in such procedure in the advance collection of the tax from an administrative standpoint, but it was also advantageous moneywise by the receipt of the money in advance. The wisdom of the consent provision of the Regulation cannot be seriously questioned, because there could be possible fraud

or other difficulty in such matters. However, to consider the Regulation as mandatory in all cases, regardless of possible or probable equity in some, is not, we think, a just and equitable interpretation of the rights of some persons who because of special circumstances the Regulation should not apply. Whether a person has been prevented from using the tax paid crowns, etc. by reason of some subsequently enacted law or regulation, or by reason of some financial condition rendering him unable to use the stamps, it seems unfair for the taxpayer to suffer the loss of the value of what is really just a tax overpayment. Each case of this nature must be determined by its own particular facts. Here the State has not been damaged, and the retention by the State of the amount of the overpayment amounts to an unjust enrichment on the part of the State; and pursuant to our authority to consider and decide claims in which, as the statute provides, "the State should in equity and good conscience discharge and pay", we are of the opinion that the facts in this case justify the refund sought, and we do hereby award the claimant the sum of $7,777.37.

Award of $7,777.37.

Opinion issued February 6, 1975

HOFFMAN-LA ROCHE, INC.

vs.

WEST VIRGINIA DEPARTMENT OF MENTAL HEALTH

(No. D-902)

PER CURIAM:

Claimant sold and delivered to respondent at Barboursville State Hospital valium tablets for use by respondent in said hospital pursuant to orders therefor, and within budgetary provisions for the incurring of said expenditure at the price of $275.94. The facts relating thereto and the amount thereof being stipulated by claimant and respondent, the claimant is hereby awarded the sum of $275.94.

Award of $275.94.

Opinion issued February 6, 1975

NORFOLK & WESTERN RAILWAY COMPANY

vs.

WEST VIRGINIA DEPARTMENT OF HIGHWAYS

(No. D-739)

PER CURIAM:

Claimant's slide fence and railroad track between Rock and Matoaka, West Virginia, were damaged by blasting operations of respondent, and the damages are stipulated.

Award of $1,258.29.

Opinion issued March 26, 1975

MARYLAND CASUALTY COMPANY

vs.

ALCOHOL BEVERAGE CONTROL COMMISSION

(No. D-656)

John F. Wood, Jr., Attorney at Law for claimant.

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

GARDEN, JUDGE:

By decision of this Court issued on October 22, 1974*, the claim of Maryland Casualty Company for refund of its forfeited liquor license bond was denied. A Class C license issued by the Alcohol Beverage Control Commission had been revoked by reason of the conviction of the licensee before a justice of the peace for violation of Code 61-10-6, permitting gaming on tavern premises. The statutory bond upon which claimant was surety was thereafter declared forfeited and upon demand of the Commissioner claimant paid over the penal sum.

The claim for refund was denied by this Court on the ground that the attempted appeal by the licensee was untimely and the conviction had become final.

* See *Maryland Casualty Company v. Alcohol Beverage Control Commission,* 10 Ct. Cl. 126.

Claimant, upon rehearing, now contends that the conviction was void for want of jurisdiction and that the bond forfeiture should be set aside.

We concur. Justices of the peace can exercise no criminal jurisdiction other than that conferred by statute. *State v. McKain,* 56 W.Va. 128, 49 S.E. 20. The general jurisdiction of justices over misdemeanors is found in Code 50-18-1. Many other offenses are brought within the jurisdiction of justices by specific statutes. See footnote to Code 50-18-1. We find no statute giving a justice of the peace jurisdiction over the offense of gaming with which the licensee was charged under Code 61-10-6. Lacking jurisdiction, the judgment of conviction was void.

A void judgment is a mere nullity and ". . . it may be, at any time and in any court having jurisdiction, attacked directly or collaterally." *State ex rel. Valley v. Oakley,* 153 W.Va. 94, 100, 168 S.E.2d 532 (1969).

It is regrettable that counsel for claimant failed to raise the jurisdictional issue at the original hearing. However, in the interests of justice the decision of October 22, 1974 denying the award is hereby vacated and the award is now granted in the sum of $2500.00.

Award of $2500.00.

Opinion issued March 26, 1975

OPAL BAKER THOMAS and ELSEY THOMAS

vs.

DEPARTMENT OF HIGHWAYS

(No. D-307)

A. Dana Kahle, Esq., for claimants.

Gregory W. Evers, Esq., for respondent.

GARDEN, JUDGE:

On May 24, 1968, the claimants resided in Ruby Trees Addition of the City of Moundsville, Marshall County, West Virginia. Prior to

that date, the respondent, through an independent contractor, erected a temporary bridge or causeway over Middle Grave Creek and used the same to haul heavy construction equipment in connection with the erection of a bridge across said Creek. After the completion of the bridge, the claimants requested respondent to remove the temporary bridge or causeway because of a danger of flooding their property. This was not done and on May 24, 1968, a flooding occurred which completely inundated the home of claimants destroying and damaging items of personal property of a total value of $5,999.55, according to the Notice of Claim.

The liability in this claim was not contested, counsel for respondent in his opening statement admitting the same. The problem that confronts this Court is that of making a proper award and one that will make the claimants "whole". The items of personal property that were destroyed ranged from three used automobiles, a freezer, and a hot water tank to the contents of the freezer consisting of beef, poultry, and frozen foods. As a matter of fact, 18 separate items of personal property were alleged to have been destroyed. The testimony at the hearing by the claimants was far from satisfactory and certainly did not in any way meet the degree of proof necessary to establish a proper measure of damages.

There was introduced at the hearing as a joint exhibit an affidavit of claimant, Opal Baker Thomas, setting forth the various items of personal property alleged to have been destroyed. In this affidavit she places a fair market value for each item immediately before they were destroyed, and with the exception of a salvage value of $10.00 for each of the automobiles, she asserts that remaining items of personal property had no value after the flood. In her opinion, according to the affidavit, these items, less salvage, had a total value of $3,759.00. The problem with her estimates as contained in the affidavit is in the fact that her valuations immediately prior to their destruction equals the amount that the claimants paid for such items, with the exception of the $10.00 salvage for each of the three automobiles. This would not disturb the Court, except that the affidavit further reflects that most of the items were purchased some time prior to their destruction and some as early as three years before the loss on May 24, 1968.

Mere speculation or conjecture is not proper proof of damages and the law in this State is clear that damages must be proved with rea-

sonable certainty. We have scrutinized each item of personal property destroyed and have attempted to place a reasonable fair market value on each item considering its cost and the date of purchase, and we have attempted to be fair to both the claimants and the State and have arrived at a total valuation of $1,920.00.

Award of $1,920.00.

Opinion issued March 26, 1975

OATHER T. VANCE

vs.

DEPARTMENT OF HIGHWAYS

(No. D-723)

Claimant present in person.

Emerson Salisbury, Esq., for respondent.

GARDEN, JUDGE:

The claimant, 71 years of age, on a day in January of 1974 was walking on the sidewalk in a westerly direction on the north side of 7th Avenue near its intersection with Rebecca Street in Charleston, West Virginia. He had been to a neighborhood grocery store for his daughter and was proceeding back to her home with a bag of groceries in one arm and a carton of soft drinks in the other. According to his testimony, he was looking down, observing where he was walking. Apparently, a week or so before this incident, the Department of Highways had constructed a route direction sign in the sidewalk on the north side of 7th Avenue.

The sign itself was erected on a standard approximately 61" above the sidewalk and the standard itself was approximately 39½" north of the edge of the sidewalk on the north side of 7th Avenue.

The claimant testified that he had been in this area on other occasions, but not very often. While he did not so testify, it must be assumed from the record that he never saw the sign and simply walked into it, receiving a laceration on his forehead. The day following the incident, he visited his family doctor who bandaged the

lacerated area and rendered a bill in the amount of $10.00. This was his only visit to his doctor, and the above mentioned doctor bill was his only item of special damage.

The respondent, by counsel, indicated on the record that in his opinion the sign should not have been erected in this particular location. However, assuming negligence on the part of the respondent, it is this Court's opinion that as a matter of law, the claimant was guilty of contributory negligence. Pedestrians are bound to use ordinary and reasonable care to avoid danger and are not entitled to recover for injuries inflicted by coming in contact with obstructions which are obvious to the most casual observer. 17 M.J., Streets and Highways, § 145. Accordingly, this Court is inclined to and makes no award.

No award.

Opinion issued March 26, 1975

JERRY W. WARE

vs.

ADJUTANT GENERAL

(No. D-774)

Thomas O. Mucklow, Esq., for the claimant.

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

GARDEN, JUDGE:

On July 15, 1972, PFC Paul A. Kearny was operating a 1¼ ton truck and trailer loaded with camp equipment owned by the Adjutant General and which was part of a National Guard convoy enroute from Morgantown to Elkins, West Virginia. In attempting to negotiate a curve in the Town of Junior, Barbour County, West Virginia, Kearny lost control of the truck and trailer and as a result, it left the roadway and struck a residence owned by the claimant. The testimony revealed that this property had been purchased by the claimant

in 1970 for the sum of $2,500.00. The impact caused extensive damage to the front room or living room of the residence knocking out all five windows and destroying all the floor joists in the room (being 12 in number).

While the answer filed by the respondent denied negligence, there was no dispute at the hearing concerning the same. The principal issue in this claim is the amount of damages that should be awarded to claimant. Subsequent to the hearing, and by agreement of counsel, a deposition of one, Ken Auvil, was taken on behalf of the claimant. This witness testified that he had been in the home building business since 1962 and was familiar with the cost of repairs in the Upshur County area and was, in addition, familiar with real estate values in that County. Auvil estimated the cost of repairing the house to be in the amount of $2,400.00, but more importantly to this Court, he indicated that the value of the residence was reduced between $1,500.00 and $2,000.00 as a result of the accident.

In addition to the actual damage to the residence, the claimant testified that it became necessary for him to seek other living accommodations, and that he, since the date of the damage to the residence, had been living with a friend and was contributing $20.00 per month towards the rental of his friend's property. In his complaint, the claimant contends that he should recover this rental expense in the amount of $600.00, or for a period of 30 months.

While the case of *Cline v. Paramount Pacific, Inc.*, (W. Va.) 196 SE 2d 87 (1973), would seem to indicate that the proper measure of damages for temporary damage to real estate is the cost of repairs, we feel that the better view and the one followed by this Court in prior decisions, is the diminution of the market value, and consequently, an award of $2,000.00 for the damage to the residence is hereby made. We further believe that the claimant has failed to comply with his legal duty of minimizing damages in respect to the rent claim, but we do feel that an award of $60.00 covering his rental expense for a three-month period is justified and reasonable.

Award of $2,060.00.

Opinion issued April 2, 1975

THE SANITARY BOARD OF THE CITY OF WHEELING

vs.

WEST VIRGINIA DEPARTMENT OF HIGHWAYS

(No. D-735)

John L. Allen, Attorney at Law for the claimant.

Dewey B. Jones, Attorney at Law for the respondent.

DUCKER, JUDGE:

The Sanitary Board of the City of Wheeling seeks reimbursement in the amount of $8,544.52 expended by claimant in the restoration of the easterly river bank of the back channel of the Ohio River in Wheeling and the replacement of a part of the interceptor sewer of the City of Wheeling near and adjacent to the said river bank. Claimant alleges the river bank had eroded and the sewer had been broken by erosion of the land under the sewer resulting from eddies in the flow of the river water around the bridge piers constructed by the respondent for the Interstate 70 bridge crossing the Ohio River at that place. The amount of damage was stipulated to be the amount claimed.

The interceptor sewer was constructed in 1958 and the bridge on Interstate 70 in 1965, and the failure of the sewer was discovered and repaired in 1973. A resident of Wheeling Island reported that there was a leak from the sewer, which was both a sanitary and a storm sewer, polluting the river and creating a nuisance, whereupon an investigation was made and it was discovered that the sewer had actually failed and that there had been a washout and all the waste water from the north end of Wheeling Island was discharging into the back channel of the Ohio River.

The testimony is that a two foot rise in the pool stage of the river impedes the flow of the water around the bridge piers and causes it to go around the pier, backs up its flow on the other side and creates eddy currents which erode the bank and remove the ground support

of the sewer, causing the sewer to break. The slope of the bank at the point of the sewer breakage was 40 feet high with an approximately two to one foot slope, and the soil was of a sandy, silty texture. The reparation of the sewer and the eroded area involved thirty-eight feet of the sewer line. When the river was at a 620 foot above sea level elevation, the water would be on the foot of the bridge pier, and for 132 days a year when it was at that stage and elevation the eddy currents occurred. There was a distance of 30 feet between the bridge piers, and the sewer breakage was about 40 feet south of the southerly pier. There was no other noticeable erosion of the river bank in the area of the piers and the sewer, except where the sewer failed, but there was installed south of the pier a headwall structure with a top elevation of 625 feet, which did create some erosion.

The respondent's evidence is to the effect that there was a two foot depth of water "working on the toe of the slope" of the river bank at the place of the sewer failure and that such flow of water could have caused the bank to slide. This assertion is alleged to be negated by the fact that the uppermost pier is struck by water at five feet and the lower pier by two feet. Claimant says the drop of three feet between the piers was due to the scouring and washing over the stone that had been placed on the bank between the piers causing the ground to be three feet lower in that area. No leak in the sewer had been discovered before its complete failure.

The respondent's testimony was to the effect that while there are always eddy currents wherever you have a flow against immovable objects, there were no large or major eddy currents at the piers and there was nothing unusual caused by the stems of the piers. Water from Wheeling Creek came in partly above the I-70 bridge and caused some turbulence in the water, mixing under the bridge and down below. The sewer line runs about seven feet east of the easterly line of the piers and at an elevation of 630 feet above sea level or about twelve feet above normal pool stage of the river. The principal witness for the respondent testified that in his opinion the following things possibly could have caused the failure of the sewer, namely: an increased flow of Wheeling Creek caused by Interstate construction increasing the runoff and an undermining of the bank and a consequent slip; a leak in the sewer which would soften the material and increase the weight of the sewer, which being both sanitary and

storm, could have caused the failure with a slide; and that there had been erected in 1967 after the piers were constructed a major sign structure, a hundred feet high, 30 feet above the water, up the bank from the sewer, with major concrete footers. The wind load of the sign would cause vibration which would be transmitted to the ground, and affect the area of the sewer failure.

George Alan Hall, an expert soils engineer, testified that the eddy currents were evidently created by the entrance flow of Wheeling Creek from Ohio just north of the I-70 west bound bridge. He said it is virtually impossible to reconstruct exactly what happened, but that based on the evidence which he had examined, he would say that it's quite possible, in his opinion, that erosion not of the river bank but of the river bottom and the extension of scouring downstream undercut the river bank and permitted a landslide. He further testified that from the contours of the map of the river there was a concavity in the contours of the bank, which implies that surface water has been running off toward the river bank at the part involved, and that as such surface water runs over the granule soil, it seeps into the ground and toward the river bank creating forces which tend to force the soil downward and outward, and that, probably with other factors, resulted, he believes, in a landslide causing the sewer to break. He further stated that he thought there was a good possibility that the failure of the sewer would have occurred even if the bridge had never been built.

Neither the claimant nor respondent has proved by factual evidence the cause of the sewer failure; they have had to rely almost entirely on circumstantial and opinion evidence. This, of course, leaves much to conjecture, which is not usually a basis for judgment. To allow a recovery for the claimant against the respondent, negligence on the part of the latter should be proved by a preponderance of the evidence. We cannot conclude that either the construction of the bridge piers was so done in the river as to cause the flow of the water to form eddies which would undermine the land under the sewer and destroy the sewer, or that the slide of the bank and the undermining of the ground under the sewer line was caused by other water pressures than the bridge construction. From the evidence we cannot with any reasonable degree of certainty determine what the real cause of the sewer failure was. Accordingly, inasmuch as we are of the opin-

ion that the claimant has not shown by a preponderance of the evidence that the damages suffered were the result of actionable negligence on the part of the respondent, we can make no award herein to the claimant.

Judge Garden did not participate in the consideration or decision of this claim.

Claim disallowed.

Opinion issued May 28, 1975

LEONARD JOHNSON FUNERAL HOME, INC.

vs.

WORKMEN'S COMPENSATION FUND

(No. D-797)

Milton S. Koslow, Attorney at Law, for the claimant.

Henry C. Bias, Jr., Assistant Attorney General, and *Michael Crane,* Attorney at Law, for the respondent.

JONES, JUDGE:

The claimant, Leonard Johnson Funeral Home, Inc., seeks payment of the sum of $1,200.00 for the Paul Guy Moore funeral services performed in September, 1973, and compensable in that amount under an award by the respondent, Workmen's Compensation Fund. The respondent admits liability in the amount of $1,200.00 under West Virginia Code 23-4-4, but says it is entitled to an offset of $500.00 by reason of an erroneous payment in that amount to the claimant for funeral services rendered in an earlier, unrelated claim.

In 1969, the State Compensation Commissioner determined that the claim of Opal Kirk for the death of her husband, Harold A. Kirk, was compensable and on July 7 of that year the then allowable award of $500.00 was paid by the respondent to the claimant. Thereafter, on October 10, 1972, pursuant to a Workmen's Compensation

Appeals Board ruling, the original order was set aside and the claim rejected on the ground that Kirk's death was not a result of an injury received in the course of his employment. Under date of April 16, 1973, the respondent demanded that the claimant refund the erroneous payment. The claimant did not comply, and on or about January 10, 1974, after deducting the $500.00 paid on the Kirk account, a State warrant for $700.00 was issued and delivered to the claimant as payment in full of the Paul Guy Moore account, which payment was refused and the warrant was returned to the respondent. The respondent contends that in cases involving payments to doctors, hospitals and funeral homes, it is the customary practice of the respondent to correct erroneous payments on account by offsetting obligations later incurred.

It is the Court's view of this matter that the estate of Harold A. Kirk and his widow, Opal Kirk, were primarily liable for the payment of the funeral expenses; that as permitted by statute, the respondent elected to pay the funeral expense award directly to the claimant rather than to the estate or to Mrs. Kirk; that the services were rendered to the estate and the widow and not to the respondent; that the charges made by the claimant were just and reasonable; that the claimant is not indebted to the respondent, and, therefore, the respondent is not entitled to an offset; and that the respondent's recourse, if any, is against the estate of Harold A. Kirk, deceased, or his widow, Opal Kirk. Accordingly, an award is hereby made to the claimant, Leonard Johnson Funeral Home, Inc., in the amount of $1,200.00.

Award of $1,200.00.

REFERENCES

ABANDONED PROPERTY

A claimant is entitled to an award of damages for the taking and destruction of two automobiles where no notice had been given to the claimant by the respondent in compliance with Chapter 17, Article 24, Section 6 of the W. Va. Code pertaining to abandoned vehicles. *Stanley v. REAP* (No. D-730). 106

ADVISORY OPINIONS

The Court advised the Board of Architects to pay travel expenses of certain members where the Board had sufficient funds and general revenue of the State was not involved. *Elden, Et al v. Board of Architects* (No. D-703—D-707). 80

The Court advised the respondent to pay the claimant for ten months rent even though no formal lease agreement was prepared or signed, but the premises were accepted and used by the respondent University and a formal lease was later entered into for the premises. *Hardesty v. Board of Regents* (No. D-658). 55

ADJOINING PROPERTY OWNERS

Claimants were made an award for damage to real property where the Court found that the damage was proximately caused by a blast from a blasting operation being operated by employees of the respondent in a quarry not far from the claimants' property. *Galyean v. Department of Highways* (No. D-575). 121

Claimant was entitled to damages to compensate him for pollution to his well where the respondent stored salt on his land in such a manner that the action of rain and snow would cause the salt to impregnate the surrounding land and pollute the well. *Henderson v. Department of Highways* (No. D-332). 177

BLASTING

Claimant was entitled to an award for damage to a water service line while employees were engaged in a blasting operation which caused the damages. *Coal River Pub. Svc. Dist. v. Department of Highways* (No. D-699). 92

Claimant was awarded for the cost of having a well drilled when the well was destroyed as the proximate result of blasting by employees of the respondent. *Corzine v. Department of Highways* (No. D-778). 144

Where claimant's automobile was damaged by a dynamite blast set off by employees of the respondent, the respondent will be liable for the trespass upon the claimant's property. *Dietz v. Department of Highways* (No. D-682). 98

Claimants are entitled to an award for damage to real property where the Court determined that the damage was proximately caused by a blast from a blasting operation being operated by employees of the respondent in a quarry not far from the claimants' property. *Galyean v. Department of Highways* (No. D-575). 121

BOARD OF REGENTS

BRIDGES

BUILDING CONTRACTORS

The acceptance of a change order extending the time for completion of a project does not waive or prejudice the contractor's claims for damages due to delays attributable to the respondent. *Baltimore Contractors, Inc. v. Department of Natural Resources* (Nos. D-510, D-516, & D-528). ---------- 148

A contractor's claim for direct costs allegedly incurred as the result of an architect's redesign and delayed approval of shop drawings for window walls, the Court denied such claim as it appeared that the contractor would not have gained any advantage in time or otherwise if the drawings had been approved earlier and the windows ordered. *Baltimore Contractors, Inc. v. Department of Natural Resources* (Nos. D-510, D-516 & D-528). ---------- 148

The extra expense incurred by the contractor in drilling jack holes for two elevator shafts was denied by the Court as this was not attributable to any act or omission of the respondent, but was the probable and direct result of the failure of the contractor to utilize a known and correct drilling procedure which would have nullified the excessive costs. *Baltimore Contractors, Inc. v. Department of Natural Resources* (Nos. D-510, D-516 & D-528). ---------- 148

A contractor's claim for unanticipated expenses incurred in drilling jack holes for two elevators was denied where the Court found that this was not a subsurface condition materially differing from those shown on the plans for the project. *Baltimore Contractors, Inc. v. Department of Natural Resources* (Nos. D-510, D-516, & D-528).

Unless there is a breach of contract or wrongful delay on the part of the respondent, additional costs to the contractor do not justify additional compensation as the State does not guarantee a profit or the indemnification of a loss when it contracts for a construction project. *Black Rock Contracting, Inc. v. Department of Highways* (No. D-493). ---------- 12

A contractor's claim for delay was denied by the Court where the contract made no provision for test beams of concrete and the respondent chose to hold the contractor to the 14 days curing time provided by Section 2.36.3 (S) of the Standard Specifications for Roads and Bridges. *Black Rock Contracting, Inc. v. Department of Highways* (No. D-493). ---------- 12

Even though extra work may delay a project, if the work was not the result of a changed condition for which the respondent is accountable, the contractor is not entitled to additional compensation. *Black Rock Contracting, Inc. v. Department of Highways* (No. D-493). ---------- 12

The Court did not find a "changed condition" sufficient to entitle the claimant to additional compensation where additional excavation was performed even though a supplemental agreement was necessitated to provide for payment to the contractor for borrow excavation not contemplated in the original contract. *Black Rock Contracting, Inc. v. Department of Highway* (No. D-493). ---------- 12

Claimant's request for additional compensation for unclassified excavation was denied by the Court where the quantity of unclassified excavation did not increase by 25% as required by one of the sections of the Standard Specifications for Roads and Bridges. *Black Rock Contracting, Inc. v. Department of Highways* (No. D-493). ---------- 12

CIVIL SERVICE

The claimant was denied recovery for annual leave where the Court found from the evidence that the claimant was a per diem employee and therefore, under the rules and regulations of the Civil Service System was not entitled to payment for annual leave, and such payment would have been illegal. *Newcome v. Civil Service System* (No. D-754). 146

COLLEGES AND UNIVERSITIES—See Board of Regents; W.Va. University

CONDEMNATION—See Eminent Domain

CONTRACTS—See also Building Contracts

Claimant was made an award for hospital charges where a contractual obligation existed, and there were sufficient funds to pay the charges but payment was deferred pending negotiations by the respondent with an insurance company during which time the fiscal year ended. *Albert B. Chandler Medical Center, University of Kentucky v. Department of Voc. Ed., Div. of Voc. Rehab.* (No. D-681a). See also *Physician Accounts Dept. Albert B. Chandler Medical Center, Univ. of Kentucky v. Dept. of Voc. Ed., Div. of Voc. Rehab.* (No. D-681b). 67

Promises or assurances given by a road contractor or his employees that an access road would be provided the claimants do not create any obligation binding upon the State, the road contractor and its employees not being agents of the State. *Boehm v. Department of Highways* (No. D-613). 110

Promises and representations of a right of way agent employed by the respondent, which exceed the scope of the agent's limited or apparent authority, do not create a contractual obligation on behalf of the State. *Boehm v. Department of Highways* (No. D-613) 110

Promises or assurances given by a road contractor or his employees that an access road would be provided the claimants do not create any obligation binding upon the State. *Boehm v. Department of Highways* (No. D-613). (Petition for rehearing) 140

The unauthorized conduct of an independent road contractor, even if approved by the supervising personnel of the respondent, does not create a binding contractual obligation upon the State. *Boehm v. Department of Highways* (No. D-613). (Petition for rehearing). 140

Where the claimant performed extra work which could not be considered as part of the work contemplated by either the original contract or subcontract, and the claimant did such work under authority of the business manager, it was unjust enrichment on the part of the State if the claimant was not reimbursed for such work. *Brunetti Hardware & Painting v. Department of Mental Health* (No. D-676). 96

Where the claimant performed extra work in good faith and in reliance upon the action of the respondent's agent, the requirements and procedure under Chapter 5a, Article 3 of the Code of W. Va. relating to the purchasing procedures of the State should not be strictly applied when to do so would deprive a citizen of the State of his just and equitable rights. *Brunetti Hardware & Painting v. Department of Mental Health* (No. D-676). 96

The Court disallowed claimant's claim for extra work done under an alleged contract which claimant entered into with the respondent as the facts did not disclose evidence of a contract nor evidence of value of extra services on a quantum meruit basis. *Casdorph v. Department of Pub. Safety* (No. D-661). 86

A compromise settlement between the claimants and their insurance company will not reduce or bar recovery by the claimants for injuries inflicted by the respondent. *Galyean v. Department of Highways* (No. D-575). 121

Claimant was entitled to an award of $27,180.96 for the printing of a book under a contract entered into with the respondent when the funds for payment of the contract were expended by the respondent for other purposes, and the claimant had the right to rely upon the availability of the funds. *Joe L. Smith, Jr., Inc. v. Office of the Governor* (No. D-619). 52

Claimant was awarded $44,825.17 of which $25,000 was for a reasonable anticipated gain to the claimant, had claimant been able to perform the contract which was breached by the respondent. *Russell Transfer, Inc. v. Dept. of Finance and Administration* (No. D-615). 40

Claimant was awarded $44,825.17 based upon the finding of the Court that a valid contract was executed between claimant and respondent even though respondent contended that a purchase order required by statute had not been completed. *Russell Transfer, Inc. v. Dept. of Finance and Administration* (No. D-615). 40

The claimant was awarded $44,825.17 upon a contract held to be legally enforceable by the Court, which held that administrative policy of the Governor cannot override the legislative intent. *Russell Transfer, Inc. v. Dept. of Finance and Administration* (No. D-615). 40

The Court held that the issuance of purchase order is a ministerial act and the destruction of same did not nullify a written and legally enforceable contract between the parties. The claimant was made an award for the breach of the contract. *Russell Transfer, Inc. v. Dept. of Finance and Administration* (No. D-615). 40

The Court made an award to the claimant upon a contract upheld by the Court where public interest requires State agencies to accept the lowest bid, and the State has a limited discretion in rejecting the bid of the lowest responsible bidder. *Russell Transfer, Inc. v. Dept. of Finance and Administration* (No. D-615). 40

Claimant was made an award for a breach of contract wherein the Court held that the State had a moral obligation to perform its duly executed contract when the existence of a contractual obligation was created by following regular statutory purchasing procedures enacted by the legislature. *Russell Transfer, Inc. v. Dept. of Finance and Administration* (No. D-615). 40

DAMAGES

Claimant was awarded the sum of $145.83 for temporary expenses incurred prior to his permanent assignment to another location and within the 30-day period after his permanent assignment in accordance with a long-established practice of the respondent to make this allowance when an employee is transferred from one district to another. *Bacon v. Department of Highways* (No. D-623). 26

Rental value of a building is not the same as fair market value in establishing the amount of damages, which will be allowed for the destruction of a building. *Buckeye Union Ins. Co., Et al v. Department of Highways* (No. D-585b). 71

The fact that a building was insured on the basis of cost of reproduction does not determine its fair market value. *Buckeye Union Ins. Co., Et al v. Department of Highways* (No. D-585b)..... 71

Where a claim is not one of damnum absque injuria, but is one that, as the result of an act done by the respondent, creates the proximate cause of the resulting damage to the claimant, the Court made an award as the claimant is entitled to recover its damages to personal property. *The Firestone Tire & Rubber Co., Et al v. Department of Highways* (No. D-227 Et al). 1

A compromise settlement between the claimants and their insurance company will not reduce or bar recovery by the claimants for injuries inflicted by the respondent. *Galyean v. Department of Highways* (No. D-575). 121

The Court determined the difference in value of the property immediately before and immediately after blasting occurred which caused damage to the property based upon the Court's view of the premises and the testimony of construction experts for both the claimants and the respondent with regard to the cost of restoring the property to its value immediately prior to the blasting. *Galyean v. Department of Highways* (No. D-575). 121

The reasonable cost of repairs properly proved may be considered as evidence in determining the market value of property after it has been damaged. *Galyean v. Department of Highways* (No. D-575). 121

The general rule for determining the amount of damages for injury to real property is to allow the difference between the maket value of the property immediately before the injury happened and the market value immediately after the injury taking into account only the damage which was the result of the acts of the respondent. *Galyean v. Department of Highways* (No. D-575). 121

Claimant was denied recovery for alleged sickness resulting from drinking polluted and contaminated water as the claimant assumed the risk of physical consequences that would result from drinking the unpalatable water where he was aware of the bad condition. *Henderson v. Department of Highways* (No. D-332)..... 177

Where the evidence failed to prove that claimants were dependent distributees of the decedent, the claimants were awarded only the sums of $10.000 for wrongful death and $2,000 for funeral expenses. *House v. Department of Mental Health* (No. D-603). 58

The respondent was denied an off-set to the claim of the claimant where the respondent's recourse if any was against a third party. *Leonard Johnson Funeral Home, Inc. v. Workmen's Comp. Fund* (No. D-797). 195

The cost of repairing real estate which has been damaged assists the Court in evaluating the damage and supports the difference in market values but is not of itself sufficient to establish the amount of damages. *Osborne v. Department of Highways* (No. D-579 and D-634). 83

DEEDS

DRAINS AND SEWERS—See also Waters and Watercourses

EASEMENTS

ELECTRICITY

EMINENT DOMAIN

EXPENDITURES

Where respondent failed to pay claimant for supplies sold and delivered and there were sufficient funds to pay for the same, but the fiscal year expired, this Court has authority to make an award to the claimant. *Eaton Laboratories v. Department of Mental Health* (No. D-695). 76

Over-expenditure by a State agency invalidates unpaid invoices. *Exxon Company, U.S.A. v. Department of Mental Health* (No. D-657). See also Airkem Sales and Service v. Department of Mental Health, 8 Ct. Cl. 180. 63

Due to confusion on the part of the respondent, certain invoices of the claimant were not paid within the proper fiscal year when funds were available to pay the same; therefore, the Court held the respondent liable for the same. *Exxon Company, U.S.A. v. Department of Mental Health* (No. D-657). 63

The Court advised the Horse Racing Commission to pay the claim of a hospital which rendered services to a member of the Horsemen's Mutual Insurance Company where in legal affect the claim would not be paid from State funds but from fees paid into the fund by the horsemen themselves even though the fund is under the supervision of the State Auditor and the State Treasurer. *Fairfax County Hospital v. W. Va. Racing Commission* (No. D-617). 114

See also *Freed et al v. Alcohol Beverage Control Comm'n.* (Nos. D-775, D-776, D-789a-i). 166

Claimant was awarded the amount of its billing for products sold and delivered for which the respondent failed to pay the claimant within the proper fiscal year when funds were available for such purpose. *Hoffman-La Roche Inc. v. Department of Mental Health* (No. D-902). 185

Claimant was entitled to an award of $27,180.96 for the printing of a book under a contract entered into with the respondent when the funds for payment of the contract were expended by the respondent for other purposes, and the claimant had the right to rely upon the availability of the funds. *Joe L. Smith, Jr., Inc. v. Office of the Governor* (No. D-619). 52

See also *Kirby v. Alcohol Beverage Control Comm'n.* (No. D-789k). 181

The Court will disallow claims where the facts of *Airkem Sales and Service Et al v. Department of Mental Health,* 8 Ct. Cl. 180, are identical to the facts in the present claims. *Midland Wholesale Grocery Co., Et al v. Department of Pub. Institutions* (No. D-799 Et al.) 167

Where an agency of the State incurrs liabilities in excess of the then current appropriation, the agency has violated Chapter 12, Article 3, Section 17, of the W.Va. Code. The Court is in a position where it must deny the claim as an illegal over-expenditure. *Ruddell v. Alcohol Beverage Control Comm'n.* (No. D-789j). 163

See also *Valley Animal Clinic v. Department of Public Institutions* (No. D-911). 181

FALLING ROCKS—See also Landslides; Negligence

Claimant was denied recovery for damages sustained when a boulder fell off of a hillside striking claimant's automobile driven by her son, as the accident occurred in a falling rocks area similar to many others, and the Court's holding in similar cases that the user of the highway travels at his own risk and that the State does not and cannot assure him a safe journey applied to the claimant herein. *Edgell v. Department of Highways* (No. D-630 a&b). 161

Claimant's claim for damages to his automobile was denied by the Court where it appeared that the claim of *Mullins v. Department of Highways,* 9 Ct. Cl. 221 was controlling in this rock slide claim. *Walker v. Department of Highways* (No. D-618). 32

The Court has consistently held that the State is not a guarantor of the safety of travelers on its highways. This principal established in *Parsons v. State Road Commission,* 8 Ct. Cl. 210 was applied to the claim of a claimant whose automobile was damaged in a rockslide. *Walker v Department of Highways* (No. D-618). 32

FIRES AND FIRE PROTECTION

Negligence on the part of respondent's employees is established when they cleaned a paint striper machine with gasoline close to a gas heater, as the failure to have workable fire extinguishers nearby shows that reasonable care was not taken. *Buckeye Unions Ins. Co., Et al v. Department of Highways* (No. D-585b). 71

Where a fire which destroyed a building was caused by the negligence of the respondent, the insurer of a nearby property owner who suffered damages as a direct result, is also entitled to an award. *Federal Ins. Co. v. Department of Highways* (No. D-585a). 77

Where a fire which destroyed a building was caused by the negligence of the respondent, the insurer of a nearby property owner who suffered damages as a direct result, is also entitled to an award. *Monarch Ins. Co. v. Department of Highways* (No. D-585c)..... 79

FLOODING

Where the respondent's contractor while working on a highway caused the release of water from an abandoned mine shaft to flood a community, the respondent's acts amounted to a trespass causing the damages alleged and claimant is entitled to an award for damage to personal property. *The Firestone Tire & Rubber Co., Et al v. Department of Highways* (No. D-227 Et al). 1

Claimants were entitled to awards for damages to personal property where water from an impounded coal mine was released and flooded the community, as the impoundment itself was not unlawful, but the direct and proximate cause of the damages was the act which caused the release of the water. *The Firestone Tire & Rubber Co., Et al v. Department of Highways* (No. D-227 Et. al). 1

Where respondent's employee drove a W.Va. National Guard army truck through accumulated flood water on a highway and the water was forced against the doors of a business building owned by the claimant breaking the doors and glass thereof, the respondent's agent was guilty of negligence in the operation of the truck, and

the claimant was entitled to damages. *Moore v. Adjutant General* (No. D-719). 93

Where an open ditch which served as adequate drainage for a road was removed in widening the road and caused flooding of claimant's property, the inadequate drainage provisions were the proximate cause of damage to claimant's property. *Osborne v. Department of Highways* (No. D-579 and D-634). 83

Claimants were made an award for the loss of personal property when the respondent failed to remove a temporary bridge which resulted in flooding to the claimants' property. *Thomas v. Department of Highways* (No. D-307). 187

HORSE RACING COMMISSION

The Court advised the Horse Racing Commission to pay the claim of a hospital which rendered services to a member of the Horsemen's Mutual Insurance Company where in legal affect the claim would not be paid from State funds but from fees paid into the fund by the horsemen themselves even though the fund is under the supervision of the State Auditor and the State Treasurer. *Fairfax County Hospital v. W.Va. Racing Commission* (No. D-617). 114

HOSPITALS

Claimant was made an award for hospital charges where a contractual obligation existed, and there were sufficient funds to pay the charges but payment was deferred pending negotiations by the respondent with an insurance company during which time the fiscal year ended. *Albert B. Chandler Medical Center, University of Kentucky v. Department of Voc. Ed., Div. of Voc. Rehab.* (No. D-681a). See also *Physician Accounts Dept. Albert B. Chandler Medical Center, Univ. of Kentucky v. Dept. of Voc. Ed., Div. of Voc. Rehab.* (No. D-681b). 68

An award was made to the claimant hospital where it performed services, but due to a confusion in billing, the bill was submitted to the respondent after the proper fiscal year had ended and funds were available during that fiscal year to legally pay this bill. *Cleveland Clinic v. Bd .of Voc. Ed., Div. of Voc. Rehab.* (No. D-731). 101

Where the claimant suffered injury in a fall which occurred while the claimant was having an epileptic seizure, and such fall occurred in claimant's own room which was furnished by the employer hospital, there was no liability upon the employer, as the accident was one which could not have been reasonably forseen or anticipated. *DuPont v. Department of Pub. Institutions* (No. D-628). 117

Claimant was not entitled to an award for personal injury where the law applicable only requires an employer of respondent to forsee and anticipate what might be reasonably expected to happen, not guarantee an employee's safety against all possible hazards. *DuPont v. Department of Pub. Institutions* (No. D-628). 117

Claimant was awarded $12,000 for the wrongful death of his decedent, who was killed by a fellow inmate in a mental institution, where hospital officials failed to fulfill its moral and legal obligations to protect the decedent from a convict patient well known to be dangerous, and such failure constituted negligence. *House v. Department of Mental Health* (No. D-603). 58

INDEPENDENT CONTRACTORS

JOINT TORTFEASORS

JUDGMENTS AND DECREES

JURISDICTION

Where the respondent contended that a voucher for lodging was paid by mistake and constituted a set-off to the claimant, the Court held that it had no jurisdiction to render a personal judgment against the claimant for the amount paid on his behalf in excess of the claim. *Bacon v. Dept. of Highways* (No. D-623). 26

Claimant, an insurer of a building owned by a county court, is entitled to sue in the Court of Claims, as a county court is a corporation and would be able to sue; therefore, a claim by the county court would inure to the benefit of its insurer and would be within the jurisdiction of the Court. *Buckeye Union Ins. Co., Et al v. Department of Highways* (No. D-585b). 71

Naming the Commissioner of the State Road Commission as the respondent rather than the Department, State Road Commission, is not of sufficient merit to be allowed as a technical objection to the claims. *The Firestone Tire & Rubber Co., Et al v. Department of Highways* (No. D-227 Et al.) 1

Claims for damage to personal property resulting from an act of trespass by the State are clearly in tort, ex delicto, and as such are within the jurisdiction of the Court of Claims. *The Firestone Tire & Rubber Co., Et al v. Department of Highways* (No. D-227 Et al). 1

Even though there is no statutory law in W.Va. for compensation for personal property damage for public use as referred to in Article 3, Section 9 of the West Virginia Constitution, the common law provides for actions of trespass on the case, therefore a claim of trespass is maintainable in the Court of Claims. *The Firestone Tire & Rubber Co., Et al v. Department of Highways* (No. D-227 Et al). 1

Where the respondent revoked the license of claimant's licensee by reason of a conviction before a justice of the peace, which conviction was void, the bond forfeiture was set aside by the Court. *Maryland Cas. Co. v. Alcohol Beverage Control Comm'n.* (No. D-656). 186

A justice of the peace may exercise no criminal jurisdiction other than that conferred by statute; therefore, a justice has no jurisdiction over the offense of gaming. *Maryland Cas. Co. v. Alcohol Beverage Control Comm'n.* (No. D-656). (Petition for rehearing). 186

An advisory opinion of the Court was issuable within the jurisdiction of the Court of Claims, advising the respondent to pay the claimant for ten months rent even though no formal lease agreement was prepared or signed, but the premises were accepted and used by the respondent University and a formal lease was later entered into for the premises. *Hardesty v. Board of Regents* (No. D-658). 55

The Court of Claims lacks jurisdiction to make an award where a claim is against the Workmen's Compensation Fund under Chapter 14, Article 2, Section 14 of the W.Va. Code. *Stevens v. Workmen's Comp. Fund* (No. D-724). 88

LANDLORD AND TENANT

LANDSLIDES

MANDAMUS

MINES AND MINERALS

MOTOR VEHICLES

A motorcycle with only two wheels is a more hazardous vehicle to operate than an ordinary automobile, and when a motorcycle is ridden on a secondary road more care on the part of the rider is required. *Bartz v. Department of Highways* (No. D-722). 170

The claimant is entitled to an award for damages to his automobile which had struck a piece of iron which had come loose from the center section of a bridge as the result of respondent's negligence. *Carney v. Department of Highways* (No. D-761). 103

An award to the claimant will be made when the claimant and respondent stipulated that claimant's truck was sprayed with red lead paint by agents of the respondent who were engaged in painting a building belonging to the respondent. *Cooper v. Department of Highways* (No. D-787). See also *Ellison v. Department of Highways* (No. D-788). 173

Claimant is not entitled to recover damages to the automobile of its insured where the evidence revealed that there was no obstruction of any consequence in the road by a grader being operated by the respondent's agent. *Dairyland Ins. Co. v. Department of Highways* (No. D-714). 174

Claimant is not entitled to recover damages where claimant's insured caused the accident himself by driving over from the southbound lane of traffic to the northbound lane and stopping there too long for clearance by a coal truck which was properly proceeding in the northbound lane. *Dairyland Ins. Co. v. Department of Highways* (No. D-714). 174

Claimant is entitled to recover damages to his automobile where he was driving at a lawful rate of speed and was not able to see a defective condition in the street wherein no warning signs were there to warn motorists of the condition. *Duffy v. Department of Highways* (No. D-738). 176

Claimants were entitled to an award of damages for injuries resulting from a collision of a motorcycle operated by claimants with an automobile driven by respondent's agent who in making a left turn in the highway failed to see the claimants approaching on the motorcycle, where such failure to see was not sufficient to release the driver of responsibility imposed upon such driver under the law to ascertain that the road was clear before making a turn from his lane of traffic into and across the opposite line of traffic to enter a private driveway. *Forney and Moss v. Dept. of Finance and Administration and Dept. of Natural Resources* (Nos. D-506 & D-507). 16

Claimant was entitled to an award for damages to his automobile where the Court found that the accident was unavoidable insofar as the two drivers were concerned, and that the respondent was liable by reason of its attempt to control traffic at a junction which was not a true intersection as though it was a true intersection, thereby creating a dangerous condition which was not likely to be forseen or recognized by the traveling public. *Greene v. Department of Highways* (No. D-687). 133

Claimant was awarded damages sustained by his automobile while crossing a bridge and the automobile was struck by a section of non-glare metal fence owned and maintained by the respondent where the respondent admitted liability and stipulated the amount of damages due the claimant. *Lantz v. Department of Highways* (No. D-647). 145

Claimant was denied an award for damages to her automobile where the weight of the evidence established that the claimant was operating her automobile at a speed that was too fast for the prevailing road conditions and that the accident resulted from her own negligence. *McArthur v. Department of Highways* (No. D-666). 136

Claimant was made an award of $269.00 which constituted the cost of replacing a worthless motor with a serviceable motor when a truck purchased by the claimant from the respondent upon submission of a sealed bid was sold in an "as is" condition from fire damage, and not as a truck without a motor, which is what claimant discovered after the purchase. *McGuffey v. Board of Regents* (No. D-624). 35

Where respondent's employee drove a W.Va. National Guard army truck through accumulated flood water on a highway and the water was forced against the doors of a business building owned by the claimant breaking the doors and glass thereof, the respondent's agent was guilty of negligence in the operation of the truck, and the claimant was entitled to damages. *Moore v. Adjutant General* (No. D-719). 93

Damages are awardable to a claimant whose insured's truck was struck when employees of respondent negligently threw gravel over the side of a birdge and the gravel landed on the truck. *Nationwide Mut. Ins. Co. v. Department of Highways* (No. D-713). 82

Where the claimant backed his automobile down a road at night in rainy, bad weather, with only tail lights and no back-up lights on his car, his failure to take proper precautionary steps to avoid an accident amounted to contributory negligence. *Runion v. Department of Highways* (No. D-660). 141

Claimant cannot recover damage for injuries sustained in an accident which occurred while the claimant was backing his automobile towards a bridge and struck the wingwall of the bridge, as it was necessary for the claimant to prove that the accident occurred on a road which the State was required to maintain and that the State had failed to properly maintain such road and that such failure was the proximate cause of the accident without any contributory negligence on the part of the claimant. *Runion v. Department of Highways* (No. D-660). 141

A claimant is entitled to an award of damages for the taking and destruction of two automobiles where no notice had been given to the claimant by the respondent in compliance with Chapter 17, Article 24, Section 6 of the W. Va. Code pertaining to abandoned vehicles. *Stanley v. REAP* (No. D-730). 106

Claimant was denied recovery for injuries suffered in a highway accident as it is well settled law that no recovery will be allowed for injuries where it appears that the person injured was guilty of contributory negligence, that proximately contributed to his injuries, or even where the injury was the proximate result of the concurring negligence of the parties. *Swartzmiller v. Department of Highways* (No. D-517). 29

A claim was disallowed where it appeared from the testimony that the claimant had not exercised ordinary and reasonable care in the operation of her motor vehicle, which contributory negligence was the proximate cause of the accident. *Swartzmiller v. Department of Highways* (No. D-517). 29

Claimant was made an award for damages to his automobile when a branch fell from a decayed tree which fact could have been ascertained by the exercise of reasonable inspection and care and therefor constituted a public nuisance. *Swift & Company, Inc. v. Department of Highways* (No. D-662). 56

Claimant was made an award for damages to her automobile when the respondent negligently placed a large piece of steel on a traveled portion of the bridge and claimant's automobile struck said piece of steel. *Via v. Department of Highways* (No. D-822). 165

MOVING EXPENSES

Claimant was awarded the sum of $145.83 for temporary expenses incurred prior to his permanent assignment to another location and within the 30-day period after his permanent assignment in accordance with a long-established practice of the respondent to make this allowance when an employee is transferred from one district to another. *Bacon v. Department of Highways* (No. D-623)..... 26

A set-off might have been considered for the purpose of disallowing claimant's claim for moving expenses in its entirety if it had been clearly established by the respondent that the payment made was an illegal use of State funds. *Bacon v. Department of Highways* (No. D-623). 26

Where the respondent contended that a voucher for lodging was paid by mistake and constituted a set-off to the claimant, the Court held that it had no jurisdiction to render a personal judgment against the claimant for the amount paid on his behalf in excess of the claim. *Bacon v. Dept. of Highways* (No. D-623). 26

NATIONAL GUARD

Where respondent's employee drove a W. Va. National Guard army truck through accumulated flood water on a highway and the water was forced against the doors of a business building owned by the claimant breaking the doors and glass thereof, the respondent's agent was guilty of negligence in the operation of the truck, and the claimant was entitled to damages. *Moore v. Adjutant General* (No. D-719) 93

Claimant was awarded damages for the loss he sustained when a National Guard vehicle operated by an employee of the National Guard left the highway and struck claimant's property. *Ware v. Adjutant General* (No. D-774). 190

NEGLIGENCE—See also Blasting; Falling Rocks; Landslides; Motor Vehicles; Streets and Highways

Where the claimant was operating a motorcycle on a secondary road knowing the condition of the road and did not exercise due care or caution for his own safety, he was guilty of contributory negligence. *Bartz v. Department of Highways* (No. D-722). 170

Claimant was awarded $50.80 for damage to his automobile on a drop inlet negligently allowed to deteriorate by the respondent, which negligence constituted the proximate cause of the claimant's damages. *Blackwell v. Department of Highways* (No. D-626). 33

Negligence on the part of respondent's employees is established when they cleaned a paint striper machine with gasoline close to a gas heater, as the failure to have workable fire extinguishers nearby shows that reasonable care was not taken. *Buckeye Union Ins. Co., Et al v. Department of Highways* (No. D-585b). 71

An award will be made to the claimant when the mobile home of its insured was damaged as the result of a drilling operation negligently performed by employees of the respondent. *Calvert Fire Ins. Co. v. Department of Highways* (No. D-741). 100

The claimant was entitled to an award for loss of produce in a garden when respondent employees, while spraying the right of way with herbicide, negligently sprayed claimant's property also. *Cantley v. Department of Highways* (No. D-664). 85

The claimant is entitled to an award for damages to his automobile which had struck a piece of iron which had come loose from the center section of a bridge as the result of respondent's negligence. *Carney v. Department of Highways* (No. D-761). 105

Respondent was held to be negligent where claimant's truck was damaged by a can of concrete which was pushed off a loading dock by a high lift operated by respondent's employee. *Casdorph v. Department of Highways* (No. D-752). 90

Claimant was made an award for damages to its water main due to the negligent operation of a backhoe by respondent's employee. *Coal River Pub. Svc. Dist. v. Department of Highways* (No. D-698). 91

An award to the claimant will be made when the claimant and respondent stipulated that claimant's truck was sprayed with red lead paint by agents of the respondent who were engaged in painting a building belonging to the respondent. *Cooper v. Department of Highways* (No. D-787). See also *Ellison v. Department of Highways* (No. D-788). 173

Claimant is not entitled to recovery for damages to the automobile of its insured where the evidence revealed that there was no obstruction of any consequence in the road by a grader being operated by the respondent's agent. *Dairyland Ins. Co. v. Department of Highways* (No. D-714). 174

Claimant was not entitled to an award for personal injury where the law applicable only requires an employer of respondent to foresee and anticipate what might be reasonably expected to happen, not guarantee an employee's safety against all possible hazards. *DuPont v. Department of Pub. Institutions* (No. D-628). 117

Where the claimant suffered injury in a fall which occurred while the claimant was having an epileptic seizure, and such fall occurred in claimant's own room which was furnished by the employer hospital, there was no liability upon the employer, as the accident was one which could not have been reasonably forseen or anticipated. *DuPont v. Department of Pub. Institutions* (No. D-628). 117

Where a fire which destroyed a building was caused by the negligence of the respondent, the insurer of a nearby property owner who suffered damages as a direct result, is also entitled to an award. *Federal Ins. Co. v. Department of Highways* (No. D-585a). 77

Even though there was no negligence on the part of the respondent and the consequences were not reasonably forseeable, the damages done were a consequence of the work done by the respondent's contractor and is therefore compensable. *The Firestone Tire & Rubber Co., Et al v. Department of Highways* (No. D-227 Et al). 1

Claimants were entitled to an award of damages for injuries resulting from a collision of a motorcycle operated by claimants with an automobile driven by respondent's agent who in making a left turn in the highway failed to see the claimants approaching on the motorcycle, where such failure to see was not sufficient to release the driver of responsibility imposed upon such driver under the law to ascertain that the road was clear before making a turn from his lane of traffic into and across the opposite line of traffic to enter a private driveway. *Forney and Moss v. Dept. of Finance and Administration* and *Dept of Natural Resources* (Nos. D-506 & D-507). 16

The law applicable to a case in which the claimants while riding on a motorcycle struck an automobile driven by respondent's agent who was making a left turn across the highway to enter a private driveway is that applied in *Brake v. Cerra,* 145 W.Va. 76, wherein the plaintiff was held to have not looked *effectively. Forney and Moss v. Department of Fin. and Admin. and Department of Natural Resources* (Nos. D-506 and D-507). 16

Claimants were made an award for damage to real property where the Court found that the damage was proximately caused by a blast from a blasting operation being operated by employees of the respondent in a quarry not far from the claimants' property. *Galyean v. Department of Highways* (No. D-575). 121

An award of $235.40 was made to the claimant for damages to its telephone cable, which damages occurred when respondent's employees were engaged in a blasting operation to widen a State road. *General Telephone Company of the Southeast v. Department of Highways* (No. D-616). 22

Claimant was made an award of $78.92 for damages to her automobile where in parking her car it was impossible for her to observe a sunken drain alongside of the curb, and the respondent should have been aware of the hazard. *Harris v. Department of Highways* (No. D-655). 116

The claimant was entitled to an award for loss of produce in a garden when respondent employees, while spraying the right of way with herbicide, negligently sprayed claimant's property. *Hodge v. Department of Highways* (No. D-665). 78

Claimant was awarded $12,000 for the wrongful death of his decedent, who was killed by a fellow inmate in a mental institution, where hospital officials failed to fulfill its moral and legal obligations to protect the decedent from a convict patient well known to be dangerous, and such failure constituted negligence. *House v. Department of Mental Health* (No. D-603). 58

Where claimant's decedent was stabbed to death by a fellow inmate in a public institution, the negligence of hospital officials in failing to protect the decedent from a dangerous convict-patient was the proximate cause of the death. *House v. Department of Mental Health* (No. D-603). 58

Claimant was denied an award for damages to her automobile where the weight of the evidence established that the claimant was operating her automobile at a speed that was too fast for the prevailing road conditions and that the accident resulted from her own negligence. *McArthur v. Department of Highways* (No. D-666). 136

Claimants are entitled to damages to real property sustained when the respondent was negligent in its maintenance of the road by continuing to make insufficient additions to the surface of the roadway instead of timely correcting the road structure to avoid pressure against claimants' property. *McIver and White v. Department of Highways* (Nos. D-548 and D-552). 23

Claimants are entitled to damages to real property where the respondent should have forseen the probability of the result of the slipping of the roadway onto the claimants' property causing damage. *McIver and White v. Department of Highways* (Nos. D-548 and D-552). 23

Where a fire which destroyed a building was caused by the negligence of the respondent, the insurer of a nearby property owner who suffered damages as a direct result, is also entitled to an award. *Monarch Ins. Co. v. Department of Highways* (No. D-585c). 79

Claimant was awarded $200.66 for damage to telephone lines when employees of the respondent negligently permitted a tree to fall into the lines. *Monongahela Power Co. v. Department of Highways* (No. D-645a). 37

Claimant was awarded $26.23 for damage to a pole when respondent's employee negligently backed one of respondent's trucks into the pole. *Monongahela Power Co. v. Department of Highways* (No. D-645-b). 37

Claimant was awarded $65.04 for damage to power lines when a tree was cut and negligently permitted to fall upon claimant's power lines. *Monongahela Power Co. v. Department of Highways* (No. D-645d). 39

Where respondent's employee drove a W. Va. National Guard army truck through accumulated flood water on a highway and the water was forced against the doors of a business building owned by the claimant breaking the doors and glass thereof, the respondent's agent was guilty of negligence in the operation of the truck, and the claimant was entitled to damages. *Moore v. Adjutant General* (No. D-719). 93

Damages are awardable to a claimant whose insured's truck was struck when employees of respondent negligently threw gravel over the side of a bridge and the gravel landed on the truck. *Nationwide Mut. Ins. Co. v. Department of Highways* (No. D-713). 82

Where the negligent design, construction and maintenance of a drainage system constructed to improve a State highway, resulted in damages to the property of the claimant, this negligence constituted the proximate cause of said damages. *Osborne v. Department of Highways* (Nos. D-579 & D-634). 83

Where an open ditch which served as adequate drainage for a road was removed in widening the road and caused flooding of claimant's property, the inadequate drainage provisions were the proximate cause of damage to claimant's property. *Osborne v. Department of Highways* (Nos. D-579 and D-634). 83

Claimant was made an award for property owned by it which was stolen when the respondent did not take the proper precautions to care for and protect claimant's property while it was being used by the respondent. *Raines Piano & Organ Center, Inc. v. Board of Regents* (No. D-743). 139

Where the claimant's tree died as a result of herbicide being sprayed upon it negligently by employees of the respondent who were spraying the herbicide upon the State's right of way, the claimants were reimbursed for the reasonable value of the tree. *Reed v. Department of Highways* (No. D-677). 99

Where the claimant backed his automobile down a road at night in rainy, bad weather, with only tail lights and no back-up lights on his car, his failure to take proper precautionary steps to avoid an accident amounted to contributory negligence. *Runion v. Department of Highways* (No. D-660). 141

Claimant cannot recover damage for injuries sustained in an accident which occurred while the claimant was backing his automobile towards a bridge and struck the wingwall of the bridge, as it was necessary for the claimant to prove that the accident occurred on a road which the State was required to maintain and that the State had failed to properly maintain such road and that such failure was the proximate cause of the accident without any contributory negligence on the part of the claimant. *Runion v. Department of Highways* (No. D-660). 141

Where the claimant is not able to show by a preponderance of the evidence that the damages suffered were the result of actionable negligence on the part of the respondent, the claimant is not entitled to an award. *The Sanitary Bd. of the City of Wheeling v. Department of Highways* (No. D-735). 192

An award was made to the claimant where an automobile belonging to its insured had to be repainted as the result of paint being splashed upon the side of the automobile by employees of the respondent. *State Farm Mutual Automobile Ins. Co. v. Department of Highways* (No. D-768). 108

Claimant was denied recovery for injuries suffered in a highway accident as it is well settled law that no recovery will be allowed for injuries where it appears that the person injured was guilty of contributory negligence, that proximately contributed to his injuries, or even where the injury was the proximate result of the concurring negligence of the parties. *Swartzmiller v. Department of Highways* (No. D-517). 29

The claim was disallowed where it appeared from the testimony that the claimant had not exercised ordinary and reasonable care in the operation of her motor vehicle, which contributory negligence was the proximate cause of the accident. *Swartzmiller v. Department of Highways* (No. D-517). 29

NOTICE

NUISANCE

Claimant was awarded damages to his automobile when a branch fell from a decayed tree which fact could have been ascertained by the exercise of reasonable inspection and care and therefor constituted a public nuisance. *Swift & Company, Inc. v. Department of Highways* (D-662). 56

PARKS AND PLAYGROUNDS

Where the contractor relied upon pre-bid assurances as to an access road to the construction projects which was to be completed prior to or soon after the commencement of construction work, the claimant was made an award for the delays which resulted to him. *Baltimore Contractors, Inc. v. Department of Natural Resources* (Nos. D-510, D-516 & D-528). 148

Interference by an independent contractor of a new road to the construction site caused delay to the claimant contractor and also caused it to have to construct temporary access roads to the construction areas, all of which caused additional expenses to the contractor for which the Court made an award. *Baltimore Contractors, Inc. v. Department of Natural Resources* (Nos. D-510, D-516 & D-528). 148

Where the contractor was required to "stake out" the buildings of the construction project, but the necessary starting points were not there due to unsatisfactory aerial surveys furnished by the respondent, the Court made an award to reimburse claimant for having to hire the engineer who had originally laid out the road for the respondent. *Baltimore Contractors, Inc. v. Department of Natural Resources* (Nos. D-510, D-516 & D-528). 148

Where the respondent, Department of Natural Resources, by its own memoranda accepted the responsibility for factors which resulted in the delay to the contractor and agreed that the contractor was entitled to 142 additional days to complete its contract, the Court made an award to the contractor for the unwarranted delays. *Baltimore Contractors, Inc. v. Department of Natural Resources* (Nos. D-510, D-516 & D-528). 148

The acceptance of a change order extending the time for completion of a project does not waive or prejudice the contractor's claims for damages due to delays attributable to the respondent. *Baltimore Contractors, Inc. v. Department of Natural Resources* (Nos. D-510, D-516 & D-528). 148

The claimant contractor should have mitigated its damages by shutting down the job temporarily or through improvement of the roads where "country access roads" never intended to carry loads in wintertime were used to haul materials to the job sites resulting in great expense to the contractor. *Baltimore Contractors, Inc. v. Department of Natural Resources* (Nos. D-510, D-516 & D-528). 148

A contractor's claim for direct costs allegedly incurred as the result of an architect's redesign and delayed approval of shop drawings for window walls, the Court denied such claim as it appeared that the contractor would not have gained any advantage in time or otherwise if the drawings had been approved earlier and the windows ordered. *Baltimore Contractors, Inc. v. Department of Natural Resources* (Nos. D-510, D-516 & D-528). 148

PHYSICIANS AND SURGEONS—See Hospitals

POISONS

POLICE

PRINTING

PUBLIC OFFICERS

Claimant, Director of the Department of Mental Health, was made an award of $2,500 by reason of a statutory increase in her salary for the fiscal year July 1, 1973 to June 30, 1974 pursuant to Chapter 6, Article 7, Section 2a of the W.Va. Code. *Bateman v. Department of Mental Health* (No. D-907). 182

Claimant was entitled to an award for damages to his automobile where the damages proximately resulted from the helpful and hazardous assistance which the claimant rendered to officers of the respondent in effecting the capture of fugitives. *Bradfield v. Department of Public Safety* (No. D-720). 130

The Court found that there was such a strong appearance of authority in the commandeering and direction of the claimant in his automobile that the claimant was justified in believing that he was legally required to render assistance where an officer of the respondent was attempting to capture fugitives and in so doing the claimant's automobile was damaged. *Bradfield v. Department of Pub. Safety* (No. D-720). 130

The claimant was awarded $44,825.17 upon a contract held to be legally enforceable by the Court, which held that administrative policy of the Governor cannot override the legislative intent. *Russell Transfer, Inc. v. Dept. of Finance and Administration* (No. D-615). 40

REHEARING

The unauthorized conduct of an independent road contractor, even if approved by the supervising personnel of the respondent, does not create a binding contractual obligation upon the State. *Boehm v. Department of Highways* (No. D-613). (Petition for rehearing.) 140

Where the claimants alleged that promises made by a right of way agent were tantamount to fraud and misconduct and beyond the scope of the limited authority of the right of way agent, the Court found that the State is not responsible for torts committed by the official in the performance of his duties. *Boehm v. Department of Highways* (No. D-613). (Petition for rehearing). 140

RELEASES

Where the language in the release recites the release of joint tortfeasors "as well as all other persons, firms and corporations whatsoever", and the express understanding that the release "shall operate to extinguish" all claims, and includes a declaration by the claimants that all claims are "extinguished, now and forever", the Court held that the release should inure to the benefit of the State of West Virginia. *Hopson v. Department of Natural Resources* (No. D-549a). 8

If the State may be sued as a person, it may be released as a person; and in that context the Court held that the words "all other persons, firms or corporations", contained in a release, included the State of West Virginia. *Hopson v. Department of Natural Resources* (No. D-549a). 8

RELOCATION ASSISTANCE

SIDEWALKS—See also Negligence

STATE

Compensatory damages for injury to real estate caused by the State will be measured by the diminution in market value and not exclusively on cost of repair or restoration of the property to its former condition. *Osborne v. Department of Highways* (Nos. D-579 & D-634). 83

The Court made an award to the claimant upon a contract upheld by the Court where public interest requires State agencies to accept the lowest bid, and the State has a limited discretion in rejecting the bid of the lowest responsible bidder. *Russell Transfer, Inc. v. Dept. of Finance and Administration* (No. D-615). 40

The Court held that the issuance of purchase order is a ministerial act and the destruction of same did not nullify a written and legally enforceable contract between the parties. The claimant was made an award for the breach of the contract. *Russell Transfer, Inc. v. Dept. of Finance and Administration* (No. D-615). 40

Claimant was awarded $44,825.17 based upon the finding of the Court that a valid contract was executed between claimant and respondent even though respondent contended that a purchase order required by statute had not been completed. *Russell Transfer, Inc. v. Dept. of Finance and Administration* (No. D-615). 40

STATUTES

Claimant, Director of the Department of Mental Health, was made an award of $2,500 by reason of a statutory increase in her salary for the fiscal year July 1, 1973 to June 30, 1974 pursuant to Chapter 6, Article 7, Section 2a of the W.Va. Code. *Bateman v. Department of Mental Health* (No. D-907). 182

To consider a regulation on taxes as mandatory in all cases is not a just and equitable interpretation of the rights of certain persons who, because of special circumstances, are entitled to exemption from the regulation. *Central Investment Corp. v. Nonintoxicating Beer Comm'n.* (No. D-740). 182

Claimant was entitled to an award for a funeral performed for the respondent, Workmen's Compensation Comm'n. for which the respondent admits liability under Chapter 23, Article 4, Section 4 of the W.Va. Code. *Leonard Johnson Funeral Home, Inc. v. Workmen's Comp. Fund* (No. D-797). 195

A justice of the peace may exercise no criminal jurisdiction other than that conferred by statute; therefore, a justice has no jurisdiction over the offense of gaming. *Maryland Cas. Co. v. Alcohol Beverage Control Comm'n.* (No. D-656) (Petition for rehearing). 186

Where an agency of the State incurrs liabilities in excess of the then current appropriation, the agency has violated Chapter 12, Article 3, Section 17, of the W.Va. Code. The Court is in a position where it must deny the claim as an illegal over-expenditure. *Ruddell v. Alcohol Beverage Control Comm'n.* (No. D-789j). 163

Claimant was made an award for a breach of contract wherein the Court held that the State had a moral obligation to perform its duly executed contract when the existence of a contractual obligation was created by following regular statutory purchasing procedures enacted by the legislature. *Russell Transfer, Inc. v. Dept. of Finance and Administration* (No. D-615). 40

STIPULATION AND AGREEMENT

STREETS AND HIGHWAYS—See also Falling Rocks; Landslides; Motor Vehicles; Negligence

Claimant is not entitled to recover damages where claimant's insured caused the accident himself by driving over from the southbound lane of traffic to the northbound lane and stopping there too long for clearance by a coal truck which was properly proceeding in the northbound lane. *Dairyland Ins. Co. v. Department of Highways* (No. D-714). 174

Claimant is entitled to recover for damages to his automobile where he was driving at a lawful rate of speed and was not able to see a defective condition in the street wherein no warning signs were there to warn motorists of the condition. *Duffy v. Department of Highways* (No. D-738). 176

Claimant was denied recovery for damages sustained when a boulder fell off of a hillside striking claimant's automobile driven by her son, as the accident occurred in a falling rocks area similar to many others, and the Court's holding in similar cases that the user of the highway travels at his own risk and that the State does not and cannot assure him a safe journey applied to the claimant herein. *Edgell v. Department of Highways* (No. D-630 a&b). 161

Claimant was entitled to an award for damages to his automobile where the Court found that the accident was unavoidable insofar as the two drivers were concerned, and that the respondent was liable by reason of its attempt to control traffic at a junction which was not a true intersection as though it was a true intersection, thereby creating a dangerous condition which was not likely to be forseen or recognized by the traveling public. *Greene v. Department of Highways* (No. D-687). 133

Claimant was made an award for damages to his automobile which occurred when claimant collided with an automobile while he was making a right hand turn and the other automobile was passing through an area which was not a true intersection, but the attempt by respondent to control traffic as if this were an ordinary intersection did create a dangerous condition which was not likely to be forseen or recognized by the traveling public. *Greene v. Department of Highways* (No. D-687). 133

Claimant was made an award of $78.92 for damages to her automobile where in parking her car it was impossible for her to observe a sunken drain alongside of the curb, and the respondent should have been aware of the hazard. *Harris v. Department of Highways* (No. D-655). 116

Claimant was denied an award for damages to her automobile where the weight of the evidence established that the claimant was operating her automobile at a speed that was too fast for the prevailing road conditions and that the accident resulted from her own negligence. *McArthur v. Department of Highways* (No. D-666). 136

In fulfilling a legal duty to keep the highways of this State in a reasonably safe condition, it may become necessary for the respondent to create temporarily hazardous conditions, and when this occurs it becomes the respondent's duty to fully and adequately warn the traveling public of these temporary conditions. *McArthur v. Department of Highways* (No. D-666). 136

Claimants are entitled to damages to real property where the respondent should have forseen the probability of the result of the slipping of the roadway onto the claimants' property causing damage. *McIver and White v. Department of Highways* (Nos. D-548 and D-552). 23

Claimants are entitled to damages to real property sustained when the respondent was negligent in its maintenance of the road by continuing to make insufficient additions to the surface of the roadway instead of timely correcting the road structure to avoid pressure against claimants' property. *McIver and White v. Department of Highways* (Nos. D-548 and D-552). 23

Where respondent's employee drove a W.Va. National Guard army truck through accumulated flood water on a highway which water was forced against the doors of a business building owned by the claimant breaking the doors and glass thereof, the Court held that the operation of the truck was negligent and the claimant was awarded damages in the amount of $416.38. *Moore v. Adjutant General* (No. D-719). 93

Where an open ditch which served as adequate drainage for a road was removed in widening the road and caused flooding of claimant's property, the inadequate drainage provisions were the proximate cause of damage to claimant's property. *Osborne v. Department of Highways* (Nos. D-579 and D-634). 83

Claim was disallowed where the Court found that the claimant had knowledge of the specific defect or dangerous condition of the road and failed to use the care which an ordinary and reasonably prudent person would have used under the circumstances. *Swartzmiller v. Department of Highways* (No. D-517). 29

Claimant was denied recovery for injuries suffered in a highway accident as it is well settled law that no recovery will be allowed for injuries where it appears that the person injured was guilty of contributory negligence, that proximately contributed to his injuries, or even where the injury was the proximate result of the concurring negligence of the parties. *Swartzmiller v. Department of Highways* (No. D-517). 29

Claimant was made an award for damages to his automobile when a branch fell from a decayed tree which fact could have been ascertained by the exercise of reasonable inspection and care and therefor constituted a public nuisance. *Swift & Company, Inc. v. Department of Highways* (No. D-662). 56

Claimant was made an award for damages to her automobile where an employee of the respondent threw a shovel full of hot asphalt mix against her automobile in a work area where the claimant was directed by an employee to pass around the work area. *Travelers Indemnity Co. v. Department of Highways* (No. D-747). 95

The Court has consistently held that the State is not a guarantor of the safety of travelers on its highways. This principal established in *Parsons v. State Road Commission,* 8 Ct. Cl. 210 was applied to the claim of a claimant whose automobile was damaged in a rockslide. *Walker v. Department of Highways* (No. D-618). 32

Claimant was awarded $7,300 for damages to property when the respondent installed a series of culverts in the redesign of a State road, which resulted in a concentration of water upon claimant's property, which not only was a violation of claimant's property rights, but also a wilful act. *Young v. Department of Highways* (No. D-625). 64

A claimant was guilty of contributory negligence in her resulting fall over a manhole where nothing was shown to indicate that the manhole could have been considered in a dangerous or hazardous condition. *Zain v. Department of Highways* (No. D-727). 109

TAXATION

Where a tax regulation leaves the application of the regulation to the discretion of the commissioner the fairness of the commissioner's exercise of discretion may be considered by the Court. *Central Investment Corp. v. Nonintoxicating Beer Comm'n.* (No. D-740) 182

To consider a regulation on taxes as mandatory in all cases is not just and equitable interpretation of the rights of certain persons who, because of special circumstances, are entitled to exemption from the regulation. *Central Investment Corp. v. Nonintoxicating Beer Comm'n.* (No. D-740). 182

Where a regulation of the respondent does not permit transfer or use by anyone other than the original purchaser of tax paid crowns lids and half barrel stamps, the successor company is justified in seeking and obtaining a refund. *Central Investment Corp. v. Nonintoxicating Beer Comm'n.* (No. D-740). 182

Where a tax overpayment has not damaged the respondent, a retention by the respondent of the amount of the overpayment amounts to unjust enrichment. *Central Investment Corp. v. Nonintoxicating Beer Comm'n.* (No. D-740). 182

TRAVEL EXPENSES

The Court advised the Board of Architects to pay travel expenses of certain members where the Board had sufficient funds and general revenue of the State was not involved. *Elden, Et al v. Board of Architects* (No. D-703 - D-707). 80

TREES AND TIMBER

Claimant was awarded $65.04 for damage to power lines when a tree was cut and negligently permitted to fall upon claimant's power lines. *Monongahela Power Co. v. Department of Highways* (No. D-645d). 39

Where the claimant's tree died as a result of herbicide being sprayed upon it negligently by employees of the respondent who were spraying the heribicide upon the State's right of way, the claimants were reimbursed for the reasonable value of the tree. *Reed v. Department of Highways* (No. D-677). 99

Claimant was awarded $200.66 for damages to telephone lines when employees of the respondent negligently permitted a tree to fall into the lines. *Monongahela Power Co. v. Department of Highways* (No. D-645a). 37

TRESPASS

Where claimant's automobile was damaged by a dynamite blast set off by employees of the respondent, the respondent will be liable for the trespass upon the claimant's property. *Dietz v. Department of Highways* (No. D-682). 98

Even though there is no statutory law in W.Va. for compensation for personal property damage for public use as referred to in Article 3, Section 9 of the West Virginia Constitution, the common law provides for actions of trespass on the case, therefore a claim of trespass is maintainable in the Court of Claims. *The Firestone Tire & Rubber Co., Et al v. Department of Highways* (No. D-227 Et al). 1

Claims for damage to personal property resulting from an act of trespass by the State are clearly in tort, ex delicto, and as such are within the jurisdiction of the Court of Claims. *The Firestone Tire & Rubber Co., Et al v. Department of Highways* (No. D-227 Et al). 1

Even though there was no negligence on the part of the respondent and the consequences were not reasonably forseeable, the damages done were a consequence of the work done by the respondent's contractor and is therefore compensable. *The Firestone Tire & Rubber Co., Et al v. Department of Highways* (No. D-227 Et al). 1

Where the respondent's contractor while working on a highway caused the release of water from an abandoned mine shaft to flood a community, the respondent's acts amounted to a trespass causing the damages alleged and claimant is entitled to an award for damage to personal property. *The Firestone Tire & Rubber Co., Et al v. Department of Highways* (No. D-227 Et al). 1

Claimants were entitled to $1000 for damages to real property where the damages were the result of a single trespass, which was not a continuing one, but one which could be definitely determined as to damages. *McIver and White v. Department of Highways* (Nos. D548 and D-552). 23

WAGES

Claimant, Director of the Department of Mental Health, was made an award of $2,500 by reason of a statutory increase in her salary for the fiscal year July 1, 1973 to June 30, 1974 pursuant to Chapter 6, Article 7, Section 2a of the W.Va. Code. *Bateman v. Department of Mental Health* (No. D-907). 182

Where an agency of the State incurrs liabilities in excess of the then current appropriation, the agency has violated Chapter 12, Article 3, Section 17, of the W.Va. Code. The Court is in a position where it must deny the claim as an illegal over-expenditure. *Ruddell v. Alcohol Beverage Control Comm'n.* (No. D-789j). 163

A claim for two months salary by an agency employee of the respondent was denied because such payment would have been an illegal over-expenditure by the respondent State agency. *Ruddell v. Alcohol Beverage Control Comm'n.* (No. D-789j). 163

WARRANTY

Claimant was made an award of $269.00 for a used motor upon the theory that there is an implied warranty that goods are fit for the particular purpose for which they are sold. *McGuffey v. Board of Regents* (No. D-624). 35

Claimant was made an award of $269.00 which constituted the cost of replacing a worthless motor with a serviceable motor when a truck purchased by the claimant from the respondent upon submission of a sealed bid was sold in an "as is" condition from fire damage and not as a truck without a motor, which is what claimant discovered after the purchase. *McGuffey v. Board of Regents* (No. D-624). 35

WATERS AND WATERCOURSES—See also Drains and Sewers; Wells

Claimant was made an award for damages to its water main due to the negligent operation of a backhoe by respondent's employee. *Coal River Pub. Svc. Dist. v. Department of Highways* (No. D-698). 91

Claimants were entitled to awards for damages to personal property where water from an impounded coal mine was released and flooded the community, as the impoundment itself was not unlawful, but the direct and proximate cause of the damages was the act which caused the release of the water. *The Firestone Tire & Rubber Co., Et al v. Department of Highways* (No. D-227 Et al). 1

Claimant was entitled to damages to compensate him for pollution to his well where the respondent stored salt on its land in such a manner that the action of rain and snow would cause the salt to impregnate the surrounding land and pollute his well. *Henderson v. Department of Highways* (No. D-332). 177

Where the negligent design, construction and maintenance of a drainage system constructed to improve a State highway, resulted in damages to the property of the claimant, this negligence constituted the proximate cause of said damages. *Osborne v. Department of Highways* (Nos. D-579 & D-634). 83

Where the claimant is not able to show by a preponderance of the evidence that the damages suffered were the result of actionable negligence on the part of the respondent, the claimant is not entitled to an award. *The Sanitary Bd. of the City of Wheeling v. Department of Highways* (No. D-735). 192

Claimant was not entitled to recover for damages to a sewer where both the claimant and respondent had to rely almost entirely on circumstantial and opinion evidence leaving much to conjecture, which cannot be a basis for judgment. *The Sanitary Bd. of the City of Wheeling v. Department of Highways* (No. D-735). 192

The common enemy doctrine is not applicable where the respondent interfered with the natural flow of surface water by diverting and accelerating its flow with increased volume causing damage to claimant's property, for which claimant was awarded $7,300.00. *Young v. Department of Highways* (No. D-625). 64

WELLS

Claimant was awarded for the cost of having a well drilled when the well was destroyed as the proximate result of blasting by employees of the respondent. *Corzine v. Department of Highways* (No. D-778). 144

Claimant was entitled to damages to compensate him for pollution to his well where the respondent stored salt on its land in such a manner that the action of rain and snow would cause the salt to impregnate the surrounding land and pollute his well. *Henderson v. Department of Highways* (No. D-332). 177

Claimant was denied recovery for alleged sickness resulting from drinking polluted and contaminated water as the claimant assumed the risk of physical consequences that would result from drinking the unpalatable water where he was aware of the bad condition. *Henderson v. Department of Highways* (No. D-332). 177

Claimant is entitled to an award for damages to his residence and well when such damages are the result of blasting by the respondent. *State Farm Fire & Casualty Co. v. Department of Highways* (No. D-599). 51

W. VA. UNIVERSITY—See also Board of Regents

An advisory opinion of the Court was issuable within the jurisdiction of the Court of Claims, advising the respondent to pay the claimant for ten months rent even though no formal lease agreement was prepared or signed, but the premises were accepted and used by the respondent University and a formal lease was later entered into for the premises. *Hardesty v. Board of Regents* (No. D-658). 55

WORKMEN'S COMPENSATION FUND

Claimant was entitled to an award for a funeral performed for the respondent, Workmen's Compensation Fund, for which the respondent admits liability under Chapter 23, Article 4, Section 4 of the W.Va. Code. *Leonard Johnson Funeral Home, Inc. v. Workmen's Comp. Fund* (No. D-797). 195