STATE OF WEST VIRGINIA

REPORT

OF THE

COURT OF CLAIMS

For the Period from July 1, 2007

to June 30, 2009

by

CHERYLE M. HALL

CLERK

Volume XXVII

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

TABLE OF CONTENTS

Page

Former judges V

Letter of transmittal VII

Opinions of the Court X

Personnel of the Court IV

References 273

Terms of Court VIII

PERSONNEL
OF THE
STATE COURT OF CLAIMS

HONORABLE GEORGE F. FORDHAM . . . . . Presiding Judge

HONORABLE ROBERT B. SAYRE . . . . . Judge

HONORABLE JOHN G. HACKNEY JR. . . . . Judge

CHERYLE M. HALL . . . . . Clerk

DARRELL V. MCGRAW, JR. . . . . Attorney General

FORMER JUDGES

HONORABLE JULIUS W. SINGLETON JR. . . . . July 1, 1967 to
July 31, 1968

HONORABLE A. W. PETROPLUS . . . . . August 1, 1968 to
June 30, 1974

HONORABLE HENRY LAKIN DUCKER . . . . . July 1, 1967 to
October 31, 1975

HONORABLE W. LYLE JONES . . . . . July 1,1974 to
June 30, 1976

HONORABLE JOHN B. GARDEN . . . . . July 1,1974 to
December 31, 1982

HONORABLE DANIEL A. RULEY JR. . . . . July 1, 1976 to
February 28, 1983

HONORABLE GEORGE S. WALLACE JR. . . . . February 2, 1976 to
June 30, 1989

HONORABLE JAMES C. LYONS . . . . . February 17, 1983 to
June 30, 1985

HONORABLE WILLIAM W. GRACEY . . . . . May 19, 1983 to
December 23, 1989

HONORABLE DAVID G. HANLON . . . . . August 18, 1986 to
December 31, 1992

HONORABLE ROBERT M. STEPTOE . . . . . July 1, 1989 to
June 30, 2001

HONORABLE DAVID M. BAKER . . . . . April 10, 1990 to June 30, 2005

HONORABLE BENJAMIN HAYS II . . . . . March 17, 1993 to March 17, 2004

HONORABLE FRANKLIN L. GRITT JR. . . . . July 1, 2001 to June 30, 2007

LETTER OF TRANSMITTAL

To His Excellency
The Honorable Joe Manchin, III
Governor of West Virginia

Sir:

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

Respectfully submitted,

CHERYLE M. HALL,
Clerk

TERMS OF COURT

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

OPINIONS

Court of Claims

TABLE OF CASES REPORTED

ADAMS VS. REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY (CC-08-0230) 220

ADELPHOI VILLAGE INC. VS. DEPARTMENT OF EDUCATION (CC-06-251) 76

AFFOLTER VS. DIVISION OF HIGHWAYS (CC-08-0104) 153

AFFOLTER VS. DIVISION OF HIGHWAYS (CC-08-0103) 151

AMERICAN VENDING COMPANY INC. VS. WEST VIRGINIA UNIVERSITY (CC-04-963) 1

AMTOWER VS. DIVISION OF HIGHWAYS (CC-06-085) 20

ANGELUCCI VS. DIVISION OF HIGHWAYS (CC-07-0219) 236

ASTAR ABATEMENT INC. VS. DIVISION OF CORRECTIONS (CC-09-0114) 270

ASTAR ABATEMENT INC. VS. DIVISION OF CORRECTIONS (CC-09-0114) 261

ATKINS SR. VS. DIVISION OF HIGHWAYS (CC-08-0062) 216

AYERS VS. DIVISION OF HIGHWAYS (CC-07-122) 62

BAILEY, as Administrator of the Estate of ROGER E. BAILEY VS. DIVISION OF HIGHWAYS (CC-02-228) 15

BAKER VS. DIVISION OF CORRECTIONS (CC-07-063) 89

BAKER JR. VS. DIVISION OF HIGHWAYS (CC-08-0085) 165

BAYS VS. DIVISION OF HIGHWAYS (CC-06-392) 40

BEASLEY VS. DIVISION OF HIGHWAYS (CC-06-232) 27

BECKETT VS. DIVISION OF HIGHWAYS (CC-07-151) 44

BENNETT, as Administrator of the Estate of Barbara Rosclea Bennett VS. DIVISION OF HIGHWAYS (CC-02-294) 38

BERDINE VS. DIVISION OF HIGHWAYS (CC-08-0206) 181

BLEDSOE VS. DIVISION OF HIGHWAYS (CC-07-009) 42

BOYCE VS. DIVISION OF CORRECTIONS (CC-08-0016) 96

BROWN VS. DIVISION OF HIGHWAYS (CC-07-0324) 144

BUCKBEE, individually and as Administratix of the Estate of JULIA CAROLYN STRICKLAND, deceased VS. DIVISION OF HIGHWAYS CC-05-208) . 94

BUSH VS. DIVISION OF HIGHWAYS (CC-06-271) 29

CAMBRIDGE CENTER LLC VS. DIVISION OF TOURISM (CC-08-0511) . 250

CAMBRIDGE CENTER LLC VS. DIVISION OF TOURISM (CC-08-0514) . 250

CAMDEN-CLARK MEMORIAL HOSPITAL VS. DIVISION OF ORRECTIONS (CC-08-0425) 198

CAPP VS. DIVISION OF HIGHWAYS (CC-08-0149) 171

CAREY VS. DIVISION OF HIGHWAYS (CC-08-0276) 188

CARTE VS. DIVISION OF HIGHWAYS (CC-04-356) 73

CARTE JR. S. DIVISION OF HIGHWAYS (CC-08-0223) 218

CLARKSON VS. DIVISION OF HIGHWAYS (CC-07-222) 64

CLAYTON VS. DIVISION OF HIGHWAYS (CC-08-0083) 254

CLEAVENGER VS. DIVISION OF HIGHWAYS (CC-04-303) 72

CONN VS. DIVISION OF HIGHWAYS (CC-06-0296) 138

COOK VS. DIVISION OF HIGHWAYS (CC-07-315) 111

COOKE S. LIBRARY COMMISSION (CC-09-0141) 271

COPLEY S. REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY (CC-08-0443) 258

COPLEY VS. DIVISION OF HIGHWAYS (CC-08-0191) 178

CORRECTIONAL MEDICAL SERVICES VS. DIVISION OF CORRECTIONS (CC-07-355) 91

CRAGO VS. DIVISION OF HIGHWAYS (CC-08-031) 117

CSX TRANSPORTATION INC. VS. DIVISION OF HIGHWAYS (CC-05-0264) 223

CUMBERLEDGE VS. DIVISION OF HIGHWAYS (CC-06-360) 54

CUSACK VS. DIVISION OF HIGHWAYS (CC-05-012) 15

CUTLIP VS. DIVISION OF HIGHWAYS (CC-08-0284) 194

CUTLIP VS. DIVISION OF HIGHWAYS (CC-08-0285) 196

DANGERFIELD VS. DIVISION OF PERSONNEL (CC-08-0463) 248

DAVIS VS. REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY

(CC-08-0406) 256

DAVISVS. DIVISION OF HIGHWAYS (CC-04-0360) 199

DEEM VS. DIVISION OF HIGHWAYS (CC-06-076) 93

DICKENS VS. WV STATE POLICE (CC-07-343) 92

DONAHUE VS. DIVISION OF HIGHWAYS (CC-08-0114) 168

DUNSMORE VS. DIVISION OF HIGHWAYS (CC-07-0223) 140

DYE VS. DIVISION OF HIGHWAYS (CC-07-069) 33

EAKLE VS. DIVISION OF CORRECTIONS (CC-09-0087) 259

EASLEY VS. DIVISION OF HIGHWAYS (CC-02-205) 48

ESTEP VS. DIVISION OF HIGHWAYS (CC-07-0314) 143

EVANS VS. DIVISION OF HIGHWAYS (CC-06-0289) 136

FERGUSON VS. DIVISION OF HIGHWAYS (CC-06-282) 52

FORT HENRY REALTY INC. d/b/a ADVANCED COMMUNICATIONS CO. VS. DEPARTMENT OF ADMINISTRATION (CC-06-359) 118

FORTNEY VS. DIVISION OF HIGHWAYS (CC-06-0091) 199

GALFORD VS. DIVISION OF HIGHWAYS (CC-08-0244) 184

GASKINS VS. DIVISION OF HIGHWAYS (CC-07-0096) 206

GEORGE VS. DIVISION OF HIGHWAYS (CC-08-0057) 240

GIBBS VS. DIVISION OF HIGHWAYS (CC-07-074) 34

GLADHILL VS. REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY (CC-09-0093) 260

GODWIN VS. DIVISION OF HIGHWAYS (CC-07-0323) 119

GOOCH VS. DIVISION OF HIGHWAYS (CC-08-0301) 245

GOULD VS. DIVISION OF HIGHWAYS (CC-06-303) 47

GRAZIANI VS. DIVISION OF MOTOR VEHICLES (CC-07-229) 60

GREEN VS. STATE OF WEST VIRGINIA (CC-07-084) 66

GROUNDWORKS RECLAMATION INC. VS. DEPARTMENT OF ENVIRONMENTAL PROTECTION (CC-08-0279) 156

GROVE JR. VS. DIVISION OF HIGHWAYS (CC-05-373) 26

GUTIERREZ II VS. DIVISION OF HIGHWAYS (CC-07-0137) 235

HAID VS. DIVISION OF HIGHWAYS (CC-07-0304) 237

HALL, Personal Representative of the Estate of Jamie Hall VS. DIVISION OF HIGHWAYS (CC-03-563) 158

HALL VS. DIVISION OF HIGHWAYS (CC-03-031) 61

HANDLEY VS. DIVISION OF HIGHWAYS (CC-08-0069) 149

HANSEN VS. DIVISION OF HIGHWAYS (CC-08-0099) 67

HARLESS VS. DIVISION OF HIGHWAYS (CC-06-200) 18

HARMON VS. REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY (CC-08-0418) 67

HARRIS VS. DIVISION OF HIGHWAYS (CC-07-0282) 214

HASH VS. DIVISION OF HIGHWAYS (CC-07-0003) 253

HAYWORTH VS. DIVISION OF MOTOR VEHICLES (CC-08-0221) 194

HELD VS. REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY (CC-08-0361) 162

HENDRICK VS. DIVISION OF HIGHWAYS (CC-07-076) 35

HINKLE VS. DIVISION OF HIGHWAYS (CC-08-0074) 150

HODGE VS. DIVISION OF HIGHWAYS (CC-07-071) 42

HOUSMAN VS. DIVISION OF HIGHWAYS (CC-08-0162) 173

HOY VS. DIVISION OF HIGHWAYS (CC-07-0380) 239

HUNT VS. DIVISION OF HIGHWAYS (CC-07-090) 39

IGO VS. DIVISION OF HIGHWAYS (CC-08-0195) 179

INFOPRINT SOLUTIONS COMPANY VS. DEPARTMENT OF ADMINISTRATION (CC-08-0414) 190

JOHNSON VS. DIVISION OF HIGHWAYS (CC-08-0138) 170

JOHNSON VS. DIVISION OF HIGHWAYS (CC-06-297) 53

JOHNSTON VS. DIVISION OF HIGHWAYS (CC-07-0260) 141

KENT VS. DIVISION OF HIGHWAYS (CC-06-250) 28

KESSLER VS. DIVISION OF HIGHWAYS (CC-07-210) 63

KNIGHT VS. DIVISION OF HIGHWAYS (CC-08-0105) 122

KONICA MINOLTA BUSINESS SOLUTIONS VS. INSURANCE COMMISSION (CC-08-0472) 249

LABORATORY CORPORATION OF AMERICA HOLDINGS VS. DEPARTMENT OF HEALTH AND HUMAN RESOURCES (CC-08-0329) 158

LANCASTER VS. DIVISION OF HIGHWAYS (CC-08-0316) 189

LANGILLE JR. VS. DIVISION OF HIGHWAYS (CC-08-0035) 240

LARCK VS. DIVISION OF HIGHWAYS (CC-06-278) 19

LEGRAND VS. DIVISION OF HIGHWAYS (CC-07-214) 106

LESTER, Administratrix of the Estate of STANLEY LESTER VS. DIVISION OF HIGHWAYS (CC-06-0342) 233

LEVINSON VS. DIVISION OF HIGHWAYS (CC-06-0254) 135

LINGER VS. DIVISION OF HIGHWAYS (CC-07-0167) 209

LOTT VS. DIVISION OF HIGHWAYS (CC-05-180) 24

MANPOWER VS. MARSHALL UNIVERSITY (CC-05-269) 96

MARION VS. DIVISION OF HIGHWAYS (CC-07-064) 56

MASTON VS. DIVISION OF HIGHWAYS (CC-08-0110) 124

MAY JR. VS. DIVISION OF HIGHWAYS (CC-05-056) 78

MAYNOR VS. DIVISION OF HIGHWAYS (CC-08-0125) 125

MCCLUNG VS. DIVISION OF HIGHWAYS (CC-08-0354) 197

MCCOY VS. DIVISION OF HIGHWAYS (CC-07-131) 43

MCCRAW VS. DIVISION OF HIGHWAYS (CC-06-088) 98

MCCUMBERS VS. DIVISION OF HIGHWAYS (CC-07-0365) 127

MCDANIEL VS. DEPARTMENT OF ADMINISTRATION (CC-04-0263) 252

MCKEIVER VS. REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY (CC-09-0070) 269

McMILLION VS. DIVISION OF HIGHWAYS (CC-01-334) 22

MEDDINGS VS. DIVISION OF HIGHWAYS (CC-04-0110) 128

MENDEZ VS. DIVISION OF HIGHWAYS (CC-07-065) 32

MILLER VS. DIVISION OF HIGHWAYS (CC-08-0171) 175

MILLS VS. DIVISION OF HIGHWAYS (CC-06-0247) 207

MINOR VS. DIVISION OF HIGHWAYS (CC-07-194) 106

MOHR VS. DIVISION OF HIGHWAYS (CC-06-0047) 191

MONGOLD VS. DIVISION OF HIGHWAYS (CC-08-0203) 180

MONONGALIA GENERAL HOSPITAL VS. DIVISION OF CORRECTIONS (CC-07-330) 86

MONONGALIA GENERAL HOSPITAL VS. DIVISION OF CORRECTIONS (CC-07-0341) 238

MONTGOMERY GENERAL HOSPITAL VS. DIVISION OF CORRECTIONS (CC-08-0280) 127

MONTGOMERY MEDCORP VS. DIVISION OF CORRECTIONS (CC-08-0311) 222

MOORE VS. DIVISION OF HIGHWAYS (CC-07-145) 56

MOORE VS. DIVISION OF HIGHWAYS (CC-08-0260) 188

MORRIS SQUARE ASSOCIATES VS. INSURANCE COMMISSION (CC-06-301) 87

MORRIS VS. DIVISION OF HIGHWAYS (CC-08-0043) 146

MORROW VS. DIVISION OF HIGHWAYS (CC-06-096) 39

MOWERY JR. VS. DIVISION OF HIGHWAYS (CC-07-0086) 163

MOWERY JR. VS. DIVISION OF HIGHWAYS (CC-07-0087) 164

MULLENS VS. DIVISION OF HIGHWAYS (CC-07-0171) 192

MULLINS VS. DIVISION OF HIGHWAYS (CC-07-190) 58

MYLES VS. DIVISION OF HIGHWAYS (CC-06-0385) 139

NATH VS. DIVISION OF HIGHWAYS (CC-08-0232) 183

NEAL VS. DIVISION OF HIGHWAYS (CC-06-125) 100

NUZUM VS. DIVISION OF HIGHWAYS (CC-06-288) 30

ORE VS. DIVISION OF HIGHWAYS (CC-06-143) 21

ORSBORN JR. VS. DIVISION OF HIGHWAYS (CC-07-0104) 233

ORTIZ VS. REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY (CC-09-0020) 251

PASCUCCI VS. DIVISION OF HIGHWAYS (CC-07-103) 37

PAVEL VS. DIVISION OF HIGHWAYS (CC-08-020) 116

PETCOVIC VS. DIVISION OF HIGHWAYS (CC-08-0154) 172

PHILLIPS VS. DIVISION OF HIGHWAYS (CC-08-0180) 177

PILL VS. DIVISION OF HIGHWAYS (CC-08-0068) 242

POLINO CONTRACTING INC. VS. DIVISION OF HIGHWAYS (CC-06-0102) 202

POMEROY IT SOLUTIONS SALES CO. INC. VS. PUBLIC SERVICE COMMISSION (CC-08-0530) 222

POMEROY IT SOLUTIONS SALES COMPANY INC. VS. DEPARTMENT OF EDUCATION (CC-08-011) 93

POMEROY IT SOLUTIONS SALES COMPANY INC. VS. DEPARTMENT OF EDUCATION (CC-08-0015) 95

POMEROY IT SOLUTIONS SALES CO. INC. VS. PUBLIC SERVICE COMMISSION (CC-08-0475) 222

POWELL VS. DIVISION OF HIGHWAYS (CC-08-0271) 220

PRICE VS. DIVISION OF HIGHWAYS (CC-07-106) 101

PRISK VS. DIVISION OF HIGHWAYS (CC-07-134) 102

REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY (CC-09-0070) 268

ROBERT VS. REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY (CC-09-0093) 260

ROCKHOLD VS. DIVISION OF HIGHWAYS (CC-05-065) 97

ROUSH VS. DIVISION OF HIGHWAYS (CC-07-281) 159

RUTHERFORD VS. DIVISION OF MOTOR VEHICLES (CC-07-251) 60

SAMUELS VS. DIVISION OF HIGHWAYS (CC-07-070) 90

SANDRETH VS. DIVISION OF HIGHWAYS (CC-07-377) 114

SERIAN VS. DIVISION OF HIGHWAYS (CC-08-0084) 243

SHUMAN d/b/a PREMIER BODY WORKS VS. DIVISION OF HIGHWAYS (CC-07-0280) 213

SIKULA VS. DIVISION OF HIGHWAYS (CC-08-0028) 215

SISK VS. DIVISION OF HIGHWAYS (CC-08-0142) 227

SISSON VS. DIVISION OF HIGHWAYS (CC-07-207) 104

SKALICAN VS. DIVISION OF HIGHWAYS (CC-08-0250) 187

SKALICAN VS. DIVISION OF HIGHWAYS (CC-08-0249) 186

SMITH VS. DIVISION OF HIGHWAYS (CC-07-199) 108

SPITZ VS. DIVISION OF HIGHWAYS (CC-05-0186) 134

STEWART VS. DIVISION OF HIGHWAYS (CC-07-372) 112

STEWART VS. DIVISION OF HIGHWAYS (CC-07-0297) 159

SUMMERS VS. DIVISION OF HIGHWAYS (CC-08-0108) 255

SYDNOR VS. DIVISION OF HIGHWAYS (CC-07-239) 110

THAXTON VS. DIVISION OF HIGHWAYS (CC-06-149) 17

THE VELOTTA COMPANY VS. DIVISION OF HIGHWAYS (CC-07-0274) . 210

THOMAS VS. DIVISION OF HIGHWAYS (CC-08-001) 114

TICKLE VS. DIVISION OF HIGHWAYS (CC-04-0951) 133

TRUSTEES OF THE SAULSVILLE BAPTIST CHURCH VS. DIVISION OF HIGHWAYS (CC-03-269) 81

TWIGG VS. DIVISION OF HIGHWAYS (CC-08-0097) 166

VANNESS VS. DIVISION OF HIGHWAYS (CC-08-0172) 176

WAGNER VS. DIVISION OF HIGHWAYS (CC-07-172) 103

WALKER VS. DIVISION OF HIGHWAYS (CC-07-073) 46

WEIMER VS. PUBLIC SERVICE COMMISSION (CC-09-0002) 251

WEST VIRGINIA UNIVERSITY HOSPITALS VS. DIVISION OF CORRECTIONS(CC-07-338) 85

WEST VIRGINIA UNIVERSITY HOSPITALS INC. VS. DIVISION OF CORRECTIONS (CC-08-234) 126

WHEELER VS. DIVISION OF HIGHWAYS (CC-08-0004) 145

WILCOX VS. DIVISION OF HIGHWAYS (CC-08-050) 121

WILLIAMS VS. DIVISION OF HIGHWAYS (CC-08-0187) 161

WILLIAMS VS. DEPARTMENT OF ADMINISTRATION (CC-07-228) 59

WILLIAMS VS. DIVISION OF HIGHWAYS (CC-08-0141) 155

WOMACK VS. DIVISION OF HIGHWAYS (CC-08-0075) 121

WOOMER VS. DIVISION OF HIGHWAYS (CC-05-375) 49

WRIGHT VS. DIVISION OF HIGHWAYS (CC-05-428) 51

WV REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY VS. DIVISION OF CORRECTIONS (CC-07-346) 86

YOUNG VS. DIVISION OF HIGHWAYS (CC-08-0207) 154

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

---

OPINION ISSUED JUNE 30, 2007

AMERICAN VENDING COMPANY INC.
VS.
WEST VIRGINIA UNIVERSITY
(CC-04-963)

Frank E. Simmerman Jr., and Bradley W. Stephens, Attorneys at Law, for claimant.

Jendonnae L. Houdyschell, Senior Assistant Attorney General, for respondent.

Sayre, Judge:

Claimant, American Vending Company Inc., (herein after referred to as American Vending) brought this action for breach of contract on the part of the respondent, West Virginia University (herein after referred to as WVU). American Vending began operating the concessions at WVU athletic events in 1974, and continued this service until June 30, 2001. The contract at issue is the 1996 contract referred to by the parties as WVUEA 96-03. American Vending alleges it is due the amount of $591,404.67 plus interest in the amount of $295,702.34[1] (as of December 2004)for the value of equipment furnished to WVU during its contracts with WVU and depreciation in accordance with the terms of the contract. The various issues of the claim are addressed by the Court herein below with the finding of fact and conclusions of law addressed separately for each issue.

The successive contracts for American Vending to provide concessions at the various athletic venues for WVU began in 1974. (At this time, WVU was still using the old "Mountaineer Field" located in the downtown area of Morgantown. However, the new stadium was built during 1978-79 and American Vending thus was the original

[1]The final amounts claimed ($740,369.64 plus interest of $510,062.86 or in the alternative the amount of $688,752.53 plus interest of $373,073.83) were provided to the Court in the Claimant's brief filed March 30, 2007, and were substantially more than the amounts in the original claim.

concessionaire at the new stadium.) During the period of serving as concessionaire for WVU, American Vending was requested by WVU to make various improvements having little or nothing to do with vending concessions (which American Vending did for a fraction of the "prevailing wage") such as the buried television cables and circuits which it installed. This issue is considered by the Court later in this opinion. Other major improvements were also made by American Vending, such as the Scoreboard Café, all of which enhanced sales of concession items which, of course, was a benefit to both parties financially.[2] American Vending asserts that when the contract terminated, it incurred expenses and lost equipment that was its separate property. All of American Vending's contentions are addressed by the Court individually in this opinion. The contract which is the subject matter of this claim was not cancelled for cause by WVU but rather the contract term expired. American Vending through its complaint seeks $591,404.67 plus interest and attorney's fees. (This Court has a past practice that it does not award attorney's fees, so this part of the claim will not be addressed separately or be discussed further.) As indicated herein above, American Vending now seeks $740,369.64 in damages for breach of the 1996 contract at the conclusion of the term of that contract (June 30, 2001) plus $510,062.86 in interest to June 30, 2006, plus simple ten percent (10%) from June 30, 2006, of the payment of an award, if any, in this claim.

WVU asserts that American Vending is not entitled to any compensation based upon WVU's interpretation of the contract.[3] WVU contends that there was never an agreement made by the parties as to how depreciation would be handled, and that Generally Accepted Accounting Principles should apply. WVU argues that the 1996 contract was, in effect, merely a lease and, therefore, based upon Generally Accepted Accounting Principles, depreciation should be so calculated as not to extend beyond the length of that contract, which by its terms expired on June 30, 2001.

The Court notes that WVU's Answer to this claim did not include a cross claim, counter claim or off-set. Therefore, the Court concludes that the sole issue before the Court is what is the sum due American Vending by reason of the award by WVU of the 2001 concessions contract to a third party vendor. Starting in 1974, all of the successive contracts, including the 1996 contract, were prepared by WVU. Thus, any issues regarding the language in the 1996FY contract must, by contract law, be construed against WVU where there is ambiguity.

---

[2] One wonders if the improvements made by American Vending have been a benefit to its successor as vendor for concessions at the athletic venues, at no cost to that contractor? Also, one wonders if the new vendor remitted a higher percentage of sales to WVU, based, at least in part, upon the availability of these improvements **for use by the successor vendor without cost to that vendor?**

[3] Although this is the position of WVU in the claim before the Court, the Court notes that prior to the filing of the claim there was correspondence dated October 22, 2001, to American Vending from WVU's General Counsel's Office wherein WVU's calculations of the amount owed American Vending by WVU is put forth in itemized detail. This correspondence was not couched as an offer or compromise. **The total of the calculations made in that correspondence states the amount due and owing by WVU to American Vending for depreciation as being $182,936.18.**

CONTRACT NEGOTIATIONS AND TERMS OF THE CONTRACT

The first issue to be discussed herein by the Court involves the evidence surrounding the contract negotiations which eventually failed between the parties and which gave rise to this claim filed by American Vending. These negotiations were lengthy, but an historical perspective is necessary to understand the process of the negotiations.

American Vending had been the concessionaire for WVU at the former Mountaineer Field located on the main campus beginning in 1974, and the company continued these services when WVU constructed the new Mountaineer Football Stadium in 1978-79 time frame with the first football season beginning in the fall of 1980. The contracts for these services were entered into for successive five year terms, but it was not at all unusual for the a renewal contract to be approved some months after the new contract term had begun. Thus, American Vending was not concerned that the contract for the 2001FY was not being negotiated prior to July 1, 2001. The normal routine was that the contract negotiations took place during the first year of a five year term, with the contract being approved in the fall of that year. During the contract period ending June 30, 2001, to the knowledge of American Vending, there had not been any problems with this relationship. At least this was the opinion of the officers of American Vending. Basically, the contract that had been in place since 1996 seemed to American Vending to be satisfactory to both parties.

The Court must first consider whether American Vending had reason to believe that it was going to receive a contract to continue to provide concession services to WVU for five years and whether the terms of the contract for 2001FY would, in fact, provide for the payment of depreciation extending beyond June 30, 2001, upon fixtures placed by American Vending during the terms of the previous contracts under which it had provided concession services at the various sports venues maintained by WVU.

The testimony and evidence in this claim supports a finding by this Court that American Vending had reasonable cause to believe that a renewal contract with American Vending would be forthcoming. It was not unusual for American Vending to receive the executed contract in the fall of the fiscal year during which it was already providing concession services at the various athletic venues, especially at the football stadium. Therefore, American Vending had no reason to question the period of time during which it opined that negotiations were on-going. The Court is of the opinion that the actions and language of personnel from WVU certainly support the belief on the part of American Vending that a contract was being negotiated and that the contract would include some appropriate reference to a depreciation schedule. At no time prior thereto did anyone in a position of authority at the WVU Athletic Department inform American Vending that the contract with American Vending was in jeopardy. Thus, it is no surprise to the Court that American Vending claims surprise when it did not receive the new contract in a timely manner.

For years prior to the execution of the 1996 concessions contract between WVU and American Vending ("the 1996 Contract"), there had existed a custom, usage, and practice of WVU allowing American Vending profit, overhead, and interest on construction and similar substantial improvements the company performed in its role as concessionaire. American Vending contends that there is a custom of institutions granting vendors a vested interest in improvements. In fact, at all times pertinent the time of the contract which is the subject matter of this claim, Craig Walker was the Assistant Athletic Director for Finance and Administration. As such, he had the authority to bind WVU in its negotiations with American Vending while he was at WVU. There developed a

custom and usage of verbal agreements between American Vending and WVU which were acceptable to both parties.

American Vending had "placed the ball in WVU's court" so to speak, and it was patiently waiting for an executed contract. While it was awaiting the contract, it prepared its employees for operating the concessions at football games at the stadium as it had done in the many years prior to the 2001 season. When it received word that it would not be the concessionaire contractor for the 2001 fiscal year, it was necessary to begin the process of removing its separate equipment and calculating the costs it incurred in performing the set-up operations for the coming football season.

The reasons, if any, for the decision made to award the concessionaire contract to another contractor are not important for the purpose of this decision. The Court is of the opinion that WVU did not inform American Vending in a timely manner that it would not be awarded the new contract as it had anticipated. The Court further finds that American Vending is entitled to all its reasonable costs expended in preparation for serving as the concessionaire for the 2001 football season. These costs will be discussed more fully by the Court herein below.

However, the crux of this claim became apparent to WVU during negotiations of the contract for the 2001 fiscal year when American Vending pressed the issue of the depreciation to be agreed upon by the parties for all of the permanent fixtures that American Vending had installed during previous contracts. This issue, it seems to the Court, became the "10,000 pound gorilla" for WVU. American Vending was insisting that specifics be addressed in the contract to resolve this issue. What depreciation should American Vending receive based upon the what number of years needed to be decided upon by the parties prior to the terms of the contract being negotiated. It appears that those in authority at WVU were unable to grasp this issue and make any decision. Thus, the specific issue that must be determined by the Court is: Is American Vending entitled to any depreciation, and if it is entitled to depreciation, how many years should be used to calculate that amount?

ISSUE OF DEPRECIATION

The parties herein each presented testimony from experts on the issue of depreciation, why depreciation is important to American Vending, what is the basis for the depreciation, which of the fixtures, if any, should be subject to a depreciation schedule, how many years should be used to calculate depreciation payments, and is American Vending even entitled to any depreciation on the fixtures.

There is an abundance of testimony on both sides as to the extensive negotiations which were on-going concerning the issue of depreciation. Both parties look to the contract in place during the 2000FY, which was the last year of the 1996 contract with American Vending as the concessionaire for WVU. The exact paragraphs from that contract provide as follows:

2.1 American Vending Company will purchase additional equipment as outlined in their response dated April 16, 1996. **All equipment shall remain the property of American Vending Company until fully depreciated as agreed upon by the University.** It then becomes the property of the University.

2.2 Improvements and additions to the Facilities. American Vending Company will provide improvements and additions to the facilities as outlined in their response dated April 16,1996.

Any improvements to facilities as approved by the University shall be the financial responsibility of American Vending Company and may be depreciated as agreed upon by the University. Improvements to the facilities, structure, plumbing, electrical service, etc. shall become the property of the University upon completion or installation at the end of the contract period. Any proposed changes to the physical structure must be submitted to the University for consideration and approval, and agreed to in writing b the University before American Vending Company can proceed.

2.3 - Depreciation Payment - **If American Vending Company makes an investment and the contract ends before the agreed upon depreciation schedule is completed, the University will pay the contractor the un-depreciated amount.** If the contract is terminated for cause, the equipment and other investment become the property of the University without payment of the un-depreciated value. (Emphasis supplied.)

It is central to the findings in this case to note that upon the execution of the 1996FY contract American Vending attempted to finalize the agreement between it and WVU on the calculation of depreciation on the several items here at issue. In fact, American Vending in 1997 prepared and presented to John D. Twining, Assistant Athletic Director for Finance and Administration, and as such, the WVU official with whom American Vending was to negotiate. In the course of discovery in this claim, American Vending found that Twining, in his own hand, on a copy of American Vending's 1997 proposed agreement with the subject line "Vested Interest Agreement" wrote the following: "O.K w/concept met w/Martin 7/14/97 dep - 20/25yrs permanent fixture".

American Vending's proposal was never responded to in writing by WVU. However, in Twining's deposition (taken in 2006), Twining testified that as a result of American Vending's concerns that there be an agreement about depreciation **before** certain major improvements were, at WVU's request, undertaken by American Vending during the years 1996-2001, he met with American Vending on July 14, 1997. **At that time, he assured American Vending that he was okay with the concept of 20 to 25 years depreciation for permanent improvements.**

WVU argues that Twining, as Assistant Athletic Director for Finance and Administration, had **no actual** authority to bind WVU. The Court, however, finds that even if he in fact, exceeded his authority, he was negotiating on behalf of WVU with American Vending and, at the least, had **apparent** authority to do so.

Be that as it may, in reliance upon Twining's assurances, American Vending borrowed considerable amounts of money (at interest) and undertook the various major improvements at the stadium that were accepted by WVU and are still in place. This, in the opinion of the Court, constitutes, at a minimum, a unilateral contract. It follows that WVU, by accepting the benefit of American Vending's permanent improvements, under basic principles of contract law, is obligated to pay a fair price for the same.

The fact that the parties were facing in 2001 a serious dilemma is evident in the language of an email between Russ Sharp and Ed Ames - two of the employees negotiating terms of the new contract with American Vending. The email is as follows:

Ed- Please review. I need to involve legal to determine how we can negotiate our way out of this depreciation deal in the current contract. Also, we need to develop a stategy (*sic*) to negotiate with Martin on the possible removal of the Scoreboard Café area if we construct the North Suite Project. Note: that I have also included some language about future beer/malt beverage sales. Let me know what you think and how we might want

to proceed on the legal questions. Russ Sharp

The subject of depreciation was on the minds of all the principal parties during this time frame of negotiating the contract. It is the opinion of the Court that this major stumbling block caused extensive delay on the part of WVU in negotiating with American Vending in good faith on the terms of the contract. Eventually, as noted hereinbefore, the contract and the issue of depreciation became moot, at least to WVU's satisfaction, when WVU awarded the contract to another concessionaire. However, that did not end the issue for American Vending since it pursued a resolution of this issue of depreciation for some time frame and, failing that, it made the determination to file this claim.

The experts for the parties testified from exact opposite positions. Gary K. Bennett, a Certified Public Account, testified on behalf of American Vending and provided a depreciation schedule for consideration by the Court. He calculated the Book Value for various items as being a total of $660,922.90. He also calculated interest at ten (10) per cent (to December 1,2006) for a total of $357,998.47. These two numbers combine for a total amount of $1,018,921.37. He based his calculations upon the useful life of each permanent fixture and the months varied from a low of 120 months for instance for the boiler to a high of 348 months for the closed circuit television installation. The Court recognizes that generally accounting principles were used in the area of depreciable assets and there was reference to the specific Accounting Research Bulletin 43, Accounting Principles Board Opinions -6 and 12, as well as the Financial Accounting Standards Board - 109 and 143, and the Financial Accounting Standards Board Interpretation - 47. His method of calculating the depreciation for American Vending appears to the Court to be well founded.

Claimant's expert, Gary K. Bennett, calculated depreciation of American Vending's major improvements under the 1996 Contract, using time periods consistent with such agreement and the projected useful lives of the improvements, and in some cases, using more conservative depreciation schedules which were substantially shorter than the projected useful life. Bennett could identify no authority which would require American Vending to depreciate its major improvements over a period shorter than those identified, particularly a period as brief as the five-year term of the 1996 Contract. Bennett performed two calculations of total claimed damages and interest based upon depreciation schedules for improvements not greater than 20 years, the lesser of the 20/25 years detailed in Mr. Twining's notes.

Bennett calculated American Vending's losses based upon an analyses allowing interest from the date of improvements, consistent with practice and custom in past dealings with WVU through Craig Walker, and supplemental American Vending documents. This analysis also reflects the fact that American Vending essentially acted as WVU's lender and general contractor for the costs and construction of such improvements at a much lower cost than the "prevailing wage." This analysis resulted in an undepreciated value for the improvements of $740,369.64, and interest through December 1, 2006, of $510,062.86, for a total claim under this methodology of $1,250,432.50

Bennett also calculated the undepreciated value of such improvements, without allowing interest from the date that improvements were placed into service as $660,922.90. He also calculated interest on that sum from the end of the contract, July 1, 2001, which is the date at which WVU's obligation to compensate American Vending for the undepreciated value of the improvements. This obligation clearly arose as of December

1, 2006, in the amount $373,073.83, for a total alternative claim of $1,061,826.35.

WVU contends that there is no provision within the 1996 Contract which specifically provides for the payment of interest. Paragraph 13 of the 1996 Contract states: "Payments may only be made after the delivery date of goods or services. Interest may be paid on late payments in accordance with the West Virginia Code." WVU argues that this is in reference to the Prompt Payment Act which is not applicable in this claim. As there is no contractual provision for interest to be paid on any undepreciated value of the improvements, WVU contends that this Court cannot award any interest in this claim.

Daniel Selby testified on behalf of WVU as to his method of calculating depreciation and his opinion as to whether American Vending was entitled to any depreciation. His professional opinion is that no depreciation is due and owing by WVU because American Vending should have recouped all its investment during the years of its previous contracts. He opined that the contract herein is actually a lease and that all improvements made by American Vending require five years or less term of depreciation. This assertion appears to be based upon the fact that American Vending was allowed a reduced percentage on its sales in compensation for its expenditures for improvements. However, Selby was at a distinct disadvantage in rendering his expert opinion since it appears from his testimony that he was not aware of the negotiations on-going by the parties to address this very issue.

In the opinion of the Court, there is no factual basis for Selby's position that American Vending was obligated to depreciate the subject claim items as leasehold improvements, limited to the term of the 1996 contract, as opposed to the projected useful lives of the respective improvements, **after which the equipment would belong to WVU.** Moreover, the Court is of the opinion that the concession agreement is not a leasehold agreement, and there are no GAAP standards which preempt controlling contract language (written by WVU). It also appears that Russ Sharp, Assistant Athletic Director for WVU, contrary to Selby's opinion, concluded that WVU was obligated to compensate American Vending for the undepreciated value of the major improvements it performed under the 1996 contract which he calculated to be $182,938.18.

The executed 1996 Contract included Sections 2.2 and 2.3, which governed the implementation of improvements to WVU facilities and WVU's attendant obligations to reimburse American Vending for the undepreciated value of improvements at the conclusion of the 1996 contract, unless the 1996 contract was terminated for cause. The 1996 contract was not terminated for cause, but instead expired on its own terms. Section 2.3 specifically provided that if American Vending "makes an investment and the contract ends before the agreed upon depreciation schedule is completed, the University will pay the contractor the un-depreciated amount."

No later than November 28, 2000, a draft renewal concessions contract between American Vending and WVU was circulated among WVU staff members. Mr. Shaffer requested two extensions of the negotiations, to July 30, 2000, and August 21, 2000, both of which were granted by Ed Ames, Chief Procurement Officer for WVU. As of no later than August 17, 2000, Mr. Shaffer believed that the negotiations with WVU had been timely and successfully completed and were simply being reduced to writing by WVU.

By letter dated February 14, 2001, Ed Ames of WVU informed Martin Shaffer that the 1996 Contract would not be renewed, asserting WVU's position that an extension of the 1996 Contract had not been achieved prior to the August 21, 2000, deadline for negotiations. Prior to this letter, WVU had not informed Mr. Shaffer, or any other agent or employee of American Vending, of its position that contract negotiations were

incomplete. Between the beginning of these negotiations and the February 2001 letter from Mr. Ames, American Vending incurred expenses in the amount of $114,609.36 to comply with demands made by WVU to effect renewal of the 1996 Contract.

Based on submittals by American Vending, John Twining's acquiescence in proposals to depreciate the major improvements at issue, the Court is of the opinion that there was an oral agreement between American Vending and WVU to depreciate such improvements over a minimum of twenty (20) years and a maximum of twenty-five (25) years.

The Court has reviewed the exhibit prepared by Gary Bennett, hereinbefore discussed through his testimony and adopts his schedule of depreciation for the purpose of calculating depreciation for each separate item to the extent that he used twenty (20) years as the term for calculating depreciation. The Court concludes that the on-going negotiations for an agreement between the parties for depreciation did not contemplate any schedule of depreciation of a longer term than twenty (20) years and any depreciation is limited to no more than that number of years. Therefore, the Court will use the Bennett depreciation schedule for its determination of amounts awarded for depreciation per item limited as described herein above and addressed per item below.

EQUIPMENT INSTALLED BY AMERICAN VENDING

During the term of its contracts with WVU at the new stadium, American Vending had a desire to increase sales and, thus, revenues for both American Vending and WVU. American Vending first proposed building specialty stands for the sale of a number of non-menu/non-contract items (referred to as "the Nacho Stands"), as well as installing exhaust hoods and fire suppression systems, so that french fries could be processed and sold at the stadium during the 1991 contract. In American Vending's 1991 proposals, there were provisions for a mechanism through which American Vending would be able to recoup its future investment. Thus, American Vending and WVU agreed that American Vending would pay a reduced commission (the amount of 15% rather than the usual 44.44%) to WVU on the specialty items and french fries.

In 1994, Martin Shaffer, Treasurer of American Vending, met with Craig Walker, then Assistant Athletic Director for Finance and Administration at WVU, to agree upon American Vending's retention of a vested interest in the Nacho Stands, fire suppression systems and french fry exhaust hoods which it installed at WVU's athletic facilities. American Vending purchased and installed the exhaust hoods and fire suppression systems using the company's own resources. There was agreement by the parties for reduced commissions as a payment method for American Vending's work on improvements to WVU facilities. WVU was to reimburse American Vending for any undepreciated value of such improvements not recovered through a commission adjustment from 44.44% to 15%. This commission reduction was achieved to enable American Vending to pay off the improvements over a period of time far beyond the term of the 1991 Contract.

The Court finds that for the installation and use of the Nacho equipment, there may be no recovery for depreciation on this equipment because the removal of the equipment was accomplished prior to the expiration of the 1996 contract. Therefore, the Court will not make any award to American Vending for this item of alleged damages.

SCOREBOARD CAFÉ

In late summer 1996, American Vending proposed construction of an addition to the football stadium which was later known as the "Scoreboard Café." This was proposed

for the 1997 season and began in tent form. American Vending constructed an earthen berm and asphalt pad for the Scoreboard Café, consistent with its $20,000.00 line item set forth in American Vending's response to the 1996 RFP. After the 1997 football season, WVU required that American Vending replace the Scoreboard Café with a much more substantial structure. In effect, American Vending constructed an elaborate and substantial structure at WVU's request for its entertaining purposes, not to increase concession sales or revenues. WVU's physical plant and environmental health and safety division approved all work on the new Scoreboard Café. The Scoreboard Café was placed into service in September 1998, at a cost of $145,488.80, (plus $27,580.67 paid to Taylor Rentals for the Café tent), which far exceeded the projection of $20,000.00 set forth in the company's response to the RFP. This construction effort on the part of American Vending caused it to remove the original asphalt pad and berm, and it was required to solicit engineering, architectural, and construction work in the rebuilding effort, which included a parapet wall and concrete cap with conduit containing electrical lines installed underneath. The Scoreboard Café was operated by American Vending until WVU needed the area for suites, which it built at that end of the stadium.

American Vending contends that on August 23, 1996, Martin Shaffer submitted to John Twining, Assistant Athletic Director at WVU, a memorandum reciting a proposed depreciation schedule of twenty (20) years for the Scoreboard Café, which was, at that time, intended to consist of only an asphalt pad with surrounding landscaping and a tent to shelter a buffet line. In addition, Mr. Shaffer included in this memorandum a calculation of "10% Administrative Cost" [overhead] and 10% profit, added to the total projected cost of the improvement. At no subsequent time did Mr. Twining or any other agent or employee of WVU reject or express exception to Mr. Shaffer's proposed depreciation schedule for the Scoreboard Café, or the inclusion of charges for overhead and profit, similar to a cost plus proposal. American Vending's attempts to reduce the agreement to writing were unsuccessful chiefly because of the time pressures imposed by the start of the 1996 football season, which necessitated rapid work to complete the berm and asphalt pad for use at the first game that season.

However, on August 29, 1996, the 1996 Contract was accepted without reservation by WVU, and it was approved by the West Virginia Attorney General's office on September 25, 1996.

Following the July 14, 1997, meeting between Martin Shaffer and John Twining, American Vending made substantial investments of equipment and labor in WVU athletic facilities, in reliance upon the agreement and understanding reached with Twining that American Vending would be reimbursed for the undepreciated value of its major improvements upon expiration of the 1996 Contract. American Vending obtained a loan in order to have sufficient funds to construct the new Scoreboard Café. Also, in reliance upon WVU's obligations under Sections 2.2 and 2.3 of the 1996 Contract, American Vending obtained this loan, whereby American Vending's officers had to put up real estate and personal stocks as collateral. When American Vending could not repay the subject loans because of WVU's refusal to reimburse the company for undepreciated value, the lender collected against such real estate and personal stocks.

WVU contends that the parties never agreed to a depreciation schedule for the Scoreboard Café, or for any other equipment or improvement. As stated previously in this opinion, all equipment and improvements will be considered for a depreciation schedule. Therefore, the Court will make an award for depreciation as indicated and makes an award in the amount of $124,877.89 for the depreciation on this item.

However, the Court is not inclined to make any award for the calculation of depreciation for the Scoreboard Café Taylor rentals since this equipment was not permanent in nature for use by WVU or American Vending.

CLOSED CIRCUIT TELEVISION SYSTEM

During 1997 and 1998, Mr. Shaffer, having attended a football game at the University of Notre Dame in South Bend, Indiana, and observing a closed circuit television system at their concession stands, determined that the installation of a closed-circuit television system throughout its concessions facilities in Milan Puskar Stadium would increase sales since fans could continue to watch the football game while making food and beverage purchases. Of course, additional sales also meant more commissions for WVU, so such an improvement could benefit both parties. American Vending then proceeded to install the necessary conduit and mounting hardware for the system. American Vending incurred total expenditures of $133,563.13 ($115,333.40 for installation and $18,229.73 for the televisions) in installing the closed-circuit TV system, which was placed into service in September 1998, remains in use by WVU's current concessionaire and was available for use by the fans as recently as the 2006 home football games.

WVU asserts that the closed circuit television system now belongs to it.[4] According to Section 2.2 of the 1996 Contract, "[i]mprovements to the facilities, structure, plumbing, electrical service, etc. shall become the property of the University upon completion or installation at the end of the contract period." Further, WVU reasserts its position that the 1996 Contract should be treated as a leasehold for purposes of depreciation, which means that the equipment and improvements should be depreciated over the life of the contract, and that therefore the closed circuit television system and the conduit and hardware systems installed for the closed circuit television system should have been completely depreciated with the expiration of the contract.

The Court finds that American Vending may make a recovery of $13,064.64 for the closed circuit televisions and $102,262.44 for the installation of the closed circuit televisions which was reduced based upon a twenty (20) year life since these are improvements to the facilities at the WVU stadium which are probably still being used by the subsequent concessionaire.

BOILER INSTALLATION

In the summer of 1999, American Vending began installation of a boiler in Commissary 11 of Milan Puskar Stadium, in order to provide a reliable source of hot water for the company's sale of hot chocolate and coffee during games. American Vending was required to install a gas meter and gas main leading into the stadium to bring the boiler

[4]The Court notes that American Vending installed this wiring system at the direction of WVU surrounding the entire stadium. The work was performed by American Vending's employees at less than the prevailing wage rates which would have been required to be paid by WVU if it had performed with a local contractor. *See Aramark Facility Services, Inc., v. Concord University*, 26 Ct.Cl. ___, 2007, wherein this Court made an award to Aramark when the WV Dept. of Labor required it to pay summer employees for painting done at the request of Concord. Students were used for the summer work and were paid minimum wage rates. This Court made an award for the additional monies that Aramark was required to pay the students.

system online. The boiler was placed into service in October 2000, at a total cost of $71,660.14 ($40,645.35 for the boiler and $31,014.79 for installation), and remained in use by WVU's current concessionaire during 2006 home football games.

WVU reasserts its position that the 1996 Contract should be treated as a leasehold for purposes of depreciation, which means that the equipment and improvements should be depreciated over the life of the contract, including the boiler, and that therefore WVU owes nothing to claimant for the undepreciated value of the boiler installed by American Vending. However, the Court disagrees with this position as explained previously in this opinion and finds that depreciation is due and owing to American Vending for a useful life limited to twenty (20) years. The Court makes a total award for the equipment and installation in the amount of $67,681.32.

WORK PERFORMED AT THE WVU COLISEUM

During the fall and winter of 1999, and into the spring of 2000, WVU was involved in a project to remove asbestos-containing materials from its Coliseum. During this project, which extended into the 1999-2000 basketball season, American Vending was unable to conduct concessions operations at the Coliseum, yet the company still fulfilled its commission guarantee to WVU. Following the asbestos removal, WVU requested that American Vending refurbish some of its concessions areas that were impacted by the project. In addition to compensating third parties for this painting work, during the fall of 2000, American Vending performed several other improvements to WVU facilities, as requested by WVU in the course of renegotiation of the 1996 contract. American Vending incurred expenses totaling $9,791.67 for its work performed at the Coliseum. Concurrent with American Vending's efforts in this regard were repeated communications from employees at WVU stating that a formal renewal of the 1996 contract was imminent, and that the document was being drafted by WVU's Office of General Counsel. The Court is of the opinion that WVU received the benefit of work performed for it and, further, that WVU should reimburse American Vending for this expense. Thus, as to the renovations performed by American Vending at the Coliseum, the Court finds that American Vending may recover $6,364.59 for this item since this was required by WVU in order for concessions to be provided during the basketball season and the area normally used for this purpose was not available to American Vending due to work at the coliseum during this time frame. Thus, the Court includes the amount of $6,364.59 as part of its award to American Vending .

MISCELLANEOUS EXPENSES

In addition to the repainting of Coliseum concessions areas, American Vending incurred substantial expenses in the late fall and summer of 2000, in reliance upon its understanding that its concessions contract would be renewed. Such expenses totaled $114,609.36, and arose from the purchase of uniforms, various concessions supplies, and other items necessary to comply with negotiations with WVU concerning renewal of the 1996 Contract. American Vending was unable to utilize these uniforms and supplies for other purposes, as they were specifically designed in accordance with WVU's requirements. In contrast to the request for proposals ("RFP") for the 1996 contract, the RFP for the 2001 contract did not obligate American Vending's successor as concessionaire to purchase this remaining inventory.

WVU contends that items such as uniforms, various concessions supplies, and other items fall under Section 2.4 e. II of the 1996 Contract which states "Equipment and Improvements - American Vending Company has proposed the following equipment and improvements for Mountaineer Field and the Coliseum to be funded and paid solely by

American Vending Company at no expense to the University." These items were to be supplied by American Vending at no expense to the University; therefore, American Vending is owed nothing for these items.

The Court would agree with this position of WVU were it not for the facts and circumstances surrounding the new contract. American Vending incurred these expenses in anticipation of being the vendor for the fall football season and WVU did not award the contract as anticipated. Therefore, the Court finds that WVU should reimburse American Vending for these expenses which it reasonably incurred in the amount of $114,609.36.

In the fall of 2000, American Vending installed a gas line in Stand 12 at Milan Puskar stadium, incurring expenses totaling $1,437.63 for which it alleges that it has not received any depreciation. The work was performed by its labor force who were paid based upon non-union scale wages. The Court has determined that American Vending may make a recovery for the useful life of this item based upon twenty (20) years which calculates as being the amount of $1,357.26.

ADDITIONAL EQUIPMENT PURCHASES

During the years 1997-2001, American Vending purchased and placed into service various items of equipment necessary to maintain or improve its concessions operations under the 1996 Contract. American Vending's expenditures for items of equipment placed into service on or before January 1 of each year of the 1996 Contract are as follows: 1997, $11,959.83; 1998, $29,216.34; 1999, $14,532.75; 2000, $14,142.98; 2001, $4,863.53. The Court concludes that American Vending may make a recovery for the book value of this equipment in the total amount of $60,311.79.

In addition, certain items of equipment returned to American Vending by WVU at the expiration of the 1996 Contract had been damaged by no fault of American Vending. The value of the equipment damaged and rendered useless was $16,639.00 while the value of equipment not returned by WVU has an estimated book value of $96,362.97.

WVU contends that there was no evidence presented to substantiate American Vending's claims for lost or damaged equipment. American Vending had from February 2001 to June 30, 2001, to remove any equipment that they contended was their property. Further, American Vending was notified by letter dated July 16, 2001, that WVU would begin changing locks on July 19, 2001, and that if American Vending needed access to the facility to remove any equipment and supplies, its employees were responsible for contacting the Athletic Department. Further, Mr. Shaffer testified that the equipment was to be placed in tractor trailers by WVU, and that this equipment was later received by American Vending. WVU argues that to the extent equipment was allegedly lost or damaged, it is due to American Vending's own negligence or delay in not removing the equipment. The Court agrees with this position of WVU.

As to the equipment which was not returned by WVU to American Vending, the Court is of the opinion that American Vending had a substantial investment in the equipment for which American Vending should receive some compensation. Also, this equipment may still be in use by WVU or its vendor so it has value to WVU. The Court has determined that American Vending may make a recovery of forty (40) per cent of the book value of this equipment which is $38,545.19.

CONCLUSIONS OF LAW

The Respondent, West Virginia University, had a duty of good faith and fair dealing with

respect to the Claimant, American Vending Company, which necessitated compensating Claimant for the substantial undepreciated value of the improvements it made under its concessions contract with WVU. The November 2000 email communication between employees of WVU which cited a "need to involve legal to determine how we can negotiate our way out of the depreciation deal in the current contract," as well as the October 22, 2001, letter from Bobbie Brandt regarding settlement in exchange for a release of all claims, both demonstrate an unequivocal departure from this obligation.

Because Respondent cannot identify any instance in which any of its agents or employees expressed to any agent or employee of claimant that WVU objected to Claimant's proposed depreciation schedule of twenty (20) to twenty-five (25) years for major improvements, respondent is estopped from asserting there was no meeting of the minds between the parties concerning depreciation. Based on the course of dealings between the parties, respondent's silence in this regard constituted its acceptance of depreciation over useful lives exceeding the term of the contract.

In its performance of substantial improvements under the 1996 contract, American Vending relied upon the expectation of proper payment from WVU for the undepreciated value of the these improvements.

Each major improvement for which claimant seeks compensation was either performed out of necessity to fulfill claimant's obligations under the 1996 Contract, or performed at the request of WVU. Further, WVU benefitted substantially from such improvements, many of which are still in place and may be available for use by the current concessionaire.

PROFIT, OVERHEAD AND INTEREST

Based on custom, usage, and practice between the parties prior to the 1996 Contract, American Vending contends that it is entitled to adjustments for profit and overhead, as well as interest calculated from June 30, 2001 (the date of termination of the 1996 Contract). Furthermore, particularly with respect to the Scoreboard Café, Boiler, and Closed Circuit TV System, respondent utilized claimant's services as if the company were a general contractor. Thus, because profit and overhead are routinely charged to State agencies by outside contractors, equity demands that profit and overhead be awarded.

In contrast to the Court's prior decision in *Hourly Computer Services v. Dept. of Health and Human Res.*, CC-00-191, Claimant did not submit to Respondent a "legitimate uncontested invoice" as contemplated by the Prompt Pay Act, W. Va. Code § 5A-3-54. The amounts claimed due by American Vending under the 1996 Contract have been disputed by WVU since shortly after July 1, 2001–when such contract expired and American Vending had a right to collect such amounts under Sections 2.2 and 2.3 of that contract. Further, because claimant had not submitted a "legitimate uncontested invoice," claimant had no recourse to the courts of the state to obtain a writ of mandamus to compel the State Auditor to tender payment. This Court is of the opinion that its refusal to award "finance charges" in *Computer Services* also precludes it from awarding interest charges to American Vending which it incurred in financing the major improvements presently before this Court for consideration.

This Court is of the opinion that the provisions of the 1996 contract between the parties does not provide for the payment of interest for a legal dispute such as the action pending herein. The terms in the contract referring to interest on late payments for invoices which have not been paid in a timely manner is not the issue before this Court. In the decision

of the Court being rendered herein, there has been a determination by the Court on the merits of a claim for depreciation and other allegations of amounts due for acts on the part of the respondent, but not the issue of late payment on invoices. Therefore, the Court denies any interest upon the award it is making to American Vending in this claim.

As to profit and overhead, an award for such damages cannot be made unless expressly stated in the terms of the contract. Since the contract did not provide for these damages, the Court must deny recovery. In addition, the Court has previously denied damages for overhead expenses and loss of profits based on the premise that they are speculative in nature. *See Kenhill Construction Co., Inc. v. West Virginia Regional Jail and Facility Authority*, 22 Ct. Cl. 46, 56 (1998) (denying damages for home office overhead due to the fact that these damages were speculative in nature); *Walker v. Dept. of Highways*, 18 Ct. Cl. 11, 13 (1989) (holding that the Court will not resort to speculation in order to compensate a claimant for loss of profits). Thus, the Court denies any recovery by American Vending for profit and overhead.

In accordance with the finds of fact and conclusions of law as stated herein above, the Court is of the opinion to and does make an award to American Vending in the total amount of $529,087.48.

Award of $529,087.48.

The Honorable Judge Franklin L. Gritt Jr., former Presiding Judge of the Court, took part in the decision of this claim during his term. However, he did not take part in the written decision. Based upon that fact the decision of the Court was rendered on June 30, 2007, the opinion has been issued as of that date even though it was not completed in written form until January 11, 2008.

The Honorable George F. Fordham, Presiding Judge of the Court, did not take part in the hearing or decision of this claim since he requested to be recused and an Order of Recusal was entered.

OPINION ISSUED JULY 3, 2007

ANNABELLE BAILEY, as Administrator of the Estate
of ROGER E. BAILEY
VS.
DIVISION OF HIGHWAYS
(CC-02-228)

Juliet Walker Rundle, Attorney at Law, for claimant.

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

PER CURIAM:

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

1. On June 2, 2000, decedent, Roger E. Bailey, was killed when a vehicle emerged from a dirt alley onto County Route 1 and struck Mr. Bailey's vehicle on the driver's side.

2. Claimant alleged that trees and weeds beside County Route 1 contributed to the accident by obstructing the vision of the driver who pulled out of the dirt alley and struck Mr. Bailey's vehicle.

3. Respondent was responsible for the maintenance of County Route 1 which it failed to maintain properly on the date of this incident.

4. Claimant and respondent agree that an award of $13,000.00 would be a fair and reasonable amount to settle this claim.

The Court has reviewed the facts of the claim and finds that respondent was negligent in its maintenance of County Route 1 on the date of this incident; that the negligence of respondent was the proximate cause of the accident which resulted in Mr. Bailey's death; and that the amount of the damages agreed to by the parties is fair and reasonable. Thus, claimant may make a recovery for her loss.

Accordingly, the Court is of the opinion to and does make an award in the amount of $13,000.00.

Award of $13,000.00.

OPINION ISSUED JULY 3, 2007

MAE W. CUSACK
VS.
DIVISION OF HIGHWAYS
(CC-05-012)

Claimant appeared *pro se*.

Jason C. Workman, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for damage to her 1998 Ford Windstar which occurred when a tree limb fell onto her vehicle while she was traveling on Mill Creek Road in Beckley, Raleigh County. Mill Creek Road is a road maintained by respondent. The Court is of the opinion to deny the claim for the reasons more fully stated below.

The incident giving rise to this claim occurred between 6:00 p.m. and 6:30 p.m. on November 28, 2004. Mill Creek Road is a two-lane highway at the area of the incident involved in this claim. Claimant testified that she was traveling on Mill Creek Road when her vehicle struck what she thought was a tree limb. She stated that the tree limb pushed the antenna back into the windshield of the vehicle, damaging the windshield. Claimant's vehicle sustained damages totaling $259.70.

The position of the respondent is that it did not have actual or constructive notice of the condition on Mill Creek Road at the site of the claimant's accident for the date in question. Joe Donnally, Transportation Crew Chief for respondent in Fayette County, testified that there were no records of any complaints regarding a tree or tree limb prior to claimant's incident.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins vs. Sims*, 130 W.Va. 645; 46 S.E.2d 81 (1947). The general rule of this Court with regard to tree fall claims is that if a tree is dead and poses an apparent risk, then the respondent may be held liable. However, when an apparently healthy tree falls and causes property damage as a result of a storm, the Court has held that there is insufficient evidence of negligence upon which to justify an award. *Gerritsen v. Dept. of Highways*, 16 Ct. Cl. 85 (1986); *Wiles v. Division of Highways*, 22 Ct. Cl. 170 (1998);

In the instant case, the Court is of the opinion that respondent had no notice that a tree limb at issue posed an apparent risk to the public. The evidence adduced at the hearing established that the claimant was not sure what struck and damaged her vehicle. The Court will not speculate as to the nature of the object that claimant's vehicle struck, and thus, the claimant may not make a recovery for her loss in this claim.

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

Claim disallowed.

OPINION ISSUED JULY 3, 2007

JENNIFER L. MULLEN-THAXTON and CHRISTOPHER A. THAXTON
VS.
DIVISION OF HIGHWAYS
(CC-06-149)

Claimants appeared *pro se*.

Jason C. Workman, Attorney at Law, for respondent

PER CURIAM:

Claimants brought this action for vehicle damage which occurred when their

1999 Oldsmobile Alero struck a rock while claimant Christopher A. Thaxton was traveling southbound on I-77 near the I-79 interchange in Charleston, Kanawha County. I-77 is a road maintained by respondent in Kanawha County. The Court is of the opinion to deny this claim for the reasons more fully set forth below.

The incident giving rise to this claim occurred at approximately 4:20 p.m. on April 21, 2006. I-77 is a four-lane road at the location of claimant's accident. Mr. Thaxton testified that he was traveling in his right hand lane with a vehicle in front of him and some other vehicles in the left lane. He stated that the vehicle in front of him swerved around something and that he then noticed a rock in the road. Mr. Thaxton testified that he attempted to avoid the rock, but that his vehicle's rear tire struck the rock. Mr. Thaxton stated that the rock was approximately eight inches wide. Claimants' vehicle struck the rock and sustained damage to a rim and a tire totaling $259.70.

The position of the respondent was that it did not have notice of the rocks on I-77. Steve Knight, Transportation Crew Supervisor for respondent in Kanawha County, testified that this is not an area where he could ever recall having rock falls. He further stated that there were no records of any complaints or rock falls from the date of claimants' incident. Respondent maintains that there was no prior notice of any rocks on I-77 immediately prior to the incident in question.

It is a well-established principle that the State is neither an insurer nor a guarantor of the safety of motorists upon its highways. *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947). To hold respondent liable, claimant must establish by a preponderance of the evidence that respondent had actual or constructive notice of the road defect at issue and a reasonable amount of time to take corrective action. *Chapman v. Dept. of Highways,* 16 Ct. Cl. 103 (1986); *Pritt v. Dept. of Highways,* 16 Ct. Cl. 8 (1985). In rock fall claims, this Court has held that the unexplained falling of a rock onto a highway without a positive showing that respondent knew or should have known of a dangerous condition posing injury to person or property is insufficient to justify an award. *Coburn v. Dept. of Highways,* 16 Ct. Cl. 68 (1985).

In the present claim, claimants have not established that respondent failed to take adequate measures to protect the safety of the traveling public on I-77 in Kanawha County. While the Court is sympathetic to claimants' plight, the fact remains that there is no evidence of negligence on the part of respondent upon which to base an award.

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

Claim disallowed.

OPINION ISSUED JULY 3, 2007

JENNIFER HARLESS
VS.
DIVISION OF HIGHWAYS
(CC-06-200)

Claimant appeared *pro se*.

Jason C. Workman, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when her 1995 Chevrolet Monte Carlo struck a hole while she was traveling on County Route 15 in Fayette County. County Route 15 is a road maintained by respondent. The Court is of the opinion to deny the claim for the reasons more fully stated below.

The incident giving rise to this claim occurred between 5:00 p.m. and 6:00 p.m. on May 7, 2006. County Route 15 is a one-lane highway at the area of the incident involved in this claim. Claimant testified that she was traveling at approximately thirty miles per hour with no traffic on County Route 15 when her vehicle struck a hole in the road that she had not seen. Ms. Harless stated that she did not see the hole prior to her vehicle striking it because it was filled with water. Her vehicle sustained damage to a tire and a rim totaling $671.14.

The position of the respondent is that it did not have actual or constructive notice of the condition on County Route 15 at the site of claimant's accident for the date in question. Joe Donnally, Transportation Crew Chief for respondent in Fayette County, testified that there had been no complaints regarding holes on County Route 15 prior to claimant's incident.

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

In the instant case, the Court is of the opinion that respondent did not have actual or constructive notice of a hole on County Route 15 prior to the incident in question. Consequently, there is insufficient evidence of negligence upon which to justify an award. Thus, the claimant may not make a recovery for her loss in this claim.

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

Claim disallowed.

OPINION ISSUED JULY 3, 2007

JENNIFER E. LARCK
VS.
DIVISION OF HIGHWAYS
(CC-06-278)

Claimant appeared *pro se*.

Jason C. Workman, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when her 2003 Nissan Sentra struck a hole while she was traveling eastbound on I-64 near Barboursville, Cabell County. I-64 is a road maintained by respondent. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 5:00 p.m. on September 14, 2006. I-64 is a four-lane highway at the area of the incident involved in this claim. Claimant testified that she was driving in her left hand lane with traffic in front of her and to her right. She stated that she had just driven into a construction area where the asphalt had been removed from the road when her vehicle struck a hole in the road that she could not avoid because of the traffic. Claimant's vehicle sustained damage to a rim totaling $150.00

The position of the respondent is that it did not have actual or constructive notice of the condition on I-64 at the site of the claimant's accident for the date in question. Respondent did not present any witnesses or evidence at the hearing of this matter.

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

In the instant case, the Court is of the opinion that respondent had at least constructive notice of the hole which claimant's vehicle struck and that the hole presented a hazard to the traveling public. The location of the hole within the road and the time of the year in which claimant's incident occurred leads the Court to conclude that respondent had notice of this hazardous condition and respondent had an adequate amount of time to take corrective action. Thus, the Court finds respondent negligent and claimant may make a recovery for the damage to her vehicle.

In accordance with the findings of fact and conclusions of law stated herein above, the Court is of the opinion to and does make an award to the claimant in this claim in the amount of $150.00.

Award of $150.00.

OPINION ISSUED AUGUST 16, 2007

WILLIAM H. AMTOWER

VS.

DIVISION OF HIGHWAYS

(CC-06-085)

Claimant appeared *pro se*.

Jason C. Workman, Attorney at Law, for respondent

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when his 2001 Chevrolet Impala struck a rock when he was traveling on U.S. Route 50 near Augusta, Hampshire County. U.S. Route 50 is a road maintained by respondent in Hampshire County. The Court is of the opinion to deny this claim for the reasons more fully set forth below.

The incident giving rise to this claim occurred at approximately 8:30 p.m. on February 19, 2006. U.S. Route 50 is a three-lane road at the location of claimant's incident. Mr. Amtower was driving behind two tractor trailers when he noticed one of the tractor trailers swerve to the left. Claimant stated that it was then that he noticed rocks in the road. Mr. Amtower testified that he tried to avoid the rocks but could not and his vehicle struck a rock. Claimant stated that the rock appeared to be between ten and fourteen inches in diameter. Claimant's vehicle sustained damage to the front driver side tire and rim totaling $366.25. Claimant's insurance deductible was $250.00.

The position of the respondent was that it did not have notice of the rocks on U.S. Route 50. Chris Corbin, County Administrator for respondent in Hampshire County, testified that this is not an area that typically has rock falls. He stated that there are rock falls along this stretch of U.S. Route 50 perhaps once a year.

It is a well-established principle that the State is neither an insurer nor a guarantor of the safety of motorists upon its highways. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). To hold respondent liable, claimant must establish by a preponderance of the evidence that respondent had actual or constructive notice of the road defect at issue and a reasonable amount of time to take corrective action. *Chapman v. Dept. of Highways*, 16 Ct. Cl. 103 (1986); *Pritt v. Dept. of Highways*, 16 Ct. Cl. 8 (1985). In rock fall claims, this Court has held that the unexplained falling of a rock onto a highway without a positive showing that respondent knew or should have known of a dangerous condition posing injury to person or property is insufficient to justify an award. *Coburn v. Dept. of Highways*, 16 Ct. Cl. 68 (1985).

In the present claim, claimant has not established that respondent failed to take adequate measures to protect the safety of the traveling public on U.S. Route 50 in Hampshire County. There was no evidence presented at the hearing of this matter to show that respondent knew or should have known about the rock fall along U.S. Route 50 at the time of claimant's incident. While the Court is sympathetic to claimant's plight, the fact remains that there is no evidence of negligence on the part of respondent upon which to base an award.

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

Claim disallowed.

OPINION ISSUED AUGUST 16, 2007

ROBERT C. ORE
VS.
DIVISION OF HIGHWAYS
(CC-06-143)

Claimant appeared *pro se*.

Jason C. Workman, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when his 1985 BMW 524td struck a tree in the road on W. Va. Route 4, near Clendenin, Kanawha County. W. Va. Route 4 is a road maintained by respondent. The Court is of the opinion to deny the claim for the reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 8:10 a.m. on September 25, 2005. W. Va. Route 4 is a two-lane highway at the area of the incident involved in this claim. Claimant testified that he was traveling eastbound on W. Va. Route 4 at approximately fifty-two miles per hour when he noticed a tree falling into the road. Mr. Ore stated that he applied the brakes of his vehicle, but that his vehicle still struck the tree. He testified that the tree was approximately forty feet long and was a dead tree that was rotted. His vehicle struck the tree, damaging a wheel, oil pan, oil pump, body, fog lights, radiator and oil cooler totaling $2,323.56.

The position of the respondent is that it did not have actual or constructive notice of the condition on W. Va. Route 4 at the site of the claimant's accident for the date in question. David Fisher, Highway Administrator for respondent in Kanawha County, testified that he had no prior complaints about the tree that fell onto W. Va. Route 4 prior to the claimant's incident.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins vs. Sims*, 130 W.Va. 645; 46 S.E.2d 81 (1947). The general rule of this Court with regard to tree fall claims is that if a tree is dead and poses an apparent risk, then the respondent may be held liable. However, when an apparently healthy tree falls and causes property damage as a result of a storm, the Court has held that there is insufficient evidence of negligence upon which to justify an award. *Wiles v. Division of Highways*, 22 Ct. Cl. 170 (1998); *Gerritsen v. Dept. of Highways*, 16 Ct. Cl. 85 (1986).

In the instant case, the Court is of the opinion that respondent had no notice that the tree at issue posed an apparent risk to the public. While the tree was dead and had no limbs, respondent had received no prior complaints regarding the condition of the tree and further, the claimant testified that the tree fell into the road as he was traveling on it. Therefore, respondent was not negligent in the maintenance of W. Va. Route 4 on the

date of claimant's incident. Thus, the claimant may not make a recovery for his loss in this claim.

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

Claim disallowed.

OPINION ISSUED AUGUST 16, 2007

MARY McMILLION
VS.
DIVISION OF HIGHWAYS
(CC-01-334)

Claimant appeared pro se.

Andrew F. Tarr and Jason C. Workman, Attorneys at Law, for respondent.

GRITT, JUDGE:

Claimant brought this claim for property damage to her real estate which she alleges occurred as a result of respondent's negligent maintenance of a drainage system. Claimant's property is located in Harrison County. Claimant leased her property to tenants until some time in 1999. After the completion of the hearing of this claim on October 31 and November 1, 2006, the Court took a view of claimant's property to better understand the lay of the land and the drainage structures. Upon consideration of the testimony taken and the view of the property, the Court is of the opinion to deny this claim for the reasons more fully stated below.

Claimant's property is located on Route 36/4, locally known as Poling Road, near West Milford in Harrison County. Claimant testified that she bought the property in 1987. The incident giving rise to this claim occurred in 1999. Mrs. McMillion alleges that respondent cut back a bank which disturbed trees and rocks causing an influx of water onto her property. She testified that water seeped through the rocks in the bank below the road, and then flowed onto her property. She also testified that around this same time respondent was replacing a drainage system at the entrance to a development near her property which also resulted in a large amount of water being directed onto her property. Claimant testified that water flows out of the subdivision where it joins with water that drains off of Coal Haul Road. This water then flows under Coal Haul Road into a culvert where it flows along Route 36 and then through a culvert under Route 36 to a ditch behind her house where it flows to a culvert under Route 36/4 and eventually it flows into the West Fork River. Mrs. McMillion testified that prior to 1999 there was dampness and some drainage onto her property, but she described it as being at a tolerable level. She further stated that due to the flooding that resulted after 1999, the house on her property developed black mold such that she was no longer able to rent the property. Mrs. McMillion also testified regarding two culverts located approximately

fifty yards down stream from her property. She stated that these culverts were situated one on top of the other. The bottom culvert was a cement culvert that was completely stopped up on the intake end, while the other is a twenty-four inch metal culvert.

Douglas Pence, a property and casualty claims adjuster, testified that in 1999, prior to the flooding, claimant's property was worth approximately $35,000.00. Mr. Pence stated that due to the black mold, the house is uninhabitable. In his opinion the approximate value of the property, including the land and the structure thereon, is now $5,000.00.

The position of the claimant is that the respondent negligently caused a large amount of water to flow onto her property, damaging the house and the land. The claimant further avers that respondent did not restore the bank that it had worked on despite its assurances that repairs would be made. She also is of the opinion that there was a breach of contract on the part of the respondent based upon her allegation that respondent had agreed to take certain actions with respect to a bank adjacent to the roadway, which did not occur.

The position of the respondent is that it was not responsible for the flood related damage that was caused to claimant's property as the property is prone to flooding. Respondent further contends that there was no written agreement between the claimant and itself to repair or restore any bank and that, therefore, there was no breach of any contract on its part.

Doug Kirk, a professional engineer employed by respondent, testified at the hearing of this matter. Mr. Kirk stated that claimant's house sits in a five hundred year flood plain so there is a two percent chance that the area would be flooded by the West Fork River in any given year. He described the claimant's property as being situated in a narrow ravine and that approximately four hundred fifty four (454) acres drain into the stream that flows past claimant's property in this ravine. Mr. Kirk stated that claimant's house is impacted by this stream flooding because the house is so close to the stream both in terms of horizontal location as well as its elevation. He further concluded that the two culverts that are located on top of each other have no effect on the water surface elevation at the house since the house is at a substantially higher elevation than the roadway and, therefore, any flooding from this culvert would flow over the road before it reaches claimant's house. Mr. Kirk also stated that any work that respondent completed in 1999 would not have changed the amount of water that flows into the ravine where claimant's property is located. He testified that work done reshaping the bank and cutting trees along the hillside between Route 36 and Route 36/4 would have no discernible effect on the flow of the water either above the ground or below the ground. Mr. Kirk stated that in his opinion, this property is affected by groundwater flow because it is located between two hillsides in a narrow ravine and that it is affected by flooding from the stream because of its close proximity to the stream. He further stated that because the property is at a low elevation just above the streambed elevation and just above the West Fork River elevation, the ground in the area is prone to being saturated with water.

This Court has held that respondent has a duty to provide adequate drainage of surface water and that any drainage devices must be maintained in a reasonable state of repair. Haught vs. Dept. of Highways, 13 Ct. Cl. 237 (1980). In claims of this nature, the Court will examine whether respondent negligently failed to protect a clamant's property from foreseeable damage. Rogers vs. Div. of Highways, 21 Ct. Cl. 97 (1996).

In the instant claim, the claimant has failed to establish that respondent maintained the drainage structures on Route 36 or Route 36/4 in Harrison County in a

negligent manner. The terrain in this area of Route 36 and Route 36/4 forms a natural drainage area onto claimant's property. The Court concludes from the testimony, the documentary evidence and the view of the property, roads and drainage structures, that the water flowing near claimant's property and at times flooding claimant's property would have flowed into this same area regardless of what actions respondent undertook in 1999 to either reshape the bank or change the drainage system. Further, there was no evidence to establish that a contract existed between claimant and respondent to perform any work in the area of claimant's property. Consequently, there is insufficient evidence of either negligence on the part of the respondent or a breach of a contract upon which to base an award.

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

Claim disallowed.

OPINION ISSUED AUGUST 16, 2007

REGINA LOTT and HARRY M. LOTT
VS.
DIVISION OF HIGHWAYS
(CC-05-180)

Claimants appeared *pro se*.

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

PER CURIAM:

Claimants brought this action for vehicle damage which occurred when their 1999 Chevrolet Cavalier struck a slip in the road while claimant Regina Lott was traveling on Progress Ridge Road in Wood County. Progress Ridge Road is a road maintained by respondent. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred between 10:00 a.m. and 11:00 a.m. on April 18, 2005. Progress Ridge Road is a two-lane highway at the area of the incident involved in this claim. Regina Lott testified that she was driving on Progress Ridge Road when she saw the slip in the road. She stated that she had seen the slip previously but it had not been that bad. She further testified that she had contacted respondent several times to let them know about the condition of the road. Ms. Lott stated that the road had become more of a one-lane road because of the slip. She testified that on the date of her incident, it appeared that there had been gravel placed in part of the slip. Claimants' vehicle struck the slip and bottomed out on the road sustaining damage to the oil pan totaling $231.91.

The position of the respondent is that it did not have actual or constructive notice of the condition on Progress Ridge Road at the site of the claimants' accident for the date in question. Kenny Welch, Highway Administrator for respondent in Wood County, testified that on the date of claimants' incident, crews for respondent had put gravel in the slip on Progress Ridge Road. He further stated that filling the slip in with gravel was just a temporary fix.

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

In the instant case, the Court is of the opinion that respondent had at least constructive notice of the slip in the road which claimants' vehicle struck and that the slip presented a hazard to the traveling public. Photographs in evidence depict the slip and provide the Court an accurate portrayal of the size and location of the slip on Progress Ridge Road. The size of the slip and the time of the year in which claimants' incident occurred leads the Court to conclude that respondent had notice of this hazardous condition and respondent had an adequate amount of time to take corrective action. Thus, the Court finds respondent negligent and claimants may make a recovery for the damage to their vehicle.

In accordance with the findings of fact and conclusions of law stated herein above, the Court is of the opinion to and does make an award to the claimants in this claim in the amount of $231.91.

Award of $231.91.

OPINION ISSUED AUGUST 16, 2007

EARL W. GROVE JR.
VS.
DIVISION OF HIGHWAYS
(CC-05-373)

Claimant appeared *pro se*.

Jason C. Workman, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when his 1991 Honda Accord struck a hole while he was traveling on Fairview Drive in Berkeley Springs, Morgan County. Fairview Drive is a road maintained by respondent. The Court

is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim at approximately1:30 p.m. on August 10, 2005. Fairview Drive is a two-lane highway at the area of the incident involved in this claim. Claimant testified that he was driving on Fairview Drive when he saw the hole. He stated that he had seen the hole previously but had been able to avoid it on other occasions. Mr. Grove stated that he was unable to avoid the hole due to oncoming traffic and that his vehicle struck the hole sustaining damage to two tires and one rim. Mr. Grove stated that the hole was one foot wide and one half inch deep. Claimant's vehicle sustained damage totaling $262.12.

The position of the respondent is that it did not have actual or constructive notice of the condition on Fairview Drive at the site of the claimant's accident for the date in question. John Coleman, County Highway Administrator for the respondent in Morgan County, testified that he had no knowledge of any holes on Fairview Drive in Morgantown for the date in question. Mr. Coleman stated that there were no records of either complaints concerning the condition of the road or any maintenance done on this stretch of road prior to claimant's incident.

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

In the instant case, the Court is of the opinion that respondent had at least constructive notice of the hole which claimant's vehicle struck and that the hole presented a hazard to the traveling public. The size of the hole and the time of the year in which claimant's incident occurred leads the Court to conclude that respondent had notice of this hazardous condition and respondent had an adequate amount of time to take corrective action. Thus, the Court finds respondent negligent and claimant may make a recovery for the damage to his vehicle.

In accordance with the findings of fact and conclusions of law stated herein above, the Court is of the opinion to and does make an award to the claimant in this claim in the amount of $262.12.

Award of $262.12.

OPINION ISSUED AUGUST 16, 2007

RONALD BEASLEY
VS.
DIVISION OF HIGHWAYS
(CC-06-232)

Claimant appeared *pro se*.

Jason C. Workman, Attorney at Law, for respondent.

PER CURIAM:

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

1. On July 20, 2006, claimant was traveling on Madison Avenue in Huntington, Cabell County, when his vehicle struck a piece of rebar that was protruding from the road damaging a deflector on his vehicle.

2. Respondent was responsible for the maintenance of Madison Avenue which it failed to maintain properly on the date of this incident.

3. As a result of this incident, claimant's vehicle sustained damage in the amount of $464.49.

4. Respondent agrees that the amount of $464.49 for the damages put forth by the claimant is fair and reasonable.

The Court has reviewed the facts of the claim and finds that respondent was negligent in its maintenance of Madison Avenue on the date of this incident; that the negligence of respondent was the proximate cause of the damages sustained to claimant's vehicle; and that the amount of the damages agreed to by the parties is fair and reasonable. Thus, claimant may make a recovery for his loss.

Accordingly, the Court is of the opinion to and does make an award in the amount of $464.49.

Award of $464.49.

OPINION ISSUED AUGUST 16, 2007

KIMBERLY ANN KENT
VS.
DIVISION OF HIGHWAYS
(CC-06-250)

Claimant appeared *pro se*.

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when her 2002 Dodge Neon struck a hole while she was traveling on Wilsonburg Road in

HarrisonLEVIT County. Wilsonburg Road is a road maintained by respondent. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred between 6:00 p.m. and 6:15 p.m. on August 15, 2006. Wilsonburg Road is a two-lane highway at the area of the incident involved in this claim. Claimant testified that she was driving on Wilsonburg Road when she saw the hole. She stated that she could not avoid the hole because of oncoming traffic. Claimant's vehicle struck the hole sustaining damage to the right front rim and tire. Ms. Kent stated that the hole was approximately eight feet long and twelve inches deep. Claimant's vehicle sustained damage totaling $242.20.

The position of the respondent is that it did not have actual or constructive notice of the condition on Wilsonburg Road at the site of the claimant's accident for the date in question. Respondent did not present any witnesses or evidence at the hearing of this matter.

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

In the instant case, the Court is of the opinion that respondent had at least constructive notice of the hole which claimant's vehicle struck and that the hole presented a hazard to the traveling public. Photographs in evidence depict the hole and provide the Court an accurate portrayal of the size and location of the hole on Wilsonburg Road. The size of the hole and the time of the year in which claimant's incident occurred leads the Court to conclude that respondent had notice of this hazardous condition and respondent had an adequate amount of time to take corrective action. Thus, the Court finds respondent negligent and claimant may make a recovery for the damage to her vehicle.

In accordance with the findings of fact and conclusions of law stated herein above, the Court is of the opinion to and does make an award to the claimant in this claim in the amount of $242.20.

Award of $242.20.

OPINION ISSUED AUGUST 16, 2007

GARY BUSH
VS.
DIVISION OF HIGHWAYS
(CC-06-271)

Claimant appeared *pro se*.

Jason C. Workman, Attorney at Law, for respondent.

PER CURIAM:

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

1. On September 21, 2005, claimant was traveling on Interstate 81 in Berkeley County when his vehicle struck a hole in the road damaging his vehicle.

2. Respondent was responsible for the maintenance of Interstate 81 which it failed to maintain properly on the date of this incident.

3. As a result of this incident, claimant's vehicle sustained damage in the amount of $246.98.

4. Respondent agrees that the amount of $246.98 for the damages put forth by the claimant is fair and reasonable.

The Court has reviewed the facts of the claim and finds that respondent was negligent in its maintenance of Interstate 81 on the date of this incident; that the negligence of respondent was the proximate cause of the damages sustained to claimant's vehicle; and that the amount of the damages agreed to by the parties is fair and reasonable. Thus, claimant may make a recovery for his loss.

Accordingly, the Court is of the opinion to and does make an award in the amount of $246.98.

Award of $246.98.

OPINION ISSUED AUGUST 16, 2007

CHAD A. NUZUM
VS.
DIVISION OF HIGHWAYS
(CC-06-288)

Claimant appeared *pro se*.

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when his 2006 Toyota Camry struck a broken section of pavement while he was traveling on Pleasant Valley Road near Benton's Ferry, Marion County. Pleasant Valley Road is a road

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

The incident giving rise to this claim occurred at approximately 8:00 p.m. on August 12, 2006. Pleasant Valley Road is a two-lane highway at the area of the incident involved in this claim. Claimant testified that he was driving on Pleasant Valley Road when his vehicle struck a section of berm that had broken off. He stated that he had noticed the berm was in a state of disrepair previously but had not noticed how bad it was. Mr. Nuzum stated that the section that his vehicle struck was approximately eight feet long and over seven inches deep. Claimant's vehicle struck the broken section of berm sustaining damage to both passenger side tires totaling $248.55.

The position of the respondent is that it did not have actual or constructive notice of the condition on Pleasant Valley Road at the site of the claimant's accident for the date in question. Respondent did not present any witnesses or evidence at the hearing of this matter.

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

In the instant case, the Court is of the opinion that respondent had at least constructive notice of the broken section of pavement which claimant's vehicle struck and that the hole presented a hazard to the traveling public. Photographs in evidence depict the broken section of pavement and provide the Court an accurate portrayal of the size and location of the pavement on Pleasant Valley Road. The size of the broken section of road and the time of the year in which claimant's incident occurred leads the Court to conclude that respondent had notice of this hazardous condition and respondent had an adequate amount of time to take corrective action. However, at the hearing of this matter the Court directed the claimant to provide a copy of his insurance declaration page, which he did not submit. Therefore, the Court is of the opinion to and does hereby deny this claim.

Claim disallowed.

OPINION ISSUED AUGUST 16, 2007

MICHAEL SHAWVER and ZELLAMAE SHAWVER
VS.
DIVISION OF HIGHWAYS

(CC-07-048)

Claimants appeared *pro se*.

Jason C. Workman, Attorney at Law, for respondent.

PER CURIAM:

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

1. On February 22, 2007, claimant Michael Shawver was traveling on Route 61 in Crown Hill, Kanawha County when their vehicle struck a hole in the road, damaging a rim.

2. Respondent was responsible for the maintenance of Route 61 which it failed to maintain properly on the date of this incident.

3. As a result of this incident, claimants' vehicle sustained damage in the amount of $843.97. Claimants' insurance deductible was $500.00.

4. Respondent agrees that the amount of $500.00 for the damages put forth by the claimants is fair and reasonable.

The Court has reviewed the facts of the claim and finds that respondent was negligent in its maintenance of Route 61 on the date of this incident; that the negligence of respondent was the proximate cause of the damages sustained to claimants' vehicle; and that the amount of the damages agreed to by the parties is fair and reasonable. Thus, claimants may make a recovery for their loss.

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

Award of $500.00.

OPINION ISSUED AUGUST 16, 2007

ADAM N. MENDEZ
VS.
DIVISION OF HIGHWAYS
(CC-07-065)

Claimant appeared *pro se*.

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when his 2005 Chevrolet Cobalt struck a hole while he was traveling on County Route 29 in Preston County. County Route 29 is a road maintained by respondent. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 2:30 a.m. on February 20, 2007. County Route 29 is a two-lane highway at the area of the incident involved in this claim. Claimant testified that he was driving on County Route 29 when his vehicle struck a hole in the road. He stated that he had seen the hole previously but had been able to avoid it on other occasions. Mr. Mendez testified that there were a series of holes along this stretch of County Route 29 with at least three holes that were approximately one and a half feet wide, one foot long, and six to eight inches deep. Claimant's vehicle struck one of the holes sustaining damage to the right front rim totaling $378.46.

The position of the respondent is that it did not have actual or constructive notice of the condition on County Route 29 at the site of the claimant's accident for the date in question. Larry Weaver, Highway Administrator for the respondent in Preston County, testified that he had no knowledge of any holes on County Route 29 in Preston County for the date in question. Mr. Weaver stated that he travels this road every day and had never noticed holes this large in the area of claimant's incident. Mr. Weaver further testified that crews for respondent patched this area of County Route 29 on February 20, 2007. Respondent maintains that it had no actual or constructive notice of any holes on County Route 29.

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

In the instant case, the Court is of the opinion that respondent had at least constructive notice of the hole which claimant's vehicle struck and that the hole presented a hazard to the traveling public. Photographs in evidence depict the hole and provide the Court an accurate portrayal of the size and location of the hole on County Route 29. The size of the hole and its location within the roadway leads the Court to conclude that respondent had notice of this hazardous condition and respondent had an adequate amount of time to take corrective action. Thus, the Court finds respondent negligent and claimant may make a recovery for the damage to his vehicle.

In accordance with the findings of fact and conclusions of law stated herein above, the Court is of the opinion to and does make an award to the claimant in this claim in the amount of $378.46.

Award of $378.46.

OPINION ISSUED AUGUST 16, 2007

JEFFREY A. DYE and NANCY A. DYE
VS.
DIVISION OF HIGHWAYS
(CC-07-069)

Claimants appeared *pro se*.

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

PER CURIAM:

Claimants brought this action for vehicle damage which occurred when their 2007 Ford 500 struck a hole while claimant Nancy Dye was traveling on Old Route 50 in Harrison County. Old Route 50 is a road maintained by respondent. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 7:30 p.m. on March 2, 2007. Old Route 50 is a two-lane highway at the area of the incident involved in this claim. Claimant Nancy Dye testified that she was driving on Old Route 50 when she saw the hole. She stated that she tried to avoid the hole but could not because of oncoming traffic. Claimant's vehicle struck the hole, sustaining damage to a rim and a tire. She stated that the hole was approximately six inches deep. Claimants' vehicle sustained damage totaling $460.33.

The position of the respondent is that it did not have actual or constructive notice of the condition on Old Route 50 at the site of the claimants' accident for the date in question. David Cava, Highway Administrator for respondent in Harrison County, testified that respondent received a complaint about a hole on Old Route 50 several days after claimants' incident. Mr. Cava stated that at that time, a crew went out to the hole and repaired it. Respondent maintains that it did not have actual or constructive notice of the condition on Old Route 50 prior to claimants' incident.

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

In the instant case, the Court is of the opinion that respondent had at least constructive notice of the hole which claimants' vehicle struck and that the hole presented a hazard to the traveling public. Photographs in evidence depict the hole and provide the Court an accurate portrayal of the size and location of the hole on Old Route 50. The size of the hole and the time of the year in which claimants' incident occurred leads the Court to conclude that respondent had notice of this hazardous condition and respondent had an adequate amount of time to take corrective action. Thus, the Court finds respondent negligent and claimants may make a recovery for the damage to their vehicle.

In accordance with the findings of fact and conclusions of law stated herein above, the Court is of the opinion to and does make an award to claimants in this claim in the amount of $460.33.

Award of $460.33.

OPINION ISSUED AUGUST 16, 2007

ALLEN G. GIBBS and ESTHER L. GIBBS
VS.
DIVISION OF HIGHWAYS
(CC-07-074)

Claimants appeared *pro se*.

Jason C. Workman, Attorney at Law, for respondent.

PER CURIAM:

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

1. On February 23, 2007, claimant Esther Gibbs was traveling on Washington Street West in Charleston, Kanawha County, when the vehicle struck a hole in the road, damaging a tire and rim.

2. Respondent was responsible for the maintenance of Washington Street West which it failed to maintain properly on the date of this incident.

3. As a result of this incident, claimants' vehicle sustained damage in the amount of $252.32.

4. Respondent agrees that the amount of $252.32 for the damages put forth by the claimants is fair and reasonable.

The Court has reviewed the facts of the claim and finds that respondent was negligent in its maintenance of Washington Street West on the date of this incident; that the negligence of respondent was the proximate cause of the damages sustained to claimants' vehicle; and that the amount of the damages agreed to by the parties is fair and reasonable. Thus, claimants may make a recovery for their loss.

Accordingly, the Court is of the opinion to and does make an award in the amount of $252.32.

Award of $252.32.

OPINION ISSUED AUGUST 16, 2007

STEVE HENDRICK
VS.
DIVISION OF HIGHWAYS
(CC-07-076)

Claimant appeared *pro se*.

Jason C. Workman, Attorney at Law, for respondent.

PER CURIAM:

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

1. On February 23, 2007, claimant was traveling on Teays Valley Road in Putnam County when his vehicle struck a hole in the road damaging two tires.

2. Respondent was responsible for the maintenance of Teays Valley Road which it failed to maintain properly on the date of this incident.

3. As a result of this incident, claimant's vehicle sustained damage in the amount of $256.76.

4. Respondent agrees that the amount of $256.76 for the damages put forth by the claimant is fair and reasonable.

The Court has reviewed the facts of the claim and finds that respondent was negligent in its maintenance of Teays Valley Road on the date of this incident; that the negligence of respondent was the proximate cause of the damages sustained to claimant's vehicle; and that the amount of the damages agreed to by the parties is fair and reasonable. Thus, claimant may make a recovery for his loss.

Accordingly, the Court is of the opinion to and does make an award in the amount of $256.76.

Award of $256.76.

OPINION ISSUED AUGUST 16, 2007

SHEILA ANN HUNT and GLENN HUNT
VS.

DIVISION OF HIGHWAYS
(CC-07-090)

Claimants appeared *pro se*.

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

PER CURIAM:

Claimants brought this action for vehicle damage which occurred when their 2004 Mazda MPV struck a hole while claimant Sheila Hunt was traveling southbound on Route 250 in Fairmont, Marion County. Route 250 is a road maintained by respondent. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 2:00 p.m. on March 28, 2007. Route 250 is a three-lane highway at the area of the incident involved in this claim. Sheila Hunt testified that she was driving on Route 250 with a large truck in front of her. She stated that the truck was turning left onto I-79. The truck blocked her vision of the roadway so she did not see the hole in the road until it was too late. Claimants' vehicle struck the hole sustaining damage a rim, tire and the undercarriage totaling $419.77.

The position of the respondent is that it did not have actual or constructive notice of the condition on Route 250 at the site of the claimants' accident for the date in question. Respondent did not present any witnesses or evidence at the hearing of this matter.

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

In the instant case, the Court is of the opinion that respondent had at least constructive notice of the hole which claimants' vehicle struck and that the hole presented a hazard to the traveling public. Photographs in evidence depict the hole and provide the Court an accurate portrayal of the size and location of the hole on Route 250. The size of the hole and its location within the roadway leads the Court to conclude that respondent had notice of this hazardous condition and respondent had an adequate amount of time to take corrective action. Thus, the Court finds respondent negligent and claimants may make a recovery for the damage to their vehicle.

In accordance with the findings of fact and conclusions of law stated herein above, the Court is of the opinion to and does make an award to the claimants in this claim in the amount of $419.77.

Award of $419.77.

OPINION ISSUED AUGUST 16, 2007

CAROL A. PASCUCCI
VS.
DIVISION OF HIGHWAYS
(CC-07-103)

Claimant appeared *pro se*.

Jason C. Workman, Attorney at Law, for respondent.

PER CURIAM:

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

1. On March 20, 2007, claimant was traveling on Dunbar Avenue in Dunbar, Kanawha County when her vehicle struck a hole in the road, damaging a rim.

2. Respondent was responsible for the maintenance of Dunbar Avenue which it failed to maintain properly on the date of this incident.

3. As a result of this incident, claimant's vehicle sustained damage in the amount of $357.15.

4. Respondent agrees that the amount of $357.15 for the damages put forth by the claimant is fair and reasonable.

The Court has reviewed the facts of the claim and finds that respondent was negligent in its maintenance of Dunbar Avenue on the date of this incident; that the negligence of respondent was the proximate cause of the damages sustained to claimant's vehicle; and that the amount of the damages agreed to by the parties is fair and reasonable. Thus, claimant may make a recovery for her loss.

Accordingly, the Court is of the opinion to and does make an award in the amount of $357.15.

Award of $357.15.

OPINION ISSUED SEPTEMBER 11, 2007

LARRY RAY BENNETT, as Administrator
of the Estate of Barbara Rosclea Bennett
VS.

DIVISION OF HIGHWAYS
(CC-02-294)

Letisha R. Bika, Attorney at Law, for claimant.

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

PER CURIAM:

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

1. On January 20, 2001, decedent, Barbara Rosclea Bennett, was killed while traveling on County Route 9, near Wilsie, Braxton County, when her vehicle went out of control and into a rain swollen creek along County Route 9.

2. Claimant alleged that the portion of County Route 9 where the accident occurred was in an icy condition and that respondent had not properly treated the area prior to Ms. Bennett's accident.

3. Respondent was responsible for the maintenance of County Route 9 which it failed to maintain properly on the date of this incident.

4. Claimant and respondent agrees that the amount of $37,000.00 is a fair and reasonable amount to settle this claim.

The Court has reviewed the facts of the claim and finds that respondent was negligent in its maintenance of County Route 9 on the date of this incident; that the negligence of respondent was the proximate cause of the decedent's accident; and that the amount of the damages agreed to by the parties is fair and reasonable. Thus, claimant may make a recovery for his loss.

Accordingly, the Court is of the opinion to and does make an award in the amount of $37,000.00.

Award of $37,000.00.

OPINION ISSUED OCTOBER 10, 2007

JOHN W. MORROW and DEVONNA MORROW
VS.
DIVISION OF HIGHWAYS
(CC-06-096)

Claimants appeared *pro se*.

Jason C. Workman, Attorney at Law, for respondent.

PER CURIAM:

Claimants brought this action for vehicle damage which occurred when their 2004 Dodge Stratus struck a hole while they were traveling on Route 41 in Lewis County. Route 41 is a road maintained by respondent. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 9:30 a.m. on March 27, 2006. Route 41 is a two-lane highway at the area of the incident involved in this claim. Claimant John Morrow testified that he was driving on Route 41 when his vehicle struck a hole in the road that he had not seen. He stated that the hole was approximately one foot wide and eight to ten inches deep. Claimants' vehicle struck the hole sustaining damage to both passenger side rims and tires totaling $601.70. Claimants' insurance deductible was $500.00.

The position of the respondent is that it did not have actual or constructive notice of the condition on Route 41 at the site of the claimant's accident for the date in question. Respondent did not present any witnesses or evidence at the hearing of this matter.

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

In the instant case, the Court is of the opinion that respondent had at least constructive notice of the hole which claimants' vehicle struck and that the hole presented a hazard to the traveling public. The size of the hole and the time of the year in which claimants' incident occurred leads the Court to conclude that respondent had notice of this hazardous condition and respondent had an adequate amount of time to take corrective action. Thus, the Court finds respondent negligent and claimants may make a recovery for the damage to their vehicle.

In accordance with the findings of fact and conclusions of law stated herein above, the Court is of the opinion to and does make an award to the claimants in this claim in the amount of $500.00.

Award of $500.00.

OPINION ISSUED OCTOBER 10, 2007

LONNIE A. BAYS

VS.

DIVISION OF HIGHWAYS

(CC-06-392)

Claimant appeared *pro se*.

Jason C. Workman, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when his 1998 Chevrolet Cavalier struck a broken section of road while he was traveling eastbound on Plantation's Creek Road in Putnam County. Plantation's Creek Road is a road maintained by respondent. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred on December 18, 2006. Plantation's Creek Road is a two-lane highway at the area of the incident involved in this claim. Claimant testified that he was driving on Plantation's Creek Road when his vehicle struck a section of road that was broken off which he had not seen. Claimant's vehicle struck the broken section of road sustaining damage to a tire totaling $58.30.

The position of the respondent is that it did not have actual or constructive notice of the condition on Plantation's Creek Road at the site of the claimant's accident for the date in question. Respondent did not present any witnesses or evidence at the hearing of this matter.

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

In the instant case, the Court is of the opinion that respondent had at least constructive notice of the broken section of road which claimant's vehicle struck and that this presented a hazard to the traveling public. The size of the broken section of road leads the Court to conclude that respondent had notice of this hazardous condition and respondent had an adequate amount of time to take corrective action. Thus, the Court finds respondent negligent and claimant may make a recovery for the damage to his vehicle.

In accordance with the findings of fact and conclusions of law stated herein above, the Court is of the opinion to and does make an award to the claimant in this claim in the amount of $58.30.

Award of $58.30.

OPINION ISSUED OCTOBER 10, 2007

ISAIAH BLEDSOE and JUDY BLEDSOE
VS.
DIVISION OF HIGHWAYS
(CC-07-009)

Claimants appeared *pro se*.

Jason C. Workman, Attorney at Law, for respondent.

PER CURIAM:

Claimants brought this action for vehicle damage which occurred when their 2003 Chevrolet Impala struck a section of broken pavement while claimant Isaiah Bledsoe was traveling on Martha Road near Barboursville, Cabell County. Martha Road is a road maintained by respondent. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 9:30 p.m. on December 20, 2006. Martha Road is a two-lane highway at the area of the incident involved in this claim. Claimant Isaiah Bledsoe testified that he was driving on Martha Road when his vehicle struck a broken section of pavement that he had not seen. Mr. Bledsoe testified that the broken section of pavement was at least a five inch drop. Claimant's vehicle struck the broken section of pavement sustaining damage to both passenger side rims totaling $201.79.

The position of the respondent is that it did not have actual or constructive notice of the condition on Martha Road at the site of the claimant's accident for the date in question. Mike King, Highway Administrator for the respondent in Cabell County, testified that he had no knowledge of any broken pavement on Martha Road near Barboursville for the date in question. Mr. King stated that at the time of claimants' incident, crews for respondent were involved in snow removal and ice control.

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

In the instant case, the Court is of the opinion that respondent had at least constructive notice of broken section of pavement which claimants' vehicle struck and that the broken pavement presented a hazard to the traveling public. Photographs in evidence depict the broken section of pavement provide the Court an accurate portrayal of the size and location of the broken pavement on Martha Road. The size of the broken section of pavement leads the Court to conclude that respondent had notice of this hazardous condition and respondent had an adequate amount of time to take corrective action. Thus, the Court finds respondent negligent and claimants may make a recovery for the damage to their vehicle.

In accordance with the findings of fact and conclusions of law stated herein above, the Court is of the opinion to and does make an award to the claimants in this

claim in the amount of $201.79.

Award of $201.79.

OPINION ISSUED OCTOBER 10, 2007

ELMER MICKEY HODGE and SHIRLEY ANN HODGE
VS.
DIVISION OF HIGHWAYS
(CC-07-071)

Claimants appeared *pro se*.

Jason C. Workman, Attorney at Law, for respondent.

PER CURIAM:

Claimants brought this action for vehicle damage which occurred when their 2006 Chevrolet HHR struck a broken section of road while claimants were traveling on Goodwill Road in Wayne County. Goodwill Road is a road maintained by respondent. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred on March 13, 2007. Goodwill Road is a two-lane highway at the area of the incident involved in this claim. Claimant Shirley Hodge testified that she was driving on Goodwill Road with a vehicle traveling towards her in the other lane when her vehicle struck the broken section of road. She stated that she had seen the broken section of road previously but had been able to avoid it on other occasions. Ms. Hodge testified that the broken section of road was approximately eight to ten inches deep and six to eight inches wide. She further testified that there was Division of Highways equipment and machines along the side of the road to repair it at the time of her incident. Claimants' vehicle struck the broken section of road sustaining damage to the right front tire totaling $125.08.

The position of the respondent is that it did not have actual or constructive notice of the condition on Goodwill Road at the site of the claimants' accident for the date in question. Respondent presented no evidence or witnesses at the hearing of this matter.

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

In the instant case, the Court is of the opinion that respondent had at least

constructive notice of the broken section of road which claimants' vehicle struck and that this broken section of road presented a hazard to the traveling public. The size of the broken section of road and the time of the year in which claimants' incident occurred leads the Court to conclude that respondent had notice of this hazardous condition and respondent had an adequate amount of time to take corrective action. Thus, the Court finds respondent negligent and claimants may make a recovery for the damage to their vehicle.

In accordance with the findings of fact and conclusions of law stated herein above, the Court is of the opinion to and does make an award to the claimants in this claim in the amount of $125.08.

Award of $125.08.

OPINION ISSUED OCTOBER 10, 2007

LONA R. McCOY
VS.
DIVISION OF HIGHWAYS
(CC-07-131)

Claimant appeared *pro se*.

Jason C. Workman, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when her 2005 Chevrolet Cavalier struck holes while she was traveling on County Route 14 in Braxton County. County Route 14 is a road maintained by respondent. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred on April 15, 2007. County Route 14 is one-lane gravel road at the area of the incident involved in this claim. Claimant testified that she was driving on County Route 14 when her vehicle struck a hole in the road which she could not avoid. She stated that she had seen the hole previously but had to try to avoid other holes that were on the road. Ms. McCoy testified that she had called respondent numerous times prior to her incident regarding the holes on County Route 14. Claimant's vehicle struck a hole sustaining damage to the oil pan totaling $408.33.

The position of the respondent is that it did not have actual or constructive notice of the condition on County Route 14 at the site of the claimant's accident for the date in question. Gary Moore, Assistant Supervisor for respondent in Braxton County, stated that his office had received complaints about holes along County Route 14. He further stated that this is an ongoing problem due to water and a rock cliff that is adjacent to the road in this area.

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

In the instant case, the Court is of the opinion that respondent had at least constructive notice of the hole which claimant's vehicle struck and that the hole presented a hazard to the traveling public. Photographs in evidence depict the hole and provide the Court an accurate portrayal of the size and location of the hole on County Route 14. The size of the hole and the time of the year in which claimant's incident occurred leads the Court to conclude that respondent had notice of this hazardous condition and respondent had an adequate amount of time to take corrective action. Thus, the Court finds respondent negligent and claimant may make a recovery for the damage to her vehicle.

In accordance with the findings of fact and conclusions of law stated herein above, the Court is of the opinion to and does make an award to the claimant in this claim in the amount of $408.33.

Award of $408.33.

OPINION ISSUED OCTOBER 10, 2007

ROY L. BECKETT
VS.
DIVISION OF HIGHWAYS
(CC-07-151)

Claimant appeared *pro se*.

Jason C. Workman, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when his 2000 Chevrolet S10 struck several holes while his daughter, Britney Beckett, was traveling on Route 152 near Genoa, Wayne County. Route 152 is a road maintained by respondent. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incidents giving rise to this claim occurred on April 2, 2007, and April 29, 2007. Route 152 is a two-lane highway at the area of the incident involved in this claim. Britney Beckett testified that on April 2, 2007, she was driving on Route 152 when her vehicle struck holes that she had not seen. Ms. Beckett stated that the holes were approximately four inches deep and that her vehicle struck the holes damaging both

passenger side tires. She stated on April 29, 2007, she was traveling on Route 152 when her vehicle struck several holes. She testified that she had seen the holes previously but had been able to avoid it on other occasions. Ms. Beckett stated that she could not avoid the holes on this occasion because of a truck that was traveling in the oncoming lane of traffic. Claimant's vehicle struck the holes sustaining damage to both passenger side tires. Claimant's vehicle sustained damage totaling $316.98.

The position of the respondent is that it did not have actual or constructive notice of the condition on Route 152 at the site of the claimant's accident for the date in question. Respondent did not present any evidence or witnesses at the hearing of this matter.

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

In the instant case, the Court is of the opinion that respondent had at least constructive notice of the holes which claimant's vehicle struck and that the holes presented a hazard to the traveling public. The size of the holes and the time of the year in which claimant's incident occurred leads the Court to conclude that respondent had notice of this hazardous condition and respondent had an adequate amount of time to take corrective action. However, in at least one of the incidents, claimant's daughter was aware that there were holes on Route 152 and had avoided them on prior occasions. Therefore, the Court finds that claimant's daughter was ten percent comparatively negligent, and the reward will be reduced by this amount. Thus, the Court finds respondent negligent and claimant may make a recovery for the damage to her vehicle.

In accordance with the findings of fact and conclusions of law stated herein above, the Court is of the opinion to and does make an award to the claimant in this claim in the amount of $285.28.

Award of $285.28.

OPINION ISSUED OCTOBER 10, 2007

MICHAEL WALKER and SHARON WALKER

VS.

DIVISION OF HIGHWAYS

(CC-07-073)

Claimants appeared *pro se*.

Jason C. Workman, Attorney at Law, for respondent.

PER CURIAM:

Claimants brought this action for vehicle damage which occurred when their 2007 Ford Edge was struck by dust and gravel while claimant Michael Walker was traveling northbound on W. Va. Route 62 in Midway, Putnam County. W. Va. Route 62 is a road maintained by respondent. The Court is of the opinion to deny the claim for the reasons more fully stated below.

The incident giving rise to this claim occurred between 10:00 p.m. and 10:30 p.m. on March 2, 2007. W. Va. Route 62 is a two-lane highway at the area of the incident involved in this claim. Michael Walker testified that he had noticed piles of mud and debris on the road from where a logging company had tracked it onto the road. Claimant testified that he saw the log trucks bringing the debris onto the road. He stated that when he drove in the same area later that same day, wind blew dust and gravel onto his vehicle, damaging the hood, fender, grill, and headlights totaling $1,255.53.

The position of the respondent is that it did not have actual or constructive notice of the condition on W. Va. Route 62 at the site of claimants' accident for the date in question. Gordon Bowles, Crew Chief Supervisor I for respondent in Putnam County, testified that crews for respondent had taken a snow plow and scraped the mud and debris off of W. Va. Route 62 on February 21, 2007 after receiving a complaint about the condition of the road. He stated that a logging company was bringing the debris onto the roads and that crews for respondent removed the debris whenever they received complaints about it.

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

In the instant case, the Court is of the opinion that respondent did not have actual or constructive notice of the debris in the road which claimants' vehicle struck prior to the incident in question. Further, testimony at hearing identified a logging company as the cause of the debris being brought onto the road. Respondent cleared the debris after being made aware of it. Consequently, there is insufficient evidence of negligence upon which to justify an award. Thus, the claimants may not make a recovery for their loss in this claim.

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

Claim disallowed.

OPINION ISSUED OCTOBER 10, 2007

STEPHEN M. GOULD and JERI A. GOULD

VS.

DIVISION OF HIGHWAYS
(CC-06-303)

Claimants appeared *pro se*.

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

PER CURIAM:

Claimants brought this action for vehicle damage which occurred when a tree limb fell onto their 1985 Dodge D100 while it was parked adjacent to Sand Hill Road near St. Albans, Kanawha County. Sand Hill Road is a road maintained by respondent. The Court is of the opinion to deny the claim for the reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 11:00 p.m. on October 5, 2006, a stormy evening. Sand Hill Road is a one-lane highway at the area of the incident involved in this claim. Stephen Gould testified that a limb from a tree that was on respondent's right of way fell and damaged their vehicle. He stated that the tree appeared to be a live tree prior to falling. Claimants' vehicle sustained damages totaling $2,231.09.

The position of the respondent is that it did not have actual or constructive notice of the condition on Sand Hill Road at the site of the claimant's accident for the date in question. Chet Burgess, an employee for respondent in Kanawha County, testified that he had no information about the tree that fell onto claimants' vehicle prior to the incident .

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins vs. Sims*, 130 W.Va. 645; 46 S.E.2d 81 (1947). The general rule of this Court with regard to tree fall claims is that if a tree is dead and poses an apparent risk, then the respondent may be held liable. However, when an apparently healthy tree falls and causes property damage as a result of a storm, the Court has held that there is insufficient evidence of negligence upon which to justify an award. *Wiles v. Division of Highways*, 22 Ct. Cl. 170 (1998); *Gerritsen v. Dept. of Highways*, 16 Ct. Cl. 85 (1986).

In the instant case, the Court is of the opinion that respondent had no notice that the tree at issue posed an apparent risk to the public. The evidence adduced at the hearing established that the tree appeared to be a healthy tree. Neither claimants nor respondent had reason to believe that the tree was in danger of falling. Thus, the claimants may not make a recovery for their loss in this claim.

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

Claim disallowed.

OPINION ISSUED OCTOBER 29, 2007

ETHEL J. EASLEY

VS.

DIVISION OF HIGHWAYS

(CC-02-205)

Michael Magann, Attorney at Law, for claimant.

Andrew F. Tarr and Xueyan Palmer, Attorneys at Law, for respondent.

SAYRE, JUDGE:

Claimant brought this action for personal injuries which occurred when she stepped into a hole in the berm of U.S. Route 52 in Kimball, McDowell County. U.S. Route 52 is a two lane road with a wide berm at the site of claimant's incident that is maintained by respondent. This claim was heard on the issue of liability only. The Court is of the opinion to deny the claim for the reasons more fully stated below.

The incident giving rise to this claim occurred between 2:00 p.m. and 3:00 p.m. on May 11, 2000. Ms. Easley testified that she was headed to the Kimball Post Office to pick up her mother's mail. She parked along the shoulder of U.S. Route 52, an area that she stated was frequently used as a parking area for the post office and Kimball Light and Water Company. Claimant testified that after she parked her vehicle, she walked around to the left rear of her vehicle and between her vehicle and the vehicle parked behind her. As she was walking between the vehicles, her left foot twisted and she fell forward, breaking her foot. She stated that her foot had gotten stuck in a hole in the shoulder of the road that she had not seen. Ms. Easley testified that the hole was approximately two inches deep and just wide enough for her foot to get stuck in it. She further stated that there were no markings around the hole to warn the traveling public that it was there.

Ricky Bohin testified on behalf of claimant that on the date of claimant's incident he was walking in the door to the post office when he heard Ms. Easley yell as she fell to the ground. Mr. Bohin stated that he turned around to see her on the ground approximately six feet from where he was standing at the entrance to the post office. He testified that he helped Ms. Easley get up and get her mail, then helped her back to her vehicle. Mr. Bohin further stated that he knew the hole that claimant stepped into had been there for a while.

The position of claimant is that respondent was negligent in failing to give any type of warning regarding the hole to the traveling public.

The position of the respondent is that it did not have actual or constructive notice of the condition on U.S. Route 52 at the site of the claimant's accident for the date in question.

Kenneth Jenkins, Maintenance Assistant for the respondent in Mercer County and McDowell County as well as on I-77, testified that he was not aware of any complaints regarding a hole in the shoulder area of U.S. Route 52 in the area of the Kimball Post Office prior to claimant's incident. Mike Vasarhelyi, an Investigator Two in the Claims Section, Legal Division of respondent, testified that the hole in the area of claimant's incident was a utility cover that is about six inches in diameter. He stated that the utility cover is approximately two inches below the surface of the shoulder. Mr. Vasarhelyi further testified that the hole is approximately four feet south of the post office

door, in the center of the shoulder.

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

In the instant case, the evidence established that the respondent did not have actual or constructive notice of a hole on U.S. Route 52 in the shoulder near the Kimball Post Office prior to the incident in question. Consequently, there is insufficient evidence of negligence upon which to justify an award. Thus, the claimant may not make a recovery for her loss in this claim.

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

Claim disallowed.

OPINION ISSUED OCTOBER 29, 2007

LORA J. WOOMER AND BOBBY WOOMER
VS.
DIVISION OF HIGHWAYS
(CC-05-375)

Claimants appeared *pro se*.

Jason C. Workman, Attorney at Law, for respondent.

PER CURIAM:

Claimants brought this action for vehicle damage which occurred when their 1996 Ford Mustang slid into a creek due to debris left on the road while Ms. Woomer was traveling about one mile off of State Route 2 on Big Seven Mile Creek Road in Cabell County. Big Seven Mile Creek Road, which is also known as County Route 11, is a road maintained by respondent. The Court is of the opinion to make an award in this claim for the reasons more fully set forth below.

The incident giving rise to this claim occurred on August 18, 2005, at approximately 10:45 p.m. Big Seven Mile Creek Road is a two-lane road with a speed limit of thirty miles per hour. Ms. Woomer was driving approximately twenty-three miles per hour in damp conditions when the accident occurred. Ms. Woomer was traveling home from work and was proceeding in a curve when

the vehicle slid on gravel and clumps of mud that were left on the road by respondent while it was preparing to resurface the road. As a result of the road conditions, claimants' vehicle slid into a nearby creek. Ms. Woomer traveled this road to work every day and

noticed some debris on the opposite side of the road when she left for work at around 2:00 p.m. that afternoon. Bobby Woomer stated that respondent's employees were working on the road when he drove by at around 4:00 p.m. that afternoon.

Claimants' vehicle sustained damages totaling $4,674.51 which includes $4,045.38 for the body work, $155.91 for the towing expenses and $473.22 in repairs. The Court notes that the body work has not yet been performed on the vehicle. The claimants purchased the vehicle in 2003 for $4,500.00. The Kelley Blue Book Value for a 1996 two-door Mustang in good condition is $2,680.00. Since the cost of the vehicle's repairs would be greater than the price that claimants paid for the vehicle in 2003, the Court will consider the Kelley Blue Book value of $2,680.00 in determining the amount of damages. Since the claimants' insurance was limited to liability coverage on this vehicle, their insurance carrier did not cover this claim.

The position of the respondent was that even though it had notice of the debris in question on County Route 11, warning signs were properly placed on the road. Charles Michael King, Highway Administrator for respondent in Cabell County, testified that there was mud on the road since it had been raining earlier that day. However, Mr. King stated that a set of "men working" signs had been posted in the area.

It is a well-established principle that the State is neither an insurer nor a guarantor of the safety of motorists upon its highways. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). To hold respondent liable, claimant must establish by a preponderance of the evidence that respondent had actual or constructive notice of the road defect at issue and a reasonable amount of time to take corrective action. *Chapman v. Dept. of Highways*, 16 Ct. Cl. 103 (1986); *Pritt v. Dept. of Highways*, 16 Ct. Cl. 8 (1985).

In the present claim, the evidence established that respondent was aware of the ongoing hazardous conditions on County Route 11 and had actual notice of the condition then and there existing. The Court is of the opinion that respondent did not take reasonable steps to ensure the safety of motorists traveling on County Route 11 in Cabell County. Consequently, there is sufficient evidence of negligence to base an award. Notwithstanding the negligence of respondent, the Court is also of the opinion that Ms. Woomer was negligent in her operation of the vehicle since she was aware that there was debris on the road at around 2:00 p.m. that day when she was traveling to work. In a comparative negligence jurisdiction such as West Virginia, the claimants' negligence may reduce or bar recovery in a claim. Based on the above, the Court finds that the claimants' negligence equals thirty-five percent (35%) of their loss. Since the negligence of the claimants is not greater than or equal to the negligence of respondent, claimants may recover sixty-five percent (65%) of the loss sustained.

In accordance with the findings of fact and conclusions of law stated herein above, the Court is of the opinion to and does make an award to the claimants in the amount of $1,742.00.

Award of $1,742.00.

OPINION ISSUED OCTOBER 29, 2007

ALISA WRIGHT
VS.
DIVISION OF HIGHWAYS
(CC-05-428)

Claimant appeared *pro se*.

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

PER CURIAM:

Claimant brought this action for damages to her vehicle and for personal injury damages as a result of an accident that occurred when her 1989 Oldsmobile Cutlass Supreme struck concrete pillars set up by respondent on the Philippi Pike near East View in Harrison County. This claim was heard on the issue of liability only. The Philippi Pike is a road maintained by respondent. The Court is of the opinion to deny an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 3:30 p.m. on October 6, 2005. Claimant testified that she was driving on the Philippi Pike towards Anmoore when her vehicle struck a concrete barrier which was placed in the center of the road. The concrete pillar served as a barricade to cover a fourteen (14) foot hole on a project site where the gas and water company were moving two gas lines and a water line. Claimant testified that when she saw a jeep traveling towards her, she lost control of the car and swerved into the concrete barricade to avoid hitting the oncoming jeep. After hitting the concrete block, her car spun around until it finally came to rest in the parking lot of a towing company located adjacent to the project site.

The position of the respondent is that there were warning signs properly placed around the work site where claimant's accident occurred. Respondent's maintenance record for the installation of work signs indicates that two "roadmen ahead" signs, two "shoulder work ahead" signs, and "two "flagger" signs were installed at the project site. Mr. Larry Burgess, foreman for respondent, testified that the purpose of the cement barrier was to prevent vehicles from falling into the fourteen (14) foot hole and to protect workmen from being injured.

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

In the instant case, the Court is of the opinion that the respondent had actual notice of the cement barricade that claimant's vehicle struck and that it took all the necessary actions to protect the safety of the traveling public by properly placing signs in each direction. Respondent's maintenance record for the installation of work signs indicates that a total of six signs were placed in the area of the accident. In addition, lights and flags were installed on the signs. Further, the accident report completed by the

Harrison County Sheriff's Department indicates that claimant failed to maintain control of her vehicle. Consequently, there is insufficient evidence of negligence on the part of respondent upon which to justify an award.

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

Claim disallowed.

OPINION ISSUED OCTOBER 29, 2007

EARL D. FERGUSON
VS.
DIVISION OF HIGHWAYS
(CC-06-282)

Claimant appeared *pro se*.

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

PER CURIAM:

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

1. On September 20, 2006, claimant Earl D. Ferguson was traveling on Route 52 in Mingo County when his 2006 Ford Fusion struck a hole as he was traveling from Varney to Delbarton,

West Virginia.

2. Respondent was responsible for the maintenance of Route 52 which it failed to properly maintain on the date of this incident.

3. As a result of this incident, claimant's vehicle sustained damages in the amount of $288.58.

4. Respondent agrees that the amount of $288.58 for the damages put forth by the claimant is fair and reasonable.

The Court has reviewed the facts of the claim and finds that respondent was negligent in its maintenance of Route 52 on the date of this incident; that the negligence of respondent was the proximate cause of the damages sustained to claimant's vehicle; and that the amount of the damages agreed to by the parties is fair and reasonable. Thus, claimant may make a recovery for his loss.

Accordingly, the Court is of the opinion to and does make an award in the amount of $288.58.

Award of $288.58.

OPINION ISSUED OCTOBER 29, 2007

ROBERT RAY JOHNSON
VS.
DIVISION OF HIGHWAYS
(CC-06-297)

Claimant appeared *pro se*.

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when his 2004 Tacoma Pre Runner pickup truck struck a rock while claimant Robert Ray Johnson was traveling on Route 3/5 on Laurel Creek Road in Mingo County. Route 3/5 is a road maintained by respondent. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred on September 4, 2006, at approximately 10:20 p.m. Route 3/5 on Laurel Creek Road is a two-lane paved road at the site of the incident involved in this claim. Claimant was on his way to work the night shift and he was driving at a speed of approximately twenty miles an hour when a rock the size of a truck fell on his vehicle and the top of his truck caved in. Mr. Johnson testified that he almost came to a complete stop, but since he was proceeding in a curve, it was pouring rain outside, and coal trucks frequently pass through this road, he decided to continue to drive forward. Mr. Johnson stated that he was familiar with this road and that about a month or two before this incident, a rock fell and tore the guardrail alongside the area in question. Claimant stated that respondent had replaced the guardrail at the same location of this accident and had cleaned up the previous rock fall. Claimant's vehicle sustained damages in the amount of $3,720.88. Claimant's insurance deductible is $500.00 so his recovery is limited to that amount.

The position of the respondent is that it did not have actual or constructive notice of the condition on Route 3/5 on Laurel Creek Road at the site of claimant's accident for the date in question. Respondent stipulated that claimant sustained damages in the amount of $500.00. The respondent did not present any witnesses.

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

In the instant case, the Court is of the opinion that respondent had actual notice of rocks likely to fall at that point on Route 3/5. The respondent had cleaned up a rock

fall in the same area where claimant's accident occurred about a month or two before this incident. The rock or boulder which fell onto claimant's truck was adjacent to the same rock strata. Thus, the Court is of the opinion that respondent is liable for the damages which proximately flow from its inadequate protection of the traveling public in this specific location of Route 3/5 on Laurel Creek Road in Mingo County, and further, that respondent is liable for the damages to claimant's vehicle in this claim.

In accordance with the findings of fact and conclusions of law as stated herein above, the Court is of the opinion to and does make an award to the claimant in this claim in the amount of $500.00.

Award of $500.00.

OPINION ISSUED OCTOBER 29, 2007

COY CUMBERLEDGE
VS.
DIVISION OF HIGHWAYS
(CC-06-360)

Claimant appeared *pro se*.

Jason C. Workman, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when his 2003 Mazda Protégé struck a large hole in the pavement while he was traveling northbound on County Route 50/30 in Doddridge County which is also known as Sunny Side Road. County Route 50/30 is a road maintained by respondent. The Court is of the opinion to make an award in this claim for the reasons more fully set forth below.

The incident giving rise to this claim occurred at approximately 5:30 a.m. on November 11, 2006. Claimant was traveling north on County Route 50/30 at a speed of forty to fifty miles per hour when he rounded a bend of the road and saw a log truck in the oncoming lane which was on the yellow center line of the road. County Route 50/30 is a two-lane highway with a speed limit of forty miles per hour. To provide greater distance between his vehicle and the oncoming log truck, he maneuvered his vehicle to his right where his vehicle struck a large hole in the road. Mr. Cumberledge stated that he had noticed the missing piece of pavement on other occasions. However, at the time of the incident, he was unable to see the hole because it was dark and raining outside. Mr. Cumberledge further stated that the hole was approximately twelve inches long and more than two inches deep. Claimant's vehicle sustained damages totaling $1,250.80, and the amount of his insurance deductible is $500.00.

The position of the respondent is that it did not have notice of the hole in

question on County Route 50/30. Charles Richards, Highway Administrator for the respondent in Doddridge County, testified that he did not have any complaints regarding the area in question until the date of this incident. Mr. Richards further stated that the area in question is not patched very frequently because it was just paved a year ago.

It is a well-established principle that the State is neither an insurer nor a guarantor of the safety of motorists upon its highways. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). To hold respondent liable, claimant must establish by a preponderance of the evidence that respondent had actual or constructive notice of the road defect at issue and a reasonable amount of time to take corrective action. *Chapman v. Dept. of Highways*, 16 Ct. Cl. 103 (1986); *Pritt v. Dept. of Highways*, 16 Ct. Cl. 8 (1985).

In the instant case, the Court is of the opinion that respondent had at least constructive notice of the hole that claimant's vehicle struck and that the hole presented a hazard to the traveling public on County Route 50/30. The size of the hole leads the Court to conclude that respondent had notice of this hazardous condition and had adequate time to take corrective action. Thus, there is sufficient evidence of negligence to base an award. However, the Court is also of the opinion that claimant was negligent in his operation of the vehicle. Claimant was aware that there was a large piece of missing pavement on County Route 50/30, but he failed to adjust his speed accordingly even though it was raining and dark outside. In a comparative negligence jurisdiction, such as West Virginia, the negligence of a claimant may reduce or bar recovery in a claim. The Court concludes that the claimant was forty-percent (40%) negligent. Since the negligence of claimant is not greater than or equal to the negligence of respondent, claimant may recover sixty percent (60%) of the loss sustained.

In accordance with the findings of fact and conclusions of law stated herein above, the Court is of the opinion to and does make an award to claimant in the amount of $300.00.

Award of $300.00.

OPINION ISSUED OCTOBER 29, 2007

JULIA MARION and LARRY MARION
VS.
DIVISION OF HIGHWAYS
(CC-07-064)

Claimants appeared *pro se*.

Jason C. Workman, Attorney at Law, for respondent.

PER CURIAM:

This claim was submitted to the Court for decision upon a Stipulation entered

into by claimants and respondent wherein certain facts and circumstances of the claim were agreed to as follows:

1. On March 2, 2007, claimant Julia Marion was traveling on Route 21 in Ripley, Jackson County, when their was struck by a road sign that was blown over by wind.

2. Respondent was responsible for the maintenance of Route 21 which it failed to maintain properly on the date of this incident.

3. As a result of this incident, claimants' vehicle sustained damage in the amount of $1,384.54. Claimants' insurance deductible was $500.00.

4. Respondent agrees that the amount of $500.00 for the damages put forth by the claimants is fair and reasonable.

The Court has reviewed the facts of the claim and finds that respondent was negligent in its maintenance of Route 21 on the date of this incident; that the negligence of respondent was the proximate cause of the damages sustained to claimants' vehicle; and that the amount of the damages agreed to by the parties is fair and reasonable. Thus, claimants may make a recovery for their loss.

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

Award of $500.00.

OPINION ISSUED OCTOBER 29, 2007

BERNICE MOORE

VS.

DIVISION OF HIGHWAYS

(CC-07-145)

Claimant appeared *pro se*.

Jason C. Workman, Attorney at Law, for respondent

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when her 1998 Buick Century struck a boulder while she was traveling northbound on State Route 4 in Braxton County, between Gassaway and Frametown, West Virginia. State Route 4 is a road maintained by respondent. The Court is of the opinion to deny this claim for the reasons more fully set forth below.

The incident giving rise to this claim occurred on January 8, 2007, at approximately 6:30 p.m. State Route 4 is a two-lane paved road with a speed limit of fifty-five miles per hour. Claimant was driving to a meeting in Gassaway in dry conditions when she spotted an object in the road that was about ten feet away from her

vehicle. Claimant's vehicle struck a boulder and sustained damages totaling $422.21. Ms. Moore's insurance deductible is $100.

The position of the respondent is that it did not have notice of the boulder on State Route 4. Gary Moore, Assistant Supervisor for respondent in Braxton County, testified that a rock fall is an infrequent occurrence in the area in question and occurs only about twice a year. Consequently, there are no "falling rock" signs on this stretch of the road. Mr. Moore further testified that State Route 4 is a priority road, and respondent's employees promptly remove rocks from this area as soon as it is notified.

It is a well-established principle that the State is neither an insurer nor a guarantor of the safety of motorists upon its highways. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). To hold respondent liable, claimant must establish by a preponderance of the evidence that respondent had actual or constructive notice of the road defect at issue and a reasonable amount of time to take corrective action. *Chapman v. Dept. of Highways*, 16 Ct. Cl. 103 (1986); *Pritt v. Dept. of Highways*, 16 Ct. Cl. 8 (1985). In rock fall claims, this Court has held that the unexplained falling of a rock onto a highway without a positive showing that respondent knew or should have known of a dangerous condition posing injury to person or property is insufficient to justify an award. *Coburn v. Dept. of Highways*, 16 Ct. Cl. 68 (1985).

In the present claim, claimant has not established that respondent failed to take adequate measures to protect the safety of the traveling public on State Route 4. Evidence adduced at the hearing established that the respondent did not receive any notice or complaints of rock falls along this stretch of State Route 4 prior to the claimant's incident. While the Court is sympathetic to claimants' plight, the fact remains that there is no evidence of negligence on the part of respondent upon which to base an award.

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

Claim disallowed.

OPINION ISSUED OCTOBER 29, 2007

WILLIS MULLINS
VS.
DIVISION OF HIGHWAYS
(CC-07-190)

Claimant appeared *pro se*.

Andrew Tarr, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when his 1997 Plymouth Breeze struck a large hole while he was traveling southbound on Route 52 between Huntington and Tolsia in Wayne County. Route 52 is a road maintained by respondent. The Court is of the opinion to make an award in this claim for the reasons more fully set forth below.

The incident giving rise to this claim occurred on June 5, 2007, at approximately 3:30 p.m. while claimant was traveling between Huntington and Tolsia High School on Route 52, a two-lane paved road with a speed limit of fifty-five miles per hour. Claimant was returning to his home in Mingo County after taking his father to the hospital, and his father and fiancee were passengers in the vehicle. The claimant was traveling southbound at about fifty-five miles per hour when his vehicle struck a hole located in the southbound lane approximately one to two feet from the white line. Mr. Mullins stated that the weather conditions were clear when his vehicle struck the hole in the pavement. The claimant testified that he was about ten feet away from the hole when he first noticed it, and there were no vehicles around at the time of the incident. Mr. Mullins stated that he traveled on this road about four times a year. Claimant's vehicle sustained damage to two tires, two rims, and the break system totaling $690.91.

The position of the respondent is that it did not have notice of the hole in question on Route 52. The respondent did not call any witnesses.

It is a well-established principle that the State is neither an insurer nor a guarantor of the safety of motorists upon its highways. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). To hold respondent liable, claimant must establish by a preponderance of the evidence that respondent had actual or constructive notice of the road defect at issue and a reasonable amount of time to take corrective action. *Chapman v. Dept. of Highways*, 16 Ct. Cl. 103 (1986); *Pritt v. Dept. of Highways*, 16 Ct. Cl. 8 (1985).

In the instant case, the evidence established that respondent had at least constructive notice of the hole that claimant's vehicle struck, and that the hole presented a hazard to the traveling public on Route 52 in Mingo County. The size of the hole leads the Court to conclude that respondent had notice of this hazardous condition, and respondent had an adequate amount of time to take corrective action. Thus, there is sufficient evidence of negligence to base an award. However, the Court is also of the opinion that claimant was negligent in his operation of the vehicle. Since the incident occurred in the afternoon under clear weather conditions, claimant should have seen the hole in the road ahead of him and he should have been able to drive into the adjacent unoccupied lane. In a comparative negligence jurisdiction such as West Virginia, the negligence of a claimant may reduce or bar recovery in a claim. The Court concludes that the claimant was thirty-percent (30%) negligent. Since the negligence of claimant is not greater than or equal to the negligence of respondent, claimant may recover seventy percent (70%) of the loss sustained.

In accordance with the findings of fact and conclusions of law stated herein above, the Court is of the opinion to and does make an award to claimant in the amount of $483.64.

Award of $483.64.

OPINION ISSUED OCTOBER 29, 2007

STEFANEY A. WILLIAMS
VS.
DEPARTMENT OF ADMINISTRATION
(CC-07-228)

Claimant appeared *pro se*.

James A. Kirby III, General Counsel, for respondent.

PER CURIAM:

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

Claimant seeks $64.80 which was deducted from her payroll checks from April 2005 through March 15, 2007. Claimant states that the "City of Charleston User Fees" were inadvertently deducted from her payroll checks even though she works in Westover, West Virginia. The documentation was not processed for payment within the appropriate fiscal year; therefore, claimant has not been paid. In its Answer, respondent admits the validity of the claim as well as the amount, and states that there were sufficient funds expired in the appropriate fiscal year from which the invoice could have been paid.

Accordingly, the Court makes an award to claimant in the amount of $64.80.

Award of $64.80.

OPINION ISSUED OCTOBER 29, 2007

DONNA E. GRAZIANI
VS.
DIVISION OF MOTOR VEHICLES
(CC-07-229)

Claimant appeared *pro se*.

Ronald R. Brown, Assistant Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice

of Claim and respondent's Answer.

Claimant seeks $228.50 for taxes that she was overcharged when she obtained a West Virginia license plate for her 1992 Toyota Camry on August 15, 2006. Claimant alleges that she should not have been charged for these taxes since the vehicle was purchased in West Virginia.

In its Answer, respondent admits the validity of the claim in the sum of $162.50, rather than in the amount of $228.50. Although the respondent states that its policy is to not provide refunds after six (6) months, it acknowledges that the claimant should not have been overcharged for the taxes. In claimant's reply to respondent's Answer, the claimant admits that the amount of taxes that she was overcharged on August 15, 2006 was in fact $162.50.

Accordingly, the Court makes an award to claimant in the amount of $162.50.

Award of $162.50.

OPINION ISSUED OCTOBER 29, 2007

LUCY RUTHERFORD

VS.

DIVISION OF MOTOR VEHICLES

(CC-07-251)

Claimant appeared *pro se*.

Ronald R. Brown, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks to recover $90.00 in towing expenses which she was charged when her grandson's 1989 Honda was improperly towed due to respondent's failure to update the renewal notice for the vehicle. Since the registration and license plate number did not match, the Ceredo Police towed the vehicle.

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

In view of the foregoing, the Court is of the opinion to and does make an award to claimant in the amount of $90.00.

Award of $90.00.

OPINION ISSUED NOVEMBER 15, 2007

DONALD D. HALL JR.
VS.
DIVISION OF HIGHWAYS
(CC-03-031)

Claimant appeared *pro se*.

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when his 1992 Dodge Caravan struck a man hole cover while he was traveling on an access road located off of Route 19 near Summersville, Nicholas County. The access road off of Route 19 is a road maintained by respondent. The Court is of the opinion to make an award in this claim for the reasons more fully set forth below.

The incident giving rise to this claim occurred at approximately 12:00 p.m. on November 25, 2002, a clear day. The claimant was traveling on a two-lane, unmarked access road located in front of a shopping center in Summersville. As claimant proceeded diagonally through the shopping center's parking lot, he noticed a deep rut on the road and decided to travel on the access road instead. After the claimant turned onto the access road, he struck a manhole cover which was approximately six inches high and five-feet in diameter. Mr. Hall stated that he noticed the manhole cover approximately twenty-feet ahead of his vehicle. Although claimant could have veered to the right of the manhole cover to avoid striking it, he did not expect it would be raised so high above the pavement. The claimant sustained damage to two tires, the vehicle's k-frame, and the vehicle's axle totaling $1,335.00.

The position of the respondent is that it did not have notice of the condition of the manhole cover on the access road off of Route 19. James D. Brown, Assistant County Supervisor for respondent in Nicholas County, testified that the area where the incident occurred was primarily a construction entrance. The respondent had placed barricades over the manhole cover, but the traveling public would frequently remove these barricades. Mr. Brown explained that when the manhole cover was placed in the road, it was level with the surface of the roadway. Even though the access road was maintained by respondent, Mr. Brown stated that the manhole cover was not maintained by respondent. The witness further testified that he did not have knowledge of any other travelers who struck the manhole cover on this access road.

It is a well-established principle that the State is neither an insurer nor a guarantor of the safety of motorists upon its highways. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). To hold respondent liable, claimant must establish by a preponderance of the evidence that respondent had actual or constructive notice of the road defect at issue and a reasonable amount of time to take corrective action. *Chapman*

v. Dept. of Highways, 16 Ct. Cl. 103 (1986); *Pritt v. Dept. of Highways*, 16 Ct. Cl. 8 (1985).

In the instant case, the evidence established that respondent had, at the least, constructive notice of the manhole cover that claimant's vehicle struck, and that it presented a hazard to the traveling public on the access road off of Route 19. It is respondent's position that it did not have the responsibility for maintaining the manhole cover. Nevertheless, the Court finds that the respondent left the manhole cover in a hazardous state since it was at one time level with the road. Thus, there is sufficient evidence of negligence to base an award. The Court is also of the opinion that claimant was negligent in his operation of the vehicle. Since the claimant saw the manhole cover approximately twenty feet ahead of his vehicle, the Court finds that the claimant should have proceeded to the right of the manhole cover in the road. In a comparative negligence jurisdiction such as West Virginia, the negligence of a claimant may reduce or bar recovery in a claim. The Court concludes that the claimant was forty-percent (40%) negligent. Since the negligence of claimant is not greater than or equal to the negligence of respondent, claimant may recover sixty percent (60%) of the loss sustained.

In accordance with the findings of fact and conclusions of law stated herein above, the

Court is of the opinion to and does make an award to claimant in the amount of $801.00.

Award of $801.00.

OPINION ISSUED NOVEMBER 15, 2007

JAMES W. AYERS AND LISA A. AYERS
VS.
DIVISION OF HIGHWAYS
(CC-07-122)

Claimants appeared *pro se*.

Jason C. Workman, Attorney at Law, for respondent.

PER CURIAM:

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

1. On April 9, 2007, claimant was traveling on Glen View Road on Route 54 in Raleigh County, when claimants' 2005 Mitsubishi Eclipse struck a hole in the road causing damage to two rims.

2. Respondent was responsible for the maintenance of Glen View Road, which

it failed to properly maintain on the date of this incident.

3. As a result of this incident, claimants' vehicle sustained damage in the amount of $631.81. Claimants' insurance deductible is $500.00.

4. Claimant and respondent agree that the amount of $500.00 for the damages put forth by claimants is fair and reasonable.

The Court has reviewed the facts of the claim and finds that respondent was negligent in its maintenance of Glen View Road on the date of this incident; that the negligence of respondent was the proximate cause of the damages sustained to claimants' vehicle; and that the amount of the damages agreed to by the parties is fair and reasonable. Thus, claimants may make a recovery for their loss.

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

Award of $500.00.

OPINION ISSUED NOVEMBER 15, 2007

MELVIN R. KESSLER
VS.
DIVISION OF HIGHWAYS
(CC-07-210)

Claimant appeared *pro se*.

Jason C. Workman, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when his 2005 Toyota Seneca van struck a hole while he was traveling on Route 31 between Meadow Bridge and Danese in Fayette County. Route 31 is a road maintained by respondent. The Court is of the opinion to make an award in this claim for the reasons more fully set forth below.

The incident giving rise to this claim occurred between 12:00 p.m. and 1:00 p.m. on July 2, 2007, a clear day. Route 31 is a paved two-lane road with a speed limit of approximately fifty-five miles per hour. While the claimant was proceeding up Pity Me Mountain on Route 31 from Meadow Bridge to Danese at a speed of approximately forty-five miles an hour, he came to a sharp turn in the road and noticed a coal truck traveling towards him that was on the centerline in the road. As the claimant cautiously drove his vehicle closer to the edge of the road to avoid the oncoming truck, his vehicle struck a hole that was approximately one foot and a half wide and three or four inches deep. Since the shoulder of the road was worn and had eroded in certain parts, the claimant stated that he could not have avoided the hole by traveling on the shoulder of the road.

The claimant testified that he traveled on this road approximately four or five times a year. As a result of this incident, the claimant sustained damage to a rim totaling $490.43. The claimant's insurance deductible is $500.00.

The position of the respondent is that it did not have notice of the hole in question on Route 31. The respondent did not call any witnesses.

It is a well-established principle that the State is neither an insurer nor a guarantor of the safety of motorists upon its highways. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). To hold respondent liable, claimant must establish by a preponderance of the evidence that respondent had actual or constructive notice of the road defect at issue and a reasonable amount of time to take corrective action. *Chapman v. Dept. of Highways*, 16 Ct. Cl. 103 (1986); *Pritt v. Dept. of Highways*, 16 Ct. Cl. 8 (1985).

In the instant case, the evidence established that respondent, at the least, had constructive notice of the hole that claimant's vehicle struck, and that the hole presented a hazard to the traveling public on Route 31 in Fayette County. The size of the hole and the time of the year in which claimant's incident occurred leads the Court to conclude that respondent had notice of this hazardous condition, and respondent had an adequate amount of time to take corrective action. Thus, the Court finds respondent negligent, and claimant may make a recovery for the damage to his vehicle.

In accordance with the findings of fact and conclusions of law stated herein above, the Court is of the opinion to and does make an award to claimant in the amount of $490.43

Award of $490.43.

OPINION ISSUED NOVEMBER 15, 2007

MICHELLE D. CLARKSON
VS.
DIVISION OF HIGHWAYS
(CC-07-222)

Claimant appeared *pro se*.

Jason C. Workman, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when her 2006 Nissan Sentra struck a hole while she was traveling on Old Crow Road, which is also known as County Route 119/36, in Beaver, Raleigh County. County Route 119/36 is a road maintained by respondent. The Court is of the opinion to make an award in this claim for the reasons more fully set forth below.

The incident giving rise to this claim occurred on July 6, 2007, at approximately

6:00 p.m. while claimant was traveling on County Route 119/36, which is a one-lane paved road that is located

about one mile from Route 19. The claimant stated that she was traveling to her mother's house and the weather conditions were clear. As the claimant was driving around a sharp curve at a speed of approximately five miles per hour, she saw another vehicle traveling towards her in the opposite direction that was occupying more than half of the paved portion of the roadway. In order to avoid the oncoming vehicle, the claimant veered to her right side of the road, and the vehicle struck a large hole. There were jagged edges around the hole, and the hole was approximately six inches deep and two feet wide. The claimant testified that her vehicle had struck the same hole on another occasion about one year prior to this incident. Claimant sustained towing expenses and damage to a tire totaling $219.12. Claimant's insurance deductible is $500.00.

The position of the respondent is that it did not have notice of the hole in question on County Route 119/36. Dale Hughart, County Administrator for respondent in Raleigh County, stated that County Route 119/36 is a low priority road, and the respondent did not receive any complaints regarding the condition of this road prior to the incident in question.

It is a well-established principle that the State is neither an insurer nor a guarantor of the safety of motorists upon its highways. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). To hold respondent liable, claimant must establish by a preponderance of the evidence that respondent had actual or constructive notice of the road defect at issue and a reasonable amount of time to take corrective action. *Chapman v. Dept. of Highways*, 16 Ct. Cl. 103 (1986); *Pritt v. Dept. of*

Highways, 16 Ct. Cl. 8 (1985).

In the instant case, the evidence established that respondent had, at the least, constructive notice of the hole that claimant's vehicle struck, and that the hole presented a hazard to the traveling public on County Route 119/36 in Raleigh County. The size of the hole leads the Court to conclude that respondent had notice of this hazardous condition, and respondent had an adequate amount of time to take corrective action. Thus, there is sufficient evidence of negligence upon which to base an award.

In accordance with the findings of fact and conclusions of law stated herein above, the

Court is of the opinion to and does make an award to claimant in the amount of $219.12.

Award of $219.12

OPINION ISSUED NOVEMBER 19, 2007

MARJORIE GREEN

VS.

STATE OF WEST VIRGINIA

(CC-07-084)

Lonnie C. Simmons and Heather M. Langeland, Attorneys at Law, for claimant.

Ronald R. Brown and Gretchen Murphy, Assistant Attorneys General, for respondent.

PER CURIAM:

This claim came before the Court upon oral argument of respondent's Motion to Dismiss. At the hearing, the attorneys agreed that there were no additional facts which would be presented in a further proceeding. Therefore, the parties conceded that the claim is now submitted to the Court for determination upon the merits through the Motion. The Court, having reviewed the transcript of the hearing, the briefs filed by the parties, and the documentation submitted with the claim, has determined to grant the respondent's Motion to Dismiss for the reasons more fully stated below.

On September 19, 2004, claimant was traveling in the eastbound lane on Route 50 near Augusta, Hampshire County, when the claimant's vehicle collided with a vehicle being driven by Rhonda Dante which had stopped in front of her. That driver (Dante) was delayed in making a left turn because there was a procession of motorcycles traveling in the westbound lane. The collision pushed the Dante vehicle into the opposite lane where it collided with a motorcycle. As a result of the collision, the passenger (Kaitlyn Marie Dante) in the stopped vehicle and a motorcyclist (Janeann Moore Stehle) were killed. It was uncontested that the collision was caused, at minimum, by the claimant's failure to keep a proper watch on the road.

On January 4, 2005, a Hampshire County grand jury indicted the claimant on two counts of negligent homicide.[5] A Hampshire County jury convicted claimant on both

[5]The indictment stated as follows: Indictment for two misdemeanors
First Count- Negligent Homicide The Grand Jurors of the State of West Virginia, in and for the body of the County of Hampshire, upon their oaths present that MARJORIE VIRGINIA GREEN did commit the offense of negligent homicide in that she did, on September 19, 2004, in the said county of Hampshire, unlawfully drive and operate a motor vehicle in this State in reckless disregard for the safety of others and, by such driving and operation, did cause bodily injury to Kaitlyn Marie Dante, which bodily injury proximately resulted in the death of the said Kaitlyn Marie Dante, in violation of Chapter 17C, Article 5, Section 1(a), of the West Virginia Code, as amended, against the peace and dignity of the State.

Second Count- Negligent Homicide

The Grand Jurors, upon their oaths, do further present that MARJORIE VIRGINIA GREEN did commit the offense of negligent homicide in that she did, on September 19, 2004, in the said county of Hampshire, unlawfully drive and operate a motor vehicle in this State in reckless disregard for the safety of others and, by such driving and operation, did cause bodily injury to Janeann Moore Stehle, which bodily injury proximately resulted in the death of the said Janeann Moore Stehle, in violation of Chapter 17C, Article 5, Section 1(a) of the West Virginia Code, as amended, against

counts. The Honorable Judge Donald H. Cookman entered an order on February 7, 2006, wherein the claimant was sentenced to serve one year in prison on each count, with the sentences to be served consecutively. Although Judge Cookman stayed the execution of the sentence pending an appeal, he revoked the claimant's bond. Consequently, the claimant was incarcerated in the Potomac Highlands Regional Jail. The guilty verdict was subsequently appealed to the West Virginia Supreme Court.

On February 21, 2007, the West Virginia Supreme Court reversed the negligent homicide convictions and found as a matter of law that there was insufficient evidence to convince a reasonable person of claimant's guilt beyond a reasonable doubt. *State v. Green*, ___ W.Va. ___, 647 S.E.2d 736, 746-47 (2007).[6] However, the Supreme Court stated, in *dicta*, the following:

From this Court's review of the record, in a light most favorable to the State, it is apparent that the Appellant failed to keep a proper watch on the highway in front of her, resulting in her inability to avoid a collision with the Dante vehicle, in violation of West Virginia Code § 17C-6-1(a) (2003) (Repl.Vol.2004). It is likewise apparent that the Appellant was operating her vehicle at a speed above the applicable speed limit, in violation of West Virginia Code §17C-6-1(b). The evidence also indicates that the collision was so violent as to be characterized as an explosion, sending pieces of metal and glass thirty feet in the air. There were no skid marks at the point of impact, indicating that the Appellant did not brake significantly prior to impact. The State maintained that the Appellant failed to take any measures to mitigate the seriousness of the collision and drove, full speed, into the rear of Mrs. Dante's vehicle. *Id.* at 747.

Thereafter, the claimant filed the instant claim for unjust conviction and imprisonment pursuant to West Virginia Code § 14-2-13a.

In order to recover damages under W. Va. Code § 14-2-13a, the claimant must establish by clear and convincing evidence that she is "innocent" within the meaning of the statute.[7] First, the claimant must demonstrate that she was convicted of a crime where

---

the peace and dignity of the State.

[6] The Supreme Court held, "A conviction for negligent homicide must not be premised solely upon the violation of a traffic statute unless the underlying act which constitutes the violation or accompanying circumstances evidence a reckless disregard for the safety of others, characterized by negligence so gross, wanton, and culpable as to show a reckless disregard for human life." *Id.* at 746-47.

[7] In particular, the claimant must comply with the requirements in (e)(2) and (e)(3) of W.Va. Code § 14-2-13a which are as follows:

> (e) The claim shall state facts in sufficient detail to permit the court to find that claimant is likely to succeed at trial in proving that...
> (2) in the case of an unjust conviction and imprisonment that [s]he did not commit any of the acts charged in the accusatory instrument or [her] acts or omissions charged in the accusatory instrument did not constitute a felony or misdemeanor against the State, and
> (3) [s]he did not by [her] own conduct cause or bring about [her] conviction.

Furthermore, the claimant must satisfy W.Va. Code §14-2-13a(f), which states:

she was sentenced and has served a term of imprisonment, and the conviction was subsequently reversed. W.Va. Code § 14-2-13a(f)(2)-(3)(B). Second, the claimant must prove that she did not commit any of the acts charged in the accusatory instrument or her acts or omissions charged in the accusatory instrument did not constitute a felony or misdemeanor. W.Va. Code § 14-2-13a(f)(4). Third, the claimant must show that she did not by her own conduct cause or bring about her conviction. W.Va. Code § 14-2-13a(f)(5).

The claimant contends that in the instant case, *Simmons v. State* is dispositive in interpreting W.Va. Code § 14-2-13a. ___ N.Y.S.2d ___, 2007 WL 2390710 (N.Y.Ct.Cl. 2007). The Court notes that West Virginia's unjust arrest statute mirrors the New York Unjust Conviction and Imprisonment Act § 8-b.[8] In *Simmons*, the State of

---

(f) In order to obtain a judgment in [her] favor, claimant must prove by clear and convincing evidence that:
(1) [She] has been arrested and imprisoned, or both arrested and imprisoned, and charged by warrant, information or indictment for one or more felonies, and that the charges were dismissed against [her] when another person was subsequently charged, arrested and convicted of the same felony or felonies;
(2) [She] has been convicted of one or more felonies or misdemeanors against the state and subsequently sentenced to a term of imprisonment, and has served all or any part of the sentence; or
(3) (A) [She] has been pardoned upon the ground of innocence of the crime or crimes for which [s]he was sentenced and which are the grounds for the complaint; or
(B) [her] judgment of conviction was reversed or vacated, and the accusatory
instrument dismissed, or if a new trial was ordered, either [s]he was found not guilty at the new trial or [s]he was not retried and the accusatory instrument dismissed; or
(C) the statute or application thereof, on which the accusatory instrument was based violated the constitution of the United States or the state of West Virginia;
(4) [S]he did not commit any of the acts charged in the accusatory instrument or [her] acts or omissions charged in the accusatory instrument did not constitute a felony or misdemeanor against the state; and
(5) [She] did not by [her] own conduct cause or bring about [her] conviction.

[8] The New York Court of Claims Act § 8-b(5) provides:
(5) In order to obtain a judgment in [her] favor, claimant must prove by clear and convincing evidence that:
(a) [s]he has been convicted of one or more felonies or misdemeanors against the state and subsequently sentenced to a term of imprisonment, and has served all or any part of the sentence; and
(b) (i) [s]he has been pardoned upon the ground of innocence of the crime or crimes for which [s]he was sentenced and which are the grounds for the complaint; or

New York moved to dismiss a claim for wrongful arrest and imprisonment that was brought under New York's Court of Claims Act § 8-b. *Id.* The claimant was convicted of negligent homicide as well as various traffic offenses arising out of the death of a baby. Claimant was sentenced to six months in jail, five years probation and his driver's license was revoked for one year.[9] *Id.*

On appeal, the court reversed claimant's conviction for negligent homicide. *Id.* The New York Court of Claims found that the claim stated facts in sufficient detail to find that the claimant was likely to succeed at trial in establishing that the acts charged in the accusatory instrument did not constitute a felony or misdemeanor,[10] and that he did not by his own conduct bring about his conviction pursuant to the New York Court of Claims Act § 8-b. *Id.*

Although the Court finds *Simmons* to be noteworthy, the Court is of the opinion that *Reed v. State*, 574 N.E.2d 433 (N.Y. 1991), the seminal case on unjust arrest in New York, is more dispositive of the issues presented here. In *Reed*, the claimant was convicted of first-degree manslaughter and served three years and eight months in prison.

> (ii) [her] judgment of conviction was reversed or vacated, and the accusatory instrument dismissed or, if a new trial was ordered, either [s]he was found not guilty at the new trial or [s]he was not retried and the accusatory instrument dismissed; provided that judgement of conviction was reversed or vacated, and the accusatory instrument dismissed, on any of the following grounds: (A) paragraph (a), (b), (c), (e), or (g) of subdivision one of section 440.10 of the criminal procedure law; or (B) subdivision one (where based upon grounds set forth in item (A) hereof), two, three (where the count dismissed was the sole basis for the imprisonment complained of) or five of section 470.20 of the criminal procedure law; or (C) comparable provisions of the former code of criminal procedure or subsequent law; or (D) the statue, or application thereof, on which the accusatory instrument was based violated the constitution of the United States or the state of New York; and
>
> (c) [s]he did not commit any of the acts charged in the accusatory instrument or [her] acts or omissions charged in the accusatory instrument did not constitute a felony or misdemeanor against the state; and
>
> (d) [s]he did not by [her] own conduct cause or bring about [her] conviction.

[9] Claimant was convicted of (1) criminally negligent homicide (Penal Law §125.10); (2) operation of a motor vehicle at imprudent speed (Vehicle and Traffic Law § 1180(a)); (3) failure to stop at a stop sign (Vehicle and Traffic Law § 1172(a)); and (4) failure to keep right (Vehicle and Traffic Law § 1120(a)). *Id.*

[10] The Court found that all of the other offenses in the accusatory instrument, including those for which he was found guilty: operation of a motor vehicle at imprudent speed (Vehicle and Traffic Law § 1180[a]), failure to stop at a stop sign (Vehicle and Traffic Law § 1172[a]), and failure to keep right (Vehicle and Traffic Law §1120[a]), are infractions (Vehicle and Traffic Law § 1101) and do not constitute a felony or misdemeanor. *Id.*

574 N.E.2d at 434. The Court of Appeals of New York reversed her conviction based on the legal insufficiency of the evidence. *Id.* When the claimant presented her claim for unjust imprisonment in the New York Court of Claims, the court granted summary judgment for the claimant on the issue of liability based on the Court of Appeals' dismissal of the indictment. *Id.* The Court of Claims concluded that the claimant retained the presumption of innocence and had met her burden of proof. The Court of Appeals affirmed the decision, a trial on damages was held, and a judgment was entered for the claimant. *Id.*

However, the Court of Appeals subsequently reversed its prior decision. *Id.* at 435. In reversing its decision and dismissing the claim, the New York Court of Appeals relied on the legislative history of the New York Court of Claims Act § 8-b, particularly the report of the Law Revision Commission. *Id.* at 437. The Commission noted: In addition to the fact of reversal or vacating, it will still be necessary to state facts which will establish innocence; failure to do so will result in dismissal of the claim. The Commission anticipated that most claims would not survive a motion to dismiss. It acknowledged that putting the burden of proof on claimant 'places one in a difficult position' of proving a negative, but the Commission believed it was appropriate to do so. *Id.*

The Court of Appeals found that although Court of Claims Act § 8-b(3)(b)(ii) requires the claimant to prove that the conviction was reversed or vacated and the accusatory instrument dismissed, satisfying this one element is insufficient to establish the claimant's right to recover. *Id.* at 436. The Appeals Court stated, "If satisfying this one element itself established the claimant's right to recover, then the succeeding two sections of the statute - setting forth what the claimant must do to overcome a motion to dismiss and prevail upon the merits - would be superfluous." *Id.* The Appeals Court further stated, "[w]e will not construe the statute in a way that renders two of its sections superfluous."[11] *Id.*

In the instant case, the claimant has met the first requirement in West Virginia Code §14-2-13a(f)(2) by establishing that on August 25, 2006, a Hampshire County jury convicted Ms. Green of two counts of negligent homicide. The claimant has also demonstrated that she was sentenced to a term of imprisonment of one year on each count that she was charged with in the indictment, as required under the statute. Under W.Va. Code §14-2-13a(f)(3)(B), the claimant has met her burden of establishing that her conviction was subsequently reversed by the West Virginia Supreme Court of Appeals due to the insufficiency of the evidence. *State v. Green,* ___ W.Va. ___, 647 S.E.2d 736 (2007).

---

[11] *See also Mike v. State*, 808 N.Y.S.2d 537, 542 (N.Y. Ct. Cl. 2005) (dismissing claimant's unjust arrest claim and stating that although the claimant's conviction for third degree criminal sale of a controlled substance was reversed, the New York Court of Appeals did not determine that the claimant was innocent of the charges, but rather the prosecution failed to prove the key elements of the charges"); *Chandler v. State*, 641 N.E.2d 1382,1386 (Ohio Ct. App. 1994) (dismissing claimant's unjust arrest claim and stating, "As a general rule, a verdict or judgment of acquittal in a criminal trial is a determination that the state has not met its burden of proof on the essential elements of the crime. It is not necessarily a finding that the accused is *innocent*").

Nevertheless, the Court finds that the claimant has failed to satisfy W.Va. Code § 14-2-13a(f)(4), which requires a showing that "[s]he did not commit any of the acts charged in the accusatory instrument or [her] acts or omissions charged in the accusatory instrument did not constitute a felony or misdemeanor against the state." Although the Supreme Court acquitted the claimant of her negligent homicide conviction, this finding establishes that the prosecution failed to prove claimant's guilt beyond a reasonable doubt. However, as in *Reed*, the reversal of a criminal conviction alone will not satisfy the claimant's burden of showing by clear and convincing evidence that she did not commit the acts for which she was charged in the accusatory instrument or her acts or omissions charged in the accusatory instrument did not constitute a felony or misdemeanor. 574 N.E.2d at 436.

At the hearing, counsel for the claimant stated that there were no additional facts besides those stated in *State v. Green* which would be presented in a further proceeding. *State v. Green*, ___ W.Va. ___, 647 S.E.2d 736 (2007). In essence, claimant is attempting to rely wholly on the reversal of her criminal conviction. Although this establishes one element of her case in chief, claimant has not demonstrated by clear and convincing evidence that she did not commit any of the acts with which she was charged in the accusatory instrument or her acts or omissions charged in the accusatory instrument did not constitute a felony or misdemeanor pursuant to W.Va. Code § 14-2-13a(f)(4). Since the claimant has failed to meet this element, the Court need not consider whether the claimant's conduct caused or brought about her conviction pursuant to W.Va. Code § 14-2-13a(f)(5).

Accordingly, the Court is of the opinion to and does hereby grant respondent's Motion to Dismiss.

Claim dismissed.

OPINION ISSUED DECEMBER 7,2007

MARILYN CLEAVENGER
VS.
DIVISION OF HIGHWAYS
(CC-04-303)

Otis R. Mann Jr., Attorney at Law, for claimant.

Jason C. Workman, Attorney at Law, for respondent.

FORDHAM, JUDGE:

Claimant brought this action for vehicle damage which occurred when her 2002 Saturn Ion Quad Coupe struck water on Heizer Creek Road in Putnam County. The Court is of the opinion to deny this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 1:00 a.m. on

November 20, 2003, as claimant was returning from shooting pool at Denver's Depot in Charleston. On her way home, claimant noticed that respondent had placed barricades and rope to block Manila Creek Road due to the flooding and heavy fog. After finding the road blocked off, claimant took another route home. She proceeded on Heizer Creek Road, which is a two-lane paved road with a speed limit of thirty miles per hour. The low-lying fog affected claimant's visibility, and she did not realize that the bridge on Heizer Creek Road had flooded. As she proceeded towards the bridge at a speed of thirty-five miles per hour, her vehicle struck water on the road. Claimant stated that her vehicle floated in water that was approximately five feet deep. However, claimant managed to crawl out of one of her vehicle's windows and swim to safety. Then, claimant called her neighbor, Larry Allen Cavender, for assistance. Claimant stated that the vehicle was towed out of the water twelve hours after the incident occurred.

Claimant's vehicle was totaled in this incident, and her insurance company paid the fair market value of the vehicle, which is $14,922.50. However, claimant's loss also includes the numerous personal belongings and work supplies she carried in her vehicle. Since claimant worked for an insurance company, she carried gift packets and incentives valued at $178.53. Other items which claimant lost as a result of this incident include work supplies ($54.90), cleaning supplies ($98.02), binders ($13.49), a compact disc case ($13.75), a plug for her cellular telephone ($20.14), a radar detector ($59.87), and miscellaneous items ($1,125.00). Thus, the total amount of loss claimant sustained is $22,008.86.

Claimant contends that respondent failed to provide adequate warnings to the traveling public on Heizer Creek Road. Larry Allen Cavender, claimant's neighbor who assisted her on the day of the incident in question, testified that the fog laid so low on the road that he could not see the water. When Mr. Cavender drove from his house to the bridge, he did not notice any signs warning the public of the flooding on the road near the bridge. Mr. Cavender stated that he has lived in the Heizer Creek area all of his life, and he could not remember the bridge ever flooding.

It is respondent's position that it placed warning signs properly on Heizer Creek Road. Daniel Shawn West, who works for the Poca Community Volunteer Fire Department, stated that numerous residents called concerning the high water in the area. Mr. West monitored the roads in Putnam County and assisted respondent in ensuring that the high water did not cause a hazard to the traveling public. Since Mr. West was concerned about the high water on the road, he called respondent to place a sign in that area. Mr. West monitored traffic until respondent arrived to place a warning sign on the road.

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

In the instant case, the Court is of the opinion that respondent is not liable for the conditions on Heizer Creek Road. Claimant has the burden of proof of demonstrating that respondent had actual or constructive notice of the hazardous conditions. Although respondent had actual notice of the conditions on the road, the Court finds that respondent took corrective action to prevent harm to the traveling public on Heizer Creek Road. Mr. West's testimony demonstrates that he worked, in

collaboration with respondent, to take adequate measures to protect the traveling public from the high water on Heizer Creek Road. Claimant stated that she never saw a sign in the area in question. However, based on Mr. West's testimony, the Court finds that respondent had placed a sign to warn the public of the hazardous conditions on the road. Although the Court is sympathetic to claimant's plight, there is insufficient evidence of negligence on the part of respondent upon which to justify an award.

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

Claim disallowed.

OPINION ISSUED DECEMBER 7, 2007

ALESIA G. CARTE
VS.
DIVISION OF HIGHWAYS
(CC-04-356)

Claimant appeared *pro se*.

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

PER CURIAM:

Claimant brought this action for water damage to her property which she alleges was caused by respondent's failure to place proper drains and its negligent maintenance of the drainage ditch line on Big Fork Road in Elkview, Kanawha County. Big Fork Road is a road maintained by respondent. The Court is of the opinion to deny this claim for the reasons more fully stated below.

Claimant's one acre property, which is located on Big Fork Road, is situated between a creek and a hill side. Respondent's ditch line runs on the opposite side of the road from claimant's house. The closest drain to claimant's property is located to the east of claimant's property. Although claimant purchased the mobile home where she currently resides on Big Fork Road in 1982, she has lived on Big Fork Road all of her life.[12] Claimant stated that the drainage problems have existed for the last forty years, but in the last two or three years, the water damage to her property has worsened. In particular, claimant indicated that there were two events where the heavy rains flooded her property: in May of 2004 and in July of 2005.

Claimant stated that whenever it rains, water runs down the middle of the road and flows onto her yard. Claimant explained that respondent has failed to clean out the ditches in the area which prevents the water from draining properly. Although in 2005,

[12] Claimant stated that before living in her current mobile home, her former dwelling on Big Fork Road was destroyed when a private drain collapsed causing severe water damage to the residence.

the State placed a drain at the foot of the hill above her property, the flooding still persists. Claimant stated that if there were another ditch in place, the ditch would have prevented the water and mud from accumulating on the road and flowing onto her property.

Claimant presented photographs as evidence depicting the damage to her property caused by the heavy rains in May of 2004 and in July of 2005. During the May 2004 incident, claimant explained that it had been raining for several days and she called respondent to clean the ditch because water was flooding onto her property. The photographs demonstrate that, as a result of the rain, approximately one foot of mud, dirt, and rocks covered her driveway, yard and approximately one hundred feet of Big Fork Road. The water and mud flowed underneath her mobile home, causing damage to the mobile home's underpinning. The wood on claimant's porch rotted and portions of the kitchen floor were destroyed as a result of the water.

Claimant sustained similar damages during the incident in July of 2005. On this occasion, claimant stated that it had been raining heavily for a couple of days. As a result of the rain, a large amount of mud, rocks, and water covered Big Fork Road, her driveway, and her yard. The moisture caused considerable mold and mildew damage to claimant's porch and kitchen.

Claimant submitted as evidence a construction estimate which stated that the cost of labor to replace the damaged floors, electrical wiring, insulation and underpinning, and the front and back porch amounts to $10,720.00. The cost of materials to replace the damaged areas on her property equals $5,853.71. Thus, claimant's loss totals $16,573.71. Claimant did not have insurance coverage for her loss.

Jack W. Larch, a neighbor of the claimant, testified that almost every time it rains, he would help claimant clean out the ditch line on Big Fork Road. Carl W. Dolan lives next door to claimant and testified that he has lived in the area near Big Fork Road for the last fifty years and is familiar with the drainage problems on Big Fork Road. Mr. Dolan presented a diagram to the Court which depicted the location of the drains on Big Fork Road. He explained that the main ditch line, located behind Big Fork Road, has not been properly maintained. Since the low spot on the road is between Mr. Dolan's residence and claimant's residence, the water and debris build up in this area. The large amounts of mud, water, and debris that run off the hill causes the drains to clog very quickly. Although the State placed a new drain to alleviate the flooding, the amount of water flowing from the hill side and from the hollows in this area still overwhelms the State maintained drains. Neighbors in the area have installed private drains, but this has exacerbated the problem because these drains have subsequently collapsed and caused further flooding on Big Fork Road. In order to resolve the water drainage problem, Mr. Dolan opined that respondent would need to place a larger drain near claimant's property.

It is respondent's position that the proximate cause of claimant's flooding problem is the layout of the land, and not respondent's failure to maintain the drainage line and ditches near Big Fork Road. James Robinson, crew supervisor for respondent, testified that he cleaned the ditches that were clogged and put a new ditch in the area during the heavy flooding in May of 2004. In July of 2005, Mr. Robinson did not have any equipment with him to clean the road, but he reported to respondent that the drainage pipes needed to be cleaned. Mr. Robinson stated that the eighteen inch pipe which is currently in place is capable of carrying the water that comes down the ditch line, but it must be routinely maintained. Mr. Robinson testified that respondent performs routine maintenance on Big Fork Road each year.

Douglas W. Kirk, a civil engineer for respondent, testified that he visited claimant's property on January 29, 2007, and on September 25, 2007, to determine the cause of the significant moisture on claimant's residence. During his visit on September 25, 2007, Mr. Kirk noticed that claimant's yard was saturated even though there was a drought during the summer. Mr. Kirk testified that the property is located between a steep hill side and a creek at a fairly low elevation. He stated that ground water naturally flows from the hill side to the creek, causing the ground to be wet. This layout of the land significantly contributes to the moisture in the area. Also, the ground elevation is in a slight depression, which enables the land to retain the surface water for a longer period of time. In addition, water pouring from the septic system also contributes to the moisture on claimant's property.

The Court previously has held that respondent has a duty to provide adequate drainage of surface water, and that drainage systems must be maintained in a reasonable state of repair. *Haught v. Dept. of Highways*, 21 Ct. Cl. 237 (1980). To hold respondent liable for damages caused by an inadequate drainage system, claimants must prove that respondent had actual or constructive notice of the existence of the inadequate drainage system and had a reasonable amount of time to take corrective action. *Orsburn v. Div. of Highways*, 18 Ct. Cl. 125 (1991); *Ashworth v. Div. of Highways*, 19 Ct. Cl. 189 (1993); *Harrah v. Division of Highways*, 24 Ct. Cl. 326 (2003).

The Court, after a careful review of the evidence in this claim, is of the opinion that a combination of factors contributed to the flooding and water damage on claimant's property. The Court finds that the lay of the land between a hill side and a creek is one of the causes of the persistent moisture on claimant's residence. The consistent flow of groundwater onto claimant's property, coupled with the failure of claimant's neighbors to maintain their private drains in this area, has exacerbated the flooding problems. The evidence establishes that the mold, mildew, and rotting wood on claimant's property were the result of continuous exposure to moisture, rather than the occasional storms in May of 2004 and July of 2005. Although the Court finds that these incidents contributed to the amount of water on claimant's property, the evidence demonstrates that this area has been prone to flooding for the last forty years. The Court finds that claimant has not satisfied her burden of proving that respondent's negligent maintenance of the drainage line and ditches was the proximate cause of the flooding problems on Big Fork Road. Although the Court is sympathetic to claimant's plight, there is insufficient evidence of negligence upon which to base an award.

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

Claim disallowed.

OPINION ISSUED DECEMBER 7, 2007

ADELPHOI VILLAGE INC.
VS.
DEPARTMENT OF EDUCATION
(CC-06-251)

Gordon H. Copland, Attorney at Law, for Claimant.

Ronald R. Brown, Assistant Attorney General, and Sherri D. Goodman, Attorney at Law, for Respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer. Claimant seeks payment in the amount of $31,270.00 from the respondent for educational and treatment services which it provided to certain juveniles referred to it by various governmental entities during the 2005-2006 fiscal year (from July 1, 2005 to June 30, 2006). In its Answer, the respondent admitted that the portion of the claim in the amount of $17,700.00 for services rendered from January 2006 through June 2006, may be paid if claimant establishes that there was a contract in place on January 3, 2006. The issue before the Court is whether the claimant is entitled to recover both the $17,700.00 and the remaining amount of the claim in the amount $13,570.00, which includes the cost of services provided to juveniles on behalf of the State from August 2005 through December 2005. The Court, having reviewed the transcript of the hearing, the briefs filed by the parties, and documentation submitted with the claim, is of the opinion to make an award in the amount of $31, 270.00 for the reasons more fully set forth below.

The claimant is a nonprofit agency in the State of Pennsylvania which has a longstanding history of providing educational and treatment services to court-placed and dependent youth. The respondent does not seek the claimant's services, but rather the Department of Health and Human Resources ("DHHR"), county probation officers, and judges refer juveniles for specialized services provided by claimant which are not available in West Virginia. The respondent is responsible for paying for the special education costs incurred for these juveniles who are placed in out-of-state facilities if the juveniles are in the legal custody of the DHHR and if they have disabilities under the Individuals with Disabilities Education Act.

The claimant contends that the respondent would be unjustly enriched if it was not required to pay for the full amount of the services which it provided on behalf of the State. In addition, it is claimant's position that it was never required by respondent to submit or execute its contract prior to the beginning of the fiscal year. The claimant states that it has never submitted its contracts prior to the start of the fiscal year in the past, and it always received payment for the full amount for its services. Thus, the claimant anticipated that it would receive payment for the services it rendered to juveniles on behalf of the State when it sent the executed contract to respondent on May 26, 2006, which was one month prior to the close of the 2005-2006 fiscal year.

Respondent avers that the claimant has unclean hands and should be denied recovery because it continuously refused to comply with the respondent's requirement that there be an annual contract in place before payment would be rendered to claimant for its services. Respondent sent a letter to claimant on March 15, 2004, which stated that the respondent would not process invoices without a signed agreement in place. In addition, the contract renewal package was mailed to the claimant in April 2005; faxed in August 2005; mailed in October 2005; mailed in January 2006; and an e-mail was sent to the claimant in April 2006 to remind it that the contract had still not been received.

Judy Rutter, chief administrative officer for claimant, testified for claimant that

respondent was sent an executed contract for the 2005-2006 fiscal year on three occasions. First, the claimant sent a signed contract to the respondent at least by January 3, 2006. Second, an undated copy of the contract was placed in the claimant's file, which was pursuant to the claimant's standard business practice and demonstrates that the document was mailed to the respondent. Third, an executed contract was sent to the respondent on May 26, 2006, via certified mail.

During the 2004-2005 fiscal year, Ms. Rutter stated that even though the respondent received claimant's contract on October 28, 2004, which was after the start of the fiscal year, the claimant was still paid for the entire fiscal year. However, the contract was not processed until December 13, 2004. Therefore, the respondent also bears some of the responsibility for the administrative delays.

Ghaski Browning, Special Education Coordinator in the Office of Assessment and Accountability, testified for respondent that she does not have the authority to process an invoice to the Finance Department without first receiving a contract that had been approved by the Purchasing Division. Ms. Browning stated that a contract package was originally sent to claimant in April 2005 and should have been returned by May 2005 to enable the respondent to have the contract by July 1, 2005, before the beginning of the school year. Ms. Browning stated that despite the respondent's multiple attempts to send a contract to claimant, a properly executed contract was not received until May 31, 2006.

Phillip Uy, Assistant Director in the Office of Internal Operations, testified that if the respondent routinely authorized payment for services when there was no contract, then it would be violating its fiduciary responsibilities and it would be penalized in the event of an audit. Since the respondent did not receive a properly executed contract until May 2006, the respondent contends that the claimant should be limited to receiving payment for services rendered from the beginning of May 2006 through June 2006.

The Court finds that principles of equity and fairness require that the claimant be compensated for the services it provided to the State. West Virginia Code §14-2-13(1) provides that the Court has jurisdiction to hear all claims which the state should in equity and good conscience discharge and pay. "Unjust enrichment of a person occurs when he has and retains money or benefits which in justice and equity belong to another . . . The benefit may be an interest in money, land, chattels, or choses in action; beneficial services conferred; satisfaction of a debt or duty owed by him; or anything which adds to his security or advantage." *Dunlap v. Hinkle,* 317 S.E.2d 508, 512 (W.Va. 1984).

The Court is of the opinion that the respondent would be unjustly enriched if the claimant was denied full payment for its services during the 2005-2006 fiscal year. Here, the benefit of the claimant's services has already been received by the State. The Court finds that it would be contrary to equity and good conscience to withhold payment to the claimant for services rendered from January 2006 to June 2006 in the amount of $17,700.00, and for services rendered from August 2005 through December 2005 in amount of $13,570.00. Thus, the Court finds that the claimant is entitled to payment for the full amount of the claim.

In view of the foregoing, the Court is of the opinion to and does make an award to the claimant in the amount of $31,270.00.

Award of $31,270.00.

OPINION ISSUED JANUARY 10, 2008

DALLAS MAY JR.
VS.
DIVISION OF HIGHWAYS
(CC-05-056)

William T. Forester, Attorney at Law, for claimant.

Andrew F. Tarr and Jason C. Workman, Attorneys at Law, for respondent.

PER CURIAM:

Claimant brought this action for vehicle damage and for personal injuries which resulted when a tree fell on Route 52 in Mingo County. The Court is of the opinion to deny this claim for the reasons set forth below.

The incident giving rise to this claim occurred during a period of good weather at approximately 1:00 p.m. on February 11, 2003. Route 52 is a road maintained by respondent. The speed limit on this road is fifty-five miles per hour. On the day in question, as claimant was traveling north from Varney to Fort Gay on Route 52 in his1999 Ford Explorer at or near the speed limit, the crown of a tree fell from a rock-cut high wall adjacent to the roadway. Claimant stated that he did not notice that the crown of the tree was falling until immediately before the impact with his vehicle. Thus, he did not have an opportunity to accelerate or stop his vehicle to avoid the tree.

Andrew Harmon, the only passenger in the vehicle, testified that claimant swerved his vehicle into the left lane of traffic to avoid hitting the tree. Despite claimant's attempt to avoid the tree, a limb struck the driver's side of the vehicle. Mr. Harmon stated that he became unconscious, but he recalled that volunteer firemen came to their assistance shortly after the incident.

As a result, claimant's vehicle was totaled, and he sustained medical bills in excess of $200,000.00. Claimant asserts that respondent knew or should have known that the tree was rotten and that by allowing it to stand over or near the highway, the tree presented a hazardous condition to the traveling public. The tree was located approximately six feet off respondent's forty-foot right-of-way. Claimant contends that even though the tree is not within respondent's forty foot right-of-way, it is situated on a rock-cut high wall that is maintained and controlled by respondent. Thus, claimant alleges that respondent is liable for the damage caused by this tree.

During the hearing, claimant presented the expert testimony of consulting forester Daniel Parker. Mr. Parker has extensive experience in identifying potential danger trees. He explained that the tree in question is a white oak tree that continues to live, sans its crown, on the top of the edge of a high wall on Route 52. The tree is a medium sized, saw timber tree that is approximately sixteen inches in diameter. Mr. Parker explained that a white oak tree can have a life span of five hundred years, and the tree in question appears to be fifty to eighty years old. Claimant stated that generally, white oak trees are very resilient and not subject to rot compared to other trees.

Mr. Parker explained that it would have been possible to identify this tree as a danger tree prior to this incident because of the tree's juxtaposition to the road. In this case, there are two large white oak trees, including the one that fell, that are standing next

to each other on the top of this particular cliff. Mr. Parker stated that both of these trees pose an imminent threat of falling on the road. In his report, Mr. Parker explained that any reasonable person would assume that it and all trees in similar circumstances have the potential to fall on the highway. He stated that trees located in such an area would be reaching for sunlight over the top of the road.

In addition, Mr. Parker stated that the tree in question was rotten at a point high on its trunk. Mr. Parker, as an expert, immediately recognized that the tree was rotten from the highway. After climbing up the cliff to view the tree, he stated that a reasonable person standing at the base of the tree would recognize that the tree was rotten to the core. However, he stated that the tree may have appeared more alive in 2003 than it did when he conducted his investigation which was four years after the incident.

Mr. Parker testified that a tree can be rotten and still be alive. In this case, he stated that the base of the tree could have been damaged by a wild fire. He observed that a limb that hangs over the highway still has green leaves on it. Despite the fact that this limb is alive, Mr. Parker believes that the roots of the tree are dying. Therefore, Mr. Parker stated that it is likely that the tree will eventually fall again.

Since the crown of this particular tree fell in the middle of the day and weather was not a factor, Mr. Parker believes that there must have been a significant amount of rot on the inside of the tree. Mr. Parker stated that it is unlikely that installation of the rock wall caused this tree to fall. He stated that this particular tree either did not exist when the high wall was created during construction on the road or was a very small tree at the time. The rot was most likely caused by an injury that occurred twenty feet up the main trunk of the tree. Mr. Parker believes that the rot could have been caused by lightening, or it could have been the result of construction damage resulting from the installation or maintenance of the utility line located behind the tree. This damage could have occurred decades prior to the incident herein. Mr. Parker explained that prior to the time of the incident, loose bark would probably have been visible from the road. However, the damage to the base of the tree and the damage to the trunk would not have been in plain view from the highway.

The position of the respondent is that it did not have actual or constructive notice that the tree that struck claimant's vehicle posed a risk to the traveling public prior to the time of claimant's incident. Respondent states that the remaining portion of the tree that fell still had green leaves and appeared to be a live tree. In addition, respondent avers that the tree is located off of its right-of-way. Respondent states that it cannot be found liable for every tree along the road side that has the potential of creating a hazard to the traveling public.

Joshua Albert Hunt, the firefighter for the Kermit Volunteer Fire Department that responded to the incident in question, observed that the top portion of the tree was lying through the windshield of a Ford Explorer. He testified that the vehicle was located against the guardrail on the road. Since the tree was situated on the hood of the vehicle, it did not occupy the entire width of the road. The bottom portion of the tree remained standing on the hill. Mr. Hunt explained that he stabilized the patient inside the vehicle, and then removed the tree from the road. As he cut the crown of the tree in order to remove it, he noticed that the crown had hard wood that was not rotted.

Larry Michael Vasarhelyi, Chief Investigator for respondent's Legal Division, testified that he visited the site of this incident on September 27, 2007. Mr. Vasarhelyi described Route 52 as a two-lane priority road. Respondent submitted as evidence photographs indicating the location of the incident on Route 52. Mr. Vasarhelyi stated

that the photographs indicate that the remaining portion of the tree is located in the center of two jagged rock edges, and there is green foliage growing from the tree in question. Norman Stepp, County Supervisor for respondent in Mingo County, testified that he is familiar with the stretch of Route 52 between East Kermit and Naugatuck where the claimant's accident occurred. Prior to this incident, he stated that the respondent did not receive any complaints regarding tree falls in this particular location. Although he does not recall removing any trees in the area where this incident occurred, he stated that respondent has continuously removed trees over the years along Route 52. In the twenty years that he has worked for respondent, Mr. Stepp stated that he has removed or has directed other employees to remove at least four hundred to five hundred trees. If the tree is located off respondent's right of way, Mr. Stepp stated that respondent's general policy is that its crews may not cut a tree without the property owner's authorization.

It is a well established principle of law that the State is neither an insurer nor a guarantor of the safety of motorists on its roads and highways. *Adkins v. Sims*, 46 S.E.2d 81 (W.Va.1947). To hold respondent liable, claimant must establish by a preponderance of the evidence that respondent had actual or constructive notice of the road defect in question and a reasonable amount of time to take corrective action. *Chapman v. Dept. of Highways*, 16 Ct. Cl. 103 (1986); *Pritt v. Dept. of Highways*, 16 Ct. Cl. 8 (1985).

In cases involving falling trees or tree limbs, the Court has held that respondent is liable for dangerous trees or tree limbs on its property or rights-of-way. *Wiles v. Division of Highways,* 22 Ct. Cl.170 (1999). The general rule is that if a tree is dead and poses an apparent risk then the respondent may be held liable. However, where a healthy tree or tree limb falls as a result of a storm and causes damage, the Court has held that there is insufficient evidence upon which to justify an award. *Gerritsen v. Dept. of Highways*, 16 Ct. Cl. 85 (1986).

In the instant case, the Court is of the opinion that respondent did not have actual or constructive notice of the fallen tree on Route 52 on the day in question. Based on the evidence presented by Joshua Hunt, who observed the tree on the day of the incident, the tree's crown consisted of hard wood and appeared alive. In addition, the tree was off respondent's right-of-way, and the cut that respondent made in the high-wall was not the cause of the tree fall. The evidence also indicates that the portion of the tree that appeared rotten could not have been seen from the highway unless specifically brought to the attention of the respondent. Prior to this incident, respondent did not have any complaints regarding tree falls in this particular location. The Court will not place a burden on respondent with respect to trees surrounding its highways unless the tree poses an obvious hazard to the traveling public. While the Court is sympathetic to claimant's loss, the Court has determined that there is insufficient evidence of negligence upon which to base an award.

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

Claim disallowed.

OPINION ISSUED JANUARY 2, 2008

TRUSTEES OF THE SAULSVILLE BAPTIST CHURCH
VS.

DIVISION OF HIGHWAYS
(CC-03-269)

Charles B. \Mullins II, Attorney at Law, for claimant.

Andrew F. Tarr and Xueyan Palmer, Attorneys at Law, for respondent.

FORDHAM, JUDGE:

Claimant trustees brought this action for damages to their church building and contents in Saulsville, Wyoming County. Claimant trustees for the Saulsville Baptist Church (herein after referred to as claimant) allege damages occurred to their church as a result of respondent's failure to design and construct an adequate culvert system under Route 97. Route 97 is a public highway in Wyoming County and is maintained by the respondent. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The Saulsville Baptist Church is located on property adjacent to Route 97 and Route 97/1. The Marsh Fork and Bear Hole Fork flow near this property with the Marsh Fork being adjacent to the east side of the property. The Marsh Fork flows through a culvert beneath Route 97.

The incident giving rise to this claim occurred on July 8, 2001. A heavy rainfall occurred on that date which resulted in the flooding of claimant's building located on its property. Karen Bailey testified that the church was originally built in 1947. She stated that Route 97 in its present configuration was constructed in 1968 coincident with the opening of Twin Falls State Park. Prior to the road being constructed, the property around the church was used as hay fields and meadows and that neither the claimant's property nor the church building itself had flooded. Mrs. Bailey testified that the structure has flooded periodically since Route 97 was constructed in its present configuration. She stated that the church was flooded on May 1, 1975, September 8, 1989, May 18, 2001, and July 8, 2001, the date of the incident involved in this claim. Mrs. Bailey stated that on July 8, 2001, she was in the church in Sunday School when the water began to back up at the culvert. A truck was used to get the older women and the children out of the building while several people remained inside the church trying to move personal property to higher areas to avoid the flood waters. Mrs. Bailey testified that within an hour the water was waist deep inside the building. She also stated that the culvert did not have to be full for the church to flood, and that when the water was waist deep inside the church, the culvert was not full. She stated that there was eventually six feet of water in the building and that the water completely surrounded the church. After the flood there was approximately six inches of mud left in the building. Mrs. Bailey testified that after the flood, the use of the building was limited and that only the pews were saved. She also stated that the heating and cooling duct work had to be replaced and the foundation of the building was damaged. Mrs. Bailey stated that claimant has received $80,000.00 from its insurance company for the flood damages to the church.

John Bailey, Deacon at Saulsville Baptist Church, testified that prior to the incident involved in this claim there were some trees and brush located in Marsh Fork in front of the culvert. Mr. Bailey stated that he first contacted respondent regarding problems with flooding in the church approximately 20 years ago. He again met with a representative of respondent in the late 1990s. Mr. Bailey testified that during this time period, engineers for respondent came out to inspect the area and that he walked around

the area with them describing the problems the church was having and showing the engineers where the problems were. Mr. Bailey stated that the culvert did not have to be full for the water to back up and flood the church. After these talks, Mr. Bailey stated that plans were drawn up by respondent for a culvert to be installed for both Bearhole Fork and Marsh Fork and that these creeks would then meet up on the opposite side of the highway from the church. Mr. Bailey testified that Saulsville Baptist Church had to spend $1,000.00 to tear down and remove the church building that was damaged in the flooding involved in this incident. The Church also paid $21,000.00 to fill with dirt the area where the new church is now located. Mr. Bailey stated that the total damages claimant suffered was $183,262.08.

David McDorman, a registered professional engineer, testified on behalf of the claimant. Mr. McDorman testified that the West Virginia State Road Commission Drainage Manual, adopted in 1963, gives direction for designing drainage structures. According to the manual, feeder and state and local routes, such as Route 97, must be designed to carry a twenty-five year flood event. Mr. McDorman stated that according to the original designs, the average daily traffic along Route 97 was 240 and that any road with an average daily traffic count over 200 is supposed to be designed for a twenty-five year flood.

Mr. McDorman conducted a hydraulic study of the area surrounding the church, taking into account average rainfalls of different size storm events, as well as looking at the ability of the culvert to carry the expected water flows from the different storm events. He testified that the total acreage draining into this culvert under Route 97 is 1,717 acres. Mr. McDorman stated that the culvert, an 84 inch pipe, was capable of carrying 300 cubic feet of water per second. He testified that a two-year storm would create 460 cubic feet of water per second, a ten year storm event would have 1,393 cubic feet of water per second and that a twenty-five year storm would have 2,028 cubic feet of water per second. In Mr. McDorman's opinion, the culvert was too small when it was constructed and is the primary cause of the flooding that occurred on claimant's property in 2001. Mr. McDorman further stated that based upon the size of Marsh Fork, if the culvert were to carry the same amount of water as the stream channel, the water level has to be approximately four feet above the stream channel. The bottom of the culvert, however, is at the same elevation as the creek bed, and Mr. McDorman testified that because of this, the creek is going to overflow its banks before the culvert is filled to capacity.

Mr. McDorman also analyzed the plans that respondent had prepared, but never implemented, to separate the flow of the two creeks into two separate culverts. According to his calculations, the design would still be inadequate to carry a twenty-five year storm event as they could only carry 600 cubic feet of water per second. Mr. McDorman testified that in his expert opinion, the best solution for correcting the flooding problem would be to construct a bridge over the stream crossing or a channel crossing. He stated that in a channel crossing, a rectangular box culvert made from concrete is used, with the bottom of the box culvert being at the same elevation as the stream channel, but it could be made as wide as necessary to provide for adequate drainage. The position of the claimant, based upon the testimony and evidence, is that the respondent failed to maintain a culvert located adjacent to its property and to Route 97. Claimant also alleges that the design of the culvert is inadequate.

The position of the respondent is that it was not responsible for the flooding that occurred to claimant's property on July 8, 2001, in that there was a significant rainfall in southern West Virginia, overwhelming its drainage systems and causing flooding in

several counties.

James Stewart, Supervisor for Respondent in Wyoming County, testified that the culvert under Route 97 is an 84 inch structural engineered culvert with concrete sides and bottom and a steel structure on top that had been in place since the 1960s. Mr. Stewart stated that the road was built in 1968 and that when it was constructed, the road made the church lower than the elevation of the road. He stated that there had been meetings about improving the intersection with John Bailey around 1999 and that Mr. Bailey complained that flooding was a problem at that time. Mr. Stewart testified that a redesign of the intersection was prepared in 2000 which included a redesign of the drainage. This redesign called for two 84 inch culverts to be installed, one each for Bearhole Fork and Marsh Fork, to replace the one culvert under Route 97. He stated that the proposed redesign would have put the drainage of both creeks on the other side of Route 97 from Saulsville Baptist Church. Mr. Stewart testified that on July 8, 2001, there was significant flooding throughout Wyoming County. He stated that approximately 3,500 homes were destroyed throughout Wyoming County. Mr. Stewart testified that eleven inches of rain fell at Twin Falls State Park in 24 hours. He also stated that there were approximately twelve million dollars ($12,000,000.00) in damages to the roads within Wyoming County. He stated that at claimant's property, the water was across Route 97 and nearly up to the top of the front door to the church. He further stated that after the water receded, there was no debris inside the culvert. Mr. Stewart further testified that he found no maintenance records relating to the culvert under Route 97 in front of claimant's property in 2001.

David Cox, Assistant Supervisor for respondent in Wyoming County, testified that he did not recall any maintenance work being done on the culvert under Route 97 in front of claimant's property. He stated that on average eight to eleven inches of rain fell on July 8, 2001, throughout Wyoming County. He further stated that there were no drains in Wyoming County that were adequate to deal with that amount of water. Finally, Mr. Cox testified that if the proposed design change had been implemented, there would have been double the amount of drainage available in the area.

To hold respondent liable for damages caused by inadequate drainage, claimant must prove by a preponderance of the evidence that respondent had actual or constructive notice of the existence of the inadequate drainage system and a reasonable amount of time to correct it. *Ashworth v. Division of Highways*, 19 Ct. Cl. 189 (1993); *Orsburn v. Division of Highways*, 18 Ct. Cl. 125 (1991).

The Court, having reviewed the all of the facts and evidence including all exhibits, briefs of the parties, the transcript in this claim as well as the post-hearing depositions, concludes that the flood which occurred on July 8, 2001, and which destroyed the Saulsville Baptist Church was the result of the inadequate drainage system beneath Route 97 and that respondent had actual notice that there was a potential for a flood in the area as the result of an unusual rainfall. Thus, the Court finds respondent liable for the damages to the church property, the building, the value of the contents destroyed in the flood, and the costs for preparing the land for a new building to be erected on the same property, but at an elevation designed to protect the church building from future flooding.

One of the difficulties for the Court in determining damages in this claim is that the deed conveying the property to the Saulsville Baptist Church provided that the "property automatically reverts back" to the grantors or his/her legal heirs "without any process at law" if the "property ceases to be used ...for regular church services for a period of twelve months" which provision then renders the difference in fair market value

as a useless method of calculating the damages. Thus, any appraisal based upon fair market value is inappropriate for the facts in this particular claim.

It must also be noted in any discussion of the damages that claimant received a total of $80,000.00 from FEMA and its flood insurance based upon appraisals performed by FEMA adjusters. This amount accounts for damages to the real estate, church building, contents, removal of debris, and for the fill and grading of the new site. The actual cost of the fill and grading of the new site for the rebuilt church is in the amount of $37,043.27. The compensation for removal of debris was calculated at $1,000.00 in both of the appraisals. The claimant also lost the contents of the former church building, other than the pews.

An appraisal was performed by Bane E. Sarrett and Jimmy L. Parker, Appraisers, at the request of this Court subsequent to the hearing of the claim. The appraisers are consultants for the Court. One of the approaches that they used in their appraisal was "The Cost Approach To Value" which resulted in the value of the loss to claimant as being the amount of $161,500.00. The Cost Approach is based upon the replacement of the subject and a deduction for Physical Deterioration, Functional Obsolescence, and External Depreciation. The Court is of the opinion that this is the better approach to determine the actual loss to the claimant in this claim. However, as to this appraisal, the Court will not take into consideration the land value of $6,700.00 or the site improvement calculation of $5,000.00. Claimant continues to have use of the land so the land value of $6,700.00 will not be included in any award. As to the site improvement issue, the Court notes that claimant expended more than $37,000.00 for fill and grading of the new site. While the Court is constrained from making an award for the total amount expended by claimant for the cost of these improvements to the site, it recognizes that respondent benefits from relocating the church building farther from Route 97 and raising the structure approximately twenty-one feet. Accordingly, the Court makes an award of $12,000.00 for this benefit to respondent thus alleviating the possibility of future flooding of the subject church building from the culvert at issue in this claim. The Court concludes the total loss to claimant is the amount of $161,800.00 from which there is a deduction of $80,000.00 (insurance proceeds mentioned herein above) for a loss to the claimant of $81,800.00.

Accordingly, the Court makes an award to claimant in the amount of $81,800.00.

Award of $81,800.00.

The Honorable Franklin L. Gritt Jr., former Presiding Judge of the Court of Claims, took part in the hearing of this claim and in the decision upon the issue of liability only. He did not participate in the decision upon the issue of damages.

The Honorable John G. Hackney Jr., Judge of the Court of Claims, did not take part in the hearing or decision of this claim.

OPINION ISSUED DECEMBER 7, 2007

MONONGALIA GENERAL HOSPITAL
VS.

DIVISION OF CORRECTIONS
(CC-07-330)

Claimant appeared pro se.

Charles P. Houdyschell Jr., Senior Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks payment in the amount of $80,299.30 for the cost of medical services provided to an inmate at Huttonsville Correctional Center. Respondent, in its Answer, admits the validity of the claim in this amount and further states that there were insufficient funds in its appropriation for the fiscal year in question from which to pay the claim.

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

Claim disallowed.

OPINION ISSUED JANUARY 18, 2008

WEST VIRGINIA UNIVERSITY HOSPITALS
VS.
DIVISION OF CORRECTIONS
(CC-07-338)

Claimant appeared *pro se.*

Charles P. Houdyschell Jr., Senior Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks payment in the amount of $294,535.34 for the cost of medical services provided to an inmate at Lakin Correctional Center. Respondent, in its Answer, admits the validity of the claim in this amount and further states that there were insufficient funds in its appropriation for the fiscal year in question from which to pay the claim.

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

Mental Health, 8 Ct. Cl. 180 (1971).

Claim disallowed.

OPINION ISSUED DECEMBER 7, 2007

WV REGIONAL JAIL AND CORRECTIONAL
FACILITY AUTHORITY
VS.
DIVISION OF CORRECTIONS
(CC-07-346)

Chad Cardinal, Attorney at Law, for claimant.

Charles Houdyschell Jr., Senior Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant, Regional Jail and Correctional Facility Authority, provides and maintains the Northern Regional Jail, the North Central Regional Jail, the Potomac Highlands Regional Jail, and the Tygart Valley Regional Jail, as facilities for the incarceration of prisoners who have committed crimes in various counties. Some of the prisoners held in these regional jails have been sentenced to facilities owned and maintained by the respondent, Division of Corrections. Claimant brought this action in the amount of $877,753.00 to recover the costs of housing and providing associated services to prisoners who have been sentenced to a State penal institution, but due to circumstances beyond the control of the claimant, these prisoners have had to remain in the regional jails for periods of time beyond the dates of the commitment orders.

Respondent filed an Answer admitting the validity of the claim and that the amount of the claim is fair and reasonable.

This Court has determined in prior claims by claimant for the cost of housing inmates that respondent is liable to claimant for these costs, and the Court has made the appropriate awards. This issue was considered by the Court previously in the claim of *County Comm'n. of Mineral County v. Div. of Corrections*, 18 Ct. Cl. 88 (1990), wherein the Court held that the respondent is liable for the cost of housing inmates.

In view of the foregoing, the Court makes an award to claimant in the amount of $877,753.00.

Award of $877,753.00.

OPINION ISSUED JANUARY 18, 2008

MORRIS SQUARE ASSOCIATES
VS.
INSURANCE COMMISSION
(CC-06-301)

G. Nicholas Casey Jr. and Spencer D. Elliott, Attorneys at Law, for claimant.

Ronald R. Brown and Gretchen Murphy, Assistant Attorneys General, for respondent.

PER CURIAM:

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

1. Morris Square Associates, a West Virginia limited partnership, (hereinafter referred to as "Lessor") leased unto the State of West Virginia, by the Secretary of the Department of Administration, (hereinafter referred to as "Lessee") an office space located in a four story building known as "The Greenbrooke" in Charleston, Kanawha County. The Insurance Commission was the tenant of this office space (hereinafter referred to as "Tenant").

2. The contract period began on May 3, 1995, and ended on August 31, 2005.

3. The lease, unlike other leases, did not expressly make the Lessee responsible for the cost of trash or garbage service.

4. The Lessor paid the garbage services for the leased office space for the full ten years of the lease and did not bill the Lessee or the Tenant for that service during the ten year period of the lease.

5. The Lessor was aware that it was not billing for trash disposal during the term of this lease and on several occasions made statements that it should bill for the trash disposal.

6. There were at least six amendments to the lease over the ten year term in which the Lessor had the opportunity to negotiate an amendment to the lease to include the cost of trash disposal as a responsibility of the Tenant and failed to do so.

7. The Lessor seeks to recover $19,891.51 for the cost of trash or garbage service to the Tenant during the term of the lease.

8. The Lessee and Tenant plead the affirmative defenses of statute of limitations and latches contending that the portion of the Lessor's claims for the years 1995 and 1996 were barred by the statute of limitations and that the Lessee and Tenant were prejudiced by the delay of the Lessor making its claim in that the Lessee and Tenant could have canceled the lease with thirty (30) days notice had such claim been made. In addition, the Lessee and Tenant lost their ability to cancel and renegotiate the lease because no such claim for trash or garbage service was made by the Lessor during the ten year term of the lease and the Lessee and Tenant lost the ability to request additional services in exchange for the requested cost of trash and garbage services.

9. The Lessee and Tenant have offered to admit to the Lessor a claim in the sum of $4,634.00 as a full settlement of all claims arising from the leasing agreements between the Lessor and the Lessee and Tenant.

10. The settlement figure shall not be subject to interest.

11. Lessor agrees to release the Lessee and Tenant from any and all other claims against them arising out of the facts and circumstances of this claim and any other claim that Lessor has or may have as a result of the Lessor-Lessee relationship between Lessor and Lessee and the Tenant regarding "The Greenbrooke Lease."

The Court finds that the amount agreed to by the parties is fair and reasonable. Thus, the Court is of the opinion to and does make an award in the amount of $4,634.00.

Award of $4,634.00.

OPINION ISSUED JANUARY 18, 2008

LINDA A. PORTER and THOMAS E. PORTER
VS.
DIVISION OF HIGHWAYS
(CC-07-018)

Claimants appeared *pro se*.

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

PER CURIAM:

Claimants brought this action for vehicle damage which occurred when their 2003 Chrysler Sebring struck a large hole while claimant, Linda Porter, was traveling on I-70 through Wheeling in Ohio County. I-70 is a road maintained by respondent. The Court is of the opinion to make an award in this claim for the reasons more fully set forth below.

The incident giving rise to this claim occurred on January 13, 2007, while claimant was traveling from Bethlehem to Washington, Pennsylvania. In the area where this incident occurred, two lanes of I-70 and two lanes of I-470 merge into three lanes. The speed limit is fifty-five miles per hour. As claimant was proceeding in the center lane of I-70 near Exit 5, the vehicle struck a large hole in the road. Claimant was traveling at approximately fifty-five miles per hour, and she was unable to avoid the hole due to the heavy traffic. Even though she traveled on this road three to four weeks earlier, she did not notice this hole prior to the incident in question. Claimant Thomas Porter testified that their vehicle sustained damage to the wheel, valve, and alignment totaling $288.73. Claimants' insurance deductible is $500.00.

Terry Kuntz, Interstate Supervisor for respondent, testified that the road's surface consisted of a concrete base with an asphalt overlay. Mr. Kuntz stated that the hole in this area was a reoccurring problem and needed to be re-patched every time it would rain. Since the hole was located in the middle of a busy intersection, there was not an adequate location to place a warning sign for the traveling public. Although respondent repeatedly filled the hole, the problem persisted until April when the respondent applied hot mix to this area.

It is a well-established principle that the State is neither an insurer nor a

guarantor of the safety of motorists upon its highways. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). To hold respondent liable, claimant must establish by a preponderance of the evidence that respondent had actual or constructive notice of the road defect at issue and a reasonable amount of time to take corrective action. *Chapman v. Dept. of Highways*, 16 Ct. Cl. 103 (1986); *Pritt v. Dept. of Highways*, 16 Ct. Cl. 8 (1985).

In the instant case, the evidence established that respondent had, at the least, constructive notice of the hole that claimants' vehicle struck, and that the hole presented a hazard to the traveling public on I-70 in Ohio County. The location of the hole on a heavily traveled portion of the interstate, where vehicles travel at high speeds, leads the Court to conclude that respondent had notice of the condition on I-70. Despite respondent's attempts to patch the hole in this area, the patchwork was inadequate when this incident occurred. Thus, the Court finds that there is sufficient evidence of negligence to base an award.

In accordance with the findings of fact and conclusions of law stated herein above, the

Court is of the opinion to and does make an award to claimants in the amount of $288.73.

Award of $288.73.

OPINION ISSUED JANUARY 18, 2008

GARY BAKER
VS.
DIVISION OF CORRECTIONS
(CC-07-063)

Claimant appeared *pro se*.

Charles P. Houdyschell Jr., Senior Assistant Attorney General, for respondent.

PER CURIAM:

Claimant, an inmate at the Mount Olive Correctional Complex, seeks $80.00 for items of personal property that he alleges were entrusted to respondent but which have not been returned to him. On or around January 26, 2007, claimant stated that respondent stored a pair of his Nike Air Max shoes. Despite claimant's attempts to recover the property, respondent has failed to produce the shoes.

Although respondent filed a Motion to Dismiss, the Motion was subsequently withdrawn. At the hearing, respondent stipulated to damages in the amount of $80.00.

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

items. The Court finds the value of the Nike Air Max shoes, which were approximately one month old, is $69.00. The Court holds that respondent is liable for the loss to claimant's property in the amount of $69.00, and claimant may make a recovery for his loss.

Accordingly, the Court is of the opinion to and does make an award in the amount of $69.00.

Award of $69.00.

OPINION ISSUED JANUARY 18, 2008

JOHN SAMUELS
VS.
DIVISION OF HIGHWAYS
(CC-07-070)

Claimant appeared *pro se*.

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when his 1987 Nissan Maxima struck a hole while he was traveling on the Colliers Way Exit ramp of U.S. Route 22 in Hancock County. Colliers Way is a road maintained by respondent. The Court is of the opinion to deny the claim for the reasons more fully stated below.

The incident giving rise to this claim occurred between 7:00 p.m. and 8:00 p.m. on February 20, 2007. Colliers Way is a two-lane paved road with a posted speed limit of twenty-five miles per hour. Claimant testified that the road was dark and wet at the time this incident occurred. Claimant was traveling home from work on U.S. Route 22 at approximately twenty-five miles per hour. As claimant was proceeding on the Colliers Way Exit from U.S. Route 22 towards Pennsylvania Avenue, his vehicle struck a hole that was approximately 100 yards from the end of the exit ramp. The hole, which was located on the left side of the road, was approximately two to three feet deep and two to three feet in diameter. Although claimant had driven on this road before, he never noticed the hole prior to this incident. In addition, there were no warning signs posted in this area. Claimant's vehicle sustained damage to the alignment, driver's side tire and rim in the amount of $251.75. Claimant did not have insurance coverage for his loss.

The position of the respondent is that it did not have actual or constructive notice of the condition on the Colliers Way Exit at the site of claimant's accident for the date in question. Samuel DeCapio, Highway Administrator for respondent in Hancock County, testified that due to the rough conditions on the Colliers Way Exit, respondent had to keep patching the road with cold mix. Mr. DeCapio stated that on the day of claimant's incident, respondent was engaged in snow and ice control, which is a priority in terms of respondent's work activities.

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

an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins vs. Sims*, 130 W.Va. 645; 46 S.E.2d 81 (1947). In order to hold respondent liable for road defects of this type, a claimant must prove that respondent had actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman vs. Dept. of Highways*, 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that respondent is not liable for the conditions on the Colliers Way Exit. The evidence adduced at the hearing established that respondent was engaged in snow and ice removal on the day in question, which is a priority activity. Since the respondent was working diligently to clean the roads on the date of this incident, the Court finds that respondent was not negligent when it was unable to make repairs to this particular condition in a timely manner. Thus, there is insufficient evidence of negligence upon which to base an award.

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

Claim disallowed.

OPINION ISSUED JANUARY 18, 2008

CORRECTIONAL MEDICAL SERVICES
VS.
DIVISION OF CORRECTIONS
(CC-07-355)

Claimant appeared *pro se.*

Charles P. Houdyschell Jr., Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks payment in the amount of $439,922.81for medical services rendered to inmates in the custody of respondent at Mount Olive Correctional Complex, St. Mary's Correctional Center, Lakin Correctional Center, St. Anthony's Correctional Center, Huttonsville Correctional Center, Pruntytown Correctional Center and Denmar Correctional Center, facilities of the respondent. Respondent, in its Answer, admits the validity of the claim, and further states that there were insufficient funds in its appropriation for the fiscal year in question from which to pay the claim.

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

Claim disallowed.

OPINION ISSUED JANUARY 18, 2008

JAMES W. DICKENS
VS.
WV STATE POLICE
(CC-07-343)

Claimant appeared *pro se*.

John A. Hoyer and Virginia G. Lanham, Assistant Attorneys General, for respondent.

PER CURIAM:

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

Claimant seeks to recover $2,475.00 for the cost of his 1994 Ford F150 truck which he entrusted to respondent in the course of a police investigation. On July 26, 2007, claimant informed respondent that his truck was stolen, and later that day, respondent notified claimant that his truck was found. Respondent requested that claimant leave the truck in the location where it was discovered in order to further an investigation regarding mine thefts. Claimant agreed to leave his truck under respondent's supervision to further this investigation. However, on July 27, 2007, claimant's truck was burned by the individual who originally stole the vehicle. Thus, claimant seeks to recover the value of his truck which was destroyed.

In its Answer, respondent admits liability in the amount of $2,475.00, which amount is the fair market value for claimant's property.

In view of the foregoing, the Court is of the opinion to and does make an award to claimant in the amount of $2,475.00.

Award of $2,475.00.

OPINION ISSUED JANUARY 18, 2008

POMEROY IT SOLUTIONS SALES COMPANY INC.
VS.
DEPARTMENT OF EDUCATION
(CC-08-011)

Claimant appeared *pro se*.

Richard E. Hitt, General Counsel, for respondent.

PER CURIAM:

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

Claimant seeks $373.30 for technological consulting services that it provided to respondent. Claimant stated that the original invoice was lost in the mail; therefore, claimant has not been paid. Since the documentation for these services was not processed for payment within the appropriate fiscal year, claimant has not been paid.

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

In view of the foregoing, the Court is of the opinion to and does make an award to claimant in the amount of $373.30.

Award of $373.30.

OPINION ISSUED FEBRUARY 7, 2008

RUSSELL R. DEEM
VS.
DIVISION OF HIGHWAYS
(CC-06-076)

Claimant appeared *pro se*.

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

PER CURIAM:

Claimant brought this action for personal injuries which occurred as a result of a wooden plank falling off Hutchinson Bridge while he was walking on County Route 90/3 near Worthington, Marion County. County Route 90/3 is a road maintained by respondent. The Court is of the opinion to deny the claim for the reasons more fully stated below.

The incident giving rise to this claim occurred between 12:00 p.m. and 1:00 p.m. on February 13, 2006. Hutchinson Bridge on County Route 90/3 is a one-lane highway with a wooden sidewalk at the area of the incident involved in this claim. Claimant testified that he was walking across Hutchinson Bridge when a wooden board fell out from the bridge after he stepped on it. Mr. Deem stated that he then fell into the road, injuring his right arm and back. Claimant stated that his damages were $5,000.00.

The position of the respondent is that it did not have actual or constructive notice of the condition on Hutchinson Bridge on County Route 90/3 at the site of the claimant's accident for the date in question. Randy Harris, District Bridge Engineer for the respondent in District 4, which includes Marion County, testified that he had no knowledge of any loose wood planks on Hutchinson Bridge on County Route 90/3. Mr. Harris stated that the bridge is a one lane bridge with a sidewalk made up of two by six wood planks. He testified that there had been no complaints regarding Hutchinson Bridge prior to claimant's incident. Respondent had received no notice of loose planks

in the sidewalk on Hutchinson Bridge on County Route 90/3 on the day of the incident in question.

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

In the instant case, the evidence established that the respondent did not have actual or constructive notice of loose wooden planks on Hutchinson Bridge on County Route 90/3 prior to the incident in question. Consequently, there is insufficient evidence of negligence upon which to justify an award. Thus, the claimant may not make a recovery for his loss in this claim.

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

Claim disallowed.

OPINION ISSUED FEBRUARY 4, 2008

CONNIE BUCKBEE, individually and as Administratix of the Estate of
JULIA CAROLYN STRICKLAND, deceased
VS.
DIVISION OF HIGHWAYS
(CC-05-208)

J. Timothy DiPiero, Attorney at Law, for respondent.

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

PER CURIAM:

This claim was submitted to the Court for decision based upon a Mutual Settlement Agreement which provides as follows:

1. On or about July 7, 2001, West Virginia Paving Inc., began paving and berm work on a portion of W.Va. Route 39, near the Gauley Bridge. The work was performed pursuant to a contract issued by respondent.

2. The paving job left holes along the edge of the road where the grates were located. The grate in question was approximately three inches deep and extended eighteen inches into the paved highway.

3. On July 24, 2000, Julia Carolyn Strickland was traveling east on W.Va. Route 39 near Gauley Bridge when her vehicle struck the drainage grate which is partially located on the roadway. Julia Carolyn Strickland lost control of her vehicle and it crashed into a truck traveling in the opposite direction. She was killed as a result of this collision.

4. Claimant alleges that respondent's inspector, who was present when the paving took place, should have been aware that the paving created a problem with respect to the grate, but failed to take steps to have the grate raised or to pave over the grate.

5. Claimant further contends that respondent, having inspected and approved the work performed, having released the road to the traveling public without warning signs and having failed to paint the white edge lines along the side of the highway, was negligent in its actions.

6. As a result, the parties have agreed that claimant is entitled to recover damages in the amount of $500,000.00.

The Court has reviewed the facts of the claim and finds that respondent was negligent in its maintenance of W.Va. Route 39 on the date of this incident; that the negligence of respondent was the proximate cause of the death of Julia Carolyn Strickland; and that the amount of damages agreed to by the parties is fair and reasonable. Thus, claimant may make a recovery for this loss.

Accordingly, the Court is of the opinion to and does make an award in the amount of $500,000.00.

Award of $500,000.00.

OPINION ISSUED FEBRUARY 4, 2008

POMEROY IT SOLUTIONS SALES COMPANY INC.
VS.
DEPARTMENT OF EDUCATION
(CC-08-0015)

Claimant appeared *pro se*.

Gretchen A. Murphy, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks $38,541.00 for various items of equipment that it provided to respondent. Claimant has not been paid for this equipment since the documentation for these services was not processed for payment within the appropriate fiscal year.

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

In view of the foregoing, the Court is of the opinion to and does make an award to claimant in the amount of $38,541.00.

Award of $38,541.00.

OPINION ISSUED FEBRUARY 4, 2008

JOHN BOYCE
VS.
DIVISION OF CORRECTIONS
(CC-08-0016)

Claimant appeared *pro se*.

Charles P. Houdyschell Jr., Senior Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant, an inmate at the Mount Olive Correctional Complex, seeks compensation for lost wages in the amount of $28.62. On August 27, 2007, claimant was injured while performing work-related duties and asserts that respondent has a duty to pay inmate workers for lost wages when they are injured on the job.

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

Accordingly, the Court makes an award to the claimant herein in the amount of $28.62.

OPINION ISSUED FEBRUARY 4, 2008

MANPOWER
VS.
MARSHALL UNIVERSITY
(CC-05-269)

Kevin Carr, Attorney at Law, for claimant.

Jendonnae L. Houdyschell, Senior Assistant Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon an agreement between the parties.

Claimant seeks to recover for services rendered from January 12, 1997, through March 22, 1998, in the amount of $50,316.07. Claimant alleges that respondent failed to reveal that temporary help services are a prevailing wage job. Therefore, claimant

incurred expenses not anticipated in its contract with respondent.

Pursuant to the parties' agreement, respondent states that claimant may recover $20,000.00 based upon the finding of this Court in its previous decision in *Aramark Facility Services Inc. v. Concord University*, CC-04-436 (September 6, 2005).

Accordingly, the Court is of the opinion to and does make an award to claimant in the amount of $20,000.00.

Award of $20,000.00.

OPINION ISSUED JANUARY 29, 2008

DOROTHY ROCKHOLD and HOWARD ROCKHOLD
VS.

DIVISION OF HIGHWAYS
(CC-05-065)

Claimants appeared *pro se*.

Andrew F. Tarr and Jason C. Workman, Attorneys at Law, for respondent

PER CURIAM:

Claimants brought this action for vehicle damage which occurred when their 2000 Kia Sephia struck a rock in the road on Route 10 in Logan County. Route 10 is a road maintained by respondent. The Court is of the opinion to deny this claim for the reasons more fully set forth below.

The incident giving rise to this claim occurred at approximately 5:25 p.m. on January 25, 2005. It was a clear day. The speed limit on this road is forty-five miles per hour. Claimant Dorothy Rockhold was traveling on Route 10 towards Mitchell Heights at approximately forty miles per hour, when claimants' vehicle struck a red rock that was located in the middle of the lane. She was unable to avoid the rock due to oncoming traffic and a vehicle traveling closely behind her. The photographs submitted as evidence demonstrate that the rock was approximately the size of a shoe box. Since the respondent's Chapmanville substation is located near the area where this incident occurred, claimants allege that the rock originated from this substation. Ms. Rockhold stated that she noticed similar sized rocks located in stockpiles on respondent's property. Claimants contend that the rock might have fallen from one of respondent's trucks while it was hauling rocks. Although claimant has traveled on this road every day for the last four years, she has never noticed a rock on Route 10 prior to this incident. The amount of claimants' insurance deductible is $500.00.

The position of the respondent is that it did not have notice of the rock on Route 10. Curley Belcher, Highway Administrator for respondent in Logan County, testified that respondent's substation is located close to where this incident occurred. Mr. Belcher stated that respondent stockpiles rocks and other materials at this station. However, Mr. Belcher testified that most of the rocks at respondent's station are gray, and he has never

seen any rocks at the Chapmanville substation with a red tint similar to the rock which claimant's vehicle struck. In addition, he was not aware of any activity on or around January 25, 2005, which involved hauling rocks on Route 10.

It is a well-established principle that the State is neither an insurer nor a guarantor of the safety of motorists upon its highways. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). To hold respondent liable, claimant must establish by a preponderance of the evidence that respondent had actual or constructive notice of the road defect at issue and a reasonable amount of time to take corrective action. *Chapman v. Dept. of Highways*, 16 Ct. Cl. 103 (1986); *Pritt v. Dept. of Highways*, 16 Ct. Cl. 8 (1985). In rock fall claims, this Court has held that the unexplained falling of a rock onto a highway without a positive showing that respondent knew or should have known of a dangerous condition posing injury to person or property is insufficient to justify an award. *Coburn v. Dept. of Highways*, 16 Ct. Cl. 68 (1985).

In the present claim, claimants have not established that respondent failed to take adequate measures to protect the safety of the traveling public on Route 10. Although the rock created a dangerous condition on the road, there is no evidence that respondent had notice of this hazard on Route 10. Furthermore, the Court concludes that the rock was unlikely to have fallen from one of respondent's trucks since the rock in question had a red tint unlike the other rocks stockpiled at respondent's substation. Although the Court is sympathetic to claimants' plight, there is insufficient evidence of negligence on the part of respondent upon which to justify an award.

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

Claim disallowed.

OPINION ISSUED JANUARY 29, 2008

TANA B. MCCRAW

VS.

DIVISION OF HIGHWAYS

(CC-06-088)

Claimant appeared *pro se*.

Andrew F. Tarr and Jason C. Workman, Attorneys at Law, for respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when her 2000 Toyota Camry struck a hole on the berm of Route 2 in Millwood, Jackson County. Route 2 is a road maintained by respondent. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 7:30 a.m. on July 22, 2004, a rainy day. Route 2 is a two-lane paved road with a center line and edge lines. The posted speed limit on this road is fifty-five miles per hour. Claimant was traveling to work on Route 2 at a speed of approximately fifty miles per hour when she

noticed that an oncoming truck was traveling close to the center line. In order to avoid a potential collision, the claimant maneuvered her vehicle closer to the edge of the road where her vehicle struck a hole. The hole was located along the white edge line and was approximately nine inches deep. Claimant lost control of her vehicle, and her vehicle struck a storm drain causing the vehicle to flip on its top. As a result, the vehicle was totaled in this incident. Claimant stated that she traveled on Route 2 several times a month prior to the time of this incident.

Claimant purchased the vehicle for $10,399.00 five months before this incident occurred. The Kelley Blue Book value of the vehicle is $9,810.00. Claimant's insurance company paid $1,397.27 to the claimant, thus the amount of her claim is $8,412.73.

The position of the respondent is that it did not have actual or constructive notice of the condition on Route 2 at the site of claimant's incident for the date in question. Terry Johns, Crew Supervisor for respondent in Jackson County, explained the cause of the erosion on Route 2. Since Route 2 is an expressway, many heavy trucks travel on this roadway, which causes the shoulder to erode. Mr. Johns further stated that the erosion of the berm in this area is an ongoing problem. Mr. Johns testified that his employees travel on this road at least once a week.

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

In the instant case, the Court is of the opinion that respondent had, at the least, constructive notice of the condition on Route 2 on the date in question. The size of the hole and the time of year in which this incident occurred leads the Court to conclude that respondent had notice of the hole and had an adequate amount of time to take corrective action. Since respondent's employees frequently travel on this road, the Court finds that respondent should have maintained this portion of Route 2 in proper repair to avoid creating a hazard to the traveling public. Consequently, there is sufficient evidence of negligence upon which to justify an award. Thus, claimant may make a recovery in the amount of $8,412.73.

In accordance with the findings of fact and conclusions of law as stated herein above, the Court is of the opinion to make an award in the amount of $8,412.73.

Award of $8,412.73.

OPINION ISSUED JANUARY 29, 2008

JEFFREY NEAL
VS.
DIVISION OF HIGHWAYS
(CC-06-125)

Claimant appeared *pro se*.

Jason C. Workman, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when his 1993 Subaru Legacy struck a piece of tire in the road while he was traveling on I-64 near Dunbar, Kanawha County. I-64 is a road maintained by respondent. The Court is of the opinion to deny the claim for the reasons more fully stated below.

The incident giving rise to this claim occurred between 9:30 p.m. and 10:00 p.m. on April 18, 2006. In the area where this incident occurred, I-64 has three lanes of traffic traveling westbound. The road was dark and wet, and claimant's speed was approximately forty miles per hour. Claimant was proceeding cautiously on I-64 when a tractor trailer veered into his lane of traffic. As claimant maneuvered his vehicle into the left lane, his vehicle struck a piece of a truck's tire which was lying on the road. Since there was a concrete wall located to his left and the tractor-trailer to his right, he was unable to switch lanes to avoid this hazard on the road. Thus, claimant's vehicle sustained damage to its front bumper, front lamps, and fender in the amount of $822.91. Claimant did not have insurance coverage for his loss.

The position of the respondent is that it did not have actual or constructive notice of the condition on I-64 at the site of claimant's accident for the date in question. Respondent did not present any witnesses at the hearing of this matter.

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

In the instant case, the Court is of the opinion that respondent is not liable for the damage to claimant's vehicle which occurred on I-64. Even though the Court finds that the piece of tire on the road created a hazard to the traveling public, respondent did not have notice of this condition prior to claimant's incident. Although the Court is sympathetic to the claimant's plight, there is insufficient evidence of negligence upon which to base an award.

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

Claim disallowed.

OPINION ISSUED JANUARY 29, 2008

HEATHER L. PRICE
VS.
DIVISION OF HIGHWAYS
(CC-07-106)

Claimant appeared *pro se*.

Andrew F. Tarr and Jason C. Workman, Attorneys at Law, for respondent

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when her 2002 Ford Focus struck a rock while her husband, Clarence David Price, was traveling northbound on Route 17 in Logan County. Route 17 is a road maintained by respondent. The Court is of the opinion to deny this claim for the reasons more fully set forth below.

The incident giving rise to this claim occurred on February 2, 2007, at approximately 5:30 a.m. Route 17 is a two-lane, paved road with a speed limit of fifty-five miles per hour. The driver, Clarence David Price, was traveling to work from Blair to Charleston. As the driver was proceeding out of a curve on Route 17 near Sharples, his vehicle struck an object that looked like a brown bag in the middle of the right lane. The driver subsequently discovered that the object that his vehicle had struck was a rock that was the size of a shoe box. Mr. Price stated that he was unable to avoid the rock even though he noticed it before the vehicle struck it. Although Mr. Price has traveled to work on this road on a daily basis for the last seven years, he did not notice any rocks on Route 17 prior to this incident. Mr. Price further stated that there are no rock fall signs on Route 17. The driver observed that he passed one of respondent's snow plow trucks at the time of this incident, and the rock could have fallen from the snow plow truck. As a result of this incident, claimant's vehicle sustained damage to its transmission in the amount of $2,543.30. Claimant did not have insurance coverage for this loss.

The position of the respondent is that it did not have notice of the rock fall on Route 17 on the date of this incident. Curley Belcher, County Superintendent in Logan County, stated that prior to February 2, 2007, his office had received few complaints regarding fallen rocks at or near this location. Mr. Belcher stated that it was unlikely that the object that claimant's vehicle struck fell from one of respondent's snow plow trucks. Although the snow plow trucks carry salt and abrasive stone, Mr. Belcher stated that the salt and stone would have "splattered" if it fell on the road.

It is a well-established principle that the State is neither an insurer nor a guarantor of the safety of motorists upon its highways. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). To hold respondent liable, claimant must establish by a preponderance of the evidence that respondent had actual or constructive notice of the road defect at issue and a reasonable amount of time to take corrective action. *Chapman v. Dept. of Highways*, 16 Ct. Cl. 103 (1986); *Pritt v. Dept. of Highways*, 16 Ct. Cl. 8 (1985). In rock fall claims, this Court has held that the unexplained falling of a rock onto a highway without a positive showing that respondent knew or should have known of a dangerous condition posing injury to person or property is insufficient to justify an award. *Coburn v. Dept. of Highways*, 16 Ct. Cl. 68 (1985).

In the present claim, the Court finds that respondent did not have notice of the fallen rock on Route 17. Based on the evidence established at the hearing, the Court concludes that Route 17 is not an area known for rock falls, and respondent was not aware of this hazard on the date in question. Even if respondent had notice of the condition, the Court finds that the driver's speed given the wet road conditions contributed to his inability to avoid the rock in this area. While the Court is sympathetic to claimants' plight, the fact remains that there is insufficient evidence of negligence on the part of respondent upon which to base an award.

In accordance with the findings of fact and conclusions of law stated herein

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

Claim disallowed.

OPINION ISSUED JANUARY 29, 2008

BONNIE M. PRISK
VS.
DIVISION OF HIGHWAYS
(CC-07-134)

Claimant appeared *pro se*.

Andrew F. Tarr and Jason C. Workman, Attorneys at Law, for respondent.

PER CURIAM:

Claimant brought this action for damage which occurred to the water line on her property. In addition, claimant seeks to recover for the cost of excess water bills that she incurred as a result of this incident. Claimant's property is located on Oak Ridge in Putnam County. Oak Ridge is a road maintained by respondent. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred around March of 2007. Although Oak Ridge is located in a residential subdivision, respondent purchased the lot next to claimant's property in connection with the construction of Route 35. In preparation for the construction of the highway, respondent demolished the house on its lot next to the claimant's property and removed the septic system. Putnam Public Service District dug trenches in respondent's driveway to place a new sewer line. The sewer line was placed next to the water line, which runs underneath respondent's driveway and onto claimant's property. On or about March 2, 2007, the Putnam Public Service District notified claimant that there was a problem with the water line causing more water to be expended.

Claimant contends that the heavy construction trucks and equipment crossing on respondent's driveway, where a portion of the water line is located, caused claimant's water line to break. Paul Callahan, claimant's neighbor, testified that a tri-axle truck was situated on respondent's property and contained equipment used to perform core drilling. Mr. Callahan stated that this privately constructed road is not intended to withhold the weight of large construction trucks and equipment. As a result of the heavy equipment on this road, claimant states that she incurred the cost of installing a new water line, which amounted to $800.00. In addition, claimant's water bills, which normally cost approximately $30.00 a month, totaled $106.37 from January 31, 2007 through March 1, 2007, and $57.50 from March 1, 2007 through March 30, 2007.

The position of the respondent is that it did not have actual or constructive notice of the condition on Oak Ridge when this incident occurred. Shawn Smith, Project Engineer for respondent, stated that construction trucks were situated near respondent's property from January through March of 2007 for the installation of the sewer line and

the demolition of the house on its property. In addition, contractors were bidding on a project to place a road behind the property. In order to submit a bid for this project, multiple contractors were independently engaged in core drilling on respondent's property as a necessary step in bidding the project.

In the instant case, the Court is of the opinion that respondent was negligent in failing to take adequate measures to protect claimant's water line from breakage. The respondent knowingly permitted multiple contractors, with heavy trucks and equipment, to enter onto respondent's property and engage in core drilling as part of their contract bidding process. Respondent was fully aware that Oak Ridge is primarily a residential road and is not intended to withhold the weight of large construction trucks and equipment. Therefore, the Court finds that respondent is negligent. Claimant is entitled to recover for the damage caused to her water line ($800.00) and for the excess water bills ($103.87) that she incurred. Since claimant's water bills typically cost $30.00 a month, the Court has deducted $60.00 to reflect the average amount that claimant would have paid regardless of this incident. Thus, the Court finds that $903.87 is a fair and reasonable amount of damages to be awarded to the claimant.

In accordance with the findings of fact and conclusions of law stated herein above, the Court is of the opinion to and does make an award to the claimant in the amount of $903.87.

Award of $903.87.

OPINION ISSUED JANUARY 29, 2008

JOHN WAGNER and JEANINE WAGNER
VS.
DIVISION OF HIGHWAYS
(CC-07-172)

Claimants appeared *pro se*.

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

PER CURIAM:

Claimants brought this action for vehicle damage which occurred when their 2003 Pontiac Grand Am GT struck a hole while claimant Jeanine Wagner was traveling on Route 88 in West Liberty. Route 88 is a road maintained by respondent. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred on approximately March 31, 2007. Claimant is a student at West Liberty State College, and regularly takes Route 88 to travel to school. Route 88 is a road with a centerline and white edge lines. While claimant was driving from Wheeling to West Liberty on Route 88, her vehicle struck a large hole that was approximately a half mile from the College. Claimant stated that the hole was located near the golf course and occupied approximately half the lane of traffic. Claimant testified that she travels this road approximately twice a week, and she could not drive on this road without the vehicle striking at least one or two holes. During the

incident in question, claimants' vehicle sustained damage to three rims in the amount of $622.17. Claimant has been unable to repair these damages, but she has paid $37.95 to have her tires balanced. Since claimants' insurance deductible is $500.00, their recovery in this claim is limited to that amount.

The position of the respondent is that it did not have actual or constructive notice of the condition on Route 88 at the site of claimants' accident for the date in question. The respondent did not call any witnesses.

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

In the instant case, the Court is of the opinion that respondent had, at the least, constructive notice of the hole which claimants' vehicle struck, and that the hole presented a hazard to the traveling public. The Court finds that the road was covered with holes in the particular area in question. The size of the hole which claimants' vehicle struck and the time of the year in which the incident occurred leads the Court to conclude that respondent had notice of this hazardous condition, and respondent had an adequate amount of time to take corrective action. Thus, the Court finds respondent negligent, and claimants may make a recovery for the damage to their vehicle.

In accordance with the findings of fact and conclusions of law stated herein above, the Court is of the opinion to and does make an award to the claimants in the amount of $500.00.

Award of $500.00.

OPINION ISSUED JANUARY 29, 2008

PATRICIA AND TANYA SISSON
VS.
DIVISION OF HIGHWAYS
(CC-07-207)

Claimants appeared *pro se*.

Andrew F. Tarr and Jason C. Workman, Attorneys at Law, for respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when her 1996 Chevrolet Monte Carlo struck a hole on the berm while she was traveling on Brounland Road in Kanawha County. Brounland Road is a road maintained by respondent. The Court is of the opinion to make an award in this claim for the reasons more fully set forth below.

The incident giving rise to this claim occurred at approximately 2:50 p.m. on

June 20, 2007. Brounland Road is a narrow, two-lane paved road that has a posted speed limit of thirty-five miles per hour. Claimant was traveling at a speed of twenty-five miles per hour when she noticed an oncoming vehicle traveling in the opposite direction. To provide greater distance between her vehicle and the oncoming vehicle, claimant maneuvered her vehicle to the right portion of her lane where her vehicle struck a hole on the berm. Claimant stated that she traveled on this road everyday, and had noticed the missing piece of pavement on prior occasions. However, at the time of the incident, she was unable to avoid the hole because of the presence of the oncoming vehicle. Claimant further stated that the road is not wide enough for two cars to pass. As a result, claimant sustained damage to the passenger's side front tire and the rim totaling $766.42, and claimant did not have insurance coverage for her loss.

The position of the respondent is that it did not have notice of the hole in question on Brounland Road. Respondent did not call any witnesses.

It is a well-established principle that the State is neither an insurer nor a guarantor of the safety of motorists upon its highways. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). To hold respondent liable, claimant must establish by a preponderance of the evidence that respondent had actual or constructive notice of the road defect at issue and a reasonable amount of time to take corrective action. *Chapman v. Dept. of Highways*, 16 Ct. Cl. 103 (1986); *Pritt v. Dept. of Highways*, 16 Ct. Cl. 8 (1985).

In the instant case, the Court is of the opinion that respondent had, at the least, constructive notice of the hole that claimant's vehicle struck and that the hole presented a hazard to the traveling public on Brounland Road. The size of the hole and the time of year in which this incident occurred leads the Court to conclude that respondent had notice of this hazardous condition and had adequate time to take corrective action. Thus, there is sufficient evidence of negligence to base an award. However, the Court is also of the opinion that claimant was negligent in her operation of the vehicle. Claimant was aware that there were holes on Brounland Road. In addition, she should have seen the oncoming vehicle before her vehicle struck the hole. In a comparative negligence jurisdiction, such as West Virginia, the negligence of a claimant may reduce or bar recovery in a claim. The Court concludes that the claimant was twenty percent (20%) negligent. Since the negligence of claimant is not greater than or equal to the negligence of respondent, claimant may recover eighty percent (80%) of the loss sustained.

In accordance with the findings of fact and conclusions of law stated herein above, the Court is of the opinion to and does make an award to claimant in the amount of $613.14.

Award of $613.14.

OPINION ISSUED JANUARY 29, 2008

JULIA E. LEGRAND
VS.
DIVISION OF HIGHWAYS
(CC-07-214)

Claimant appeared *pro se*.

Andrew F. Tarr and Jason C. Workman, Attorneys at Law, for respondent.

PER CURIAM:

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

1. During a storm on the evening of June 27, 2007, at approximately 9:00 p.m., a tree from respondent's property along I-64 on Mile Marker 37 fell on a workshop. The damage totaled the building.

2. Respondent was responsible for the maintenance of I-64 which it failed to properly maintain on the date of this incident.

3. As a result of this incident, claimant's property sustained damage, and claimant's insurance deductible is $250.00.

4. Respondent agrees that the amount of $250.00 for the damages put forth by the claimant is fair and reasonable.

The Court has reviewed the facts of the claim and finds that respondent was negligent in its maintenance of I-64 on the date of this incident; that the negligence of respondent was the proximate cause of the damages sustained to claimant's vehicle; and that the amount of the damages agreed to by the parties is fair and reasonable. Thus, claimant may make a recovery for her loss.

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

Award of $250.00.

OPINION ISSUED MAY 28, 2008

CAROL LYNN MINOR and RANDY LEE MINOR
VS.
DIVISION OF HIGHWAYS
(CC-07-194)

Claimants appeared *pro se*.

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

PER CURIAM:

Claimants brought this action for vehicle damage which occurred when their 2002 GZ Suzuki 250 motorcycle struck a crack in the pavement on County Route 17 in Marshall County. County Route 17 is a road maintained by respondent. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 7:00 a.m. on

June 7, 2007. County Route 17, commonly referred to as Fork Ridge Hill, is a two-lane road at the area of the incident involved in this claim. Carol Minor was operating the motorcycle with her husband, Randy Minor, following her on his motorcycle. As Ms. Minor was traveling on the right portion of the lane at approximately twenty-five to thirty miles per hour, the motorcycle's front tire struck a crack in the road. Ms. Minor did not realize that the crack existed until she came upon it. The photographs demonstrate that the crack was situated between the centerline and edge line, and it was located on a hill near a gradual turn in the road. Claimant testified that she was unable to avoid the crack because the pavement was rough throughout this area. Ms. Minor stated that she had driven her truck on County Route 17 the day before the incident, but she had not ridden her motorcycle in this area for about two weeks prior to the accident. Since she was aware that the crack existed, she usually drove closer to the centerline and to the left of the crack. On the day in question, she decided it was too dangerous to drive near the centerline because of the prospect of oncoming traffic near the centerline, which could result in a collision with the motorcycle. In addition, she stated that it is the usual and customary practice for motorcyclists to operate motorcycles closer to the outside of the lane when maneuvering through a curve in the road.

When claimants' motorcycle struck the crack, it caused the motorcycle to tip over onto Ms. Minor's left ankle. As a result, she suffered from a fractured ankle, abrasions, and bruises on her right elbow. Although she did not suffer from permanent injuries, it took approximately two months for her ankle to heal. In addition, the photographs submitted as evidence demonstrate that the motorcycle's mirror, windshield, and fender were damaged. Claimant seeks to recover $3,000.46 as a result of this incident, including $2,500.00 for pain and suffering; $435.46 in out-of-pocket medical costs; and $65.00 in motorcycle repairs.

Mr. Minor testified that he was following his wife on his motorcycle when the incident occurred. He stated that Ms. Minor was driving the motorcycle towards the right side of the lane so that oncoming traffic would not hit the motorcycle. As she was proceeding up the hill, the motorcycle's front tire caught on a jagged edge in the surface of the pavement. As a result, the motorcycle fell to the ground and slid for approximately five feet. He stated that there was no oncoming traffic at the time of the incident. Mr. Minor testified that he frequently rides his motorcycle on this road, and he noticed that the road's condition had worsened during the previous year. He stated that respondent had repaired a slip in the road once before, but the slip had reappeared. The slip caused the pavement to sink which created the crack on the road's surface. He testified that the crack was approximately thirty feet long, six inches wide, and five inches deep.

The position of the respondent is that it did not have notice of the crack on County Route 17 on the day in question. Christopher Minor, Highway Administrator II for respondent in Marshall County, testified that County Route 17 is a secondary access road. He stated that flooding in 2004 caused various slips to appear on this road. Respondent had contractors re-stabilize the bank, place steel piling in the ground, and reshape the road to make it safe for the traveling public. In this particular location, the piling wall failed, which caused an aggravated slip to form. When the piling wall failed, it took the shoulder of the road as well as the road's surface. Mr. Minor testified that respondent worked with contractors to improve the conditions of the road. On April 10, 2007, respondent patched the area with cold mix. Mr. Minor stated that the crack in question could have formed after April 10, 2007. However, respondent did not have notice of the crack prior to this incident.

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

In the instant case, the Court is of the opinion that respondent had, at the least, constructive notice of the crack in the road which claimants' motorcycle struck and that the crack presented a hazard to the traveling public. The testimony of Christopher Minor leads the Court to conclude that respondent had notice that this was a problem area on County Route 17. In addition, the evidence established that the crack was approximately thirty feet long, six inches wide, and five inches deep. Thus, the Court finds that respondent was negligent in its maintenance of County Route 17. The Court has determined that the amount of damages set forth by the claimants is fair and reasonable. However, the Court also finds that claimants had notice of the crack along County Route 17 prior to this incident. Ms. Minor stated that she was aware of the slips along County Route 17, and she had seen the crack before this accident. Since the claimants had notice of the road's conditions, the Court finds that Ms. Minor was comparatively negligent, and the Court will reduce the claimants' recovery by thirty-percent (30%).

In accordance with the findings of fact and conclusions of law stated herein, the Court is of the opinion to and does make an award to the claimant in the amount of $2,100.33.

Award of $2,100.33.

OPINION ISSUED MAY 28, 2008

V. CHRISTINE SMITH AND RAY A. SMITH
VS.
DIVISION OF HIGHWAYS
(CC-07-199)

Claimants appeared *pro se*.

Jason C. Workman, Attorney at Law, for respondent.

PER CURIAM:

Claimants brought this action for vehicle damage which occurred when their 2000 Nissan Maxima struck a piece of concrete on the Route 16 bypass bridge in Mount Hope, Fayette County. Route 16 is a road maintained by respondent. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 7:45 a.m. on May 10, 2007. The Route 16 bypass bridge is a paved, two-lane road, and the speed limit is forty-five miles per hour. Claimant V. Christine Smith was driving to work at approximately forty to forty-five miles per hour. As she was proceeding across the

bridge, her vehicle struck a piece of concrete that came out of a hole on the bridge deck. The piece of concrete was approximately one foot in diameter. She was unable to avoid the hole because the piece of concrete did not come out of the hole until she traveled over it. Claimant stated that she drives on this road on a daily basis and stated that she was aware that there were holes on the bridge surface. At the time of the incident, she was driving closer to the right side of the road to avoid a hole. There were no warning signs at this location. As a result of the incident, claimants' vehicle sustained damage to its rear passenger's side rim in the amount of $166.42. The amount of claimants' insurance deductible is $250.00.

The position of the respondent is that it did not have actual or constructive notice of the condition on the Route 16 bypass bridge at the site of the claimant's accident for the date in question. John Zimmerman, Assistant County Administrator for respondent in Fayette County, testified that Route 16 is a primary route. He stated that the bridge in this location is in failing condition. He explained that the bridge is one of the older bridges in the County and needs to be replaced. Respondent monitors the condition of the bridge approximately four or five times a week and patches the holes that need repaired on the bridge surface. Mr. Zimmerman stated that there are no "reduce speed" or "rough road" signs before reaching the bridge. He testified that it is a common occurrencefor pieces of concrete to come out of the bridge's surface because the bridge deck is so unstable. Vehicles traveling over the concrete patches cause the patches to crack and pop out of the road's surface. Mr. Zimmerman stated that respondent did not receive any complaints regarding this particular problem, but individuals have inquired about the replacement of the bridge. Even though the bridge has been in disrepair for approximately seven years, the bridge is not scheduled to be replaced until 2015. The cost of replacing the bridge's deck is in excess of one million dollars.

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

In the instant case, the Court is of the opinion that respondent had, at the least, constructive notice of the piece of concrete which claimants' vehicle struck and that it presented a hazard to the traveling public. Mr. Zimmerman testified that it was not uncommon for pieces of concrete to come out of the bridge's surface. Although respondent was aware that the bridge was in failing condition, there were no warning signs in place at the time of this incident. Thus, the Court finds respondent negligent and claimants may make a recovery for the damage to their vehicle.

In accordance with the findings of fact and conclusions of law stated herein above, the Court is of the opinion to and does make an award to the claimants in the amount of $166.42.

Award of $166.42.

OPINION ISSUED MAY 28, 2008

RICHARD W. SYDNOR

VS.
DIVISION OF HIGHWAYS
(CC-07-239)

Claimant appeared *pro se*.

Jason C. Workman, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when his 1996 Ford Taurus struck a piece of concrete on the Route16 bypass bridge in Mount Hope, Fayette County. Route 16 is a road maintained by respondent. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 3:00 p.m. on July 21, 2007. The Route 16 bypass bridge is a paved, two-lane road, and the speed limit is forty-five miles per hour. Claimant's son, Matthew David Sydnor, was driving from Beckley towards Oak Hill at approximately thirty-five miles per hour. As he was traveling across the bridge, the vehicle struck a piece of concrete that was protruding approximately six inches from a hole in the road. The piece of concrete scraped the bottom of claimant's vehicle, damaging the transmission, transmission pan and oil pan. The total amount of claimant's damages amounts to $1,253.95.

The position of the respondent is that it did not have actual or constructive notice of the condition on the Route 16 bypass bridge at the site of claimant's accident for the date in question. John Zimmerman, Assistant County Administrator for respondent in Fayette County, testified that Route 16 is a primary route. He stated that the bridge in this location is in failing condition. He explained that the bridge is one of the older bridges in the County and needs to be replaced. Respondent monitors the condition of the bridge approximately four or five times a week and patches the holes that need repaired on the bridge's surface. Mr. Zimmerman stated that there are no "reduce speed" or "rough road" signs before reaching the bridge. He testified that it is a common occurrence for pieces of concrete to come out of the bridge's surface because the bridge's deck is so unstable. When vehicles travel over the concrete patches, it causes the patches to crack and pop out of the road's surface. Even though the bridge has been in disrepair for approximately seven years, it is not scheduled to be replaced until 2015. The cost of replacing the bridge's deck is in excess of one million dollars.

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

In the instant case, the Court is of the opinion that respondent had, at the least, constructive notice of the piece of concrete which claimant's vehicle struck and it presented a hazard to the traveling public. Based upon the Court's decision in *Smith v. Division of Highways*, CC-07-199, the Court finds respondent negligent. Thus, claimant is entitled to recover for his loss.

In accordance with the findings of fact and conclusions of law stated herein

above, the Court is of the opinion to and does make an award to the claimant in the amount of $1,253.95.

Award of $1,253.95.

OPINION ISSUED MAY 28, 2008

RUSSELL G. COOK AND REBECCA G. COOK
VS.
DIVISION OF HIGHWAYS
(CC-07-315)

Claimants appeared *pro se*.

Jason C. Workman, Attorney at Law, for respondent.

PER CURIAM:

Claimants brought this action for vehicle damage which occurred when their 2007 Honda Accord struck a hole on the white edge line while claimant Russell G. Cook was traveling on County Route 16/14 in Midway, Raleigh County. Route 16/14 is a road maintained by respondent. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred between 2:30 p.m. and 3:00 p.m. on October 13, 2007. County Route 16/14 is a paved two-lane road with white edge lines and a double-yellow center line. The posted speed limit is thirty-five miles per hour. Claimant Russell G. Cook was traveling from Beckley towards Sophia at approximately forty miles per hour when he noticed a vehicle traveling towards him that was partially in his lane of travel. As claimant drove his vehicle closer to the white edge line to avoid the oncoming vehicle, his vehicle struck a hole that was approximately twenty-four inches long, six to eight inches wide, and four inches deep. He first noticed that the oncoming vehicle was on his side of the road when it was fifteen to twenty feet away from his vehicle. Mr. Cook stated that he travels on this road an average of once a month and had not noticed the hole on the white edge line prior to this incident. As a result, claimants' vehicle sustained damage to a tire and a rim in the amount of $360.68. Since claimants' insurance deductible is $250.00, their recovery is limited to that amount.

The position of the respondent is that it did not have actual or constructive notice of the hole on the white edge line on County Route 16/14. Dale Hughart, Raleigh County Administrator for respondent, testified that this road is a second priority in terms of maintenance. Mr. Hughart stated that his office did not receive any complaints regarding the condition of Route 16/14 prior to this incident. However, at least one of his employees travels this road on a regular basis. Mr. Hughart explained that the rain must have washed away a portion of the road in this particular area. He also stated that traffic could have caused the erosion in this location.

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

this type, a claimant must prove that respondent had actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman vs. Dept. of Highways*, 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that respondent had, at the least, constructive notice of the hole which claimants' vehicle struck and that the hole presented a hazard to the traveling public. Since respondent had at least one employee that traveled on this road on a regular basis, the Court finds that respondent was aware of the hole. Also, the size of the hole and the time of year in which this incident occurred leads the Court to conclude that respondent had notice of this hazardous condition. Thus, the Court finds respondent negligent and claimants may make a recovery for the damage to their vehicle.

In accordance with the findings of fact and conclusions of law stated herein above, the Court is of the opinion to and does make an award to claimants in the amount of $250.00.

Award of $250.00.

OPINION ISSUED MAY 28, 2008

KIMBERLY A. STEWART and RICHARD PAUL STEWART
VS.
DIVISION OF HIGHWAYS
(CC-07-372)

Claimants appeared *pro se*.

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

PER CURIAM:

Claimants brought this action for vehicle damage which occurred when their 2005 Honda Odyssey struck rocks on the road while the driver, Kimberly Stewart, was traveling south on Route 2 in Brooke County. Route 2 is a road maintained by respondent. The Court is of the opinion to deny this claim for the reasons more fully set forth below.

The incident giving rise to this claim occurred on November 28, 2007, at approximately 6:15 a.m. Route 2 is a two-lane road with a speed limit of forty-five miles per hour which increases to fifty-five miles per hour. At the time of the incident, the vehicle was proceeding at approximately fifty-five miles per hour when it encountered falling rocks on the road. Since it was dark outside, the driver did not notice the rocks until her vehicle struck them. Claimant stated that she travels on this road everyday and was aware of previous problems with rock slides on Route 2. She explained that in the past two years, respondent cut the hill side back near Wellsburg to prevent rock slides. Although she has seen rocks fall onto the side of the road on other occasions, she never saw rocks slide into the roadside prior to this incident. Claimants' vehicle sustained damage to the left, front tire and transmission in the amount of $3,497.80, and the amount

of their insurance deductible was $500.00.

The position of the respondent is that it did not have notice of the rocks on Route 2. Craig Sperlazza, Highway Administrator for respondent in Brooke County, testified that there are two miles along Route 2 which are known for rock falls. In order to advise the public of the condition in this area, respondent placed two "falling rock" signs on the southbound lane and two signs on the northbound lane. He stated that the sign that claimant would have passed is located at mile post 6.73, and the incident occurred at mile post 6.33. Mr. Sperlazza testified that the signs were installed prior to November of 2007. In addition, respondent would periodically have contractors clean up fallen rocks and secure the shoulder with larger limestone rocks. Mr. Sperlazza stated that although similar incidents occurred in this area, rock fall accidents are infrequent.

It is a well-established principle that the State is neither an insurer nor a guarantor of the safety of motorists upon its highways. *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947). To hold respondent liable, claimant must establish by a preponderance of the evidence that respondent had actual or constructive notice of the road defect at issue and a reasonable amount of time to take corrective action. *Chapman v. Dept. of Highways,* 16 Ct. Cl. 103 (1986); *Pritt v. Dept. of Highways,* 16 Ct. Cl. 8 (1985). In rock fall claims, this Court has held that the unexplained falling of a rock onto a highway without a positive showing that respondent knew or should have known of a dangerous condition posing injury to person or property is insufficient to justify an award. *Coburn v. Dept. of Highways,* 16 Ct. Cl. 68 (1985).

In the present claim, claimants have not established that respondent failed to take adequate measures to protect the safety of the traveling public on Route 2 in Brooke County. Respondent placed "falling rock" signs to warn the traveling public of the potential for rock falls at this location. The Court finds that respondent did not have prior notice in the instant case because the rocks fell instantaneously as claimant was traveling on Route 2. While the Court is sympathetic to the claimants' plight, the fact remains that there is insufficient evidence of negligence on the part of respondent upon which to base an award.

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

Claim disallowed.

OPINION ISSUED MAY 28, 2008

ELMER SANDRETH AND REBECCA SANDRETH
VS.
DIVISION OF HIGHWAYS
(CC-07-377)

Kevin M. Pearl and Michael G. Simon, Attorneys at Law, for claimants.

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

PER CURIAM:

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

1. On or about October 1, 2007, the claimants' son, Micah Sandreth, was traveling on Route 2 in New Cumberland, Hancock County, when a rock fell from the Station Hill wall into the path of the vehicle, causing damage to the tire, rim, and suspension system.

2. Respondent was responsible for the maintenance of Route 2 which it failed to maintain properly on the date of this incident.

3. As a result, claimants' vehicle sustained damage in the amount of $933.61.

4. Claimants and respondent both agree that the amount of $466.80 for the damages put forth by the claimants is a fair and reasonable amount to settle this claim.

The Court has reviewed the facts of the claim and finds that respondent was negligent in its maintenance of Route 2 on the date of this incident; that the negligence of respondent was the proximate cause of the damages sustained to claimants' vehicle; and that the amount of the damages agreed to by the parties is fair and reasonable. Thus, claimants may make a recovery for their loss. The parties agreed that the amount of $466.80 represents a full compromise and settlement for this claim.

Accordingly, the Court is of the opinion to and does make an award in the amount of $466.80.

Award of $466.80.

OPINION ISSUED MAY 28, 2008

JABBAR K. THOMAS
VS.
DIVISION OF HIGHWAYS
(CC-08-001)

G. Patrick Jacobs, Attorney at Law, for claimant.

Jason C. Workman, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when his 2006 Chrysler 300 struck a hole while he was driving east on I-64 in Charleston, Kanawha County. I-64 is a road maintained by respondent. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred at 12:15 p.m. on December 14, 2007. I-64 is a six-lane highway with three eastbound and three westbound lanes. The posted speed limit is sixty miles per hour. Claimant's speed was approximately sixty miles per hour. At the time of the incident, claimant was driving past the Oakwood Road

exit and was preparing to take the Lee Street Exit. Since his vehicle was located in the center lane, he needed to change lanes in order to take the exit. Claimant testified that there was a lot of traffic on the road at this time. As he was driving towards Laidley Towers in the center lane, his vehicle struck a hole in the road. Although claimant travels this road every day, he did not notice the hole before this incident occurred. He observed that the hole was approximately two to three feet wide and eight inches deep. The claimant cautiously maneuvered his vehicle to the side of the road, and he immediately contacted respondent from the site of the incident. Claimant's vehicle sustained damage to the passenger's side tires and rims. The estimate for replacing the damaged tires amounts to $854.15, and the estimate for replacing the damaged rims is $1,150.00. Since claimant's insurance deductible is $1,000.00, his recovery is limited to that amount.

The position of the respondent is that it did not have notice of the hole immediately before the incident, and it responded in a timely manner after the incident occurred. Stephen Wayne Knight, Transportation Crew Supervisor for respondent in Kanawha County, testified that I-64 is a high priority road in terms of maintenance. Mr. Knight first became aware of the problem in this area in mid- November. He explained that a portion of the section of highway is located on a bridge. Fifteen years ago, a section of the concrete in this area was milled off and replaced with latex. Around November of 2007, the latex reached its maturity date causing the latex to come out of the road's surface. Prior to this incident, respondent had to shut down the lanes of traffic to remove some of the latex and replace it with new concrete. However, when the weather became colder, respondent used cold mix to patch this area.[13] Mr. Knight stated that one or two days before claimant's incident, respondent patched the holes on this road with cold mix. His crews monitored this area approximately three to four times a week. Mr. Knight further stated that his crew only performs bridge deck repair when the bridge crew is unavailable.

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

In the instant case, the Court finds that respondent had, at the least, constructive notice of the hole that claimant's vehicle struck, and that the hole presented a hazard to the traveling public on I-64 in Kanawha County. The Court finds that respondent was aware that the latex had reached its maturity date. The location of the hole on a heavily traveled portion of the interstate, where vehicles travel at high speeds, leads the Court to conclude that respondent had constructive notice of the condition on I-64. Mr. Knight testified that this portion of I-64, which runs through the center of Charleston, is of the highest priority in terms of maintenance. Despite respondent's attempts to patch the hole in this area, the patchwork was inadequate when this incident occurred. Thus, the Court finds respondent negligent and claimant may make a recovery for the damage to his

[13] Mr. Knight explained that cold mix is generally used during the winter months when hot mix is unavailable. Hot mix typically sets up in forty-five minutes to an hour whereas cold mix does not set up, it compacts to harden.

vehicle.

In accordance with the findings of fact and conclusions of law stated herein above, the Court is of the opinion to and does make an award to the claimant in this claim in the amount of $1,000.00.

Award of $1,000.00.

OPINION ISSUED MAY 28, 2008

SHAWN PAVEL
VS.
DIVISION OF HIGHWAYS
(CC-08-020)

Claimant appeared *pro se*.

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when his 1991 Pontiac Firebird scraped the road surface on Home Access Route 932 (hereinafter referred to as "HA932") in Weirton, Hancock County as a result of the washed out condition of the road. HA932, commonly referred to as Shenandoah Lane, is an orphan road maintained by respondent. The Court is of the opinion to deny this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred on October 16, 2007. HA932 is a one-lane, dead-end access road. The entrance to the road intersects with County Route 9/12. As claimant was driving at approximately five miles per hour, the washed out portion of the road caused his vehicle to scrape the body of the vehicle on the road surface at the entrance of HA932. He stated that the road washes out when it rains, and the ditches in this area are full of gravel. Although claimant was aware of the eroded condition of the road, he testified that it had gotten worse when this incident occurred. The photographs submitted as evidence demonstrate that his vehicle's bumper dragged on the road's surface. As a result of this incident, the passenger's side of the vehicle sustained body damage in the amount of $852.81.

The position of the respondent is that it did not have actual or constructive notice of the condition on HA932 at the site of claimant's accident for the date in question. Samuel DeCapio, Highway Administrator for respondent in Hancock County, testified that HA932 is a fourth priority road in terms of maintenance. This road was originally an orphan road that was taken into the State's system on December 6, 2000. Mr. DeCapio stated that he did not have any knowledge of the condition on HA932 prior to this incident. He testified that part of the problem on HA932 is that the property owners who live on this road have not placed culverts beneath their driveways to prevent the road from washing out when it rains. In order to remedy the problem, his crews will need to place hot mix and a bevel at this location. However, Mr. DeCapio stated that he is

required to follow the schedule set forth in respondent's Core Maintenance Plan for making repairs such as the repair required for this particular section of roadway.

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

In the instant case, the Court is of the opinion that respondent did not have actual or constructive notice of the condition on HA932 prior to the incident in question. According to the testimony of Samuel DeCapio, respondent is required to follow a Core Maintenance Plan which sets forth the schedule for the maintenance of roads based on their condition. The Court cannot hold respondent liable for complying with the schedule of its Core Maintenance Plan. Additionally, respondent did not receive any complaints regarding the condition of Route 932 prior to this incident. Since HA932 is a fourth priority road in terms of maintenance, it is reasonable that respondent did not have notice of this condition prior to October 16, 2007. Although the Court is sympathetic to the claimant's plight, there is insufficient evidence of negligence upon which to justify an award.

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

Claim disallowed.

OPINION ISSUED MAY 28, 2008

WILLIAM J. CRAGO
VS.
DIVISION OF HIGHWAYS
(CC-08-031)

Claimant appeared *pro se*.

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when his 2003 Cadillac struck a hole in the road while he was traveling north on Route 2 in Weirton, Hancock County. Route 2 is a road maintained by respondent. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 4:30 p.m. on December 24, 2007. Route 2 in this area is a three-lane road, with two northbound lanes and one southbound lane. The posted speed limit is forty-five miles per hour. As claimant was driving in the northbound lane at approximately forty to forty-three miles per hour, his vehicle struck a hole in the road. Claimant testified that he travels on this road every day and noticed that there are a series of holes in this area. He lives in the area close to where the holes are located. Although claimant is familiar with this location

and usually tries to avoid the holes, he could not avoid the subject hole on this occasion. As a result, the vehicle's left front tire and rim sustained damage in the amount of $424.43. Claimant's insurance deductible is $500.00.

The position of the respondent is that it did not have actual or constructive notice of the condition on Route 2 at the site of the claimant's accident. Samuel DeCapio, Highway Administrator for respondent in Hancock County, stated that respondent was engaged in snow removal and ice control on the day in question. Although he states that there were a series of holes in this location, he explained that snow removal and ice control are respondent's highest priority.

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

In the instant case, the Court is of the opinion that respondent had at least constructive notice of the hole which claimant's vehicle struck and that the hole presented a hazard to the traveling public. Even though respondent was engaged in snow removal and ice control, Mr. DeCapio stated that he was aware that there were a series of holes in the road at this location. However, the Court is also of the opinion that claimant had notice of the condition of the road on Route 2. Therefore, the Court concludes that claimant was ten percent (10%) comparatively negligent for this incident which caused the damages to his vehicle.

In accordance with the findings of fact and conclusions of law stated herein above, the Court is of the opinion to and does make an award to the claimant in this claim in the amount of $381.99.

Award of $381.99.

OPINION ISSUED AUGUST 4, 2008

FORT HENRY REALTY INC. d/b/a ADVANCED COMMUNICATIONS CO.
VS.
DEPARTMENT OF ADMINISTRATION
(CC-06-359)

James T. McClure, Attorney at Law, for claimant.

James A. Kirby III, General Counsel, for respondent.

PER CURIAM:

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

1. On August 25, 2006, claimant and respondent, through its Purchasing

Division, created a purchase order (hereinafter "Purchase Order") to install a Digital/IP Hybrid Telephone System for the West Virginia Veterans Nursing Home in Clarksburg.

2. One of the requirements of the Purchase Order was that claimant perform no later than September 16, 2006.

3. On September 13, 2006, respondent's Purchasing Division issued a Cease and Desist Order in regard to the Purchasing Order.

4. On November 1, 2006, respondent's Purchasing Division cancelled the Purchase Order.

5. In preparing to perform the work required in the Purchase Order, claimant did, in good faith and reliance, reasonably incur expenses:

A. Spectra Link Equipment: $3,185.25

B. NEC Equipment W6423: $470.25

C. Mileage for two (2) round trips: $182.98

I. Wheeling to Parkersburg:

D. Certain Equipment out of Warranty: $1,465.57

I. Microsoft Small Business Server 2003

II. Bad Personal Computer

III. Bad Battery Backup

E. NEC Equipment Sale: $7,962.73

TOTAL: $13,266.78

The Court finds that the amount agreed to by the parties is fair and reasonable. Thus, the Court is of the opinion to and does make an award in the amount of $13,266.78.

Award of $13,266.78.

OPINION ISSUED AUGUST 4, 2008

LISA GODWIN
VS.
DIVISION OF HIGHWAYS
(CC-07-0323)

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when her 1999 Volvo V70 struck a hole on Route 33 in Putnam County. Route 33 is a road maintained

by respondent. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 11:00 a.m. on June 14, 2007. Route 33 is a marked, two-lane paved road with one lane traveling in each direction. As claimant's daughter, Shawna Tyree, was driving to the Putnam County Bank at approximately twenty-five miles per hour, claimant's vehicle struck a hole on Route 33. Since there was a vehicle traveling in front of Ms. Tyree, she was unable to avoid the hole before the vehicle struck it. Ms. Tyree testified that the hole extended approximately one foot from the main travel portion of the road and was approximately six inches deep. Since the claimant's daughter did not travel this road frequently, she was not aware of the holes at this location. Ms. Tyree stated that she was running an errand for the Tyree, Embree, Law Firm, and she had never been to this bank before. As a result of this incident, the vehicle had to be towed in the amount of $60.00, the rim sustained damage in the amount of $47.10, and two tires had to be replaced and balanced in the amount of $321.68. Thus, the total amount of claimant's damages amounts to $428.78. Claimant's insurance deductible at the time of the incident was $500.00.

The position of the respondent is that it did not have actual or constructive notice of the condition on Route 33. The respondent did not present any witnesses at the hearing.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold respondent liable for road defects of this type, a claimant must prove that respondent had actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman v. Dep't. of Highways*, 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that respondent had, at the least, constructive notice of the hole which claimant's vehicle struck and that the hole presented a hazard to the traveling public. The Court finds that respondent had constructive notice of the hole based on its size and its location on the main travel portion of Route 33. Since respondent's negligent maintenance of Route 33 was the proximate cause of the damages sustained to claimant's vehicle, the claimant may make a recovery in this claim.

In accordance with the findings of fact and conclusions of law stated herein above, the Court is of the opinion to and does make an award to the claimant in the amount of $428.78.

Award of $428.78.

OPINION ISSUED AUGUST 4, 2008

KIMBERLY ANN WILCOX
VS.
DIVISION OF HIGHWAYS
(CC-08-050)

Claimant appeared *pro se*.

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

PER CURIAM:

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

1. On December 10, 2007, claimant was traveling on the Teays Valley entrance ramp onto I-64 in Putnam County when her vehicle struck a hole in the road damaging one tire and two rims.

2. Respondent was responsible for the maintenance of the Teays Valley entrance ramp onto I-64 which it failed to maintain properly on the date of this incident.

3. As a result, claimant's vehicle sustained damage in the amount of $714.71. Claimant's insurance deductible is $1,000.00.

4. Respondent agrees that the amount of $714.71 for the damages put forth by the claimant is fair and reasonable.

The Court has reviewed the facts of the claim and finds that respondent was negligent in its maintenance of the Teays Valley entrance ramp onto I-64 on the date of this incident; that the negligence of respondent was the proximate cause of the damages sustained to claimant's vehicle; and that the amount of the damages agreed to by the parties is fair and reasonable. Thus, claimant may make a recovery for her loss.

Accordingly, the Court is of the opinion to and does make an award in the amount of $714.71.

Award of $714.71.

OPINION ISSUED AUGUST 4, 2008

BRANDY WOMACK
VS.
DIVISION OF HIGHWAYS
(CC-08-0075)

Claimant appeared *pro se*.

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

PER CURIAM:

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

1. On February 6, 2008, claimant was traveling on the Teays Valley entrance ramp onto I-64 in Putnam County, when her vehicle struck a hole in the road, damaging both passenger side tires and rims. After the incident, the vehicle's sensor relay was damaged, and claimant contends that this damage was a direct result of her vehicle

striking the hole.

2. Respondent was responsible for the maintenance of the Teays Valley entrance ramp onto I-64 which it failed to maintain properly on the date of this incident.

3. As a result, claimant's vehicle sustained damage in the amount of $2,374.69. Since claimant's insurance deductible is $500.00, her recovery is limited to that amount.

4. Respondent agrees that the amount of $500.00 for the damages put forth by the claimant is fair and reasonable.

The Court has reviewed the facts of the claim and finds that respondent was negligent in its maintenance of the Teays Valley entrance ramp onto I-64 on the date of this incident; that the negligence of respondent was the proximate cause of the damages sustained to claimant's vehicle; and that the amount of the damages agreed to by the parties is fair and reasonable. Thus, claimant may make a recovery for her loss.

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

Award of $500.00.

OPINION ISSUED AUGUST 4, 2008

DAWN E. WARFIELD AND THOMAS M. KNIGHT
VS.
DIVISION OF HIGHWAYS
(CC-08-0105)

Claimant appeared pro se.

Jason C. Workman, Attorney at Law, for respondent.

PER CURIAM:

Claimants brought this action for vehicle damage which occurred when their 2001 Subaru Legacy struck a hole on the berm while claimant, Dawn E. Warfield, was driving on the eastbound entrance ramp to I-64 in Charleston, Kanawha County. The I-64 entrance ramp is a road maintained by respondent. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 8:00 p.m. on September 16, 2007. The entrance ramp to I-64 is a one-lane paved road with two different lanes of traffic that

merge onto the ramp. Ms. Warfield testified that she drove onto the I-64 entrance ramp from Greenbrier Street. As she was entering the ramp, the vehicle traveling behind her passed her vehicleon the left. Since the road had narrowed from two lanes into one-lane, the claimant was forced onto the berm. Claimant stated that she moved onto the berm to avoid a collision with the passing vehicle. As she proceeded on the berm at approximately forty-five miles per hour, her vehicle struck what appeared to be drainage holes. The holes were located at regular intervals along the side of the ramp. Ms.

Warfield stated that she did not see the hole before her vehicle struck it. As a result, claimants' vehicle sustained damage to its right, front wheel; hubcap cover; and alignment in the amount of $305.04. Since claimants' insurance deductible is $250.00, her recovery is limited to that amount.

The position of respondent is that it did not have actual or constructive notice of the condition on the I-64 entrance ramp. Stephen Wayne Knight, Transportation Crew Supervisor II for respondent in Kanawha County, testified that the entrance ramp to I-64 is a high-priority road. He did not receive any complaints regarding holes on the berm prior to the incident in question. Mr. Knight stated that he has crews that will monitor the berm of the interstate approximately three times a day. In May of 2008, Mr. Knight inspected the shoulder in this particular area. Although he did not see any holes, he noticed twelve-inch by twelve-inch openings in the blacktop that were approximately two inches deep. Mr. Knight testified that these openings, located underneath every light pole, are electrical junction boxes for the street lights. Mr. Knight explained that during September, respondent had sweepers clean the roads before winter, and one of the sweepers could have deepened the openings in this location. If repairs were to be made, Mr. Knight stated that the lighting and signal crew would be responsible.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold respondent liable for road defects of this type, a claimant must prove that respondent had actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman v. Dep't. of Highways*, 16 Ct. Cl. 103 (1986). The berm or shoulder of a highway may be maintained in a reasonably safe condition for use when the occasion requires, and liability may ensue when a motorist is forced onto the berm in an emergency or otherwise necessarily uses the berm of the highway. *Sweda v. Dep't of Highways*, 13 Ct. Cl. 249 (1980).

In the instant case, the Court is of the opinion that respondent had, at the least, constructive notice of the hole which claimants' vehicle struck and that the hole presented a hazard to the traveling public. The Court finds that the claimant was forced to use the berm in an emergency situation, and the berm was in an unsafe condition. Thus, the Court finds respondent negligent and claimants may make a recovery for the damage to their vehicle.

In accordance with the findings of fact and conclusions of law stated herein above, the Court is of the opinion to and does make an award to the claimants in the amount of $250.00.

Award of $250.00.

OPINION ISSUED AUGUST 4, 2008

KENNETH R. MASTON
VS.
DIVISION OF HIGHWAYS
(CC-08-0110)

Claimant appeared *pro se*.

Jason C. Workman, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when his 1989 Honda Civic struck a hole on Pennsylvania Avenue in Charleston, Kanawha County. Pennsylvania Avenue is a road maintained by respondent. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 2:00 p.m. on March 17, 2008. Pennsylvania Avenue is a three-lane, paved road. At the time of the incident, claimant was traveling from the west side of Charleston to his home in Mink Shoals. As claimant was driving at less than twenty-five miles per hour, his vehicle struck a hole in the road. Mr. Maston testified that the hole was situated between Washington Street and Women & Children's Hospital and was approximately eight to ten inches long, four or five inches wide, and six inches deep. Claimant testified that he travels this road almost daily and had tried to avoid the holes on this road on prior occasions. Although claimant was aware of the road condition, he took this road because it was the main route to his home rather than driving on the interstate. As a result of this incident, claimant's vehicle sustained damage to its right, front tire, and the vehicle's wheels had to be re-aligned. Thus, claimant incurred damages in the amount of $120.17.

The position of the respondent is that it did not have actual or constructive notice of the condition on Pennsylvania Avenue. The respondent did not present any witnesses at the hearing.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold respondent liable for road defects of this type, a claimant must prove that respondent had actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman v. Dep't. of Highways*, 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that respondent had, at the least, constructive notice of the hole which claimant's vehicle struck and that the hole presented a hazard to the traveling public. The size of the hole and the time of year in which this incident occurred leads the Court to conclude that respondent had notice of this hazardous condition. Thus, the Court finds respondent negligent and claimant may make a recovery for the damage to his vehicle.

In accordance with the findings of fact and conclusions of law stated herein above, the Court is of the opinion to and does make an award to the claimants in the amount of $120.17.

Award of $120.17.

OPINION ISSUED AUGUST 4, 2008

ANNA L. MAYNOR AND CHRISTOPHER MAYNOR
VS.

DIVISION OF HIGHWAYS
(CC-08-0125)

Claimant appeared *pro se*.

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

PER CURIAM:

Claimants brought this action for vehicle damage which occurred when their 2006 Volkswagen Passat struck a barrel while claimant Anna Maynor was driving on I-64 East near the Dunbar bridge in Kanawha County. I-64 is a road maintained by respondent. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 2:50 p.m. on February 16,

2008, a windy day. I-64 is a four-lane, paved road with two lanes of traffic traveling in each direction. The speed limit in the construction zone is approximately fifty miles per hour. As Ms. Maynor was driving through the construction zone at less than fifty miles per hour, an orange and white striped barrel struck the front end of the vehicle. Ms. Maynor stated that there were numerous barrels along the side of the road. She stated that the wind knocked one of the barrels over, causing it to turn sideways and roll in front of the vehicle. Although claimant slowed down when she saw the barrel, she was unable to stop. Ms. Maynor testified that she could not change lanes to avoid the barrel because there was an eighteen-wheel trailer traveling in the other lane of traffic. Ms. Maynor had to drive her vehicle over to the side of the road to remove the barrel from underneath the vehicle. As a result of this incident, the vehicle sustained damage to its grille in the amount of $261.87. The amount of claimants' insurance deductible at the time of the incident was $500.00.

The position of respondent is that it did not have actual or constructive notice of the barrel that rolled in front of claimants' vehicle on I-64. Rick Hazlewood, Transportation Crew Supervisor II, testified that he is responsible for the maintenance and repairs on I-64 from the Dunbar exit to the Milton exit. Mr. Hazlewood explained that the plastic barrels were placed on this section of I-64 East

to close off a lane of traffic. The barrels have been situated along the road for approximately three years. He stated that the barrels can be blown over in high winds or when a vehicle brushes against it. Mr. Hazlewood testified that he did not have a report of this incident.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold respondent liable for road defects of this type, a claimant must prove that respondent had actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman v. Dep't. of Highways*, 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that respondent had, at the least, constructive notice of the barrel which claimants' vehicle struck on I-64 East. The Court finds that the plastic barrels located along the side of the road on I-64 were not adequately secured to prevent a hazard to the traveling public. The fact that wind may

have blown the barrels loose is a foreseeable event and should have been considered. Since the loose barrel was the proximate cause of the damages to claimants' vehicle, the Court concludes that respondent was negligent.

In accordance with the findings of fact and conclusions of law stated herein above, the Court is of the opinion to and does make an award to the claimants in the amount of $261.87.

Award of $261.87.

OPINION ISSUED AUGUST 4, 2008

WEST VIRGINIA UNIVERSITY HOSPITALS INC.
VS.
DIVISION OF CORRECTIONS
(CC-08-234)

Claimant appeared *pro se.*

Charles P. Houdyschell Jr., Senior Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks payment in the amount of $40,247.49 for the cost of medical services provided to an inmate at Mount Olive Correctional Center. Respondent, in its Answer, admits the validity of the claim in this amount and further states that there were insufficient funds in its appropriation for the fiscal year in question from which to pay the claim.

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

Claim disallowed.

OPINION ISSUED AUGUST 4, 2008

MONTGOMERY GENERAL HOSPITAL
VS.
DIVISION OF CORRECTIONS

(CC-08-0280)

Claimant appeared *pro se.*

Charles P. Houdyschell Jr., Senior Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks payment in the amount of $9,808.98 for the cost of medical services provided to inmates at the Mount Olive Correctional Complex. Respondent, in its Answer, admits the validity of the claim as well as the amount and further states that there were insufficient funds in its appropriation for the fiscal year in question from which to pay the claim.

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

Claim disallowed.

OPINION ISSUED AUGUST 4, 2008

SHERRY A. MCCUMBERS
VS.
DIVISION OF HIGHWAYS
(CC-07-0365)

Claimant appeared *pro se*.

Jason C. Workman, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when her 2000 Hyundai Elantra struck a hole while the claimant was driving on Coal River Road in St. Albans, Kanawha County. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 2:30 p.m. on November 28, 2007. Coal River Road is a two-lane, paved road with a center line and a white edge line. At the time of the incident, the claimant was traveling from Tornado to St. Albans. As she was driving around a curve on Coal River Road at approximately twenty-five miles per hour, her vehicle struck a hole in the road. The claimant stated that the hole was located approximately five-tenths of a mile from West Main Street. Since the claimant does not usually travel on Coal River Road, she did notice the hole on a prior occasion. As a result of this incident, the claimant's vehicle had to be re-aligned. The total amount of claimant's damages amounts to $78.64.

The position of the respondent is that it did not have actual or constructive notice of the condition on Coal River Road. The respondent did not call any witnesses at the hearing.

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

In the instant case, the Court is of the opinion that respondent had, at the least, constructive notice of the hole which claimant's vehicle struck and that the hole presented a hazard to the traveling public. The location of the hole on the road leads the Court to conclude that respondent had notice of this hazardous condition. Thus, the Court finds respondent negligent, and claimant may make a recovery for the damage to her vehicle.

In accordance with the findings of fact and conclusions of law stated herein above, the Court

is of the opinion to and does make an award to the claimant in the amount of $78.64.

Award of $78.64.

OPINION ISSUED OCTOBER 6, 2008

MELISSA G. MEDDINGS
VS.
DIVISION OF HIGHWAYS
(CC-04-0110)

Claimant appeared *pro se*.

Andrew F. Tarr and Jason C. Workman, Attorneys at Law, for respondent.

PER CURIAM:

Claimant brought this action to recover costs for the damage that resulted due to the landslides on her property. She alleges that the landslides were caused by respondent's negligent maintenance of the drainage system on Ferguson Branch Road, designated as Route 52/21, in Wayne County. Route 52/21 is a road maintained by respondent. The Court is of the opinion to deny this claim for the reasons more fully stated below.

In 1990, claimant and her husband purchased property adjacent to Route 52/21 from Norman Maynard and Shirley Maynard.[14] At that time, there was a house on the

[14] At the hearing, claimant testified that the previous owners brought a claim against respondent for the negligent maintenance of the drainage ditch on Route 52/21 that resulted in the slippage of the land on their property. *See Maynard v.*

property as well as two smaller structures. The house burned down in 2001. Thereafter, the claimant and her husband purchased a double-wide trailer that was placed on the property in December 2001. Claimant's husband leveled the land for the placement of the trailer in the area where the house had been situated. During January 2002, claimant and her family moved into the double-wide trailer. In 2003, claimant and her husband divorced. After the divorce, the double-wide trailer was removed from her property. Currently, there are no structures located on this parcel of land, and claimant no longer lives on the property. Although claimant is the sole owner of the real estate, her two daughters have a future interest in the property which will fully vest when both daughters reach the age of majority.[15]

Claimant's ten-and-a-half acre parcel of land is located adjacent to Route 52/21, which is a one-lane road with an asphalt surface. The property is situated approximately fifteen miles from the town of Wayne. Route 52/21 extends for approximately two miles, and claimant's driveway runs parallel to Route 52/21 for approximately 150 yards. A strip of land on claimant's property divides Route 52/21 from claimant's driveway. Respondent's drainage ditch is located across the road from claimant's property near the hillside adjacent to Route 52/21.

Claimant asserts that the crux of the problem is the failure of respondent to maintain the ditch line on Route 52/21. The ditch line became stopped up, and water would no longer flow through the culvert, causing it to flow across the road and onto claimant's property. Claimant first became aware of the problem in October 2002, when she noticed a crack on her driveway that extended into the roadway. She notified respondent's Wayne Office of the problem. She asserts that if respondent had cleaned out the ditch line, the landslides would not have occurred. Claimant submitted as evidence photographs of the entrance to her driveway which demonstrate that a portion of her driveway has broken off and sunk approximately three feet. Claimant alleges that her driveway has become unsafe to walk or drive upon.[16]

Ronnie Finley, claimant's boyfriend, contends that water travels from the hillside adjacent to the State road and towards the ditch line. Since the ditch line becomes filled with water, and the water does not reach the culvert on top of the hill, it seeps under the road and onto claimant's driveway. During the winter, water froze under Route 52/21, causing the asphalt to continue to deteriorate. Mr. Finley testified that in his opinion another culvert is needed near the ditch line because the existing culvert is located on a high point and consequently doesn't keep the water from flowing onto claimant's property.

Mr. Finley asserts that the fifty yards of claimant's property adjacent to Route

---

Dep't of Highways, 12 Ct. Cl. 4 (1977). The findings in this claim are discussed later in this opinion.

[15] Claimant's oldest daughter is twenty years old, and her youngest daughter is thirteen years old.

[16] Claimant's youngest daughter sustained injuries when she got off the school bus and fell due to the rough surface. Also, claimant sustained damages to her vehicle from traveling on her driveway, but claimant is not seeking damages as a result of these incidents.

52/21 were affected by the failure of respondent to maintain the drainage ditches. Claimant's driveway has slipped approximately five or six feet, and at one time, this area was nearly level with the main road. During the Spring of 2003, respondent placed additional gravel on the road to alleviate the problem. Also, respondent installed boulders in an effort to hold back the State road. According to Mr. Finley, these measures did not remedy the land slide. When respondent placed additional gravel on the road, it pushed the mud down hill, causing the driveway to slope at a steeper angle before it stabilized.

Claimant seeks to recover for the cost of repairing the damage to her property. She also seeks to recover $100.00 per month in rent for the lot where her trailer is currently placed. She contends that she would not have incurred the cost of rent, which she has been paying since July 2005, if the damage to her property had not occurred. In addition, claimant obtained estimates for the cost of repairing the damage. The first estimate, from R&D Trucking and Excavating, totals to $16,000.[17] The second estimate, from Bryant's Construction, totals $17,800.00.[18]

Respondent avers that it is not liable for the landslides that are occurring on claimant's property. Joseph D. Carte, Senior Geotechnical Engineer for respondent, testified that he visited claimant's parcel of land on three separate occasions and analyzed the cause of the landslides that occurred on claimant's property. Mr. Carte explained that claimant's property is located in a slip prone area.

In Mr. Carte's professional opinion, a disturbance to the property triggered the landslides. He stated that respondent's failure to maintain the ditch line was not the cause of the slip because there were no landslides from 1990 until October of 2002. These landslides occurred after the house burned down in 2001, and claimant's ex-husband bulldozed the field on top of a spring on the property without placing a proper drainage

[17] The estimate from R& D Trucking and Excavating indicates that the following work would need to be performed: (1) Remove stone and over burden on existing slip; (2) Take slip out down to harden material; (3) Below slip, dig footer for 6' retaining block; (4) Set block for wall to hold slip; (5) Dig and place 80' of 2' culvert for drainage; (6) Dig from back of property dirt to haul and fill slip and compact it to keep it from sinking; (7) Haul dirt to fill in 1ft lifts to keep compaction; (8) After fill is complete, haul approximately 80 tons of stone to be put at the entrance of the property.

[18] The Bryants' construction estimate includes the cost for the following work: (1) Remove existing slip down to solid material; (2) Dig and pour footer for retaining wall two feet below solid; (3) Build forms for retaining wall and pour concrete; (4) Excavate fill dirt from back of said property; (5) Haul new dirt from back of property using dump truck; (5) Lift new dirt in 12 inch lifts compact to minimize settling; (6) Install 2 foot culvert pipe across driveway to divert water over hill and away from new fill; (7) Build retaining wall and back fill with gravel and drain pipe.

blanket.[19] Mr. Carte submitted an aerial photograph of claimant's property which demonstrated that claimant's driveway has been widened, which constitutes a further modification to claimant's property. The mechanisms of saturation and water pressure on the ground itself further contributed to the slips.

Although claimant first observed the problem when she noticed a crack in the road, Mr. Carte testified that the crack did not originate from the road surface. Since the road surface is rigid, the crack was first noticeable on the road. However, when the toe of the slope began to give way, it migrated up the slope resulting in the crack in the road surface. Mr. Carte testified that a principle of slide mechanics is that a slide will seek equilibrium by migrating to a flatter slope. The end result is that it will stop sliding. Mr. Carte explained that when respondent placed additional gravel on the road, the weight caused the area below the road to give way, but this was the effect of the slip rather than its cause.

Mr. Carte further observed that there are two distinct slips on claimant's property. The first slip is located in the area where the modular home was once situated. Mr. Carte stated that the toe of the slope was cut out when the driveway was widened and the area was cleared in order to place the modular home on the property. The presence of naturally occurring spring water had softened the toe of the slope, making the ground weak. Thus, Mr. Carte concluded that the excavation at the toe of the slope and the naturally occurring spring caused the landslide located in the area of the house seat.

Mr. Carte testified that the second slip is located at the front of claimant's property in the area adjacent to Route 52/21 that extends onto claimant's driveway. Mr. Carte believes that the driveway was improperly placed on a steep slope. He explained that the slope in this area is steeper than a forty-five degree angle and such a slope could not exist naturally because it is beyond the angle of repose. He further stated that soil located on such a steep slope would slip very easily when the surface became wet.

Mr. Carte stated that the driveway was at one time located at a higher level, and it has gradually sloped to the level of the house seat. He explained that the driveway has dropped to the point where the spring line is located, causing water to run across the road instead of through the fill. Cattails, which are plants that grow in areas where there is persistent water, emerged due to the presence of the ground water. He stated that the lack of subsurface drainage for the naturally occurring spring water contributed to the cause of the land slide. Also, the disturbance of widening the road when the double-wide trailer was brought onto the property further contributed to the landslide.

Mr. Carte explained that to remedy the landslide on claimant's property, it is necessary to fortify the toe of the slope. He recommended that smaller sections of the slip be extracted to break up the slip surface. He stated that it would also be necessary to place a drainage blanket at the bottom of the slip plain. Then, the soil should be compacted over the top of the drainage blanket. He reviewed the costs of the estimates provided by the claimant and agreed that the work would cost around $16,000 to

[19] When the house was bulldozed, Mr. Carte explained that the debris was not disposed of in a professional manner. He stated that the debris was placed in the toe of the slip where it was covered with soil. He stated that after the wood debris starts to decay, water may percolate through the soil, creating the potential for another slip in this area.

$17,800.00.

To hold respondent liable for damages caused by inadequate drainage, claimant must prove by a preponderance of the evidence that respondent had actual or constructive notice of the existence of the inadequate drainage system and a reasonable amount of time to correct it. *Orsburn v. Div. of Highways*, 18 Ct. Cl. 125 (1991). In *Maynard v. Dep't of Highways*, 12 Ct. Cl. 4 (1977), the claimants, who were the previous property owners, sought to recover for the landslide which occurred due to the negligent maintenance of the drainage ditch on Route 52/21. The damage to the Maynards' property consisted of a broken side walk and roughness in Norman Maynard's driveway. Claimant and respondent had experts conduct an investigation of the cause of the landslide.[20] Respondent admitted liability and the Court made an award of $2,475.00 to Arthur Maynard and Mollie Maynard, and it also made an award of $1,250.00 to Norman Maynard and Shirley Maynard.[21]

In the present case, the Court finds that respondent was not negligent in its maintenance of the drainage ditch on Route 52/21. Since over twenty-five years have passed between the Maynards' claim and the present claim, the Court finds that the conditions on the property changed substantially during this period of time. As Mr. Carte testified, the property has undergone several major disturbances which triggered the two landslides on their property, more specifically, the actions taken by claimant's ex-husband which affected the toe of the slope abutting the driveway. Although it may seem reasonable for claimant to assume that the "stopped up" drainage ditch caused the landslide, the testimony at the hearing established that there are multiple factors that have contributed to the slippage which is continuing to occur on this property. As Mr. Carte

---

[20] Jerry W. Phelps, a civil engineer that testified on behalf of the claimants, concluded that the presence of respondent's culvert had contributed to the slide. He stated that relocating the culvert would decrease the erosion and help prevent future movement of the slide. He recommended three remedial measures: (1) Backfill the scarp cracks with clay material; (2) Backfill the ravine which would restore the natural condition of the land; (3) Relocate the road culvert drain pipe to eliminate the excessive erosion force.

H. Douglas Preble, consulting geologist for respondent, conducted a field investigation of the cause of the landslide on claimants' property. He concluded that no slip would have occurred if the area were receiving natural drainage flow. He testified that the slip was caused by excessive amounts of water being directed into the bowl and ravine area. He stated that normal drainage conditions existed until respondent placed a culvert beneath Route 52/21, directing an excessive amount of surface water into the area of the present slip, bowl and ravine. Also, the clogged ditch above Route 52/21 contributed to these conditions. He observed that the slip had stabilized after respondent's culvert was removed sometime after Mr. Phelps' investigation on September 19, 1975. However, he stated that the scarp line represents a zone of weakness and recommended that a culvert be used to cross the scarp and slip area in the drain ditch above Route 52/21, as well as the eastern scarp line where it crosses Norman Maynard's private road.

[21] Norman Maynard and Shirley Maynard are the son and daughter-in-law of Arthur Maynard and Mollie Maynard.

explained, the landslide located at the house seat occurred due to the excavation at the toe of the slope and the naturally occurring spring in this area. The slip in the area between Route 52/21 and claimant's driveway was caused by the lack of subsurface drainage for the naturally occurring spring water and the disturbance which resulted from widening the road at this location. All of these factors lead the Court to conclude that claimant's allegation that the slip is caused by respondent's failure to maintain the ditch on its roadway is not substantiated by the evidence. The Court appreciates the careful analysis provided by respondent's expert witness in this claim and his suggestions for claimant to consider to remedy the slip on her property. Although the Court is sympathetic to the claimant's plight, there is insufficient evidence of negligence on the part of the respondent upon which to base an award.

Claim disallowed.

OPINION ISSUED OCTOBER 6, 2008

LARRY A. TICKLE AND SHARON MARIE TICKLE
VS.
DIVISION OF HIGHWAYS
(CC-04-0951)

Claimants appeared *pro se*.

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

PER CURIAM:

Claimants brought this action for vehicle damage which occurred when their 1999 Dodge Stratus struck a hole while claimant, Sharon Marie Tickle, was driving on Route 20 in Mercer County. Route 20 is a road maintained by respondent. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 7:15 p.m. on Friday, November 26, 2004. Route 20 is a two-lane, paved road with a yellow center line and white edge lines. The posted speed limit is thirty-five miles per hour. At the time of the incident, Ms. Tickle was returning from her father's house after delivering Thanksgiving dinner to him. As she was driving on Route 20 at approximately thirty-five miles per hour, her vehicle struck a hole on the white edge line that was approximately one foot long and six inches wide. Claimant stated that she was aware that there were holes in the middle of the road, and she drove closer to the white edge line to avoid the holes. Since the hole was located on the white edge line, she was unable to avoid it. In addition, she did not see the hole before her vehicle struck it. Ms. Tickle testified that she travels on this road approximately once every month or two months. As a result of this incident, claimants' vehicle sustained damage to its tire in the amount of $56.00 and rim in the amount of $292.95. Thus, claimants' total damages amount to $348.95. Claimants' insurance deductible at the time of the incident was $200.00.

The position of the respondent is that it did not have actual or constructive notice of the condition on Route 20. The respondent did not present any witnesses at the

hearing.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold respondent liable for road defects of this type, a claimant must prove that respondent had actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman v. Dep't. of Highways*, 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that respondent had, at the least, constructive notice of the hole which claimants' vehicle struck and that the hole presented a hazard to the traveling public. The size of the hole leads the Court to conclude that respondent had notice of this hazardous condition. Thus, the Court finds respondent negligent and claimants may make a recovery for the damage to their vehicle.

In accordance with the findings of fact and conclusions of law stated herein above,

the Court is of the opinion to and does make an award to the claimants in the amount of $200.00.

Award of $200.00.

OPINION ISSUED OCTOBER 6, 2008

ALAN J. SPITZ
VS.
DIVISION OF HIGHWAYS
(CC-05-0186)

Claimant appeared *pro se*.

Jason C. Workman, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when his 2005 Dodge Grand Caravan struck a sign while claimant was driving on Route 607 in Lawrence County, Ohio. At the time of the incident, claimant was approaching the 31st Street Bridge in Huntington. Respondent had placed the "Men Working Ahead" sign while work was being performed on the 31st Street Bridge. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 6:45 p.m. on March 8, 2005. The portion of Route 607 where this incident occurred is a three-lane paved road. Claimant was driving approximately two tenths of a mile from the 31st Street Bridge on Route 607 when a road sign struck his vehicle's passenger side fender. It was dark and snowing, and claimant was driving below the speed limit of forty-five miles per hour. Although claimant did not see the sign fall, he believed that the twenty mile an hour winds blew the sign's posts into the roadway. The "Men Working Ahead" portion of the sign was not laying on the travel portion of the road. Claimant was familiar with

this road and had driven it earlier the same day, but he did not notice any problems with the sign prior to this incident. As a result, claimant's vehicle sustained damage to its fender totaling $421.37, and the amount of his insurance deductible is $250.00.

The position of respondent is that it did not have actual or constructive notice of the fallen road sign on Route 607. Neal Morrison, Assistant Supervisor for respondent in Cabell County, testified that his office was not responsible for the work in this area, but the Bridge Department could have been performing maintenance at this location. Mr. Morrison stated that his office did not receive any complaints prior to claimant's incident.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold respondent liable for incidents such as this, a claimant must prove that respondent had actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman v. Dep't of Highways*, 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that respondent had, at the least, constructive notice of the sign that had been blown down due to wind, which presented a hazard to the traveling public. Thus, the Court finds respondent negligent and claimant may make a recovery for the damage to his vehicle.

In accordance with the findings of fact and conclusions of law stated herein above, the Court is of the opinion to and does make an award to the claimant in the amount of $250.00.

Award of $250.00.

OPINION ISSUED OCTOBER 6, 2008

LYNN LEVINSON
VS.
DIVISION OF HIGHWAYS
(CC-06-0254)

Claimant appeared *pro se*.

Jason C. Workman, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when her 2001 Ford Focus struck a hole while her son, Aaron Levinson, was driving on Fifth Avenue in Huntington, Cabell County. Fifth Avenue is a road maintained by respondent. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred between 11:30 p.m. and 1:00 a.m on September 5, 2005. Fifth Avenue is a paved, four-lane road with a posted speed limit of thirty-five miles per hour. Mr. Levinson and the three passengers in his vehicle were

returning from picking up a friend at a bar on Fourth Avenue. He was driving at the speed limit when his vehicle struck a hole that was five feet long, two feet wide, and six to eight inches deep. Mr. Levinson, a student at Marshall University who resided in the State of Washington at that time, explained that he had driven on this road almost every day during the prior school year. Since claimant had just returned to campus for the start of a new school year, he was not aware of the hole on Fifth Avenue before his vehicle struck it. Aaron Jamieson, a passenger in the vehicle, recalled that he heard a loud "pop," and Mr. Levinson pulled the vehicle over into a parking lot to see what had happened. Then, they saw the hole in the road. As a result of this incident, claimant's vehicle sustained damage to its alignment, right passenger wheel, rim, frame, and steering. The total amount of claimant's damages amounts to $1,100.00, and claimant's insurance deductible at the time of the incident was $500.00.

The position of the respondent is that it did not have actual or constructive notice of the condition on Fifth Avenue. The respondent did not present any witnesses at the hearing.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold respondent liable for road defects of this type, a claimant must prove that respondent had actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman v. Dep't of Highways*, 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that respondent had, at the least, constructive notice of the hole which claimant's vehicle struck and that the hole presented a hazard to the traveling public. The size of the hole and the time of year in which this incident occurred leads the Court to conclude that respondent had notice of this hazardous condition. Thus, the Court finds respondent negligent and claimant may make a recovery for the damage to her vehicle.

In accordance with the findings of fact and conclusions of law stated herein above, the Court is of the opinion to and does make an award to the claimant in the amount of $500.00.

Award of $500.00.

OPINION ISSUED OCTOBER 6, 2008

CHRISTOPHER EVANS
VS.
DIVISION OF HIGHWAYS
(CC-06-0289)

Claimant appeared *pro se*.

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when his 2001 Toyota Tacoma truck struck a hazard paddle on West Run Road, designated as County Route 67/1, in Morgantown, Monongalia County. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred at 6:30 p.m. on September 14, 2006. County Route 67/1 is a paved, unmarked road. At the time of the incident, claimant was driving to the West Virginia University/University of Maryland football game at the stadium, and he decided to take a shortcut onto County Route 67/1. As he was proceeding at approximately five miles per hour, he noticed a vehicle traveling in the opposite direction. There was traffic in front of him and behind him, and he was forced to maneuver his vehicle closer to the right side of the road. As he steered his vehicle to his right, a sign located on the right side of the road scratched the passenger side of his truck. The sign was hanging over the edge of the road and was partly detached from its post. He could not see the sign because there were weeds blocking his view. Although claimant heard a scraping sound, he did not notice the sign until after this incident occurred. Claimant obtained several estimates for the damage to his vehicle, which range from $1,773.31 to $2,236.05 for the cost of labor, parts, and paint. Since claimant's insurance deductible is $500.00, his recovery is limited to that amount.

The position of the respondent is that it did not have actual or constructive notice of the condition on Route 67/1. Kathy Westbrook, Highway Administrator for respondent in Monongalia County, testified that she is familiar with this area. She stated that County Route 67/1 is a third priority road in terms of its maintenance. The hazard board that claimant's vehicle struck was placed in this area to warn drivers that there is a drainage pipe at the edge of the road. Ms. Westbrook testified that she did not realize that a bolt was missing from the top of the sign until after this incident occurred. She was notified of the problem when the claimant called her office on September 21, 2006.

The well-established principle of law in West Virginia is that the State is neither an insurer or a guarantor of the safety of travelers upon its roads. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold respondent liable for road defects of this type, a claimant must prove that respondent had actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman v. Dep't of Highways*, 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that respondent had, at the least, constructive notice of the condition of the sign which claimant's vehicle struck and that it presented a hazard to the traveling public. The Court finds that the claimant was unable to avoid striking the hazard paddle due to oncoming traffic at this location. Since the hazard paddle was partly detached from the post and was hanging onto the roadway, the Court finds that respondent was negligent in its maintenance of the sign. Thus, the claimant may make a recovery for the damage to his vehicle.

In accordance with the findings of fact and conclusions of law stated herein above, the

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

Award of $500.00.

OPINION ISSUED OCTOBER 6, 2008

GOBEL LEE CONN
VS.
DIVISION OF HIGHWAYS
(CC-06-0296)

Claimant appeared *pro se*.

Jason C. Workman, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when his 1994 Plymouth Grand Voyager van struck a depression in the road surface on West Road, designated as County Route 60/24, in Wayne County. The Court is of the opinion to make an award in this claim for the

reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 4:00 p.m. on September 14, 2006. County Route 60/24 is a paved, two-lane road at the area of the incident involved in this claim. Claimant was driving on County Route 60/24 towards his home on Cook School Road when his vehicle struck a depression in the roadway surface. Approximately a week before this incident occurred, respondent had dug ditches across the road in order to place drainage pipes in this area. Claimant alleges that the gravel was not properly compacted on the road surface, causing several depressions to form. Claimant contends that there were no signs to warn the traveling public of this hazard in the road. He was able to drive through the first area without sustaining any damage to his vehicle. When he drove over the second area, there was a depression in the road between four to six inches deep. His vehicle went into the depression and sustained damage to its alignment, engine mount, bumper cover, transmission case, and vehicle struts. The total amount of claimant's damages amounts to $1,964.18, and claimant's insurance deductible is $200.00.

The position of the respondent is that it did not have actual or constructive notice of the condition on County Route 60/24. Randolph Eugene Smith, Highway Administrator II for respondent in Wayne County, testified that the drainage pipe was installed on County Route 60/24 on September 12, 2006. Respondent did not receive any complaints regarding the road condition prior to this incident. Mr. Smith stated that at the time that respondent completed the project, the area would have been level with the pavement. He explained that rain could have caused the depression in the road surface. Raymond Watts, Operator Three for respondent, testified that he went to the area to repair the problem on September 15, 2006. Mr. Watts stated that rain as well as traffic on the road caused the depression.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold respondent liable for road defects of this type, a claimant must prove that respondent had actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman v. Dep't of Highways*, 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that respondent had, at the least, constructive notice of the depression in the road which claimant's vehicle struck and that it presented a hazard to the traveling public. The depth of the depression at the project site and the time of year in which this incident occurred leads the Court to conclude that respondent had notice of this hazardous condition. Thus, the Court finds respondent negligent and claimant may make a recovery for the damage to his vehicle.

In accordance with the findings of fact and conclusions of law stated herein above, the

Court is of the opinion to and does make an award to the claimant in the amount of $200.00.

Award of $200.00.

OPINION ISSUED OCTOBER 6, 2008

ROBERT L. MYLES
VS.
DIVISION OF HIGHWAYS
(CC-06-0385)

Claimant appeared *pro se*.

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when his 1994 Ford Mustang struck a raised section of pavement on Route 25 near the Bayer Plant in Kanawha County. Route 25 is a road maintained by respondent. The Court is of the opinion to deny the claim for the reasons more fully stated below.

Claimant testified that his vehicle sustained damage as a result of his daily drive from St. Albans to Charleston on Route 25. Although claimant could not recall the date of the incident, he stated that it occurred sometime before December 21, 2006. Claimant stated that his vehicle struck a raised section of pavement on Route 25 on more than one occasion. Water underneath the blacktop created an elevated section of asphalt on the road. He explained that every time he went across the road, the road condition was rough. Since Route 25 was the shortest route to Charleston, he did not take an alternate route. In addition, claimant stated that he did not use an alternative road such as Route 60 because the road condition is rough and there are holes on this road. Claimant notified respondent of the road condition after his vehicle struck the elevated area on the road. As a result of this incident, claimant's vehicle sustained damage to its alignment in the amount of $49.98.

The position of the respondent is that it did not have actual or constructive notice of the condition on Route 25 at the site of claimant's accident for the date in question. Respondent did not present any witnesses at the hearing of this matter.

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

an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold respondent liable for road defects of this type, a claimant must prove that respondent had actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman v. Dep't. of Highways*, 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that respondent had, at the least, constructive notice of the hole on Route 25. The evidence also established that the claimant had notice of the road condition on Route 25. In a comparative negligence jurisdiction, such as West Virginia, the negligence of a claimant can reduce or bar recovery of a claim. A party's comparative negligence or fault cannot equal or exceed the combined negligence or fault of the other parties involved in the accident. *See Bradley v. Appalachian Power Co.*, 163 W.Va. 332, 342, 256 S.E. 2d 879, 885 (1979). In the instant case, the Court finds that the negligence of the claimant was equal to or more than the negligence of the respondent; therefore, the claimant may not make a recovery in this claim.

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

Claim disallowed.

OPINION ISSUED OCTOBER 6, 2008

KRISTI DUNSMORE
VS.
DIVISION OF HIGHWAYS
(CC-07-0223)

Claimant appeared *pro se*.

Andrew F. Tarr, Attorney at Law, for respondent

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when her 1994 Nissan Sentra struck a rock while she was driving south on Route 28, approximately two miles north of Seneca Rocks in Pendleton County. Route 28 is a road maintained by respondent. The Court is of the opinion to deny this claim for the reasons more fully set forth below.

The incident giving rise to this claim occurred at 2:00 a.m. on Saturday, May 19, 2007. Route 28 is a two-lane, paved road with a posted speed limit of fifty-five miles per hour. The incident occurred as claimant was driving from Petersburg to Seneca to pick up newspapers to deliver for her stepfather's paper route. As she was driving on Route 28 at approximately forty miles per hour, her vehicle struck a rock in the road. The rocks were scattered on both sides of the road, and she was able to avoid the rocks except for one. Claimant's mother, Tina Rose Shrout, was a passenger in the vehicle at the time of the incident. On their way back to Petersburg, Ms. Shrout stopped and removed some of the rocks from the road. She stated that the largest rocks were approximately one foot

in diameter. As a result of this incident, claimant's vehicle sustained damage to its right rear tire in the amount of $50.00.

The position of the respondent is that it did not have notice of the rocks on Route 28.

Darell Warner, Maintenance Supervisor in Pendleton County, testified that there is a high bank on the left side of the road on Route 28 north towards Petersburg. He stated that rocks have been known to fall from the bank and onto the roadway, but respondent did not have any information regarding this incident. Respondent has placed falling rock signs on both sides of the road to warn the traveling public of the potential for rock falls. In addition, respondent has placed concrete barriers to catch any rocks that fall from the bank and onto the roadway. Respondent cleans the area behind these barriers approximately every year or two years.

It is a well-established principle that the State is neither an insurer nor a guarantor of the safety of motorists upon its highways. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). To hold respondent liable, claimant must establish by a preponderance of the evidence that respondent had actual or constructive notice of the road defect at issue and a reasonable amount of time to take corrective action. *Chapman v. Dep't. of Highways*, 16 Ct. Cl. 103 (1986); *Pritt v. Dep't. of Highways*, 16 Ct. Cl. 8 (1985). In rock fall claims, this Court has held that the unexplained falling of a rock onto a highway without a positive showing that respondent knew or should have known of a dangerous condition posing injury to person or property is insufficient to justify an award. *Coburn v. Dep't. of Highways*, 16 Ct. Cl. 68 (1986).

In the present claim, claimant has not established that respondent failed to take adequate measures to protect the safety of the traveling public on Route 28 in Pendleton County. Mr. Warner testified that respondent has placed falling rock signs and concrete barriers to prevent accidents in this area. The Court cannot hold respondent liable for the spontaneous falling of a rock. While the Court is sympathetic to claimant's plight, the fact remains that there is insufficient evidence of negligence on the part of respondent upon which to base an award.

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

Claim disallowed.

OPINION ISSUED OCTOBER 6, 2008

RONALD L. JOHNSTON
VS.
DIVISION OF HIGHWAYS
(CC-07-0260)

Claimant appeared *pro se*.

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when claimant's mother, Dreama L. Johnston, was driving her son's 2001 Ford F150 truck and it struck a sign on Cheesy Creek Road, referred to as County Route 28, in Mercer County. County Route 28 is a road maintained by respondent. The Court is of the opinion to deny this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 10:00 a.m. on August 9, 2007. County Route 28 is a two-lane, paved road at the area of the incident involved in this claim. As Ms. Johnston was driving on County Route 28, she noticed a vehicle traveling from the opposite direction. Ms. Johnston testified that she moved the vehicle over in her lane of traffic to provide space for the vehicle. She stated that the road collapsed underneath her vehicle, and her vehicle struck a hazard paddle, damaging the vehicle's right side mirror. Ms. Johnston testified that the hazard paddle was too close to the road. Although Ms. Johnston lives near the area where this incident occurred, she stated that she does not drive on a regular basis. Claimant seeks to recover $106.00 for the damage caused to the vehicle's mirror and $1,000 for pain and suffering as a result of this incident.

The position of the respondent is that it did not have actual or constructive notice of the condition on County Route 28. Richard Delp, Highway Administrator II for respondent in Mercer County, testified that two hazard signs were placed in this area. The hole at the edge of the road was created due to water from the creek. Prior to August 9, 2007, Mr. Delp had not received any complaints regarding the sign at this location. Respondent could not have placed the hazard paddle further away from the road because of the location of the creek. Since respondent is required to obtain an environmental permit or clearance before it can make repairs in this area, it placed the signs to warn the traveling public of the hazard until the problem could be fixed.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold respondent liable for road defects of this type, a claimant must prove that respondent had actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman v. Dep't. of Highways*, 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that respondent did not have actual or constructive notice of the hazard paddle that claimant's vehicle struck on Route 28. Mr. Delp testified that respondent had not received any complaints regarding the sign prior to this incident. In addition, the Court finds that the sign was properly placed at this location. Although the Court is sympathetic to the claimant's plight, there is insufficient evidence of negligence on the part of respondent upon which to base an award.

In accordance with the findings of fact and conclusions of law stated herein above, the

Court is of the opinion to deny this claim.

Claim disallowed.

OPINION ISSUED OCTOBER 6, 2008

DANNY LEE ESTEP
VS.
DIVISION OF HIGHWAYS
(CC-07-0314)

Claimant appeared *pro se*.

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when his 2000 Ford F150 truck struck a metal expansion joint on the bridge on Route 460 in Mercer County. Route 460 is a road maintained by respondent. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 12:45 p.m. on October 4, 2007. The incident occurred on the steel beam bridge on Route 460. Claimant was driving at approximately fifty-five miles an hour when his vehicle struck the bridge's metal expansion joint that had come loose and was jutting up several inches above the road surface in his lane of traffic. Claimant stated that he travels on Route 460 approximately every month or every couple of months to visit his son. He had never noticed any problems on the bridge surface prior to this incident. Claimant's vehicle sustained damage to four tires, four rims, and its alignment in the amount of $3,066.00. In addition, claimant had to rent a truck for eight days at a cost of $660.64. Since claimant's insurance deductible at the time of the incident was $500.00, his recovery is limited to that amount.

The position of the respondent is that it did not have actual or constructive notice of the condition on Route 460. Eddie Kessler was the Princeton Interstate Supervisor for respondent at the time of this incident. Mr. Kessler testified that another individual had called on October 4, 2007, to report the problem. Respondent sent a crew to this location immediately after receiving the call and closed the lane of traffic. Prior to the time of this accident, respondent did not receive any complaints regarding the condition of the road at this location.

Timothy Powell, District 10 Bridge Engineer in Mercer County, is responsible for the design, repair, inspection, evaluation, and construction of bridges in Mercer County. Mr. Powell stated that Mr. Kessler informed him of the problem with the expansion joint on the bridge. Mr. Powell had the bridge crew repair this area on October 5, 2007. He explained that expansion joints are designed to prevent cracks on the deck of the bridge, and the failure of an expansion joint is not a common occurrence. He stated that there are certain signs that can indicate the failure of a bridge joint. During the inspection of the bridge in August 2004, Mr. Powell stated that respondent discovered that the metal expansion joint had come loose. In January 2005, the expansion joint in question was put in place of the one that was in disrepair. Mr. Powell testified that he travels on this road approximately five times a week and never noticed any problems on the bridge surface.

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

this type, a claimant must prove that respondent had actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman v. Dep't. of Highways*, 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that respondent had, at the least, constructive notice of the metal expansion joint which claimant's vehicle struck and that it presented a hazard to the traveling public. Claimant had no reason to suspect the failure of the metal expansion joint whereas respondent had notice that the previous metal expansion joint had come loose at this location. Although the metal expansion joint was repaired, these repairs proved inadequate since the repaired expansion joint created a hazardous condition to the traveling public on the bridge at the time of claimant's incident. Thus, the Court finds respondent negligent and claimant may make a recovery for the damage to his vehicle.

In accordance with the findings of fact and conclusions of law stated herein above,

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

Award of $500.00.

OPINION ISSUED OCTOBER 6, 2008

WAYNE BROWN
VS.
DIVISION OF HIGHWAYS
(CC-07-0324)

Claimant appeared *pro se*.

Jason C. Workman, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when his 2003 Cadillac struck a hole while claimant was driving on Maple Acres Road in Mercer County. Maple Acres Road is a road maintained by respondent. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 1:00 p.m. on October 23, 2007. Maple Acres Road is a two-lane, paved road at the area in question. At the time of the incident, claimant was proceeding from Princeton to Glenwood. While claimant was driving towards Elks Golf Course, he noticed a truck hauling cars that was coming from the opposite direction. Since the truck bed crossed the yellow center line, claimant moved his vehicle closer to the white edge line to avoid the vehicle. As a result, claimant's vehicle struck a hole in the road that was approximately eight inches deep and three to six feet long. The road's white-edge line had eroded in this area. Claimant stated that he does not travel on this road often and had not driven on this road for approximately two months prior to the incident. Claimant's vehicle sustained damage

to two rims and one tire in the amount of $874.13. Claimant's insurance deductible at the time of the incident was $1,000.00.

The position of respondent is that it did not have actual or constructive notice of the condition on Maple Acres Road. Richard Delp, Highway Administrator II for respondent in Mercer County, testified that he is familiar with the area involved in this claim. Mr. Delp stated that he received a complaint regarding a hole in this area prior to October, but the hole was off the roadway. Since the hole was confined to the shoulder area, respondent patched the hole with gravel instead of asphalt. He testified that the condition of the hole could have worsened on the date of claimant's incident due to water saturation, traffic running too close to the edge of the road, and fatigue cracks.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold respondent liable for road defects of this type, a claimant must prove that respondent had actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman v. Dep't. of Highways*, 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that respondent had actual notice of the hole which claimant's vehicle struck and that the hole presented a hazard to the traveling public. The size of the hole and the time of year in which this incident occurred leads the Court to conclude that respondent had notice of this hazardous condition. Thus, the Court finds respondent negligent and claimant may make a recovery for the damage to his vehicle.

In accordance with the findings of fact and conclusions of law stated herein above, the

Court is of the opinion to and does make an award to the claimant in the amount of $874.13.

Award of $874.13.

OPINION ISSUED OCTOBER 6, 2008

MARY L. WHEELER
VS.
DIVISION OF HIGHWAYS
(CC-08-0004)

Claimant appeared *pro se*.

Jason C. Workman, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when her 2002 Ford Focus struck a hole while she was traveling on Six Mile Road near Madison, Boone County. The Court is of the opinion to deny the claim for the reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 3:00 p.m. on December 16, 2007. Six Mile Road is a narrow, two-lane, paved road with a posted speed limit of forty-five miles per hour. At the time of the incident, claimant was traveling west on Six Mile Road from Route 17 to Corridor G. Claimant testified that she was driving at approximately forty miles per hour when her vehicle struck a hole that was approximately one foot and a half wide, one foot long, and three inches deep. There were no other vehicles traveling in the same direction or coming from the opposite direction. She stated that she had not traveled on this road for about six months to a year before this incident occurred. As a result, claimant's vehicle sustained damage to its tire and rim in the amount of $315.09.

The position of the respondent is that it did not have actual or constructive notice of the condition on Six Mile Road at the site of claimant's accident for the date in question. Mr. Stefen

White, Equipment Operator II for respondent in Boone County, testified that Six Mile Road is a second priority road in terms of its maintenance. Prior to the incident, respondent did not have any complaints regarding the hole on Six Mile Road.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims*, 130 W.Va. 645; 46 S.E.2d 81 (1947). In order to hold respondent liable for road defects of this type, a claimant must prove that respondent had actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman v. Dep't. of Highways*, 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that respondent did not have actual or constructive notice of the hole on Six Mile Road. While the Court finds that claimant's vehicle struck a hole on Six Mile Road on the day in question, that fact alone is insufficient to establish negligence on the part of respondent. Respondent did not receive any complaints about the condition on Six Mile Road before this incident occurred. Although the Court is sympathetic to the claimant's plight, the Court does not find any negligence on the part of respondent upon which to justify an award.

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

Claim disallowed.

OPINION ISSUED OCTOBER 6, 2008

FRED P. MORRIS
VS.
DIVISION OF HIGHWAYS
(CC-08-0043)

Claimant appeared *pro se*.

Andrew F. Tarr, Attorney at Law, for respondent

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when his vehicle struck a rock while he was traveling through Tongue Hill, which is designated as County Route 47, between Pinch and Elkview. County Route 47 is a road maintained by respondent in Kanawha County. The Court is of the opinion to deny this claim for the reasons more fully set forth below.

The incident giving rise to this claim occurred on January 29, 2008, at approximately 3:30 p.m. On the rainy afternoon in question, claimant was traveling on County Route 47 in his 1992 Buick LeSabre. County Route 47 is a narrow, two-lane road and there is a rock cliff along the side of the road. Claimant was driving at approximately thirty to thirty-five miles per hour when a rock the size of a five-gallon bucket rolled off of the hill side and onto the road, striking his vehicle. Although claimant tried to avoid the rock, he was unable to do so because there were vehicles traveling in the opposite direction. As a result of this incident, claimant's vehicle sustained damage to its alignment, two tires, the front end inspection, and two tie rod ends in the amount of $538.63.

The position of the respondent is that it did not have notice of the rock on County Route 47. Mr. David Fisher, Highway Administrator for respondent in Kanawha County, testified that this is not an area that is known for rock falls. Mr. Fisher stated that there was a telephone call about a rock fall, but when respondent checked the area in question, the rock was gone. Respondent maintains that there was no prior notice of any rocks on County Route 47 prior to the incident in question.

It is a well-established principle that the State is neither an insurer nor a guarantor of the safety of motorists upon its highways. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). To hold respondent liable, claimant must establish by a preponderance of the evidence that respondent had actual or constructive notice of the road defect at issue and a reasonable amount of time to take corrective action. *Chapman v. Dep't. of Highways*, 16 Ct. Cl. 103 (1986); *Pritt v. Dep't. of Highways*, 16 Ct. Cl. 8 (1985). In rock fall claims, this Court has held that the unexplained falling of a rock onto a highway without a positive showing that respondent knew or should have known of a dangerous condition posing injury to person or property is insufficient to justify an award. *Coburn v. Dep't. of Highways*, 16 Ct. Cl. 68 (1986).

In the present claim, claimant has not established that respondent failed to take adequate measures to protect the safety of the traveling public on County Route 47 in Kanawha County. Mr. Fisher testified that County Route 47 is not an area known for rock falls. The Court cannot hold respondent liable for the spontaneous falling of a rock. While the Court is sympathetic to claimant's plight, the fact remains that there is no evidence of negligence on the part of respondent upon which to base an award.

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

Claim disallowed.

OPINION ISSUED OCTOBER 6, 2008

ROGER L. LAMBERT AND KATHERINE V. LAMBERT
VS.

DIVISION OF HIGHWAYS
(CC-08-0049)

Claimants appeared *pro se*.

Jason C. Workman, Attorney at Law, for respondent.

PER CURIAM:

Claimants brought this action for vehicle damage which occurred when their 2005 Chevrolet Malibu struck a hole while claimant, Katherine Virginia Lambert, was driving on Maple Acres Road, referred to as Route 19/33, in Mercer County. Maple Acres Road is a road maintained by respondent. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 10:00 a.m. on December 10, 2007. Maple Acres Road is a two-lane, paved road with a speed limit of thirty-five miles per hour. At the time of the incident, Ms. Lambert was taking her daughter to the doctor and was traveling from Glenwood to Bluefield. She was driving near Elks Golf Course at approximately thirty-five miles per hour when she noticed a vehicle traveling towards her that had crossed the yellow center line in the road. As claimant maneuvered her vehicle closer to the white edge line to avoid the vehicle, claimants' vehicle struck a hole on the white edge line that was approximately seven inches long. The photographs demonstrate that the white edge line had eroded in this area. Although Ms. Lambert travels on this road often, she was unable to avoid the hole due to the vehicle traveling towards her. As a result of this incident, claimants' vehicle sustained damage to its front passenger tire and rim in the amount of $326.14. Claimants' insurance deductible at the time of the incident was $500.00.

The position of respondent is that it did not have actual or constructive notice of the condition on Maple Acres Road. Richard Delp, Highway Administrator II for respondent in Mercer County, testified that respondent received a call regarding the condition of the shoulder of this road prior to October of 2007. Respondent placed gravel in this area because the hole was not located on the roadway surface. Mr. Delp testified that the hole had not eroded onto the roadway prior to October of 2007. Michael McMillion, Transportation Crew Supervisor for respondent in Mercer County, testified that he is familiar with the location of the hole on Maple Acres Road. Mr. McMillion stated that respondent did not receive any complaints regarding the condition of the road from October of 2007 to the time of this incident in December of 2007.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold respondent liable for road defects of this type, a claimant must prove that respondent had actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman v. Dep't. of Highways*, 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that respondent had, at the least, constructive notice of the hole which claimants' vehicle struck and that the hole presented a hazard to the traveling public. The size of the hole and the time of year in which this incident occurred leads the Court to conclude that respondent had notice of this hazardous condition. Thus, the Court finds respondent negligent and claimants may make a recovery for the damage to their vehicle.

In accordance with the findings of fact and conclusions of law stated herein above, the Court is of the opinion to and does make an award to the claimants in the amount of $326.14.

Award of $326.14.

OPINION ISSUED OCTOBER 6, 2008

E. RALPH WALKS WITH WOLVES HANDLEY
VS.
DIVISION OF HIGHWAYS
(CC-08-0069)

Claimant appeared *pro se*.

Jason C. Workman, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when his 1991 Dodge Grand Caravan struck a hole on the berm of State Route 601 in Kanawha County. State Route 601, known as Jefferson Road, is a road maintained by respondent. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 12:15 a.m. on January 3, 2008. Route 601 is a paved, two-lane road with a center line and edge lines. The posted speed limit is forty-five miles per hour. While claimant was driving on Route 601 at approximately forty miles per hour, he came to a curve in the road and noticed a vehicle traveling from the opposite direction in his lane of traffic. As claimant drove on the berm to avoid the oncoming vehicle, his vehicle struck a hole that was approximately six to nine inches deep. Claimant testified that he drove on this road frequently. As a result of this incident, claimant's insurance company, AIG, declared that claimant's vehicle was totaled. The claimant purchased the vehicle for $200.00 or $300.00, but AIG determined that the Blue Book value for the vehicle was $2,828.00. AIG paid claimant $1,700.00 to replace the vehicle after taking into consideration his $500.00 deductible.

The position of respondent is that it did not have actual or constructive notice of the condition on State Route 601. Christopher Shaffer was the acting supervisor at St. Albans at the time of this incident. Mr. Shaffer testified that State Route 601 is a first priority road in terms of maintenance. Prior to this incident, respondent did not receive any complaints regarding the condition of the berm on State Route 601. Mr. Shaffer explained that the edge of the road is situated approximately ten to fifteen feet from the guardrail. He stated that if a vehicle were forced onto the berm, it would have to use the gravel portion of the berm because the paved portion was approximately two-feet long.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims*, 130

W.Va. 645, 46 S.E.2d 81 (1947). In order to hold respondent liable for road defects of this type, a claimant must prove that respondent had actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman v. Dep't. of Highways*, 16 Ct. Cl. 103 (1986). The berm or shoulder of a highway may be maintained in a reasonably safe condition for use when the occasion requires, and liability may ensue when a motorist is forced onto the berm in an emergency or otherwise necessarily uses the berm of the highway. *Sweda v. Dep't of Highways*, 13 Ct. Cl. 249 (1980).

In the instant case, the Court is of the opinion that respondent had, at the least, constructive notice of the hole which claimant's vehicle struck and that the hole presented a hazard to the traveling public. State Route 601 is a first priority road in terms of maintenance and the berm in this particular location was in an unsafe condition. Since claimant was forced to use the berm in an emergency situation and it was not properly maintained, the Court finds respondent negligent. Thus, claimant may make a recovery for the damage to his vehicle. The Court finds that $300.00 is a fair and reasonable amount to compensate the claimant for his out-of-pocket expenses.

In accordance with the findings of fact and conclusions of law stated herein above, the

Court is of the opinion to and does make an award to the claimant in the amount of $300.00.

Award of $300.00.

OPINION ISSUED OCTOBER 6, 2008

AMBERLEE CHRISTEY AND KAREN HINKLE
VS.
DIVISION OF HIGHWAYS
(CC-08-0074)

Claimants appeared *pro se*.

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

PER CURIAM:

Claimants brought this action for vehicle damage which occurred when their 2002 PT Cruiser struck a hole while claimant, Amberlee Christey, was driving on Route 119, also known at the "Mile Ground," in Morgantown, Monongalia County. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 10:30 p.m. on February 6, 2008. Route 119 is a three-lane road with a speed limit of thirty-five miles per hour. At the time of the incident, claimant Amberlee Christey and her friend, Kylie Frazier, were returning home from a cake decorating. As Ms. Christey was driving under the posted speed limit between BFS gas station and the Monro Muffler shop, her vehicle struck a hole that was approximately one foot and a half long, one foot wide, and ten

inches deep. Ms. Christey had not noticed the hole on prior occasions. According to Ms. Christey, three other vehicles also had struck the hole at this location. A cone was not placed in the hole until after the subject incident occurred. As a result of this incident, claimants' vehicle sustained damage to two tires in the amount of $190.80. In addition, the tires needed to be mounted and the front end of the vehicle needed to be realigned in the amount of $87.75. Thus, the total amount of damages amounts to $278.55. Claimant's insurance company indicated that the deductible for collision coverage is $250.00, but road hazard is not a peril that is covered under the policy.

The position of the respondent is that it did not have actual or constructive notice of the condition on Route 119. Kathy Westbrook, Monongalia County Administrator for respondent, testified that at least 17,000 vehicles travel on this road on a daily basis. According to Ms. Westbrook, respondent patched the hole on February 4, 2008, and the hole could have reopened by February 6, 2008. Ms. Westbrook explained that the cold mix that was used was below specifications and would not adhere to the road surface. Since she did not have an alternative supply of cold mix, her office had to use the supply that was available at that time.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold respondent liable for road defects of this type, a claimant must prove that respondent had actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman v. Dep't of Highways*, 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that respondent had, at the least, constructive notice of the hole which claimants' vehicle struck and that the hole presented a hazard to the traveling public. Since the cold mix was below specifications and proved inadequate, the Court finds the respondent negligent and claimants may make a recovery for the damage to their vehicle.

In accordance with the findings of fact and conclusions of law stated herein above, the Court is of the opinion to and does make an award to the claimants in the amount of $278.55.

Award of $278.55.

OPINION ISSUED OCTOBER 6, 2008

RITA AFFOLTER
VS.
DIVISION OF HIGHWAYS
(CC-08-0103)

Claimant appeared *pro se*.

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when her 2002 Mercury Cougar struck a hole in the road as her daughter, Lisa Affolter, was driving on Route 25 in Institute, Kanawha County. Route 25 is a road maintained by respondent. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 7:00 a.m. on February 6, 2008. Route 25 is a two-lane, paved road with white edge lines. Lisa Affolter was driving at approximately forty-miles per hour, the posted speed limit, when her vehicle struck a hole in the road near the Praxair Plant. It was raining, and she was unable to see the hole before the vehicle struck it. The hole was approximately three and a half feet long and one and a half feet wide. Lisa Affolter stated that she could not determine how deep the hole was because it was filled with water. Although she normally takes Route 25 to drive to work, the area where this incident occurred is beyond the location where she usually turns on Goff Mountain Road. Lisa Affolter testified that she travels on this road approximately once every three or four months and had not seen the hole on a prior occasion. As a result of this incident, claimant's vehicle sustained damage to its tire in the amount of $15.90 and rim in the amount of $159.00. Thus, the total amount of damages sustained is $174.90.

The position of respondent is that it did not have actual or constructive notice of the condition on Route 25. Charles Earl Smith, Highway Administrator for respondent in Kanawha County, testified that he was informed that there was a hole on this particular area on Route 25 before noon on February 6, 2008. Mr. Smith stated that he did not recall seeing the hole on the day before this incident. Although Mr. Smith stated that it would be unusual for a hole of this size to form over a twenty-four hour period, he testified that it does happen. The DOH 12, a record of respondent's work activities, indicates that the hole was patched with cold mix on the day of the incident.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold respondent liable for road defects of this type, a claimant must prove that respondent had actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman v. Dep't. of Highways*, 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that respondent had, at the least, constructive notice of the hole which claimant's vehicle struck and that the hole presented a hazard to the traveling public. The size of the hole and the time of year in which this incident occurred leads the Court to conclude that respondent had notice of this hazardous condition. Thus, the Court finds respondent negligent. Although Ms. Affolter was driving at approximately forty-miles per hour, she could have further reduced her speed based on the road conditions on this particular day. The Court finds that she was ten percent (10%) negligent in her operation of the vehicle. Thus, claimant's recovery is limited to ninety-percent (90%) of her loss, or $157.41.

In accordance with the findings of fact and conclusions of law stated herein above, the Court is of the opinion to and does make an award to the claimant in the amount of $157.41.

Award of $157.41.

OPINION ISSUED OCTOBER 6, 2008

RITA AFFOLTER
VS.
DIVISION OF HIGHWAYS
(CC-08-0104)

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when her 2002 Mercury Cougar struck a hole on Route 25 in Nitro, Kanawha County. Route 25 is a road maintained by respondent. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 8:00 p.m. on March 1, 2008. Route 25 is a two-lane, paved road with white edge lines and has a speed limit of forty-five miles per hour. Lisa Affolter ("Ms. Affolter"), the driver of the vehicle, testified that she was traveling at approximately forty miles per hour when claimant's vehicle struck a hole in front of Twin City Bible Church. Ms. Affolter testified that since she knew there was a hole in this location, she normally would swerve into the other lane of traffic to avoid the hole. She explained that her vehicle struck a hole on this road on a separate occasion. Although she was aware of the hole, she testified that she could not avoid it on the day in question due to oncoming traffic. The hole was approximately two feet wide, four feet long, and one foot deep. As a result, the claimant's vehicle sustained damage to its rim, and the tires needed to be balanced in the amount of $193.30.

The position of the respondent is that it did not have actual or constructive notice of the condition on Route 25. Charles Earl Smith, Highway Administrator for respondent in Kanawha County, testified that prior to this incident, the hole had been filled with cold mix during the winter and hot mix during the summer. Mr. Smith stated that the hole became a problem a couple of weeks prior to this incident. The respondent submitted a DOH 12, a record of the work crew's daily activities, that indicates the hole was patched on March 3, 2008.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold respondent liable for road defects of this type, a claimant must prove that respondent had actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman v. Dep't. of Highways*, 16 Ct. Cl. 103 (1986).

While the Court agrees with the position of the claimant that the respondent had, at the least, constructive notice of the hole which claimant's vehicle struck and that the hole presented a hazard to the traveling public, the Court is also of the opinion that the claimant's driver knew the roadway contained holes and nevertheless drove at a speed in excess of that which was prudent under the existing condition of the roadway. The

Court assigns forty percent (40%) of the responsibility for this loss to the claimant's driver and awards the claimant sixty percent (60%) of her loss, or $115.98.

In accordance with the findings of fact and conclusions of law stated herein above, the Court is of the opinion to and does make an award to the claimant in the amount of $115.98.

Award of $115.98.

OPINION ISSUED OCTOBER 6, 2008

MILDRED CARLOTTA YOUNG
VS.
DIVISION OF HIGHWAYS
(CC-08-0207)

Claimant appeared *pro se*.

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when her 2006 Nissan Altima struck a rock on Route 52 in Welch, McDowell County. Route 52 is a road maintained by respondent. The Court is of the opinion to deny this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 1:45 p.m. on April 23, 2008. Route 52 is a paved, two-lane road at the area of the incident involved in this claim. As claimant was driving from Welch to Kimble at a speed of approximately twenty-five to thirty-five miles per hour, her vehicle struck a rock in the road. The vehicle in front of her went over the rock which caused the rock to flip back toward her vehicle and it went over the rock causing damage to her vehicle's exhaust system. She explained that the rock must have fallen from the mountainside onto the roadway. Although claimant had traveled on this road earlier that day, she did not recall seeing the rock. As a result of this incident, claimant's vehicle sustained damage to its exhaust system in the amount of $676.46.

The position of the respondent is that it did not have actual or constructive notice of the condition on Route 52. The respondent did not present any witnesses at the hearing.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold respondent liable for road defects of this type, a claimant must prove that respondent had actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman v. Dep't. of Highways*, 16 Ct. Cl. 103 (1986). In rock fall claims, this Court has held that the unexplained falling of a rock onto a highway without a positive showing that respondent knew or should have known of a dangerous condition posing injury to person or property is insufficient to

justify an award. *Coburn v. Dep't. of Highways,* 16 Ct. Cl. 68 (1986).

In the present claim, claimant has not established that respondent failed to take adequate measures to protect the safety of the traveling public on Route 52. The Court cannot hold respondent liable for the spontaneous falling of a rock. While the Court is sympathetic to claimant's plight, the fact remains that there is insufficient evidence of negligence on the part of respondent upon which to base an award.

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

Claim disallowed.

OPINION ISSUED OCTOBER 6, 2008

SHERRY WILLIAMS
VS.
DIVISION OF HIGHWAYS
(CC-08-0141)

Claimant appeared *pro se*.

Jason C. Workman, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when her 1996 Ford F150 truck struck a hole on the surface of the low water bridge on Kale Road, also referred to as Route 71/4, in Mercer County. The Court is of the opinion to deny this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 8:45 a.m. on March 10, 2008. The low water bridge on Route 71/4 is a one-lane, paved road. Claimant lives approximately one quarter of a mile from the location of the bridge. As she was proceeding across the low water bridge at ten miles per hour, her truck went into a dip at the edge of the bridge. When the truck came out of the dip, claimant noticed that the tires were flat on the passenger side. Claimant stated that there had been water over the bridge until the night before this incident occurred. Even though the water had cleared, a portion of the road had washed out in the area of the low water bridge. She testified that the area of the dip was located where she drove from the road onto the bridge. Claimant was uncertain as to whether the road surface had caved in prior to her incident or if it fell in as she was driving across the bridge. As a result, claimant's vehicle sustained damage to its passenger side tires and rims. Claimant has replaced the tires but has not replaced the rims. Although claimant did not provide a copy of the receipt for the purchase of the replacement tires, she testified that the cost was approximately $187.50. The estimate for replacing the rims amounts to $309.96. Thus, claimant's damages total $497.46.

The position of the respondent is that it did not have actual or constructive notice of the bridge's condition on Route 71/4. Michael McMillion, Transportation Crew Supervisor for respondent in Mercer County, testified that he is familiar with the area

where this incident occurred. Mr. McMillion stated that respondent received a call on March 9, 2008, that the road had washed out at this location. On March 10, 2008, respondent sent a crew to place rocks to stabilize this area. Around March 10, 2008, Mr. McMillion stated that there had been flooding throughout Mercer County. He also testified that Route 71/4 is a third priority road in terms of its maintenance; however, this particular bridge had been paved approximately two to three months prior to the date of claimant's incident.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold respondent liable for road defects of this type, a claimant must prove that respondent had actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman v. Dep't. of Highways*, 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that respondent did not have actual or constructive notice of the hole which claimant's vehicle struck on Route 71/4. Since there was flooding throughout Mercer County around the date of this incident, the Court finds that respondent maintained Route 71/4, a third priority road, in a timely manner. Although the Court is sympathetic to claimant's plight, there is insufficient evidence of negligence on the part of respondent upon which to justify an award.

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

Claim disallowed.

OPINION ISSUED OCTOBER 6, 2008

GROUNDWORKS RECLAMATION INC.
VS.
DEPARTMENT OF ENVIRONMENTAL PROTECTION
(CC-08-0279)

Edward J. George, Attorney at Law, for claimant.

Ronald R. Brown, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks to recover $12,000 in expenses that it incurred in completing DEP No. 12620 Project for respondent in Craigsville. When claimant had completed the majority of the ground channels for the project, the channels needed to be redirected, and in some cases, redesigned to accommodate the water flow in the area. The cost in reconstructing the ground channels exceeded the amount that was allocated to perform the project. Thus, claimant seeks compensation for these extra expenses.

In its Answer, respondent admits the validity of the claim as well as the amount

and states that the amount set forth by the claimant is fair and reasonable.

In view of the foregoing, the Court is of the opinion to and does make an award to claimant in the amount of $12,000.00.

Award of $12,000.00.

OPINION ISSUED OCTOBER 6, 2008

LABORATORY CORPORATION OF AMERICA HOLDINGS
VS.
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
(CC-08-0329)

Claimant appeared *pro se*.

Charles S. Dunn, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks to recover $34,043.38 for the cost of laboratory services that were provided to individuals at William R. Sharpe Jr. Hospital in Weston. Since there was no formal contract in place between claimant and William R. Sharpe Jr. Hospital, the State Auditor's Office did not approve the invoices for payment.

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

In view of the foregoing, the Court is of the opinion to and does make an award to claimant in the amount of $34,043.38.

Award of $34,043.38.

OPINION ISSUED NOVEMBER 19, 2008

SANDRA L. HALL, Personal Representative of the Estate of Jamie Hall
VS.
DIVISION OF HIGHWAYS
(CC-03-563)

Daniel R. James, Attorney at Law, for claimant.

Andrew F. Tarr and Jason C. Workman, Attorneys at Law, for respondent.

PER CURIAM:

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

1. Respondent is responsible for the maintenance of Route 28, Hampshire County.

2. Jamie Hall was operating a motor vehicle northbound on Route 28 near the town of Romney on October 11, 2002, at 7:15 a.m. At that time, the conditions were the following: raining, wet roadway surface, and dark without artificial lighting.

3. The vehicle driven by Ms. Hall veered into a yaw rotation and struck a Sycamore tree located on the east side of the roadway, located partially in Respondent's right-of-way.

4. Other motorists have struck the Sycamore tree.

5. The incident resulted in the death of Ms. Hall.

6. For the purpose of settlement, Respondent acknowledges culpability for the preceding incident.

7. Claimant and respondent believe that in this particular incident and under these particular circumstances that an award of Forty Thousand Dollars ($40,000.00) would be a fair and reasonable amount to settle this claim.

8. The parties to this claim agree that the total sum of Forty Thousand Dollars ($40,000.00) to be paid by respondent to the claimant in Claim No. CC-03-563 will be a full and complete settlement, compromise and resolution of all matters in controversy in said claim and full and complete satisfaction of any and all past and future claims claimant may have against respondent arising from the matters described in said claim.

The Court has reviewed the facts of the claim and finds that respondent was negligent in its maintenance of Route 28 on the date of this incident; that the negligence of respondent was the proximate cause of the damages sustained to Jamie Hall's vehicle; and that the amount of the damages agreed to by the parties is fair and reasonable. Thus, claimant may make a recovery for her loss.

Accordingly, the Court is of the opinion to and does make an award in the amount of $40,000.00.

Award of $40,000.00.

OPINION ISSUED NOVEMBER 19, 2008

GEORGIA ROUSH
VS.
DIVISION OF HIGHWAYS
(CC-07-281)

Claimant appeared *pro se*.

Andrew F. Tarr and Jason C. Workman, Attorneys at Law, for respondent.

PER CURIAM:

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

1. Respondent is responsible for the maintenance of County Route 1/6 in Kanawha County.

2. On or around April 15, 2007, the Claimant's property suffered flood damage as a result of a clogged culvert during a rain event.

3. For the purposes of settlement, Respondent acknowledges culpability for the preceding incident.

4. Claimant and Respondent believe that in this particular incident and under these particular circumstances that an award of four thousand five hundred dollars ($4,500.00) would be a fair and reasonable amount to settle this claim.

5. The parties to this claim agree that the total sum of four thousand five hundred dollars ($4,500.00) to be paid by Respondent to the Claimant in Claim No. CC-07-281 will be a full and complete settlement, compromise and resolution of all matters in controversy in said claim and full and complete satisfaction of any and all past and future claims Claimant may have against Respondent arising from the matters described in said claim.

The Court has reviewed the facts of the claim and finds that respondent was negligent in its maintenance of County Route 1/6 in Kanawha County on the date of this incident; that the negligence of respondent was the proximate cause of the damages sustained to claimant's property; and that the amount of the damages agreed to by the parties is fair and reasonable. Thus, claimant may make a recovery for her loss.

Accordingly, the Court is of the opinion to and does make an award in the amount of $4,500.00.

Award of $4,500.00.

OPINION ISSUED NOVEMBER 19, 2008

REBECCA STEWART AND ROBERT D. STEWART
VS.
DIVISION OF HIGHWAYS
(CC-07-0297)

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

PER CURIAM:

Claimants brought this action for vehicle damage which occurred when

claimants' daughter, Brandi Stewart, was driving claimants' 2002 Mitsubishi Eclipse, and their vehicle struck a hole on U.S. Route 19, south of Sutton, in Braxton County. U.S. Route 19 is a road maintained by respondent. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 3:00 p.m. on July 3, 2007.

U.S. Route 19 is a paved, two-lane road with a speed limit of fifty-five miles per hour. At the time of the incident, claimants' daughter was driving from the Flatwoods Outlet Mall to her home. She was proceeding around a curve on U.S. Route 19 at approximately thirty-five or forty-five miles per hour when she noticed four vehicles traveling in the opposite lane of traffic. One of the vehicles was a logging truck which was occupying her lane of traffic by approximately one foot and a half or two feet. As she drove closer to the road's white edge line to avoid the truck, her vehicle struck a hole that was approximately four and a half or five inches wide and five inches deep. Although claimant drives this road on a daily basis and was aware of the hole, she was unable to avoid it due to the oncoming truck. As a result of this incident, her vehicle sustained damage to its passenger side rims in the amount of $385.20. Claimant's insurance deductible at the time of the incident was $500.00.

The position of the respondent is that it did not have actual or constructive notice of the condition on U.S. Route 19. Respondent did not present a witness at the hearing.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold respondent liable for road defects of this type, a claimant must prove that respondent had actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman v. Dep't of Highways*, 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that respondent had, at the least, constructive notice of the hole which claimants' vehicle struck and that it presented a hazard to the traveling public. The size of the hole and the time of year in which this incident occurred lead the Court to conclude that respondent had notice of this hazardous condition. Thus, there is sufficient evidence of negligence to base an award. Notwithstanding the negligence of the respondent, the Court is also of the opinion that the claimant's daughter was negligent since she was aware of the condition of the road. Thus, the Court will reduce claimants' award by fifteen percent (15%), and claimants may recover eighty-five percent (85%) of the loss sustained.

In accordance with the findings of fact and conclusions of law stated herein above, the

Court is of the opinion to and does make an award to the claimants in the amount of $327.42.

Award of $327.42.

OPINION ISSUED NOVEMBER 19, 2008

DAVID JOSH WILLIAMS

VS.
DIVISION OF HIGHWAYS
(CC-08-0187)

Claimant appeared *pro se*.
Jason C. Workman, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when claimant's sixteen-year-old brother, Zack Williams, was driving claimant's 2005 Toyota Scion, and it struck a hole on W.Va. Route 3, approximately four miles west of Beckley, in Raleigh County. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 1:00 p.m. on March 14, 2008. W.Va. Route 3 is a two-lane, paved road with a yellow center line and white edge lines. At the time of the incident, Zack Williams was driving claimant's vehicle, and his mother, Susan Louise Williams, was a passenger in the vehicle. Zack Williams testified that they were returning from shopping at the Beckley Mall when, instead of taking U.S. Route 19, he missed a turn and took W.Va. Route 3. He was driving around a curve at approximately forty miles per hour when claimant's vehicle struck a hole that was located in the travel portion of the road. The hole, which was situated two to three inches from the white edge line, was approximately seven to eight inches wide and five to six inches deep. After the incident, claimant's brother proceeded to drive on W.Va. Route 3 for one fourth of a mile until he was able to pull over. Zack Williams stated that there was oncoming traffic, and he did not see the hole before the vehicle struck it. He was not familiar with the road prior to this incident. Ms. Williams testified that earlier that morning, she had purchased the four tires that were on the vehicle when it was damaged. As a result of this incident, claimant's vehicle sustained damage to its two passenger side tires ($152.64) and passenger side rims ($970.73). Claimant also incurred towing expenses ($60.00). Thus, the total amount of damages amounts to $1,183.37. Claimant's vehicle had liability insurance coverage.

The position of the respondent is that it did not have actual or constructive notice of the condition on W.Va. Route 3. The respondent did not present a witnesses at the hearing.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold respondent liable for road defects of this type, a claimant must prove that respondent had actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman v. Dep't of Highways*, 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that respondent had, at the least, constructive notice of the hole which claimant's vehicle struck and that the hole presented a hazard to the traveling public on W.Va. Route 3. The size of the hole and its location on the travel portion of the road lead the Court to conclude that respondent had notice of this hazardous condition. Thus, the Court finds respondent negligent and claimant may make a recovery for the damage to his vehicle.

In accordance with the findings of fact and conclusions of law stated herein above, the

Court is of the opinion to and does make an award to the claimant in the amount of $1,183.37.

Award of $1,183.37.

OPINION ISSUED NOVEMBER 19, 2008

MARK A. HELD
VS.
REGIONAL JAIL AND CORRECTIONAL
FACILITY AUTHORITY
(CC-08-0361)

Claimant appeared *pro se*.

Ronald R. Brown, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant, an inmate, seeks $1,061.00 for items of personal property that were entrusted to respondent. On or around December 7, 2007, through February 14, 2008, claimant was transported from Western Regional Jail in Barboursville to South Central Regional Jail in Charleston for court hearings in Kanawha County. Claimant contends that his possessions were misplaced when he was transported between the facilities. Although claimant had certain items of sentimental value that cannot be replaced, he indicated that the following items can be replaced: (1) leather wallet ($30.00), (2) contents in wallet ($200.00), (3) L.G. camera phone ($349.00), (4) Wolverine boots ($190.00), (5) Levi Jeans ($30.00), (6) Army field jacket ($100.00), (7) jacket liner ($40.00), (8) Harley Davidson shirt ($48.00), (9) t-shirt ($15.00), (10) long johns ($25.00), and (11) two pairs of socks ($8.00). Thus far, respondent’s employees have been unable to produce claimant’s personal property.

In its Answer, respondent admits the validity of the claim and that the amount is fair and reasonable.

This Court has taken the position in prior claims that if a bailment situation has been created, respondent is responsible for property of an inmate which is taken from that inmate, remains in its custody, and is not produced for return to the inmate. The Court finds that $1,035.00 is a fair and reasonable amount to compensate the claimant for his lost items.

Accordingly, the Court makes an award to the claimant herein in the amount of $1,035.00.

Award of $1,035.00.

OPINION ISSUED DECEMBER 12, 2008

JOHN B. MOWERY JR.
VS.
DIVISION OF HIGHWAYS
(CC-07-0086)

Claimant appeared *pro se*.

Jason C. Workman, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when excess gravel from the road struck the windshield of his 2000 Honda Civic on I-79 North in Elkview, Kanawha County. I-79 North is a road maintained by respondent. The Court is of the opinion to deny this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 8:45 p.m. on October 19, 2006. Claimant was driving towards mile marker seven at approximately fifty-five miles per hour when the vehicle in front of him "kicked up" loose asphalt, and the asphalt struck and cracked his vehicle's windshield. Claimant observed that paving work was being performed at this location and assumed that either the respondent or a contractor left the excess gravel in this area. As a result of this incident, claimant's vehicle sustained damage to its windshield in the amount of $210.94.

The position of the respondent is that it did not have actual or constructive notice of the condition on I-79 at mile marker seven. The respondent did not present any witnesses at the hearing.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold respondent liable for road defects of this type, a claimant must prove that respondent had actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman v. Dep't. of Highways*, 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that respondent did not have notice of the loose piece of gravel which struck claimant's vehicle on I-79 at mile marker seven. Since it is too speculative to determine where the piece of asphalt came from, the Court cannot find respondent liable. Thus, there is insufficient evidence of negligence upon which to base an award.

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

Claim disallowed.

OPINION ISSUED DECEMBER 12, 2008

JOHN B. MOWERY JR.
VS.
DIVISION OF HIGHWAYS
(CC-07-0087)

Claimant appeared *pro se*.

Jason C. Workman, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when gravel on the I-64 eastbound exit ramp at Cross Lanes struck the windshield of his 2006 Nissan Frontier pickup truck. The I-64 Cross Lanes exit ramp is an area maintained by respondent. The Court is of the opinion to deny the claim for the reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 8:30 a.m. on September 6, 2006. The I-64 eastbound Cross Lanes exit ramp is a one-lane, paved road. As claimant was driving on the exit ramp at approximately fifteen miles per hour, he noticed that there was loose gravel situated one third of the way across the exit ramp. There was a sports utility vehicle in front of him on the exit ramp. When the sports utility vehicle drove through this area, pieces of gravel were thrown into the air and struck the vehicle's windshield. Claimant surmised that respondent was responsible for the loose gravel at this location. The gravel looked misplaced, and he thought it came off the back of one of respondent's trucks. Although respondent had finished performing work on the exit ramp, he stated that he saw respondent's employees performing road construction in the vicinity. As a result of this incident, claimant's vehicle sustained damage to its windshield in the amount of $264.69.

The position of the respondent is that it did not have actual or constructive notice of the condition on the I-64 Cross Lanes exit ramp at the site of claimant's accident for the date in question. Respondent did not present any witnesses at the hearing of this matter.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims*, 130 W.Va. 645; 46 S.E.2d 81 (1947). In order to hold respondent liable for road defects of this type, a claimant must prove that respondent had actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman v. Dep't of Highways*, 16 Ct. Cl. 103 (1986).

In the instant case, the Court finds that respondent did not have actual or constructive notice of the loose gravel located on the I-64 Cross Lanes exit ramp. Although claimant contends that the loose gravel came from one of respondent's trucks, an award cannot be based on mere speculation. The Court finds that the claimant has not established that the damage to his vehicle was caused by any negligence on the part of the respondent, and further, it would be mere speculation for the Court to conclude where the excess gravel in the road came from. Therefore, the Court is constrained by the evidence to deny this claim.

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

OPINION ISSUED DECEMBER 12, 2008

MELISSA M. BAKER AND DANIEL J. BAKER JR.
VS.
DIVISION OF HIGHWAYS
(CC-08-0085)

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

PER CURIAM:

Claimants brought this action for vehicle damage which occurred when their 2008 Subaru Impreza struck a hole while Melissa Baker was driving on Point Marion Road, designated as Route 119, in Morgantown, Monongalia County. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 9:15 p.m. on February 1, 2008. Route 119 is a two-lane road with a center line and edge lines. At the time of the incident, Melissa Baker was returning from dropping her children off at her father-in-law's house on Warm Hollow Road. She was driving below the posted speed limit of forty-five miles per hour. Before claimant had reached the Baker's Ridge entrance on Route 119, claimants' vehicle struck a hole that was located within the white edge line. Ms. Baker testified that there was oncoming traffic, and she did not see the hole before her vehicle struck it. She had driven on this road approximately two weeks before this incident occurred and did not see the hole on a prior occasion. She pulled off to the side of the road, and her husband and father-in-law placed donut tires on the vehicle. As a result of this incident, claimants' vehicle sustained damage to one rim, both passenger side tires, and its alignment totaling $872.78. Claimants' insurance deductible is $1,000.00.

The position of the respondent is that it did not have actual or constructive notice of the condition on Route 119. Kathy Westbrook, Highway Administrator for Monongalia County, testified that Route 119 is a first priority road in terms of its maintenance. There are approximately 5,000 vehicles that travel on this road on a daily basis. She explained that a lot of trucks travel on Route 119, and this causes the edges of the road to break down. The claimant contacted respondent on February 4, 2008, to report the incident. Ms. Westbrook stated that the hole was patched on the morning that it was reported to respondent.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold respondent liable for road defects of this type, a claimant must prove that respondent had actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman v. Dep't of Highways*,

16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that respondent had, at the least, constructive notice of the hole which claimants' vehicle struck and that the hole presented a hazard to the traveling public. The fact that this incident occurred on a primary road leads the Court to conclude that respondent had notice of this hazardous condition. Thus, the Court finds respondent negligent, and claimants may make a recovery for the damage to their vehicle.

In accordance with the findings of fact and conclusions of law stated herein above, the

Court is of the opinion to and does make an award to the claimants in the amount of $872.78.

Award of $872.78.

OPINION ISSUED DECEMBER 12, 2008

THERESA M. TWIGG
VS.
DIVISION OF HIGHWAYS
(CC-08-0097)

Claimant appeared *pro se*.

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when her 2002 PT Cruiser struck a hole on West Run Road, designated as County Route 67/1, in Morgantown, Monongalia County. County Route 67/1 is a road maintained by respondent. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 1:00 p.m. or 2:00 p.m. on March 6, 2008. County Route 67/1 is a narrow road with no center lines or edge lines. At the time of the incident, claimant was driving at approximately five miles per hour. Since the road is narrow, she was watching for oncoming traffic. When she saw an oncoming vehicle traveling towards her, her vehicle struck a hole that was approximately five or six inches wide and three or four inches deep. The claimant is familiar with this road, and stated that the road surface could have cracked due to the trucks traveling on County Route 67/1. As a result of this incident, claimant's oil plan needed to be replaced ($160.06), and she had to purchase spark plugs ($9.37). Claimant incurred damages in the amount of $169.43. She also seeks to recover the cost of gas expenses for her friends and family that provided her with transportation while her vehicle was in disrepair, but she did not provide the Court with documentation for this loss. Claimant's insurance deductible is $1,000.00.

The position of the respondent is that it did not have actual or constructive notice

of the condition on County Route 67/1. Kathy Westbrook, Highway Administrator for respondent in Monongalia County, testified that County Route 67/1 is a third priority road in terms of its maintenance. The road was closed for approximately six months due to contractors performing construction in this area. Respondent did not have any prior problems with this particular hole on County Route 67/1.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold respondent liable for road defects of this type, a claimant must prove that respondent had actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman v. Dep't of Highways*, 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that respondent had, at the least, constructive notice of the hole which claimant's vehicle struck and that the hole presented a hazard to the traveling public. The size of the hole and the time of year in which this incident occurred leads the Court to conclude that respondent had notice of this hazardous condition. Thus, the Court finds respondent negligent and claimant may make a recovery for the damage to her vehicle. However, the Court is unable to reimburse the claimant for the gas expenses incurred by her family and friends while her vehicle was in disrepair.

In accordance with the findings of fact and conclusions of law stated herein above, the Court is of the opinion to and does make an award to the claimant in the amount of $169.43.

Award of $169.43.

OPINION ISSUED DECEMBER 12, 2008

DAVID KARL HANSEN
VS.
DIVISION OF HIGHWAYS
(CC-08-0099)

Claimant appeared *pro se*.

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when his 2000 Subaru Legacy struck a hole while claimant's wife, Evelyn Hansen, was driving on W.Va. Route 7 in Sabraton, Monongalia County. W.Va. Route 7 is a road maintained by respondent. The Court is of the opinion to make an award for the reasons more fully stated below.

The incident giving rise to this claim occurred between 6:00 p.m. and 6:30 p.m. on February 29, 2008. W.Va. Route 7 is a three-lane, paved road. At the time of the incident, claimant was traveling from Westover towards Wendy's Restaurant in Sabraton on W.Va. Route 7. Ms. Hansen was driving at approximately twenty-five miles per hour

when her vehicle struck a hole near the location where the Food Lion grocery store was once located. The hole occupied from the center portion of the road to the area near the white edge line. Since it was dark and raining, she was unable to see the hole before the vehicle struck it. Her children, who were seated in the back seat of the vehicle, were startled by the impact from underneath the vehicle. Ms. Hansen stated that she could hear a noise coming from underneath of the vehicle, but she was able to drive the vehicle home. She had driven on this road approximately two weeks prior to the incident, and did not notice the hole at that time. As a result of this incident, claimant seeks damages for the replacement of the vehicle's Y-pipe, the needed gaskets and bolts, and an alignment all in the amount of $546.71. Claimant's insurance deductible is $1,000.00.

The position of the respondent is that it did not have actual or constructive notice of the condition on W.Va. Route 7. Kathy Westbrook, Highway Administrator for respondent in Monongalia County, testified that W.Va. Route 7 is a first priority road in terms of its maintenance. Since the cold mix was below specifications and would not adhere to the road surface, respondent had to patch holes on this road almost daily due to the freezing and thawing during February.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold respondent liable for road defects of this type, a claimant must prove that respondent had actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman v. Dep't of Highways*, 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that respondent had, at the least, constructive notice of the hole which claimant's vehicle struck and that the hole presented a hazard to the traveling public. The size of the hole leads the Court to conclude that respondent had notice of this hazardous condition. Since the cold mix was below specifications and proved inadequate, the Court finds the respondent negligent and claimant may make a recovery for the damage to his vehicle.

In accordance with the findings of fact and conclusions of law stated herein above, the Court is of the opinion to and does make an award to the claimant in the amount of $546.71.

Award of $546.71.

OPINION ISSUED DECEMBER 12, 2008

JASON DONAHUE
VS.
DIVISION OF HIGHWAYS
(CC-08-0114)

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when his 2008 Mercedes Benz struck a hole while claimant's wife, Janet Donahue, was driving on the Mileground, designated as U.S. Route 119, in Morgantown, Monongalia County. U.S. Route 119 is a road maintained by respondent. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred between 8:00 a.m. and 8:15 a.m. on March 19, 2008. U.S. Route 119 is a three-lane road with twelve foot wide lanes. At the time of the incident, Janet Donahue was driving from the airport towards W.Va. Route 705. As she was driving in rainy conditions at approximately twenty miles per hour, her vehicle struck a hole located near the Monro Muffler shop. She testified that the hole was approximately six inches deep. Since the hole was covered with water, she did not see it before her vehicle struck it. Although Ms. Donahue travels this road on a daily basis, she did not notice the hole on the day prior to this incident. The claimant testified that water drains onto the roadway in the area where this hole formed. As a result of this incident, claimant's vehicle sustained damage to its passenger front and rear tire in the amount of $342.42. Claimant's insurance deductible is $1,000.00.

The position of the respondent is that it did not have actual or constructive notice of the condition on Route 119. Kathy Westbrook, Highway Administrator for respondent in Monongalia County, stated that there are approximately 17,000 to 19,000 vehicles that travel on this road each day. Ms. Westbrook did not have any DOT12s, or daily work reports, regarding this particular hole on Route 119. She testified that the hole could have developed within a twenty-four hour period due to the freezing and thawing that can cause deterioration on the roadway.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold respondent liable for road defects of this type, a claimant must prove that respondent had actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman v. Dep't of Highways*, 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that respondent had, at the least, constructive notice of the hole which claimant's vehicle struck and that the hole presented a hazard to the traveling public. The size of the hole leads the Court to conclude that respondent had notice of this hazardous condition. Thus, the Court finds respondent negligent and claimant may make a recovery for the damage to his vehicle.

In accordance with the findings of fact and conclusions of law stated herein above, the Court is of the opinion to and does make an award to the claimant in the amount of $342.42.

Award of $342.42.

OPINION ISSUED DECEMBER 12, 2008

CARMEN JOHNSON
VS.
DIVISION OF HIGHWAYS
(CC-08-0138)

Claimant appeared *pro se*.

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when her 2006 Chevrolet Monte Carlo struck a hole on May Road, designated as County Route 3, in Follansbee, Brooke County. County Route 3 is a road maintained by respondent. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 7:30 p.m. to 8:00 p.m. on March 14, 2008. County Route 3 is a paved, two-lane road with a centerline and edge lines. The posted speed limit is twenty-five miles per hour. As claimant was driving at approximately twenty miles per hour, her vehicle struck a hole situated on the edge of the road that she estimated was two feet long and two feet wide. Although she was familiar with the road and was aware that there were several holes in this area, claimant testified that she could not avoid the hole because it was dark and raining. As a result of this incident, claimant's vehicle sustained damage to its passenger side tires ($289.95), and she also incurred towing expenses ($55.00). Thus, claimant's damages total $344.95. Claimant's insurance policy does not provide coverage for this loss.

The position of the respondent is that it did not have actual or constructive notice of the condition on County Route 3. Craig Sperlazza, Brooke County Administrator for respondent, testified that he is familiar with the area where this incident occurred. At the time of claimant's incident, respondent had nineteen employees available for road maintenance and 225 miles of road that he was responsible for maintaining in Brooke County. He explained that County Route 3 is a low priority road in terms of its maintenance. According to the DOH12, a record of respondent's daily work activity, respondent had patched holes on County Route 3 on February 15, 2008, and February 21, 2008, with cold mix. He testified that cold mix is only a temporary repair.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold respondent liable for road defects of this type, a claimant must prove that respondent had actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman v. Dep't of Highways*, 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that respondent had, at the least, constructive notice of the hole which claimant's vehicle struck and that the hole presented a hazard to the traveling public. The size of the hole and its location lead the Court to conclude that respondent had notice of this hazardous condition. Thus, the Court finds respondent negligent and claimant may make a recovery for the damage to her vehicle.

In accordance with the findings of fact and conclusions of law stated herein above, the Court is of the opinion to and does make an award to the claimant in the amount of $344.95.

Award of $344.95.

OPINION ISSUED DECEMBER 12, 2008

ERNEST W. CAPP
VS.
DIVISION OF HIGHWAYS
(CC-08-0149)

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when his 2000 Chevrolet Tracker struck a hole as he was driving south on W.Va. Route 2 near Wellsburg, Brooke County. W.Va. Route 2 is a road maintained by respondent. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 8:30 p.m. on March 12, 2008. W.Va. Route 2 is a paved, two-lane road at the area of the incident involved in this claim. The posted speed limit is fifty-five miles per hour. As claimant was driving on W.Va. Route 2 at approximately forty miles per hour, his vehicle struck a hole that he estimated was one and a half feet wide. Although claimant travels this road on a regular basis and was aware that there were a series of holes in this area, he was unable to avoid the hole because there was oncoming traffic. As a result of this incident, claimant's vehicle sustained damage to its undercarriage in the amount of $1,031.31. Since claimant's insurance deductible at the time of the incident was $500.00, his recovery is limited to that amount.

The position of the respondent is that it did not have actual or constructive notice of the condition on W.Va. Route 2. Craig Sperlazza, Brooke County Administrator for respondent, testified that W.Va. Route 2 is a high priority road in terms of its maintenance. Mr. Sperlazza indicated that the two mile stretch on W.Va. Route 2 where this incident occurred had deteriorated during the winter months. Respondent performed maintenance on this stretch of road on March 2, 2008, March 3, 2008, and March 12, 2008. Respondent's crews used cold mix and perma patch to fill the holes in this particular area.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold respondent liable for road defects of this type, a claimant must prove that respondent had actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman v. Dep't of Highways*, 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that respondent had, at the least, constructive notice of the hole which claimant's vehicle struck and that the hole presented a hazard to the traveling public. Although respondent had performed maintenance in this area, the attempts to fill the hole proved inadequate at the time of claimant's incident. Thus, the Court finds respondent negligent and claimant may make a recovery for the damage to his vehicle.

In accordance with the findings of fact and conclusions of law stated herein above, the

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

Award of $500.00.

OPINION ISSUED DECEMBER 12, 2008

AMY PETCOVIC
VS.
DIVISION OF HIGHWAYS
(CC-08-0154)

Claimant appeared *pro se*.

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when her 2006 Hyundai Tiburon struck two holes on Lazelle Road, designated as W.Va. Route 100, near Morgantown, Monongalia County. W.Va. Route 100 is a road maintained by respondent. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 6:40 a.m. on March 21, 2008. W.Va. Route 100 is a two-lane, paved road with a speed limit of fifty-five miles per hour. At the time of the incident, claimant was driving to work from her home in Washington, Pa. to the Fort Martin Power Plant in Maidsville. As she was traveling at approximately thirty-five or forty miles per hour, her vehicle struck two holes on W.Va. Route 100. The holes were located approximately six-tenths of a mile from Scott's Run Road and were situated on the right portion of the roadway. Both holes were located inside the white edge line. Although she normally drives into the opposite lane to avoid the holes, on the day in question, there were coal trucks traveling in the opposite lane. In addition, there is no shoulder on this portion of W.Va. Route 100. The primary hole was approximately two feet long, two feet wide, and five inches deep. The secondary hole was approximately five feet long, two feet wide, and six inches deep. Claimant stated that she takes several different routes to travel to work and had driven on this road a week prior to this incident. Although claimant's employer, Longview Power, had complained to respondent regarding the condition of the road, she did not contact respondent about the holes before this incident occurred. Her vehicle sustained damage to a tire and a rim in the amount of $388.77. The amount of claimant's insurance deductible is $500.00.

The position of the respondent is that it did not have actual or constructive notice of the condition on W.Va. Route 100. Kathy Westbrook, Highway Administrator for respondent in Monongalia County, testified that W.Va. Route 100 is heavily traveled by coal trucks. She testified that the road was widened, and it did not have a strong base.

The daily truck traffic, weather conditions, and the road's proximity to the Monongalia River, contributed to the deterioration of the roadway. Respondent's DOH 12, or record of its daily work reports, did not indicate that any work was performed in this area prior to the time of claimant's incident. After reviewing the photographs that claimant submitted as exhibits, Ms. Westbrook stated that the holes might have been patched on a prior occasion.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold respondent liable for road defects of this type, a claimant must prove that respondent had actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman v. Dep't of Highways*, 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that respondent had, at the least, constructive notice of the holes which claimant's vehicle struck and that the holes presented a hazard to the traveling public. The size of the holes and their location on the travel portion of the road lead the Court to conclude that respondent had notice of this hazardous condition. Thus, there is sufficient evidence of negligence to base an award. Notwithstanding the negligence of the respondent, the Court is also of the opinion that the claimant was negligent since she was aware of the condition on the road. In a comparative negligence jurisdiction such as West Virginia, the claimant's negligence may reduce or bar recovery in a claim. Based on the above, the Court finds that the claimant's negligence equals twenty-percent (20%) of her loss. Since the negligence of the claimant is not greater than or equal to the negligence of the respondent, claimant may recover eighty-percent (80%) of the loss sustained.

In accordance with the findings of fact and conclusions of law stated herein above, the Court is of the opinion to and does make an award to the claimant in the amount of $311.02.

Award of $311.02.

OPINION ISSUED DECEMBER 12, 2008

JACK K. HOUSMAN
VS.
DIVISION OF HIGHWAYS
(CC-08-0162)

Claimant appeared *pro se*.

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when his 2003 Suzuki struck a hole on County Route 33/3 in Preston County. County Route 33/3 is a road maintained by respondent. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 6:20 a.m. on March 21, 2008. County Route 33/3 is a rural country road that varies in width from sixteen to twenty feet. The claimant and his son-in-law were traveling from Morgantown to Snowshoe on a skiing trip. They decided to take W.Va. Route 92 instead of the interstate. When they reached Gladesville, the claimant's son-in-law, who was navigating using his I-Phone with Google maps, instructed the claimant to turn onto County Route 33/3. As claimant was driving at approximately thirty-five miles per hour, his vehicle struck a hole that was approximately nine inches deep. Claimant was not familiar with this road, and he did not have notice of the hole prior to this incident. The photographs submitted as evidence demonstrate that the hole occupied the travel portion of the roadway, and claimant could not have avoided the hole. As a result, claimant's vehicle sustained damage to two tires and two rims in the amount of $1,061.12, and including related expenses, his claim totals $1,140.86. Since claimant's insurance deductible is $500.00, his recovery is limited to that amount.

The position of the respondent is that it did not have actual or constructive notice of the condition on County Route 33/3. Larry Weaver, Highway Administrator for respondent in Preston County, testified that County Route 33/3 is a third priority road in terms of its maintenance. He stated that there was a contractor working on a waterline project in this area, and the contractor had a permit to perform work along respondent's right of way. Respondent did not receive information regarding the hole prior to this incident. Respondent did not receive its first shipment of cold mix until January 18, 2008. Further, it had to perform work on its first and second priority roads before it could maintain the third priority roads such as County Route 33/3. Due to the late delivery of cold mix, respondent was unable to perform maintenance on its third priority routes until the hot mix plants opened on or around April 15, 2008.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold respondent liable for road defects of this type, a claimant must prove that respondent had actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman v. Dep't of Highways*, 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that respondent had, at the least, constructive notice of the hole which claimant's vehicle struck and that it presented a hazard to the traveling public. The Court finds that a hole of this size could not have developed in a short period of time without respondent's knowledge. Although respondent was unable to patch holes on its third priority roads due to the late delivery of cold mix, respondent could have placed cones at this location or taken other measures to warn the traveling public of this hazard. Thus, the Court finds respondent negligent and claimant may make a recovery for the damage to his vehicle.

In accordance with the findings of fact and conclusions of law stated herein above, the Court is of the opinion to and does make an award to the claimant in the amount of $500.00.

Award of $500.00.

OPINION ISSUED DECEMBER 12, 2008

ALAN J. MILLER AND DEBRA A. MILLER
VS.
DIVISION OF HIGHWAYS
(CC-08-0171)

Claimants appeared *pro se*.

Jason C. Workman, Attorney at Law, for respondent.

PER CURIAM:

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

1. On March 20, 2008, claimant Alan J. Miller was driving one mile north of Wallace on W.Va. Route 20 in Harrison County when his vehicle struck holes in the road damaging two tires, two rims, while also requiring an alignment.

2. Respondent was responsible for the maintenance of W.Va. Route 20 which it failed to maintain properly on the date of this incident.

3. As a result, claimants' vehicle sustained damage in the amount of $793.66. Claimants' insurance deductible was $500.00.

4. The amount of $500.00 for the damages is fair and reasonable.

The Court has reviewed the facts of the claim and finds that respondent was negligent in its maintenance of W.Va. Route 20 on the date of this incident; that the negligence of respondent was the proximate cause of the damages sustained to claimants' vehicle; and that the amount of the damages agreed to by the parties is fair and reasonable. Thus, claimants may make a recovery for their loss.

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

Award of $500.00.

OPINION ISSUED DECEMBER 12, 2008

ROBERTA VANNESS
VS.
DIVISION OF HIGHWAYS
(CC-08-0172)

Claimant appeared *pro se*.

Jason C. Workman, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when her 2006 Ford Fusion struck a hole while she was driving on W.Va. Route 94 in Hernshaw, Kanawha County. W.Va. Route 94 is a road maintained by respondent. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 4:30 p.m. on March 25, 2008.

W.Va. Route 94 is a two-lane, paved road with a posted speed limit of forty-five miles per hour. At the time of the incident, claimant was driving at approximately forty miles per hour, and her husband and son were passengers in the vehicle. As she drove near the Hernshaw Post Office, her vehicle struck a hole that was situated toward the yellow center line and was approximately twelve inches long and eight inches wide. Although she travels this road on a regular basis, she did not notice the hole on a prior occasion. As a result of this incident, claimant's vehicle sustained damage to its front, left tire in the amount of $78.03.

The position of the respondent is that it did not have actual or constructive notice of the condition on W.Va. Route 94. John Wayne Walker, Maintenance Assistant for respondent in Kanawha, Boone, and Mason County, testified that he is familiar with the area where claimant's incident occurred. He stated that W.Va. Route 94 is a first priority road in terms of its maintenance. He does not recall receiving any complaints regarding this particular hole prior to March 25, 2008.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold respondent liable for road defects of this type, a claimant must prove that respondent had actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman v. Dep't of Highways*, 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that respondent had, at the least, constructive notice of the hole which claimant's vehicle struck and that the hole presented a hazard to the traveling public. The size of the hole and its location on the road lead the Court to conclude that respondent had notice of this hazardous condition. Thus, the Court finds respondent negligent and claimant may make a recovery for the damage to her vehicle.

In accordance with the findings of fact and conclusions of law stated herein above, the Court is of the opinion to and does make an award to the claimant in the amount of $78.03.

Award of $78.03.

OPINION ISSUED DECEMBER 12, 2008

JANET E. PHILLIPS
VS.
DIVISION OF HIGHWAYS
(CC-08-0180)

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when her 2008 Hyundai Sonata struck two holes on Cheat Road, designated as County Route 857, in Morgantown, Monongalia County. County Route 857 is a road maintained by respondent. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 11:00 a.m. on March 28, 2008. County Route 857 is a two-lane road with a center line and edge lines. At the time of the incident, claimant was traveling home from an appointment at her dentist's office. Claimant was driving at approximately thirty miles per hour when her vehicle struck two holes on County Route 857 near the Purple Cow Lounge. One of the holes was approximately twelve inches long, eight inches wide, and four to six inches deep and was situated approximately eighteen inches from the edge line. She was unable to avoid the holes due to oncoming traffic, and she had not seen the holes at this location on a prior occasion. Claimant does not travel on this road on a regular basis. As a result of this incident, her vehicle sustained damage to its two passenger side tires in the amount of $362.09. Claimant's insurance deductible is $500.00.

The position of the respondent is that it did not have actual or constructive notice of the condition on County Route 857. Kathy Westbrook, Highway Administrator for respondent in Monongalia County, testified that County Route 857 is a secondary road in terms of its maintenance. Respondent's DOH 12, a record of its daily work activity, indicates that respondent patched a hole on

March 13, 2008. Since the cold mix that respondent had available was not compacting well, respondent patched the hole with perma-patch. According to Ms. Westbrook, it is possible that the material could have come out of the hole between the time that it was patched on March 13, 2008, and the time of this incident on March 28, 2008.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims,* 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold respondent liable for road defects of this type, a claimant must prove that respondent had actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman v. Dep't of Highways,* 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that respondent had, at the least, constructive notice of the holes which claimant's vehicle struck and that the holes presented a hazard to the traveling public. The size and location of the holes leads the Court to conclude that respondent had notice of this hazardous condition. Thus, the Court finds respondent negligent and claimant may make a recovery for the damage to her vehicle.

In accordance with the findings of fact and conclusions of law stated herein above, the Court is of the opinion to and does make an award to the claimant in the amount of $362.09.

Award of $362.09.

OPINION ISSUED DECEMBER 12, 2008

SARAH M. COPLEY
VS.
DIVISION OF HIGHWAYS
(CC-08-0191)

Claimant appeared *pro se*.

Jason C. Workman, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when her 2007 Mazda 3 struck holes on U.S. Route 60 in Charleston, Kanawha County. U.S. Route 60 is a road maintained by respondent. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 8:00 p.m. on March 4, 2008. U.S. Route 60 is a paved, four-lane road with a speed limit of forty-five miles per hour. Claimant was driving at approximately thirty-five to forty miles per hour and was changing lanes when her vehicle struck holes in the road near Tudor's Biscuit World. One of the holes was approximately two feet long and eight to ten inches wide. She travels this road frequently, but on the day in question, she was unable to see the holes before her vehicle struck them because it was raining and the holes were filled with water. As a result of this incident, her vehicle sustained damage to its front rims and wheel bearings, and an alignment had to be performed, all in the amount of $1,293.67. Since claimant's insurance deductible at the time of the incident was $500.00, her recovery is limited to that amount.

The position of the respondent is that it did not have actual or constructive notice of the condition on U.S. Route 60. John Wayne Walker, Maintenance Assistant for respondent in Kanawha, Boone, and Mason County, testified that U.S. Route 60 is a first priority road in terms of its maintenance. He testified that approximately 7,000 to 8,000 vehicles travel this road on a daily basis. During the time of claimant's incident, there was high water on the roads in Kanawha County, and respondent was attending to that situation. He also stated that in March, respondent was involved in snow removal and ice control, which is a priority activity.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold respondent liable for road defects of this type, a claimant must prove that respondent had actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman v. Dep't of Highways*, 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that respondent had, at the least, constructive notice of the holes which claimant's vehicle struck and that the holes presented a hazard to the traveling public. The size of the holes and their location lead the Court to conclude that respondent had notice of this hazardous condition. Thus, the Court finds respondent negligent and claimant may make a recovery for the damage to her vehicle.

In accordance with the findings of fact and conclusions of law stated herein

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

Award of $500.00.

OPINION ISSUED DECEMBER 12, 2008

MICHELLE IGO AND DAVID J. IGO
VS.
DIVISION OF HIGHWAYS
(CC-08-0195)

Claimants appeared *pro se*.

Jason C. Workman, Attorney at Law, for respondent.

PER CURIAM:

Claimants brought this action for vehicle damage which occurred when claimant Michelle Igo's father, Carl Skeens, was driving claimants' 2006 Chevrolet Silverado truck, and the truck struck rocks that were placed on Cabin Creek Road in Kayford, Kanawha County. Cabin Creek Road, designated as County Route 79/3, is a road maintained by respondent. The Court is of the opinion to deny this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 1:30 p.m. on April 3, 2008. County Route 79/3 is a gravel-based road at the area of the incident involved in this claim. On the day in question, Mr. Skeens had borrowed the claimants' vehicle to replace its inspection sticker. He decided to take County Route 79/3 because it was the shortest route rather than taking W.Va. Route 93 that connects with W.Va. Route 3. Mr. Skeens stated that it appeared that either the coal company or respondent had placed rocks at this particular location. As he was driving at less than five miles per hour in order to avoid the rocks, a rock cut the side of the vehicle's tire. Since the rocks were covering a large portion of the road surface, he was unable to avoid them. When claimant traveled on the road two weeks prior to this incident, he did not notice the rocks. According to Mr. Skeens, the road has been in disrepair for the past several years due to the coal truck traffic on the road. He thought that the rocks were placed in this area to alleviate the ruts in the road surface. After the incident, Mr. Skeens stated that the large rocks were removed and smaller stones were placed in this area. As a result of this incident, his vehicle sustained damage to its tire in the amount of $134.99.

The position of the respondent is that it did not have actual or constructive notice of the condition on County Route 79/3. John Wayne Walker, Maintenance Assistant for respondent in Kanawha, Boone, and Mason County, testified that County Route 79/3 is a third priority road in terms of its maintenance. Mr. Walker testified that respondent did not place the rocks in this area. He explained that respondent and a coal company have a maintenance agreement for this road, and under the agreement, the coal company is responsible for providing additional maintenance for the road. Mr. Walker stated that his office did not receive any complaints regarding rocks on this road prior to April 3, 2008.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold respondent liable for road defects of this type, a claimant must prove that respondent had actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman v. Dep't of Highways*, 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that respondent did not have actual or constructive notice of the rocks that were placed on County Route 79/3. Since respondent did not place the rocks in this area, the Court cannot find respondent negligent in failing to maintain County Route 79/3. According to Mr. Walker's testimony, the coal company may have placed the rocks at this location. Thus, the claimants may have an action against the coal company for the damage to their vehicle. Despite this, there is insufficient evidence of negligence on the part of respondent upon which to base an award.

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

Claim disallowed.

OPINION ISSUED DECEMBER 12, 2008

BECKY L. MONGOLD
VS.
DIVISION OF HIGHWAYS
(CC-08-0203)

Claimant appeared *pro se*.

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when her 2005 Subaru Legacy struck a hole while claimant's son, Joshua Mongold, was driving on Van Voorhis Road, designated as County Route 59, in Morgantown, Monongalia County. County Route 59 is a road maintained by respondent. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred at 9:00 p.m. on April 23, 2008. County Route 59 is a two-lane road. Mr. Mongold testified that he was driving from the District Apartments where he resides. He was proceeding up the hill toward College Park Apartments at a speed of approximately forty to forty-five miles an hour when his vehicle struck a hole in the road. Since there was oncoming traffic, he was unable to avoid the hole. Mr. Mongold testified that he was aware that the hole had existed for approximately one month prior to the incident. He stated that the hole was located in the travel portion of the lane and was approximately one and a half feet in diameter and five or six inches deep. As a result, claimant's vehicle sustained damage to the right passenger front and rear tires, the passenger front, rear, and left front rims, and the

vehicle's tires had to be re-aligned. The total amount of claimant's damages amounts to $1,553.34, and claimant's insurance deductible at the time of the incident was $250.00.

The position of the respondent is that it did not have actual or constructive notice of the condition on County Route 59. Kathy Westbrook, Highway Administrator for respondent in Monongalia County, testified that she is familiar with the area where this incident occurred. She did not receive prior notice of the hole which claimant's vehicle struck until after the incident occurred.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold respondent liable for road defects of this type, a claimant must prove that respondent had actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman v. Dep't of Highways*, 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that respondent had, at the least, constructive notice of the hole which claimant's vehicle struck and that the hole presented a hazard to the traveling public. The size of the hole and its location on the road lead the Court to conclude that respondent had notice of this hazardous condition. Thus, claimant may make a recovery for her loss.

In accordance with the findings of fact and conclusions of law stated herein above, the Court is of the opinion to and does make an award to the claimant in the amount of $250.00.

Award of $250.00.

OPINION ISSUED DECEMBER 12, 2008

DENISE BERDINE
VS.
DIVISION OF HIGHWAYS
(CC-08-0206)

Claimant appeared *pro se*.

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when her 1996 Subaru Legacy struck a raised section of the road on Little Rush Run, designated as County Route 250/3 in Burton, Wetzel County. County Route 250/3 is a road maintained by respondent. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred on March 7, 2008. County Route 250/3 is a narrow, one-lane, tar and chip road. At the time of the incident, claimant was proceeding from her driveway onto County Route 250/3. As claimant was driving on

County Route 250/3 at less than twenty miles per hour, her vehicle struck a raised section of the road surface, causing her to lose control of her vehicle. The raised portion, which was located in the middle of the road, consisted of mud and gravel. Since the road was icy, her vehicle slid in this area. When the claimant tried to use the brake, she testified that she panicked and may have stepped on the gas pedal instead, causing her vehicle to go up the embankment and slide into a trailer. However, the trailer was not damaged in this incident. According to the claimant, CNX Gas Drilling Co. ("CNX"), brought heavy equipment onto this road to perform drilling, causing the road condition to deteriorate. As a result of this incident, claimant's vehicle sustained damage to its front bumper, grille, fender, hood, strope, upper tie bar, and head lamp in the amount of $2,841.15. Claimant's vehicle had liability insurance coverage only.

The position of the respondent is that it did not have actual or constructive notice of the condition on County Route 250/3. Mark Poe, Maintenance Crew Supervisor for respondent in Wetzel County, testified that County Route 250/3 is a narrow, dead end road. It is a third priority road in terms of its maintenance. Mr. Poe stated that CNX was performing drilling related to the methane degasification of coal. According to Mr. Poe, respondent has a means of recovering its costs for the damage to the road caused by CNX's activities in this area. On March 3, 2008, respondent had placed two hundred tons of gravel and graded this area. Mr. Poe testified that respondent's crews were involved in snow removal and ice control during this season. Respondent did not receive any complaints regarding the condition of the road between March 3, 2008, and the time of claimant's incident.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold respondent liable for road defects of this type, a claimant must prove that respondent had actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman v. Dep't of Highways*, 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that respondent had, at the least, constructive notice of the raised section of the road surface which claimant's vehicle struck and that it presented a hazard to the traveling public. The Court finds that respondent was aware of CNX's activity in this area. Although respondent had taken measures to maintain the road, these measures proved inadequate on the day of the incident. Thus, the Court finds respondent negligent. The Court also finds that

the claimant was negligent in failing to maintain control of her vehicle, and the Court will therefore reduce her recovery by twenty-percent (20%).

In accordance with the findings of fact and conclusions of law stated herein above,

the Court is of the opinion to and does make an award to the claimant in the amount of $2,272.92.

Award of $2,272.92.

OPINION ISSUED DECEMBER 12, 2008

JOGINDER NATH

VS.
DIVISION OF HIGHWAYS
(CC-08-0232)

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when his 1994 Subaru Legacy struck a hole on Chestnut Ridge Road near its intersection with Irwin Street in Morgantown, Monongalia County. Chestnut Ridge Road, which is designated as County Route 61, is a road maintained by respondent. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 4:00 p.m. on May 8, 2008. County Route 61 is a two-lane road with center lines and no edge lines. At the time of the incident, claimant was driving at the intersection of Irwin Street and County Route 61. As he was driving on County Route 61 at approximately twenty-five miles per hour, his vehicle struck a hole that was approximately three feet long, two feet wide, and eighteen inches deep. Claimant stated that he does not travel on this road on a regular basis, and he did not see the hole before his vehicle struck it. Claimant's vehicle sustained damage to its tire in the amount of $76.27. The amount of claimant's insurance deductible is $500.00.

The position of the respondent is that it did not have actual or constructive notice of the condition on County Route 61 near the intersection with Irwin Street. Kathy Westbrook, Highway Administrator for respondent in Monongalia County, testified that the hole was filled with hot mix the day after the incident occurred. She observed the hole and testified that it was approximately one foot and a half wide and six to eight inches deep. She was unaware of what caused the hole to form in this particular area.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold respondent liable for road defects of this type, a claimant must prove that respondent had actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman v. Dep't of Highways*, 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that respondent had, at the least, constructive notice of the hole which claimant's vehicle struck and that the hole presented a hazard to the traveling public. The size of the hole and its location lead the Court to conclude that respondent had notice of this hazardous condition. Thus, the Court finds respondent negligent and claimant may make a recovery for the damage to his vehicle.

In accordance with the findings of fact and conclusions of law stated herein above, the Court is of the opinion to and does make an award to the claimant in the amount of $76.27.

Award of $76.27.

OPINION ISSUED DECEMBER 12, 2008

JENNIFER HARMAN AND VICKYE GALFORD
VS.
DIVISION OF HIGHWAYS
(CC-08-0244)

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

PER CURIAM:

Claimants brought this action for vehicle damage which occurred when their1994 Ford Taurus struck a hole and a broken section of pavement while claimant, Jennifer Harman, was driving on Chaplain Hill Road in Morgantown, Monongalia County. Chaplain Hill Road is a road maintained by respondent. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred between 9:00 a.m. and 10:00 a.m. on April 24, 2008. Chaplain Hill Road is a two-lane road with a speed limit of forty-five miles per hour. At the time of the incident, claimant was driving near the Milan Park School, and she had just driven past the school bus garage. As she was proceeding on Chaplain Hill Road at approximately thirty-five miles per hour, her vehicle struck a hole and a raised section of pavement on the road. According to the claimant, the area where the group of holes and broken section of pavement were located was approximately three and a half to four feet wide and ten to twelve feet long. She drove closer to the yellow center line in order to avoid a hole located in the center of the road. Since there was a school bus traveling in the opposite lane, and there was a vehicle traveling behind her, she was unable to avoid the hole and the raised section of pavement. She stated that Chaplain Hill Road is a heavily traveled road. Although she noticed that the road was in disrepair when she had driven on the road several days prior to this incident, the road condition had worsened since the last time she had traveled on this road. As a result of this incident, the vehicle sustained damage to its exhaust extension pipe ($98.88), exhaust resonator ($48.88), exhaust pipe/flange gasket ($16.06), catalytic converter ($388.88), oil pan ($37.10), and transmission filter ($24.13). The labor charges total $236.84. Ms. Harman also seeks to recover work loss in the amount of $84.00. Thus, claimants' damages amount to $934.77. Claimants did not have insurance coverage for this loss.

The position of the respondent is that it did not have actual or constructive notice of the condition on Chaplain Hill Road. Kathy Westbrook, Highway Administrator for respondent in Monongalia County, testified that Chaplain Hill Road is a secondary road in terms of its maintenance. Since there is a new elementary school and a school bus garage in this area, school buses travel on this road on a daily basis. According to Ms. Westbrook, the traffic on this road and the weather conditions could have caused the road to deteriorate. In addition, she stated that the base of the road underneath the asphalt was not compacted properly, causing the asphalt to become loose.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims*, 130

W.Va. 645, 46 S.E.2d 81 (1947). In order to hold respondent liable for road defects of this type, a claimant must prove that respondent had actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman v. Dep't of Highways*, 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that respondent had, at the least, constructive notice of the hole and the broken section of pavement which claimants' vehicle struck and that these conditions presented a hazard to the traveling public. The size of the hole and the time of year in which this incident occurred leads the Court to conclude that respondent had notice of this hazardous condition. Thus, the Court finds respondent negligent and claimants may make a recovery for the damage to their vehicle.

In accordance with the findings of fact and conclusions of law stated herein above, the Court is of the opinion to and does make an award to the claimants in the amount of $934.77.

Award of $934.77.

OPINION ISSUED DECEMBER 12, 2008

JOSEPH SKALICAN
VS.
DIVISION OF HIGHWAYS
(CC-08-0249)

Claimant appeared *pro se*.

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when his 2005 Chrysler Crossfire struck a hole on W.Va. Route 705, known as "Two Hundred First Memorial Highway", in Morgantown, Monongalia County. W.Va. Route 705 is a road maintained by respondent. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred on March 15, 2008. W.Va. Route 705 is a two-lane road with a speed limit of fifty miles per hour. At the time of the incident, claimant was driving on W.Va. Route 705 in the left lane of traffic. He was driving toward U.S. Route 119 and was trying to avoid traveling in the right turn lane because the road surface was rough. As he drove onto the right turn lane at the end of W.Va. Route 705 at approximately twenty-five or thirty miles per hour, his vehicle struck a hole in the road. Claimant testified that he noticed a hole, but as he was trying to avoid that hole, his vehicle struck another hole. Claimant had traveled on this road the week before in a different vehicle. As a result of this incident, his vehicle sustained damage to its right front tire in the amount of $275.55. The amount of claimant's insurance deductible at the time of the incident was $250.00, thus claimant's recovery is limited to that amount.

The position of the respondent is that it did not have actual or constructive notice of the condition on W.Va. Route 705. Kathy Westbrook, Highway Administrator for respondent in Monongalia County, testified that approximately half of the right turn lane is composed of concrete and half is composed of asphalt. She testified that the asphalt had loosened in this particular area. Respondent had cold mix and perma-mix available to patch holes at this time, and she explained that both cold mix and perma-patch are temporary solutions. During this time of year, respondent performed patching when its crews were not involved in snow removal and ice control.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold respondent liable for road defects of this type, a claimant must prove that respondent had actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman v. Dep't of Highways*, 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that respondent had, at the least, constructive notice of the hole which claimant's vehicle struck and that it presented a hazard to the traveling public. The size of the hole and its location on the travel portion of the road lead the Court to conclude that respondent had notice of this hazardous condition. Thus, there is sufficient evidence of negligence to base an award. Notwithstanding the negligence of the respondent, the Court is also of the opinion that the claimant was negligent since he was aware of the condition on the road. In a comparative negligence jurisdiction such as West Virginia, the claimant's negligence may reduce or bar recovery in a claim. Based on the above, the Court finds that the claimant's negligence equals twenty-percent (20%) of his loss. Since the negligence of the claimant is not greater than or equal to the negligence of the respondent, claimant may recover eighty-percent (80%) of the loss sustained.

In accordance with the findings of fact and conclusions of law stated herein above, the Court is of the opinion to and does make an award to the claimant in the amount of $200.00.

Award of $200.00.

OPINION ISSUED DECEMBER 12, 2008

JOSEPH SKALICAN
VS.
DIVISION OF HIGHWAYS
(CC-08-0250)

Claimant appeared *pro se*.

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when his 2005 Chrysler Crossfire struck a hole on Cheat Road, designated as County Route 73/12, in

Morgantown, Monongalia County. County Route 73/12 is a road maintained by respondent. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 6:00 a.m. on April 7, 2008. County Route 73/12 is a two-lane road with a speed limit of forty miles per hour. Claimant, who is a teacher at Cheat Lake Middle School, was driving to work on County Route 73/12 at the speed limit when his vehicle struck a hole in the road. The hole was approximately two feet long, eighteen inches wide, and four inches deep. Since claimant travels this road approximately two hundred days out of the year, he was familiar with the road and was aware of the hole. On the day in question, he was unable to avoid the hole because there was an oncoming vehicle traveling in the opposite lane. As a result, claimant's vehicle sustained damage to its right front tire in the amount of $277.67. The amount of claimant's insurance deductible on the date of the incident was $250.00.

The position of the respondent is that it did not have actual or constructive notice of the condition on County Route 73/12. Kathy Westbrook, Highway Administrator for respondent in Monongalia County, testified that County Route 73/12 is a secondary road in terms of its maintenance. Prior to this incident, Ms. Westbrook stated that she did not have knowledge of the hole at this location.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold respondent liable for road defects of this type, a claimant must prove that respondent had actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman v. Dep't of Highways*, 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that respondent had, at the least, constructive notice of the hole which claimant's vehicle struck and that the hole presented a hazard to the traveling public. The size of the hole and its location lead the Court to conclude that respondent had notice of this hazardous condition. Thus, there is sufficient evidence of negligence to base an award. Notwithstanding the negligence of the respondent, the Court is also of the opinion that the claimant was negligent since he was also aware of the condition on the road. In a comparative negligence jurisdiction such as West Virginia, the claimant's negligence may reduce or bar recovery in a claim. Based on the above, the Court finds that the claimant's negligence equals twenty-percent (20%) of his loss. Since the negligence of the claimant is not greater than or equal to the negligence of respondent, claimant may recover eighty-percent (80%) of the loss sustained.

In accordance with the findings of fact and conclusions of law stated herein above, the Court is of the opinion to and does make an award to the claimant in the amount of $200.00.

Award of $200.00.

OPINION ISSUED DECEMBER 12, 2008

LAWRENCE R. MOORE AND ROSEMARY KINDER MOORE
VS.

DIVISION OF HIGHWAYS
(CC-08-0260)

Claimants appeared *pro se*.

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

PER CURIAM:

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

1. On May 23, 2008, claimant Lawrence R. Moore was driving north on W.Va. Route 2 near Warwood when his vehicle struck a hole that was approximately four feet long, two feet wide, and twelve inches deep. The vehicle's passenger-side tires sustained damage from the incident.

2. Respondent was responsible for the maintenance of W.Va. Route 2 which it failed to maintain properly on the date of this incident.

3. As a result of this incident, claimants' vehicle sustained damage in the amount of $265.51.

4. The amount of $265.51 for the damages is fair and reasonable.

The Court has reviewed the facts of the claim and finds that respondent was negligent in its maintenance of W.Va. Route 2 on the date of this incident; that the negligence of respondent was the proximate cause of the damages sustained to claimants' vehicle; and that the amount of the damages agreed to by the parties is fair and reasonable. Thus, claimants may make a recovery for their loss.

Accordingly, the Court is of the opinion to and does make an award in the amount of $265.51.

Award of $265.51.

OPINION ISSUED DECEMBER 12, 2008

RICHARD L. CAREY
VS.
DIVISION OF HIGHWAYS
(CC-08-0276)

Claimant appeared *pro se*.

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

PER CURIAM:

This claim was submitted to the Court for decision upon a Stipulation entered into by claimant and respondent wherein certain facts and circumstances of the claim

were agreed to as follows:

1. On June 3, 2008, the claimant was driving north on W.Va. Route 88 next to Oglebay Park when he noticed a vehicle in the southbound lane had stopped in the roadway. Claimant observed that the road was blocked with tree branches. As he stopped his vehicle, a branch from the tree fell onto his vehicle damaging the vehicle's windshield, hood, and fender.

2. Respondent was responsible for the maintenance of W.Va. Route 88 which it failed to maintain properly on the date of this incident.

3. As a result of this incident, claimant's vehicle sustained damage in the amount of $362.00.

4. The amount of $362.00 for the damages is fair and reasonable.

The Court has reviewed the facts of the claim and finds that respondent was negligent in its maintenance of W.Va. Route 88 on the date of this incident; that the negligence of respondent was the proximate cause of the damages sustained to claimant's vehicle; and that the amount of the damages agreed to by the parties is fair and reasonable. Thus, claimant may make a recovery for his loss.

Accordingly, the Court is of the opinion to and does make an award in the amount of $362.00.

Award of $362.00.

OPINION ISSUED DECEMBER 12, 2008

CECIL E. LANCASTER
VS.
DIVISION OF HIGHWAYS
(CC-08-0316)

Claimant appeared *pro se*.

Jason C. Workman, Attorney at Law, for respondent.

PER CURIAM:

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

1. On March 22, 2008, claimant was driving on W.Va. Route 20 between Folsom and Wallace in Harrison County. Claimant's wife, Margaret Lancaster, was a passenger in the vehicle. As claimant was traveling at approximately fifty-five miles per hour, his 2000 Lincoln Town Car struck a hole, damaging the vehicle's tire. Claimant lost control of the vehicle and ran off the roadway. The vehicle crossed the ditch and struck the embankment where it flipped on its top. The vehicle came to rest on its top facing south.

2. Respondent was responsible for the maintenance of W.Va. Route 20 which

it failed to maintain properly on the date of this incident.

3. As a result, the vehicle was totaled in this incident. Claimant seeks to recover his insurance deductible in the amount of $250.00.

4. Respondent agrees that the amount of $250.00 for the damages put forth by the claimant is fair and reasonable.

The Court has reviewed the facts of the claim and finds that respondent was negligent in its maintenance of W.Va. Route 20 on the date of this incident; that the negligence of respondent was the proximate cause of the damages sustained to claimant's vehicle; and that the amount of the damages agreed to by the parties is fair and reasonable. Thus, claimant may make a recovery for his loss.

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

Award of $250.00.

OPINION ISSUED DECEMBER 12, 2008

INFOPRINT SOLUTIONS COMPANY
VS.
DEPARTMENT OF ADMINISTRATION
(CC-08-0414)

Claimant appeared *pro se*.

James A. Kirby III, General Counsel, for respondent.

PER CURIAM:

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

1. Via Purchase Order No. ISC 76067 entered into with the Office of Technology, formerly Department of Administration IS&C, IBM was to provide, among other things, printer hardware maintenance services to the State of West Virginia.

2. In June of 2007, IBM and Ricoh Systems formed a joint venture under which the former IBM Printer Division was transferred to InfoPrint Solutions Company.

3. When invoicing for printer hardware maintenance began on June 2007, InfoPrint Solutions Company was not a current State of West Virginia vendor, nor did it have a valid contract against which to pay. Consequently, the Office of Technology was unable to pay the maintenance invoices.

4. The Office of Technology assisted InfoPrint Solutions in filing the appropriate paperwork and forms so that InfoPrint could become an authorized vendor of the State.

5. InfoPrint Solutions continued to maintain the printers in good faith during this period.

6. A new contract for fiscal year 2009 is currently in place.

7. The outstanding invoices which the Office of Technology has been unable to pay total One Hundred Eighty-Seven Thousand Seven Hundred Sixty-Three and Fourteen Cents ($187,763.14).

8. The Office of Technology agrees that InfoPrint provided all services for which it has invoiced.

Based on the abovementioned stipulated facts, the parties agree that the State of West Virginia has a moral obligation to reimburse InfoPrint Solutions Company in the amount of One Hundred Eighty-Seven Thousand Seven Hundred Sixty-Three and Fourteen Cents ($187,763.14) from special revenue for services rendered in good faith.

The Court has reviewed the facts of the claim and finds that the amount agreed to by the parties is fair and reasonable.

Award of $187,763.14.

OPINION ISSUED DECEMBER 29, 2008

RAYMOND E. MOHR
VS.
DIVISION OF HIGHWAYS
(CC-06-0047)

Claimant present by telephone.

Jason C. Workman, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when his 2002 Ford F150 struck a hole as he was driving at the W.Va. Route 41 and W.Va. Route 55 junction in Calvin, Nicholas County. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 8:30 p.m. on January 23, 2006. Claimant was driving to a wake service near Cowen at between twenty-five and thirty miles per hour when his vehicle struck a hole in the road. The hole was situated in a curve and extended into the shoulder of the roadway. Claimant did not see the hole before his vehicle struck it because it was dark and raining, and the hole was filled with water. He stated that there was a low spot in this particular area, and the rain could have caused the hole to form. Claimant, who resides in Northport, Florida, had not noticed the hole on a prior occasion. As a result of this incident, claimant's vehicle sustained damage to its rim in the amount of $259.99. Since claimant's insurance deductible at the time of the incident was $250.00, his recovery is limited to that amount.

The position of the respondent is that it did not have actual or constructive notice of the condition at the W.Va. Route 41 and W.Va. Route 55 junction. John Jarrell, Highway Administrator for respondent in Nicholas County, testified that he is familiar

with the area involved in this claim. Mr. Jarrell stated W.Va. Route 41 is the main artery from Craigsville, Richwood, and Webster County to Summersville. Since this particular portion of W.Va. Route 41 is narrow, trucks have a tendency to drive partially on the berm of the road causing the shoulder to erode in this area. Mr. Jarrell testified that respondent had received calls regarding the condition of the road during the fall, but respondent's main priority during the winter is snow removal and ice control. Mr. Jarrell stated that respondent maintains the shoulder of the road at this location at least twice a year.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold respondent liable for road defects of this type, a claimant must prove that respondent had actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman v. Dep't of Highways*, 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that respondent had, at the least, constructive notice of the hole which claimant's vehicle struck and that the hole presented a hazard to the traveling public. The size of the hole leads the Court to conclude that respondent had notice of this hazardous condition. Thus, the Court finds respondent negligent and claimant may make a recovery for the damage to his vehicle.

In accordance with the findings of fact and conclusions of law stated herein above, the Court is of the opinion to and does make an award to the claimant in the amount of $250.00.

Award of $250.00.

OPINION ISSUED DECEMBER 29, 2008

MARY E. MULLENS
VS.
DIVISION OF HIGHWAYS
(CC-07-0171)

Claimant appeared *pro se*.

Jason C. Workman, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when her 2001 Kia Rio struck a hole as she was driving on Enterprise Drive in Braxton County. Enterprise Drive is a road maintained by respondent. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 3:00 p.m. on May 4, 2007. Enterprise Drive is a two-lane road with center lines and white edge lines, and the posted speed limit is thirty-five miles per hour. Claimant testified that she was traveling from her home, which is located on Enterprise Drive, towards Gassaway. She was driving at approximately thirty miles per hour at the bottom of the hill, where

Enterprise Drive intersects with W.Va. Route 4, when her vehicle struck a hole located near the drainage ditch in the middle of the right lane of traffic. She explained that there was a piece of cement missing from the drainage ditch, causing her tire to fall into the hole. Her vehicle also struck the piece of cement that was protruding from the road surface. Claimant travels on Enterprise Drive on a regular basis because it is the only means of ingress and egress from her home. Claimant testified that she was aware of the hole at this location before the day in question, and she stated that her vehicle had struck the hole on two prior occasions. On this particular occasion, she stated that there was no oncoming traffic. As a result of this incident, claimant's vehicle sustained damage to its front suspension, steering gear and linkage, and alignment and in the amount of $283.44. Claimant's insurance deductible is $500.00.

The position of the respondent is that it did not have actual or constructive notice of the condition of the road on Enterprise Drive. Respondent did not present a witness at the hearing.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold respondent liable for road defects of this type, a claimant must prove that respondent had actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman v. Dep't of Highways*, 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that respondent had, at the least, constructive notice of the hole which claimant's vehicle struck, and that it presented a hazard to the traveling public. The hole's location on the travel portion of the road leads the Court to conclude that respondent had notice of this hazardous condition. Thus, there is sufficient evidence of negligence to base an award. Notwithstanding the negligence of the respondent, the Court is also of the opinion that the claimant was negligent since she was aware of the road condition and should have stopped her vehicle to avoid the hole. In a comparative negligence jurisdiction such as West Virginia, the claimant's negligence may reduce or bar recovery in a claim. Based on the above, the Court finds that the claimant's negligence equals twenty-percent (20%) of her loss. Since the negligence of the claimant is not greater than or equal to the negligence of the respondent, claimant may recover eighty-percent (80%) of the loss sustained.

In accordance with the findings of fact and conclusions of law stated herein above, the

Court is of the opinion to and does make an award to the claimant in the amount of $226.76.

Award of $226.76.

OPINION ISSUED DECEMBER 29, 2008

BRENDA F. HAYWORTH
VS.
DIVISION OF MOTOR VEHICLES
(CC-08-0221)

Claimant appeared *pro se*.

Ronald R. Brown, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks to recover an impoundment fee in the amount of $164.00 which she incurred when her vehicle was improperly impounded due to an error made by respondent.

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

In view of the foregoing, the Court is of the opinion to and does make an award to claimant in the amount of $164.00.

Award of $164.00.

OPINION ISSUED DECEMBER 29, 2008

JESSIE L. CUTLIP AND CHARLES E. CUTLIP
VS.
DIVISION OF HIGHWAYS
(CC-08-0284)

Claimants appeared *pro se*.
Jason C. Workman, Attorney at Law, for respondent.

PER CURIAM:

Claimants brought this action for vehicle damage which occurred when their 2008 Buick Lucerne struck a hole when their son, Byron David Cutlip, was driving at the W.Va. Route 41 and W.Va. Route 55 junction in Nicholas County. W.Va. Route 41 is a road maintained by respondent. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 5:30 p.m. on June 14, 2008. W.Va. Route 41 is a paved, two-lane road with a center line and edge lines. The speed limit is fifty-five miles per hour in this area. At the time of the incident, Byron David Cutlip was driving his parents, the claimants, from Salem, Virginia to Craigsville. The driver was proceeding around a curve at forty-five miles an hour or less when he noticed an oncoming log truck that was traveling on the yellow center line. In order to provide space between his parents' vehicle and the truck, he maneuvered the vehicle closer to the side of the road and struck a hole. Since it was raining and the hole was filled with water, the driver did not notice the hole before the vehicle struck it. The hole was approximately one foot long and extended approximately three or four inches beyond the white edge line. Although the driver is familiar with this road, he did not

notice the hole on a prior occasion. However, the driver testified that he was aware that this was a dangerous area. He would normally avoid driving close to the shoulder of the road because it was lower than the road surface. As a result of this incident, claimants' vehicle sustained damage to its rim and alignment in the amount of $565.87. Since claimants' insurance deductible at the time of the incident was $500.00, their recovery is limited to that amount.

The position of the respondent is that it did not have actual or constructive notice of the condition on W.Va. Route 41. John Jarrell, Highway Administrator for respondent in Nicholas County, testified that respondent is responsible for maintaining approximately 700 miles of road in Nicholas County. He stated that W.Va. Route 41 is a high priority road in terms of its maintenance. The DOH 12, a record of respondent's daily work activities, indicates that respondent had performed maintenance on the shoulder of W.Va. Route 41 on March 17, 2008. Mr. Jarrell explained that W.Va. Route 41 is a heavily traveled road. He stated that the road is swampy in this area, and the traffic and weather conditions cause the shoulder to erode. The intersection has been overlaid twice in the last ten years. Respondent normally maintains this area approximately twice a year.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold respondent liable for road defects of this type, a claimant must prove that respondent had actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman v. Dep't of Highways*, 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that respondent had, at the least, constructive notice of the hole which claimants' vehicle struck and that the hole presented a hazard to the traveling public. The size of the hole and the time of year in which this incident occurred leads the Court to conclude that respondent had notice of this hazardous condition. Thus, the Court finds respondent negligent and claimants may make a recovery for the damage to their vehicle.

In accordance with the findings of fact and conclusions of law stated herein above, the Court is of the opinion to and does make an award to the claimants in the amount of $500.00.

Award of $500.00.

OPINION ISSUED DECEMBER 29, 2008

JESSIE L. CUTLIP AND CHARLES E. CUTLIP
VS.
DIVISION OF HIGHWAYS
(CC-08-0285)

Claimant appeared *pro se*.

Jason C. Workman, Attorney at Law, for respondent.

PER CURIAM:

Claimants brought this action for vehicle damage which occurred when their 2000 Buick Park Avenue struck a hole as claimant, Charles E. Cutlip, was driving on U.S. Route 60 between Rupert and Charmco in Greenbrier County. U.S. Route 60 is a road maintained by respondent. The Court is of the opinion to deny this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred approximately during the middle of July 2007. U.S. Route 60 has a speed limit of fifty-five miles per hour in this area. At the time of the incident, claimant, Charles E. Cutlip, and his wife, Jessie L. Cutlip, were returning from the VA Medical Center in Salem, Virginia to their home in Craigsville, Nicholas County. As Mr. Cultip was driving at between forty and forty-five miles per hour, their vehicle struck a hole that was approximately one foot wide, two feet long, and six to eight inches deep. The incident occurred on a straight stretch of road, and Ms. Cutlip testified that there was an oncoming coal truck traveling in the other lane of traffic. Claimants travel on this road every three to six months and did not notice the hole on the edge of the road on a prior occasion. Ms. Cutlip stated that she could not see the hole before the vehicle struck it because she is blind in her right eye. As a result of this incident, claimants' vehicle sustained damage to its rim in the amount of $680.00. Claimants were unable to provide documentation for the vehicle's damage because C. Adam Tony's Tires, which had preformed the repairs, no longer has a record of the purchase of the rim. Since claimants' insurance deductible at the time of the incident was $500.00, their recovery is limited to that amount.

The position of the respondent is that it did not have actual or constructive notice of the condition on U.S. Route 60. Respondent did not present a witness at the hearing.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold respondent liable for road defects of this type, a claimant must prove that respondent had actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman v. Dep't of Highways*, 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that respondent did not have actual or constructive notice of the hole on U.S. Route 60. Consequently, there is insufficient evidence of negligence upon which to justify an award. Thus, claimants may not make a recovery for their loss in this claim.

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

Claim disallowed.

OPINION ISSUED DECEMBER 29, 2008

DELMAS F. MCCLUNG AND WALTRAUD MCCLUNG
VS.
DIVISION OF HIGHWAYS
(CC-08-0354)

Claimants appeared *pro se*.

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

PER CURIAM:

Claimants brought this action for vehicle damage which occurred when their 2006 Buick LaCrosse struck a hole as claimant, Delmas F. McClung, was driving on Kentucky Road, designated as County Route 39/32 in Summersville, Nicholas County. County Route 39/32 is a road maintained by respondent. The Court is of the opinion to make an award in this claim for the reasons more fully set forth below.

The incident giving rise to this claim occurred on June 24, 2008. County Route 39/32 is an eighteen foot road with a center line, and it has a speed limit of twenty-five miles per hour. Mr. McClung testified that at the time of the incident, he was traveling to Hardman's Hardware which is located off of W.Va. Route 41. As he was driving on County Route 39/32 at a speed of approximately twenty to twenty-five miles per hour, he noticed that there was a truck that had crossed the yellow center line. Mr. McClung maneuvered his vehicle to the right of his lane of traffic in order to avoid the truck, and his vehicle struck a hole in the road. Mr. McClung testified that the broken section of pavement was approximately eight inches long and seven to eight inches deep. There was a stretch of pavement in this area that had broken that was approximately twelve to fifteen feet long. Mr. McClung had driven on this road two months prior to this incident, but he did not notice a problem with this particular area at that time. As a result of this incident, claimants' vehicle sustained damage to its right front rim ($190.65) and right front tire ($82.00). Thus, claimants' damages total $272.65. Although Mr. McClung decided to replace the left front tire, the right front tire was the only tire that was damaged. Claimants' insurance deductible at the time of the incident was $500.00.

The position of the respondent is that it did not have actual or constructive notice of the condition on County Route 39/32. John Jarrell, Highway Administrator for respondent in Nicholas County, testified that he is familiar with the area where this incident occurred. He stated that County Route 39/32 is a city street that is a short cut between Summersville and W.Va. Route 39 from W.Va. Route 41. County Route 39/32 is a heavily traveled, narrow road, and it is a second priority in terms of its maintenance. According to Mr. Jarrell, traffic uses the edge of the road when there are vehicles approaching in the opposite direction which causes the breakage along the side of the road. The city is responsible for maintaining the road in the winter, and respondent maintains the road during the summer. Respondent's Core Maintenance Plan indicates that respondent was scheduled to patch County Route 39/32 during the first two weeks of July 2008. The DOH 12, a record of respondent's work activities, indicates that respondent patched County Route 39/32 on June 27, 2008.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold respondent liable for road defects of this type, a claimant must prove that respondent had actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman v. Dep't of Highways*, 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that respondent had, at the least, constructive notice of the hole which claimants' vehicle struck and that the hole presented a hazard to the traveling public. The size of the hole and its location lead the Court to conclude that respondent had notice of this condition. Thus, the Court finds respondent

negligent and claimants may make a recovery for the damage to their vehicle.

In accordance with the findings of fact and conclusions of law stated herein above, the Court is of the opinion to and does make an award to the claimants in the amount of $272.65.

Award of $272.65.

OPINION ISSUED DECEMBER 29, 2008

CAMDEN-CLARK MEMORIAL HOSPITAL
VS.
DIVISION OF CORRECTIONS
(CC-08-0425)

Claimant appeared *pro se*.

Charles P. Houdyschell Jr, Senior Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks payment in the amount of $4,372.43 for medical services provided to an inmate at St. Mary's Correctional Center, a facility of respondent. Respondent, in its Answer, admits the validity of the claim in this amount and further states that there were insufficient funds in its appropriation for the fiscal year in question from which to pay the claim.

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

Claim disallowed.

OPINION ISSUED FEBRUARY 11, 2009

MILDRED DAVIS
VS.
DIVISION OF HIGHWAYS
(CC-04-0360)

Claimant appeared *pro se*.

Andrew F. Tarr and Jason C. Workman, Attorneys at Law, for respondent.

PER CURIAM:

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

1. Respondent is responsible for the maintenance of W.Va. Route 61 in Fayette County.

2. Claimant alleges that on or around May 27, 2004, her property suffered flood damage as a result of inadequate drains and culverts during a rain event.

3. For the purposes of settlement, respondent acknowledges culpability for the preceding incident.

4. Claimant and respondent believe that in this particular incident and under these particular circumstances that an award of Twelve Thousand Dollars ($12,000.00) would be a fair and reasonable amount to settle this claim.

5. The parties to this claim agree that the total sum of Twelve Thousand Dollars ($12,000.00) to be paid by respondent to the claimant in Claim No. CC-04-0360 will be a full and complete settlement, compromise, and resolution of all matters in controversy in said claim and full and complete satisfaction of any and all past and future claims claimant may have against respondent arising from the matters described in said claim.

The Court has reviewed the facts of the claim and finds that respondent was negligent in its maintenance of W.Va. Route 61 on the date of this incident; that the negligence of respondent was the proximate cause of the damages sustained to claimant's property; and that the amount of the damages agreed to by the parties is fair and reasonable. Thus, claimant may make a recovery for her loss.

Accordingly, the Court is of the opinion to and does make an award in the amount of $12,000.00.

Award of $12,000.00.

OPINION ISSUED FEBRUARY 11, 2009

BRENDA A. FORTNEY
VS.
DIVISION OF HIGHWAYS
(CC-06-0091)

Claimant appeared *pro se*.

Andrew F. Tarr and Jason C. Workman, Attorneys at Law, for respondent.

PER CURIAM:

Claimant brought this action for personal injuries which occurred when she fell into a drainage grate on W.Va. Route 76 in Rosemont, Taylor County. The drainage grate on W.Va. Route 76 is maintained by respondent. At the time of the incident,

claimant was walking towards the residence of Sara Henderson when she fell through the space between the slats in the drainage grate located on the side of the road. Claimant alleges that respondent used an inappropriate grating cover at this location. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 7:30 p.m. on March 28,

2004. Claimant and her husband went to the residence of Sara Henderson, a co-worker of the claimant at Mountain State Auto Auction, to inform her that she needed to work the following day. The Hendersons' residence is located adjacent to W.Va. Route 76. A guardrail separates the Hendersons' property from W.Va. Route 76, but the guardrail does not extend around the drainage grate, which is located outside the white edge line on the corner of the property. The drainage grate is situated approximately twelve feet south of the Hendersons' front porch. In order to enter the Hendersons' residence from the parking area, which is located approximately eighteen feet from their residence, one would need to walk around the drainage grate and onto a narrow area between the guardrail and the white edge line on W.Va. Route 76. There is a gap in the guardrails where there are steps leading to the Hendersons' house.

Sara Henderson, who resides in the property where this incident occurred, testified that on the evening in question, she recalled that her husband notified her that a vehicle had pulled into their parking area. Her husband stated, "Whose car is this?" When Ms. Henderson walked out the door, she heard the claimant yell "Hey," and then the claimant "disappeared." Claimant had fallen through the space between the slats in the grate.

Ms. Henderson explained that the guardrail was placed at this location prior to the installation of the drainage grate. Ms. Henderson's husband was concerned that the drainage grate was exposed and had expressed his concern to respondent during the installation of the drainage grate. Since the Hendersons' have young grandchildren, he realized that they potentially could get injured and wanted the guardrail to extend around the drainage grate. Ms. Henderson testified that this incident was the first time anyone had fallen at the drainage grate.

Brenda Fortney testified that she and her husband decided to stop at the Hendersons' residence after church that evening. They went to the Hendersons' house because the Hendersons did not have a phone at that time. Claimant's husband parked their vehicle in the parking area next to the Hendersons' house. Although it was dark and claimant had never been to Ms. Henderson's house prior to this evening, she did not bring a flashlight with her. Claimant exited the vehicle and proceeded towards the house. She did not have any knowledge of the drainage grate, and she had not walked along that road in recent years. Claimant recalled yelling "Hey," and before she had a chance to say "it's me," she fell into the drainage grate. Ms. Fortney stated that the openings in the drainage grate were approximately three and a half inches wide. Claimant's left foot turned and slid into the grate, and the bone in her knee fell into one of the openings. Claimant testified that her leg was stinging and burning as her husband lifted her out of the grate. After the incident, claimant's husband helped her walk towards the house. Ms. Henderson met the claimant and her husband at the top of the steps, and claimant indicated that she had fallen and tore her jeans. She told Ms. Henderson that she needed to come to work the next day, and then she and her husband left the residence and returned to Shinnston where they reside.

As a result of this incident, claimant sustained swelling and bruising in her left leg and experienced severe pain and discomfort. Claimant went to the doctor's office the day after the incident, and the doctor advised her to keep off her leg as much as possible. Claimant had trouble walking after the injury and occasionally used crutches. Although her leg has healed, claimant testified that to this date, she suffers from swelling in her leg. In addition, the injury left scarring on her leg, and she now walks with a limp. Claimant submitted invoices for her medical and pharmaceutical expenses. The invoices demonstrate that she incurred the following costs: 1) medical supplies in the amount of $22.98; 2) prescription medication in the amount of $33.29; and 3) a co-pay for claimant's medical visit in the amount of $15.00. Thus, claimant's medical expenses total $71.27. Claimant also sustained work loss in the amount of $500.00 from April 3, 2004, to May 1, 2004.

The position of the respondent is that it did not have actual or constructive notice of the allegedly defective drainage grate prior to this incident. Jeff Pifer testified that he is currently the Assistant District Four Maintenance Engineer for respondent. At the time of the incident, Mr. Pifer was the Maintenance Assistant for respondent. He stated that the drainage grate at this particular location was installed in 1994 on respondent's thirty-foot right of way. He testified that the inlet for the drainage grate is referred to as a Type G Inlet, which is used on rural paving jobs and interstate medians. Mr. Pifer explained that there is a distinction between rural and urban drainage grates.[22]

In urban areas, where there are more pedestrians, and the drainage grates are maintained more regularly, urban grates are used. In rural areas, where there is more debris, larger openings are needed. Mr. Pifer stated that the drainage grate's openings at this particular location were approximately three to three and a half inches wide. The guardrail in this area was designed to protect motorists from going over the hill side. Since the hazard was the hill side behind the guardrail and not the drainage grate, respondent did not extend the guardrail around the drainage grate. Prior to claimant's incident, respondent did not receive any complaints regarding this particular drainage grate.

According to Bob Caltrider, Transportation Crew Supervisor for respondent in Taylor County, the drainage grate at this location was used to drain water underneath W.Va. Route 76. Mr. Caltrider stated that in 1994, respondent had performed work on a paving project in this area, and respondent was responsible for upgrading drainage and ditch lines to conform to federal standards. Mr. Caltrider did not have knowledge of any complaints regarding the drainage grate prior to this incident.

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

---

[22] Mr. Pifer explained the distinction between rural and urban drainage grates as follows:

Q: Why is that kind of grate used in rural areas and on the interstate?

A: It's a maintenance issue. In the cities you use a smaller grate opening because of bicycles and pedestrians but in the country there's not somebody that can, we just can't watch all these inlets all the time. They'll cover over with stick or rocks and then leaves and then the water is jumping the inlet and going where it shouldn't go. Whereas, in the city, you know, there's usually an agency that's watching those and can keep them cleaned off more regularly.

defect and a reasonable time to take corrective action. *Chapman v. Dept of Highways*, 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that respondent had at least constructive notice of the drainage grate that caused claimant's injury. The Court finds that the drainage grate used at this particular location created a hazard due to the grate's large openings. The rural grate was located in close proximity to a parking area used by the Hendersons' residents and guests, necessarily placing them in jeopardy when they walked on the only means of ingress and egress to the residence. Thus, there is sufficient evidence of negligence to base an award. The Court finds that claimant is entitled to recover $2,371.27 (medical expenses in the amount of $71.27, work loss in the amount of $500.00, and pain and suffering in the amount of $1,800.00). Notwithstanding the negligence of the respondent, the Court is also of the opinion that the claimant was negligent since she failed to take carry a flashlight or take precautions to avoid falling while she was walking in a dark, unfamiliar area. In a comparative negligence jurisdiction such as West Virginia, the claimant's negligence may reduce or bar recovery in a claim. Based on the above, the Court finds that the claimant's negligence equals fifteen-percent (15%) of her loss. Since the negligence of the claimant is not greater than or equal to the negligence of the respondent, claimant may recover eighty-five percent (85%) of the loss sustained.

In accordance with the findings of fact and conclusions of law stated herein above, the Court is of the opinion to and does make an award to the claimant in the amount of $2,015.58.

Award of $2,015.58.

OPINION ISSUED FEBRUARY 11, 2009

POLINO CONTRACTING INC.
VS.
DIVISION OF HIGHWAYS
(CC-06-0102)

R. Stephen Davis, Attorney at Law, for Claimant.

Jeff J. Miller, Attorney At Law, for respondent.

SAYRE, JUDGE:

This claim was brought by Polino Contracting Inc., ("Polino") for certain extra work, which the claimant alleges it performed while engaged in the execution of a contract ("The Contract") with the Division of Highways ("Highways") for the construction of a portion of Corridor H in Hardy County. This project is referred to as the Lost River Project and is designated by Highways as Project No. APD-0484(211)C ("the Project").

Polino was required by Highways to place substantially more dumped rock

gutter[23] than was called for by Highways in its Invitation to Bid on the Contract. Polino contends there was, as a result, a significant change in the character of the work as defined by the Contract and it should be paid more for the dumped rock gutter actually placed than the unit bid price for dumped rock gutter agreed to in the Contract. Polino asserts specifically that it is entitled to be paid an additional $114,123.97 for the extra work and material required in placing the additional dumped rock gutter.

The Court, however, is of the opinion to deny this claim based upon the facts and circumstances set forth herein below.

Polino was the low bidder for the Lost River Project in Hardy County in the fall of 2001. It was awarded the contract on November 28, 2001. Construction of the project was delayed because of environmental issues along Corridor H, which at the time were being addressed by Highways. Construction was actually begun by Polino in the spring of 2002. The Project involved cuts and fills with dirt ditches as well as construction of a bridge. It is the issue of the dirt ditches that forms the basis of this claim because completion of these ditches brought about the necessity for more dumped rock gutter than was anticipated when the bid packages were published by Highways. Highways determined during the course of construction that, to meet environmental concerns with the dirt ditches, it was necessary to place the additional dumped rock gutter to hold the soil at the sides of those ditches. The position of Highways is that Polino had a bid item in the contract for placing dumped rock gutter at the price of $10.00 per cubic meter.

There were a total of 936 cubic meters of dumped rock gutter indicated to be placed per the terms of the Contract. However, Polino subsequently was required by Highways to place a total of 7,300 cubic meters of dumped rock gutter during construction of the project.[24] Highways paid Polino for the 7,300 cubic meters of dumped rock gutter at the unit bid price. Since there was a unit bid price in the Contract and Polino was compensated for all the dumped rock gutter at that price, Highways takes the position that it has paid for all of the work performed by Polino for the dumped rock gutter placed during the construction of the Project.[25] In fact, during the construction of this Project there were meetings conducted with representatives of Highways and Polino at which the need for additional dumped rock gutter was discussed and the consistent position of the representatives for Highways was that there would be no payment beyond the unit bid price for this item. Therefore, Highways contends that it is not obligated to pay Polino any of the additional $114,123.97 alleged by Polino to be due for the dumped

---

[23] As explained by Randolph Epperly Jr., a former engineer with Highways and the Deputy State Highway Engineer for Project Development during the time of the construction project in the instant claim, dumped rock gutter is defined as rock that is generally various sizes but large enough to prevent it from being washed away. It is used for protection of ditches constructed for erosion control.

[24] Polino was paid an additional amount of $4,780.00 for grout placed on parts of the dumped rock gutter since there was no provision in the Contract for this particular item.

[25] The Court notes that evidence in this claim establishes that Polino was paid for all of the dumped rock gutter through several change orders and the basis for payments was the unit bid price provided by the terms of the contract.

rock gutter.[26]

During the construction of the cuts called for in the Contract, Polino obtained the rock for both the fills and the dumped rock gutter used on the Project. Since only 936 cubic meters of dumped rock gutter was indicated in the Contract, Polino asserts it would be able to easily set aside this amount as the first cut was being made. This could be done by its employees at little cost as the rock was produced from the cuts. However, as the amount of dumped rock gutter needed on the Project increased, it became necessary for Polino to "manufacture" the rock needed. To do this, a laborer was required to use a piece of equipment known as a hoeram (a larger version of a jackhammer) to break larger pieces of rock into the size needed as dumped rock gutter. Then this rock had to be moved to the area where it was to be placed. Polino contends that this "manufacture" of rock used for dumped rock gutter constituted extra work for which it is entitled to an amount over the unit bid price of $10.00 per cubic meter. The amount of dumped rock gutter actually increased by approximately 800% over the amount in the original contract of 936 cubic meters.

Highways does not pay more than the unit bid price of an item bid as such in contracts unless the item change meets the criteria provided in the Standard Specifications Roads and Bridges §104.11Significant Changes in the Character of Work which states, in part, as follows:

If the alterations or changes in quantities do not significantly change the character of the work to be performed under the contract, the altered work will be paid for as provided elsewhere in the contract.

The term "significant change" shall be construed to apply only to the following circumstances:

a) When the character of the work as altered differs materially in kind or nature from that involved or included in the original proposed construction; or

---

[26]The testimony in this claim established that the additional dumped rock gutter resulted from concerns by the inspector with the Department of Environmental Protection who advised Highways that the sediment controls for erosion put forth in the contract (which included matting and seeding with grass for sediment control) was not sufficient for the hillsides along the ditches. Thus, Highways required its contractor (Polino) to place the additional dumped rock gutter which is defined as an erosion and sediment control item.

During the hearing, William F. Timmermeyer II, testified that he was an Environmental Enforcement Inspector for the Department of Environmental Protection which had given Highways a general permit for construction for storm water pollution prevention on this project. He conducted inspections at the project site to make sure that the plan was followed. If he noted that the approved plan was ineffective, then he advised personnel with Highways to modify its plan and do something different. It is the responsibility of Highways to determine the modification. Many times the change was to use dumped rock gutter. The original method was to use grass on the slopes but if the grass eroded, then some other method was needed to control erosion. He could not advise any modifications until the ditch was completely installed and had several rain events to determine the adequacy of the erosion method used per the contract plans. He described dumped rock gutter as "the most hardy type of armor" for erosion control.

b) When a major item of work, (any item having an original contract value in excess of 10 percent of the original contract amount or $50,000 dollars), is increased in excess of 125 percent or decreased below 75 percent of the original contract quantity. Any allowance for an increase in quantity shall apply only to that portion in excess of 125 percent of original contract item quantity, or in case of a decrease below 75 percent, to the actual amount of work performed.

Highways denies that it owes any additional compensation for the dumped rock gutter which was placed by Polino during this construction project. Highways acknowledges that there was an increase in the amount of dumped rock gutter used on the project but there was no material change in the character or value of the work, so it would not renegotiate the amount paid to Polino for the work. The original contract amount was approximately $18 million dollars of which only $9,360.00 was for the item of dumped rock gutter. Thus, the additional cost claimed by Polino does not meet the criteria set forth in §104.11(b) because the dumped rock gutter item was not in excess of ten percent (10% (at least $180,000.00 based upon this contract) of the original contract amount.

The Court has determined that there was no change in the character of the work performed by Polino in the placing of extra dumped rock gutter. Polino had a unit bid price in its contract for dumped rock gutter and the fact that it became necessary to place a larger quantity along the ditches constitutes a change in quantity only, for which Polino was paid by Highways at that unit bid price.[27] In fact, while the quantity increased by some 800%, there was no change in the character of the work because Polino had enough rock on the project to "manufacture" the dumped rock gutter. There was no necessity to borrow rock from a site off the project. Polino had to "manufacture" the additional dumped rock gutter through use of a hoeram and a laborer dedicated to that job. Of course, Polino had to move the rock with dump trucks to various sites but there was no necessity to bring additional or different equipment to the job site to perform the work for the "manufacture" of the additional dumped rock gutter.

The work performed by Polino for the dumped rock gutter does not meet the provisions of §104.11(b) which is the applicable section for the claim herein because the payment for this item did not exceed 10% of the contract bid price of $18 million dollars. Therefore, it is the opinion of the Court that Polino may not make a recovery for any additional amount of payment beyond the unit bid price for the dumped rock gutter placed during this construction project.

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

Claim disallowed.

---

[27]The Court notes that the unit bid price for the dumped rock gutter item varied greatly in bids submitted by other contractors from a high of $68.00 per cubic meter to a middle amount of $39.00 per cubic meter to a low of $10.00 per cubic meter by Polino. The Court will not speculate as to the amounts bid by the various contractors which submitted bids for this project because there are too many variables calculated by contractors when making bids for projects. The reasoning by each bidder certainly varies greatly, but no other contractor's bid approached the $10.00 per cubic meter bid by Polino.

OPINION ISSUED FEBRUARY 11, 2009

CARRIE L. GASKINS AND JEFFREY PAUL GASKINS
VS.
DIVISION OF HIGHWAYS
(CC-07-0096)

Claimants appeared *pro se*.

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

PER CURIAM:

Claimants brought this action for vehicle damage which occurred when their 2007 Ford Fusion struck a hole while claimant, Carrie L. Gaskins, was driving on Sabraton Avenue in Morgantown, Monongalia County. Sabraton Avenue is a road maintained by respondent. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 5:10 p.m. on March 23, 2007. At the area of the incident involved in this claim, Sabraton Avenue is a one-lane, paved road. Ms. Gaskins testified that she was driving at approximately five or ten miles per hour in the rain when the vehicle struck a water covered hole. She stated that the road had numerous water covered holes, and she could not ascertain the exact hole that her vehicle struck. She stated that landmarks near the area where this incident occurred include the Unique Boutique and Smoker Friendly. Ms. Gaskins was not familiar with the area where this incident occurred. As a result of this incident, claimants' vehicle sustained damage to its tire and rim in the amount of $328.68. Claimants' insurance deductible at the time of the incident was $500.00.

The position of the respondent is that it did not have actual or constructive notice of the condition on Sabraton Avenue. Kathy Westbrook, Highway Administrator for respondent in

Monongalia County, testified that she is familiar with the area where this incident occurred. Ms. Westbrook explained that a portion of Sabraton Avenue, which is mostly a two-lane, paved road, turns into a narrow section where only one vehicle can pass. At this particular area, the eastbound traffic has to yield to the westbound traffic. She testified that this road is a third priority in terms of its maintenance. Since the hot mix plants did not open until April 5, 2007, respondent used cold patch during this time of year. She explained that cold mix is a temporary patch used in the winter to patch holes.

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

In the instant case, the Court is of the opinion that respondent had, at the least, constructive notice of the hole which claimants' vehicle struck and that the hole presented

a hazard to the traveling public. Since there were numerous holes on Sabraton Avenue, the Court finds that respondent had constructive notice of the condition of the road. Thus, the Court finds respondent negligent and claimants may make a recovery for the damage to their vehicle.

In accordance with the findings of fact and conclusions of law stated herein above, the Court is of the opinion to and does make an award to claimants in the amount of $328.68.

Award of $328.68.

The Honorable Judge Robert B. Sayre did not participate in the hearing of this claim; however, he reviewed the transcript and exhibits and he participated in the decision and the writing of this opinion of the Court.

OPINION ISSUED FEBRUARY 11, 2009

JAMES MILLS AND SHARON MILLS
VS.
DIVISION OF HIGHWAYS
(CC-06-0247)

Claimants appeared *pro se*.

Andrew F. Tarr and Jason C. Workman, Attorneys at Law, for respondent.

PER CURIAM:

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

1. Respondent is responsible for the maintenance of W.Va. Route 152, Wayne County.

2. Claimant alleges that on or around July 21, 2006, their property suffered flood damage as a result of clogged drains and culverts during a rain event.

3. For the purposes of settlement, respondent acknowledges culpability for the preceding incident.

4. Claimant and respondent believe that in this particular incident and under these particular circumstances that an award of five thousand five hundred eighty-two dollars and ninety-seven cents ($5,582.97) would be a fair and reasonable amount to settle this claim.

5. The parties to this claim agree that the total sum of five thousand five hundred eighty-two dollars and ninety-seven cents ($5,582.97) to be paid by respondent to the claimants in Claim No. CC-06-0247 will be a full and complete settlement, compromise, and resolution of all matters in controversy in said claim and full and complete satisfaction of any and all past and future claims claimants may have against

respondent arising from the matters described in said claim.

The Court has reviewed the facts of the claim and finds that respondent was negligent in its maintenance of W.Va. Route 152 on the date of this incident; that the negligence of respondent was the proximate cause of the damages; and that the amount of the damages agreed to by the parties is fair and reasonable. Thus, claimants may make a recovery for their loss.

Accordingly, the Court is of the opinion to and does make an award in the amount of $5,582.97.

Award of $5,582.97.

OPINION ISSUED FEBRUARY 11, 2009

CARRIE L. GASKINS AND JEFFREY PAUL GASKINS
VS.
DIVISION OF HIGHWAYS
(CC-07-0096)

Claimants appeared *pro se*.

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

PER CURIAM:

Claimants brought this action for vehicle damage which occurred when their 2007 Ford Fusion struck a hole while claimant, Carrie L. Gaskins, was driving on Sabraton Avenue in Morgantown, Monongalia County. Sabraton Avenue is a road maintained by respondent. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 5:10 p.m. on March 23, 2007. At the area of the incident involved in this claim, Sabraton Avenue is a one-lane, paved road. Ms. Gaskins testified that she was driving at approximately five or ten miles per hour in the rain when the vehicle struck a water covered hole. She stated that the road had numerous water covered holes, and she could not ascertain the exact hole that her vehicle struck. She stated that landmarks near the area where this incident occurred include the Unique Boutique and Smoker Friendly. Ms. Gaskins was not familiar with the area where this incident occurred. As a result of this incident, claimants' vehicle sustained damage to its tire and rim in the amount of $328.68. Claimants' insurance deductible at the time of the incident was $500.00.

The position of the respondent is that it did not have actual or constructive notice of the condition on Sabraton Avenue. Kathy Westbrook, Highway Administrator for respondent in

Monongalia County, testified that she is familiar with the area where this incident occurred. Ms. Westbrook explained that a portion of Sabraton Avenue, which is mostly a two-lane, paved road, turns into a narrow section where only one vehicle can pass. At this particular area, the eastbound traffic has to yield to the westbound traffic. She

testified that this road is a third priority in terms of its maintenance. Since the hot mix plants did not open until April 5, 2007, respondent used cold patch during this time of year. She explained that cold mix is a temporary patch used in the winter to patch holes.

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

In the instant case, the Court is of the opinion that respondent had, at the least, constructive notice of the hole which claimants' vehicle struck and that the hole presented a hazard to the traveling public. Since there were numerous holes on Sabraton Avenue, the Court finds that respondent had constructive notice of the condition of the road. Thus, the Court finds respondent negligent and claimants may make a recovery for the damage to their vehicle.

In accordance with the findings of fact and conclusions of law stated herein above, the Court is of the opinion to and does make an award to claimants in the amount of $328.68.

Award of $328.68.

OPINION ISSUED FEBRUARY 11, 2009

DAVID LINGER
VS.
DIVISION OF HIGHWAYS
(CC-07-0167)

Claimant appeared *pro se*.

Jason C. Workman, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when his 1985 Chevrolet pickup truck struck a hole on Rutledge Road in Charleston, Kanawha County. Rutledge Road is a road maintained by respondent. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 11:15 a.m. on April 21, 2007. Rutledge Road is a paved, narrow, two-lane road at the area of the incident involved in this claim. Claimant was driving on Rutledge Road at approximately thirty miles per hour when he noticed a Ford pickup truck traveling in the opposite direction. Since the oncoming vehicle was on the road's yellow center line, claimant maneuvered his vehicle to the side of the road. As he drove his vehicle to his right, his truck struck a hole on the edge of the road. There is no berm in this particular area, and claimant's vehicle fell into a ditch line on the side of the road and collided with a rock cliff located adjacent to the ditch line. As a result of this incident, claimant's

vehicle sustained damage to its fender, inner fender, core support, mirror, hood, battery box, front bumper, wheel, and tire in the amount of $1,696.00. Claimant had liability insurance only.

The position of the respondent is that it did not have actual or constructive notice of the condition on Rutledge Road. David Fisher, Highway Administrator for respondent in Kanawha County, testified that he is familiar with the area where claimant's incident occurred. Mr. Fisher stated that Rutledge Road is a second priority road in terms of its maintenance. According to Mr. Fisher, approximately six to twelve inches of the edge of the road appeared to be missing at this location. He estimated that the there was a drop of approximately one and a half to two feet between the road surface and the ditch line. Since the rock cliff is situated close to the edge of the road, he stated that there is no room to place a shoulder. He testified that respondent did not receive complaints regarding the condition of the road prior to this incident.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold respondent liable for road defects of this type, a claimant must prove that respondent had actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman v. Dep't of Highways*, 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that respondent had, at the least, constructive notice of the defective condition which led to the damage to claimant's vehicle. Further, the deep ditch line and the lack of any berm adjacent to the hillside presented a hazard to the traveling public. Thus, the Court concludes that respondent had notice of the defective condition existing on Rutledge Road at the time of this incident and that further, claimant may make a recovery for the damage to his vehicle.

In accordance with the findings of fact and conclusions of law stated herein above, the

Court is of the opinion to and does make an award to the claimant in the amount of $1,696.00.

Award of $1,696.00.

OPINION ISSUED FEBRUARY 11, 2009

THE VELOTTA COMPANY
VS.
DIVISION OF HIGHWAYS
(CC-07-0274)

Johnson W. Gabhart, Attorney at Law, for claimant.

Jeff J. Miller, Attorney At Law, for respondent.

SAYRE, JUDGE:

Claimant, The Velotta Company, brought this action to recover $137,165.25 for

that portion of its home office overhead expense which it incurred when claimant was delayed in its performance of a highway contract with respondent, Division of Highways. The parties agree that the delay was compensable. As a consequence, claimant was reimbursed by respondent for the delay. However, respondent denied any payment to claimant for its alleged loss of $137,165.25 for home office overhead since there was no provision in the contract for payment of home office overhead. The Court is of the opinion to deny this claim for the reasons set forth herein below.

Claimant and respondent entered into a contract on December 17, 2002, for the construction of the South Martinsburg Interchange in Berkeley County. The project involved work on two bridge structures as well as asphalt work on I-81. The original contract was in the amount of $7,178,540.70, but the final amount paid to claimant for the completion of the project was $8,519,801.60. There was a delay on the project for which respondent accepted full responsibility. The delay involved unsuitable material issues beneath the approaches for both structures. This delay was not anticipated by either party when the contract was awarded to claimant. As a result, in placing asphalt on I-81, claimant was delayed beyond the time frame for completing the project contemplated in the original contract. When claimant was paid for the work performed by it during the period of the delay, claimant was not paid any additional amount for its home office overhead.

Claimant contends that this Court should amend its previous position as it relates to consideration of home office overhead as an item of damages in construction contract claims. It readily admits that this Court has found that the item, home office overhead, alleged in these claims is based upon conjecture and speculation. The Court has consistently denied this element of damages. Claimant asserts that respondent should be required to pay claimant for its home office overhead incurred during the delay of the project, and further, the payment should be calculated by the application of a formula known in the construction industry as the "Eichleay Formula." The

original contract contemplated 793 days for the construction of the project; however, the project was in fact completed 215 days beyond the original completion date due to the compensable delay. Claimant was paid for all of the work performed during the extension. Claimant further contends that since respondent had once previously paid it for home office overhead in a former contract (the Left Hand Bridge project in Kanawha County), then it should also pay for this item of damages as claimed herein.

Respondent relies upon the principle of *stare decisis* in this claim and asserts that claimant is not entitled to any compensation for home office overhead since this Court has consistently denied this particular item of damages in contract claims previously considered by the Court. Respondent asserts that this element should have been included in claimant's calculation of each contract item in the original bid submitted to respondent for this contract and claimant was paid for these same items at the same bid prices for the work performed during the delay period for the completion of the contract; therefore, claimant has, in fact, been compensated for its home office overhead. Respondent also asserts that all contractors bidding on this highway project were, at the time, well aware of the fact that home office overhead has never been awarded as a compensable item. Therefore, the projects were bid with knowledge that recovery for this particular item has historically been denied by this Court on the ground that it is too speculative.

Respondent admits that it had paid claimant for home office overhead when it terminated a contract for a small bridge project in Kanawha County. However, that payment was made in settlement of the termination of the contract and in accordance with

§108.9 Termination of Contract for Convenience of the State in the Standard Specifications Roads and Bridges. This section is a very specific section which particularly applied to that situation. It is not applicable to situations involving excusable compensable delays as defined by §108.6.2.2.

During the hearing of this claim, the Court considered Change Order No. 22, dated December 7, 2006, which was negotiated by the parties for payment of the extra work performed by claimant during the extended period of the construction. This Change Order appears to have been signed by an unauthorized individual within claimant's main office. However, claimant nonetheless accepted the payment made through that Change Order and may not now contest the Change Order. The claimant failed to list home office overhead in this Change Order, and respondent contends that this failure constitutes a waiver by claimant for payment of this item of damages.

There were on-going negotiations by the parties and part of the negotiations included the items of field office overhead for which claimant claimed $118,324.00 and home office overhead for which it claimed $137,116.00. The field office overhead item of damages was settled by the parties for $81,000.00 on or about May 25, 2006, but the item of home office overhead remained in contention between the parties.

It is claimant's position that it did not and could not assert the item of home office overhead at the time of Change Order No. 22 since the contract had not been finalized by the parties. Claimant did include this particular item in the Final Estimate signed by the parties on May 31, 2007, as an item for which it would file a claim.

Although the Court is concerned about the unauthorized signature on Change Order No. 22, it agrees that claimant's acceptance of the monies paid in accordance with the terms of the Change Order binds claimant to the terms therein. However, this situation does not alter the claim for home office overhead since that item of damages was noted as a claim item in the written waiver and was included in the final estimate signed by both parties.

This Court has consistently denied claims for home office overhead filed by contractors since this issue was first brought before the Court. In fact, the Court refused to apply the Eichleay Formula as recently as 2006 in the opinion of *American Vending Co. Inc. v. WVU*, (Claim No. CC-04-0963, Opinion Issued June 30, 2007) and in the opinion issued in the construction claim of *Kenhill Construction Co. Inc. v. DOH*, 22 Ct.Cl.46 (1998) wherein the Court stated that it "will not consider the home office overhead item, even though Kenhill used the Eichleay Formula to calculate this amount. The Court considers this element of damages to be speculative in nature and it has consistently refused to speculate as to home office overhead in contract claims." Thus, construction contractors which bid on projects let by all State agencies were on fair notice as to the position of this Court on the item of home office overhead and, more specifically, should have been aware that if a claim was filed for any reason by the contractor before this Court (the only forum for contract claims against a State agency) that the element of damages for home office overhead would be denied based upon established precedence. The Court presumes that the claimant and other contractors when bidding on State construction projects have taken this into consideration and, if deemed necessary, added some amount to cover home office overhead. The Court further presumes that the contractors who bid on the subject project were all aware of the Court's position as to home office overhead and bid the project accordingly.

The claimant herein bid on the project with that same knowledge and was, therefore, bidding on an equal basis with all other contractors. For the Court to now

reverse its long standing position concerning home office overhead to the benefit of claimant on this contract would be patently unfair to all other contractors who submitted bids to respondent for this project.

This Court is aware that the Eichleay Formula was adopted by some states and the Federal Claims Court in the 1960's. The Court has previously heard testimony in numerous claims where the theory of home office overhead was explained and the Court heard an expert (claimant's witness Robert Lewis Beers Jr.) in this claim explaining the theory of the Eichleay Formula. The West Virginia Supreme Court has not discussed this element of damages or considered the Eichleay Formula in any of its decisions so the parties are unable to provide citations to the Court on this matter. Although the Court is aware of the adoption of the Eichleay Formula by some states, a split of authority exists on this issue. The State of Ohio, for instance, (as pointed out by the claimant) adopted its own formula for calculating home office overhead in claims by contractors.

The Court is aware that respondent intends to adopt a new section in its handbook "Standard Specifications Roads and Bridges" which provides for consideration of home office overhead. The proposed section (§108.11 - HOME OFFICE OVERHEAD) addresses excusable, compensable delays while providing for the payment of home office overhead pursuant to a specific formula. It is to be adopted at the beginning of 2009. The section was drafted in consultation with the West Virginia Contractors' Association. When that adoption is made, all contractors bidding on construction contracts will be subject to the new section and the bids presumably will take its

provision into consideration.

The Court is reluctant to reverse its long standing precedent which holds that claims for home office overhead must be denied due to the speculative nature of same. Thus, the Court reaffirms its previous posture in relation to claims for home office overhead in highways or bridge construction claims until such time as there is an amendment to respondent's handbook which provides otherwise.

The Court, having considered the previous decisions of this Court and having reviewed the facts in this claim concerning claimant's assertion that home office overhead as calculated by the Eichleay Formula is compensable, is of the opinion that the claim be and the same is denied.

Claim disallowed.

OPINION ISSUED FEBRUARY 11, 2009

ROBERT D. SHUMAN d/b/a PREMIER BODY WORKS
VS.
DIVISION OF HIGHWAYS
(CC-07-0280)

David Glance, Attorney at Law, for claimant.

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

PER CURIAM:

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

1. On August 30, 2007, a tree from W.Va. Route 21 fell across the road and onto claimant's property, Premier Body Works, located in Barrackville, Marion County. The tree fell on seven customer's vehicles and two employee's vehicles.

2. Respondent was responsible for the maintenance of W.Va. Route 21which it failed to maintain properly on the date of this incident.

3. As a result of this incident, claimant incurred expenses in the amount of $3,165.00.

4. Respondent agrees that the amount of $3,165.00 for the damages put forth by the claimant is fair and reasonable.

The Court has reviewed the facts of the claim and finds that respondent was negligent in its maintenance of W.Va. Route 21 on the date of this incident; that the negligence of respondent was the proximate cause of the damages; and that the amount of the damages agreed to by the parties is fair and reasonable. Thus, claimant may make a recovery for his loss.

Accordingly, the Court is of the opinion to and does make an award in the amount of $3,165.00.

Award of $3,165.00.

OPINION ISSUED FEBRUARY 11, 2009

ELVIS D. HARRIS
VS.
DIVISION OF HIGHWAYS
(CC-07-0282)

Claimant appeared *pro se*.

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

PER CURIAM:

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

1. On August 30, 2007, a tree from W.Va. Route 21 fell across the road and onto the property of Premier Body Works located in Barrackville, Marion County. The tree landed on claimant's 1991 Chevrolet Corsica, which his son, Chris Harris, had driven to work and parked in Premier Body Works' parking lot.

2. Respondent was responsible for the maintenance of W.Va. Route 21 which it failed to maintain on the date of this incident.

3. As a result of this incident, claimant's vehicle sustained damage in the amount of $425.00.

4. Respondent agrees that the amount of $425.00 for the damages put forth by the claimant is fair and reasonable.

The Court has reviewed the facts of the claim and finds that respondent was negligent in its maintenance of W.Va. Route 21 on the date of this incident; that the negligence of respondent was the proximate cause of the damages sustained to claimant's vehicle; and that the amount of the damages agreed to by the parties is fair and reasonable. Thus, claimant may make a recovery for his loss.

Accordingly, the Court is of the opinion to and does make an award in the amount of $425.00.

Award of $425.00.

OPINION ISSUED FEBRUARY 11, 2009

ANDREW SIKULA SR. AND JUDITH SIKULA
VS.
DIVISION OF HIGHWAYS
(CC-08-0028)

Claimants appeared *pro se*.

Jason C. Workman, Attorney at Law, for respondent.

PER CURIAM:

Claimants brought this action for vehicle damage which occurred when claimant, Judith Sikula, was driving their 2004 Nissan Murano, and their vehicle struck a metal post attached to a hole cover. The incident occurred on Old MacCorkle Avenue in Charleston, Kanawha County. Old MacCorkle Avenue is a road maintained by respondent. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred between 3:00 p.m. and 4:00 p.m. on January 4, 2008. The bridge on Old MacCorkle Avenue is a paved, four-lane bridge with two lanes traveling in each direction. Since there was snow on the road and construction in the area, Ms. Sikula was proceeding cautiously at a speed of approximately fifteen or twenty miles per hour. As she was driving on the bridge on Old MacCorkle Avenue, her vehicle struck a metal post that was attached to a square metal base. The object was obstructing the middle of the roadway. She later discovered that the object was a hole cover, and that the post, which was supposed to hold the metal plate in place, had come out of the hole. The hole cover had flipped over, and the post was sticking upward instead of downward inside the hole. Ms. Sikula did not see the object until her vehicle was approximately three feet away from it. She explained that she could not have maneuvered her vehicle to avoid the object. If she would have veered her vehicle to the left, she would have driven on the median. If she moved her vehicle to the right, she would have driven on the sidewalk. Ms. Sikula testified that she frequently drives on Old MacCorkle Avenue, and she had never encountered the object on a prior occasion. As a result of this incident, claimants' vehicle sustained damage to its fender,

bumper, spoiler, and radiator in the amount of $3,372.42. Claimants' insurance deductible at the time of the incident was $1,000.00.

The position of the respondent is that it did not have actual or constructive notice of the condition on Old MacCorkle Avenue. Robert Steven Campbell, District One Bridge Engineer for respondent, testified that he is familiar with the area where this incident occurred. He stated that it is a low priority road in terms of its maintenance. Mr. Campbell testified that the hole cover was placed on the road temporarily until respondent could patch the hole. The post was intended to prevent the metal cover from coming out of the hole, and the post was supposed to fit inside the hole. Mr. Campbell stated that respondent did not have notice of the object prior to this incident, and he was unaware of the amount of time that the hole cover had been flipped over.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold respondent liable for road defects of this type, a claimant must prove that respondent had actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman v. Dep't of Highways*, 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that respondent had, at the least, constructive notice of the hole cover's post which claimants' vehicle struck. The Court has determined that the metal post, which was improperly protruding into the road surface instead of downward inside the hole, presented a hazard to the traveling public. Thus, the Court finds respondent negligent and claimants may make a recovery for the damage to their vehicle.

In accordance with the findings of fact and conclusions of law stated herein above, the

Court is of the opinion to and does make an award to the claimants in the amount of $1,000.00.

Award of $1,000.00.

OPINION ISSUED FEBRUARY 11, 2009

NORVELL RAY ATKINS SR.
VS.
DIVISION OF HIGHWAYS
(CC-08-0062)

Claimant appeared *pro se*.

Jason C. Workman, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when his 2007 Chevrolet Impala struck a hole on Kanawha Boulevard in Charleston, Kanawha County. Kanawha Boulevard is a road maintained by respondent. The Court is of the opinion to

make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 8:30 p.m. on January 30, 2008. At the time of the incident, claimant and his wife, who was a passenger in the vehicle, were traveling from Riverview Gospel Tabernacle to their home in Belle. Claimant was driving between Wertz Avenue and the Charleston Moose Club at approximately twenty to twenty-five miles per hour when his vehicle struck a hole in the road. The hole was located in the far right lane and was approximately one and one-half feet long, one foot wide, and eight inches deep. Claimant does not travel on this road frequently, and he had not encountered the hole prior to this incident. As a result, claimant's vehicle sustained damage to its wheel in the amount of $315.23 and its alignment in the amount of $103.35. Thus, claimant's damages total $418.58. Claimant's insurance deductible was $500.00 at the time of the incident.

The position of the respondent is that it did not have actual or constructive notice of the condition on Kanawha Boulevard. Respondent did not present a witness at the hearing.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold respondent liable for road defects of this type, a claimant must prove that respondent had actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman v. Dep't of Highways*, 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that respondent had, at the least, constructive notice of the hole which claimant's vehicle struck and that the hole presented a hazard to the traveling public. The size of the hole and its location on the road lead the Court to conclude that respondent had notice of this condition. Thus, the Court finds respondent negligent and claimant may make a recovery for the damage to his vehicle.

In accordance with the findings of fact and conclusions of law stated herein above, the

Court is of the opinion to and does make an award to the claimant in the amount of $418.58.

Award of $418.58.

OPINION ISSUED FEBRUARY 11, 2009

PENNY SISK
VS.
DIVISION OF HIGHWAYS
(CC-08-0142)

Claimant appeared *pro se*.

Jason C. Workman, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when her 2005 Chrysler PT Cruiser struck two holes when she was driving on U.S. Route 60 in South Charleston, Kanawha County. U.S. Route 60 is a road maintained by respondent. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 11:30 a.m. on March 31, 2008. At the time of the incident, claimant was returning to work at Columbia Gas from TJ Maxx. Although claimant did not recall her speed, she stated that she was traveling slowly due to the traffic. Claimant was driving eastbound on U.S. Route 60 in her right lane when her vehicle struck two holes in the road. She was unable to maneuver her vehicle into the left lane because there was a vehicle in that lane of traffic. Claimant testified that she did not have knowledge of the holes before her vehicle struck them. As a result of this incident, claimant's vehicle sustained damage to two rims in the amount of $604.20 and a tire in the amount of $111.01. In addition, claimant incurred expenses in renting a car while her vehicle was being repaired in the amount of $78.30. Thus, claimant's damages total $793.51, and her insurance deductible at the time of the incident was $1,000.00.

The position of the respondent is that it did not have actual or constructive notice of the condition on U.S. Route 60. Randy Hammond, Crew Supervisor for respondent in Kanawha County at the time of this incident, testified that he is familiar with the area where claimant's vehicle was damaged. Mr. Hammond stated that U.S. Route 60 is a first priority road in terms of its maintenance. Mr. Hammond testified that cold patch was used at this particular location. Cold patch is a temporary patching material used in the winter. He explained that holes such as these form when they are subjected to wet conditions. Mr. Hammond stated that he was not familiar with this problem prior to March 31, 2008.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold respondent liable for road defects of this type, a claimant must prove that respondent had actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman v. Dep't of Highways*, 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that respondent had, at the least, constructive notice of the holes which claimant's vehicle struck and that the holes presented a hazard to the traveling public. The size of the holes and their location on U.S. Route 60, a first priority road, lead the Court to conclude that respondent had notice of this condition. Thus, the Court finds respondent negligent and claimant may make a recovery for the damage to her vehicle.

In accordance with the findings of fact and conclusions of law stated herein above, the

Court is of the opinion to and does make an award to the claimant in the amount of $793.51.

Award of $793.51.

OPINION ISSUED FEBRUARY 11, 2009

DAISY MAE CARTE AND HAROLD LARRY CARTE JR.
VS.
DIVISION OF HIGHWAYS
(CC-08-0223)

Claimants appeared *pro se*.

Jason C. Workman, Attorney at Law, for respondent.

PER CURIAM:

Claimants brought this action for vehicle damage which occurred when the edge of the road broke underneath their 1989 Ford F150 truck as claimant, Harold Larry Carte Jr., was driving on Valley Grove Road in Kanawha County. Valley Grove Road is a road maintained by respondent. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred on April 10, 2008. Valley Grove Road is a paved, one-lane road at the area of the incident involved in this claim. Mr. Carte was driving to his uncle's house at approximately five or ten miles per hour when he noticed a coal truck traveling in the opposite direction. As he maneuvered his vehicle to the edge of the road to provide room for the coal truck, the road underneath his vehicle broke away, causing his vehicle to fall into a ditch on the side of the road. The portion of road that broke off was approximately five feet long and two feet wide. The ditch was approximately three feet deep. As a result of this incident, claimants' truck sustained body damage to the passenger's side of the vehicle. Claimants submitted an estimate for repairs in the amount of $1,957.80, and claimants' insurance declaration sheet indicates that they had liability insurance only. The Blue Book value of a 1989 Ford F150 in "excellent" condition is $1,100.00.

The position of respondent is that it did not have actual or constructive notice of the condition on Valley Grove Road. David Fisher, Highway Administrator for respondent in Kanawha County, testified that Valley Grove Road is a third priority road in terms of its maintenance. He stated that a nearby bridge can become blocked with trees and brush, causing the water to fill the ditch line. Mr. Fisher stated that he had not received complaints regarding the condition on the edge of the road prior to this incident.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims*, 130 W.Va. 645; 46 S.E.2d 81 (1947). In order to hold respondent liable for road defects of this type, a claimant must prove that respondent had actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman v. Dep't of Highways*, 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that respondent had at least constructive notice of the condition on Valley Grove Road. Respondent could reasonably expect that the water at this particular area could erode the edge of the road, creating a hazard for vehicles that potentially could fall into the ditch line at this location. Since the cost of performing repairs would be greater than the Blue Book value of the vehicle, the Court has determined that the Blue Book value in the amount of $1,100.00 is a fair and reasonable amount of compensation for this incident. Thus, the Court finds respondent negligent, and claimants may make a recovery for the damage to their vehicle.

In accordance with the findings of fact and conclusions of law stated herein above, the Court is of the opinion to and does make an award to the claimants in the amount of $1,100.00.

Award of $1,100.00.

OPINION ISSUED FEBRUARY 11, 2009

MARVIN D. ADAMS
VS.
REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY
(CC-08-0230)

Claimant appeared pro se.

Ronald R. Brown, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks to recover $277.00 in personal items including a hat, belt, shoes, comb, chain, and snuff that were entrusted to respondent. These items were misplaced when claimant was transferred between facilities. Claimant was booked at Potomac Highlands Regional Jail on March 1, 2008, and was transferred to Southern Regional Jail on April 4, 2008. He was transferred back to Potomac Highlands Regional Jail on April 17, 2008.

In its Answer, respondent admits the validity of the claim in the amount of $150.00 rather than the amount of $277.00. Respondent states that several items were found and returned to the claimant, but his hat, belt and shoes were not located. Thus, respondent has determined that $150.00 is a fair and reasonable amount to compensate the claimant for his missing items.

This Court has taken the position in prior claims that if a bailment situation has been created, respondent is responsible for property of an inmate which is taken from that inmate, remains in its custody, and is not produced for return to the inmate. The Court agrees that $150.00 is a fair and reasonable amount to compensate the claimant for his loss. In view of the foregoing, the Court is of the opinion to and does make an award to claimant in the amount of $150.00.

Award of $150.00.

OPINION ISSUED FEBRUARY 11, 2009

PAULA J. POWELL
VS.

DIVISION OF HIGHWAYS
(CC-08-0271)

Claimant appeared *pro se*.
Jason C. Workman, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when her 2002 Pontiac Grand Am GT struck a hole as claimant was driving on W.Va. Route 25 in Nitro, Kanawha County. First Avenue is a road maintained by respondent. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 1:00 p.m. on or about March 1, 2008, or March 2, 2008. W.Va. Route 25 is a paved, two-lane road, and the speed limit in this area is forty-five miles per hour. Claimant was driving at approximately forty miles per hour when her vehicle struck a hole in the road before she reached Ocean Breeze, a tanning salon located in Nitro. The hole was situated on the right toward the white edge line, but it was within the roadway surface. It was approximately sixteen inches long, twelve inches wide, and six or seven inches deep. Claimant testified that she had no previous knowledge of the hole at this location, and she does not travel this road on a routine basis. As a result of this incident, claimant's vehicle sustained damage to its rim and tire. In addition, claimant incurred costs for a rental vehicle. Thus, claimant's damages total $767.64, and claimant's insurance deductible at the time of the incident was $500.00.

The position of the respondent is that it did not have actual or constructive notice of the condition on W.Va. Route 25 in Nitro. Charles E. Smith, Highway Administrator for respondent in Kanawha County, is familiar with the stretch of road where claimant's incident occurred. He stated that it is a first priority road in terms of its maintenance. Mr. Smith stated that his office received complaints regarding a hole located near the Twin City Bible Church, and his crews patched the hole on March 3, 2008. However, he was not aware of a hole near the tanning salon.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold respondent liable for road defects of this type, a claimant must prove that respondent had actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman v. Dep't of Highways*, 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that respondent had, at the least, constructive notice of the hole which claimant's vehicle struck and that the hole presented a hazard to the traveling public. The size of the hole and its location lead the Court to conclude that respondent had notice of this condition. Thus, the Court finds respondent negligent and claimant may make a recovery for the damage to her vehicle.

In accordance with the findings of fact and conclusions of law stated herein above, the Court is of the opinion to and does make an award to the claimant in the amount of $500.00.

Award of $500.00.

OPINION ISSUED FEBRUARY 11, 2009

MONTGOMERY MEDCORP
VS.
DIVISION OF CORRECTIONS
(CC-08-0311)

Claimant appeared *pro se.*

Charles P. Houdyschell Jr., Senior Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks payment in the amount of $3,598.00 for medical services that it provided to inmates at Mount Olive Correctional Complex. Respondent, in its Answer, admits the validity of the claim and further states that there were insufficient funds in its appropriation for the fiscal year in question from which to pay the claim.

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

Claim disallowed.

OPINION ISSUED FEBRUARY 11, 2009

POMEROY IT SOLUTIONS SALES CO. INC.
VS.
PUBLIC SERVICE COMMISSION
(CC-08-0475)

Claimant appeared *pro se*.

Ronald R. Brown, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks to recover $1,224.53 for five laser jet printers, twenty ink cartridges, and two toners, which it provided to respondent. Claimant did not receive payment for these items.

In its Answer, respondent admits the validity of the claim as well as the amount,

and states that there were sufficient funds expired in that appropriate fiscal year from which the invoices for these items could have been paid.

In view of the foregoing, the Court is of the opinion to and does make an award to claimant in the amount of $1,224.53.

Award of $1,224.53.

OPINION ISSUED FEBRUARY 11, 2009

POMEROY IT SOLUTIONS SALES CO. INC.
VS.
PUBLIC SERVICE COMMISSION
(CC-08-0530)

Claimant appeared *pro se*.

Ronald R. Brown, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks to recover $415.30 for computer-related services that were not paid because the invoice was lost in the mail.

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

In view of the foregoing, the Court is of the opinion to and does make an award to claimant in the amount of $415.30.

Award of $415.30.

OPINION ISSUED FEBRUARY 20, 2009

CSX TRANSPORTATION INC.
VS.
DIVISION OF HIGHWAYS
(CC-05-0264)

Andrew S. Zettle and Cindy McCarty, Attorneys at Law, for claimant.

Jeff J. Miller, Attorney at Law, for respondent.

FORDHAM, JUDGE:

Claimant seeks to recover $911,978.64 for the replacement of a culvert system located in Logan County near the mouth of Godby Branch which drains that creek under claimant's railroad and respondent's adjacent W.Va. Route 10. Respondent's W.Va. Route 10 at Godby Branch is parallel to and upstream from the claimant's railroad. This claim arises from the aftermath of a flood that occurred on June 16, 2003, in which there was an apparent failure of portions of the culvert system. Claimant asserts that it had no alternative but to replace both claimant's and respondent's portions of the conjoined culvert structure and seeks to be reimbursed its total costs in doing so.

Claimant alleges that respondent 1) improperly constructed and attached a single box culvert to claimant's pre-existing twin box culvert, which as a consequence, could catch debris and thus block the culvert system; 2) negligently failed to control the flow of mud and debris that blocked the inlet of the culvert system during respondent's clean-up operations at Godby Branch; 3) failed to inspect its culvert during the clean-up efforts at Godby Branch until the condition of the culvert system was beyond the point were it could be easily remedied; and 4) was unjustly enriched when it failed to take steps to restore the flow of water through the inlet of its culvert, causing claimant to bear the expense of replacing the entire culvert system. The Court is of the opinion to make an award in this claim for the reasons more fully set forth below.

Godby Branch Culvert System

Claimant's portion of the culvert system located at the Godby Branch watershed as it existed on June 16, 2003, was constructed by claimant's predecessor approximately one hundred years ago to allow drainage from Godby Branch to flow into the Guyandotte River beneath its railroad bed. Claimant's predecessor railroad constructed approximately two-thirds (133' in addition to the 19.5' extension) of the culvert structure. Respondent constructed approximately one-third (85.5') of the culvert system some years thereafter. The total combined culvert system was approximately 238 feet long.

The original culvert system constructed by claimant's predecessor was comprised of twin three foot by five foot (3' x 5') stone box culverts. The cells of the culvert system were apparently separated by a common vertical stone wall extending the length of the twin culverts and are approximately 133 feet in length. There is no credible testimony in the record as to the width of the vertical stone wall. Subsequently, claimant added a single cell concrete extension on the outfall end of the twin culverts to extend its culvert system an additional 19.5 feet.

In about 1928, as part of respondent's construction of the Pecks Mill to Chapmanville section of W.Va. Route 10, respondent constructed a single cell culvert which it attached to the upstream inlet of the claimant's twin culvert system, so that W.Va. Route 10 could be constructed over Godby Branch adjacent to the railway. The original plans drafted by respondent depicted a twin three foot by five foot (3' x 5') culvert system to mirror claimant's twin culverts. However, respondent instead constructed a five foot by six foot (5' x 6') single cell concrete box culvert that was approximately 85.5 feet in length. This section of the culvert system was covered with fill which became the roadbed for W.Va. Route 10.

Claimant contends that respondent's installation of a single cell culvert leading into claimant's double cell culvert at the inlet portion of the culvert system constitutes a defective design, and respondent should have constructed a double cell culvert to match claimant's twin cell culvert as originally designed. James Steven Gardner, a licensed

professional engineer and President and CEO of Engineering Consulting Services, testified for claimant that he was concerned with the original construction of respondent's portion of the culvert system. Mr. Gardner testified as follows:

> Q: And in that regard, from a design standpoint, what was the major concern with that particular design that caught your attention?
>
> A: The fact that there is a constriction located inside of the culvert system that creates a potential trap for material.
>
> ***
>
> A: ...The main concern I had was in any kind of storm event that might wash material downstream, the types that we've all seen in the mountains where we've grown up, you might imagine bridges that have brush dams that accumulate with a center pier. The same thing could happen underground with a small root wad or tree stump that might get lodged there and trapping additional material which could build up over time. A system like this I guess could function for decades without a problem and then all of a sudden something could happen, especially with a circumstance that might trigger the blockage even more.

June 16, 2003, Flood at Godby Branch

On June 16, 2003, a significant flood event occurred at the Godby Branch watershed. In June 2003, Godby Branch experienced extraordinary rainfall which occurred throughout the Chapmanville area.[28] The flood event was a result of rainfall runoff and a discharge of water from an abandoned underground coal mine blowout on the hillside above Godby Branch. The excess water caused damage to County Route 10/1 and to homes in this area.[29] The area was covered with flood debris. In addition, there were slides from hills in the area. The creeks were filled and had flooded over the top of County Route 10/1. The combined flow of water from the mine and the runoff from the storm event caused a temporary pooling of water at the upstream inlet of respondent's portion of the culvert system under W.Va. Route 10. Although flooding occurred above

---

[28] Curley Belcher, County Administrator for respondent, testified that he went to the Godby Branch area on June 17, 2003, the day after the flood and observed that the creeks were filled up, and there was mud in the road that was approximately twelve to eighteen inches deep in different areas.

[29] Claimant is currently being sued by residents and real property owners in Godby Branch whose property was damaged by flood waters allegedly caused or exacerbated by the collapse of claimant's culvert. In a companion case, CC-05-0278, claimant seeks indemnification from respondent for any adverse judgments in those civil actions. The case deals with the events leading up to and including the June 16, 2003, event. However, that claim is not ripe for the Court's review.

the culvert, the culvert remained functional for a period of time following the flood.[30]

Clean-up Measures at Godby Branch

During the latter part of June 2008 and early July 2008, respondent assigned maintenance crews to remove debris from Godby Branch, replace drainage structures in and along Godby Branch, and repair County Route 10/1 that parallels Godby Branch. Respondent was engaged in clean-up activities along Godby Branch from June 19, 2003, to July 23, 2003. During this period, respondent's crews used a hydraulic excavator, known as a Gradall, to remove approximately 4,000 tons of mud and debris from Godby Branch. Terry Ellis, Crew Supervisor for respondent, testified that he scooped mud from the flowing creek and used the Gradall to break up trees and brush lodged in the stream.[31] The material was then loaded into trucks for its disposal. Troy Belcher, foreman for respondent, was directed to complete the work that Mr. Ellis had started at Godby Branch.[32] Mr. Belcher testified that respondent's crews did not perform work at the location of the inlet end of the culvert.

On June 17, 2003, Steven Michael Runyon, District Two Bridge Design Engineer for respondent, was sent to Godby Branch to observe the damage throughout Logan County, but he also was there to check on his mother and grandmother who live on Godby Branch where he was raised. He testified that he had never seen flooding on Godby Branch until the flood that occurred in June of 2003. At that time he was inspecting the area, respondent's crews had been performing work throughout Logan County. During his travels to Godby Branch in June and July 2003, he did not observe the inlet of the culvert until he was made aware that there was a problem.

During mid-July 2003, respondent's crews performed pumping operations to carry water from Godby Branch across W.Va. Route 10 and into a drain that was located under the railroad tracks. At that time, essentially no water was flowing through the culvert system, and respondent was taking steps to prevent water from flooding upstream residences. Clifford Martin, Operator 3 for respondent, was the crew leader responsible for overseeing the pumping operations at the inlet of the culvert. Mr. Martin testified that he worked on the pumping operations on July 23, 2003, for seventeen hours that day

---

[30] Mike Smith, claimant's Bridge Supervisor during the 2003 flood, testified that based on his observations immediately after the June 16, 2003, flooding, the culvert was conveying water. Steven Runyon, District II Bridge Design Engineer for respondent, testified that when he went to Godby Branch on June 17, 2003, the culvert was conveying water.

[31] Terry Ellis, Crew Supervisor for respondent, had been engaged in clean-up efforts on County Route 10/1 from June 19, 2003, to July 7, 2003. Respondent's DOH 12's, or daily work reports, indicate that respondent was engaged in channeling the creek, rip-rapping the embankment, placing shot rock in the creek bank, performing shoulder work, among other related activities, during this time. Respondent's crews also worked on cleaning up slides on W.Va. Route 10 from July 8, 2003, to July 10, 2003.

[32] The DOH 12's indicate that, among other activities, Mr. Belcher's crews worked on dipping the creek out from July 14, 2003, to July 23, 2003.

and was involved in the pumping operations for two or three days. At the beginning of the pumping operations, respondent's crews burned up one pump and brought in a larger pump with a six-inch line. Respondent's crews pumped as much water out of the area as they could before ceasing the pumping operations. Mr. Martin was uncertain as to what would happen if there was a subsequent rain in the area.

Claimant alleges that respondent's clean-up activities caused five feet of sediment to settle at the mouth of respondent's culvert, threatening the viability of the culvert system. Claimant further alleges that respondent negligently caused and/or allowed five or more feet of mud to block the inlet of respondent's culvert. Claimant contends that when the mud was transferred from the stream to trucks for its disposal, the silt and muddy water would run out of the trucks and back into the stream.

Claimant's expert, James Steven Gardner, opined that respondent's clean-up operations could have caused mud and debris to flow towards the Godby Branch culvert. Mr. Gardner stated that as much material could have been carried downstream as was actually removed during the channelization of the stream. He further testified that if 4,000 tons of material were removed, and no remedial measures were taken, then as much as 4,000 tons of material could have been carried downstream. The rain in early July 2003, he believed, could have re-suspended silt and increased the amount of sediment carried to the inlet of the culvert.

In addition, claimant contends that respondent failed to implement "best management" practices during its clean-up activities to minimize the downstream impact of sediment. Mr. Gardner testified that best management practices include rock check dams, straw bales, silt fences, or other erosion and sediment control techniques. According to Mr. Gardner, rock check dams are commonly used in construction and mining operations regardless of the size stream to serve primarily as a temporary sediment control measure to prevent sediment from moving downstream. Although Mr. Gardner stated that rock check dams can wash out in high flow areas, he stated that the flow of water at Godby Branch had receded to a normal flow. Mr. Gardner testified that he would have placed a rock check dam near the inlet of the culvert system, and then he would have placed a series of rock check dams upstream around the work areas.

Mr. Gardner further testified that inspection plays a role in best management practices:

> Q: Now, I take it from that standpoint if you know that you're going to be disturbing sediment upstream, that it would be appropriate to inspect the downstream to see whether they were in fact having an impact. Is that part of the normal best management practices?
>
> A: Yes, especially in a situation like the culvert system that's in place. I think it would have been appropriate to inspect not only the inlet but the outlet and try to assess exactly what the conditions were.

Respondent argues that there is insufficient evidence that the material from respondent's work area was re-suspended in-stream and carried to the inlet of the culvert. Respondent's expert, Douglas Kirk, civil engineer and head of respondent's hydraulics and hydrology section, testified that re-suspension occurs when the creek re-establishes its channel and moves sediment downstream. If respondent had left the material undisturbed in the creek after the flood event, then the next time it rained, it would have washed further downstream. Thus, it was necessary for respondent to remove the material to reduce the amount of sediment available to be washed downstream to the

culvert. Since respondent performed its clean-up activities approximately 800 to 1,000 yards from the inlet of the culvert, Mr. Kirk stated that he did not expect a significant amount of sediment to be carried across the 800 to 1,000 yards to be deposited at the inlet end of the culvert system.

Mr. Kirk opined that best management practices such as ditch checks, straw bales, and silt fences would not have been appropriate at the Godby Branch site. Mr. Kirk explained that ditch checks are designed to slow the flow of water and prevent erosion in a ditch. If respondent had placed rocks in the stream, then the channel would no longer have been the path of least resistence, and water would have flowed over top of the banks, onto the flood plain, and onto the road, causing further erosion in those areas.

In addition, Mr. Runyon, District Two Bridge Design Engineer for respondent, testified that there is no best management practice for in-stream work. The rock ditch checks are intended to catch runoff leading into the creek and not in the creek itself. Mr. Runyon stated that rock check dams would have washed downstream, or it would have caused the elevation of the water upstream to rise, threatening the residents in the area. Also, Mr. Runyon opined that the placement of a silt fence at Godby Branch was not an option because it would have washed downstream.

According to respondent's expert, Mr. Kirk, best management practices for in-stream work involve several techniques. The first technique involves pumping water around the work area. In this particular situation, respondent would have had to pump all the water out around the area that they were working, which he opined was impractical and impossible at that point. The second technique involves limiting the in-stream work and keeping equipment out of the stream. Since there was a road close to the creek, this method was not an issue at the Godby Branch site. The third technique, which is known as the "get in/get out" method, involves limiting the amount of time that work is being performed in the creek area in order to minimize the disturbance to the stream. Mr. Kirk testified that respondent tried to remove as much sediment as possible before additional rains washed the sediment into the culvert. Since respondent's crews were working in an emergency situation, their main goal was to remove the sediment as quickly as possible in order to minimize the disturbance to the creek.

Inspections at the Godby Branch Culvert

Mike Smith, Bridge Supervisor for claimant in 2003, testified that inspections were performed at the Godby Branch culvert system on an annual basis. Two employees are assigned to observe the water flow and ensure that daylight can be visibly seen through the culvert. In addition, the inspectors are responsible for rating the condition of the culvert's wing wall, head wall, and water way. The results of the inspection are then recorded on a zero through three rating system. A zero signifies that the culvert failed the inspection, and a three indicates that the culvert was in superior condition.

During the inspections of the Godby Branch culvert held on November 11, 1999, November 10, 2000, December 3, 2001, and September 23, 2002, the culvert received three's, indicating that the culvert was in superior condition, for all conditions on the inlet and outlet sides of the culvert. On July 8, 2003, the inlet of the culvert received the following ratings: 1) inlet wing wall - three,

2) inlet head wall - three, and 3) inlet waterway - zero. The outlet of the culvert was rated as follows: 1) outlet wing wall - three, 2) outlet head wall - three, and 3) outlet waterway - zero. The results of the inspection determined that the inlet was under water and the outlet was approximately fifty percent (50%) under water. Claimant's personnel were

unable to see the waterway at the inlet and the outlet side of the culvert. Claimant's records also demonstrate that the Guyandotte River was out of its bank during this inspection.

Collapse of the Godby Branch Culvert System

Around July 2003, before respondent had begun pumping operations, an unidentified citizen notified Mr. Runyon, District Two Bridge Design Engineer for respondent, that the culvert was no longer functioning. When Mr. Runyon went to inspect the upstream side of the culvert, he noticed that a small amount of water was coming out of the culvert. Mr. Runyon was aware that respondent's crews used both excavators and pumps to find the inlet of the culvert, but he was also unable to observe the inlet end of the culvert system because it was covered with soupy mud. He testified that at least five feet of mud had accumulated at the inlet opening.

Curley Belcher, Logan County Administrator for respondent in 2003, also observed an apparent blockage near the outlet end of claimant's culvert the week after the flood. He walked approximately twenty feet into the culvert and indicated that the collapse was approximately ten to twelve feet beyond that point. When Mr. Belcher inspected claimant's double barrel culvert, he noticed that a rock had collapsed from the ceiling and from the walls in the left barrel. The rock was approximately four and a half feet high, and approximately four to eight inches of water was flowing through the left cell of claimant's culvert. He also observed that approximately sixty-five percent (65%) to seventy percent (70%) of the right side barrel of claimant's culvert was blocked. However, he was unable to observe the inlet of the culvert because it was covered with water and debris.

During the week of July 21, 2003, Mr. Runyon, District Two Bridge Design Engineer for respondent, observed a collapse in claimant's end of the culvert. He noticed that the outlet end of the twin culverts had collapsed approximately twenty-five to thirty feet into the left cell of the twin culvert system, and the right cell was completed blocked. He did not go into the culvert to observe the collapse. Respondent sent a work-release prisoner into the culvert to obtain a photograph of the collapsed culvert. At that point, Mr. Runyon notified Mike Smith, Bridge Supervisor for claimant, of the culvert collapse. Mr. Runyon also contacted Roy Kaiser, claimant's Manager of Bridges, to inform him that respondent considered the blockage of the culvert to be in claimant's hands, and respondent was withdrawing its crews from Godby Branch.

On July 24, 2003, Mike Smith, Bridge Supervisor for claimant in 2003, was notified that there was a culvert problem at Godby Branch. He visited the outlet end of the culvert and took photographs of the inside of the culvert. Mr. Smith observed that the stone pillar of the left cell had failed approximately twenty to thirty feet in the outlet end of claimant's culvert. Mr. Smith stated that right cell of claimant's culvert was approximately seventy-five percent (75%) blocked, and the left cell was approximately seventy-five percent (75%) to eighty percent (80%) blocked.

Mr. Smith testified that the inlet was completely backed up with water and there was no flow coming out of the culvert. According to Mr. Smith, approximately six feet of mud was present, and the mud consisted of fine material that lacked any solidity. He drove to the upper end of Godby Branch to investigate what could have caused the mud to accumulate at the inlet end of the culvert. He noticed that there had been a lot of cleaning of the creek upstream from the flood, and the upstream activities were consistent with the material that he saw deposited downstream.

Potential Causes of the Culvert Collapse

Although claimant contends that it is possible that a collapse occurred at the intersection of the two culvert systems, respondent argues that there is no direct testimony or evidence that establishes what happened to the interior of respondent's eighty-five foot portion of the culvert system. Respondent argues that claimant did not prove that the obstruction was located in respondent's culvert, rather than within the claimant's portion of the culvert system. Respondent contends that the letters submitted by DMJM+Harris, Inc. ("DMJM") during the permitting process for the replacement of the culvert system indicate that "the culvert is believed to have a center wall collapse approximately 20-25 feet from the outfall, east of Route 10 and the CSXT tracks, with the remainder of 210' feet blocked with debris." Claimant contends that Daniel Corey, engineer for DMJM, testified that he nor anyone retained at DMJM was involved in investigating the cause of the blockage.

Despite respondent's contention that the cause of the blockage remains unknown, claimant's engineer, Mr. Gardner, testified to a reasonable degree of engineering certainty regarding the potential cause of the collapse. Mr. Gardner opined that sediment from respondent's clean-up operations became trapped by flood debris in respondent's culvert system at the junction or upstream from the junction of respondent's single barrel and claimant's double barrel culverts. Mr. Gardner testified that the design of the culvert increased his concern that best management practices needed to be applied at Godby Branch because the pillar situated in the middle of respondent's culvert created a potential trap for material. Material could accumulate in the center area and build up over time, and a circumstance such as a flood event could trigger a blockage. Mr. Gardner stated as follows:

> A: I think we have a set of circumstances that created a situation that led to the blockage of the culvert. First of all, heavy rains and a mine blowout that created a sudden surge of water into Godby Branch washing debris downstream.
>
> In my opinion it's likely that the sudden surge, which was an unusual event for Godby Branch, that debris became either lodged at the entrance of the culvert or at some point in and certainly at the intersection of the DOH culvert and the CSX double barrel culvert, and then the debris that was there wasn't fully blocking the culvert but over time after the cleanup began and sediment continued to be transported downstream, there were some additional rains in July, I believe, that eventually that mud was trapped by the debris there much like a silt fence or a check dam inside the culvert and built up to essentially cement or plug the culvert.

Respondent avers that there is no evidence to support Mr. Gardner's assertion that material occluded the culvert system at the junction of respondent's and claimant's sections. Mr. Gardner testified that he did not use, nor did he have knowledge of anyone that used, a borescope or any kind of camera inspection to determine the condition of the culvert system. Mr. Kirk, respondent's expert engineer, testified that it was "most likely" that a blockage downstream could have caused debris and mud to fill the rest of the structure upstream. However, respondent asserts that nobody knows what happened in the 122 to 132 feet located before respondent's section of the culvert.

Further, respondent contends that the fact that the obstruction occurred after respondent removed sediment from Godby Branch does not mean that the obstruction was the cause of the removal of the sediment. It is respondent's position that there were independent proximate causes for the obstruction. Claimant's expert engineer, Mr.

Gardner, testified that other sources of water that might have introduced debris include: 1) the flood, 2) the mine blowout, 3) slides, 4) clean-up activities of others, and 5) subsequent rains carrying sediment from roads, hill sides, slides, and yards into the stream.

Replacement of the Culvert System

Claimant contends that regardless of the cause of the culvert collapse, claimant has established that respondent had a duty to maintain the flow of water at Godby Branch, and respondent breached its duty. Thus, claimant was required to perform the necessary repairs to restore the culvert system. Claimant determined that due to the blockage at the inlet of the culvert, it had no choice but to replace the entire culvert system.

Performing repairs solely on claimant's side of the culvert system would not have been feasible. Mike Smith, Bridge Supervisor for claimant in 2003, testified that repair of the culvert was not an option for two main reasons: First, from a safety perspective, it was too dangerous to send personnel to perform repairs of the culvert system when the inlet end was completely stopped up; Second, it would have been futile to perform repairs on the stone collapse as long as the blockage remained at the inlet side of the culvert system.

Respondent stipulates that $911,978.64 for the replacement of the 238 foot culvert system was reasonable. Claimant hired consulting engineers DMJM to design the replacement culvert system. On August 25, 2003, DMJM requested an emergency permit from the US Army Corps of Engineers.[33] The Corps of Engineers issued a permit for the planned construction, and respondent issued a permit for the placement of a forty-eight inch steel pipe to relieve the flooding of Godby Branch. Claimant expended additional sums in complying with respondent's more demanding standards. Both parties also agree that the replacement of the culvert was essential in order to prevent the flooding of upstream residences and to ensure the stability of the highway and the railway line.

The Court observes that for reasons of personal safety, no one inspected the full length of the 133 foot interior of claimant's twin cell culvert, which appear from photographs introduced into evidence taken from the outflow end, to have collapsed just inside the outflow, filling the culvert with debris. Accordingly, there is no convincing evidence in the record to support the claimant's burden of proof that respondent is responsible for the failure of claimant's twin cell culvert system. Accepting, *arguendo,* that an obstruction was created out of mud and debris at the juncture of claimant's twin cell culvert with respondent's single cell system, it seems likely that the dam thus created would have merely rendered claimant's portion of the culvert system empty (which it routinely was during periods of drought), not cause it to collapse. There was, on the other hand, testimony that the Guyandotte River itself was in flood on or about June 16, 2003,

[33] The authorization involved a two phase plan: phase 1 would allow for jacking a 48-inch diameter pipe under W.Va. Route 10 and the railway to eliminate the need for emergency pumping; phase 2 would allow for construction of a permanent drainage system to convey the required year storm. The finals plans and construction replaced the existing culvert with the forty-eight-inch pipe constructed for phase 1and a 96-inch pipe which conveys a twenty-five-year storm event as required by respondent.

and that its waters rose several feet above the outflow end of claimant's Godby Branch culvert. Could this have played a part in its collapse?

The Court also observes that, like the respondent, the claimant also had a duty to maintain the water flow at Godby Branch. That said, the Court, having considered the arguments and examined the evidence put forth by the parties in this claim, has determined that in equity and good conscience, claimant should have had more cooperation from respondent in its replacement of the culvert system. Respondent gave notice to claimant of the obstruction in the culvert system at a time when no one could observe what had happened at the inlet end of the culvert where a wall of mud and debris completely blocked the portion of the system constructed by respondent. Since there was a vertical wall separating the twin box culverts, it is reasonable to conjecture that branches, debris, and mud from the flood and the resulting actions of respondent to remove silt from Godby Branch accumulated at this wall causing a blockage at the mouth of the twin culverts. Water carried materials into the single cell culvert constructed by respondent but there may have been so much material flowing in the water such that the wall separating the claimant's twin cell culvert actually became a dam. Would this have happened if respondent had constructed a twin system of culverts as originally designed? One can only speculate. But the fact remains that somewhere a blockage definitely occurred and claimant had no option once it was noticed of the blocked system but to construct a completely new culvert system which included replacing the portion placed by respondent. Claimant bore the expense of the new system and respondent does not dispute that claimant's actions were reasonable under the circumstances or contend that the amount of the cost of the new system was unreasonable.

Both claimant and respondent had a responsibility to protect the residents of Godby Branch from any further flooding in the area and the only way to provide this protection was to make sure water from Godby Branch had a way to flow into the Guyandotte River. Since its railway tracks were across Godby Branch at its confluence with the Guyandotte River, and since respondent failed to act, the only solution open to the claimant was the new culvert system. However, the Court is of the opinion that claimant should not have to bear all of the expense for this new culvert. To rule otherwise would constitute the unjust enrichment of the respondent, there being no evidence that the failure of the culvert was the result of an act or acts or failure to act on the part of the claimant. *See Quintain Dev., LLC v. Columbia Natural Res., Inc.*, 210 W.Va. 128, 556 S.E.2d 95 (W.Va. 2001); *Equitable Gathering Equity, LLC v. Dynamic Energy, Inc.* 2009 WL 37186 (S.D.W.Va. 2009). Thus, the Court has determined that respondent and claimant should share in this expense based upon each lineal share of the culvert system. Since respondent constructed approximately one-third of the culvert system as it existed on June 16, 2003, in its construction of W.Va. Route 10, the Court has determined that an award in this claim of one-third of the cost of the new culvert system is both fair and reasonable. Claimant incurred $911,978.64 for the new culvert system and, based upon that amount, the Court has determined that respondent should bear $303,992.88 of that cost.

Claimant filed a Motion for Summary Judgment which was heard by the Court and taken under advisement. The decision in this claim renders the Motion moot.

In accordance with the findings of fact and conclusions of law stated herein above, the Court is of the opinion to and does make an award to the claimant in the amount of $303,992.88.

Award of $303,992.88.

The Honorable John G. Hackney Jr., Judge, was recused from participating in the hearing and decision of this claim.

OPINION ISSUED FEBRUARY 20, 2009

PRISCILLA LESTER,
Administratrix of the Estate of STANLEY LESTER
VS.
DIVISION OF HIGHWAYS
(CC-06-0342)

William E. Murray and Travis E. Ellison III, Attorneys at Law, for claimant.
Andrew F. Tarr and Jason C. Workman, Attorneys at Law, for respondent.

PER CURIAM:

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

1. On December 4, 2004, Stanley Lester was driving north on County Route 3/5, near Mud Fork, in McDowell County when his truck drove into overflowing water and icy mudslides in the road, causing Mr. Lester to lose control of the vehicle. The vehicle swerved and flipped over before it came to rest on the side of the hill next to the road. Mr. Lester died as a result of injuries caused by this accident.

2. Claimant alleges that the accident was the result of respondent's failure to properly maintain the ditch lines and culvert along the road, resulting in excess water on the road at the time of the accident. Claimant asserts that the ditches and culvert along the road had been a problem since a flood which occurred in 2001 or 2002. Claimant states that respondent had received complaints regarding the condition on the road, but failed to repair and maintain the culvert in a timely manner.

3. For the purposes of settlement, respondent acknowledges liability for this incident.

4. The parties agree that $85,000.00 is a fair and reasonable amount to settle this claim.

The Court has reviewed the facts of the claim and finds that respondent was negligent in its maintenance of County Route 3/5 on the date of this incident; that Mr. Lester's death was a direct and proximate result of respondent's negligence in failing to repair and maintain the ditch lines and culvert along the road; and that the amount of the damages agreed to by the parties is fair and reasonable. Thus, claimant may make a recovery in this claim.

Accordingly, the Court is of the opinion to and does make an award in the amount of $85,000.00.

Award of $85,000.00.

OPINION ISSUED FEBRUARY 20, 2009

BRUCE L. ORSBORN JR.
VS.
DIVISION OF HIGHWAYS
(CC-07-0104)

Claimant appeared *pro se*.
Jason C. Workman, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when his 1993 Toyota pick-up truck struck a hole on County Route 33 in Fairmont, Marion County. County Route 33 is a road maintained by respondent. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 5:00 p.m. on March 19, 2007. The speed limit in this area is forty-five miles per hour. Claimant testified that his vehicle had a fiberglass camper attached to the back of the truck. At the time of the incident, claimant was driving

home from work at approximately thirty-five to forty miles per hour when his vehicle struck a hole in the road. Since claimant was aware that there were a series of holes towards the right of his lane, he drove onto the yellow center lines to avoid the holes. Claimant was unable to avoid the hole that his vehicle struck because there was a vehicle traveling in the opposite direction. The hole was approximately three feet long, one and a half feet wide, and six to eight inches deep. Claimant testified that he travels this road on a daily basis and noticed that the holes had been at this location for approximately one week. However, he did not call respondent prior to the incident to report the holes. As a result of this incident, claimant's vehicle sustained damage to its right rear leaf spring assembly in the amount of $589.42.

The position of the respondent is that it did not have actual or constructive notice of the condition on County Route 33. Respondent did not present a witness at the hearing.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold respondent liable for road defects of this type, a claimant must prove that respondent had actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman v. Dep't of Highways*, 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that respondent had, at the least, constructive notice of the hole which claimant's vehicle struck and that it presented a hazard to the traveling public. The size of the hole and its location on the travel portion of the road lead the Court to conclude that respondent had notice of this hazardous condition. Further, the Court finds that respondent had a reasonable amount of time to

take corrective action. Thus, there is sufficient evidence of negligence to base an award. Notwithstanding the negligence of the respondent, the Court is also of the opinion that the claimant was negligent since he was aware of the condition on the road and could have further reduced his speed in accordance with the conditions then and there existing. In a comparative negligence jurisdiction such as West Virginia, the claimant's negligence may reduce or bar recovery in a claim. Based on the above, the Court finds that the claimant's negligence equals twenty-five percent (25%) of his loss. Since the negligence of the claimant is not greater than or equal to the negligence of the respondent, claimant may recover seventy-five percent (75%) of the loss sustained.

In accordance with the findings of fact and conclusions of law stated herein above, the

Court is of the opinion to and does make an award to the claimant in the amount of $442.07.

Award of $442.07.

OPINION ISSUED FEBRUARY 20, 2009

ALICIA ASHCRAFT AND BOBBY GUTIERREZ II
VS.
DIVISION OF HIGHWAYS
(CC-07-0137)

Claimant Bobby Gutierrez II, appeared *pro se*.

Jason C. Workman, Attorney at Law, for respondent.

PER CURIAM:

Claimants brought this action for vehicle damage which occurred when their 1997 Dodge Grand Caravan struck a hole as Bobby Gutierrez II was driving on Philippi Pike Road in East View, Harrison County. Philippi Pike Road is a road maintained by respondent. The Court is of the opinion to make an award in this claim for the reasons set forth below.

The incident giving rise to this claim occurred at approximately 6:30 a.m. on February 6, 2007. The speed limit on Philippi Pike Road is thirty-five miles per hour. At the time of the incident, Mr. Gutierrez was driving to work in Bridgeport and was proceeding through East View into Anmoore at approximately thirty-five miles per hour. Claimant was driving near the two-lane bridge by B & J Truck Service when his vehicle struck a hole on the right side of the road. The hole was situated approximately one foot inside the road's white edge line and was approximately one foot in diameter and six to seven inches deep. Mr. Gutierrez testified that he travels this road on a daily basis and stated that the hole had existed at this location for approximately one month. He testified that he was unable to avoid the hole on this occasion due to oncoming traffic. As a result of this incident, claimants' vehicle sustained damage to its right rear wheel in the amount of $574.52. Mr. Gutierrez also incurred work loss in the amount of $60.00. Thus, claimants' damages total $634.52.

The position of the respondent is that it did not have actual or constructive notice of the condition on Philippi Pike Road. Respondent did not present a witness at the hearing.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold respondent liable for road defects of this type, a claimant must prove that respondent had actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman v. Dep't of Highways*, 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that respondent had, at the least, constructive notice of the hole which claimants' vehicle struck and that it presented a hazard to the traveling public. The size of the hole and its location on the travel portion of the road as well as the fairly high volume of traffic at that location, lead the Court to conclude that respondent had notice of this hazardous condition. Thus, there is sufficient evidence of negligence to base an award. Notwithstanding the negligence of the respondent, the Court is also of the opinion that the claimant was negligent since he was aware of the condition on the road. In a comparative negligence jurisdiction such as West Virginia, the claimant's negligence may reduce or bar recovery in a claim. Based on the above, the Court finds that the claimant's negligence equals twenty-five percent (25%) of the loss sustained. Since the negligence of the claimant is not greater than or equal to the negligence of the respondent, claimants may recover seventy-five percent (75%) of the loss sustained.

In accordance with the findings of fact and conclusions of law stated herein above, the Court is of the opinion to and does make an award to the claimants in the amount of $475.89.

Award of $475.89.

OPINION ISSUED FEBRUARY 20, 2009

MARK ANGELUCCI AND KATHY S. ANGELUCCI
VS.
DIVISION OF HIGHWAYS
(CC-07-0219)

Claimant Mark Angelucci, appeared *pro se*.

Jason C. Workman, Attorney at Law, for respondent.

PER CURIAM:

Claimants brought this action for vehicle damage which occurred when their 2005 GMC Yukon struck a hole while Mark Angelucci was driving on W.Va. Route 91 in Farmington, Marion County. W.Va. Route 91 is a road maintained by respondent. The Court is of the opinion to make an award in this claim for the reasons more fully set forth below.

The incident giving rise to this claim occurred on April 24, 2007. The speed limit on W.Va. Route 91 is twenty-five miles per hour. At the time of the incident, Mr. Angelucci was traveling north on W.Va. Route 91 towards Farmington. As he was driving at approximately twenty-five miles per hour, his vehicle struck a hole in the road. The hole was located approximately three or four feet into the roadway towards the right side of the road and was approximately two feet long and twelve inches wide. The hole was covered with water when the incident occurred. Claimants live approximately 1.25 miles from this area, and Mr. Angelucci stated that he travels this road often. As a result of this incident, claimants' vehicle sustained damage to the passenger side tire and rim. The estimate for the replacement of the tire amounts to $308.00, but claimants have been unable to find a replacement custom rim for their vehicle. Claimants' insurance deductible at the of the incident was $250.00. Thus, claimants' recovery is limited to that amount.

The position of the respondent is that it did not have actual or constructive notice of the condition on W.Va. Route 91. The respondent did not present a witness at the hearing.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold respondent liable for road defects of this type, a claimant must prove that respondent had actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman v. Dep't. of Highways*, 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that respondent had, at the least, constructive notice of the hole which claimants' vehicle struck and that the hole presented a hazard to the traveling public. The size of the hole and the time of year in which this incident occurred leads the Court to conclude that respondent had notice of this hazardous condition. Thus, the Court finds respondent negligent and claimants may make a recovery for the damage to their vehicle.

In accordance with the findings of fact and conclusions of law stated herein above, the Court is of the opinion to and does make an award to the claimants in the amount of $250.00.

Award of $250.00.

OPINION ISSUED FEBRUARY 20, 2009

JOHN HAID AND AMBER HAID
VS.
DIVISION OF HIGHWAYS
(CC-07-0304)

Claimants appeared *pro se*.

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

PER CURIAM:

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

1. At approximately 8:00 a.m. on September 25, 2007, claimant Dr. John Haid, was driving his 2007 Audi A4 on McCullough Road/Miller Road in Huntington, Cabell County, when his vehicle struck a hole in the road. The hole extended across the width of the lane of traffic, and he could not have avoided the hole due to oncoming traffic. Dr. Haid had notified respondent of this condition prior to the incident.

2. Respondent was responsible for the maintenance of McCullough Road/Miller Road which it failed to maintain properly on the date of this incident.

3. As a result of this incident, claimants' vehicle sustained damage to its right, rear rim ($451.26), and the tires had to be rotated and balanced ($47.65). Thus, claimants' damages total $498.91. Claimants' insurance deductible at the time of the incident was $500.00.

4. Respondent agrees that the amount of $498.91 for the damages put forth by the claimants is fair and reasonable.

The Court has reviewed the facts of the claim and finds that respondent was negligent in its maintenance of McCullough Road/Miller Road on the date of this incident; that the negligence of respondent was the proximate cause of the damages sustained to claimants' vehicle; and that the amount of damages agreed to by the parties is fair and reasonable. Thus, claimants may make a recovery for their loss.

Accordingly, the Court is of the opinion to and does make an award in the amount of $498.91.

Award of $498.91.

OPINION ISSUED FEBRUARY 20, 2009

MONONGALIA GENERAL HOSPITAL
VS.
DIVISION OF CORRECTIONS
(CC-07-0341)

Claimant appeared *pro se.*

Charles P. Houdyschell Jr., Senior Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks payment in the amount of $477.60 for medical services provided to an inmate at Huttonsville Correctional Center. Respondent, in its Amended Answer, admits the validity of the claim in this amount and further states that sufficient funds to pay the claim were not appropriated in its budget during the subject fiscal years.

While the Court believes that this is a claim which in equity and good

conscience should be paid, the Court further believes that an award cannot be recommended based upon the decision in *Airkem Sales and Service, et al. v. Dep't of Mental Health*, 8 Ct. Cl. 180 (1971).

Claim disallowed.

OPINION ISSUED FEBRUARY 20, 2009

TODD HOY AND AUTUMN L. HOY
VS.
DIVISION OF HIGHWAYS
(CC-07-0380)

Claimant Todd Hoy, appeared *pro se*.

Jason C. Workman, Attorney at Law, for respondent.

PER CURIAM:

Claimants brought this action for vehicle damage which occurred when their 2006 Dodge Grand Caravan struck loose pieces of asphalt as Todd Hoy was driving on I-79 between Exits 119 and 120 in Harrison County. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 8:30 p.m. on December 8, 2007. The speed limit in this area is sixty-five miles per hour. At the time of the incident, claimants were leaving the Meadowbrook Mall and were driving to Super K-Mart. Mr. Hoy testified that he was traveling southbound on I-79 between the Meadowbrook exit and U.S. Route 50 at the Clarksburg/Bridgeport interchange. His wife and three daughters were passengers in the vehicle. As he was driving at between fifty and sixty miles per hour, claimants' vehicle struck pieces of asphalt that were located in his lane of traffic. The loose pieces of asphalt appeared to have kicked up from the road surface and were already situated on the roadway when claimants' vehicle struck them. Mr. Hoy testified that he was unable to avoid striking the pieces of asphalt with his vehicle due to the traffic. As a result of this incident, claimants' vehicle sustained damage to the front driver's side tire ($102.29) and alignment ($67.41). Thus, claimants' damages total $169.70. Claimants' insurance deductible at the time of the incident was $500.00.

The position of respondent is that it did not have actual or constructive notice of the condition on I-79 between Exits 119 and 120. Robert Suan, Assistant Supervisor for respondent in Harrison County, testified that he is familiar with the area where claimants' incident occurred. Respondent's crews had patched holes in this area with hot mix on November 28, 2007, but he was uncertain whether the patching was performed at the exact location where claimants incident occurred. He further testified that this particular portion of I-79 South was one of the older sections that had never been overlaid. Respondent did not receive complaints regarding the condition of the road until December 9, 2008.

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

an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold respondent liable for road defects of this type, a claimant must prove that respondent had actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman v. Dep't of Highways*, 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that respondent had, at the least, constructive notice of the loose pieces of asphalt which claimants' vehicle struck. The Court finds that the road had continually deteriorated in this area, and respondent had failed to overlay this portion of I-79 in a timely manner. Thus, the Court finds respondent negligent and claimants may make a recovery for the damage to their vehicle.

In accordance with the findings of fact and conclusions of law stated herein above, the Court is of the opinion to and does make an award to the claimants in the amount of $169.70.

Award of $169.70.

OPINION ISSUED FEBRUARY 20, 2009

FREDERICK C. LANGILLE JR.

VS.

DIVISION OF HIGHWAYS

(CC-08-0035)

Claimant appeared *pro se*.

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

PER CURIAM:

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

1. On January 15, 2008, claimant's daughter was traveling on Cedar Crest Drive in Huntington, Cabell County, when his 2006 Kia Spectra struck a hole in the road damaging a tire and rim.

2. Respondent was responsible for the maintenance of Cedar Crest Drive which it failed to maintain properly on the date of this incident.

3. As a result of this incident, claimant's vehicle sustained damage in the amount of $246.49. Claimant's insurance deductible at the time of the incident was $500.00.

4. Respondent agrees that the amount of $246.49 for the damages put forth by the claimant is fair and reasonable.

The Court has reviewed the facts of the claim and finds that respondent was

negligent in its maintenance of Cedar Crest Drive on the date of this incident; that the negligence of respondent was the proximate cause of the damages sustained to claimant's vehicle; and that the amount of the damages agreed to by the parties is fair and reasonable. Thus, claimant may make a recovery for his loss.

Accordingly, the Court is of the opinion to and does make an award in the amount of $246.49.

Award of $246.49.

OPINION ISSUED FEBRUARY 20, 2009

KELLY D. GEORGE
VS.
DIVISION OF HIGHWAYS
(CC-08-0057)

Claimant appeared *pro se*.

Jason C. Workman, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when his 2000 Kia Spectra struck a hole on Pleasant Valley Road in Fairmont, Marion County. Pleasant Valley Road is a road maintained by respondent. The Court is of the opinion to make an award in this claim for the reasons more fully set forth below.

The incident giving rise to this claim occurred between 5:00 p.m. and 6:00 p.m. during the first week of February 2007. The speed limit on Pleasant Valley Road is forty miles per hour. At the time of the incident, claimant was driving from his house on Leonard Avenue in Fairmont towards Valley Lanes to take his son bowling. Claimant was driving on Pleasant Valley Road at approximately forty miles per hour when his vehicle struck a hole that was approximately two feet wide. The Church of Christ was the landmark closest to the hole. Claimant traveled on this road regularly and testified that he was aware that this was a rough road with numerous holes. As a result of this incident, claimant's vehicle sustained damage to its tire in the amount of $73.14.

The position of the respondent is that it did not have actual or constructive notice of the condition on Pleasant Valley Road. Respondent did not present a witness at the hearing.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold respondent liable for road defects of this type, a claimant must prove that respondent had actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman v. Dep't of Highways*, 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that respondent had, at the least, constructive notice of the hole which claimant's vehicle struck and that it presented a hazard to the traveling public. The size of the hole leads the Court to conclude that

respondent had notice of this hazardous condition. Thus, there is sufficient evidence of negligence to base an award. Notwithstanding the negligence of the respondent, the Court is also of the opinion that the claimant was negligent since he was aware of the condition on the road and did not reduce his speed accordingly. In a comparative negligence jurisdiction such as West Virginia, the claimant's negligence may reduce or bar recovery in a claim. Based on the above, the Court finds that the claimant's negligence equals ten-percent (10%) of his loss. Since the negligence of the claimant is not greater than or equal to the negligence of the respondent, claimant may recover ninety-percent (90%) of the loss sustained.

In accordance with the findings of fact and conclusions of law stated herein above, the

Court is of the opinion to and does make an award to the claimant in the amount of $65.83.

Award of $65.83.

OPINION ISSUED FEBRUARY 20, 2009

ROGER B. PILL
VS.
DIVISION OF HIGHWAYS
(CC-08-0068)

Claimant appeared *pro se*.

Jason C. Workman, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when his 2004 Ford Focus struck two holes on Enterprise Road in Fairmont, Marion County. Enterprise Road is a road maintained by respondent. The Court is of the opinion to make an award in this claim for the reasons set forth below.

The incident giving rise to this claim occurred at approximately 7:30 p.m. or 8:00 p.m. on February 1, 2008. Enterprise Road is a paved, two-lane road with yellow center lines and white edge lines. At the time of the incident, claimant was driving from Muriel's Restaurant in Fairmont to his home in Shinnston. Claimant's two sons, who were passengers in the vehicle, suggested a shortcut through Manley Chapel Road. Claimant drove onto Manley Chapel Road and turned onto Enterprise Road. As he was driving on Enterprise Road at approximately thirty-five to forty miles per hour, his vehicle struck a hole located on the right side of the road near the road's white edge line. The hole was approximately five or six inches deep. The second hole was situated a quarter of a mile from the first hole and was located on the left side of the road near the road's yellow center lines. This hole was approximately eight inches deep. The photographs demonstrate that there were numerous holes on the road. Claimant testified that he travels this road approximately once a month. As a result of this incident, claimant's vehicle sustained damage to two tires ($374.69), two rims ($711.65), and its

alignment ($74.19) in the amount of $1,160.53. Since claimant's insurance deductible was $500.00, his recovery is limited to that amount.

The position of the respondent is that it did not have actual or constructive notice of the condition on Enterprise Road. Respondent did not present a witness at the hearing.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold respondent liable for road defects of this type, a claimant must prove that respondent had actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman v. Dep't of Highways*, 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that respondent had, at the least, constructive notice of the holes which claimant's vehicle struck and that the holes presented a hazard to the traveling public. The size of the holes and their location lead the Court to conclude that respondent had notice of this condition. Thus, the Court finds respondent negligent and claimant may make a recovery for the damage to his vehicle.

In accordance with the findings of fact and conclusions of law stated herein above, the

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

Award of $500.00.

OPINION ISSUED FEBRUARY 20, 2009

JOSEPH SERIAN
VS.
DIVISION OF HIGHWAYS
(CC-08-0084)

Claimant appeared *pro se*.

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when his 2001 Buick LeSabre struck a hole as he was driving on Country Club Road in Fairmont, Marion County. Country Club Road is a road maintained by respondent. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred around 12:00 p.m. on February 20, 2008. Country Club Road is a paved, two-lane road at the area of the incident involved in this claim. At the time of the incident, claimant was traveling to visit his sisters at a nursing home. Claimant was driving on Country Club Road near the Say-Boy Steak House when his vehicle struck a hole in the road. The hole was approximately eighteen to twenty-two inches in diameter and six to eight inches deep. Since there was oncoming traffic, he was unable to avoid the hole at this location. As a result of this

incident, claimant's vehicle sustained damage to its front, right tire in the amount of $90.10.

The position of the respondent is that it did not have actual or constructive notice of the condition on Country Club Road. Michael Roncone, Highway Administrator for respondent in Marion County, testified that he is familiar with the area where claimant's incident occurred. He testified that Country Club Road is a two-lane road with yellow center lines and white edge lines. The average daily traffic count on Country Club Road is approximately 4,000 vehicles per day. Mr. Roncone testified that the hole is situated approximately two hundred feet from respondent's office. Respondent has patched the hole with cold mix during the winter and hot mix after April. According to Mr. Roncone, the hole in this particular area is a recurring problem caused by the water line or a spring located underneath the road. Respondent has notified the City of Fairmont that there is a water leakage problem in this area, but the city claims that this is not a city issue. Mr. Roncone testified that respondent's Maintenance Assistant is in the process of working with the city to resolve this problem. Mr. Roncone stated that respondent has been monitoring this hole because Country Club Road is a heavily traveled road.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold respondent liable for road defects of this type, a claimant must prove that respondent had actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman v. Dep't of Highways*, 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that respondent had, at the least, constructive notice of the hole which claimant's vehicle struck and that the hole presented a hazard to the traveling public. The size of the hole and its location lead the Court to conclude that respondent was aware of the condition on Country Club Road. Thus, the Court finds respondent negligent and claimant may make a recovery for the damage to his vehicle.

In accordance with the findings of fact and conclusions of law stated herein above, the Court is of the opinion to and does make an award to the claimant in the amount of $90.10.

Award of $90.10.

OPINION ISSUED FEBRUARY 20, 2009

KATIE BENNETT REED
VS.
DIVISION OF HIGHWAYS
(CC-08-0281)

Claimant's husband, Jed Allen Reed, appeared *pro se*.

Jason C. Workman, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when her 2007 Honda Civic struck a hole as her husband, Jed Allen Reed, was driving near Mile Marker 160 in Monongalia County. I-79 is a road maintained by respondent. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred on March 20, 2008. The speed limit on I-79 is seventy miles per hour. Mr. Reed testified that he was driving on the bridge at between seventy-three and seventy-four miles per hour when the vehicle struck a hole in the road. The hole was located in the right lane of traffic and was approximately one foot long, two feet wide, and six to eight inches deep. The photographs demonstrate that the bridge's rebar was exposed inside the hole. Claimant was unable to maneuver his vehicle into the left lane to avoid the hole due to traffic. Mr. Reed stated that he traveled on this portion of the interstate approximately one week prior to the incident, and he did not recall seeing the hole at that time. As a result of this incident, claimant's vehicle sustained damage to its front tire ($68.90) and rim ($451.09). Thus, claimant's damages total $519.99. Since claimant's insurance deductible at the time of the incident was $500.00, her recovery is limited to that amount.

The position of the respondent is that it did not have actual or constructive notice of the condition on I-79. Respondent did not present a witness at the hearing.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold respondent liable for road defects of this type, a claimant must prove that respondent had actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman v. Dep't of Highways*, 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that respondent had, at the least, constructive notice of the hole which claimant's vehicle struck and that the hole presented a hazard to the traveling public. The location of the hole on a heavily traveled portion of the interstate, where vehicles travel at high speeds, leads the Court to conclude that respondent had constructive notice of the condition on I-79. Thus, the Court finds respondent negligent and claimant may make a recovery for the damage to her vehicle. Notwithstanding the negligence of the respondent, the Court is also of the opinion that the driver was negligent since he was traveling above the posted speed limit at the time of the incident. Also, the driver was talking on his cellular telephone, which could have been a distraction. Based on the above, the Court finds that the driver's negligence equals ten-percent (10%) of claimant's loss. Since the driver's negligence is not greater than or equal to the negligence of the respondent, claimant may recover ninety-percent (90%) of the loss sustained.

In accordance with the findings of fact and conclusions of law stated herein above, the Court is of the opinion to and does make an award to the claimant in the amount of $450.00.

Award of $450.00.

OPINION ISSUED FEBRUARY 20, 2009

DAMON K. GOOCH AND ANGELA H. GOOCH
VS.

DIVISION OF HIGHWAYS
(CC-08-0301)

Claimant Lt. Col. Damon Gooch appeared *pro se* for claimants.
Andrew F. Tarr, Attorney at Law, for respondent.

PER CURIAM:

Claimants brought this action for vehicle damage which occurred when their trailer was damaged in a tunnel incident as they were traveling on County Route 60/14 in Greenbrier County. Lt. Col. Gooch was driving and his wife was a passenger in the vehicle. The tunnel at this location is maintained by respondent. Claimants allege that respondent failed to provide adequate warnings of the clearance inside the tunnel. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

Claimants purchased a 2008 Keystone Raptor Toy Hauler trailer in March of 2008 for $62,000.00. Lt. Col. Gooch testified that he and his wife purchased the trailer to serve as a second home while they were separated geographically due to their military duties. The trailer, which can be hauled on the back of a truck, is 39'1" long, 8'6" wide, and has an exterior height of 13'4". At the time of the incident, claimants were traveling from Louisville, Kentucky, to Ruckersville, Virginia, on I-64 eastbound. Thereafter, Lt. Col. Gooch intended to relocate to Austin, Texas, to complete a fellowship at the Army War College, and he planned to live in the trailer. Lt. Col. Gooch stated that he never owned a trailer prior to this incident, but he had experience hauling trailers.

The incident giving rise to this claim occurred at approximately 7:00 p.m. on June 10, 2008. At the time of the incident, claimants were traveling through West Virginia on I-64 East, and they decided to stop for the night at Pleasant Valley Recreational Vehicle Campgrounds in Greenbrier County. The incident occurred as claimants were trying to find the location of the campgrounds. Claimants took Exit 175 and drove onto County Route 60/14. It was raining, and claimants decided to follow the signs toward Greenbrier State Forest. When they reached the tunnel's southbound entrance, Lt. Col. Gooch observed the "15'-0"" and the "14'-2"" clearance signs that were posted at the top of the tunnel. He testified that he did not recall observing a "9'-2"" clearance sign that preceded the signs positioned at the top of the tunnel. He drove through the tunnel and realized that he had made a wrong turn. He testified that, at the time, he did not notice any damage to the trailer from driving through the tunnel.

Lt. Col. Gooch turned around at a recreational vehicle park and proceeded through the tunnel's northbound entrance. The same warning signs were posted at the top of the tunnel. Since the trailer's height is 13'4", Lt. Col. Gooch thought he could clear the tunnel. He did not observe the "9'-2"" clearance sign. Lt. Col. Gooch could not drive in the center of the tunnel due to a retaining wall that separated the road surface from a stream inside the tunnel. As they proceeded through the tunnel, they heard a crashing and scraping sound.

Claimants stopped the trailer to observe the damage. Although Lt. Col. Gooch did not notice any damage when the trailer went through the tunnel the first time, he stated that he and his wife later discovered light scrapes that extended for the length of the trailer. He testified that most of the damage was caused when the trailer went through the tunnel the second time. Claimants noticed that the roof of their trailer had struck the

top right portion of the tunnel. The evidence of record indicates structural damage resulted from the incident and that the main structural damage occurred on the front, passenger side of the trailer. The trailer also sustained damage to its rubber roof cap, including the sheeting and internal support frame. The invoice indicates that claimants had to replace the trailer's roof, paneling, decking, and interior aluminum radius. As a result of this incident, claimants' trailer sustained damage in the amount of $8,553.51. Claimants did not have insurance coverage for their loss.

Respondent avers that it provided adequate warnings of the tunnel's clearance. Barry Williams, District Traffic Engineer for respondent in District Nine, testified that he is responsible for overseeing signing, pavement markings, and traffic signals in five counties, including Greenbrier County. Mr. Williams further testified that respondent had carefully placed warning signs on both the southbound and northbound entrances to the tunnel. Mr. Williams stated that the clearances vary at different locations inside the tunnel, and respondent installed signs to indicate these variations.

At the tunnel's southbound entrance leading into Greenbrier State Forest, respondent installed the following warnings: 1) a "tunnel" sign with a "one lane" plaque beneath it; 2) a 46-inch, "9'-2"" clearance sign that is situated 280 feet north of the tunnel; 3) two hazard paddles on the sides of the tunnel; 4) a "15'-0"" clearance sign at the apex of the tunnel on the tunnel's face; and 5) a "14'-2"" clearance sign to the left of the "15'-0"" clearance sign on the tunnel's face.

At the tunnel's northbound entrance leading from Greenbrier State Forest to the interstate, respondent placed the following warnings: 1) a "tunnel" sign with a "one lane" plaque beneath it located 700 feet south of the tunnel; 2) a "9'-2"" clearance sign situated 375 feet south of the tunnel; 3) a hazard paddle sign located to the right of the entrance to the tunnel; 4) a "15'-0"" clearance sign at the apex of the tunnel on the tunnel's face; and 5) a "14'-2"" clearance sign positioned to the right of the "15'-0"" clearance sign on the tunnel's face.

Mr. Williams testified that the placement of signs on the tunnel created a unique situation because there are only a handful of similarly constructed tunnels in the State, and respondent had to apply traffic engineering principles to a nonstandard situation. Mr. Williams stated that at one time, all three signs were mounted to the tunnel, but that vehicles had knocked the signs off the face of the tunnel. According to Mr. Williams, respondent did not place the "9'-2"" clearance sign on the tunnel adjacent to the two clearance signs because respondent was concerned that it was too much information to display on the tunnel's face at once.[34]

Steven Cole, Acting District Engineer in District Nine for respondent, testified

[34] When asked why the "9'-2"" clearance sign was not placed on the face of the tunnel, Mr. Williams testified as follows:

A: Because we wanted to emphasize the 9 foot 2. If you just leave it with another sign, even
just one other sign, then you're kind of muddying the waters there and people won't, you know, maybe not pay as much attention to it. If you have a sign out in advance by itself, oversized, highly reflective, that should get people's attention right there and then they would know in advance that, hey, you know, I may not be able to get through this tunnel.

that he is responsible for overseeing all construction, bridge, maintenance, and right of way activities in District Nine. Mr. Cole is familiar with the tunnel on County Route 60/14. He stated that the railroad line is located on the top portion of the tunnel. Hart's Run stream flows through the tunnel, and there is a retaining wall that serves as a barrier between the road and the stream bed. Mr. Cole stated that the retaining wall prevents water from undercutting the roadway surface. Although County Route 60/14 is the primary route into Greenbrier State Forest, Mr. Cole testified that it is a low priority road in terms of its maintenance.

The Court has considered this condition previously in *Putnam Truckload Direct v. Div. of Highways*, 23 Ct. Cl. 97 (1999). In *Putnam*, the driver of a tractor trailer was traveling through this same tunnel on County Route 60/14 in Greenbrier County when the driver's side of the tractor trailer scraped the top of the tunnel, causing damage to the vehicle. *Id.* The Court held that respondent was negligent in its maintenance of the roadway portion of the tunnel but also determined that the driver was twenty-percent (20%) comparatively negligent. *Id*. The Court found that the combination of the height of the tunnel and the creek which flows through the tunnel creates an unreasonable risk for drivers. *Id.* at 99. However, the Court also found that the driver was negligent since the signs indicated that there could be problems ahead for a tractor trailer. *Id.* Further, the driver could have turned around, but he risked the chance that the vehicle would not make the clearance. *Id.*

In the instant case, the Court is of the opinion that the signs installed at the entrances to the tunnel failed to provide adequate warnings to travelers on County Route 60/14. Although respondent placed the essential measurements at various locations before entering the tunnel, the Court finds that the three measurements could be confusing for travelers. In this particular case, claimants focused on the "15'-0"" and "14'-2"" clearance signs installed at the face of the tunnel. However, the sign most essential to warn approaching members of the public is the "9'-2"" clearance sign, and it was not placed at the face of the tunnel. Although respondent placed the sign independently at both entrances to the tunnel, it should have been placed at the face of the tunnel to ensure that travelers would see it and recognize that it represented the tunnel's lowest clearance level. The Court finds that the nine foot two inch measurement was especially significant because there was a retaining wall inside the tunnel that forced drivers to travel closer to the side of the tunnel. Thus, there is sufficient evidence of negligence upon which to base an award.

Notwithstanding the negligence of the respondent, the Court is also of the opinion that claimants were comparatively negligent in failing to observe the 46-inch, "9'-2"" signs that were placed at both entrances to the tunnel. The Court finds that there were posted warnings indicating that there could be problems ahead for a driver of a larger vehicle. In a comparative negligence jurisdiction such as West Virginia, the claimants' negligence may reduce or bar recovery in a claim. Based on the above, the Court finds that the claimants' negligence equals twenty-percent (20%) of their loss. Since the negligence of the claimants is not greater than or equal to the negligence of the respondent, claimants may recover eighty-percent (80%) of the loss sustained.

In accordance with the findings of fact and conclusions of law stated herein above, the Court is of the opinion to and does make an award to the claimants in the amount of $6,842.81.

Award of $6,842.81.

OPINION ISSUED FEBRUARY 20, 2009

DEBRA A. DANGERFIELD
VS.
DIVISION OF PERSONNEL
(CC-08-0463)

Claimant appeared *pro se*.

Ronald R. Brown, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks to recover $600.00 for teaching a workshop, "Writing for Results," on June 5, 2008, and June 6, 2008. Since the invoice for the workshop was not submitted in time to be processed during the fiscal year, claimant did not receive payment.

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

In view of the foregoing, the Court is of the opinion to and does make an award to claimant in the amount of $600.00.

Award of $600.00.

OPINION ISSUED FEBRUARY 20, 2009

KONICA MINOLTA BUSINESS SOLUTIONS
VS.
INSURANCE COMMISSION
(CC-08-0472)

Claimant appeared *pro se*.

Ronald R. Brown, Assistant Attorney General, for respondent.

PER CURIAM:

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer. Claimant seeks to recover from respondent the cost for six copy machines in the amount of $13,885.21.

In its Answer, respondent admits the validity of the claim in the amount of

$4,042.12, rather than the amount of $13,885.21. Respondent states that only $4,042.12 of the claimed $13,885.21 in charges include invoices incurred during a period prior to the termination of the former Workers' Compensation Commission and the transfer of employees and certain assets to the Insurance Commission and charges for machines that were transferred to BrickStreet Insurance from the former Workers' Compensation Commission. These charges are not the responsibility of respondent. Claimant has agreed that the amount owed by respondent is $4,042.12.

In view of the foregoing, the Court is of the opinion to and does make an award to claimant in the amount of $4,042.12.

Award of $4,042.12.

OPINION ISSUED FEBRUARY 20, 2009

CAMBRIDGE CENTER LLC
VS.
DIVISION OF TOURISM
(CC-08-0511)

Wendel B. Turner, Attorney at Law, for claimant.

Ronald R. Brown, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks to recover $8,013.05 for an invoice that was not submitted by the required due date for reimbursement due to a billing error. The amount represents that proportion of the increase costs of utility and custodial services in excess of the base year for the space occupied by the tenant.

In its Amended Answer, respondent admits the validity of the claim in the amount of $7,638.08, and states that there were sufficient funds expired in that appropriate fiscal year from which the invoice could have been paid. Claimant has agreed to accept payment in the amount of $7,638.08.

In view of the foregoing, the Court is of the opinion to and does make an award to claimant in the amount of $7,638.08.

Award of $7,638.08.

OPINION ISSUED FEBRUARY 20, 2009

CAMBRIDGE CENTER LLC
VS.

DIVISION OF TOURISM
(CC-08-0514)

Wendel B. Turner, Attorney at Law, for claimant.

Ronald R. Brown, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks to recover $5,930.83 for an invoice that was not submitted by the required due date for reimbursement due to a billing error. The amount represents the proportion of the increase costs of utility and custodial services in excess of the base year for the space occupied by the tenant.

In its Amended Answer, respondent admits the validity of the claim in the amount of $4,834.34. Respondent further states that there were sufficient funds at the close of the fiscal year in question from which the invoice could have been paid. Claimant has agreed to the amount of $4,834.34.

In view of the foregoing, the Court is of the opinion to and does make an award to claimant in the amount of $4,834.34.

Award of $4,834.34.

OPINION ISSUED FEBRUARY 20, 2009

JAMES C. WEIMER
VS.
PUBLIC SERVICE COMMISSION
(CC-09-0002)

Claimant appeared *pro se*.

Ronald R. Brown, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks to recover $145.39 from respondent for travel expenses. Since claimant submitted the expense report after the cut off date for submission, he was not reimbursed for the expenditures.

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

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

to claimant in the amount of $145.39.

Award of $145.39.

OPINION ISSUED FEBRUARY 20, 2009

JAIME NAVARRETE ORTIZ
VS.
REGIONAL JAIL AND CORRECTIONAL
FACILITY AUTHORITY
(CC-09-0020)

Claimant appeared *pro se*.

Ronald R. Brown, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant, an inmate at the Tygart Valley Regional Jail, seeks $1,200.00 for a necklace that was entrusted to respondent but has been misplaced.

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

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

Accordingly, the Court makes an award to the claimant herein in the amount of $1,200.00.

Award of $1,200.00.

OPINION ISSUED MAY 14, 2009

ROY J. MCDANIEL
VS.
DEPARTMENT OF ADMINISTRATION
(CC-04-0263)

Claimants appeared *pro se*.

James A. Kirby, Attorney at Law, for respondent.

PER CURIAM:

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

1. On or about March 27, 2004, claimant purchased what he believed was a 1987 International dump truck from respondent for Four Thousand Dollars ($4,000.00) at a public auction under an "as-is" condition.

2. On or about March 27, 2004, claimant discovered said International dump truck was, in fact, a 1986 model year and not a 1987 model year based upon the issued Certificate of Title to the International dump truck.

3. On or about May 12, 2004, claimant filed a claim against respondent in the West Virginia Court of Claims seeking to recover monetary damages in the amount of Seven Thousand, One Hundred Seventy-Two Dollars ($7,172.00).

4. Claimant is currently in possession and he has used said 1986 International dump truck for over four (4) years.

5. The parties hereby agree that a discrepancy, or inaccuracy, existed relative to the model year of the International dump truck during presentation of said dump truck at the public auction and upon the bill of sale to claimant for the purchase of said dump truck both in relation to the issued Certificate of Title.

6. The parties also hereby agree that due to the discrepancy, or inaccuracy, in the description of said dump truck, respondent shall pay claimant the amount of Two Hundred and Fifty Dollars ($250.00) for a good faith settlement of all claims and demands of claimant in this matter and for the withdrawal and dismissal of this claim.

Based on the foregoing facts, the State of West Virginia, Department of Administration, Purchasing Division/Surplus Property has a moral obligation to issue payment to claimant in the amount of Two Hundred and Fifty Dollars ($250.00) from Fund #2281 Surplus Property Special Revenue Account.

The Court concludes that $250.00 is a fair and reasonable settlement of this claim.

Award of $250.00.

OPINION ISSUED MAY 14, 2009

TERRI HASH
VS.
DIVISION OF HIGHWAYS
(CC-07-0003)

Claimant appeared *pro se*.

Jason C. Workman, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when her 2003 Chevrolet Silverado truck struck a protruding concrete curb on Highland Drive in St. Albans, Kanawha County. The Court is of the opinion to deny this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred on December 5, 2006. At the time of the incident, claimant testified that she was driving uphill on Highland Drive. As she was driving around a curve at approximately twenty-five miles per hour, she noticed an oncoming vehicle. She then maneuvered her vehicle closer to her right side of the road to avoid the oncoming vehicle when her vehicle's rear tire struck a protruding concrete curb. Claimant stated that she travels this road multiple times a day, but she did not notice the condition of the curb prior to this incident. As a result, claimant's vehicle sustained damage to its rear tire in the amount of $298.87.

The position of the respondent is that it did not have actual or constructive notice of the condition on Highland Drive at the site of claimant's accident for the date in question. Randy Hammond, Crew Leader for respondent in Kanawha County at the time of the incident, testified that respondent is responsible for maintaining only the travel portion of the road, and the city of St. Albans is responsible for maintaining the curbs and sidewalks in this area. Respondent did not receive complaints regarding the condition of the curb prior to this incident.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold respondent liable for road defects of this type, a claimant must prove that respondent had actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman v. Dep't of Highways*, 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that respondent did not have actual or constructive notice of the condition on Highland Drive. The Court finds that respondent is not responsible for maintaining the curbs and sidewalks in the city of St. Albans and it was unaware of any incidents involving the condition of the curb prior to this claim. Thus, there is insufficient evidence of negligence on the part of respondent upon which to base an award.

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

Claim disallowed.

OPINION ISSUED MAY 14, 2009

ROBERTA CLAYTON
VS.
DIVISION OF HIGHWAYS
(CC-08-0083)

Claimant appeared *pro se*.

Jason C. Workman, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when the edge of the bank on County Route 10 gave way, causing her 1995 Ford Explorer Limited to roll over the hill. County Route 10 is located in Marion County. The Court is of the opinion to deny this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred on February 5, 2008. County Route 10 is a gravel road, and the travel portion of the road is approximately fourteen to eighteen feet wide. At the time of the incident, claimant was driving in the rain from her home towards Highland Church Road. Claimant was driving up the hill on County Route 10 when a deer jumped out onto the road, and she swerved her vehicle to the edge of the right side of the road to avoid the deer. She indicated that gravel had recently been placed on the road. When she drove to the edge of the road, the driver's side of the vehicle was located on the gravel portion of the road, but the passenger's side of the vehicle was situated on an incline where the hill side was located. Since there was approximately one and a half feet of mud on the edge of the bank where the passenger's side tires were located, she put her vehicle into four-wheel drive. However, the vehicle was stuck in the mud. She exited her vehicle and went to the top of the hill to try to get cellular phone service to call her ex-husband for help. As she was away from her vehicle, the mud gave way and her vehicle rolled on its side. Claimant testified that she travels this road approximately four or five times per year. Her vehicle was totaled in this incident, and the value of the vehicle was $4,900.00.

The position of the respondent is that it did not have actual or constructive notice of the condition on County Route 10 at the site of claimant's accident for the date in question. Michael Roncone, Highway Administrator for respondent in Marion County, testified that he is familiar with County Route 10 and stated that it is a low priority road in terms of its maintenance. Mr. Roncone testified that he did not have knowledge that fresh gravel was placed on this road before the time of this incident. Mr. Roncone maintains that he had not received any complaints regarding the condition of County Route 10 prior to February 5, 2008.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold respondent liable for road defects of this type, a claimant must prove that respondent had actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman v. Dep't of Highways*, 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that respondent did not have actual or constructive notice of the condition on the edge of the road prior to this incident. The Court finds that there is insufficient evidence of negligence on the part of respondent upon which to base an award.

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

Claim disallowed.

OPINION ISSUED MAY 14, 2009

DIANA L. SUMMERS

VS.
DIVISION OF HIGHWAYS
(CC-08-0108)

Claimant appeared *pro se*.

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when her 2004 Chevrolet Monte Carlo struck rocks on County Route 36 in Clarksburg, Harrison County. County Route 36 is a road maintained by respondent. The Court is of the opinion to deny this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred on February 29, 2008, at between 1:00 p.m. and 3:00 p.m. County Route 36 is a two-lane road with a center line and no edge lines. There is a rock-cut high wall located along the side of the road. At the time of the incident, it was raining and claimant was traveling from her home on Laurel Valley Road to the supermarket located on Route 19. Claimant was driving on County Route 36 at approximately thirty to thirty-five miles per hour when rocks rolled off the top of the hill wall and onto the road, causing her vehicle to strike them. Claimant was unable to see the rocks until they were located in front of her vehicle. After the incident, claimant removed at least one of the rocks from the road. Claimant testified that there is no barrier or "falling rock" warning signs in this area. As a result of this incident, claimant's vehicle sustained damage in the amount of $1,216.24. Claimant's insurance deductible is $1,000.00.

The position of the respondent is that it did not have notice of the rocks on County Route 36 prior to the incident in question. David Cava, Highway Administrator for respondent in Harrison County, testified that this is not an area that is known for rock falls. Mr. Cava stated that County Route 36 is a secondary route, and the average daily traffic count is approximately 300 to 500 vehicles per day. Respondent maintains that it did not receive complaints regarding rock falls at this particular location before this incident occurred.

It is a well-established principle that the State is neither an insurer nor a guarantor of the safety of motorists upon its highways. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). To hold respondent liable, claimant must establish by a preponderance of the evidence that respondent had actual or constructive notice of the road defect at issue and a reasonable amount of time to take corrective action. *Chapman v. Dep't of Highways*, 16 Ct. Cl. 103 (1986). In rock fall claims, this Court has held that the unexplained falling of a rock onto a highway without a positive showing that respondent knew or should have known of a dangerous condition posing injury to person or property is insufficient to justify an award. *Coburn v. Dep't of Highways*, 16 Ct. Cl. 68 (1986).

In the present claim, claimant has not established that respondent failed to take adequate measures to protect the safety of the traveling public on County Route 36 in Harrison County. Mr. Cava testified that County Route 36 is not an area known for rock falls. The Court cannot hold respondent liable for the spontaneous falling of a rock. *See Jack v. Division of Highways*, CC-06-0111 (1999). While the Court is sympathetic to claimant's plight, the fact remains that there is no evidence of negligence on the part of

respondent upon which to base an award.

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

Claim disallowed.

OPINION ISSUED MAY 14, 2009

WALLACE DAVIS
VS.
REGIONAL JAIL AND CORRECTIONAL
FACILITY AUTHORITY
(CC-08-0406)

Claimant appeared *pro se*.

Ronald R. Brown, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant, a former inmate at the Eastern Regional Jail, seeks to recover $62.00 for an identification wallet that he alleges was misplaced by respondent. Claimant had the wallet when he was booked at the Eastern Regional Jail on March 26, 2008, but he did not have the wallet when he was released on July 8, 2008.

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

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

Accordingly, the Court makes an award to the claimant herein in the amount of $62.00.

Award of $62.00.

OPINION ISSUED MAY 14, 2009

LARRY EDWARD HARMON
VS.
REGIONAL JAIL AND CORRECTIONAL

FACILITY AUTHORITY
(CC-08-0418)

Claimant appeared *pro se*.

Ronald R. Brown, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant, a former inmate at the Southern Regional Jail, seeks $426.96 for items of personal property that were entrusted to respondent. When claimant was preparing to leave the jail on July 31, 2008, his ankle boots, shorts, shirt, hat, wallet, identification, G.E.D. card, Walmart gift card, Zippo lighter, socks, and boxers were missing.

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

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

Accordingly, the Court makes an award to the claimant herein in the amount of $426.96.

Award of $426.96.

OPINION ISSUED MAY 14, 2009

SAMMY RAY COPLEY
VS.
REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY
(CC-08-0443)

Claimant appeared *pro se*.

Ronald R. Brown, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant, an inmate at the Southwestern Regional Jail in Holden, Logan County, seeks $39.16 for items of personal property that were entrusted to respondent. When claimant sent his clothes to the jail’s laundry facility, his clothes were misplaced.

Claimant seeks reimbursement for three pairs of underwear ($4.36 each), three undershirts ($4.36 each), one thermal top ($6.50), and one thermal bottom ($6.50). In its Answer, respondent admits the validity of the claim and that the amount is fair and reasonable.

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

Accordingly, the Court makes an award to the claimant herein in the amount of $39.16.

Award of $39.16.

OPINION ISSUED MAY 14, 2009

FRANK MCKEIVER
VS.
REGIONAL JAIL AND CORRECTIONAL
FACILITY AUTHORITY
(CC-09-0070)

Claimant appeared *pro se*.

Ronald R. Brown, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant, a former inmate at the Tygart Valley Regional Jail, seeks $199.00 plus tax for his diamond earring that was missing when he was released from the facility on February 2, 2009

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

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

Accordingly, the Court makes an award to the claimant herein in the amount of $210.94.

Award of $210.94.

OPINION ISSUED MAY 14, 2009

DONALD EAKLE
VS.
DIVISION OF CORRECTIONS
(CC-09-0087)

Claimant appeared *pro se*.

Charles P. Houdyschell Jr., Senior Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant, an inmate, seeks to recover $127.05 in personal property that he alleges was misplaced by respondent. Claimant's personal property, including one pair of Wolverine boots and one pair of Nike tennis shoes, was accounted for and secured at Stevens Correctional Center before his transfer to Slayton Work Camp located at Mount Olive Correctional Complex. On September 26, 2008, claimant arrived at Mount Olive Correctional Complex where his property was inventoried and held for seventy-two hours. On October 1, 2008, when claimant went to retrieve his property, his boots and shoes were missing. In its Answer, respondent admits the validity of the claim and the amount.

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

Accordingly, the Court makes an award to the claimant herein in the amount of $127.05.

Award of $127.05.

OPINION ISSUED MAY 14, 2009

ROBERT GLADHILL
VS.
REGIONAL JAIL AND CORRECTIONAL
FACILITY AUTHORITY
(CC-09-0093)

Claimant appeared *pro se*.

Ronald R. Brown, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant, a former inmate at the Eastern Regional Jail, seeks to recover $129.99 for a pair of "Rocky" boots and $55.00 plus tax for a Harley Davidson silk shirt. Claimant alleges that these items were not returned to him when he was discharged from the facility.

In its Answer, respondent admits the validity of the claim in the amount of $129.99. Respondent denies the amount of $55.00 plus tax for the shirt. According to the claimant's property inventory sheet, two shirts were released to him. The Court is aware that respondent does not have a fiscal method for paying claims of this nature; therefore, the claim has been submitted to this Court for determination. Claimant has agreed to accept payment in the amount of $129.99.

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

Accordingly, the Court makes an award to the claimant herein in the amount of $129.99.

Award of $129.99.

OPINION ISSUED MAY 14, 2009

ASTAR ABATEMENT INC.
VS.
DIVISION OF CORRECTIONS
(CC-09-0114)

Claimant appeared *pro se*.

Charles P. Houdyschell Jr., Senior Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks to recover $20,411.77 for additional services that claimant provided during an asbestos abatement project (COR61347) for respondent. Although the additional work was authorized by respondent, since it was deemed essential in conjunction with the original scope once the project was initiated, the Department of Administration has final authority on approval/disapproval. Respondent was unable to obtain the approval of the Department of Administration's Purchasing Division for these additional services in a timely manner.

In its Answer, respondent admits the validity of the claim as well as the amount, and states that there were sufficient funds expired in that appropriate fiscal year from which the invoice could have been paid. However, respondent was unable to "get the change order through the Purchasing Division for the additional services that were

completed" in a timely manner

In view of the foregoing, the Court is of the opinion to and does make an award to claimant in the amount of $20,411.77.

Award of $20,411.77.

OPINION ISSUED MAY 14, 2009

JO ANNE COOKE
VS.
LIBRARY COMMISSION
(CC-09-0141)

Claimant appeared *pro se*.

Ronald R. Brown, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks to recover $895.63 from respondent for an error in the calculation of her increment ($22.87) and annual leave pay ($872.76). Claimant discovered the miscalculation when she reviewed the Post Audit Report of the Library Commission.

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

In view of the foregoing, the Court is of the opinion to and does make an award to claimant in the amount of $895.63.

Award of $895.63.

OPINION ISSUED MAY 14, 2009

ROY J. MCDANIEL
VS.
DEPARTMENT OF ADMINISTRATION
(CC-04-0263)

Claimants appeared *pro se*.

James A. Kirby, Attorney at Law, for respondent.

PER CURIAM:

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

1. On or about March 27, 2004, claimant purchased what he believed was a 1987 International dump truck from respondent for Four Thousand Dollars ($4,000.00) at a public auction under an "as-is" condition.

2. On or about March 27, 2004, claimant discovered said International dump truck was, in fact, a 1986 model year and not a 1987 model year based upon the issued Certificate of Title to the International dump truck.

3. On or about May 12, 2004, claimant filed a claim against respondent in the West Virginia Court of Claims seeking to recover monetary damages in the amount of Seven Thousand, One Hundred Seventy-Two Dollars ($7,172.00).

4. Claimant is currently in possession and he has used said 1986 International dump truck for over four (4) years.

5. The parties hereby agree that a discrepancy, or inaccuracy, existed relative to the model year of the International dump truck during presentation of said dump truck at the public auction and upon the bill of sale to claimant for the purchase of said dump truck both in relation to the issued Certificate of Title.

6. The parties also hereby agree that due to the discrepancy, or inaccuracy, in the description of said dump truck, respondent shall pay claimant the amount of Two Hundred and Fifty Dollars ($250.00) for a good faith settlement of all claims and demands of claimant in this matter and for the withdrawal and dismissal of this claim.

Based on the foregoing facts, the State of West Virginia, Department of Administration, Purchasing Division/Surplus Property has a moral obligation to issue payment to claimant in the amount of Two Hundred and Fifty Dollars ($250.00) from Fund #2281 Surplus Property Special Revenue Account.

The Court concludes that $250.00 is a fair and reasonable settlement of this claim.

Award of $250.00.

OPINION ISSUED MAY 14, 2009

TERRI HASH
VS.
DIVISION OF HIGHWAYS
(CC-07-0003)

Claimant appeared *pro se*.

Jason C. Workman, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when her 2003 Chevrolet Silverado truck struck a protruding concrete curb on Highland Drive in St. Albans, Kanawha County. The Court is of the opinion to deny this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred on December 5, 2006. At the time of the incident, claimant testified that she was driving uphill on Highland Drive. As she was driving around a curve at approximately twenty-five miles per hour, she noticed an oncoming vehicle. She then maneuvered her vehicle closer to her right side of the road to avoid the oncoming vehicle when her vehicle's rear tire struck a protruding concrete curb. Claimant stated that she travels this road multiple times a day, but she did not notice the condition of the curb prior to this incident. As a result, claimant's vehicle sustained damage to its rear tire in the amount of $298.87.

The position of the respondent is that it did not have actual or constructive notice of the condition on Highland Drive at the site of claimant's accident for the date in question. Randy Hammond, Crew Leader for respondent in Kanawha County at the time of the incident, testified that respondent is responsible for maintaining only the travel portion of the road, and the city of St. Albans is responsible for maintaining the curbs and sidewalks in this area. Respondent did not receive complaints regarding the condition of the curb prior to this incident.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold respondent liable for road defects of this type, a claimant must prove that respondent had actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman v. Dep't of Highways*, 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that respondent did not have actual or constructive notice of the condition on Highland Drive. The Court finds that respondent is not responsible for maintaining the curbs and sidewalks in the city of St. Albans and it was unaware of any incidents involving the condition of the curb prior to this claim. Thus, there is insufficient evidence of negligence on the part of respondent upon which to base an award.

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

Claim disallowed.

OPINION ISSUED MAY 14, 2009

ROBERTA CLAYTON
VS.
DIVISION OF HIGHWAYS
(CC-08-0083)

Claimant appeared *pro se*.
Jason C. Workman, Attorney at Law, for respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when the edge of the bank on County Route 10 gave way, causing her 1995 Ford Explorer Limited to roll over the hill. County Route 10 is located in Marion County. The Court is of the opinion to deny this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred on February 5, 2008. County Route 10 is a gravel road, and the travel portion of the road is approximately fourteen to eighteen feet wide. At the time of the incident, claimant was driving in the rain from her home towards Highland Church Road. Claimant was driving up the hill on County Route 10 when a deer jumped out onto the road, and she swerved her vehicle to the edge of the right side of the road to avoid the deer. She indicated that gravel had recently been placed on the road. When she drove to the edge of the road, the driver's side of the vehicle was located on the gravel portion of the road, but the passenger's side of the vehicle was situated on an incline where the hill side was located. Since there was approximately one and a half feet of mud on the edge of the bank where the passenger's side tires were located, she put her vehicle into four-wheel drive. However, the vehicle was stuck in the mud. She exited her vehicle and went to the top of the hill to try to get cellular phone service to call her ex-husband for help. As she was away from her vehicle, the mud gave way and her vehicle rolled on its side. Claimant testified that she travels this road approximately four or five times per year. Her vehicle was totaled in this incident, and the value of the vehicle was $4,900.00.

The position of the respondent is that it did not have actual or constructive notice of the condition on County Route 10 at the site of claimant's accident for the date in question. Michael Roncone, Highway Administrator for respondent in Marion County, testified that he is familiar with County Route 10 and stated that it is a low priority road in terms of its maintenance. Mr. Roncone testified that he did not have knowledge that fresh gravel was placed on this road before the time of this incident. Mr. Roncone maintains that he had not received any complaints regarding the condition of County Route 10 prior to February 5, 2008.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). In order to hold respondent liable for road defects of this type, a claimant must prove that respondent had actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman v. Dep't of Highways*, 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that respondent did not have actual or constructive notice of the condition on the edge of the road prior to this incident. The Court finds that there is insufficient evidence of negligence on the part of respondent upon which to base an award.

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

Claim disallowed.

OPINION ISSUED MAY 14, 2009

DIANA L. SUMMERS

VS.
DIVISION OF HIGHWAYS
(CC-08-0108)

Claimant appeared *pro se*.

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when her 2004 Chevrolet Monte Carlo struck rocks on County Route 36 in Clarksburg, Harrison County. County Route 36 is a road maintained by respondent. The Court is of the opinion to deny this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred on February 29, 2008, at between 1:00 p.m. and 3:00 p.m. County Route 36 is a two-lane road with a center line and no edge lines. There is a rock-cut high wall located along the side of the road. At the time of the incident, it was raining and claimant was traveling from her home on Laurel Valley Road to the supermarket located on Route 19. Claimant was driving on County Route 36 at approximately thirty to thirty-five miles per hour when rocks rolled off the top of the hill wall and onto the road, causing her vehicle to strike them. Claimant was unable to see the rocks until they were located in front of her vehicle. After the incident, claimant removed at least one of the rocks from the road. Claimant testified that there is no barrier or "falling rock" warning signs in this area. As a result of this incident, claimant's vehicle sustained damage in the amount of $1,216.24. Claimant's insurance deductible is $1,000.00.

The position of the respondent is that it did not have notice of the rocks on County Route 36 prior to the incident in question. David Cava, Highway Administrator for respondent in Harrison County, testified that this is not an area that is known for rock falls. Mr. Cava stated that County Route 36 is a secondary route, and the average daily traffic count is approximately 300 to 500 vehicles per day. Respondent maintains that it did not receive complaints regarding rock falls at this particular location before this incident occurred.

It is a well-established principle that the State is neither an insurer nor a guarantor of the safety of motorists upon its highways. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). To hold respondent liable, claimant must establish by a preponderance of the evidence that respondent had actual or constructive notice of the road defect at issue and a reasonable amount of time to take corrective action. *Chapman v. Dep't of Highways*, 16 Ct. Cl. 103 (1986). In rock fall claims, this Court has held that the unexplained falling of a rock onto a highway without a positive showing that respondent knew or should have known of a dangerous condition posing injury to person or property is insufficient to justify an award. *Coburn v. Dep't of Highways*, 16 Ct. Cl. 68 (1986).

In the present claim, claimant has not established that respondent failed to take adequate measures to protect the safety of the traveling public on County Route 36 in Harrison County. Mr. Cava testified that County Route 36 is not an area known for rock falls. The Court cannot hold respondent liable for the spontaneous falling of a rock. *See Jack v. Division of Highways*, CC-06-0111 (1999). While the Court is sympathetic to claimant's plight, the fact remains that there is no evidence of negligence on the part of

respondent upon which to base an award.

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

Claim disallowed.

OPINION ISSUED MAY 14, 2009

WALLACE DAVIS
VS.
REGIONAL JAIL AND CORRECTIONAL
FACILITY AUTHORITY
(CC-08-0406)

Claimant appeared *pro se*.

Ronald R. Brown, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant, a former inmate at the Eastern Regional Jail, seeks to recover $62.00 for an identification wallet that he alleges was misplaced by respondent. Claimant had the wallet when he was booked at the Eastern Regional Jail on March 26, 2008, but he did not have the wallet when he was released on July 8, 2008.

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

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

Accordingly, the Court makes an award to the claimant herein in the amount of $62.00.

Award of $62.00.

OPINION ISSUED MAY 14, 2009

LARRY EDWARD HARMON
VS.
REGIONAL JAIL AND CORRECTIONAL

FACILITY AUTHORITY
(CC-08-0418)

Claimant appeared *pro se*.

Ronald R. Brown, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant, a former inmate at the Southern Regional Jail, seeks $426.96 for items of personal property that were entrusted to respondent. When claimant was preparing to leave the jail on July 31, 2008, his ankle boots, shorts, shirt, hat, wallet, identification, G.E.D. card, Walmart gift card, Zippo lighter, socks, and boxers were missing.

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

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

Accordingly, the Court makes an award to the claimant herein in the amount of $426.96.

Award of $426.96.

OPINION ISSUED MAY 14, 2009

SAMMY RAY COPLEY
VS.
REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY
(CC-08-0443)

Claimant appeared *pro se*.

Ronald R. Brown, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant, an inmate at the Southwestern Regional Jail in Holden, Logan County, seeks $39.16 for items of personal property that were entrusted to respondent. When claimant sent his clothes to the jail's laundry facility, his clothes were misplaced. Claimant seeks reimbursement for three pairs of underwear ($4.36 each), three

undershirts ($4.36 each), one thermal top ($6.50), and one thermal bottom ($6.50). In its Answer, respondent admits the validity of the claim and that the amount is fair and reasonable.

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

Accordingly, the Court makes an award to the claimant herein in the amount of $39.16.

Award of $39.16.

OPINION ISSUED MAY 14, 2009

FRANK MCKEIVER
VS.
REGIONAL JAIL AND CORRECTIONAL
FACILITY AUTHORITY
(CC-09-0070)

Claimant appeared *pro se*.

Ronald R. Brown, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant, a former inmate at the Tygart Valley Regional Jail, seeks $199.00 plus tax for his diamond earring that was missing when he was released from the facility on February 2, 2009

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

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

Accordingly, the Court makes an award to the claimant herein in the amount of $210.94.

Award of $210.94.

OPINION ISSUED MAY 14, 2009

DONALD EAKLE
VS.
DIVISION OF CORRECTIONS
(CC-09-0087)

Claimant appeared *pro se*.

Charles P. Houdyschell Jr., Senior Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant, an inmate, seeks to recover $127.05 in personal property that he alleges was misplaced by respondent. Claimant's personal property, including one pair of Wolverine boots and one pair of Nike tennis shoes, was accounted for and secured at Stevens Correctional Center before his transfer to Slayton Work Camp located at Mount Olive Correctional Complex. On September 26, 2008, claimant arrived at Mount Olive Correctional Complex where his property was inventoried and held for seventy-two hours. On October 1, 2008, when claimant went to retrieve his property, his boots and shoes were missing. In its Answer, respondent admits the validity of the claim and the amount.

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

Accordingly, the Court makes an award to the claimant herein in the amount of $127.05.

Award of $127.05.

OPINION ISSUED MAY 14, 2009

ASTAR ABATEMENT INC.
VS.
DIVISION OF CORRECTIONS
(CC-09-0114)

Claimant appeared *pro se*.

Charles P. Houdyschell Jr., Senior Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks to recover $20,411.77 for additional services that claimant

provided during an asbestos abatement project (COR61347) for respondent. Although the additional work was authorized by respondent, since it was deemed essential in conjunction with the original scope once the project was initiated, the Department of Administration has final authority on approval/disapproval. Respondent was unable to obtain the approval of the Department of Administration's Purchasing Division for these additional services in a timely manner.

In its Answer, respondent admits the validity of the claim as well as the amount, and states that there were sufficient funds expired in that appropriate fiscal year from which the invoice could have been paid. However, respondent was unable to "get the change order through the Purchasing Division for the additional services that were completed" in a timely manner

In view of the foregoing, the Court is of the opinion to and does make an award to claimant in the amount of $20,411.77.

Award of $20,411.77.

OPINION ISSUED MAY 14, 2009

JO ANNE COOKE
VS.
LIBRARY COMMISSION
(CC-09-0141)

Claimant appeared *pro se*.

Ronald R. Brown, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant seeks to recover $895.63 from respondent for an error in the calculation of her increment ($22.87) and annual leave pay ($872.76). Claimant discovered the miscalculation when she reviewed the Post Audit Report of the Library Commission.

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

In view of the foregoing, the Court is of the opinion to and does make an award to claimant in the amount of $895.63.

Award of $895.63.

OPINION ISSUED MAY 14, 2009

ROBERT GLADHILL
VS.
REGIONAL JAIL AND CORRECTIONAL
FACILITY AUTHORITY
(CC-09-0093)

Claimant appeared *pro se*.

Ronald R. Brown, Assistant Attorney General, for respondent.

PER CURIAM:

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

Claimant, a former inmate at the Eastern Regional Jail, seeks to recover $129.99 for a pair of "Rocky" boots and $55.00 plus tax for a Harley Davidson silk shirt. Claimant alleges that these items were not returned to him when he was discharged from the facility.

In its Answer, respondent admits the validity of the claim in the amount of $129.99. Respondent denies the amount of $55.00 plus tax for the shirt. According to the claimant's property inventory sheet, two shirts were released to him. The Court is aware that respondent does not have a fiscal method for paying claims of this nature; therefore, the claim has been submitted to this Court for determination. Claimant has agreed to accept payment in the amount of $129.99.

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

Accordingly, the Court makes an award to the claimant herein in the amount of $129.99.

Award of $129.99.

REFERENCES

Page

I. COURT OF CLAIMS 273

I. COURT OF CLAIMS

- **BERMS – See also Comparative Negligence and Negligence**
- **BRIDGES**
- **CONTRACTS**
- **COMPARATIVE NEGLIGENCE – See also Berms; Falling Rocks and Rocks; Negligence & Streets and Highways**
- **DAMAGES**
- **DRAINS and SEWERS**
- **FALLING ROCKS AND ROCKS – See also Comparative Negligence and Negligence**
- **LEASES**
- **MOTOR VEHICLES**
- **NEGLIGENCE – See also Berms; Falling Rocks and Rocks & Streets and Highways**
- **NOTICE**
- **PEDESTRIANS**
- **PRISONS AND PRISONERS**
- **PUBLIC EMPLOYEES**
- **STATE AGENCIES**
- **STREETS & HIGHWAYS – See also Comparative Negligence and Negligence**
- **TREES and TIMBER**
- **UNJUST CONVICTION**
- **VENDOR**
- **VENDOR – Denied because of insufficient fundsW. VA. UNIVERSITY**

The following is a compilation of head notes representing decisions from July 1, 2007 to June 30, 2009. Due to time and space constraints, the Court has decided to exclude certain decisions, most of which involve vendors, typical road hazard claims and expense reimbursements.

BERMS – See also Comparative Negligence and Negligence

BUCKBEE Individually and as Administratix of the Estate of JULIA CAROLYN STRICKLAND, deceased VS. DIVISION OF HIGHWAYS (CC-05-208)

The parties stipulated that on or about July 7, 2001, West Virginia Paving Inc., began paving and berm work on a portion of W.Va. Route 39, near the Gauley Bridge; the paving job left holes along the edge of the road where the grates were located; on July 24, 2000, Julia Carolyn Strickland was traveling east on W.Va. Route 39 near Gauley Bridge when her vehicle struck the drainage grate which is located on the roadway; Julia Carolyn Strickland lost control of her vehicle and it crashed into a truck traveling in the opposite direction; she was killed as a result of this collision; the Court finds that $500,000.00 is a fair and reasonable amount to settle this claim. . . . . p. 94

COOK VS. DIVISION OF HIGHWAYS (CC-07-315)

Claimants brought this action for vehicle damage which occurred when their 2007 Honda Accord struck a hole on the white edge line while claimant Russell G. Cook was traveling on County Route 16/14 in Midway, Raleigh County. The Court opines that respondent had, at the least, constructive notice of the hole and that it presented a hazard to the traveling public. Award of $250.00. . . . . p. 111

EASLEY VS. DIVISION OF HIGHWAYS (CC-02-205)

Claimant brought this action for personal injuries which occurred when she stepped into a hole in the berm of U.S. Route 52 in Kimball, McDowell County. In the instant case, the evidence established that the respondent did not have actual or constructive notice of a hole on U.S. Route 52. *See Chapman v. Dep't of Highways*, 16 Ct. Cl. 103 (1986). Claim disallowed. $250.00. . . . . p. 48

HANDLEY VS. DIVISION OF HIGHWAYS (CC-08-0069)

Claimant brought this action for vehicle damage which occurred when his 1991 Dodge Grand Caravan struck a hole on the berm of State Route 601 in Kanawha County. Since claimant was forced to use the berm in an emergency situation and it was not properly maintained, the Court finds respondent negligent.

Award of $300.00. . . . . p. 149

NUZUM VS. DIVISION OF HIGHWAYS (CC-06-288)

Claimant brought this action for vehicle damage which occurred when his 2006 Toyota Camry struck a broken section of pavement while he was traveling on Pleasant Valley Road near Benton's Ferry, Marion County. The Court finds that respondent had notice of this hazardous condition. However, at the hearing of this matter the Court directed the claimant to provide a copy of his insurance declaration page, which he did not submit. Claim disallowed. . . . . p. 30

KNIGHT VS. DIVISION OF HIGHWAYS (CC-08-0105)

Claimant brought this action for vehicle damage which occurred when their 2001 Subaru Legacy struck a hole on the berm while claimant, Dawn E. Warfield, was driving on the eastbound entrance ramp to I-64 in Charleston, Kanawha County. The

Court finds that claimant was forced to use the berm in an emergency situation, and the berm was in an unsafe condition. Thus, the Court finds respondent negligent. *See Sweda v. Dep't of Highways*, 13 Ct. Cl. 249 (1980). Award of $250.00. . . . . p. 122

BRIDGES

SMITH VS. DIVISION OF HIGHWAYS (CC-07-199)

Claimants brought this action for vehicle damage which occurred when their 2000 Nissan Maxima struck a piece of concrete on the Route 15 bypass bridge in Mount Hope, Fayette County. Since there were no warning signs in place at the time of the incident, the Court finds respondent negligent. Award of $166.42. . . . . p. 108

SYDNOR VS. DIVISION OF HIGHWAYS (CC-07-239)

Claimant brought this action for vehicle damage which occurred when his 1996 Ford Taurus struck a piece of concrete on the Route 16 bypass bridge in Mount Hope, Fayette County. Claimant's son, Matthew David Sydnor, was driving from Beckley towards Oak Hill. As he was traveling across the bridge, his vehicle struck a piece of concrete that was protruding approximately six inches from a hole in the road. The Court opines that respondent had, at the least, constructive notice of the piece of concrete which claimant's vehicle struck, and it presented a hazard to the traveling public. Award of $1,253.95. . . . . p. 110

CONTRACTS

ADELPHOI VILLAGE INC. VS. DEPARTMENT OF EDUCATION (CC-06-251)

The claimant is a non-profit agency which has a longstanding history of providing educational and treatment services to court-placed and dependent youth. Claimant seeks payment in the amount of $31,270.00 from the respondent for educational and treatment services which it provided to certain juveniles referred to it by various governmental entities during the 2005-2006 fiscal year (from July 1, 2005 to June 30, 2006). The Court finds that principles of equity and fairness require that claimant be compensated for these services. Award of $31,270.00. . . . . p. 76

MANPOWER VS. MARSHALL UNIVERSITY (CC-05-269)

Claimant seeks to recover for services rendered from January 12, 1997, through March 22, 1998, in the amount of $50,316.07. Claimant alleges that respondent failed to reveal that temporary help services are a prevailing wage job. Pursuant to the parties' agreement, respondent states that claimant may recover $20,000.00 based upon *Aramark Facility Services Inc. v. Concord University*, CC-04-436 (September 6, 2005). Accordingly, the Court is of the opinion to and does make an award to claimant in the amount of $20,000.00. . . . . p. 96

COMPARATIVE NEGLIGENCE - See also Berms; Falling Rocks and Rocks; Negligence & Streets and Highways

GUTIERREZ II VS. DIVISION OF HIGHWAYS (CC-07-0137)

Claimants brought this action for vehicle damage which occurred when their 1997 Dodge Grand Caravan struck a hole as Bobby Gutierrez II was driving on Philippi Pike Road in East View, Harrison County. The Court is of the opinion that respondent had, at the least, constructive notice of the hole which claimants' vehicle struck and that it presented a hazard to the traveling public. Notwithstanding the negligence of the respondent, the Court is also of the opinion that the claimant was twenty-five percent (25%) negligent since he was aware of the condition on the road. Award of $475.89. . . . . p. 235

BERDINE VS. DIVISION OF HIGHWAYS (CC-08-0206)

Claimant brought this action for vehicle damage which occurred when her 1996 Subaru Legacy struck a raised section of the road on Little Rush Run, designated as County Route 250/3 in Burton, Wetzel County. The Court is of the opinion that respondent had, at the least, constructive notice of the raised section of the road surface which claimant's vehicle struck and that it presented a hazard to the traveling public. The Court also finds that the claimant was negligent in failing to maintain control of her vehicle, and the Court will therefore reduce her recovery by twenty-percent (20%).

Award of $2,272.92. . . . . p. 178

CRAGO VS. DIVISION OF HIGHWAYS (CC-08-031)

Claimant brought this action for vehicle damage which occurred when his 2003 Cadillac struck a hole in the road while he was traveling north on Route 2 in Weirton, Hancock County. The Court finds that respondent had at least constructive notice of the hole which claimant's vehicle struck and that it presented a hazard to the traveling public. However, the Court also opines that claimant had notice of the condition of the road on Route 2. Therefore, the Court concludes that claimant was ten percent (10%) comparatively negligent. Award of $381.99. . . . . p. 117

CUMBERLEDGE VS. DIVISION OF HIGHWAYS (CC-06-360)

Claimant brought this action for vehicle damage which occurred when his 2003 Mazda Protégé struck a large hole in the pavement while he was traveling northbound on County Route 50/30 in Doddridge County. The Court opines that respondent had at least constructive notice of the hole that claimant's vehicle struck and that the hole presented a hazard to the traveling public on County Route 50/30. However, the Court also concludes that the claimant was forty-percent (40%) negligent.

Award of $300.00. . . . . p. 54

GEORGE VS. DIVISION OF HIGHWAYS (CC-08-0057)

Claimant brought this action for vehicle damage which occurred when his 2000 Kia Spectra struck a hole on Pleasant Valley Road in Fairmont, Marion County. The Court is of the opinion that respondent had, at the least, constructive notice of the hole which claimant's vehicle struck and that it presented a hazard to the traveling public. Notwithstanding the negligence of the respondent, the Court is also of the opinion that the claimant was negligent since he was aware of the condition on the road and did not

reduce his speed accordingly. Claimant may recover ninety-percent (90%) of the loss sustained. Award of $65.83. . . . . p. 240

GOOCH VS. DIVISION OF HIGHWAYS (CC-08-0301)

Claimants brought this action for vehicle damage which occurred when their trailer was damaged in a tunnel incident as they were traveling on County Route 60/14 in Greenbrier County. The Court found that respondent was negligent. Notwithstanding the negligence of the respondent, the Court is also of the opinion that claimants were comparatively negligent in failing to observe the 46-inch, "9'-2"" signs that were placed at both entrances to the tunnel. The Court finds that the claimants' negligence equals twenty-percent (20%) of their loss. Award of $6,842.81. . . . . p. 245

HALL JR. VS. DIVISION OF HIGHWAYS (CC-03-031)

Claimant brought this action for vehicle damage which occurred when his 1992 Dodge Caravan struck a manhole cover while he was traveling on an access road located off of Route 19 near Summersville, Nicholas County. The evidence establishes that respondent had, at the least, constructive notice of the manhole cover that claimant's vehicle struck, and that it presented a hazard to the traveling public on the access road off of Route 19. However, the Court also concludes that the claimant was

forty-percent (40%) negligent in his operation of the vehicle.

Award of $801.00. . . . . p. 61

MINOR VS. DIVISION OF HIGHWAYS (CC-07-194)

Claimants brought this action for vehicle damage which occurred when their 2002 GZ Suzuki 250 motorcycle struck a crack in the pavement on County Route 17 in Marshall County. The Court finds that respondent was negligent in its maintenance of County Route 17. However, the Court also finds that claimants had notice of the crack along County Route 17 prior to this incident. Thus, the Court will reduce claimants' recovery by thirty-percent (30%). Award of $2,100.33. . . . . p. 106

MULLENS VS. DIVISION OF HIGHWAYS (CC-07-0171)

Claimant brought this action for vehicle damage which occurred when her 2001 Kia Rio struck a hole as she was driving on Enterprise Drive in Braxton County. The Court is of the opinion that respondent had, at the least, constructive notice of the hole which claimant's vehicle struck, and that it presented a hazard to the traveling public. Notwithstanding the negligence of the respondent, the Court is also of the opinion that the claimant was negligent since she was aware of the road condition and should have stopped her vehicle to avoid the hole. The Court finds that the claimant's negligence equals twenty-percent (20%) of her loss. Award of $226.76. . . . . p. 192

MULLINS VS. DIVISION OF HIGHWAYS (CC-07-190)

Claimant brought this action for vehicle damage which occurred when his 1997 Plymouth Breeze struck a large hole while he was traveling southbound on Route 52 between Huntington and Tolsia in Wayne County. The evidence established that respondent had at least constructive notice of the hole that claimant's vehicle struck, and

that the hole presented a hazard to the traveling public on Route 52 in Mingo County. However, the Court also concludes that the claimant was thirty-percent (30%) negligent. Award of $483.64. . . . . p. 57

ORSBORN JR. VS. DIVISION OF HIGHWAYS (CC-07-0104)

Claimant brought this action for vehicle damage which occurred when his 1993 Toyota pick-up truck struck a hole on County Route 33 in Fairmont, Marion County. The Court finds that respondent had, at the least, constructive notice of the hole which claimant's vehicle struck and that it presented a hazard to the traveling public. Notwithstanding the negligence of respondent, the Court is also of the opinion that claimant was negligent since he was aware of the condition on the road and could have further reduced his speed in accordance with the conditions then and there existing. Since the negligence of the claimant is not greater than or equal to the negligence of the respondent, claimant may recover seventy-five (75%) of the loss sustained. Award of $442.07. . . . . p. 233

PETCOVIC VS. DIVISION OF HIGHWAYS (CC-08-0154)

Claimant brought this action for vehicle damage which occurred when her 2006 Hyundai Tiburon struck two holes on Lazelle Road, designated as W.Va. Route 100, near Morgantown, Monongalia County. The Court is of the opinion that respondent had, at the least, constructive notice of the hole which claimant's vehicle struck and that the holes presented a hazard to the traveling public. Notwithstanding the negligence of respondent, the Court is also of the opinion that the claimant was negligent since she was aware of the condition of the road. The Court finds that the claimant's negligence equals twenty percent (20%) of her loss.

Award of $311.02. . . . . p. 172

REED VS. DIVISION OF HIGHWAYS (CC-08-0281)

Claimant brought this action for vehicle damage which occurred when her 2007 Honda Civic struck a hole as her husband, Jed Allen Reed, was driving near Mile Marker 160 in Monongalia County. The location of the hole on a heavily traveled portion of the interstate, where vehicles travel at high speeds, leads the Court to conclude that respondent had constructive notice of the condition on I-79. Thus, the Court finds respondent negligent and claimant may make a recovery for the damage to her vehicle. Notwithstanding the negligence of the respondent, the Court is also of the opinion that the driver was negligent and will reduce the award by ten percent (10%). Award of $450.00. . . . . p. 244

SISSON VS. DIVISION OF HIGHWAYS (CC-07-207)

Claimants brought this action for vehicle damage which occurred when their 1996 Chevrolet Monte Carlo struck a hole on the berm while claimant was traveling on Brounland Road in Kanawha County. The Court opines that respondent had, at the least, constructive notice of the hole that claimants' vehicle struck, and that the hole presented a hazard to the traveling public on Brounland Road. However, the Court finds that claimant was twenty percent (20%) negligent in her operation of the vehicle. Award of $613.14. . . . . p. 104

SKALICAN VS. DIVISION OF HIGHWAYS (CC-08-0250)

Claimant brought this action for vehicle damage which occurred when his 2005 Chrysler Crossfire struck a hole on Cheat Road, designated as County Route 73/12, in Morgantown , Monongalia County. The Court opines that respondent had, at the least, constructive notice of the hole which claimant's vehicle struck and that the hole presented a hazard to the traveling public. Notwithstanding the negligence of the respondent, the Court is also of the opinion that the claimant was negligent since he was aware of the condition on the road. The Court finds that claimant's negligence equals twenty-percent (20%) of his loss. Award of $200.00. . . . . p. 187

WOOMER VS. DIVISION OF HIGHWAYS (CC-05-375)

Claimants brought this action for vehicle damage which occurred when their 1996 Ford Mustang slid into a creek due to debris left on the road while Ms. Woomer was traveling about one mile off of State Route 2 on Big Seven Mile Creek Road in Cabell County. The evidence established that respondent was aware of the ongoing hazardous conditions on County Route 11. However, the Court finds that claimants' negligence equals thirty-five percent (35%) of their loss.

Award of $1,742.00. . . . . p. 49

DAMAGES

AYERS VS. DIVISION OF HIGHWAYS (CC-07-122)

The parties stipulated to the following: on April 9, 2007, claimant was traveling on Glen View Road on Route 54 in Raleigh County, when claimants' 2005 Mitsubishi Eclipse struck a hole in the road causing damage to two rims; claimant and respondent agree that the amount of $500.00 for the damages put forth by claimants is fair and reasonable; the Court has reviewed the facts of the claim and finds that respondent was negligent in its maintenance of Glen View Road on the date of this incident. Award of $500.00. . . . . p. 62

BLEDSOE VS. DIVISION OF HIGHWAYS (CC-07-009)

Claimants brought this action for vehicle damage which occurred when their 2003 Chevrolet Impala struck a section of broken pavement while claimant Isaiah Bledsoe was traveling on Martha Road near Barboursville, Cabell County. The Court opines that respondent had at least constructive notice of the broken section of pavement which claimants' vehicle struck, and that the broken pavement presented a hazard to the traveling public. Thus, the Court finds respondent negligent. Award of $201.79.

. . . . . p. 42

BUSH VS. DIVISION OF HIGHWAYS (CC-06-271)

The parties stipulated to the following: on September 21, 2005, claimant was traveling on Interstate 81 in Berkeley County when his vehicle struck a hole in the road; respondent agrees that the amount of $246.98 for the damages put forth by the claimant is fair and reasonable. The Court finds that respondent was negligent in its maintenance of Interstate 81 on the date of this incident.

Award of $246.98. . . . . p. 29

CSX TRANSPORTATION INC. VS. DIVISION OF HIGHWAYS (CC-05-0264)

Claimant seeks to recover $911,978.64 for the replacement of a culvert system located in Logan County near the mouth of Godby Branch which drains that creek under claimant's railroad and respondent's adjacent W.Va. Route 10. Respondent's W.Va. Route 10 at Godby Branch is parallel to and upstream from the claimant's railroad. This claim arises from the aftermath of a flood that occurred on June 16, 2003, in which there was an apparent failure of portions of the culvert system. Claimant asserts that it had no alternative but to replace both claimant's and respondent's portions of the conjoined culvert structure and seeks to be reimbursed its total costs in doing so. The Court, having considered the arguments and examined the evidence put forth by the parties in this claim, has determined that in equity and good conscience, claimant should have had more cooperation from respondent in its replacement of the culvert system. Respondent gave notice to claimant of the obstruction in the culvert system at a time when no one could observe what had happened at the inlet end of the culvert where a wall of mud and debris completely blocked the portion of the system constructed by respondent. However, the Court is of the opinion that claimant should not have to bear all of the expense for this new culvert. To rule otherwise would constitute the unjust enrichment of the respondent, there being no evidence that the failure of the culvert was the result of an act or acts or failure to act on the part of the claimant. Since respondent constructed approximately one-third of the culvert system as it existed on June 16, 2003, in its construction of W.Va. Route 10, the Court has determined that an award in this claim of one-third of the cost of the new culvert system is both fair and reasonable. Since the Court considered this claim to be a moral obligation of the State, the Court made an award in the amount of $303,992.88. . . . . . p. 223

DICKENS VS. STATE POLICE (CC-07-343)

Claimant seeks to recover $2,475.00 for the cost of his 1994 Ford F150 truck which he entrusted to respondent in the course of a police investigation, but which was subsequently burned by an alleged perpetrator. In its Answer, respondent admits liability in the amount of $2,475.00, which is the fair market value for claimant's property.

. . . . . p. 92

HAID VS. DIVISION OF HIGHWAYS (CC-07-0304)

The parties stipulated to the following: On September 25, 2007, claimant Dr. John Haid, was driving his 2007 Audi A4 on McCullough Road/Miller Road in Huntington, Cabell County when his vehicle struck a hole in the road; respondent was responsible for the maintenance of McCullough Road/Miller Road which it failed to maintain properly on the date of this incident. The Court finds that the amount of damages agreed to by the parties is fair and reasonable.

Award of $498.91. . . . . p. 237

HARLESS VS. DIVISION OF HIGHWAYS (CC-06-200)

Claimant brought this action for vehicle damage which occurred when her 1995 Chevrolet Monte Carlo struck a hole while she was traveling on County Route 15 in Fayette County. the Court is of the opinion that respondent did not have actual or constructive notice of a hole on County Route 15 prior to the incident in question. Claim disallowed. . . . . p. 18

LANGILLE JR. VS. DIVISION OF HIGHWAYS (CC-08-0035)

The parties stipulated to the following: On January 15, 2008, claimant's daughter was traveling on Cedar Crest Drive in Huntington, Cabell County when his 2006 Kia Spectra struck a hole in the road damaging a tire and rim; respondent was responsible for the maintenance of Cedar Crest Drive which it failed to maintain properly on the date of this incident. The Court has reviewed the facts of the claim and finds that respondent was negligent in its maintenance of Cedar Crest Drive on the date of this incident; that the negligence of respondent was the proximate cause of the damages sustained to claimant's vehicle; and that the amount of the damages agreed to by the parties is fair and reasonable. Thus, claimant may make a recovery for his loss in the amount of $246.49. . . . . p. 240

MARION VS. DIVISION OF HIGHWAYS (CC-07-064)

The parties stipulated to the following: on March 2, 2007, claimant Julia Marion was traveling on Route 21 in Ripley, Jackson County, when their vehicle was struck by a road sign that was blown over by wind; the Court has reviewed the facts of the claim and finds that respondent was negligent in its maintenance of Route 21 on the date of this incident. Award of $500.00. . . . . p. 56

LONA R. MCCOY VS. DIVISION OF HIGHWAYS (CC-07-131)

Claimant brought this action for vehicle damage which occurred when her 2005 Chevrolet Cavalier struck holes while she was traveling on County Route 14 in Braxton County. The Court opines that respondent had at least constructive notice of the hole which claimant's vehicle struck and that the hole presented a hazard to the traveling public. Thus, the Court finds respondent negligent. Award of $408.33.

MCCRAW VS. DIVISION OF HIGHWAYS (CC-06-088)

Claimant brought this action for vehicle damage which occurred when her 2000 Toyota Camry struck a hole on the berm of Route 2 in Millwood, Jackson County. Claimant lost control of her vehicle, and her vehicle struck a storm drain causing the vehicle to flip on its top. The vehicle was totaled in this incident. The Court holds that respondent had, at the least, constructive notice of the condition on Route 2 on the date in question. Consequently, there is sufficient evidence of negligence upon which to justify an award. Award of $8,412.73. . . . . p. 98

MORROW VS. DIVISION OF HIGHWAYS (CC-06-096)

Claimants brought this action for vehicle damage which occurred when their 2004 Dodge Stratus struck a hole while they were traveling on Route 41 in Lewis

County. The Court opines that respondent had at least constructive notice of the hole which claimants' vehicle struck and that the hole presented a hazard to the traveling public. Thus, the Court finds respondent negligent and claimants may make a recovery for the damage to their vehicle. Since claimants' insurance deductible is $500.00, their recovery is limited to that amount. Award of $500.00. . . . . p. 39

PASCUCCI VS. DIVISION OF HIGHWAYS (CC-07-103)

The parties stipulated to the following: on March 20, 2007, claimant was traveling on Dunbar Avenue in Dunbar, Kanawha County when her vehicle struck a hole in the road, damaging a rim; respondent agrees that the amount of $357.15 for the damages put forth by the claimant is fair and reasonable; the Court has reviewed the facts of the claim and finds that respondent was negligent in its maintenance of Dunbar Avenue on the date of this incident. Thus, claimant may make a recovery for her loss. Award of $357.15. . . . . p. 37

POLINO CONTRACTING INC. VS. DIVISION OF HIGHWAYS (CC-06-0102)

This claim was brought by Polino Contracting Inc. for certain extra work, which the claimant alleges it performed while engaged in the execution of the contract with the Division of Highways for the construction of a portion of Corridor H in Hardy County. Polino was required by Highways to place substantially more dumped rock gutter than was called for by Highways in its Invitation to Bid on the Contract. Polino contends that there was, as a result, a significant change in the character of the work as defined by the Contract, and it should be paid more for the dumped rock gutter actually placed than the unit bid price for dumped rock gutter agreed to in the Contract. Polino asserts specifically that it is entitled to be paid an additional $114,123.97 for extra work and material required in placing the additional dumped rock gutter. The Court has determined that there was no change in the character of the work performed by Polino in the placing of extra dumped rock gutter. The work performed by Polino for the dumped rock gutter does not meet the provisions in the Standard Specifications Roads and Bridges § 104.11(b), which is the applicable section for the claim herein because the payment for this item does not exceed 10% of the contract bid price of $18 million dollars. Therefore, it is the opinion of the Court that Polino may not make a recovery for any additional amount of payment beyond the unit bid price for the dumped rock gutter placed during the construction project. Claim disallowed. . . . . p. 202

THE VELOTTA COMPANY VS. DIVISION OF HIGHWAYS (CC-07-0274)

Claimant, The Velotta Company, brought this action to recover $137,165.25 for that portion of its home office overhead expense which it incurred when claimant was delayed in its performance of a highway contract with respondent, Division of Highways. The parties agree that the delay was compensable. As a consequence, claimant was reimbursed by respondent for the delay. However, respondent denied any payment to claimant for its alleged loss of $137,165.25 for home office overhead since there was no provision in the contract for payment of home office overhead. The Court has consistently denied claims for home office overhead filed by contractors since the issue was first brought before the Court. The Court considers this element of damages to be

speculative in nature. The Court further presumes that the contractors who bid on the subject project were all aware of the Court's position as to home office overhead and bid the project accordingly. The claimant herein bid on the project with that same knowledge, and was, therefore, bidding on an equal basis with all other contractors. For the Court to now reverse its long standing position concerning home office overhead to the benefit of claimant on this contract would be patently unfair to all other contractors who submitted bids to respondent for this project. Claim disallowed. . . . . p. 210

DRAINS and SEWERS

CARTE VS. DIVISION OF HIGHWAYS (CC-04-356)

Claimant brought this action for water damage to her property which she alleges was caused by respondent's failure to place proper drains and its negligent maintenance of the drainage ditch line on Big Fork Road in Elkview, Kanawha County. The Court finds that claimant has not satisfied her burden of proving that respondent's negligent maintenance of the drainage line and ditches was the proximate cause of the flooding problems on Big Fork Road. Claim disallowed. . . . . p. 73

DAVIS VS. DIVISION OF HIGHWAYS (CC-04-0360)

The parties stipulated to the following: Claimant alleges that on or around May 27, 2004, her property suffered flood damage as a result of inadequate drains and culverts during a rain event. For the purposes of settlement, respondent acknowledges culpability for the preceding incident. The parties have agreed to settle this claim for Twelve Thousand Dollars ($12,000.00). The Court finds that the amount of the damages agreed to by the parties is fair and reasonable. Award of $12,000.00. . . . . p. 199

FORTNEY VS. DIVISION OF HIGHWAYS (CC-06-0091)

Claimant brought this action for personal injuries which occurred when she fell into a drainage grate on W.Va. Route 76 in Rosemont, Taylor County. The position of respondent is that it did not have actual or constructive notice of the allegedly defective drainage grate prior to this incident. The Court opines that respondent had at least constructive notice of the drainage grate that caused claimant's injury. The Court finds that the rural grate used at this particular location created a hazard due to the grate's large openings. Notwithstanding the negligence of the respondent, the Court finds that the claimant was fifteen-percent (15%) negligent. Award of $2,015.58. . . . . p. 199

MCMILLION VS. DIVISION OF HIGHWAYS (CC-01-334)

Claimant brought this claim for property damage to her real estate which she alleges occurred as a result of respondent's negligent maintenance of a drainage system. Mrs. McMillion alleges that respondent cut back a bank which disturbed trees and rocks causing an influx of water onto her property. The Court concludes from the testimony, the documentary evidence and the view of the property, roads and drainage structures, that the water flowing near claimant's property and at times flooding claimant's property would have flowed into this same area regardless of what actions respondent undertook

in 1999 to either reshape the bank or change the drainage system. Claim disallowed. . . . . p. 22

MEDDINGS VS. DIVISION OF HIGHWAYS (CC-04-0110)

Claimant brought this action to recover costs for the damage that resulted due to the landslides on her property. She alleges that the landslides were caused by respondent's negligent maintenance of the drainage system on Ferguson Branch Road, designated as Route 52/21, in Wayne County. Claimant asserts that the crux of the problem is the failure of respondent to maintain the ditch line on Route 52/21. The ditch line became stopped up, and water would no longer flow through the culvert, causing it to flow across the road and onto claimant's property. Respondent avers that it is not liable for the landslides that are occurring on claimant's property. As Mr. Carte, Senior Geotechnical Engineer for respondent, explained, the landslide located at the house seat occurred due to the excavation at the toe of the slope and the naturally occurring spring in this area. The slip in the area between Route 52/21 and claimant's driveway was caused by the lack of subsurface drainage for the naturally occurring spring water and the disturbance which resulted from widening the road at this location. All of these factors lead the Court to conclude that claimant's allegation that the slip is caused by respondent's failure to maintain the ditch on its roadway is not substantiated by the evidence. Claim disallowed. . . . . p. 128

MILLS VS. DIVISION OF HIGHWAYS (CC-06-0247)

The parties stipulated to the following: Claimants allege that on or around July 21, 2006, their property suffered flood damage as a result of clogged drains and culverts during a rain event. For the purposes of settlement, respondent acknowledges culpability for the preceding incident. Claimants and respondent have agreed to settle the claim for $5,582.97. The Court finds the amount of damages agreed to by the parties is fair and reasonable. Award of $5,582.97. . . . . p. 207

PRISK VS. DIVISION OF HIGHWAYS (CC-07-134)

Claimant brought this action for damage which occurred to the water line on her property. Although Oak Ridge is located in a residential neighborhood, respondent purchased the lot next to claimant's property for construction on Route 35. Respondent advertised for bids on the project so drilling rigs, bulldozers, and a tri-axle truck were brought onto the property to perform core drilling. Due to the heavy equipment traveling over the trench line, the water line, which runs underneath respondent's driveway and onto claimant's property, broke. The Court determined that the damage to claimant's water line was a foreseeable consequence of the action taken by the bidders to the contract; therefore, the Court finds that claimant may recover for her loss. Award of $903.87. . . . . p. 102

TRUSTEES OF THE SAULSVILLE BAPTIST CHURCH VS. DIVISION OF HIGHWAYS (CC-03-269)

Claimant trustees for the Saulsville Baptist Church allege damages occurred to

their church as a result of respondent's failure to design and construct an adequate culvert system under Route 97. The Court concludes that the flood was the result of the inadequate drainage system beneath Route 97 and that respondent had actual notice that there was a potential for a flood in the area as the result of an unusual rainfall. Thus, the Court finds respondent liable for the damages. The Court concludes the total loss to claimant is the amount of $161,800.00 from which there is a deduction of $80,000.00 (insurance proceeds mentioned herein above) for a loss to the claimant of $81,800.00. . . . . p. 81

FLOODING

CSX TRANSPORTATION INC. VS. DIVISION OF HIGHWAYS (CC-05-0264)

Claimant seeks to recover $911,978.64 for the replacement of a culvert system located in Logan County near the mouth of Godby Branch which drains that creek under claimant's railroad and respondent's adjacent W.Va. Route 10. Respondent's W.Va. Route 10 at Godby Branch is parallel to and upstream from the claimant's railroad. This claim arises from the aftermath of a flood that occurred on June 16, 2003, in which there was an apparent failure of portions of the culvert system. Claimant asserts that it had no alternative but to replace both claimant's and respondent's portions of the conjoined culvert structure and seeks to be reimbursed its total costs in doing so. The Court, having considered the arguments and examined the evidence put forth by the parties in this claim, has determined that in equity and good conscience, claimant should have had more cooperation from respondent in its replacement of the culvert system. Respondent gave notice to claimant of the obstruction in the culvert system at a time when no one could observe what had happened at the inlet end of the culvert where a wall of mud and debris completely blocked the portion of the system constructed by respondent. However, the Court is of the opinion that claimant should not have to bear all of the expense for this new culvert. To rule otherwise would constitute the unjust enrichment of the respondent, there being no evidence that the failure of the culvert was the result of an act or acts or failure to act on the part of the claimant. Since respondent constructed approximately one-third of the culvert system as it existed on June 16, 2003, in its construction of W.Va. Route 10, the Court has determined that an award in this claim of one-third of the cost of the new culvert system is both fair and reasonable. Since the Court considered this claim to be a moral obligation of the State, the Court made an award in the amount of $303,992.88. . . . . p. 223

FALLING ROCKS AND ROCKS - See also Comparative Negligence and Negligence

AMTOWER VS. DIVISION OF HIGHWAYS (CC-06-085)

Claimant brought this action for vehicle damage which occurred when his 2001 Chevrolet Impala struck a rock when he was traveling on U.S. Route 50 near Augusta, Hampshire County. Claimant has not established that respondent failed to take adequate measures to protect the safety of the traveling public on U.S. Route 50 in Hampshire County. Claim disallowed. . . . . p. 20

DUNSMORE VS. DIVISION OF HIGHWAYS (CC-07-0223)

Claimant brought this action for vehicle damage which occurred when her 1994 Nissan Sentra struck a rock while she was driving south on Route 28, approximately two miles north of Seneca Rocks in Pendleton County. Claimant has not established that respondent failed to take adequate measures to protect the safety of the traveling public on Route 28 in Pendleton County. Claim disallowed. . . . . p. 140

JOHNSON VS. DIVISION OF HIGHWAYS (CC-06-297)

Claimant brought this action for vehicle damage which occurred when his 2004 Tacoma Pre Runner pickup truck struck a rock while claimant was traveling on Route 3/5 on Laurel Creek Road in Mingo County. Claimant's vehicle sustained damage in the amount of $3,720.88, but claimant's recovery is limited to the amount of his insurance deductible which is $500.00. The Court finds that respondent is liable for the damages which proximately flow from its inadequate protection of the traveling public in this specific location of Route 3/5. Award of $500.00. . . . . p. 53

LAMBERT VS. DIVISION OF HIGHWAYS (CC-08-0049)

Claimants brought this action for vehicle damage which occurred when their 2005 Chevrolet Malibu struck a hole while claimant, Katherine Virginia Lambert, was driving on Maple Acres Road, referred to as Route 19/33, in Mercer County. The size of the hole and the time of year in which this incident occurred leads the Court to conclude that respondent had notice of this hazardous condition. Award of $326.14.
. . . . . p. 148

MOORE VS. DIVISION OF HIGHWAYS (CC-07-145)

Claimant brought this action for vehicle damage which occurred when her 1998 Buick Century struck a boulder while she was traveling northbound on State Route 4 in Braxton County. The claimant has not established that respondent failed to take adequate measures to protect the safety of the traveling public on Route 4. Claim disallowed.
. . . . . p. 56

MORRIS VS. DIVISION OF HIGHWAYS (CC-08-0043)

Claimant brought this action for vehicle damage which occurred when his vehicle struck a rock while he was traveling through Tongue Hill, which is designated as County Route 47, between Pinch and Elkview. The Court cannot hold respondent liable for the spontaneous falling of a rock. Claim disallowed. . . . . p. 146

THAXTON VS. DIVISION OF HIGHWAYS (CC-06-149)

Claimants brought this action for vehicle damage which occurred when their 1999 Oldsmobile Alero struck a rock while claimant Christopher A. Thaxton was traveling southbound on I-77 near the I-79 interchange in Charleston, Kanawha County.

Mr. Thaxton testified that the vehicle in front of him swerved around something and that he then noticed a rock in the road. Respondent maintains that there was no prior notice of any rocks on I-77 immediately prior to the incident in question. The Court finds that the claimants have not established that respondent failed to take adequate measures to protect the safety of the traveling public on I-77 in Kanawha County. Claim disallowed. . . . . p. 17

PRICE VS. DIVISION OF HIGHWAYS (CC-07-106)

Claimant brought this action for vehicle damage which occurred when her 2002 Ford Focus struck a rock while her husband, Clarence David Price, was traveling northbound on Route 17 in Logan County. The position of the respondent is that it did not have notice of the rock fall on Route 17 on the date of this incident. Based on the evidence established at the hearing, the Court concludes that Route 17 is not an area known for rock falls, and respondent was not aware of this hazard on the date in question. Claim disallowed. . . . . p. 101

ROCKHOLD VS. DIVISION OF HIGHWAYS (CC-05-065)

Claimants brought this action for vehicle damage which occurred when their 2000 Kia Sephia struck a rock on Route 10 in Logan County. The Court found that claimants have not establish that respondent failed to take adequate measures to protect the safety of the traveling public on Route 10. Claim disallowed. . . . . p. 97

SANDRETH VS. DIVISION OF HIGHWAYS (CC-07-377)

The parties stipulated that on or about October 1, 2007, the claimants' son, Micah Sandreth, was traveling on Route 2 in New Cumberland, Hancock County, when a rock fell from the Station Hill wall into the path of the vehicle, causing damage to the tire, rim, and suspension system. Respondent was responsible for the maintenance of Route 2 which it failed to maintain properly on the date of this incident. The Court finds that $466.80 is a fair and reasonable amount to settle this claim. Award of $466.80. . . . . p. 114

STEWART VS. DIVISION OF HIGHWAYS (CC-07-372)

Claimants brought this action for vehicle damage which occurred when their 2005 Honda Odyssey struck rocks on the road while the driver, Kimberly Stewart, was traveling south on Route 2 in Brooke County. In rock fall claims, the Court has

held that the unexplained falling of a rock onto a highway without a positive showing that respondent knew or should have known of a dangerous condition posing injury to person or property is insufficient to justify an award. *Coburn v. Dept. of Highways,* 16 Ct. Cl. 68 (1985). The Court finds that respondent did not have prior notice in the instant case because the rocks fell instantaneously as claimant was traveling on Route 2. Claim disallowed. . . . . p. 159

SUMMERS VS. DIVISION OF HIGHWAYS (CC-08-0108)

Claimant brought this action seeking reimbursement for damages to her vehicle paid out as a result of a rock slip on County Route 36 in Harrison County. In rock fall claims, the Court has held that the unexplained falling of a rock onto a highway without a positive showing that respondent knew or should have known of a dangerous condition posing injury to person or property is insufficient to justify an award. *Coburn v. Dept. of Highways*, 16 Ct. Cl. 68 (1985). The Court finds that respondent did not have prior notice in this case because the rocks fell instantaneously as claimant was traveling on Route 36. . . . . p. 255

Claim disallowed.

YOUNG VS. DIVISION OF HIGHWAYS (CC-08-0207)

Claimant brought this action for vehicle damage which occurred when her 2006 Nissan Altima struck a rock on Route 52 in Welch, McDowell County. The Court finds that claimant has not established that respondent failed to take adequate measures to protect the safety of the traveling public on Route 52.

Claim disallowed. . . . . p. 154

LEASES

MORRIS SQUARE ASSOCIATES, LP VS. INSURANCE COMMISSION (CC-06-301)

Morris Square Associates, a West Virginia limited partnership, (hereinafter referred to as "Lessor") leased unto the State of West Virginia, by the Secretary of the Department of Administration, (hereinafter referred to as "Lessee") an office space located in a four story building known as "The Greenbrooke" in Charleston, Kanawha County. The Insurance Commission was the tenant of this office space (hereinafter referred to as "Tenant"). The lease, unlike other leases, did not expressly make the Lessee responsible for the cost of trash or garbage service. The Lessor paid the garbage services for the leased office space for the full ten years of the lease and did not bill the Lessee or the Tenant for that service during the ten year period of the lease. The Lessee and Tenant have offered to admit to the Lessor a claim in the sum of $4,634.00 as a full settlement of all claims arising from the leasing agreements between the Lessor and the Lessee and Tenant. . . . . .p. 87

MOTOR VEHICLES

GRAZIANI VS. DIVISION OF MOTOR VEHICLES (CC-07-229)

Claimant seeks $228.50 for taxes that she was overcharged when she obtained a West Virginia license plate for her 1992 Toyota Camry on August 15, 2006. Claimant alleges that she should not have been charged for these taxes since the vehicle was purchased in West Virginia. In its Answer, respondent admits the validity of the claim in the sum of $162.50, rather than in the amount of $228.50. In claimant's reply to respondent's Answer, the claimant admits that the amount of taxes that she was

overcharged on August 15, 2006, was in fact $162.50. Thus, claimant may make a recovery in the amount of $162.50. . . . . p. 60

HAYWORTH VS. DIVISION OF MOTOR VEHICLES (CC-08-0221)

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer. Claimant seeks to recover an impoundment fee in the amount of $164.00 which she incurred when her vehicle was improperly impounded due to an error made by respondent. In its Answer, respondent admits the validity of the claim as well as the amount, and states that there were sufficient funds expired in that appropriate fiscal year from which the invoice could have been paid. Award of $164.00. . . . . p. 194

RUTHERFORD VS. DIVISION OF MOTOR VEHICLES (CC-07-251)

Claimant seeks to recover $90.00 in towing expenses which she was charged when her grandson's 1989 Honda was improperly towed due to respondent's failure to update the renewal notice for the vehicle. In its Answer, respondent admits the validity of the claim as well as the amount, and states that there were sufficient funds expired in that appropriate fiscal year from which the invoice could have been paid. Thus, claimant may make a recovery in the amount of $90.00. . . . . p. 60

NEGLIGENCE - See also Berms; Falling Rocks and Rocks & Streets and Highways

ANGELUCCI VS. DIVISION OF HIGHWAYS (CC-07-0219)

Claimants brought this action for vehicle damage which occurred when their 2005 GMC Yukon struck a hole while Mark Angelucci was driving on W.Va. Route 91 in Farmington, Marion County. The Court is of the opinion that respondent had, at the least, constructive notice of the hole which claimants' vehicle struck and that the hole presented a hazard to the traveling public. Thus, the Court finds respondent negligent and claimants may make a recovery for the damage to their vehicle. Award of $250.00. . . . . p. 236

BAILEY, as Administrator of the Estate of ROGER E. BAILEY VS. DIVISION OF HIGHWAYS (CC-02-228)

The parties stipulated to the following: on June 2, 2000, decedent, Roger E. Bailey, was killed when a vehicle emerged from a dirt alley onto County Route 1 and struck Mr. Bailey's vehicle on the driver's side; claimant alleged that trees and weeds beside County Route 1 contributed to the accident by obstructing the vision of the driver who pulled out of the dirt alley and struck Mr. Bailey's vehicle. The Court reviewed the facts of the claim and finds respondent negligent in its maintenance of County Route 1 on the date of this incident. Award of $13,000.00. . . . . p. 15

BAYS VS. DIVISION OF HIGHWAYS (CC-06-392)

Claimant brought this action for vehicle damage which occurred when his 1998

Chevrolet Cavalier struck a broken section of road while he was traveling eastbound on Plantation's Creek Road in Putnam County. The Court finds that respondent had at least constructive notice of the broken section of road which claimant's vehicle struck presenting a hazard to the traveling public. Thus, the Court finds respondent negligent. See *Chapman v. Dep't of Highways,* 16 Ct. Cl. 103 (1986). Award of $58.30.

. . . . . p. 40

BEASLEY VS. DIVISION OF HIGHWAYS (CC-06-232)

The parties stipulated to the following: on July 20, 2006, claimant was traveling on Madison Avenue in Huntington, Cabell County, when his vehicle struck a piece of rebar that was protruding from the road damaging a deflector on his vehicle. The Court has reviewed the facts of the claim and finds respondent negligent in its maintenance of Madison Avenue on the date of this incident. Award of $464.49. . . . . p. 27

BECKETT VS. DIVISION OF HIGHWAYS (CC-07-151)

Claimant brought this action for vehicle damage which occurred when his 2000 Chevrolet S10 struck several holes while his daughter, Britney Beckett, was traveling on Route 152 near Genoa, Wayne County. The Court opines that respondent had at least constructive notice of the holes which claimant's vehicle struck, and that the holes presented a hazard to the traveling public. Thus, the Court finds respondent negligent. See *Chapman v. Dep't of Highways,* 16 Ct. Cl. 103 (1986). Award of $285.28.

. . . . . .p. 44

BENNETT, as Administrator of the Estate of BARBARA ROSCLEA BENNETT VS. DIVISION OF HIGHWAYS (CC-02-294)

On January 20, 2001, decedent, Barbara Rosclea Bennett, was killed while traveling on County Route 9, near Wilsie, Braxton County, when her vehicle went out of control and into a rain swollen creek along County Route 9. Respondent was responsible for the maintenance of County Route 9 which it failed to maintain properly on the date of this incident. Claimant and respondent agree that the amount of $37,000.00 is a fair and reasonable amount to settle this claim. Thus, the Court finds respondent negligent in its maintenance of County Route 9 on the date of this incident. Award of $37,000.00. . . . . p. 38

CLARKSON VS. DIVISION OF HIGHWAYS (CC-07-222)

Claimant brought this action for vehicle damage which occurred when her 2006 Nissan Sentra struck a hole while she was traveling on Old Crow Road, which is also known as County Route 199/36 in Beaver, Raleigh County. The Court finds that respondent had, at the least, constructive notice of the hole that claimant's vehicle struck, and that the hole presented a hazard to the traveling public.

ward of $219.12. . . . . p. 64

CLEAVENGER VS. DIVISION OF HIGHWAYS

Claimant brought this action for vehicle damage which occurred when her 2002 Saturn Ion Quad Coupe struck water on Heizer Creek Road in Putnam County. Claimant contends that respondent failed to provide adequate warnings to the traveling public on Heizer Creek Road. The Court finds that respondent took corrective action to prevent harm to the traveling public on Heizer Creek Road. See *Chapman v. Dep't of Highways,* 16 Ct. Cl. 103 (1986). Claim disallowed. . . . . p. 72

CUTLIP VS. DIVISION OF HIGHWAYS (CC-08-0284)

Claimants brought this action for vehicle damage which occurred when their 2008 Buick Lucerne struck a hole when their son, Byron David Cutlip, was driving at the W.Va. Route 41 and W.Va. Route 55 junction in Nicholas County. The Court finds that respondent had, at the least, constructive notice of the hole which claimants' vehicle struck and that the hole presented a hazard to the traveling public. Award of $500.00. . . . . p. 194

CUTLIP VS. DIVISION OF HIGHWAYS (CC-08-0285)

Claimants brought this action for vehicle damage which occurred when their 2000 Buick Park Avenue struck a hole as claimant, Charles E. Cutlip, was driving on U.S. Route 60 between Rupert and Charmco in Greenbrier County. The Court is of the opinion that respondent did not have actual or constructive notice of the hole on U.S. Route 60. Consequently, there is insufficient evidence of negligence upon which to justify an award. Claim disallowed. . . . . .p. 196

GASKINS VS. DIVISION OF HIGHWAYS (CC-07-0096)

Claimants brought this action for vehicle damage which occurred when their 2007 Ford Fusion struck a hole while claimant, Carrie L. Gaskins, was driving on Sabraton Avenue in Morgantown, Monongalia County. Since there were numerous holes on Sabraton Avenue, the Court finds that respondent had constructive notice of the condition of the road. Thus, the Court finds respondent negligent and claimants may make a recovery for the damage to their vehicle. Award of $328.68. . . . . p. 206

HUSMAN VS. DIVISION OF HIGHWAYS (CC-08-0162)

Claimant brought this action for vehicle damage which occurred when his 2003 Suzuki struck a hole on County Route 33/3 in Preston County. The Court finds that a hole of this size could not have developed in a short period of time without respondent's knowledge. Although respondent was unable to patch holes on its third priority roads due to the late delivery of cold mix, respondent could have placed cones at this location or taken other measures to warn the traveling public of this hazard. Thus, the Court finds respondent negligent. Award of $500.00. . . . . .p. 173

LARCK VS. DIVISION OF HIGHWAYS (CC-06-278)

Claimant brought this action for vehicle damage which occurred when her 2003

Nissan Sentra struck a hole while she was traveling eastbound on I-64 near Barboursville, Cabell County. The Court is of the opinion that respondent had at least constructive notice of the hole which claimant's vehicle struck and that the hole presented a hazard to the traveling public. Award of $150.00. . . . . p. 19

LINGER VS. DIVISION OF HIGHWAYS (CC-07-0167)

Claimant brought this action for vehicle damage which occurred when his 1985 Chevrolet pickup truck struck a hole on Rutledge Road in Charleston, Kanawha County. The Court is of the opinion that respondent had, at the least, constructive notice of the defective condition which led to the damage to claimant's vehicle. Award of $1,696.00. . . . . p. 209

MCCLUNG VS. DIVISION OF HIGHWAYS (CC-08-0354)

Claimants brought this action for vehicle damage which occurred when their 2006 Buick LaCrosse struck a hole as claimant, Delmas F. McClung, was driving on Kentucky Road, designated as County Route 39/32 in Summersville, Nicholas County. The Court is of the opinion that respondent had, at the least, constructive notice of the hole which claimants' vehicle struck and that the hole presented a hazard to the traveling public. Award of $272.65. . . . . p. 197

MILLER VS. DIVISION OF HIGHWAYS (CC-08-0171)

This claim was submitted to the Court for decision upon a Stipulation entered into by claimants and respondent wherein certain facts and circumstances of the claim were agreed to as follows: On March 20, 2008, claimant Alan J. Miller was driving one mile north of Wallace on W.Va. Route 20 in Harrison County when his vehicle struck holes in the road damaging two tires, two rims, while also requiring an alignment; Respondent was responsible for the maintenance of W.Va. Route 20 which it failed to maintain properly on the date of this incident; claimants' vehicle sustained damage in the amount of $793.66, and claimant's insurance deductible was $500. The Court finds that respondent was negligent and claimants may make a recovery for their loss. Award of $500.00. . . . . .p. 175

NEAL VS. DIVISION OF HIGHWAYS (CC-06-125)

Claimant brought this action for vehicle damage which occurred when his 1993 Subaru Legacy struck a piece of tire in the road while he was traveling on I-64 near Dunbar, Kanawha County. Even though the Court finds that the piece of tire on the road created a hazard to the traveling public, respondent did not have notice of this condition prior to claimant's incident. See *Chapman v. Dep't of Highways*, 16 Ct. Cl. 103 (1986). Claim disallowed. . . . . p. 100

PAVEL VS. DIVISION OF HIGHWAYS (CC-08-020)

Claimant brought this action for vehicle damage which occurred when his 1991 Pontiac Firebird scraped the road surface on Home Access Route 932 in Weirton,

Hancock County. Since Home Access Route 932 is a fourth priority road in terms of maintenance, it is reasonable that respondent did not have notice of this condition prior to the date of the incident. Claim disallowed. . . . . p. 116

SHUMAN d/b/a/ PREMIER BODY WORKS VS. DIVISION OF HIGHWAYS (CC-07-0280)

The parties stipulated to the following: On August 30, 2007, a tree from W.Va. Route 21 fell across the road and onto claimant's property. Respondent agrees that the amount of $3,1650.00 for the damages put forth by the claimant is fair and reasonable. The Court finds the respondent was negligent in its maintenance of W.Va. Route 21, and claimant may make a recover for his loss. Award of $3,165.00. . . . . p. 213

THOMAS VS. DIVISION OF HIGHWAYS (CC-08-001)

Claimant brought this action for vehicle damage which occurred when his 2006 Chrysler 300 struck a hole while he was traveling east on I-64 in Charleston, Kanawha County. The testimony established that this portion of I-64, which runs through the center of Charleston, is of the highest priority in terms of maintenance. Despite respondent's attempts to patch the hole in this area, the patchwork was inadequate when this incident occurred. Thus, the Court finds respondent negligent. Award of $1,000.00. . .
p. 114

VANNESS VS. DIVISION OF HIGHWAYS (CC-08-0172)

Claimant brought this action for vehicle damage which occurred when her 2006 Ford Fusion struck a hole while she was driving on W.Va. Route 94 in Hernshaw, Kanawha County. The size of the hole and its location on the road lead the Court to conclude that respondent had notice of this hazardous condition. Thus, the Court finds respondent negligent and claimant may make a recovery for the damage to her vehicle. Award of $78.03. . . . . p. 176

NOTICE

DYE VS. DIVISION OF HIGHWAYS (CC-07-069)

Claimants brought this action for vehicle damage which occurred when their 2007 Ford 500 struck a hole while claimant Nancy Dye was traveling on Old Route 50 in Harrison County. The Court opines that respondent had at least constructive notice of the hole which claimants' vehicle struck, and that the hole presented a hazard to the traveling public. Thus, the Court finds respondent negligent. See *Chapman v. Dep't of Highways,* 16 Ct. Cl. 103 (1986). Award of $460.33. . . . . p. 33

GROVE JR. VS. DIVISION OF HIGHWAYS (CC-05-373)

Claimant brought this action for vehicle damage which occurred when his 1991 Honda Accord struck a hole while he was traveling on Fairview Drive in Berkeley Springs, Morgan County. The Court opines that respondent had at least constructive

notice of the hole which claimant's vehicle struck and that the hole presented a hazard to the traveling public. Thus, the Court finds respondent negligent and claimant may make a recovery for the damage to his vehicle. See *Chapman v. Dep't of Highways*, 16 Ct. Cl. 103 (1986). Award of $262.12. . . . . p. 26

PORTER VS. DIVISION OF HIGHWAYS (CC-07-018)

Claimants brought this action for vehicle damage which occurred when their 2003 Chrysler Sebring struck a large hole while claimant, Linda Porter, was traveling on I-70 through Wheeling in Ohio County. The evidence establishes that respondent had, at the least, constructive notice of the hole that claimants' vehicle struck, and that the hole presented a hazard to the traveling public on I-70 in Ohio County. The location of the hole on a heavily traveled portion of the interstate, where vehicles travel at high speeds, leads the Court to conclude that respondent had notice of the condition on I-70. See *Chapman v. Dep't of Highways*, 16 Ct. Cl. 103 (1986); *Pritt v. Dep't of Highways*, 16 Ct. Cl. 8 (1985). Award of $288.73. . . . . p. 88

SAMUELS VS. DIVISION OF HIGHWAYS (CC-07-070)

Claimant brought this action for vehicle damage which occurred when his 1987 Nissan Maxima struck a hole while he was traveling on the Colliers Way Exit ramp of U.S. Route 22 in Hancock County. Since the respondent was working diligently to clean the roads on the date of this incident, the Court finds that respondent was not negligent when it was unable to make repairs to this particular condition in a timely manner. Thus, there is insufficient evidence of negligence upon which to base an award. Claim disallowed. . . . . p. 90

WAGNER VS. DIVISION OF HIGHWAYS (CC-07-172)

Claimants brought this action for vehicle damage which occurred when their 2003 Pontiac Grand Am GT struck a hole while claimant Jeanine Wagner was traveling on Route 88 in West Liberty. The Court found that respondent had, at the least, constructive notice of the hole which claimant's vehicle struck, and that the hole presented a hazard to the traveling public. Award of $500.00. . . . . p. 103

WRIGHT VS. DIVISION OF HIGHWAYS (CC-05-428)

Claimant brought this action for damages to her vehicle and for personal injury damages when her 1989 Oldsmobile Cutlass Supreme struck concrete pillars set up by respondent on the Philippi Pike near East View in Harrison County. The Court opines that respondent took all the necessary actions to protect the safety of the traveling public by placing signs in each direction. Thus, there is insufficient evidence of negligence on the part of respondent upon which to justify an award. . . . . p. 51

PEDESTRIANS

DEEM VS. DIVISION OF HIGHWAYS (CC-06-076)

Claimant testified that he was walking across Hutchinson Bridge when a wooden board fell out from the bridge after he stepped on it. Mr. Deem stated that he then fell into the road, injuring his right arm and back. The evidence established that the respondent did not have actual or constructive notice of loose wooden planks on Hutchinson Bridge on County Route 90/3 prior to the incident in question. Consequently, there is insufficient evidence of negligence upon which to justify an award. Claim disallowed. See *Chapman v. Dep't of Highways,* 16 Ct. Cl. 103 (1986)..... . . . . p. 93

PRISONS AND PRISONERS

ADAMS VS. REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY (CC-08-0230)

Claimant seeks to recover $277.00 in personal items including a hat, belt, shoes, comb, chain, and snuff. These items were misplaced when claimant was transferred between facilities. In its Answer, respondent admits the validity of the claim in the amount of $150.00 rather than in the amount of $277.00. Respondent states that several items were found and returned to the claimant. The Court finds that $150.00 is a fair and reasonable amount to compensate the claimant for his loss. Award of $150.00 . . . . . p. 219

BAKER VS. DIVISION OF CORRECTIONS (CC-07-063)

Claimant, an inmate at the Mount Olive Correctional Complex, seeks $80.00 for items of personal property that he alleges were entrusted to respondent but which have not been returned to him. This Court has taken the position in prior claims that if a bailment situation has been created, respondent is responsible for property of an inmate which is taken from that inmate, remains in its custody, and is not produced for return to the inmate. The Court holds that respondent is liable for the loss to claimant's property. Award of $69.00. . . . . p. 89

BOYCE VS. DIVISION OF CORRECTIONS (CC-08-0016)

Claimant, an inmate at the Mount Olive Correctional Complex, seeks compensation for lost wages in the amount of $28.62. On August 27, 2007, claimant was injured while performing work-related duties and asserts that respondent has a duty to pay inmate workers for lost wages when they are injured on the job. In its Answer, respondent admits the validity of the claim and that the amount is fair and reasonable. Award of $28.62. . . . . p. 96

COPLEY VS. REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY (CC-08-0443)

Claimant seeks reimbursement for $39.16 for items of personal property that were entrusted to respondent. The Court has taken the position in prior claims that if a bailment situation has been created, respondent is responsible for property of an inmate

which is taken from that inmate, remains in its custody, and is not produced for return to the inmate. The Court finds that $39.16 is a fair and reasonable amount to compensate the claimant for his lost items. Award $39.16. . . . . p. 258

DAVIS VS. REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY (CC-08-0406)

Claimant seeks reimbursement for $62.00 for items of personal property that were entrusted to respondent. The Court has taken the position in prior claims that if a bailment situation has been created, respondent is responsible for property of an inmate which is taken from that inmate, remains in its custody, and is not produced for return to the inmate. The Court finds that $62.00 is a fair and reasonable amount to compensate the claimant for his lost items. Award $62.00. . . . . p. 256

EAKLE VS. DEPARTMENT OF CORRECTIONS (CC-09-0087)

Claimant seeks reimbursement for $127.05 for items of personal property that were entrusted to respondent. The Court has taken the position in prior claims that if a bailment situation has been created, respondent is responsible for property of an inmate which is taken from that inmate, remains in its custody, and is not produced for return to the inmate. The Court finds that $127.05 is a fair and reasonable amount to compensate the claimant for his lost items. Award $127.05. . . . . p. 259

GLADHILL VS. REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY (CC-09-0093)

Claimant seeks reimbursement for $129.99 for items of personal property that were entrusted to respondent. The Court has taken the position in prior claims that if a bailment situation has been created, respondent is responsible for property of an inmate which is taken from that inmate, remains in its custody, and is not produced for return to the inmate. The Court finds that $129.99 is a fair and reasonable amount to compensate the claimant for his lost items. Award $129.99 . . . . . p. 260

HARMON VS. REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY (CC-08-0406)

Claimant seeks reimbursement for $426.96 for items of personal property that were entrusted to respondent. The Court has taken the position in prior claims that if a bailment situation has been created, respondent is responsible for property of an inmate which is taken from that inmate, remains in its custody, and is not produced for return to the inmate. The Court finds that $426.96 is a fair and reasonable amount to compensate the claimant for his lost items. Award $426.96 . . . . . p. 67

HELD VS. REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY (CC-08-0361)

Claimant seeks $1,061.00 for items of personal property that were entrusted to

respondent. The Court has taken the position in prior claims that if a bailment situation has been created, respondent is responsible for property of an inmate which is taken from that inmate, remains in its custody, and is not produced for return to the inmate. The Court finds that $1,035.00 is a fair and reasonable amount to compensate the claimant for his lost items. . . . . p. 162

MCKEIVER VS. REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY (CC-09-0070)

Claimant seeks reimbursement for $210.94 for items of personal property that were entrusted to respondent. The Court has taken the position in prior claims that if a bailment situation has been created, respondent is responsible for property of an inmate which is taken from that inmate, remains in its custody, and is not produced for return to the inmate. The Court finds that $210.94 is a fair and reasonable amount to compensate the claimant for his lost items. Award $210.94. . . . . p. 269

ORTIZ VS. REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY (CC-09-0020)

Claimant, an inmate at the Tygart Valley Regional Jail, seeks $1,200.00 for a gold necklace that was entrusted to respondent but has been misplaced. In its Answer, respondent admits the validity of the claim and that the amount is fair and reasonable. Award of $1,200.00. . . . . p. 251

WV REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY VS. DIVISION OF CORRECTIONS (CC-07-346)

Claimant brought this action in the amount of $877,753.00 to recover the costs of housing and providing associated services to prisoners who have been sentenced to a State penal institution, but due to circumstances beyond the control of the claimant, these prisoners have had to remain in the regional jails for periods of time beyond the dates of the commitment orders. Respondent filed an Answer admitting the validity of the claim and that the amount of the claim is fair and reasonable. Award of $877,753.00. p. 86

PUBLIC EMPLOYEES

COOKE VS. LIBRARY COMMISSION (CC-09-0141)

Claimant seeks to recover $895.63 for an error in the calculation of her increment and annual leave pay. In its Answer, respondent admits the validity of the claim as well as the amount. Award of $895.63. . . . . p. 271

DANGERFIELD VS. DIVISION OF PERSONNEL (CC-08-0463)

Claimant seeks to recover $600.00 for teaching a workshop. Since the invoice for the workshop was not submitted in time to be processed during the fiscal year, claimant did not receive payment. In its Answer, respondent admits the validity of the claim as well as the amount. Award of $600.00. . . . . p. 248

STATE AGENCIES

CAMBRIDGE CENTER LLC VS. DIVISION OF TOURISM (CC-08-0514)

Claimant seeks to recover $5,930.83 for an invoice that was not submitted by the required due date for reimbursement due to a billing error. In its Amended Answer, respondent admits the validity of the claim in the amount of $4,834.34. Claimant has agreed to the amended amount of $4,834.34. Award of $4,834.34. . . . . p. 250

CAMBRIDGE CENTER LLC VS. DIVISION OF TOURISM (CC-08-0511)

Claimant seeks to recover $8,013.05 for an invoice that was not submitted by the required due date for reimbursement due to a billing error. In its Amended Answer, respondent admits the validity of the claim in the amount of $7,638.08. Claimant has agreed to accept payment in the amount of $7,638.08. Award of $7,638.08. . p. 250

FORT HENRY REALTY INC d/b/a ADVANCED COMMUNICATIONS CO. VS. DEPARTMENT OF ADMINISTRATION (CC-06-359)

The parties stipulated to the following: on August 25, 2006, claimant and respondent, through its Purchasing Division, created a purchase order to install a Digital/IP Hybrid Telephone System for the West Virginia Veterans Nursing Home in Clarksburg; on September 13, 2006, respondent's Purchasing Division issued a Cease and Desist Order; on November 1, 2006, respondent's Purchasing Division cancelled the Purchasing Order; in preparing to perform the work required in the Purchasing Order, claimant did, in good faith and reliance, reasonably incur expenses in the amount of $13,266.78; the Court finds that the amount agreed to by the parties is fair and reasonable. Award of $13,266.78. . . . . p. 118

GROUNDWORKS RECLAMATION INC. VS. DEPARTMENT OF ENVIRONMENTAL PROTECTION (CC-08-0279)

Claimant seeks to recover $12,000.00 in expenses that it incurred in completing DEP No. 12620 Project for respondent in Craigsville. When claimant had completed the majority of the ground channels for the project, the channels needed to be redirected, and in some cases, redesigned to accommodate the water flow in the area. The cost in reconstructing the ground channels exceeded the amount that was allocated to perform the project. In its Answer, respondent admits the validity of the claim as well as the amount and states that the amount set forth by the claimant is fair and reasonable. Award of $12,000.00. . . . . p. 156

INFOPRINT SOLUTIONS COMPANY VS. DEPARTMENT OF ADMINISTRATION (CC-08-0414)

This claim was submitted to the Court for decision upon a Stipulation entered into by claimant and respondent wherein certain facts and circumstances of the claim were agreed to as follows: Via Purchase Order No. ISC 76067 entered into with the

Office of Technology, formerly Department of Administration IS&C, IBM was to provide, among other things, printer hardware maintenance services to the State of West Virginia. In June of 2007, IBM and Ricoh Systems formed a joint venture under which the former IBM Printer Division was transferred to InfoPrint Solutions Company. When invoicing for printer hardware maintenance began on June 2007, InfoPrint Solutions Company was not a current State of West Virginia vendor, nor did it have a valid contract against which to pay. Consequently, the Office of Technology was unable to pay the maintenance invoices. The outstanding invoices which the Office of Technology has been unable to pay total $187,763.14. The Court has reviewed the facts of the claim and finds that the amount agreed to by the parties is fair and reasonable. Award of $187,763.14. . . . . p. 190

KONICA MINOLTA BUSINESS SOLUTIONS VS. INSURANCE COMMISSION (CC-08-0472)

Claimant seeks to recover from respondent the cost for six copy machines in the amount of $13,885.21. In its Answer, respondent admits the validity of the claim in the amount of $4,042.12, rather than the amount of $13,885.21. Respondent states that only $4,042.12 of the claimed $13,885.21 in charges include invoices incurred during a period prior to the termination of the former Workers' Compensation Commission and the transfer of employees and certain assets to the Insurance Commission and charges for machines that were transferred to BrickStreet Insurance from the former Workers' Compensation Commission. These charges are not the responsibility of respondent. Claimant has agreed that the amount owed by respondent is $4,042.12. Award of $4,042.12. . . . . p. 249

LABORATORY CORPORATION OF AMERICA HOLDINGS VS. DEPARTMENT OF HEALTH AND HUMAN RESOURCES (CC-08-0239)

Claimant seeks to recover $34,043.38 for the cost of laboratory services that were provided to individuals as William R. Sharpe Jr. Hospital. Since there was no formal contract in place between claimant and William R. Sharpe Jr. Hospital, the State Auditor's Office did not approve the invoices for payment. In its Answer, respondent admits the validity of the claim as well as the amount, and states that there were sufficient funds expired in that appropriate fiscal year from which the invoice could have been paid. Award of $34,043.38. . . . . p. 158

MCDANIEL VS. DEPARTMENT OF ADMINISTRATION (CC-04-0263)

Claimant seeks $7,172.00 for monetary damages relating to the purchase of a 1897 model International dump truck which was mis-represented as a 1986 model International dump truck by the respondent. The parties agree that due to the discrepancy in the description of the vehicle, respondent shall pay claimant the amount of $250.00 for a good faith settlement. Award of $250.00. . . . . p. 252

POMEROY IT SOLUTIONS SALES COMPANY INC. VS. DEPARTMENT OF EDUCATION (CC-08-0015)

Claimant seeks $38,541.00 for various items of equipment that it provided to respondent. Claimant has not been paid for this equipment since the documentation for these services was not processed for payment within the appropriate fiscal year. In its Answer, respondent admits the validity of the claim as well as the amount and states that there were sufficient funds expired in the appropriate fiscal year from which the invoice could have been paid. Award of $38,541.00. . . . . p. 95

POMEROY IT SOLUTIONS SALES COMPANY INC. VS. DEPARTMENT OF EDUCATION (CC-08-011)

Claimant seeks $373.30 for technological consulting services that it provided to respondent. Since the documentation for these services was not processed for payment within the appropriate fiscal year, claimant has not been paid. In its Answer, respondent admits the validity of the claim as well as the amount, and states that there were sufficient funds expired in the appropriate fiscal year from which the invoice could have been paid. Award of $373.30. . . . . p. 93

POMEROY IT SOLUTIONS SALES CO. INC. VS. PUBLIC SERVICE COMMISSION (CC-08-0475)

Claimant seeks to recover $1,244.53 for five laser jet printers, twenty ink cartridges, and two toners, which it provided to respondent. In its Answer, respondent admits the validity of the claim as well as the amount, and states that there were sufficient funds expired in that appropriate fiscal year from which the invoices for these items could have been paid. Award of $1,224.53. . . . . p. 222

POMEROY IT SOLUTIONS SALES CO. INC. VS. PUBLIC SERVICE COMMISSION (CC-08-0530)

Claimant seeks to recover $415.30 for computer-related services that were not paid because the invoice was lost in the mail. In its Answer, respondent admits the validity of the claim as well as the amount, and states that there were sufficient funds expired in that appropriate fiscal year from which the invoice could have been paid. Award of $415.30. . . . . p. 222

WEIMER VS. PUBLIC SERVICE COMMISSION (CC-09-0002)

Claimant seeks to recover $145.39 from respondent for travel expenses. Since claimant submitted the expense report after the cut off date for submission, he was not reimbursed for the expenditures. In its Answer, respondent admits the validity of the claim as well as the amount. Award of $145.39. . . . . p. 251

WILLIAMS VS. DEPARTMENT OF ADMINISTRATION (CC-07-228)

Claimant seeks $64.80 which was deducted from her payroll checks from April 2005 through March 15, 2007. Claimant states that the "City of Charleston User Fees" were inadvertently deducted from her payroll checks even though she works in Westover, West Virginia. In its Answer, respondent admits the validity of the claim as well as the

amount, and states that there were sufficient funds expired in the appropriate fiscal year from which the invoice could have been paid.

Award of $64.80. . . . . p. 59

STREETS & HIGHWAYS - See also Comparative Negligence and Negligence

AFFOLTER VS. DIVISION OF HIGHWAYS (CC-08-0103)

Claimant brought this action for vehicle damage which occurred when her 2002 Mercury Cougar struck a hole in the road as her daughter, Lisa Affolter, was driving on Route 25 in Institute, Kanawha County. The size of the hole and the time of year in which this incident occurred leads the Court to conclude that respondent had notice of this hazardous condition. Award of $157.41. . . . . p. 151

AFFOLTER VS. DIVISION OF HIGHWAYS (CC-08-0104)

Claimant brought this action for vehicle damage which occurred when her 2002 Mercury Cougar struck a hole on Route 25 in Nitro, Kanawha County. While the Court agrees with the position of the claimant that the respondent had, at the least, constructive notice of the hole which claimant's vehicle struck and that the hole presented a hazard to the traveling public, the Court is also of the opinion that the claimant's driver knew the roadway contained holes and nevertheless drove at a speed in excess of that which was prudent under the existing condition of the roadway. The Court assigns forty percent of the responsibility for this loss to the claimant's driver and awards the claimant sixty percent of her loss. Award of $115.98. . . . . p. 153

ATKINS SR. VS. DIVISION OF HIGHWAYS (CC-08-0062)

Claimant brought this action for vehicle damage which occurred when his 2007 Chevrolet Impala struck a hole on Kanawha Boulevard in Charleston, Kanawha County. The Court is of the opinion that respondent had, at the least, constructive notice of the hole which claimant's vehicle struck and that the hole presented a hazard to the traveling public. Award of $418.58. . . . . p. 216

BAKER JR. VS. DIVISION OF HIGHWAYS (CC-08-0085)

Claimants brought this action for vehicle damage which occurred when their 2008 Subaru Impreza struck a hole while Melissa Baker was driving on Point Marion Road, designated as Route 119, in Morgantown, Monongalia County. The fact that this incident occurred on a primary road leads the Court to conclude that respondent had notice of this hazardous condition. Award of $872.78. . . . . p. 165

BERDINE VS. DIVISION OF HIGHWAYS (CC-08-0206)

Claimant brought this action for vehicle damage which occurred when her 1996 Subaru Legacy struck a raised section of the road on Little Rush Run, designated as County Route 250/3 in Burton, Wetzel County. The Court is of the opinion that

respondent had, at the least, constructive notice of the raised section of the road surface which claimant's vehicle struck and that it presented a hazard to the traveling public. The Court also finds that the claimant was negligent in failing to maintain control of her vehicle, and the Court will therefore reduce her recovery by twenty-percent (20%).

Award of $2,272.92. . . . . p. 181

BROWN VS. DIVISION OF HIGHWAYS (CC-07-0324)

Claimant brought this action for vehicle damage which occurred when his 2003 Cadillac struck a hole while claimant was driving on Maple Acres Road in Mercer County. The size of the hole and the time of the year in which this incident occurred leads the Court to conclude that respondent had notice of this hazardous condition. Award of $874.13. . . . . p. 144

CAPP VS. DIVISION OF HIGHWAYS (CC-08-0149)

Claimant brought this action for vehicle damage which occurred when his

2000 Chevrolet Tracker struck a hole as he was driving south on W.Va. Route 2 near Wellsburg, Brooke County. The Court is of the opinion that respondent had, at the least, constructive notice of the hole which claimant's vehicle struck and that the hole presented a hazard to the traveling public. Award of $500.00. . . . . p. 171

CAREY VS. DIVISION OF HIGHWAYS (CC-08-0276)

This claim was submitted to the Court for decision upon a Stipulation entered into by claimant and respondent wherein certain facts and circumstances of the claim were agreed to as follows: On June 3, 2008, the claimant was driving north on W.Va. Route 88 next to Oglebay Park when he noticed a vehicle in the southbound lane had stopped in the roadway. Claimant observed that the road was blocked with tree branches. As he stopped his vehicle, a branch from the tree fell onto his vehicle damaging the vehicle's windshield, hood, and fender. Respondent was responsible for the maintenance of W.Va. Route 88 which it failed to maintain properly on the date of this incident. The Court has reviewed the facts of this claim and finds that respondent was negligent in its maintenance of W.Va. Route 88. Thus, claimant may make a recovery for his loss. Award of $362.00. . . . . p. 188

218

CARTE JR VS. DIVISION OF HIGHWAYS (CC-08-0223)

Claimants brought this action for vehicle damage which occurred when the edge of the road broke underneath their 1989 Ford F150 truck as claimant, Harold Larry Carte Jr., was driving on Valley Grove Road in Kanawha County. The Court is of the opinion that respondent had at least constructive notice of the condition on Valley Grove Road. Thus, the Court finds respondent negligent and claimants may make a recovery for the damage to their vehicle. Award of $1,100.00. . . . . p. 219

CONN VS. DIVISION OF HIGHWAYS (CC-06-0296)

Claimant brought this action for vehicle damage which occurred when his 1994

Plymouth Grand Voyager van struck a depression in the road surface on West Road, designated as County Route 60/24, in Wayne County. The Court is of the opinion that respondent had, at the least, constructive notice of the depression in the road which claimant's vehicle struck and that it presented a hazard to the traveling public. Award of $200.00..... . . . . p. 138

HINKLE VS. DIVISION OF HIGHWAYS (CC-08-0074)

Claimants brought this action for vehicle damage which occurred when their 2002 PT Cruiser struck a hole while claimant, Amberlee Christey, was driving on Route 119, also known as the "Mile Ground," in Morgantown, Monongalia County. Since the cold mix was below specifications and proved inadequate, the Court finds the respondent negligent and claimants may make a recovery for the damage to their vehicle. Award of $278.55. . . . . p. 150

CLAYTON VS. DIVISION OF HIGHWAYS (CC-08-0083)

Claimant brought this action seeking $4,900.00 for vehicle damage which occurred when, in an attempt to avoid a deer on County Road 10 in Marion County, her 1995 Ford Explorer Limited rolled over an embankment after the hill side gave way. The Court is of the opinion that respondent did not have actual or constructive notice of the condition of the edge of the road prior to this incident. The Court finds that there is insufficient evidence of negligence on the part of respondent upon which to base an award. . . . . p. 254

COPLEY VS. DIVISION OF HIGHWAYS (CC-08-0191)

Claimant brought this action for vehicle damage which occurred when her 2007 Mazda 3 struck holes on U.S. Route 60 in Charleston, Kanawha County. The Court is of the opinion that respondent had, at the least, constructive notice of the holes which claimant's vehicle struck and that the holes presented a hazard to the traveling public. Award of $500.00..... . . . . p. 178

DONAHUE VS. DIVISION OF HIGHWAYS (CC-08-0114)

Claimant brought this action for vehicle damage which occurred when his 2008 Mercedes Benz struck a hole while claimant's wife, Janet Donahue, was driving on the Mileground, designated as U.S. Route 119, in Morgantown, Monongalia County. The Court is of the opinion that respondent had, at the least, constructive notice of the hole which claimant's vehicle struck and that the hole presented a hazard to the traveling public. Award of $342.42. . . . . p. 168

EVANS VS. DIVISION OF HIGHWAYS (CC-06-0289)

Claimant brought this action for vehicle damage which occurred when his

2001 Toyota Tacoma truck struck a hazard paddle on West Run Road, designated as County Route 67/1, in Morgantown, Monongalia County. The Court is of the opinion that respondent had, at the least, constructive notice of the condition of the sign which

claimant's vehicle struck and that it presented a hazard to the traveling public. Award of $500.00. . . . . p. 136

ESTEP VS. DIVISION OF HIGHWAYS (CC-07-0314)

Claimant brought this action for vehicle damage which occurred when his 2000 Ford F150 truck struck a metal expansion joint on the bridge on Route 460 in Mercer County. Claimant had no reason to suspect the failure of the metal expansion joint whereas respondent had notice that the previous metal expansion joint had come loose at this location. Award of $500.00. . . . . p. 143

FERGUSON VS. DIVISION OF HIGHWAYS (CC-06-282)

The parties stipulated to the following: on September 20, 2006, claimant was traveling on Route 52 in Mingo County when his 2006 Ford Fusion struck a hole; respondent agrees that the amount of $288.58 for the damages put forth by the claimant is fair and reasonable. The Court has reviewed the facts of the claim and finds that respondent was negligent in its maintenance of Route 52 on the date of this incident. Thus, claimant may make a recovery for his loss. Award of $288.58. . . . . p. 52

GIBBS VS. DIVISION OF HIGHWAYS (CC-07-074)

The parties stipulated to the following: on February 23, 2007, claimant Esther Gibbs was traveling on Washington Street West in Charleston, Kanawha County, when the vehicle struck a hole in the road, damaging a tire and rim; respondent agrees that the amount of $252.32 for the damages put forth by the claimants is fair and reasonable; the Court has reviewed the facts of the claim and finds that respondent was negligent in its maintenance of Washington Street West on the date of this incident. Thus, claimants may make a recovery for their loss. Award of $252.32. . . . . p. 34

GODWIN VS. DIVISION OF HIGHWAYS (CC-07-0323)

Claimant brought this action for vehicle damage which occurred when her 1999 Volvo V70 struck a hole on Route 33 in Putnam County. The Court finds that respondent had, at the least, constructive notice of the hole which claimant's vehicle struck and that it presented a hazard to the traveling public.

Award of $428.78. . . . . p. 119

HASH VS. DIVISION OF HIGHWAYS (CC-07-0003)

Claimant seeks $298.87 for vehicle damage which occurred when her vehicle struck a protruding curb in the city of St. Albans. The Court finds that respondent is not responsible for the maintenance of the sidewalks and curbs within the city limits of St. Albans and therefore finds there is insufficient evidence of negligence on the part of the respondent upon which to base an award and does deny this claim. . . . . p. 253

HENDRICK VS. DIVISION OF HIGHWAYS (CC-07-076)

The parties stipulated to the following: on February 23, 2007, claimant was traveling on Teays Valley Road in Putnam County when his vehicle struck a hole in the road damaging two tires; respondent agrees that the amount of $256.76 for the damages put forth by the claimant is fair and reasonable. The Court has reviewed the facts of the claim and finds that respondent was negligent in its maintenance of Teays Valley Road on the date of this incident. Award of $256.76. . . . . p. 35

GALFORD VS. DIVISION OF HIGHWAYS (CC-08-0244)

Claimants brought this action for vehicle damage which occurred when their 1994 Ford Taurus struck a hole and a broken section of pavement while claimant, Jennifer Harman, was driving on Chaplain Hill Road in Morgantown, Monongalia County. The Court is of the opinion that respondent had, at the least, constructive notice of the hole and the broken section of pavement which claimants' vehicle struck and that these conditions presented a hazard to the traveling public. Award of $934.77.p. 184

HALL, Personal Representative of the Estate of Jamie Hall VS. DIVISION OF HIGHWAYS (CC-03-563)

The claim was submitted to the Court for decision upon a Stipulation entered into by claimant and respondent wherein certain facts and circumstances of the claim were agreed to as follows: Respondent is responsible for the maintenance of Route 28, Hampshire County; Jamie Hall was operating a motor vehicle northbound on Route 28 near the town of Romney on October 11, 2002, at 7:15 a.m.; The vehicle driven by Ms. Hall veered into a yaw rotation and struck a Sycamore tree; Other motorists have struck the Sycamore tree; The incident resulted in the death of Ms. Hall; Claimant and respondent believe that an award of Forty Thousand Dollars ($40,000.00) would be a fair and reasonable amount to settle this claim. The Court finds that respondent was negligent and claimant may make a recovery in the amount of $40,000.00. . . . . p. 158

HANSEN VS. DIVISION OF HIGHWAYS (CC-08-0099)

Claimant brought this action for vehicle damage which occurred when his 2000 Subaru Legacy struck a hole while claimant's wife, Evelyn Hansen, was driving on W.Va. Route 7 in Sabraton, Monongalia County. The Court is of the opinion that respondent had, at the least, constructive notice of the hole which claimant's vehicle struck and that the hole presented a hazard to the traveling public.

Award of $546.71. . . . . p. 67

HODGE VS. DIVISION OF HIGHWAYS (CC-07-071)

Claimants brought this action for vehicle damage which occurred when their 2006 Chevrolet HHR struck a broken section of road while claimants were traveling on Goodwill Road in Wayne County. The Court opines that respondent had at least constructive notice of the broken section of road which claimants' vehicle struck and that this broken section of road presented a hazard to the traveling public. Thus, the Court finds respondent negligent and claimants may make a recovery for the

damage to their vehicle. Award of $125.08. . . . . p. 42

HOY VS. DIVISION OF HIGHWAYS (CC-07-0380)

Claimants brought this action for vehicle damage which occurred when their 2006 Dodge Grand Caravan struck loose pieces of asphalt as Todd L. Hoy was driving on I-79 between Exits 119 and 120 in Harrison County. The Court is of the opinion that respondent had, at the least, constructive notice of the loose pieces of asphalt which claimants' vehicle struck. Thus, the Court finds respondent negligent and claimants may make a recovery for the damage to their vehicle. Award of $169.70. . . . . p. 239

HUNT VS. DIVISION OF HIGHWAYS (CC-07-090)

Claimants brought this action for vehicle damage which occurred when their 2004 Mazda MPV struck a hole while claimant Sheila Hunt was traveling southbound on Route 250 in Fairmont, Marion County. The Court opines that respondent had at least constructive notice of the hole which claimants' vehicle struck and that the hole presented a hazard to the traveling public. Thus, the Court finds respondent negligent.

Award of $419.77. . . . . p. 39

IGO VS. DIVISION OF HIGHWAYS (CC-08-0195)

Claimants brought this action for vehicle damage which occurred when claimant Michelle Igo's father, Carl Skeens, was driving claimants' 2006 Chevrolet Silverado truck, and the truck struck rocks that were placed on Cabin Creek Road in Kayford, Kanawha County. The Court finds that respondent did not have actual or constructive notice of the rocks that were placed on County Route 79/3. Claim disallowed.p. 179

JOHNSON VS. DIVISION OF HIGHWAYS (CC-08-0138)

Claimant brought this action for vehicle damage which occurred when her 2006 Chevrolet Monte Carlo struck a hole on May Road, designated as County Route 3, in Follansbee, Brooke County. The Court is of the opinion that respondent had, at the least, constructive notice of the hole which claimant's vehicle struck and that the hole presented a hazard to the traveling public. Award of $344.95. . . . . p. 170

JOHNSTON VS. DIVISION OF HIGHWAYS (CC-07-0260)

Claimant brought this action for vehicle damage which occurred when claimant's mother, Dreama L. Johnston, was driving her son's 2001 Ford F150 truck and it struck a sign on Cheesy Creek Road, referred to as County Route 28, in Mercer County. The Court is of the opinion that respondent did not have actual or constructive notice of the hazard paddle that claimant's vehicle struck on Route 28. Claim disallowed.

. . . . . p. 141

KENT VS. DIVISION OF HIGHWAYS (CC-06-250)

Claimant brought this action for vehicle damage which occurred when her 2002

Dodge Neon struck a hole while she was traveling on Wilsonburg Road in Harrison County. Claimant's vehicle sustained damage totaling $242.20. The Court holds that respondent had at least constructive notice of the hole which claimant's vehicle struck and that the hole presented a hazard to the traveling public. Thus, the Court finds respondent negligent. Award of $242.20. . . . . p. 28

KESSLER VS. DIVISION OF HIGHWAYS (CC-07-210)

Claimant brought this action for vehicle damage which occurred when his 2005 Toyota Seneca van struck a hole while he was traveling on Route 31 between Meadow Bridge and Danese in Fayette County. The evidence establishes that respondent, at the least, had constructive notice of the hole that claimant's vehicle struck, and that the hole presented a hazard to the traveling public on Route 31 in Fayette County. Thus, the Court finds respondent negligent. Award of $490.43. . . . . p. 63

LANCASTER VS. DIVISION OF HIGHWAYS (CC-08-0316)

This claim was submitted to the Court for decision upon a Stipulation entered into by claimant and respondent wherein certain facts and circumstances were agreed to as follows: On March 22, 2008, claimant was driving on W.Va. Route 20 between Folsom and Wallace in Harrison County. As claimant was traveling at approximately fifty-five miles per hour, his 2000 Lincoln Town car struck a hole, damaging the vehicle's tire. Claimant lost control of the vehicle and ran off the roadway. The vehicle crossed the ditch and struck the embankment where it flipped on its top. Respondent was responsible for the maintenance of W.Va. Route 20 which it failed to maintain properly on the date of this incident. As a result, the vehicle was totaled in this incident. Claimant seeks to recover his insurance deductible in the amount of $250.00. The Court has reviewed the facts of the claim and finds that the amount agreed to by the parties is fair and reasonable. Award of $250.00. . . . . p. 189

LARCK VS. DIVISION OF HIGHWAYS (CC-06-278)

Claimant brought this action for vehicle damage which occurred when her 2003 Nissan Sentra struck a hole while she was traveling eastbound on I-64 near Barboursville, Cabell County. The Court holds that respondent had at least constructive notice of the hole which claimant's vehicle struck and that the hole presented a hazard to the traveling public. Thus, the Court finds respondent negligent. Award of $150.00. . . . . p. 19

LESTER, ADMINISTRATRIX OF THE ESTATE OF STANLEY LESTER (CC-06-0342)

The parties stipulated to the following: On December 4, 2004, Stanley Lester was driving north on County Route 3/5, near Mud Fork, in McDowell County when his truck drove into overflowing water and icy mudslides in the road, causing Mr. Lester to lose control of the vehicle; the vehicle swerved and flipped over before it came to rest on the side of the hill next to the road; Mr. Lester died as a result of injuries caused by this accident; claimant alleges that the accident was the result of respondent's failure to properly maintain the ditch lines and culvert along the road, resulting in excess water on

the road at the time of the accident. The Court finds that the amount of the damages agreed to by the parties is fair and reasonable. Award of $85,000.00. . . . . p. 233

LEVINSON VS. DIVISION OF HIGHWAYS (CC-06-0254)

Claimant brought this action for vehicle damage which occurred when her 2001 Ford Focus struck a hole while her son, Aaron Levinson, was driving on Fifth Avenue in Huntington, Cabell County. The Court finds that respondent had, at the least, constructive notice of the hole which claimant's vehicle struck and that the hole presented a hazard to the traveling public. Award of $500.00. . . . . p. 135

LOTT VS. DIVISION OF HIGHWAYS (CC-05-180)

Claimants brought this action for vehicle damage which occurred when their 1999 Chevrolet Cavalier struck a slip in the road while claimant Regina Lott was traveling on Progress Ridge Road in Wood County. The Court opines that respondent had at least constructive notice of the slip in the road which claimants' vehicle struck and that the slip presented a hazard to the traveling public. Thus, the Court finds respondent negligent. Award of $231.91. . . . . p. 24

MASTON VS. DIVISION OF HIGHWAYS (CC-08-0110)

Claimant brought this action for vehicle damage which occurred when his 1989 Honda Civic struck a hole on Pennsylvania Avenue in Charleston, Kanawha County. The Court finds that respondent had, at the least, constructive notice of the hole which claimant's vehicle struck and that the hole presented a hazard to the traveling public. Award of $120.17. . . . . p. 124

MAYNOR VS. DIVISION OF HIGHWAYS (CC-08-0125)

Claimants brought this action for vehicle damage which occurred when their 2006 Volkswagen Passat struck a barrel while claimant Anna Maynor was driving on I-64 East near the Dunbar bridge in Kanawha County. The Court finds that the plastic barrels located along the side of the road on I-64 were not adequately secured to prevent a hazard to the traveling public. Award of $261.87. . . . . p. 125

MCCUMBERS VS. DIVISION OF HIGHWAYS (CC-07-0365)

Claimant brought this action for vehicle damage which occurred when her 2000 Hyundai Elantra struck a hole while claimant was driving on Coal River Road in St. Albans, Kanawha County. The Court finds that respondent had, at the least, constructive notice of the hole which claimant's vehicle struck and that it presented a hazard to the traveling public. Award of $78.64. . . . . p. 127

MENDEZ VS. DIVISION OF HIGHWAYS (CC-07-065)

Claimant brought this action for vehicle damage which occurred when his 2005 Chevrolet Cobalt struck a hole while he was traveling on County Route 29 in Preston

County. The Court opines that respondent had at least constructive notice of the hole which claimant's vehicle struck and that the hole presented a hazard to the traveling public. Award of $378.46. . . . . p. 32

MOHR VS. DIVISION OF HIGHWAYS (CC-06-0047)

Claimant brought this action for vehicle damage which occurred when his 2002 Ford F150 struck a hole as he was driving at the W.Va. Route 41 and W.Va. Route 55 junction in Calvin, Nicholas County. The Court is of the opinion that respondent had, at the least, constructive notice of the hole which claimant's vehicle struck and that the hole presented a hazard to the traveling public. Award of $250.00. . . . . p. 191

MOORE VS. DIVISION OF HIGHWAYS (CC-08-0260)

This claim was submitted to the Court for decision upon a Stipulation entered into by claimants and respondent wherein certain facts and circumstances of the claim were agreed to as follows: On May 23,2008, claimant Lawrence R. Moore was driving north on W.Va. Route 2 near Warwood when his vehicle struck a hole; Respondent was responsible for the maintenance of W.Va. Route 2 which it failed to maintain properly on the date of this incident; As a result, claimants' vehicle sustained damage in the amount of $265.51. The Court has reviewed th facts of the claim and finds that respondent was negligent in its maintenance of W.Va. Route 2 on the date of this incident. Thus, claimants may make a recovery for their loss.

Award of $265.51. . . . . p. 188

MORRIS VS. DIVISION OF HIGHWAYS (CC-08-0043)

Claimant brought this action for vehicle damage which occurred when his vehicle struck a rock while he was traveling through Tongue Hill, which is designated as County Route 47, between Pinch and Elkview. The Court cannot hold respondent liable for the spontaneous falling of a rock. Claim disallowed. . . . . p. 146

MONGOLD VS. DIVISION OF HIGHWAYS (CC-08-0203)

Claimant brought this action for vehicle damage which occurred when her 2005 Subaru Legacy struck a hole while claimant's son, Joshua Mongold, was driving on Van Voorhis Road, designated as County Route 59, in Morgantown, Monongalia County. The Court is of the opinion that respondent had, at the least, constructive notice of the hole which claimant's vehicle struck and that the hole presented a hazard to the traveling public. Award of $250.00. . . . . p. 180

MOWERY JR VS. DIVISION OF HIGHWAYS (CC-07-0086)

Claimant brought this action for vehicle damage which occurred when excess gravel from the road struck the windshield of his 2000 Honda Civic on I-79 North in Elkview, Kanawha County. The Court is of the opinion that respondent did not have notice of the loose piece of gravel which struck claimant's vehicle on I-79 at mile marker seven. Claim disallowed. . . . . p. 163

MOWERY JR VS. DIVISION OF HIGHWAYS (CC-07-0087)

Claimant brought this action for vehicle damage which occurred when gravel on the I-64 eastbound exit ramp at Cross Lanes struck the windshield of his 2006 Nissan Frontier pickup truck. The Court finds that claimant has not established that the damage to his vehicle was caused by any negligence on the part of the respondent, and further, it would be mere speculation for the Court to conclude where the excess gravel in the road came from. Claim disallowed. . . . . p. 164

MYLES VS. DIVISION OF HIGHWAYS (CC-06-0385)

Claimant brought this action for vehicle damage which occurred when his 1994 Ford Mustang struck a raised section of pavement on Route 25 near the Bayer Plant in Kanawha County. The Court is of the opinion that respondent had, at the least, constructive notice of the hole on Route 25. The evidence also established that claimant had notice of the road condition on Route 25. The Court finds that the negligence of the claimant was equal to or more than the negligence of the respondent; therefore, the claimant may not make a recovery in this claim. Claim disallowed. . . . . p. 139

NATH VS. DIVISION OF HIGHWAYS (CC-08-0232)

Claimant brought this action for vehicle damage which occurred when his 1994 Subaru Legacy struck a hole on Chestnut Ridge Road near its intersection with Irwin Street in Morgantown, Monongalia County. The Court is of the opinion that respondent had, at the least, constructive notice of the hole which claimant's vehicle struck and that the hole presented a hazard to the traveling public. Award of $76.27. . . . . p. 183

PHILLIPS VS. DIVISION OF HIGHWAYS (CC-08-0180)

Claimant brought this action for vehicle damage which occurred when her 2008 Hyundai Sonata struck two holes on Cheat Road, designated as County Route 857, in Morgantown, Monongalia County. The Court is of the opinion that respondent had, at the least, constructive notice of the holes which claimant's vehicle struck and that the holes presented a hazard to the traveling public. Award of $362.09. . . . . p. 177

PILL VS. DIVISION OF HIGHWAYS (CC-08-0068)

Claimant brought this action for vehicle damage which occurred when his 2004 Ford Focus struck two holes on Enterprise Road in Fairmont, Marion County. The Court is of the opinion that respondent had, at the least, constructive notice of the holes which claimant's vehicle struck and that the holes presented a hazard to the traveling public. Thus, the Court finds respondent negligent and claimant may make a recovery for the damage to his vehicle. Award of $500.00. . . . . p. 242

POWELL VS. DIVISION OF HIGHWAYS (CC-08-0271)

Claimant brought this action for vehicle damage which occurred when her 2002 Pontiac Grand Am GT struck a hole as claimant was driving on W.Va. Route 25 in Nitro, Kanawha County. The Court is of the opinion that respondent had, at the least,

constructive notice of the hole which claimant's vehicle struck and that the hole presented a hazard to the traveling public. Award of $500.00. . . . . p. 220

ROUSH VS. DIVISION OF HIGHWAYS (CC-07-281)

This claim was submitted to the Court for decision upon a Stipulation entered into by claimant and respondent wherein certain facts and circumstances of the claim were agreed to as follows: Respondent is responsible for the maintenance of County Route 1/6 in Kanawha County; On or around April 15, 2007, the claimant's property suffered flood damage as a result of a clogged culvert during a rain event; For the purposes of settlement, Respondent acknowledges culpability for the preceding incident; Claimant and Respondent believe that in this particular incident and under these particular circumstances that an award of four thousand five hundred dollars ($4,500.00) would be a fair and reasonable amount to settle this claim. The Court finds that respondent was negligent in its maintenance of County Route 1/6 and thus claimant may make a recovery for her loss. Award of $4,500.00. . . . . p. 159

SERIAN VS. DIVISION OF HIGHWAYS (CC-08-0084)

Claimant brought this action for vehicle damage which occurred when his 2001 Buick LeSabre struck a hole as he was driving on Country Club Road in Fairmont, Marion County. The Court is of the opinion that respondent had, at the least, constructive notice of the hole which claimant's vehicle struck and that the hole presented a hazard to the traveling public. The size of the hole and its location lead the Court to conclude that respondent was aware of the condition on Country Club Road. Thus, the Court finds respondent negligent and claimant may make a recovery for the damage to his vehicle. Award of $90.10. . . . . p. 243

SIKULA VS. DIVISION OF HIGHWAYS (CC-08-0028)

Claimants brought this action for vehicle damage which occurred when claimant, Judith Sikula, was driving their 2004 Nissan Murano, and their vehicle struck a metal post attached to a hole cover. The incident occurred on Old MacCorkle Avenue in Charleston, Kanawha County. The Court has determined that the metal post, which was improperly protruding into the road surface instead of downward inside the hole, presented a hazard to the traveling public. Award of $1,000.00. . . . . p. 215

SISK VS. DIVISION OF HIGHWAYS (CC-08-0142)

Claimant brought this action for vehicle damage which occurred when her 2005 Chrysler PT Cruiser struck two holes when she was driving on U.S. Route 60 in South Charleston, Kanawha County. The size of the holes and their location on U.S. Route 60, a first priority road, lead the Court to conclude that respondent had notice of this condition. Award of $793.51. . . . . p. 217

SKALICAN VS. DIVISION OF HIGHWAYS (CC-08-0249)

Claimant brought this action for vehicle damage which occurred when his 2005

Chrysler Crossfire struck a hole on W.Va. Route 705, known as "Two Hundred First Memorial Highway", in Morgantown, Monongalia County. The Court is of the opinion that respondent had, at the least, constructive notice of the hole which claimant's vehicle struck and that it presented a hazard to the traveling public. Notwithstanding the negligence of respondent, the Court is also of the opinion that the claimant was negligence since he was aware of the condition of the road. The Court finds that the claimant's negligence equals twenty-percent (20%) of his loss. Award of $200.00.

. . . . . p. 186

SPITZ VS. DIVISION OF HIGHWAYS (CC-05-0186)

Claimant brought this action for vehicle damage which occurred when his 2005 Dodge Grand Caravan struck a sign while claimant was driving on Route 607 in Lawrence County, Ohio. The Court finds that respondent had, at the least, constructive notice of the sign that had been blown down to wind, which presented a hazard to the traveling public. Thus, the Court finds respondent negligent and claimant may make a recovery for the damage to his vehicle. Award of $250.00. . . . . p. 134

STEWART VS. DIVISION OF HIGHWAYS (CC-07-0297)

Claimants brought this action for vehicle damage which occurred when claimant's daughter, Brandi Stewart, was driving claimants' 2002 Mitsubishi Eclipse, and their vehicle struck a hole on U.S. Route 19, south of Sutton, in Braxton County. The Court is of the opinion that respondent had, at the least, constructive notice of the hole which claimants' vehicle struck and that it presented a hazard to the traveling public. Notwithstanding the negligence of the respondent, the Court is also of the opinion that the claimants' daughter was negligent since she was aware of the condition of the road. Thus, the Court will reduce claimants' award by fifteen percent, and claimants may recover eighty-five percent of the loss sustained. Award of $327.42.

. . . . . p. 112

TICKLE VS. DIVISION OF HIGHWAYS (CC-04-0951)

Claimants brought this action for vehicle damage which occurred when their 1999 Dodge Stratus struck a hole while claimant, Sharon Marie Tickle, was driving on Route 20 in Mercer County. The Court is of the opinion that respondent had, at the least, constructive notice of the hole which claimants' vehicle struck and that the hole presented a hazard to the traveling public. Award of $200.00. . . . . p. 133

TWIGG VS. DIVISION OF HIGHWAYS (CC-08-0097)

Claimant brought this action for vehicle damage which occurred when her 2002 PT Cruiser struck a hole on West Run Road, designated as County Route 67/1, in Morgantown, Monongalia County. The Court is of the opinion that respondent had, at the least, constructive notice of the hole which claimant's vehicle struck and that the hole presented a hazard to the traveling public. Award of $169.43. . . . . p. 166

WALKER VS. DIVISION OF HIGHWAYS (CC-07-073)

Claimant brought this action for vehicle damage which occurred when their 2007 Ford Edge was struck by dust and gravel while claimant Michael Walker was traveling northbound on W.Va. Route 62 in Midway, Putnam County. The Court finds that respondent did not have actual or constructive notice of the debris on the road which claimants' vehicle struck prior to the incident in question. Claim disallowed. . p. 46

WHEELER VS. DIVISION OF HIGHWAYS (CC-08-0004)

Claimant brought this action for vehicle damage which occurred when her 2002 Ford Focus struck a hole while she was traveling on Six Mile Road near Madison, Boone County. Respondent did not receive any complaints about the condition on Six Mile Road before this incident occurred. Claim disallowed. . . . . p. 145

WILCOX VS. DIVISION OF HIGHWAYS (CC-08-050)

The parties stipulated to the following: on December 10, 2007, claimant was traveling on the Teays Valley entrance ramp onto I-64 in Putnam County when her vehicle struck a hole in the road damaging one tire and two rims; respondent was responsible for the maintenance of the Teays Valley ramp onto I-64 which it failed to maintain properly on the date of this incident; the Court finds that the amount of damages agreed to by the parties is fair and reasonable. Award of $714.71. . . . . p. 121

WILLIAMS VS. DIVISION OF HIGHWAYS (CC-08-0187)

Claimant brought this action for vehicle damage which occurred when claimant's sixteen-year-old brother, Zack Williams, was driving claimant's 2005 Toyota Scion, and it struck a hole on W.Va. Route 3, approximately four miles west of Beckley, in Raleigh County. The Court is of the opinion that respondent had, at the least, constructive notice of the hole which claimant's vehicle struck and that the hole presented a hazard to the traveling public on W.Va. Route 3. Award of $1,183.37. . . . p. 161

WILLIAMS VS. DIVISION OF HIGHWAYS (CC-08-0141)

Claimant brought this action for vehicle damage which occurred when her 1996 Ford F150 truck struck a hole on the surface of the low water bridge on Kale Road, also referred to as Route 7/14, in Mercer County. Since there was flooding throughout Mercer County around the date of this incident, the Court finds that respondent maintained Route 71/4, a third priority road, in a timely manner. Claim disallowed. . . . . p. 155

WOMACK VS. DIVISION OF HIGHWAYS (CC-08-0075)

The parties stipulated to the following: on February 6, 2008, claimant was traveling on the Teays Valley entrance ramp onto I-64 in Putnam County, when her vehicle struck a hole in the road, damaging both passenger side tires and rims; respondent was responsible for the maintenance of the Teays Valley entrance ramp which it failed to maintain properly on the date of this incident; the Court finds that the amount of $500.00 for the damages put forth by the claimant is fair and reasonable. Award of

$500.00. . . . . p. 121

TREES and TIMBER

CUSACK VS. DIVISION OF HIGHWAYS (CC-05-012)

Claimant brought this action for damage to her 1998 Ford Windstar which occurred when a tree limb fell onto her vehicle while she was traveling on Mill Creek Road in Beckley, Raleigh County. The general rule of this Court with regard to tree fall claims is that if a tree is dead and poses an apparent risk, then the respondent may be held liable. However, when an apparently healthy tree falls and causes property damage as a result of a storm, the Court has held that there is insufficient evidence of negligence upon which to justify an award. *Gerritsen v. Dep't of Highways*, 16 Ct. Cl. 85 (1986); *Wiles v. Div. of Highways*, 22 Ct. Cl. 170 (1998). The Court finds that respondent had no notice that the tree limb posed an apparent risk to the public. Claim disallowed.

. . . . . p. 15

GOULD VS. DIVISION OF HIGHWAYS (CC-06-303)

Claimant brought this action for vehicle damage which occurred when a tree limb fell onto their 1985 Dodge D100 while it was parked adjacent to Sand Hill Road near St. Albans, Kanawha County. The Court found that respondent had no notice that the tree posed an apparent risk to the public. The tree appeared to be a healthy tree. Neither claimants nor respondent had reason to believe that the tree was in danger of falling. Claim disallowed. . . . . p. 47

HARRIS VS. DIVISION OF HIGHWAYS (CC-07-0282)

The parties stipulated to the following: On August 30, 2007, a tree from W.Va. Route 21 fell across the road and onto the property of Premier Body Works located in Barrackville, Marion County. Respondent agrees that the amount of $425.00 for the damages put forth by the claimant is fair and reasonable. The Court has reviewed the facts of the claim and finds that respondent was negligent in its maintenance of W.Va. Route 21. Thus, claimant may make a recovery for his loss. Award of $425.00.

. . . . . p. 24

LEGRAND VS. DIVISION OF HIGHWAYS (CC-07-214)

The parties stipulated to the following: during a storm on the evening of June 27, 2007, a tree from respondent's property along I-64 fell on a workshop totaling the building; respondent agrees that the amount of $250.00 for the damages put forth by the claimant is fair and reasonable; the Court has reviewed the facts of the claim and finds that respondent was negligent in its maintenance of I-64 on the date of this incident. Award of $250.00. . . . . p. 106

MAY JR. VS. DIVISION OF HIGHWAYS (CC-05-056)

As claimant was traveling north from Varney to Fort Gay on Route 52 in his 1999 Ford Explorer at or near the speed limit, the crown of a tree fell from a rock-cut high wall adjacent to the roadway. The Court opines that respondent did not have actual or constructive notice of the fallen tree on Route 52 on the day in question. The Court will not place a burden on respondent with respect to trees surrounding its highways unless the tree poses an obvious hazard to the traveling public. Claim disallowed.

. . . . . p. 78

ORE VS. DIVISION OF HIGHWAYS (CC-06-143)

Claimant brought this action for vehicle damage which occurred when his 1985 BMW struck a tree in the road on W.Va. Route 4, near Clendenin, Kanawha County. Claimant testified that he was traveling eastbound on W.Va. Route 4 at approximately fifty-two miles per hour when he noticed a tree falling into the road. The Court found that respondent had no notice that the tree at issue posed an apparent risk to the public. Claim disallowed. . . . . p. 21

SHUMAN d/b/a/ PREMIER BODY WORKS VS. DIVISION OF HIGHWAYS (CC-07-0280)

The parties stipulated to the following: On August 30, 2007, a tree from W.Va. Route 21 fell across the road and onto claimant's property. Respondent agrees that the amount of $3,165.00 for the damages put forth by the claimant is fair and reasonable. The Court finds the respondent was negligent in its maintenance of W.Va. Route 21, and claimant may make a recover for his loss. Award of $3,165.00. . . . . p. 213

UNJUST CONVICTION

GREEN VS. STATE OF WEST VIRGINIA (CC-07-084)

On September 19, 2004, claimant was traveling in the eastbound lane on Route 50 near Augusta, Hampshire County, when claimant's vehicle collided with a vehicle being driven by Rhonda Dante which had stopped in front of her. That driver (Dante) was delayed in making a left turn because there was a procession of motorcycles traveling in the westbound lane. The collision pushed the Dante vehicle into the opposite lane where it collided with a motorcycle. As a result of the collision, the passenger (Kaitlyn Marie Dante) in the stopped vehicle and a motorcyclist (Janeann Moore Stehle) were killed. It was uncontested that the collision was caused, at minimum, by the claimant's failure to keep a proper watch on the road. On January 4, 2005, a Hampshire County grand jury indicted the claimant on two counts of negligent homicide. A Hampshire County jury convicted claimant on both counts. On February 21, 2007, the West Virginia Supreme Court reversed the negligent homicide convictions and found as a matter of law that there was insufficient evidence to convince a reasonable person of claimant's guilt beyond a reasonable doubt. In order to recover damages under W. Va. Code § 14-2-13a, the claimant must establish by clear and convincing evidence that she is "innocent" within the meaning of the statute.

The Court finds that the claimant has not demonstrated by clear and convincing evidence that she did not commit any of the acts with which she was charged in the accusatory instrument or her acts or omissions charged in the accusatory instrument did not constitute a felony or misdemeanor pursuant to W.Va. Code § 14-2-13a(f)(4).

. . . . . p. 66

VENDOR

ASTAR ABATEMENT INC. VS. DIVISION OF CORRECTIONS
(CC-09-0114)

Claimant seeks $20,411.17 for services provided in an asbestos abatement project. Claimant has not been paid for work that was additional and was deemed essential in conjunction with the original scope of the project.In its Answer, respondent admits the validity of the claim as well as the amount and states that there were sufficient funds expired in the appropriate fiscal year from which the invoice could have been paid. In view of the foregoing, the Court is of the opinion to and does make an award to claimant in the amount of $20,411.77. . . . . p. 261

POMEROY IT SOLUTIONS SALES COMPANY INC. VS. DEPARTMENT OF EDUCATION (CC-08-0015)

Claimant seeks $38,541.00 for various items of equipment that it provided to respondent. Claimant has not been paid for this equipment since the documentation for these services was not processed for payment within the appropriate fiscal year. In its Answer, respondent admits the validity of the claim as well as the amount and states that there were sufficient funds expired in the appropriate fiscal year from which the invoice could have been paid. In view of the foregoing, the Court is of the opinion to and does make an award to claimant in the amount of $38,541.00. . . . . p. 95

VENDOR - Denied because of insufficient funds- see opinion**:** *Airkem Sales and Services, et al. vs. Dep't of Mental Health*, 8 Ct. Cl. 180 (1971). The claimants who provided commodities and/or services to the State were not paid because the agency involved overspent its budget. The Court of Claims denied these claims on the purely statutory grounds that to allow the claims would be condoning illegal acts contrary to the laws of the State. Although the Court denied the following claims, the Legislature considered the claims in Overexpenditure Bills; declared the claims to be moral obligations of the State; and funds to pay the claims were provided to the Court.

CAMDEN-CLARK MEMORIAL HOSPITAL VS. DIVISION OF CORRECTIONS (CC-08-0425)

This claim was submitted for decision based upon the allegations in the Notice of Claim and respondent's Answer. Claimant seeks payment in the amount of $4,372.43 for medical services provided to an inmate at St. Mary's Correctional Center, a facility of respondent. Respondent, in its Answer, admits the validity of the claim and further

states there were insufficient funds in its appropriation for the fiscal year in question from which to pay the claim. Claim disallowed. . . . . p. 198

CORRECTIONAL MEDICAL SERVICES VS. DIVISION OF CORRECTIONS (CC-07-355)

Claimant seeks payment in the amount of $439,922.81 for medical services rendered to inmates in the custody of respondent at Mount Olive Correctional Complex, St. Mary's Correctional Center, Lakin Correctional Center, St. Anthony's Correctional Center, Huttonsville Correctional Center, Pruntytown Correctional Center, and Denmar Correctional Center, facilities of respondent. Respondent, in its Answer, admits the validity of the claim, and further states that there were insufficient funds in its appropriation for the fiscal year in question from which to pay the claim. Claim disallowed. . . . . p. 91

MONONGALIA GENERAL HOSPITAL VS. DIVISION OF CORRECTIONS (CC-07-330)

Claimant seeks payment in the amount of $80,299.30 for the cost of medical services provided to an inmate at Huttonsville Correctional Center. Respondent, in its Answer, admits the validity of the claim and further states that there were insufficient funds in its appropriation for the fiscal year in question from which to pay the claim.

Claim disallowed. . . . . p. 86

MONONGALIA GENERAL HOSPITAL VS. DIVISION OF CORRECTIONS (CC-07-0341)

Claimant seeks payment in the amount of $477.60 for medical services provided to an inmate at Huttonsville Correctional Center. Respondent, in its Amended Answer, admits the validity of the claim in this amount and further states that sufficient funds to pay the claim were not appropriated in its budget during the subject fiscal years.

. . . . . p. 238

MONTGOMERY GENERAL HOSPITAL VS. DIVISION OF CORRECTIONS (CC-08-0280)

Claimant seeks payment in the amount of $9,808.98 for the cost of medical services provided to inmates at the Mount Olive Correctional Complex. Respondent, in its Answer, admits the validity of the claim as well as the amount and further states that there were insufficient funds in its appropriation for the fiscal year in question from which to pay the claim. . . . . p. 127

MONTGOMERY MEDCORP VS. DIVISION OF CORRECTIONS (CC-08-0311)

Claimant seeks payment in the amount of $3,598.00 for medical services that it provided to inmates at Mount Olive Correctional Complex. Respondent, in its Answer, admits the validity of the claim and further states that there were insufficient funds in its appropriation for the fiscal year in question from which to pay the claim. . . . . p. 222

WEST VIRGINIA UNIVERSITY HOSPITALS VS. DIVISION OF CORRECTIONS (CC-07-338)

Claimant seeks payment in the amount of $294,535.34 for the cost of medical services provided to an inmate at Lakin Correctional Center. Respondent, in its Answer, admits the validity of the claim in this amount and further states that there were insufficient funds in its appropriation for the fiscal year in question from which to pay the claim. . . . . p. 85

WEST VIRGINIA UNIVERSITY HOSPITALS VS. DIVISION OF CORRECTIONS (CC-08-234)

Claimant seeks payment in the amount of $40,247.49 for the cost of medical services provided to an inmate at Mount Olive Correctional Center. Respondent, in its Answer, admits the validity of the claim and further states that there were insufficient funds in its appropriation for the fiscal year in question from which to pay this claim.

. . . . . p. 126

W. VA. UNIVERSITY

AMERICAN VENDING COMPANY INC. VS. WEST VIRGINIA UNIVERSITY (CC-04-963)

Claimant brought this action alleging that WVU failed to compensate it for depreciation upon equipment and appurtenances provided to WVU during several contracts wherein claimant was the concessionaire for the athletic venues at the University. Claimant also alleged various other breaches of its 1996 contract. The Court determined that claimant was entitled to depreciation upon equipment and appurtenances it built for WVU or installed since there were on-going discussions about the depreciation schedule for the contract to be entered into for four years beginning with the 2000 FY which contract did not materialize. Rather WVU allowed the 1996 contract to terminate in accordance with the terms of the contract which action was not anticipated by claimant. The new contract was in the negotiation stage for several months before claimant was informed that it would not receive the contract.

The Court determined that WVU wrongfully misled claimant which had made preparations for the upcoming athletic season for football. Thus, the Court made a partial award for the costs associated with these preparations.

The Court based its award for depreciation upon an exhibit prepared by claimant's expert economist but limited the number of months for depreciation to 240 months since the parties were negotiating a depreciation schedule based upon twenty to twenty-five years.

The Court denied claimant a recovery of interest upon the award since the contract did not specify interest except for late payments on invoices due from WVU which was not part of this claim since it was not alleged by claimant. In accordance with specific statutory direction, this Court may make an award for interest only where the

contract between the parties so provides.

The Court also denied any recovery for loss of profits and overhead since these are speculative calculations not accepted by this Court in contract claims.

Accordingly, the Court calculated the amounts due claimant on various items of the claim and depreciation to determine the award granted to the claimant. Award of $529,087.48. . . . . p. 1