STATE OF WEST VIRGINIA

REPORT

OF THE

COURT OF CLAIMS

For the Period from July 1, 2009

to June 30, 2011

by

CHERYLE M. HALL

CLERK

Volume XXVIII

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

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HONORABLE J. DAVID CECIL . . . . . Presiding Judge

HONORABLE ROBERT B. SAYRE . . . . . 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

HONORABLE GEORGE F. FORDHAM . . . . . April 7, 2004 to June 30, 2009

HONORABLE JOHN G. HACKNEY JR. . . . . July 1, 2007 to January 6, 2011

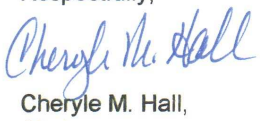
LETTER OF TRANSMITTAL

To His Excellency
The Honorable Earl Ray Tomblin
Acting 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 nine to June thirty, two thousand eleven.

Respectfully,



Cheryle M. Hall,
Clerk

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** OPINION ISSUED JUNE 4, 1997*

VENNORIA L. FERRELL, Administratrix of the Estate of Roger Billy Ferrell, deceased
VS.
DIVISION OF HIGHWAYS
(CC-92-138)

Greg Lord, Attorney at law, for claimant,
Andrew F. Tarr, Attorney at law, for respondent.

BAKER, JUDGE:

Claimant Vennoria Ferrell seeks an award for death benefits, alleging that respondent Division of Highways negligently maintained the berm area on Big Harts Creek Road, Lincoln County Route 19, thereby resulting in the death of her son.

On December 10,1991, decedent Roger Billy Ferrell, 20 years of age, was driving a 1984 Ford Ranger truck westbound on Big Harts Creek Road in Lincoln County, when, for reasons unknown, he ran off the north edge of the roadway on the right side of the road. Mr. Ferrell's vehicle continued to travel approximately 150 feet along the berm on north edge of the road, then crossed back to the south side where it went over an embankment and overturned onto the passenger side. Mr. Ferrell was thrown from the vehicle and pinned beneath the truck. He died of compression asphyxia, according to the Medical Examiner's office.

It is not clear why Mr. Ferrell's truck initially left the pavement. The weather was clear; the paved road was dry, narrow and windy . It is the claimant's position that the berm was approximately eight to ten inches deep, and that when Mr. Ferrell's truck dropped off the pavement the depth of the berm caused him to lose control of his vehicle. When Mr. Ferrell tried to guide his truck back onto the pavement, the truck veered sharply to the left, crossed the road and went over the embankment. Claimant asserts that respondent was negligent for failing to improve the ditch and berm on the north side of the road . Respondent asserts that excessive speed and decedent's own negligence in running off the road and failing to regain control of his vehicle were equal

* This opinion was inadvertently omitted at the time of publication of Volume 20 of the *Report of the Court of Claims.*

to or greater than any negligence by respondent.

There is little doubt that the berm on this section of road was unusually deep. Claimant's witness Curtis Adams, a former police officer, testified that about a week after the accident, he and the decedent's father measured the berm depth at between eight and ten inches. The police report and exhibits indicate that the truck left severe scrapes along north end of the pavement, apparently where the chassis of the truck grounded on the road.

Investigating State Trooper D.L. Kidd testified that where the truck re-entered the road, the berm was only two or three inches deep. Trooper Kidd stated that at the point where the vehicle re-entered the roadway, that the decedent had already lost control. It was his opinion that the decedent had been driving too fast to maintain control of his vehicle on this stretch of road, but he could not estimate how fast in fact the decedent was driving. (Kidd, 77-78, 88, 177-179). The posted speed limit was 35 miles per hour.

Respondent's maintenance records indicate that the last time respondent had performed any specific berm maintenance on this section of Big Harts Creek Road prior to the accident was in April 1989. The record also indicates that this section of road was resurfaced on or about August 27, 1991, and that respondent graded and filled in the berm shortly after the accident.

This Court is aware of the fiscal and manpower constraints under which respondent operates. Lincoln County maintenance supervisor Larry Pauley testified that Big Harts Creek Road is a secondary road; that there are approximately 650 miles of dirt and paved roads in Lincoln County; and, that drainage and berm washouts along these roads are a persistent problem. (Pauley, 196-199). Maintenance crew leader Bill Topping testified that he had noticed a deep berm on the road on or about December 4, 1991, while engaged in related drainage work, and that berm and shoulder maintenance was needed generally along many Lincoln County roads. (Topping, 230-232).

The Court has held that there is a lower standard of care and maintenance required for berm and shoulder areas than for regularly traveled portions of a public road. In *Whiteley vs. Division ofHighways*, Unpublished opinion issued January 6, 1993, (CC-90335), we declined to find the respondent negligent in a case very similar to the present case. In *Whiteley*, the claimant's vehicle traveled off the paved section onto the shoulder. When he tried to steer back on the road, his vehicle "tripped" on a berm approximately five inches deep and flipped over, resulting in his injury. We stated that berm drop-offs of four to five inches are not unusual in West Virginia and that the claimant's own negligence in failing to maintain his vehicle on the road precluded recovery.

The Court finds the reasoning in Whiteley to be persuasive in the present case. There is no evidence that Mr. Ferrell was forced onto the shoulder because of an emergency, such as an oncoming vehicle or such as defective pavement in his lane. The testimony and police report establish that Mr. Ferrell's excessive speed and failure to maintain control were significant contributing factors to this accident. Accordingly, the Court is of opinion to and does deny this claim.

Claim disallowed.

* This opinion was inadvertently omitted at the time of publication of Volume 20 of the *Report of the Court of Claims.*

** OPINION ISSUED FEBRUARY 7, 1995*

DELORIS ANN SHRADER, ADMINISTRATRIX OF THE ESTATE
OF ANGELA SHRADER, DECEASED
VS.
DIVISION OF HIGHWAYS
(CC-92-97)

Derrick W. Lefler, Attorney at Law, for claimant.
Andrew F. Tarr, Attorney at Law, for respondent.

BAKER, JUDGE:

Claimant, Mrs. Deloris Shrader, brought this action as the administratrix of the estate of her daughter, Angela Shrader, who died in an accident on December 23, 1989, in Mercer County. Claimant alleges that respondent, Division of Highways, failed to maintain the guardrail along Bull Tail Hollow Road, also known as W.Va. Secondary Route 25/31, near Bluefield, West Virginia. Claimant contends that the guardrail erected was inadequate for-the purpose for which it was erected, and, as a result of the failure of the guardrail to serve its purpose, Ms. Shrader lost her life. Claimant further contends that the road in question may have been exceedingly icy at the time of the accident which was a contributing factor although there were other factors involved. Damages are alleged to be in excess of the recovery received by claimant from automobile insurance which was $200,000.00.

Respondent contends that the guardrail was maintained properly and the sole cause of the accident was the improper driving on the part of the operator of the vehicle on December 23, 1989. Further, respondent had no notice that there was any problem with the guardrail and/or the road. Respondent contends that the weather conditions on this particular night were very cold, and respondent had attempted to keep the road clear of snow and ice.

The evidence adduced at the hearing of this claim on May 19 and 20, 1994, established that Angela Shrader along with her friend, Lisa Hardy, had decided to leave her home at approximately 2:30 a.m. to 3:00 a.m. on December 23, 1989, unbeknownst to her parents and without their permission. The girls were spending the night together as is the custom for many fifteen year olds. They had received a telephone call from a boy who had invited them to go to a party. It was an extremely cold evening. They crawled out of a window at the Shrader residence and joined several boys in a 1980 Jeep CJ5. At this time there were six boys in the Jeep and they proceeded to a woman's home for the party. Upon leaving the party, Angela and Lisa got back into the Jeep with four of the boys and they drove around the Bluefield area. George Michael Harvey was driving the Jeep. It was a bitter cold night with a temperature of approximately 23 degrees below zero on a Fahrenheit scale. Mr. Harvey drove the Jeep on Bu" Tail Ho"ow Road to an area airport where Robert Whittaker then took over the driving

* This opinion was inadvertently omitted at the time of publication of Volume 20 of the *Report of the Court of Claims.*

responsibilities. The testimony of Lisa Hardy is that he was driving too fast and his manner of driving scared her. Mr. Harvey testified to the contrary as to both his manner of driving on this evening and that of Mr. Whittaker, but he did not remember many circumstances about the accident with any clarity. In any event, as Mr. Whittaker drove back on Bull Tail Hollow Road, he apparently lost control of the Jeep. It rolled over, leaving the paved surface of the road, and into a reservoir adjacent to the road . The reservoir was covered with ice, but the Jeep broke through the ice, landing on its tires in the water. lisa Hardy and the four boys waded to shore, but they were unable to find Angela Shrader. She was found several hours later in the water where she evidently got trapped under the ice and drowned as a result of this tragic accident.

On the night of the accident, the guardrail posts adjacent to Bull Tail Hollow Road were pushed over and the cables were torn loose from the posts. According to Deputy Gills, the guardrail was about eight feet from the edge of the roadway. The Jeep was in the water approximately 30 feet from the road surface, but it was 67 feet from where the it left the roadway when the accident started. It was his opinion that the Jeep was being driven in a reckless manner and too fast for the roadway conditions at the time of the accident. Deputy Charles Smothers who was also at the accident scene testified that there were no tire marks leading from the guardrail to or on the surface of the ice. It was his opinion that the Jeep was in the air and landed on the ice covering the reservoir where it submerged.

According to the investigating officer, Deputy Michael Gills of the Mercer County Sheriffs Office, the driver of the Jeep did not have an operator's license and the Jeep had been stolen by the boys prior to the time they picked up Lisa Hardy and Angela Shrader. The record does not reveal who actually stole the Jeep. Neither of the girls knew that the Jeep was a stolen vehicle. Mr. Whittaker was charged in this accident and he pleaded guilty to reckless driving and operating a vehicle without an operator's license. He served a sentence in the Mercer County Jail based upon the guilty plea.

The guardrail system in place on Bull Tail Hollow Road on December 23, 1989, was a post and cable system. The system consisted of wooden posts (generally locust posts) with two steel cables running through the posts. Although this is an old system for guardrails, it is still prevalent in West Virginia. It has been replaced by the W-beam or steel guardrails when new guardrails are installed or old guardrails are replaced. The reservoir was constructed in the 1960's and the post and cable guardrail system was put in place at that time. The accident caused damage to three to four joints of the system and these were replaced with steel beam guardrails which is the customary procedure. Inspections of guardrails in Mercer County were made visually from the road by respondent's employees. There had not been any complaints made to respondent's employees in Mercer County about the guardrails on Bull Tail Hollow Road. Charles Raymond Lewis, II, a planning research engineer for respondent in the traffic engineering division, testified that from his observations of the photographs of the accident scene, the wooden post came out of the ground rather than breaking and the wood did not appear to be rotten.

Stephen Chewning, an expert in traffic safety, testified that he was able to observe the guardrails which had been in place along Bull Tail Hollow Road from photographs taken some two weeks after the accident. He visited the accident scene in 1992 and observed the new guardrail system. His testimony as to the wooden post and cable system in place on the night of the accident was based upon pure conjecture as he had only the benefit of photographs without actual observations of the guardrail. He was of the opinion that the Jeep should have been deflected and decelerated on down the

guardrail. It should not have gone into the lake if the guardrail was functioning properly. Thus, the guardrail, in his opinion, was a contributing cause of the accident. He stated that factoring in the inexperience of the driver, the icy roads, the overloading of the Jeep, "after all that had occurred, if the guardrail had been sufficient, there still may have been a crash in the guardrail, the vehicle may have spun back out into the road, but the vehicle would not have gone through the guardrail and into the lake...."

The law in the State of West Virginia has been adhered to by this Court consistently and that is that respondent may held liable for defective conditions on its roads only where it has been established that the respondent knew or should have known of the defective condition and had a reasonable time in which to take corrective action. This principle as enunciated by the West Virginia Supreme Court of Appeals is that the State is neither an insurer nor guarantor of the safety of persons traveling on its highways. *Adkins v. Sims, 130 W Va.* 645, 46 *S.E.2d* 81 (1947). For the respondent to be held, liable" for damage caused by a defect in the road, it must have had either actual or constructive notice of the defect and a reasonable time to take corrective action. *Chapman v. Division of Highways,* 16 *Ct.CI. 103* (1986). Although the instant claim is a case of first impression for the Court, the principle established extends to the maintenance of guardrails, and, thus, is applicable.

After having carefully reviewed the testimony, post trial briefs, closing arguments, and photographic exhibits in this claim, the Court is of the opinion that respondent was not negligent in its maintenance of the wooden post and cable guardrail system adjacent to Bull Tail Hollow Road at the scene of this accident. The testimony and description of the accident scene by Deputy Smothers substantiates the fact that the Jeep may have been airborne from the edge of the road to the reservoir where it landed. In that instance the condition of the guardrail would be a moot issue. The Court also is of the opinion that there were many circumstances surrounding this accident which would have made a recovery by the claimant difficult. Claimant's decedent and Lisa Hardy must be held to be responsible for their own actions. Although the Court is not unmindful of the tragedy which has occurred to the claimant as the mother of the decedent, the Court must base its decisions upon the facts and the law as it relates to each claim.

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

Claim disallowed.

** OPINION ISSUED FEBRUARY 7, 1995*

GERALD W. SHAW, INDIVIDUALLY AND AS ADMINISTRATOR
OF THE ESTATE OF YONG CHA SHAW
VS.
DIVISION OF HIGHWAYS
(CC-92-156)

Jotln W. Cooper and Matthew H. Fair, Attorneys at Law, for claimant.
Andrew F. Tarr and Cynthia Majestro, Attorneys at Law, for respondent.

* This opinion was inadvertently omitted at the time of publication of Volume 21 of the *Report of the Court of Claims.*

WEBB, JUDGE:

Claimant Gerald W. Shaw brought this action as administrator of the estate of Yang Cha Shaw, his wife, and in his own behalf for personal injuries. Claimant and his wife were involved in a serious two-vehicle accident on June 3, 1990, in Jefferson County. Claimant alleges that respondent was negligent in its maintenance of the intersection of Leetown Road and Route 51 in that there were inadequate signs or other markings to warn the travelling public of a stop required at this particular intersection. Claimant further alleges damages in the amount of$681,768.00 and unliquidated damages for his pain and suffering resulting from his personal injuries. Claimant has made a recovery of $250,000.00 for his personal injuries and $250,000.00 for his wife's estate from the driver of the other vehicle in the accident.

Respondent owns and maintains Route 51 and Leetown Road which is also designated as Secondary Route 1 for respondent's purposes.(The Court will use the designation Leetown Road as this was the terminology used by the witnesses during the hearing) Respondent contends that the intersection of Leetown Road and Route 51 was maintained properly and adequately, and that the proximate and sole cause of the accident was the action or inaction of the driver of the other vehicle in the accident when the driver made a conscious decision to drive into the intersection without stopping at a stop sign which was placed in the proper manner on Leetown Road.

The evidence adduced at hearing of this claim on June 28 and 29, 1994, established that on June 3, 1990, claimant and his wife, Yong Cha Shaw who was also referred to as Kim Shaw during the hearing, were driving in their 1990 Ford Ranger crew cab pick-up truck to their home after having been to Winchester, Virginia. They had exited Interstate 81 and they were proceeding eastbound on Route 51 to reach their home located in a housing development two to three miles east of the Leetown intersection. As claimant drove through the intersection of Route 51 and Leetown Road, a 1985 Plymouth Horizon driven by Candy Lynn Johnson came through the intersection, struck the pick-up truck, and pushed it across Route 51 into the parking lot of a gas station. The pick-up truck flipped onto its side when contact occurred between the two vehicles. As a result of this accident, Kim Shaw suffered injuries resulting in her death and Gerald Shaw suffered severe, permanent personal injuries.

This accident was investigated by two members of the West Virginia Department of Public Safety, both of whom testified at the hearing. Trooper Da"as Wolfe, III, the chief investigating officer, was notified of the Shaw accident at 6:15 p.m. and arrived at the scene about fifteen minutes later. His investigation revealed that claimant Gerald Shaw was proceeding east on Route 51 and that Candy Lynn Johnson was driving south on the Leetown Road also known as Secondary Route 1. He determined that Candy Lynn Johnson had failed to stop at a stop sign located at the norttlwest quadrant of the intersection. After an investigation by the office of the prosecuting attorney, a citation was issued to Ms. Johnson for going through the stop sign at the intersection. Trooper Wolfe took a statement from Ms. Johnson at the accident scene. He testified that she could not get stopped at the stop sign because there was another vehicle behind her and "she was more concerned about getting hit in the rear end than shooting through the intersection." She wanted to get to the parking lot so she would not get hit in the rear-end , and "unfortunately, the Shaw vehicle was coming up 51 when she made that maneuver" He described the intersection of Route 51 and Leetown Road as follows:

> Well, it's an intersection that you had better pay attention to . The way

> I see it is that roadway through there has speed limit signs leading up to that intersection. I feel that if you're obeying the speed limit and watching the other signs along the road warning that there's that intersection up there, that you could stop for that intersection. I see no problem with that. But if you are not paying attention to the signs that are along the roadway, you could go through that intersection very easily. That's how I would describe that intersection, as well as other intersections in that county. There is (sic) a lot of intersections just like this one that if you're not paying attention, because of the way the road is laid out, could shoot through several intersections in that county.

Trooper Wolfe was familiar with the roads in Jefferson County and he testified that the terrain was rolling and that the intersection of Route 51 and the Leetown Road was typical for the area.

The second investigating officer, Sergeant Stephen Tucker, took measurements at the scene of the accident and noted that there were stop signs for north and southbound traffic on the Leetown Road at this intersection and there were signs that indicated stop ahead prior to reaching the intersection. His investigation revealed that there was no evidence that Candy Lynn Johnson applied her brakes or skidded through the intersection and in her statement she related that she actually drove through the intersection or tried to accelerate when she saw that she would not be able to stop. It was his opinion that "if you're driving the speed limit or less and see the stop ahead sign, there's adequate opportunity to be stopped before you reach the intersection" When queried about the general road conditions in Jefferson County, he stated that most of the major routes in Jefferson County have the same type of rolling terrain. He testified that "There would be tens, if not hundreds, of intersections similar to this throughout Jefferson County."

The intersection at Leetown Road and Route 51 was described in great detail during the hearing, and, in fact, the Court took a view of the intersection prior to the hearing of this claim. There were video tapes introduced in evidence for the Court to observe signs on the Leetown Road as a driver approached the intersection with Route 51 . The videos provided the Court with the opportunity to observe the crest and trough nature of the approach and the additional signs warning drivers of the stop a/lead at the intersection. (The view of the accident scene taken by the Court did not provide an accurate portrayal of the scene as there was ongoing construction by respondent to remove the hill at the approach to the intersection.) The video tapes were taken sometime after the date of the accident and, likewise, do not depict the scene exactly as it was on June 3, 1990. However, the testimony and photographs taken by the investigating officers do provide the Court with sufficient information to allow the Court to formulate an opinion as to the adequacy of signs at the intersection of Route 51 and Leetown Road. A description of the intersection was provided through the statements of many of the witnesses at the hearing. The terrain at this intersection is not unlike that at many of the intersections in the eastern panhandle of our State. A motorist traveling southbound on Leetown Road encountered a"Stop Ahead" sign approximately 270 feet from the intersection with Route 51. The sign was placed on the berm of the road and it was located about two-thirds of the way up to the crest of the hill. A motorist would then crest the hill and approach the intersection where there was a thirty-inch stop sign on the northwest quadrant of the intersection. The stop sign was placed by respondent at this location in accordance with the provisions of the Manual on Uniform Traffic Control Devices. Barry Warhoftig, a traffic engineer for respondent, testified that this

particular intersection was signed in accordance with that manual which is used by respondent in determining traffic control devices. There was quite a bit of discussion during the hearing as to the existence of a stop bar on the pavement of Leetown Road at the intersection, but the Court has determined that the photographs and testimony of Sergeant Tucker substantiate the finding that there was no stop bar, ie , a white painted or plastic line on the pavement. Further, Sgt. Tucker testified that in his opinion the purpose of the stop baris "just to give a person a guide as to where to stop. Not so much to indicate a stop or to mandate a stop but just a guide as to this is where you should stop to help the flow of traffic."

The Court considered the location of the signs and the contour of the land at this particular intersection. However, the testimony of the driver of the vehicle which struck the claimant's pick-up truck is an essential element of this claim . Candy Lynn Johnson testified as to the accident with clear and precise memory. She had just graduated from high school on June 3, 1990, and she had been visiting with a friend at his home located between Kearneysville and Route 51 . She was on her way from his home to her home located near Charles Town. She was alone in her automobile. She was unfamiliar with the Leetown Road. At about one mile before the intersection, she noticed a woman driving behind her at what she estimated to be half a car length. She was distracted by this vehicle and she did not see the "Stop Ahead" sign as she drove up to the crest of the hill approaching the intersection with Route 51 . As she crested the hill, she saw the intersection and the stop sign. She then made a conscious decision to go through the intersection to reach the parking lot of the gas station where she would stop her car. She testified that she was "afraid that if I slammed on the brakes, the lady behind me would push the car and control my entering the intersection. I wanted to be in control so I decided I'd, you know, I'd better go instead of be pushed." The fact that she saw the stop sign and made a conscious decision to enter the intersection without first stopping is factual evidence that was given much weight by the Court when considering its decision.

Claimant's position is that the actions on the part of the driver may be part of the cause of the accident, but the lack of what the claimant contends is inadequate signage and/or flashing lights by respondent is also actionable negligence which contributed to the accident. David Malone, [1] civil engineer practicing as a forensic

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[1]One of the rulings during the hearing involved the application of 23 USC 409 which barred certain evidence from being introduced and restricted the testimony of David Malone. The Court has previously applied this section of the United States Code. Testimony and evidence in cases is limited where studies are made under this section of the Code to suggest changes to highwClys and more specifically to traffic signs and devices at intersections. The purpose of this section is to protect highway departments in all states from information in studies being used in court cases against the departments much as post-accident alterations may not be used to establish negligence. The Court understands the purpose in protecting states. There are many situations that could be made safer by placing different signs, tr8ffic signals, additional devices, or changes to an intersection. However, that does not mean that a highway department was negligent in its original placement of the traffic control devices at the time of a particular accident. The Court holds that this section of the Code is applicable herein and bars any additional testimony of David Malone as an expert because the testimony would be based upon documents and evidence not admissible under 23 USC 409. See *Robertson* v. *Union Pacific* R. Co. , 954 F. 2d 1433 *(8th* Cir. 1992) and *Gibson and Holcomb* v. *Div. of Highways, unpublished opinion ofthe W. Va, Court of Claims dated Feb.* 5, 1993, *Claim Nos.* CC-89-17a & b.

engineer, testified that The examined the intersection and photographs to determine the placement of the signs on the date of the accident. He referred to the Manual on Uniform Traffic Control Devices and then indicated that he used the "green book" or policy manual or guide published by AASHTO (American Association of State Highway and Transportation Officials). His opinion was that the Route 51 and Leetown Road intersection is not an open road condition, but one of limited sight distance which requires the consideration of the AASHTO guidelines and not just the Manual on Uniform Traffic Control Devices. He also was of the opinion that the skew of the intersection, the immediate location, the rolling nature of the terrain, and, additionally, the "thoroughly steep grade approaching a stop location" are central points in considering an analysis of the intersection.

The Court has given very serious thought to the issues in this claim as well as having reviewed all of the testimony and evidence in this claim. The Court recognizes the tragedy which has befallen the claimant not only in the loss of his beloved wife, but also in the severe personal injuries which he suffered in this accident. However, the Court must consider all of the evidence adduced at the hearing. Respondent had placed a"Stop Ahead" sign on the hill approaching the intersection as prudent notification to the travelling public that a required stop was forthcoming at the intersection of Route 51 and Leetown Road. There was a stop sign in place on the northwest quadrant of the intersection in the normal and proper place for such a sign as well as Route 51 direction signs. Candy Lynn Johnson did not pay heed to the "Stop Ahead" sign as she was distracted by the vehicle close behind her. The standards provided by AASHTO in the "green book" used by Mr Malone in his testimony were considered by him as the applicable standards to be used by respondent in providing signs at the intersection in question. However, Mr. Warhoftig explained that the AASHTO manual or green book provides the guidelines applied by respondent for new construction or renovations to existing roads. The Manual on Uniform Traffic Control Devices is used by respondent for placing signs at existing sites. To require respondent to have additional signage or flashing lights at intersections such as this particular intersection or to require respondent to alleviate hills at approaches to intersections is the place an unreasonable and economically unfeasible burden upon respondent. The Court will not base its decisions upon standards which would not be possible for respondent to follow throughout our State. In addition, the Court has determined that claimant has failed to establish any actionable negligence on the part of the respondent which contributed to this accident. Therefore, it is the opinion of the Court that the proximate, and only, cause of the accident herein was the action of the driver of the vehicle which struck the Shaw pick-up truck on June 3, 1990.

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 JULY 8, 2009

RUTH M. WHITTAKER AND VERNON B. WHITTAKER
V.
DIVISION OF HIGHWAYS
(CC-07-0368)

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 U.S. Route 460, Mercer County, West Virginia.

2. On October 4, 2007, Ruth Whittaker was operating an automobile on U.S. Route 460.

3. Ms. Whittaker's automobile struck a metal expansion joint, which had come loose on a bridge located along U.S. Route 460.

4. This Court has previously found liability on the part of the Respondent in *Estep v. WVDOH* (CC-07-314) regarding this matter.

5. Claimant and Respondent believe that in this particular incident and under these particular circumstances that an award of Four Thousand Dollars ($4,000.00) would be a fair and reasonable amount to settle this claim.

6. The parties to this claim agree that the total sum of Four Thousand Dollars ($4,000.00) to be paid by Respondent to the Claimant in Claim No. CC-07-368 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 U.S. Route 460 on the date of this incident; that the negligence of Respondent was the proximate cause of the damages sustained; 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 to the Claimants in the amount of $4,000.00.

Award of $4,000.00.

OPINION ISSUED JULY 8, 2009

RLI INSURANCE COMPANY
V.
DIVISION OF HIGHWAYS

(CC-07-0079)

W. Alan Torrance and R. Joseph Craycraft, Attorneys at Law for Claimant.
Jeff J. Miller, Attorney at Law, for Respondent.

SAYRE, JUDGE:

RLI Insurance Company ("RLI"), the claimant in this action, brought this claim to recover monies that it asserts were wrongfully transmitted by the respondent, Division of Highways ("Highways"), to a construction company known as Roberts Construction Company ("Roberts") as well as to a sister State agency, the West Virginia Bureau of Employment Programs (WVBEP)for the Workers'Compensation Fund. RLI had assumed responsibility for the completion of the Mullens Bridge construction project in Wyoming County as the bonding company acting as surety on Roberts' behalf when the subject transfers of funds occurred. The Court is of the opinion to make an award in this claim for the reasons set out herein below.

The facts in this claim are not in dispute, the parties having filed a stipulation of facts in the claim. This stipulation is in pertinent part substantially as follows:

Roberts was awarded a contract with Highways dated March 22, 2002, in the original amount of $1,293,795.31 for the construction of Project U355-16-25.61; BR-0016(118)E, Mullens Bridge #4704, Wyoming County, Contract ID No. 9805003 (the "Bridge Project").

Roberts provided Highways a surety performance and payment bond in the original amount of $1,319,671.22 for the Bridge Project. RLI acted as the surety for Roberts on the construction contract for the Bridge Project.

When in 2003 Roberts defaulted under the construction contract, Highways made a claim against RLI, as surety on the performance and payment bond, and RLI accepted the claim and funded the Bridge Project for completion.

Roberts and certain named Indemnitors entered into a Joint Control Trust Account Agreement with RLI dated December 5, 2003, and Roberts entered into a Trust Account Agreement dated March 5, 2004, directing Highways to deposit all subsequent Bridge Project contract payments into a Trust Account (the "Trust Account") established at BB&T Bank by RLI for the Bridge Project. While the Payee name and address in the State of West Virginia's Financial Information Management System ("FIMS") remained that of Roberts, the bank routing information for the receiving bank was changed to direct electronic payments to the Trust Account established by RLI and Roberts.

Payments totaling $377,510.24 were deposited directly into the Trust Account by the State of West Virginia on behalf of Highways from April 2004 through September 2004. Those payments into the Trust Account were used by RLI to complete the Bridge Project.

In the spring of 2005, Roberts (which, following RLI's assumption of responsibility as surety, had been employed by RLI to complete the Bridge Project) submitted a request for Change Orders 14 and 15, for a total value of $114,869.95 for extra work performed on the Bridge Project.

While Highways was in the process of evaluating the request for Change Orders, on multiple occasions between March 22, 2005, through July 2006, RLI notified Highways that in the event the extra work was approved for payment, any payment for the extra work was the property of RLI and should be deposited to the Trust Account. At no time during those communications was RLI notified that Highways was going to release payment directly to Roberts or on Roberts' behalf to the WVBEP (Workers' Compensation Fund). (In fact, the communications between respondent and RLI's

entitlement to the funds document this assertion.)

On April 26, 2006, Phillip W. White, Construction Engineer for Highways, advised counsel for RLI that the amount of Estimate 34 was approved in the amount of $167,634.95 and Estimate 35 in the amount of $2,437.90 but Highways was waiting for agreement to those amounts by Tim Roberts of Roberts. Counsel for RLI was advised at that time that payment had not been released.

On May 12,2006, Highways advised counsel for RLI that Roberts had returned the final estimate. During that conversation, Highways was advised that the union was also making a claim for payment. Counsel for RLI advised Highways to have the union representative contact counsel for RLI regarding payment. Counsel for RLI further advised Highways that Highways was not to release payment directly to Roberts and that if it did, Highways would be putting itself in a bad position. Counsel for RLI also advised Highways that he would discuss this issue with Jeff Miller, Highways' counsel, and call back. Later that day, White called RLI back and advised that Highways is going to work on this issue the following week. White confirmed receipt of the e-mail from counsel for RLI and that attorney Miller had instructed Michael H. Skiles, the Director of Contract Administration for Highways, to flag the payment (which RLI took to mean to hold the payments until the issue is resolved).

Notwithstanding the above communications, the account was not flagged within the FIMS system.

E-mails were made between counsel and telephone calls were made by counsel for RLI to various employees for Highways concerning the payments to be made to RLI by Highways. The Court notes certain of these telephone calls:

On June 28, 2006, and on June 29, 2006, RLI made calls to White, and having not received an answer, called an associate, Howard Levy, Construction Office Manager for Highways, who advised RLI that White had had to leave and was not in the office the day prior, either. That same day, counsel for RLI spoke with Ron Smith, the Regional Engineer for Highways, in an attempt to determine when the funds would be released to the Trust Account.

On July 11, 2006, RLI's counsel spoke with White who advised that White did not know anything more than he knew the previous week and would have attorney Miller call counsel for RLI.

On July 11, 2006, RLI's counsel spoke with attorney Miller and Skiles and was advised, among other things, that payment had been approved for issuance to Roberts on April 26, 2006, and, on July 18, 2006, during a conference call with attorney Miller and Skiles, counsel for RLI was advised that respondent employees do not know why the check was issued to Roberts.

In April 2006, Highways submitted documents to the West Virginia State Auditor's Office for payment of Progress Voucher No. 34 in the sum of $167,634.95 in the same manner as it had submitted past progress payments that were electronically deposited into the Trust Account. Because WV BEP had filed a lien with the West Virginia State Auditor's Office in the amount of $72,072.33, the State Auditor did not make one electronic deposit to the Trust Account in the full amount, but rather caused the State Treasurer to issue two paper drafts, one payable to WVBEP in the amount of the lien, and the other directly to "Roberts Construction Company", at the Louisa, Kentucky, address for Roberts in the FIMS system, for $95,562.62, the balance of the

estimate[2].

The payment in the amount of $95,562.62 issued directly to Roberts rather than to the Trust Account on May 11, 2006, was promptly negotiated by Roberts.

On Wednesday, July 19, 2006, RLI received documentation from Highways confirming release of the payments directly to Roberts and on its behalf to WVBEP. By letter issued Tuesday, July 25, 2006, RLI demanded tender of the payment improperly sent to or on behalf of Roberts. To date, neither Roberts nor Highways has honored this demand.

At the time of Roberts' default, RLI was surety for Roberts in several construction contracts with Highways, not just the Mullens Bridge Project. Through February 28, 2009, RLI sustained losses in the total amount of $922,808.46 as a result of the Roberts' default. These losses were not broken down as to RLI's losses on the Bridge Project and its losses on the other contracts for which RLI stood as surety for Roberts. For the reasons set forth below, this Court is of the opinion, however, that the share of RLI's $922,808.46 loss that can be assigned to the Bridge Project is immaterial to the Court's decision in this claim.

RLI had a policy of re-insurance for sums paid for Roberts in excess of a deductible of $500,000.00 that were paid under the terms of the surety performance and payment bond with Roberts. RLI has claimed reimbursement from its re-insurer in the amount of $422,808.46 subject to the following credit: To date, RLI has recovered $115,070.00 due to sales of equipment, all of which has been refunded to its re-insurers. For the reasons set forth below, the Court is of the opinion that the amount RLI may recover from these sales or from future sales of equipment, if any, is immaterial to the Court's decision in this claim.

Roberts is currently in bankruptcy. At present, there are assets in the Bankruptcy Estate with a value of $497,221.78. For the reasons set forth below, this Court is of the opinion that the amount RLI might possibly recover in the Roberts bankruptcy proceeding, if any, is immaterial to the Court's decision in this claim.

RLI maintains that it is owed monies due for Estimate 34 in the total amount of $167,634.95. RLI also claims that it is also due the amount of $2,437.90 for Estimate 35 which is currently being held by the Tax Department. RLI asserts that the diversion of the monies by the Office of the State Auditor is the responsibility of the Highways and Highways' failure to properly notify the State Auditor that any money due and owing on this particular contract for the Bridge Project was to be paid directly to RLI as the surety for its completion of the project.

Highways avers that it does not owe RLI any money for completion of the Bridge Project because it acted responsibly and with due diligence in performing all of its duties with respect to the payments to be made to RLI. In fact, payments were made in accordance with the Trust Account agreement through BB&T Bank to RLI during the

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[2] The Court notes that as to this lien for Workers' Compensation, the lien was actually filed against an entity known as "David P. Roberts Construction Company" rather than the contractor for the Mullens Bridge Project which was Roberts Construction Company. The FEIN number for both named entities was the same.

Also, the Workers' Compensation lien was for projects which predated or postdated the contract for the Mullens Bridge Project.

progress of the construction project.[3] The fact that Estimate 34 in the amount of $167,634.95 was paid to Roberts after certain deductions made for the amount owed the WV BEP was not at the direction of Highways or in consultation with Highways. This was an action taken by the State Auditor without the knowledge or consent of either Highways or RLI. Highways fully anticipated that the payment for Estimate 34 would be paid to RLI's Trust Account just as the progress payments were made to RLI and Highways had no responsibility for the diversion of the funds directly to WVBEP or to Roberts. Therefore, the argument put forth by RLI that this claim should be paid in equity and good conscience as a moral obligation of the State fails since Highways acted in good faith and with due diligence in all actions regarding the payments due to RLI for the Bridge Project.

As to Estimate 35, the final payment due on the contract, Highways assert it is unable to make any payment to any entity because the State Tax Department has notified Highways that it is to hold payment of the $2,437.90, and, in fact, Highways was still holding these funds at the time of the hearing of this claim. There has been no explanation given to Highways for this directive from the State Tax Department so this Court is unable to address the payment of Estimate 35 at this time although it appeared at the hearing that the parties agreed that the money is due and owing to RLI.

Highways also asserts that the issues in this claim should be determined in the Bankruptcy Court rather than in this Court since there are issues of priority and there may be funds available to RLI which are not known at this time to any of the parties. Since the primary obligation for paying the contract monies should be met by Roberts, Highways should not have any obligation for the payment of Estimate 34 to RLI. Highways takes the position that the Court herein should hold this claim until the Bankruptcy Court has resolved all of the issues pending before it at this time.

Further, Highways argues that, as the surety, RLI takes the risk when it enters into contracts with construction companies for performance and payment bonds that these companies do not owe taxes or other obligations that may affect the payments to be paid to it if there is a failure to perform by a particular construction company for which it is the surety.

When a final estimate is going to be paid by Highways on any construction project, it is at that time that Highways seeks releases from the State Tax Department and the Bureau of Employment Programs to determine if any monies are due those entities from the contractor on the project. Final payment is not made pending satisfaction of the monies due by the contractor. In this claim, the final amount to be paid to RLI was for Estimate 35 but it was Estimate 34 that was subject to the diversion of funds by the State Auditor. In this particular instance the expected procedure was not followed by the State Auditor so Highways maintains that it has no responsibility for the diversion of the funds to WVBEP and to Roberts.

While the facts in this claim are not in dispute as evidenced by the stipulation entered into by the parties and referred to herein above, the parties are in disagreement as to the law applicable in this claim.

This Court believes that the importance of its decision in this claim goes well

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[3] There were six progress payments made through electronic transfer to BB&T Bank prior to Estimate 34. The method of processing the documentation by respondent was done in the same manner for each of those six payments and the payment method for Estimate 34 was not anticipated to be any different from these other previously made payments by respondent.

beyond the subject dispute between the parties in this particular claim. The State of West Virginia, in all of its component parts, depends upon private contractors to construct, maintain and repair all forms of public improvements; roads and bridges, airports, courthouses, college and university buildings, and sports arenas, to name a few. State law requires that these private contractors furnish a bond to assure the proper completion of these projects and the payment of the contractor's workers and for the materials incorporated into the public improvement.[4]

In many of these public improvement projects, federal funds are the source of most or all of the monies expended. The federal government likewise requires that, in all state construction projects in which federal funds are expended, the private contractors must furnish a performance and payment bond. Both West Virginia and federal law explicitly require the private contractor to provide an acceptable surety for these performance and payment bonds.

The pool of acceptable companies willing and able to provide and act as surety for private contractors is not large. Should this Court not follow the legal precedents of our sister states and the federal courts, it would only reduce the number of such companies willing to do business in West Virginia. As to those remaining, one must ask oneself whether or not these acceptable surety companies will do so only if the fees they charge amply reflect the added risk of loss. All this necessarily in turn reflects itself in the price the State and its subdivisions must pay for the public improvements we all hope to see and have come to expect.

What then are the legal precedents of our sister states and the federal courts?

To answer the legal questions in this claim the Court agrees with RLI that, as Roberts' surety, RLI's right to payment on all sums due on the Bridge Project subsequent to the surety's assumption of the responsibility to complete the project and to pay in full all the labor and material costs required to do so, is not only derived from the surety agreement folded into Roberts performance and payment bond and the Trust Agreement signed by Roberts, but also by the surety's right of equitable subrogation. This subrogation right is superior to the interest of any other subsequent lienor or claim against the original contractor, Roberts.

Simply stated, when Highways found Roberts to be in default, it called on Roberts' surety, RLI, to complete the project and pay the expenses of labor and materials. Estimates 34 and 35 are both reflective of payments due from Highways for work performed for RLI after it became responsible for the completion of the Bridge Project. At and after that point, in legal effect, the contractor was RLI. As such, the monies that are the subject of this claim became the sole property of RLI who directed that they be deposited in the Trust Account. Highways must assume the risk and the loss for failing to insure that RLI's direction was understood and followed by the State Auditor.

The leading case on this doctrine is *Pearlman v. Reliance Insurance Company*, 371 U.S. 132, handed down on *December 3, 1962*.

The leading case in this State on the issue before this Court is *Logan Planning Mill Company v. Fidelity Casualty Company of New York*, 212 F. Supp. 906 (S.D. W.Va.) handed down by Judge Watkins on *December 20, 1962*.

Quoting *Pearlman*, Judge Watkins stated:

> ...the surety at the time of the adjudication (of bankruptcy) was, as it

[4] See W.Va. Code 38-2-39 (2008)

claimed, either the outright legal or equitable owner of the fund, or had an equitable lien or prior rights it, this property never became a part of the bankruptcy estate to be administered, liquidated, and distributed to general creditors of the bankrupt... . Some of the relevant factors in determining the questions are beyond dispute. Traditionally, sureties compelled to pay debts as their principal have been deemed to be entitled to reimbursement even without a contractual promise such as the surety here had and probably there are few doctrines better established than that a surety who pays the debt of another is entitle to all of the rights of the person he paid to enforce his right to be reimbursed. This rule is widely applied in this country.

Judge Watkins then cited with approval two prior decisions of the Supreme Court. *Prairie State Bank of Chicago v. United States*, 164 U.S. 227 (1896) and *Henningsen v. U.S. Fid. & Guar. Co.* 208 U. S. 404 (1908).

See also *State v. Coda*, 103 W.Va. 676, 138 S.E. 324 (1927) which cites with approval both of the last two cited cases.

Thus, as the primary payor for funds due on the performance of the construction contract, RLI stands as the only entity that is entitled to payment on the contract.[5] Any money due for performance of the contract belongs to and should have been paid to RLI.[6]

The Court is of the opinion that the diversion of the monies owed for Estimates 34 and 35 was wrongful and constitutes a breach of contract on the part of the Highways. The monies should be paid to RLI by Highways because RLI is an innocent party as to the diversion of monies by the State Auditor. Only Highways had control of the monies and it had the duty to ascertain payment to the appropriate trust account at BB&T Bank.

Highways apparently is unable to resolve the issue of the release of funds for Estimate 35 in the amount of $2,437.90 with the appropriate personnel at the Tax Department. This Court is of the opinion that the amount is due and owing to RLI; therefore, the Court requests that Highways's counsel provide a copy of this opinion to that agency in order that the payment may be made to RLI based upon the conclusions of law as determined by this Court. The money due on Estimate 35 should rightfully be paid to RLI and no other person or entity.

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

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[5] The Court notes that there are a limited number of surety companies throughout the United States which are willing to provide this important contract service for construction contractors and owners of construction projects. To fail to uphold the law as it is applied by the courts throughout this country may very well jeopardize the ability of State agencies bidding construction projects to attract surety/performance bond companies and that would greatly affect construction projects by all State agencies, not just the respondent, Division of Highways. It could also result in greater cost for these projects in increased premiums charged construction contractors for such coverage.

[6] As required under the Miller Act for contracts performed for the federal government, performance and payment bonds must be provided for all construction projects. The State of West Virginia likewise requires performance and payment bonds in all State construction projects.

the Court is of the opinion to and does make an award to RLI in the amount of $167,634.95.

Award of $167,634.95.

The Honorable George F. Fordham Jr., Presiding Judge, concurs in the decision in this claim and reserves the right to file a concurring opinion.

OPINION ISSUED JULY 8, 2009

TAMARA PRITT
V.
DIVISION OF HIGHWAYS
(CC-08-0044)

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 Volvo struck an area on the edge of the road which had eroded as she was driving on Walker's Branch Road in Wayne County. Walker's Branch Road is situated near W.Va. Route 75, and it 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 January 7, 2008. As claimant was driving up the hill at approximately thirty to thirty-five miles per hour, she noticed an oncoming vehicle traveling on the road's center line. When claimant maneuvered her vehicle over to the side of the road to avoid the oncoming vehicle, her vehicle encountered the area on the road which had eroded. As a result of this incident, claimant's vehicle sustained damage to its tire. Claimant testified that she had Michelin tires on her vehicle at the time of the incident. When she went to Sears to replace the tire with another Michelin tire, there were none available for her to purchase. She did not want to drive on a donut tire so she purchased four Cuma brand tires at a cost of $234.46 ($116.98 per tire). Since claimant had road hazard insurance and received a credit of $112.22 for the purchase of the tire, her out-of-pocket expense was $4.76 for the tire. In addition, claimant needed to have the tire balanced ($13.99) and a valve check ($3.99). Thus, claimant's damages total $22.74.

The position of the respondent is that it did not have actual or constructive notice of the condition on Walker's Branch Road. Randolph Eugene Smith, Wayne County Supervisor for respondent, testified that Walker's Branch Road is a secondary road in terms of its maintenance. Mr. Smith stated that under the Core Maintenance Plan, the berm at this location is maintained every three years. Mr. Smith testified that respondent did not receive complaints regarding the road's condition 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 eroded area and that it presented a hazard to the traveling public. Since vehicles are frequently forced to drive on the edge of the road due to oncoming traffic at this narrow location on Walker's Branch Road, the Court finds that this area should have been maintained more frequently than every three years. Thus, the Court finds respondent negligent and claimant may make a recovery for the damage to her vehicle. However, claimant's recovery is limited to her 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 $22.74.

Award of $22.74.

OPINION ISSUED JULY 8, 2009

MICHELLE D. ONEY
V.
DIVISION OF HIGHWAYS
(CC-05-0420)

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 Taurus
struck a construction barrel on I-64 between the Hal Greer and 29th Street Exits in Huntington, 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 in the afternoon of November 5, 2005. The speed limit at this construction zone is fifty-five miles per hour. Claimant was driving in the left lane at approximately fifty-five miles per hour when she noticed an orange and white construction barrel made of hard plastic that was out of line and blocking her lane of traffic. Since there was a vehicle traveling in the right lane of traffic, she was unable to change lanes to avoid the barrel. Claimant was concerned for the safety of her three-year-old daughter who was a passenger in the vehicle and believed it was safer for her vehicle to strike the barrel than to cut in front of another vehicle and potentially cause an accident. As a result, claimant's vehicle struck the barrel and sustained damage to its driver's side door, mirror, and front bumper in the amount of $1,289.76. Since claimant's insurance deductible is $500.00, her recovery is limited to that amount.

The position of respondent is that it did not have actual or constructive notice of the construction barrel that was blocking the left lane of traffic on I-64. Charlene Pullen, I-64 Supervisor for respondent, testified that she is familiar with the area where claimant's incident occurred. Ms. Pullen stated that I-64 is a high priority road in terms of its maintenance. She testified that in November of 2005, Orders Construction was involved in a bridge replacement project at mile marker 14.1. Respondent's records indicate that it did not receive complaints regarding a barrel

blocking the left lane of traffic 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 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 construction barrel which claimant's vehicle struck on I-64 East. The Court finds that the plastic barrel in question was not adequately secured to prevent a hazard to the traveling public. Since the barrel was the proximate cause of the damages sustained to claimant's vehicle, the Court concludes that respondent was negligent. Respondent may wish to seek reimbursement from the contractor if it is of the opinion that it is the responsible party for this dangerous condition at the construction site.

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 JULY 8, 2009

CLARK A. LAWRENCE
V.
DIVISION OF HIGHWAYS
(CC-08-0390)

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 Ford Mustang struck chunks of concrete on I-64 as he was traveling under the 5th Street Bridge in Huntington, 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 approximately11:30 a.m. on August 2, 2008. Claimant was traveling through a curve at approximately sixty-five to seventy miles per hour when his vehicle struck chunks of concrete on the road. Claimant stated that the chunks were scattered across the road, and he was unable to avoid them because there was a vehicle in the other lane of traffic. Since there was a shadow cast off the bridge and onto the interstate, claimant did not see the chunks of concrete before his vehicle struck them. He testified that the largest chunk of concrete was the size of a soccer ball. As a result of this incident, claimant's vehicle sustained damage to its converter assembly, tire, and muffler assembly in the amount of $2,497.41. Claimant had liability insurance 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 I-64 under the 5th Street Bridge. Charlene Pullen, I-64 supervisor for respondent, testified that she schedules all routine maintenance on I-64.

The DOH-12, a record of respondent's daily work activities, indicates that concrete haunches from the bridge had fallen onto the interstate. Ms. Pullen stated that the concrete haunches connect to the steel beam and the concrete deck of the bridge to create a continuous piece. She stated that it is not possible for respondent to predict when a concrete haunch will fall. She explained that materials used to treat the road for snow and ice, coupled with the traffic, may cause the concrete haunches to deteriorate over time. When respondent received notice that the concrete haunches had fallen at this location, its crews responded immediately. The 5th Street Bridge was last inspected on March 21, 2009.

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 potential deterioration of the concrete haunches on I-64 bridge and that this condition posed a hazard to the traveling public. Claimant had no knowledge that pieces of concrete would fall from the bridge presenting a hazard to him and other travelers on this section of roadway. Since his vehicle sustained damage through no fault on his part, 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 $2,497.41.

Award of $2,497.41.

OPINION ISSUED JULY 8, 2009

ANTOINE KATINY, M.D.
V.
DIVISION OF HIGHWAYS
(CC-08-0334)

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 30, 2008, claimant was driving around a curve on U.S. Route 119 in Chapmanville, Logan County, when his 2008 Subaru Outback struck a chunk of concrete that was situated in his lane of travel. Although claimant tried to maneuver his vehicle around the chunk of concrete, he was unable to do so due to the traffic.

2. Respondent was responsible for the maintenance of U.S. Route 119 which it failed to maintain properly on the date of this incident.

3. As a result, claimant's vehicle sustained damage to its tire and rim in the amount of $454.61.

4. Respondent agrees that the amount of $454.61 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 U.S. Route 119 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 $454.61.

Award of $454.61.

OPINION ISSUED JULY 8, 2009

WESLEY B. HOLLEY
V.
DIVISION OF HIGHWAYS
(CC-08-0065)

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 Ford Aspire struck rocks while he was traveling north on W.Va. Route 2 in Mason 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 5:50 a.m. on February 5, 2008. W.Va. Route 2 has a speed limit of fifty-five miles per hour. Claimant was driving to work at approximately fifty-five to sixty miles per hour when rocks from the hill side, located on the right side of the road, fell loose and struck claimant's vehicle. Claimant testified that he drove onto the southbound lane to avoid the rocks, but there were rocks located in this lane as well. Claimant couldn't avoid striking the rocks with his vehicle. Claimant travels this road frequently. He testified that this was the first time that he saw rocks scattered in the roadway. As a result of this incident, claimant's vehicle sustained damage to its tire and tie rods in the amount of $265.91. Claimant also needed to have the vehicle re-aligned ($32.95). Claimant also seeks to recover work loss in the amount of $141.84. Thus, claimant's damages total $440.70.

The position of the respondent is that it did not have actual or constructive notice of the condition on W.Va. Route 2 at the time of claimant's incident. Hamilton R. Roush, currently the Highway Administrator for respondent in Mason County, testified that he was the Transportation Crew Supervisor in Mason County at the time of this incident. He stated that this particular hill side consists of red clay at the bottom, shale in the middle, and hard rock at the top. He testified that erosion from the bottom of the hill side causes the rocks at the top to break loose. The berm in this area is approximately six feet wide, and rocks fall onto the berm approximately once every two months. Mr. Roush testified that rocks fall onto the roadway at this location approximately twice a year. He further stated that there are falling rock signs located in this area. Mr. Roush stated that a design study is currently being conducted to determine what is needed to be done to alleviate this problem. However, there are

approximately fourteen other rock fall areas in Mason County.

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 W.Va. Route 2. Although there are falling rock signs located in this area, the Court finds that respondent could have taken further measures to protect the safety of the traveling public at this location. Thus, the Court is of the opinion that respondent is liable for the damages to claimant's vehicle. The Court also finds that claimant was twenty-percent (20%) negligent because he knew that this was a rock fall area and failed to reduce his speed based on the road conditions. 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 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 $352.56.

OPINION ISSUED JULY 24, 2009

ROY POSEY
V.
DIVISION OF CORRECTIONS
(CC-09-0068)

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, a facility of the respondent, brought this claim to recover the value of property that was kept in the respondent's possession and was stolen. The Court is of the opinion to make an award in this claim for the reasons set forth below.

Claimant testified at the hearing of this matter that tobacco products are banned from the prison except for religious purposes. Claimant participated in Native American worship services at the prison's chapel and was permitted to use tobacco products once a month. The tobacco products were kept in a metal cabinet in the prison's chapel and were secured in a bag labeled with each inmate's name. A staff member at the prison would distribute the tobacco products before worship. On November 29, 2008, the tobacco products were stolen from the secured area inside the chapel. Claimant testified that his stolen tobacco was valued at $32.90.

Respondent contends that it made reasonable efforts to secure the property and is not responsible for the actions of thieves.

Clarence James Rider Jr., chaplain at the prison, testified that the claimant participated in Native American worship services at the prison. The practitioners of

this religion believe that smoke aids in carrying their prayers to heaven. When the prison went smoke free in 2008, the number of practitioners of this faith steadily increased, and respondent had to limit the practice to once a month. The tobacco products were stored in a locked cabinet in the assistant's office in the chapel. Mr. Rider testified that he, the chapel staff, and another chaplain had keys to the locked cabinet. The office and the chapel have locked doors, and inmates must ask permission to come into the office area. There is a red line placed in front of the office assistant's door indicating that inmates are not permitted to cross the line into the office.

Around Thanksgiving, Mr. Rider testified that thieves broke into the chapel and kicked down the office assistant's door. The majority of the tobacco and smoking paraphernalia stored in the six-foot cabinet were stolen. After the incident, several inmates were charged in the institution's magistrate court with the break-in. They received punitive sentences and were ordered to pay restitution for the broken doors. Although some of the tobacco has been recovered, respondent cannot return the tobacco to the inmates because it could have been tampered with. Respondent has tightened security in the chapel since this incident.

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 the claimant's property was not adequately secured at the time of the incident, and the claimant is entitled to recover the value of his lost property.

Accordingly, the Court is of the opinion to and does make an award to the claimant in the amount of $32.90.

Award of $32.90.

OPINION ISSUED JULY 24, 2009

MARLIN J. MCCLAIN
V.
DIVISION OF CORRECTIONS
(CC-08-0533)

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, a facility of the respondent, seeks to recover the value of property that was kept in the respondent's possession and was stolen. The Court is of the opinion to make an award in this claim for the reasons set forth below.

Claimant testified at the hearing of this matter that tobacco products are banned from the prison except for religious purposes. Claimant participated in Native American worship services at the prison's chapel and was permitted to use tobacco products once a month. Since inmates were not permitted to smoke pure tobacco, claimant would mix Willow Bark with the tobacco and would smoke it in a pipe. The tobacco products were kept in a metal cabinet in the prison's chapel and were secured

in a bag labeled with each inmate's name. A staff member at the prison would distribute the tobacco products before worship. On November 29, 2008, the tobacco products were stolen from the secured area inside the chapel. Claimant testified that the stolen items (the tobacco and the Willow Bark) were valued at $28.55.

Respondent contends that it made reasonable efforts to secure the property and is not responsible for the actions of thieves.

Clarence James Rider Jr., chaplain at the prison, testified that the claimant participated in Native American worship services at the prison. The practitioners of this religion believe that smoke aids in carrying their prayers to heaven. When the prison went smoke free in 2008, the number of practitioners of this faith steadily increased, and respondent had to limit the practice to once a month. The tobacco products were stored in a locked cabinet in the assistant's office in the chapel. Mr. Rider testified that he, the chapel staff, and another chaplain had keys to the locked cabinet. The office and the chapel have locked doors, and inmates must ask permission to come into the office area. There is a red line placed in front of the office assistant's door indicating that inmates are not permitted to cross the line into the office.

Around Thanksgiving, Mr. Rider testified that thieves broke into the chapel and kicked down the office assistant's door. The majority of the tobacco and smoking paraphernalia stored in the six-foot cabinet were stolen. After the incident, several inmates were charged in the institution's magistrate court with the break-in. They received punitive sentences and were ordered to pay restitution for the broken doors. Although some of the tobacco has been recovered, respondent cannot return the tobacco to the inmates because it could have been tampered with. Respondent has tightened security in the chapel since this incident.

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 the claimant's property was not adequately secured at the time of the incident, and the claimant is entitled to recover the value of his lost property. Accordingly, the Court is of the opinion to and does make an award to the claimant in the amount of $28.55.

Award of $28.55.

OPINION ISSUED JULY 24, 2009

SHANE A. DAY
V.
DIVISION OF HIGHWAYS
(CC-07-0310)

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 2002 Ford Mustang struck a piece of concrete while he was driving across the bridge on W.Va. Route 60 past the Huntington Mall in Cabell County. W. Va. 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 6:30 p.m. on September 6, 2007. The speed limit on W.Va. Route 60 is fifty-five miles per hour. As claimant was driving across the bridge at a speed of less than fifty-five miles per hour, his vehicle struck a chunk of concrete that was approximately nine inches in diameter and five inches long. The loose piece of asphalt was situated in the center of claimant's lane of traffic and came from a hole at that location. Although claimant noticed the hole in the road, he did not see the chunk of asphalt before his vehicle struck it. Claimant stated that he travels this road frequently and had never encountered this situation prior to the date of the incident. As a result, claimant's vehicle sustained damage to two wheels ($260.00), and claimant incurred costs for mounting, balancing, and aligning the vehicle's tires ($182.29). Thus, claimant's damages total $442.29.

The position of the respondent is that it did not have actual or constructive notice of the condition on W. Va. Route 60 at the site of the claimant's accident for the date in question. 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 least constructive notice of the loose piece of asphalt that claimant's vehicle struck and that it presented a hazard to the traveling public. Photographs in evidence depict that the road was in disrepair at this location. The size of the loose piece of asphalt 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 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 $442.29.

Award of $442.29.

OPINION ISSUED JULY 24, 2009

ANTHONY M. HICKS
V.
DIVISION OF HIGHWAYS
(CC-08-0145)

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 Chrysler Concord struck a hole as he was driving on I-64 in Cabell County at the 16th Street overpass. 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 4:30 p.m. on March 27, 2008. The speed limit on I-64 at the 16th Street overpass is fifty miles per hour. At the time of the incident, the claimant was driving to work at approximately fifty miles per hour when his vehicle struck a hole on the decking of the bridge. The hole was approximately two and a half feet long and six to seven inches wide. The claimant testified that he was unable to maneuver his vehicle to avoid the hole because the other lanes of traffic were closed due to construction. As a result of this incident, the claimant's vehicle sustained damage to its wheel ($320.12), tie rod ($126.14), and alignment ($45.53) in the amount of $491.79. 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 on I-64. 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 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 JULY 24, 2009

LEIGH ANN KINDER
V.
DIVISION OF HIGHWAYS
(CC-04-0010)

Kimberly E. Williams, 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 3 at or near Seth, which is located in Braxton County, West Virginia.

2. Claimant alleges that on or about January 12, 2002, she was injured when

her vehicle while traveling on Route 3, "hit black ice on the roadway surface causing her to lose control of [the] vehicle, [and] run off the roadway on the northern side and strike a tree."

3. In addition, Claimant alleges that the Respondent was notified of black ice in the area prior to the Claimant's accident, and that Respondent had not properly treated the area prior to Claimant's accident.

4. For the purposes of settlement, Respondent acknowledges culpability for the preceding incident.

5. Claimant and Respondent believe that in this particular incident and under these particular circumstances that an award of Thirty Thousand Dollars ($30,000.00) would be a fair and reasonable amount to settle this claim.

6. The parties to this claim agree that the total sum of Thirty Thousand Dollars ($30,000.00) to be paid by Respondent to the Claimant in Claim No. CC-04-010 will be a full and complete settlement, compromise and resolution of all matters in controversy in said claim as well as a full and complete satisfaction of any and all past and future claims Claimant may have against Respondent arising from the matters described in said claim.

The Court has reviewed the facts of the claim and finds that respondent was negligent in its maintenance of Route 3 on the date of this incident; that the negligence of respondent was the proximate cause of the claimant's damages; 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 $30,000.00.

Award of $30,000.00.

OPINION ISSUED AUGUST 26, 2009

JOAN LORRAINE JARVIS-HALSTEAD
V.
DIVISION OF MOTOR VEHICLES
(CC-08-0400)

Claimant appeared *pro se*.
Ronald R. Brown, Assistant Attorney General, for Respondent.

PER CURIAM:

Claimant seeks to recover $989.00 for a privilege tax that respondent mistakenly charged the claimant on her 2005 Toyota Avalon when the claimant registered her vehicle in this State. On September 27, 2007, the claimant paid a privilege tax at respondent's office in Sabraton after the respondent incorrectly informed her that the tax was due. The claimant testified that she was charged the tax in West Virginia even though she previously paid a sales tax on her vehicle in Michigan, her former state of residence. On July 12, 2008, claimant sent an application for refund to respondent's office in Charleston. On July 31, 2008, respondent denied the claim since it was not made within six months of the date of the transaction.

Respondent admits the validity of the claim in the amount of $989.00. However, respondent avers that the claim should be dismissed on the basis that the

statute of limitations has lapsed. W.Va Code § 17A-10-12 requires that an application for a refund must be made within six months after the date of the transaction. Respondent avers that the claimant paid the tax on September 27, 2007, but the request for refund was not made until July 12, 2008.

W.Va. Code § 17A-10-12 states as follows:

> Whenever any application to the department is accompanied by any fee as required by law and such application is refused or rejected said fee shall be returned to said applicant. Whenever the department through error collects any fee not required to be paid hereunder the same shall be refunded to the person paying the same upon application therefor made within six months after the date of such payment.

In *Prudential Insurance Co. of America v. Couch*, 180 W.Va. 210, 214 (1988), the Supreme Court of Appeals of West Virginia held,

> It is generally recognized in the law of restitution that if one party pays money to another party (the payee) because of a mistake of fact that a contract or other obligation required such payment, the party making the payment is entitled to repayment of the money from the payee. The theoretical basis for this principle is that it would be unjust to allow a person to retain money on which he had no valid claim and be unjustly enriched thereby, when in equity and justice it should be returned to the payor.

In the instant case, the claimant relied on the respondent's mistaken assertions that the privilege tax was owed. Despite the six-month requirement set forth in W.Va. Code § 17A-10-12, the Court finds that under the principle of unjust enrichment, the claimant is entitled to recover the amount of the tax that she was improperly charged. *See Absure, Inc. v. Huffman*, 213 W.Va. 651 (2003). Thus, the Court, in equity and good conscience, finds that the claimant is entitled to an award in the amount of $989.00.

Award of $989.00.

OPINION ISSUED AUGUST 26, 2009

JOHN H. HALSTEAD
V.
DIVISION OF MOTOR VEHICLES
(CC-08-0396)

Claimant appeared *pro se*.
Ronald R. Brown, Assistant Attorney General, for Respondent.

PER CURIAM:

Claimant seeks to recover $292.50 for a privilege tax that respondent mistakenly charged the claimant on his 2002 Mercury Sable when the claimant registered his vehicle in this State. On September 27, 2007, the claimant paid a privilege tax at respondent's office in Sabraton after the respondent incorrectly informed him that the tax was due. The claimant testified that he was charged the tax in West Virginia even though he had previously paid a sales tax on his vehicle in Michigan, his former state of residence. On July 12, 2008, claimant sent an

application for refund to respondent's office in Charleston. On July 31, 2008, respondent denied the claim since it was not made within six months of the date of the transaction.

Respondent admits the validity of the claim in the amount of $292.50. However, respondent avers that the claim should be dismissed on the basis that the statute of limitations has lapsed. W.Va Code § 17A-10-12 requires that an application for a refund must be made within six months after the date of the transaction. Respondent avers that the claimant paid the tax on September 27, 2007, but the request for refund was not made until July 12, 2008.

W.Va. Code § 17A-10-12 states as follows:

> Whenever any application to the department is accompanied by any fee as required by law and such application is refused or rejected said fee shall be returned to said applicant. Whenever the department through error collects any fee not required to be paid hereunder the same shall be refunded to the person paying the same upon application therefor made within six months after the date of such payment.

In *Prudential Insurance Co. of America v. Couch*, 180 W.Va. 210, 214 (1988), the Supreme Court of Appeals of West Virginia held,

> It is generally recognized in the law of restitution that if one party pays money to another party (the payee) because of a mistake of fact that a contract or other obligation required such payment, the party making the payment is entitled to repayment of the money from the payee. The theoretical basis for this principle is that it would be unjust to allow a person to retain money on which he had no valid claim and be unjustly enriched thereby, when in equity and justice it should be returned to the payor.

In the instant case, the claimant relied on the respondent's mistaken assertions that the privilege tax was owed. Despite the six-month requirement set forth in W.Va. Code § 17A-10-12, the Court finds that under the principle of unjust enrichment, the claimant is entitled to recover the amount of the tax that he was improperly charged. *See Absure, Inc. v. Huffman*, 213 W.Va. 651 (2003). Thus, the Court, in equity and good conscience, finds that the claimant is entitled to an award in the amount of $292.50.

Award of $292.50.

OPINION ISSUED AUGUST 26, 2009

DAVID WILFONG
V.
DIVISION OF HIGHWAYS
(CC-08-0494)

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when he

was riding his 1999 California Motorcycle Company Wide Rider, and his motorcycle struck an uneven section of the roadway on State Route 7 near Kingwood, Preston County. State Route 7 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 12:30 p.m. on October 13, 2008. State Route 7 is a paved road with a yellow center line and white edge lines. At the time of the incident, claimant was leading a group of four motorcyclists from Morgantown, Monongalia County to Deep Creek, Maryland. Claimant was traveling up the mountain on State Route 7 when he noticed a section of gravel on the roadway. Although the claimant reduced his speed to between forty-five and fifty-five miles per hour, his motorcycle struck a ledge that was approximately four inches high. The claimant later learned that the road had been cut during the installation of a culvert across the road. Gravel was placed in the area to level out the roadway but, at the time of the claimant's incident, the gravel had washed away creating an uneven surface. After the incident, the claimant realized that the signs placed by respondent to warn travelers of this hazard had blown over the hill. Claimant's motorcycle sustained damage to its front tire and rim in the amount of $897.75, and claimant's insurance deductible was $1,000.00.

James Burks testified that he was the second motorcyclist in the group and was traveling between fifty to seventy-five feet behind the claimant. Mr. Burks stated that he could not see the cut in the road until he was approximately 100 to 150 feet away from this area. He testified that the cut extended across the entire length of the roadway. Although he slowed down, he also struck the uneven section of roadway with his motorcycle. Mr. Burks stated that he and the claimant were able to warn the other motorcyclists in time so they did not sustain damage to their motorcycles.

The position of the respondent is that it did not have actual or constructive notice of the condition on State Route 7. Larry Weaver, Highway Administrator for respondent in Preston County, testified that he is familiar with the area where this incident occurred and stated that State Route 7 is a first priority route in terms of its maintenance. He testified that around October 3, 2008, respondent had replaced a culvert pipe at this location. Gravel was placed in the area where the cut was made. Respondent had to wait before paving over this area because rain and traffic could cause the surface to settle, creating an indentation in the surface. Respondent's crews placed two "Road Work" signs 528 feet ahead of this area on the eastbound and westbound lanes. Mr. Weaver testified that he traveled through this location on the Friday before the Columbus Day weekend and stated that the signs were in place and there were no problems with the gravel. Respondent did not realize that there was a problem in this area until Tuesday, October 14, 2008, which was after the holiday weekend.

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 uneven section of roadway on State Route 7. Since respondent's warning sign was down at the time of the incident, the Court finds that motorists were not warned of the hazard in this high traffic area. 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 $897.75.

Award of $897.75.

OPINION ISSUED AUGUST 26, 2009

ALLEN TENNANT
V.
DIVISION OF HIGHWAYS
(CC-09-0111)

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 30, 2009, at approximately 8:30 a.m., claimant was driving his 2006 Chevrolet Colorado truck east on State Route 7 on the Clovis Bridge in Pentress, Monongalia County, when his truck struck a metal plate, damaging his vehicle's tire. According to the claimant, the plate had been plowed off the side of the bridge by respondent's snow plow.

2. Respondent is responsible for the maintenance of State Route 7 which it failed to maintain properly on the date of this incident.

3. As a result, claimant's vehicle sustained damage to its right, rear tire in the amount of $90.58.

4. Respondent agrees that the amount of $90.58 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 State Route 7 in Pentress, Monongalia County, 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 $90.58.

Award of $90.58.

OPINION ISSUED AUGUST 26, 2009

DANIEL CANTIS AND DEBORAH CANTIS
V.
DIVISION OF HIGHWAYS

(CC-07-0208)

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 June 8, 2007, between 11:00 a.m. and 12:00 p.m., the claimants' son, Dean Cantis, was traveling toward Morgantown, Monongalia County, on State Route 81 when the 1998 Chevrolet Blazer he was driving struck a twenty-inch piece of metal joiner strip located on the interstate overpass bridge. The joiner strip had disintegrated, and there were pieces protruding from the metal strip that had punctured the vehicle's tire.

2. Respondent is responsible for the maintenance of State Route 81 which it failed to maintain properly on the date of this incident.

3. As a result, claimants' vehicle sustained damage to its tire, front bearing hub assembly, and wheel alignment in the amount of $1,199.44. Claimants' insurance deductible at the time of the incident was $500.00. Thus, claimants' recovery is limited to that amount.

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 State Route 81 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 26, 2009

LINDA L. FLOYD
V.
DIVISION OF HIGHWAYS
(CC-08-0199)

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 Pontiac GT struck a hole on U.S. Route 33, designated as West Second Street, in Weston, Lewis County. U.S. 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 1:30 p.m. on April 16, 2008. The claimant testified that she was driving on Main

Street in the right lane to make a turn onto U.S. Route 33. As she drove onto U.S. Route 33 at approximately ten miles per hour, her vehicle struck a hole in the road. Claimant stated that it looked as though respondent was performing road construction in this area. However, she did not notice any road work signs at the time that this incident occurred. Claimant submitted a photograph that demonstrates that there was a hazard sign at this location, but the sign was located behind the hole. As a result of this incident, claimant's vehicle sustained damage to its passenger side tires, rims, and its front bumper in the amount of $1,555.05. Claimant did not have insurance coverage for her loss.

The position of the respondent is that it did not have actual or constructive notice of the condition on U.S. Route 33. Victor Koon, Highway Administrator for respondent in Lewis County, testified that he is familiar with the area where this incident occurred. He stated that pursuant to respondent's Core Maintenance Plan, respondent was required to grind out the holes in this area and patch them with hot mix. It took respondent two days to perform the work at this location. Although Mr. Koon did not review the road work, he stated that anytime respondent's crews are involved in grinding activities, respondent places "Road Work" signs before the location of the hole. He testified that one sign was placed near the Corner Café, and another sign was placed between the parking lot and the entrance to the bank.

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 on U.S. Route 33 because it had placed the road hazard sign. However, since claimant's photograph demonstrates that the road hazard sign was behind the location of the hole, the Court finds that it is reasonable that the claimant did not see the sign before her vehicles struck the hole. The sign should have preceded the location of the road work in order to adequately warn the traveling public of this hazard. 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 $1,555.05.

Award of $1,555.05.

MICHAEL A. CORCOGLIONITI
VS.
DIVISION OF HIGHWAYS
(CC-08-0129)

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when he

maneuvered his 2008 Honda Accord onto the curb to avoid holes on Virginia Avenue in Bridgeport, Harrison County. Virginia Avenue 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 4:30 p.m. and 5:00 p.m. on March 13, 2008. The speed limit on Virginia Avenue is twenty-five miles per hour. At the time of the incident, the claimant was driving between ten to fifteen miles per hour on the 300 block of Virginia Avenue towards downtown Bridgeport. When claimant noticed that there were holes on the road, he swerved his vehicle to the right and onto the curb to avoid the holes. The vehicle's right front rim was cut when he struck the curb. Claimant testified that he was unable to drive onto the other lane of traffic due to oncoming vehicles. Claimant stated that he notified respondent of the condition of the road prior to this incident. As a result, claimant's vehicle sustained damage to its rim in the amount of $485.58. 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 holes on Virginia Avenue. David Cava, Highway Administrator for respondent in Harrison County, testified that the holes on the road are caused by drainage problems due to a natural spring in this area. He stated that maintenance of the drains and the sidewalks are the responsibility of the city. He testified that respondent patches this road approximately three times a year in the summer months. Since respondent had run out of winter grade patching material, respondent was unable to patch holes until the hot asphalt plants opened, which was after this 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 holes in this particular area and that the holes created a hazardous condition to the traveling public. Consequently, there is sufficient evidence of negligence to base an award. Notwithstanding the negligence of respondent, the Court is also of the opinion that claimant over- corrected his vehicle when his vehicle struck the curb. Claimant also was aware of the condition on the roadway. In a comparative negligence jurisdiction, such as West Virginia, claimant's negligence can reduce or bar recovery in a claim. Based on the above, the Court finds that the negligence of claimant equals twenty-percent (20%) of his loss. 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, for an award in the amount of $200.00.

In accordance with the findings of fact and conclusions of law stated herein above, the Court is of the opinion to and does make an award to claimant in the amount of $200.00.

Award of $200.00.

OPINION ISSUED AUGUST 26, 2009

JEFFERY S. CHUMLEY
V.
DIVISION OF HIGHWAYS
(CC-08-0314)

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 2008 Harley Davidson motorcycle struck two holes on the entrance ramp as he was merging onto I-79 South from the Meadowbrook Exit in Bridgeport, Harrison County. I-79 South 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 June 8, 2008. At the time of the incident, the claimant was driving from Monongalia County to Doddridge County, where his family resides. The claimant stopped at an Exxon station to fill his motorcycle with gas before the trip. Then the claimant took the entrance ramp onto I-79 South. As he was approaching the top of the hill on the entrance ramp at approximately fifty miles per hour, his vehicle struck two holes in the road. The holes were situated approximately one hundred feet from each other, and claimant stated that the first hole caused the damage to his motorcycle. The claimant testified that he did not see the holes before his motorcycle struck them. Claimant drove his vehicle onto the emergency pull-off area on the interstate and noticed that his motorcycle's tire and rim were damaged. Claimant's vehicle sustained damage in the amount of $1,138.39. Since claimant's insurance declaration sheet indicates that he had a $250.00 deductible, his 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 the entrance ramp of I-79 South near the Meadowbrook Exit. Gary Dyer, Crew Supervisor for respondent, testified that he is responsible for the maintenance of I-79 from the Weston Exit to the Fairmont Exit. Mr. Dyer stated that he is familiar with the area where the subject incident occurred. He testified that it is a high traffic area to the extent that this portion of I-79 is one of the last sections of concrete highway left in the State. A contractor was hired to repave the road. According to Mr. Dyer, the respondent did not receive complaints regarding the holes at this particular location prior to the subject incident. He stated that respondent had patched holes in this area on May 21, 2008, and on June 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 had, at the least, constructive notice of the holes which claimant's motorcycle struck and that the holes presented a hazard to the traveling public, especially given the heavy traffic on this road. Although respondent had performed maintenance at this location, the patchwork proved inadequate at the time of the incident in question. Thus, the Court finds respondent negligent and claimant is entitled to 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 AUGUST 26, 2009

ABNER D. ALLEN
V.
DIVISION OF CORRECTIONS
(CC-08-0403)

Claimant present via telephone conference call.

Charles P. Houdyschell Jr., Senior Assistant Attorney General, for Respondent.

PER CURIAM:

Claimant, an inmate at the Mount Olive Correctional Complex, a facility of the respondent, brought this claim to recover the value of certain personal property items that he alleges were lost by the respondent. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

Claimant testified via telephone conference call at the hearing of this matter on May 7, 2009. The claimant stated that his property was lost when he was transferred from St. Mary's Correctional Center to the Mount Olive Correctional Complex on March 21, 2008. The claimant alleges that the following items were misplaced: 1) one pair of shower shoes; 2) six pairs of Hanes briefs; 3) seven pairs of socks; 4) one thermal shirt; and 5) one thermal pant. Claimant asserts that he purchased these items while he was incarcerated at the Huttonsville Correctional Institution approximately two and a half years ago, and he had not used some of the items at the time that they were lost. After the hearing, the claimant submitted the "Huttonsville Correctional Institution Property Menu" indicating that the lost items were valued at $113.65.

Respondent admits liability in this matter.

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 the respondent is responsible for the property that was misplaced during the claimant's transfer between facilities. Accordingly, the Court makes an award to the claimant herein in the amount of $113.65.

Award of $113.65.

OPINION ISSUED AUGUST 26, 2009

MIGUEL DELGADO
V.
DIVISION OF CORRECTIONS

(CC-09-0018)

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, a facility of the respondent, brought this claim to recover the value of certain personal property items that were seized and destroyed by the respondent. Claimant placed a value of $50.00 on his property.

The claimant testified at the hearing of this matter that respondent seized and destroyed one pair of sweat pants and one spring-loaded eyeglass case that he was not permitted to have in his possession. On February 7, 2008, the claimant paid the Arts and Crafts Department at the prison $11.66 to perform alterations on his sweat pants and sweat shirt. The claimant had the pants taken in and had velcro attached to the back pocket of the pants so that his compact disc player would not fall out.

On September 23, 2008, Arietta King, Store Keeper for the State Shop, seized the sweat pants containing the velcro, and she also seized the claimant's spring-loaded eyeglass case. The claimant purchased his eyeglasses on March 25, 2008, at a cost of $272.00 and estimates that the value of the eyeglass case is $10.00. Claimant valued his sweat pants at $40.00. When the claimant filed a grievance regarding the seizure of his property, he was informed that he had two options: 1) send the property home or 2) have the property destroyed. The claimant stated that he did not have a place to mail his items, and he declined to make an election. Claimant's property was destroyed on October 24, 2008.

Arietta King, Store Keeper at the State Shop, testified that she seized the claimant's sweat pants because the claimant was not permitted to alter his clothing. Under respondent's Policy Directive Number 325.00 (dated March 1, 2008), "contraband" is defined as follows: "Any item or article which is not specifically authorized in writing by the Commissioner or Warden/Administrator for inmate possession, or an authorized item which has been altered or which has been obtained from any unauthorized source." Although the sweat pants were altered at the prison, Ms. King explained that an inmate performed the alteration, not prison personnel. In addition, Ms. King stated that the claimant's spring-loaded eyeglass case is considered contraband because the metal inside the case can be used for impermissible purposes.

The Court finds that the claimant is entitled to receive compensation for the sweat pants because respondent's Arts and Crafts Department authorized and approved the alteration. Since respondent properly seized the spring-loaded eyeglass case because it was considered contraband, the claimant is not entitled to receive compensation for this item.

Accordingly, the Court is of the opinion to and does make an award to the claimant in the amount of $40.00.

Award of $40.00.

OPINION ISSUED SEPTEMBER 10, 2009

SUE L. BANEY
V.

DIVISION OF HIGHWAYS
(CC-08-0184)

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 Ford 500 struck a hole on Mount Harmony Road, designated as County Route 73/1 in Fairmont, Marion County. County Route 73/1 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 9:10 p.m. on April 2, 2008. County Route 73/1 is a two-lane paved road with a centerline and no edge lines. The speed limit is thirty miles per hour. At the time of the incident, claimant was driving from her home in Rayford Acres to the FBI Center. As claimant was proceeding at the speed limit, her vehicle struck a hole on the right side of the paved portion of the road. The hole was approximately two feet in diameter and was situated six inches from the berm. Claimant testified that she was unable to avoid the hole due to an oncoming vehicle. As a result of this incident, claimant's vehicle sustained damage to its tire and rim in the amount of $394.82. Since claimant's insurance deductible was $250.00, 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 County Route 73/1. Michael Roncone, Highway Administrator for respondent in Marion County, testified that County Route 73/1 is a second priority road in terms of its maintenance. According to respondent's Core Maintenance Plan, respondent patches holes on County Route 73/1 after it performs patch work on U.S. Route 19 and U.S. Route 250. He explained that although County Route 73/1 is a second priority road it terms of its maintenance, it has a high average daily traffic count. Although Mr. Roncone was not aware of the particular hole in question, he stated that there were holes near the berm of the road. Mr. Roncone testified that respondent received complaints regarding holes in this area 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 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 condition. In addition, the claimant could not have avoided the hole during the time of the incident. 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 $250.00.

Award of $250.00.

OPINION ISSUED SEPTEMBER 10, 2009

JOHN R. ELKO JR
V.
DIVISION OF HIGHWAYS
(CC-08-0307)

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 Hyundai Tiburon struck a washed out section of Mount Clare Road, designated as State Route 25, near Lost Creek, Harrison County. State 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 set forth below.

The incident giving rise to this claim occurred at approximately 11:30 a.m. on June 11, 2008. State Route 25 is a paved, two-lane road with a yellow center line and white edge lines. The speed limit in this area is fifty-five miles per hour. At the time of the incident, claimant testified that he was driving from Lost Creek towards Clarksburg. The Green Valley Inn is the nearest landmark to the area where this incident occurred. As the claimant was driving at approximately forty-five miles per hour, his vehicle struck a washed out portion of the road. He stated that there was a flood one week prior to this incident that caused the section of road to wash out. Since the washed out portion occupied the entire width of both lanes of the roadway, claimant could not have avoided this area. He testified that he was not aware of the condition of the road prior to this incident. Claimant's girlfriend, Kara Randolph, was a passenger in the vehicle at the time of the incident. She testified that she travels this road several times per month. The last time that she traveled on the road prior to this incident was before the flooding had occurred. As a result, claimant's vehicle sustained damage to its right, front rim in the amount of $196.73.

The position of respondent is that it did not have actual or constructive notice of the condition on State Route 25. David Cava, Highway Administrator for respondent in Harrison County, testified that it is a second priority road in terms of its maintenance. Mr. Cava testified that he and his crews worked from June 4, 2008, through June 6, 2008, to keep the roads open which were flooded. He stated that respondent was inundated with complaints regarding washouts, high water, culverts failing, and people not being able to travel to and from their homes. Approximately twenty-five roads were affected by the flooding and were closed from two to five days. Mr. Cava testified that he was aware that State Route 25 was under high water in several locations. Respondent placed high water warning signs on the primary routes, and respondent had run out of signs to use 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 washed out portion of the road which the claimant's vehicle struck. Although respondent was performing work to clear the roads due to flooding at the time of this incident, the Court finds that the condition of State Route 25 created 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 $196.73.

Award of $196.73.

OPINION ISSUED SEPTEMBER 10, 2009

MONA L. IDDINGS
V.
DIVISION OF HIGHWAYS
(CC-08-0381)

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 Nissan Altima struck chunks of concrete on I-64 near the 5th Street Exit in Huntington, Cabell County. I-64 is a public 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 August 2, 2008. Claimant testified that she was driving westbound on I-64 at approximately sixty miles per hour when her vehicle struck chunks of concrete on the road that fell from an overpass on I-64. As a result of this incident, claimant's vehicle sustained damage to its tire and rim in the amount of $144.16. Claimant's insurance deductible was $250.00.

Respondent did not present a witness 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 *Lawrence v. Div. of Highways*, CC-08-0390 (Issued July 8, 2009), claimant's vehicle struck chunks of concrete on I-64 as he was traveling under the 5th Street Bridge on August 2, 2008, in Huntington, Cabell County. The Court found that respondent had, at the least, constructive notice of the potential deterioration of the concrete haunches on the bridge on I-64 and that this condition posed a hazard to the traveling public. Based upon the Court's decision in *Lawrence*, the Court finds respondent negligent. Thus, claimant is entitled to recover $144.16 for the damages sustained 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 $144.16.

Award of $144.16.

OPINION ISSUED SEPTEMBER 10, 2009

KATE COSBY CARDWELL
V.
DIVISION OF HIGHWAYS
(CC-09-0108)

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 Pontiac Grand Am struck rocks on U.S. Route 52 in Bluewell, Mercer County. U.S. 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 at approximately 8:30 p.m. on January 7, 2009. U.S. Route 52 is a paved three-lane road, with two lanes traveling uphill and one lane traveling downhill. The road has center lines and edge lines, and the speed limit is forty-five miles per hour. The claimant testified that it had been raining for three days. At the time of the incident, the claimant was driving up the hill in the right lane at between thirty-five and forty miles per hour when her vehicle struck rocks in the travel portion of the road. Claimant testified that she travels this road frequently, and she had seen rocks on the road on other occasions. She stated that rocks fall from the hillside onto the side of the road, and every time it rains, the rocks roll onto the roadway. When the claimant returned to the site of the incident to take a photograph, the rocks had been moved onto the side of the road near the hill side. As a result of this incident, claimant's vehicle sustained damage in the amount of $690.09. Although claimant's insurance deductible was $250.00, her insurance company required her to pay $60.00 for a replacement tire since her original tire was worn.

The position of the respondent is that it did not have actual or constructive notice of the condition on U.S. Route 52. Michael R. McMillion, Transportation Crew Supervisor for respondent in Mercer County at the time of this incident, testified that U.S. Route 52 is a high priority road in terms of its maintenance. He stated that the berm in this area is between five or six feet wide, and the hill side near the road is between twenty to thirty feet high. Mr. McMillion testified that there are no falling rock signs at this location. The DOH 12, a record of respondent's work activity, indicates that respondent received several 911 calls regarding various areas in the County where there had been rock slides, tree falls, and ditch lines that needed to be cleaned out. Respondent cleaned up the rocks in this area on January 7, 2009.

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 constructive notice of rocks likely to fall at that point on U.S. Route 52. The Court finds that respondent knew that this area is prone to rock falls. However, no warning signs were placed at this location. Thus, the Court finds respondent negligent. Notwithstanding the negligence of respondent, the Court also finds that claimant was negligent in failing to reduce her speed when she was aware that rocks fall at this location. In a comparative negligence jurisdiction, such as West Virginia, the negligence of a claimant can reduce or bar recovery in a claim. Based on the above, the Court finds that the negligence of claimant equals twenty-five (25%) percent of her loss. Since the negligence of claimant is not greater than or equal to the negligence of respondent, claimant may recover seventy-five (75%) percent of the loss sustained. The Court is limited to considering the amount of the deductible ($250.00) in determining the amount of this award. Thus, claimant is entitled to an award in the amount of $187.50.

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 $187.50.

Award of $187.50.

OPINION ISSUED SEPTEMBER 10, 2009

JANA LYNNE SHANNON
V.
DIVISION OF HIGHWAYS
(CC-09-0174)

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 3, 2009, at approximately 2:30 p.m., claimant was traveling north on State Route 2 near New Martinsville, Wetzel County, West Virginia, when her vehicle was struck by a falling piece of debris from the overpass bridge damaging the vehicle's windshield.

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

3. As a result, claimant's vehicle sustained damage to its dash panel and windshield.

4. Respondent agrees that the amount of $5,436.13 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 State Route 2 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 $5,436.13.

Award of $5,436.13.

OPINION ISSUED SEPTEMBER 23, 2009

DIRK ROBERT HUGO SCHLINGMANN AND
CATHERINE ELLEN SCHLINGMANN
V.
DIVISION OF HIGHWAYS
(CC-05-0329)

James F. Companion and Yolanda G. Lambert, Attorneys at Law, for claimants.

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 West Virginia Route 67, Brooke County, West Virginia.

2. On or around January 4, 2004, claimants' property, including their house, hillside, and property value, suffered damage as a result of a landslide adjacent to their property along West Virginia Route 67.

3. The claimants allege that the landslide was caused from WVDOH's installation of a culvert and gabion wall along West Virginia Route 67.

4. For the purposes of settlement, respondent acknowledges culpability for the preceding incident.

5. Claimant and respondent believe that in this particular incident and under these particular circumstances that an award of sixty eight thousand two hundred fifty dollars ($68,250.00) would be a fair and reasonable amount to settle this claim.

6. The parties to this claim agree that the total sum of sixty eight thousand two hundred fifty dollars ($68,250.00) to be paid by respondent to the claimants in Claim No. CC-05-0329 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 and damage 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 67 on the date of this incident; that the negligence of respondent was the proximate cause of the damages sustained to claimants' property; and that the amount of the damages agreed to by the parties is fair and reasonable. 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 $68,250.00.

Award of $68,250.00.

OPINION ISSUED OCTOBER 1, 2009

PATRICIA A. BLANKENSHIP
V.
DIVISION OF HIGHWAYS
(CC-06-0263)

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 Thunderbird struck loose pieces of asphalt on I-64 East in Institute, Kanawha County. The claimant lost control of the vehicle, and the vehicle was totaled in this incident. I-64 is a public 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 6:15 a.m. and 6:30 a.m. on August 18, 2006. There are three eastbound lanes on I-64, and the speed limit is seventy miles per hour. At the time of the incident, claimant testified that she was traveling to work at CAMC Memorial Hospital, and she was proceeding in the left lane. As she was driving at a speed of between sixty-five and seventy miles per hour, she noticed that there was a lot of asphalt on the road. The tires on her vehicle started skidding, and she lost control of the vehicle. The vehicle crossed into the median and rolled two or three times before it came to rest on the berm. Although claimant stated that there were road construction signs in this area, she did not notice any signs warning drivers to reduce their speed. She stated that it appeared as though respondent was grading the road before placing new asphalt in this area. The gravel was placed on the road to cover the ridges that were left from the grading activity. Claimant stated that when this incident occurred, she had been driving on this road for twelve years. Claimant's vehicle was totaled as a result of this incident. Claimant seeks to recover her insurance deductible in the amount of $500.00 and work loss (for fourteen hours of work at a rate of $32.24 per hour) in the amount of $451.36.

The position of the respondent is that it did not have actual or constructive notice of the condition on I-64. 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 loose pieces of asphalt which claimant's vehicle struck and that this condition presented a hazard to the traveling public. 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 $951.36.

Award of $951.36.

OPINION ISSUED OCTOBER 1, 2009

DONNA ANTHONY
V.
DIVISION OF HIGHWAYS
(CC-07-0325)

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 or around September 24, 2007, claimant fell in a hole and broke her leg in the rest area parking lot at Mineral Wells.

2. Respondent is responsible for the maintenance of state rest area parking lots which it failed to maintain properly on the date of this incident.

3. As a result, claimant sustained a broken leg and subsequent surgery with damages in the amount of $2,000.00.

4. Respondent agrees that the amount of $2,000.00 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 State Rest Area at Mineral Wells in Wood County on the date of this incident; that the negligence of respondent was the proximate cause of the personal injury sustained to claimant; 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 $2,000.00.

Award of $2,000.00.

OPINION ISSUED OCTOBER 1, 2009

PAUL D. HELMICK
V.
DIVISION OF HIGHWAYS
(CC-07-0255)

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

PER CURIAM:

Claimant brought this claim for damage to the driveway of his property, located in Clarksburg, Harrison County, which he alleges occurred as a result of respondent's negligent maintenance of the ditch lines on Strother Lane. Claimant asserts that when there is a heavy rain, water flows from Strother Lane onto County Route 7 and then washes onto thirty feet of his driveway, making it impassible. Claimant seeks to recover $4,800.00 for the cost of replacing gravel that was washed

away from his driveway by the flow of surface water. The Court finds that claimant is entitled to recover in this claim for the reasons more fully stated below.

Claimant testified that he purchased his property in 1999, and that the problems involved in the instant claim began in 2001. The property was inspected at the time that it was purchased, and there were no water problems on the property previous to 1999. Claimant testified that whenever it rains, water flows from Strother Lane, a gravel road, crosses onto County Route 7, a paved road located perpendicular to Strother Lane, and then flows onto his property. Claimant indicated that his property is located below Strother Lane and County Route 7. Due to the flow of the surface water, the gravel on his property has washed away, creating ruts on his thirty-foot driveway. Claimant testified that by easement the driveway serves as a private road that is used by four families and two businesses to travel to and from their properties and County Route 7.

Claimant seeks to recover the cost of placing gravel onto his driveway. The documentation provided by the claimant at the hearing of this matter indicates that the cost of labor and equipment to perform the work amounts to $605.00; the cost of ten tons of gravel amounts to $243.10; and the cost of moving equipment onto his property to perform the necessary repairs amounts to $310.00. Thus, claimant's damages total $1,158.10.

The position of respondent is that it was not negligent in its maintenance of the drainage system on Strother Lane. David Cava, Highway Administrator for respondent in Harrison County, testified that he is familiar with the area involved in this claim. Mr. Cava stated that since Strother Lane is a gravel, dead end road, and the rest of the road has been officially abandoned. It is considered a fourth priority road in terms of its maintenance. County Route 7, which intersects with claimant's driveway, is considered a second priority road in terms of its maintenance.

Mr. Cava stated that the claimant first contacted him regarding the water problems on Strother Lane and County Route 7 after September 4, 2007. Mr. Cava testified that subsequent to a flood event, respondent cleaned the rocks off the road, maintained the approach on Strother Lane, and performed repairs near the claimant's driveway. Afterwards, respondent cleaned out and removed several culvert pipes on both sides of the road. Then, respondent installed slotted drain pipes across Strother Lane to catch the surface water that flowed onto the middle of the road. Respondent also paved the area on Strother Lane where the pipes were installed. Mr. Cava explained that respondent could not make the two-foot ditch at this location any deeper because it would create a hazard on the side of the road for the traveling public.

Mr. Cava testified that after a rain fall event that occurred in May of 2009, the slotted drain pipe was approximately two-thirds full of gravel and stone, and the ditches at this location were almost full. Mr. Cava further stated that there are few culverts and ditches in Harrison County that could withstand the amount of water in this area. In addition, claimant's property is located at a lower elevation than County Route 7 and Strother Lane. He stated that respondent can alleviate the problem by flushing the pipe and reopening the ditches.

The Court has held that respondent has a duty to provide adequate drainage of surface water, and drainage devices must be maintained in a reasonable state of repair. *Haught v. Dep't of Highways,* 13 Ct. Cl. 237, 238 (1980). In claims of this nature, the Court will examine whether respondent negligently failed to protect a claimant's property from foreseeable damage. *Rogers v. Div. of Highways,* 21 Ct. Cl. 97, 98 (1996).

The Court finds that respondent was negligent in its maintenance of the drainage system on Strother Lane. The photographs demonstrate that water flowing from Strother Lane and onto County Route 7 would then wash onto claimant's property, which eroded the condition of the claimant's driveway. Since the failure to maintain adequate drainage was the proximate cause of the damages sustained to claimant's property, the Court finds respondent negligent, and claimant may make a recovery for his loss. Therefore, the Court finds that $1,158.10 is a fair and reasonable amount of compensate the claimant for the damages to his property.

Accordingly, the Court is of the opinion to and does make an award in the amount of $1,158.10.

Award of $1,158.10.

OPINION ISSUED OCTOBER 1, 2009

THOMAS H. FRESHWATER
V.
DIVISION OF HIGHWAYS
(CC-08-0482)

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 Mazda III struck a hole on Eldersville Road, designated as Alternate Route 27, in Follansbee, Brooke County. Alternate Route 27 is a public 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 7:35 p.m. on September 3, 2008. Alternate Route 27 is a paved, two-lane road with center lines and edge lines. The speed limit is forty miles per hour. At the time of the incident, claimant was driving west at approximately thirty-five miles per hour when his vehicle struck a hole in the road. The hole had jagged edges and was approximately two feet long, two feet wide, and four inches deep.[7] Claimant could not have avoided the hole due to oncoming traffic. Claimant traveled on this road two weeks prior to this incident, but he did not recall seeing the hole at that time. As a result of this incident, claimant's vehicle sustained damage to its rim, and the vehicle's tires needed to be re-aligned. Thus, claimant's damages total $551.94. Since claimant's insurance deductible at the time of the incident was $250.00, 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 Alternate Route 27. Craig Sperlazza, Highway Administrator for respondent in Brooke County, testified that Alternate Route 27 is a third priority road in terms of its maintenance. Mr. Sperlazza stated that there are a lot of homes in that area, and Alternate Route 27 is a highly traveled road.

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[7] Although claimant indicated that the hole was four feet deep, the Court assumes that the claimant meant four inches deep.

According to respondent's DOH12, a record of respondent's work activity, respondent's crew was patching holes with hot mix from mile post 3.7 to mile post 4.9 on August 13, 2008. Claimant's incident occurred within this area. Mr. Sperlazza could not recall whether respondent received complaints regarding the condition of the road prior to this incident. Although respondent has employees that travel this road on a daily basis, Mr. Sperlazza does not recall if they informed him that this particular area needed attention.

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 patchwork 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 $250.00.

Award of $250.00.

OPINION ISSUED OCTOBER 1, 2009

RICHARD R. GREENE II
V.
DIVISION OF HIGHWAYS
(CC-08-0128)

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 Audi S4 sedan struck a raised section of pavement on U.S. Route 50, east of Bridgeport, Harrison County. U.S. 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 between 8:45 p.m. and 9:00 p.m. on February 1, 2008. The speed limit on this particular area of U.S. Route 50 is twenty-five miles per hour. At the time of the incident, the claimant was driving from Grafton, where he works, to his father's home in Bridgeport. As he was driving in the westbound lane of U.S. Route 50 at between fifteen to twenty-five miles per hour, his vehicle struck a raised section of pavement. Claimant testified that he travels this road on a daily basis. He stated that a housing development was being constructed in this area, and a broken water line on the construction site caused the deterioration on the road. He testified that the eastbound lane was closed at the time of the

incident. Claimant asserts that respondent should have closed the westbound lane prior to this incident or made it passable. As a result of this incident, claimant's vehicle sustained damage to the vehicle's front passenger's side tire and rim in the total amount of $694.94. Claimant's insurance deductible was $1,000.00 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 U.S. Route 50. David Cava, Highway Administrator for respondent in Harrison County, testified that U.S. Route 50 is a first priority road in terms of its maintenance. Mr. Cava stated that there was a slip in the road, and a portion of the road surface was raised in this area. He explained that the condition was caused by moisture in the road surface. Respondent closed the eastbound lane first to perform milling and patching activities. During the time that the eastbound lane was closed, respondent placed temporary traffic signals and signs to direct traffic onto the portion of the road that was most passable. Although respondent was engaged in milling activities to smooth out the raised portion on the westbound lane, the road continued to deteriorate. After the claimant's incident, respondent closed both lanes of traffic to perform repairs 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 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 pavement on U.S. Route 50. Since the condition on U.S. Route 50 created a hazard to the traveling public, the Court finds respondent negligent. Thus, 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 $694.94.

Award of $694.94.

OPINION ISSUED OCTOBER 1, 2009

RONDA L. MILLER
V.
DIVISION OF HIGHWAYS
(CC-08-0438)

Chad C. Groome, Attorney at Law, for claimant.

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when her 2003 Hyundai Elantra struck a piece of asphalt on W.Va. Route 2 in Wheeling, Ohio County. W.Va. Route 2 is a public 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 8:45 a.m. on

December 10, 2007. W.Va. Route 2 is a paved, three-lane road with a speed limit of fifty-five miles per hour. Claimant testified that she was driving at approximately fifty miles per hour in the center lane, approximately 300 feet from the I-70 entrance ramp, when her vehicle struck a piece of asphalt on the road. She stated that the piece of asphalt was approximately twelve inches long, twelve inches wide, and between five to six inches thick. Claimant testified that there was a hole at this location, and the piece of asphalt was lying beside the hole. Since there was a vehicle traveling in front of her, she did not notice the hazard until the driver of the vehicle swerved to avoid it. Claimant maneuvered her vehicle over to avoid the object, but the object caught the corner of her vehicle's passenger side front and rear tire. Although claimant travels this road to work five days a week, she had never seen a piece of asphalt lying on the road prior to this occasion. As a result of this incident, claimant's vehicle sustained damage in the amount of $496.76.

The position of the respondent is that it did not have actual or constructive notice of the condition on W.Va. Route 2. Terry Kuntz, Interstate Supervisor for respondent in Ohio County, stated that W.Va. Route 2 is a heavily traveled, second priority road. He testified that he received a telephone call from Wheeling Tunnel between 8:00 a.m. and 9:00 a.m. on the date of the incident notifying him of the loose piece of asphalt on the highway. Approximately twenty-five minutes to one half hour later, respondent's crew removed the piece of asphalt and patched the hole at this location. Prior to December 10, 2007, respondent did not have notice of the loose piece of asphalt in this area. Respondent stipulates that claimant's vehicle sustained damage in the amount of $496.76.

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 piece of asphalt which claimant's vehicle struck. The Court finds that the defect presented a hazard to the traveling public on this heavily traveled road. 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 $496.76.

Award of $496.76.

OPINION ISSUED OCTOBER 1, 2009

MONONGAHELA POWER COMPANY dba ALLEGHENY POWER
V.
DIVISION OF CORRECTIONS
(CC-09-0350)

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 $1,012.40 for services that it provided to respondent for which it did not receive payment. Claimant performed emergency repairs at the Pruntytown Correctional Center on June 11, 2008.

In its Amended 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 $1,012.40.

Award of $1,012.40.

OPINION ISSUED NOVEMBER 13, 2009

MICHELE MERIGO
V.
DIVISION OF HIGHWAYS
(CC-03-0161)

John J. Pizzuti, 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 W.Va. Route 27 in Brooke County, West Virginia.

2. On or around April 2, 2001, Michele Merigo was operating her motor vehicle on W.Va. Route 27 in Brooke County, West Virginia, when her vehicle struck a rock that had fallen in the roadway from the adjacent hillside.

3. Ms. Merigo was injured as a result of the accident and required medical treatment for her injuries.

4. Claimant alleges that respondent was negligent in its maintenance of the portion of W.Va. Route 27 where claimant’s accident occurred.

5. For the purposes of settlement, respondent acknowledges culpability for the preceding accident.

6. Both the claimant and respondent believe that in this particular incident and under these particular circumstances that an award of One Hundred Twenty-Two Thousand Five Hundred Dollars ($122,500.00) would be a fair and reasonable amount to settle this claim.

7. The parties to this claim agree that the payment of the total sum of One Hundred Twenty-Two Thousand Five Hundred Dollars ($122,500.00) 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, present and future claims the 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 27. The Court finds that One Hundred Twenty-Two Thousand Five Hundred Dollars ($122,500.00) is a fair and reasonable amount to settle this claim.

Accordingly, the Court is of the opinion to and does make an award in the amount of One Hundred Twenty-Two Thousand Five Hundred Dollars ($122,500.00).

Award of $122,500.00.

OPINION ISSUED NOVEMBER 13, 2009

SUSAN RENEE FINLEY
V.
DIVISION OF HIGHWAYS
(CC-08-0536)

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 2008 Subaru Legacy struck a hole on I-64 West, one half mile before the Teays Valley Exit, in Putnam County. Claimant's husband, George Finley, was the driver at the time of the incident. I-64 West is a public 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 5:15 p.m. on December 18, 2008. George Finley testified that he was driving through a construction zone on I-64 West at approximately 48 miles per hour when his vehicle struck a hole in the road that was between six to eight inches deep. He stated that there were a series of holes in this area. The lanes had been shifted due to construction, and the holes were located near the white line on the right side of the road. Mr. Finley stated that he is familiar with this area and travels this road on a daily basis. Although he had previously noticed the hole at this location, he was unable to avoid it due to the traffic. Mr. Finley stated that the hole formed as a result of cold weather and traffic, and it had increased in size over time. Claimant's damages amount to $1,355.42. Claimant's insurance deductible at the time of the incident was $500.00. Claimant also incurred $80.00 in shipping expenses to obtain the parts to repair her vehicle and avoid the expense of renting a vehicle. However, the cost for shipping the parts was not covered by her insurance.

The position of the respondent is that it did not have actual or constructive notice of the condition on I-64 West. Respondent did not present a witness 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 which claimant's vehicle struck and that the hole

presented a hazard to the traveling public. Since there were a series of holes at this location, the Court finds respondent negligent. Thus, 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 $580.00.

Award of $580.00.

OPINION ISSUED NOVEMBER 13, 2009

GLOCK INC.
V.
DIVISION OF CORRECTIONS
(CC-09-0432)

Claimant appeared *pro se*.
John H. Boothroyd, 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 $24.00 for a bench mat purchased by respondent. Claimant has not received payment for this item.

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 $24.00.

Award of $24.00.

OPINION ISSUED NOVEMBER 13, 2009

LARRY D. FORD
V.
DIVISION OF HIGHWAYS
(CC-09-0031)

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 2008 Mercedes Benz struck several holes on I-64, near the Teays Valley entrance ramp, in Putnam County. I-64 is a public 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 p.m. on January 8, 2009. At the time of the incident, claimant was driving on I-64 eastbound

from Teays Valley to Charleston. As he was traveling between fifty and fifty-five miles per hour in his right lane of traffic, his vehicle struck three holes in the road. The third hole was approximately four inches deep. The holes were located near the road's white edge line. Claimant testified that he was unable to avoid the holes due to the traffic. Although claimant travels this road frequently, he did not notice these particular holes prior to the incident. As a result, claimant's vehicle sustained damage to its wheel in the amount of $200.87. Claimant's 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 I-64. 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 condition of the road at this location. Since there were numerous holes in claimant's lane of traffic on the interstate, the Court finds respondent negligent. Thus, 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 $200.87.

Award of $200.87.

OPINION ISSUED NOVEMBER 13, 2009

ROBERT L. ROGERS AND MELISSA J. ROGERS
V.
DIVISION OF HIGHWAYS
(CC-09-0010)

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 2001 Audi struck a hole on County Route 36 as claimant, Robert L. Rogers, was driving in Statts Mills, Jackson County. County Route 36 is a public 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 8:15 p.m. on November 12, 2008. At the time of the incident, claimants were traveling home from church. Robert Rogers testified that he was driving around a curve at between twenty and twenty-five miles per hour when their vehicle struck a hole on the edge of the pavement. Although the hole had existed at this location for approximately one month, Mr. Rogers was unable to avoid it due to an oncoming vehicle that was

traveling in the opposite lane. Melissa Rogers testified that the hole was between nine and eleven inches deep. As a result of this incident, claimants sustained damage to their vehicle in the amount of $993.05. 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 County Route 36. Mike Donohew, Crew Supervisor for respondent in Jackson County, testified that County Route 36 is a second priority road in terms of its maintenance. Mr. Donohew was not aware of complaints regarding this hole prior to November 12, 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 leads the Court to conclude that respondent had notice of this condition. In addition, Mr. Rogers testified that the hole had existed at this location for approximately one month. 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 22, 2009

DONNA KISER, as Administratrix of the Estates of MELVIN KISER and MICHEL
KISER, deceased and ROBERT WOODS, individually,
V.
DIVISION OF HIGHWAYS
(CC-06-0238)

James M. Barber, Attorney at Law, for claimants.

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 Interstate 64, Cabell County, West Virginia.

2. On or about October 23, 2005, Claimant Donna Kiser's decedents, Melvin Kiser and Michael Kiser, and Claimant Robert Woods were involved in an accident on Interstate 64 near the 15 mile marker in Cabell County, West Virginia. The

Claimant's automobile was struck in the rear end by a tractor trailer.

3. The incident occurred approximately 2 miles from a bridge repair construction project that Ahern & Associates, Inc. was performing for the Respondent.

4. Melvin and Michael Kiser suffered critical injuries and died as a result of the accident. Robert Woods suffered injuries to his cervical spine and right hip as a result of the accident.

5. The Claimants allege that the traffic control plan was inadequate due to traffic routinely backing up beyond the furthest warning sign of the construction project. Moreover, Respondent failed to install a sufficient number of warning signs to notify the traveling public of the backup.

6. For the purposes of settlement, Respondent acknowledges culpability for the preceding incident.

7. Claimant and Respondent believe that in this particular incident and under these particular circumstances an award of $90,000 to Robert Woods; an award of $300,000 to Donna Kiser, Administratrix of the Estate of Melvin Kiser; and an award of $610,000 to Donna Kiser, Administratrix of the Estate of Michael Kiser represent fair and reasonable amounts to settle this claim.

8. The parties to this claim agree that the total sum of $90,000 to Robert Woods; $300,000 to Donna Kiser, Administratrix of the Estate of Melvin Kiser; and $610,000 to Donna Kiser, Administratrix of the Estate of Michael Kiser to be paid by Respondent to the Claimants in Claim No. CC-06-0238 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 and damages Claimants may have against Respondent arising from the matters described in said claim.

The Court finds that Respondent was negligent in its maintenance of Interstate 64 near the 15 mile marker in Cabell County; that Respondent's negligence was the proximate cause of the injuries sustained to Robert Woods and the deaths of Melvin and Michael Kiser; and that the amount agreed to by the parties is fair and reasonable.

Award of:

$90,000 to Robert Woods;

$300,000 to Donna Kiser, Administratrix of the Estate of Melvin Kiser; and

$610,000 to Donna Kiser, Administratrix of the Estate of Michael Kiser.

OPINION ISSUED DECEMBER 22, 2009

JOHN SCOTT ALLEN
V.
DIVISION OF HIGHWAYS
(CC-07-0149)

Ronald W. Zavolta, 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 U.S. Route 40 in Wheeling, Ohio County, West Virginia.

2. On or around May 13, 2005, claimant's house suffered damage as a result of a tree fall. The tree was located adjacent to U.S. Route 40 within respondent's right-of-way.

3. The claimant alleges that said tree was suffering from decay.

4. For the purposes of settlement, respondent acknowledges culpability for the preceding incident.

5. Claimant and respondent believe that in this particular incident and under these particular circumstances that an award of nineteen thousand dollars ($19,000.00) would be a fair and reasonable amount to settle this claim.

6. The parties to this claim agree that the total sum of nineteen thousand dollars ($19,000.00) to be paid by respondent to the claimant in Claim No. CC-07-0149 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 and damage 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 U.S. Route 40 on the date of this incident; that the negligence of respondent was the proximate cause of the damage 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 his loss.

Accordingly, the Court is of the opinion to and does make an award in the amount of $19,000.00.

Award of $19,000.00.

OPINION ISSUED DECEMBER 22, 2009

ROSALIND DRAKE
V.
DIVISION OF HIGHWAYS
(CC-07-0218)

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 July 10, 2007, claimant's vehicle struck a broken-off sign post at the Cottageville intersection in Jackson County.

2. Respondent is responsible for the maintenance of the road at the Cottageville intersection.

3. As a result of this incident, claimant's vehicle sustained damage to its bumper and tires in the amount of $643.59. Since claimant's insurance deductible

was $100.00, claimant's recovery is limited to that amount.

4. Respondent agrees that the amount of $100.00 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 road at the Cottageville intersection on the date of this incident; that the negligence of respondent was the proximate cause of the damages 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 $100.00.

Award of $100.00.

OPINION ISSUED DECEMBER 22, 2009

TERESA M. MYERS AND ANTHONY D. MYERS
V.
DIVISION OF HIGHWAYS
(CC-07-0165)

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 23, 2007, claimants' 1999 Ford Escort was damaged when it struck an uneven surface on the Sugarlands Bridge near St. George in Tucker County causing damage to their vehicle.

2. Respondent is responsible for the maintenance of the Sugarlands Bridge which it failed to maintain properly on the date of this incident.

3. As a result, claimants' vehicle sustained damage in the amount of $813.55. Claimants have subsequently sold the vehicle. Claimants agree that $400.00 would be a fair and reasonable amount to settle this claim.

4. Respondent agrees that the amount of $400.00 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 the Sugarlands Bridge near St. George in Tucker County 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 $400.00.

Award of $400.00.

OPINION ISSUED DECEMBER 22, 2009

STACY ARMSTRONG
V.
DIVISION OF HIGHWAYS
(CC-08-0469)

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 vehicle struck a hole on the edge of East Dailey Road in Dailey, Randolph County. East Dailey Road is a public 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 October 21, 2008. The speed limit on East Dailey Road is thirty miles per hour. At the time of the incident, claimant was driving at approximately thirty miles per hour or less around a curve when her vehicle struck a hole located on the edge of the road. Claimant stated that her vehicle drifted towards the berm due to the way the road curves in this area. Claimant travels this road on a daily basis and stated that the hole had been there for at least two months prior to the incident. As a result, claimant's vehicle sustained damage to its wheel, tire, strut, and the vehicle needed to be re-aligned, totaling $335.28. Claimant's insurance deductible was $500.00.

The position of the respondent is that it did not have actual or constructive notice of the condition on East Dailey Road. Raymond W. Yeager, Highway Administrator for respondent in Randolph County, testified that East Dailey Road is between a second and a third priority road in terms of its maintenance. Mr. Yeager 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 hole on the edge of the road which claimant's vehicle struck and that it presented a hazard to the traveling public. Since the edge of the road was in disrepair at the time of this incident, the Court finds respondent negligent. Notwithstanding the negligence of the respondent, the Court is also of the opinion that the claimant was negligent since her vehicle drifted towards the berm even though there was no oncoming traffic. 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 thirty-five percent (35%) of her loss. Since the negligence of the claimant is not greater than or equal to the negligence of the respondent, claimant 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 claimant in the amount of $217.94.

Award of $217.94.

OPINION ISSUED DECEMBER 22, 2009

BONITA BELL
V.
DIVISION OF HIGHWAYS
(CC-08-0495)

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 Cadillac struck a loose delineator on I-79 North at mile post 22 near Clendenin, Kanawha County. I-79 North is a public 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 2:00 p.m. on November 5, 2008. I-79 is a paved, four-lane road with two northbound lanes and two southbound lanes. The speed limit is seventy miles per hour. At the time of the incident, claimant was traveling to her home in Summersville. Claimant testified that she was driving between sixty-five and seventy miles per hour when her vehicle struck a loose delineator on the road. The delineator, which serves as a reflector between the two northbound lanes of traffic, was lying unattached from the road's surface. After the incident, claimant pulled over to the side of the road. Two of respondent's employees slowed down traffic and stopped to help the claimant. As a result, claimant's vehicle sustained damage to its left rear tire and rim in the amount of $240.40.

The position of the respondent is that it did not have actual or constructive notice of the condition on I-79 North. 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 delineator which claimant's vehicle struck and that it presented a hazard to the traveling public. 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 $240.40.

Award of $240.40.

OPINION ISSUED DECEMBER 22, 2009

LARRY J. BOUGHNER AND BRENDA L. BOUGHNER
V.
DIVISION OF HIGHWAYS
(CC-08-0121)

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 Pontiac Grand Prix struck a hole while claimant Brenda L. Boughner was driving on State Route 31, approximately two miles from Williamstown, in Wood County. State Route 31 is a public 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 6:45 p.m. on March 12, 2008. State Route 31 is a paved, two-lane road with a center line and edge lines. The speed limit is fifty-five miles per hour. Ms. Boughner testified that at the time of the incident she was driving at less than fifty-five miles per hour, traveling from her home to church. Ms. Boughner stated that there was a truck traveling around a curve from the opposite direction that was over the center line and which protruded onto her lane of travel. When she maneuvered her vehicle to the right to provide space between her vehicle and the truck, her vehicle struck the hole. The hole was approximately twelve inches long, twelve inches wide, and it extended inside the road's white edge line. Ms. Boughner stated that she first noticed the hole at least two weeks prior to this incident but did not report the hole's existence to respondent before her vehicle struck it. After the incident, she reported the hole to the Williamstown 911 and to the respondent. As a result of the incident, claimants' vehicle sustained damage to its tire ($55.77), rim ($254.13), and the tires needed to be re-aligned ($42.39), totaling $352.29. 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 State Route 31. Steve Carson, Highway Administrator for respondent in Wood County, testified that he is familiar with State Route 31 and stated that it is a high priority road in terms of its maintenance. He testified that State Route 31 is a curvy road that is approximately twenty feet wide. Although Mr. Carson was the Parkersburg Interstate Supervisor at the time of this incident, he currently is responsible for maintaining respondent's records in Wood County. According to respondent's records, respondent did not receive complaints regarding the condition of the road prior to the date of this incident. Respondent's DOH12, a record of respondent's work activity, indicates that respondent had patched the road with cold mix on March 14, 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 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 upon which to base an award. Notwithstanding the negligence of the respondent, the Court is also of the opinion that the driver was negligent since she was aware of the condition on the road for at least two weeks prior to this incident and did not notify respondent. 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 driver's negligence equals ten-percent (10%) of claimants' loss. Since the negligence of the driver is not greater than or equal to the negligence of the respondent, claimants 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 $317.07.

Award of $317.07.

OPINION ISSUED DECEMBER 22, 2009

GARY R. FLING AND TRACY A. FLING
V.
DIVISION OF HIGHWAYS
(CC-08-0156)

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 6:00 a.m. on March 20, 2008, claimants were traveling in their 1998 Honda Civic in the center lane of 5th Street in Parkersburg, Wood County, when their vehicle struck two holes in the road.

2. Respondent is responsible for the maintenance of 5th Street which it failed to maintain properly on the date of this incident.

3. As a result, claimants' vehicle sustained damage in the amount of $998.33. Claimants' insurance deductible was $250.00. Thus, claimants' recovery is limited to that amount.

4. Respondent agrees that the amount of $250.00 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 5th Street 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 $250.00.

Award of $250.00.

OPINION ISSUED DECEMBER 22, 2009

MELVIN R. HYRE
V.
DIVISION OF HIGHWAYS
(CC-08-0405)

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 Ford 500 struck a hole on River Road, designated as County Route 26/1, in Webster County. County Route 26/1 is a public 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 August 16, 2008. County Route 26/1 is a one-lane, unmarked asphalt road. At the time of the incident, claimant was returning from taking his granddaughter to Whittaker Falls to have her senior pictures taken by the waterfalls. Claimant was driving at between fifteen and twenty miles per hour on County Route 26/1 when his vehicle struck a hole in the road. Claimant testified that there were a series of holes in this area, and he was uncertain which hole caused the damage to his vehicle. Claimant stated that he had not driven on this road for at least twenty years. As a result of this incident, claimant's vehicle sustained damage to its tire in the amount of $111.25. Claimant's insurance deductible at the time of this 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 26/1. Vincent Cogar, Highway Administrator for respondent in Webster County, testified that he is responsible for the maintenance of approximately 500 miles of roadway in this area. He stated that approximately twenty-two employees assisted in the maintenance of the roads in Webster County at the time of the incident. Mr. Cogar testified that he is familiar with the area where claimant's incident occurred and stated that it is near the Randolph County line. He stated that the holes at this location are caused by water falling from the rock cliffs. Mr. Cogar explained that County Route 26/1 is a third priority road in terms of its maintenance. Although respondent had received complaints regarding the condition of County Route 26/1, Mr. Cogar stated that respondent must follow the Core Maintenance Plan. He stated that a hole on a higher priority road would be maintained first.

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. Since there were a series of holes in this area, the Court finds respondent negligent. Thus, 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 $111.25.

Award of $111.25.

OPINION ISSUED DECEMBER 22, 2009

ROSE ANNA JOHNSON AND RONALD WAYNE JOHNSON
V.
DIVISION OF HIGHWAYS
(CC-08-0225)

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 Pontiac Grand Am GT struck a hole while claimant Rose Anna Johnson was driving on Walker Road in Wood County. Walker Road is a public 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 April 2, 2008. At the time of the incident, Ms. Johnson testified that she was driving home from work when her vehicle struck a hole in the road. Ms. Johnson stated that there were a series of holes in this area. Since claimant lives on this road, she travels it on a daily basis. Although Ms. Johnson was aware of the holes for approximately one or two months prior to this incident, she did not report the holes to respondent because her husband works as a mechanic for Respondent. She stated that the Crew Supervisor for Wood County also lives on Walker Road. She, therefore, assumed the Respondent had knowledge of the defective road-way. As a result of this incident, claimants' vehicle sustained damage to its tire and rim in the amount of $258.44. 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 Walker 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 actual notice of the hole which claimants' vehicle struck and that it presented a hazard to the traveling public. Since there were a series of holes at this location, the Court finds respondent negligent. Notwithstanding the negligence of the respondent, the Court is also of the opinion that the driver was negligent since she could have taken precautions to avoid the hole at this location. 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 driver's negligence equals ten-

percent (10%) of their loss. Since the negligence of the driver is not greater than or equal to the negligence of the respondent, claimants 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 claimants in the amount of $232.60.

Award of $232.60.

OPINION ISSUED DECEMBER 22, 2009

SHERRY L. POST
V.
DIVISION OF HIGHWAYS
(CC-08-0430)

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 1993 940 Volvo struck a drainage trench on Wildcat Road in Lewis County. Wildcat Road is a public 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 August 22, 2008. Wildcat Road is a dirt road with one and a half lanes of traffic. At the time of the incident, claimant was taking her son swimming at a nearby river. Claimant testified that she was driving at approximately ten miles per hour when her vehicle struck a drainage trench in the road. The trench was approximately eight inches wide and six inches deep. Claimant testified that she noticed two or three other trenches located on this road. She stated that the last time she had driven on this road was the year prior. As a result of this incident, claimant's vehicle sustained damage in the amount of $884.04. Claimant had liability insurance only.

The position of the respondent is that it did not have notice of the condition on Wildcat Road. Jason Hunt, Assistant Maintenance Engineer in Lewis and Gilmer counties, testified that Wildcat Road is a low priority dirt road. He stated that respondent maintains this road approximately once per year. He testified that the drainage trench was not placed at this location by respondent. He stated that respondent did not have notice of the work that was performed on this 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 drainage trench which claimant's vehicle struck and that it presented a hazard to the traveling public. 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 could have taken

precautions to avoid this hazard. Claimant could have further reduced her speed based on the road conditions. 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 forty-percent (40%) of her loss. Since the negligence of the claimant is not greater than or equal to the negligence of the 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 the claimant in the amount of $530.43.

Award of $530.43.

OPINION ISSUED DECEMBER 22, 2009

RUSSELL G. SWECKER AND WANDA L. SWECKER
V.
DIVISION OF HIGHWAYS
(CC-08-0454)

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 Chevrolet Cavalier struck an uneven surface on the berm of Corridor H, designated as US Route 33, near Elkins, Randolph County. US Route 33 is a public 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 noon on September 15, 2008. US Route 33 is a paved, four-lane highway with two lanes traveling in each direction. The speed limit on US Route 33 is sixty-five miles per hour. At the time of the incident, Russell Swecker testified that he entered onto US Route 33 from Crystal Springs and was proceeding in the left lane at between fifty-five and sixty miles per hour. Since there was traffic behind him, Mr. Swecker maneuvered his vehicle over to the right lane of traffic. Mr. Swecker was driving near the edge of the road, and his tires left the roadway and struck an uneven surface on the berm. Ms. Swecker, who was a passenger in the vehicle, testified that there was a drop-off of approximately eight inches between the road surface and the berm at this location. The stretch of uneven surface was approximately four feet long. As a result of this incident, claimants' vehicle sustained damage to two tires, two rims, and two wheel covers in the amount of $490.59. Claimants' 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 US Route 33. Lewis B. Gardner, Transportation Crew Supervisor for respondent, testified that he is responsible for maintaining Corridor H. He testified that Corridor H is a high priority road. The DOH 12, a record of respondent's daily work activity, indicates that respondent patched the drop- off on the berm with cold mix on September 16, 2008. Prior to this incident, respondent did not have notice of the condition of the berm 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 condition of the berm at this location. The drop off onto the berm created a hazard to the traveling public on this high priority road. 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 driver was negligent in traveling too close to the edge of the road. In addition, Mr. Swecker was not forced onto the berm by traffic. In a comparative negligence jurisdiction such as West Virginia, the negligence of a claimant may reduce or bar recovery in a claim. Based on the above, the Court finds that the driver's negligence equals ten-percent (10%) of the claimants' loss. Since the negligence of the driver is not greater than or equal to the negligence of the respondent, claimants 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 that the claimants should be awarded the amount of $441.54.

Award of $441.54.

OPINION ISSUED DECEMBER 22, 2009

ROBERT C. WRIGHT AND KIMBERLY S. WRIGHT
V.
DIVISION OF HIGHWAYS
(CC-08-0243)

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 Chevrolet Cobalt struck a rock that was embedded in Narrow Gauge Road, designated as County Route 3/19, in Wood County. County Route 3/19 is a public 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 April 24, 2008. County Route 3/19 is a narrow, one-lane dirt road. At the time of the incident, Mr. Wright was driving and Ms. Wright was a passenger in the vehicle. As they were traveling to the cemetery at less than ten miles per hour, their vehicle struck a rock that was embedded in the road. Mr. Wright testified that he is familiar with this road, but he usually drives on it with his truck. Mr. Wright contends that respondent should have graded the road. As a result of this incident, claimants' vehicle sustained damage to its oil pan in the amount of $529.76. Since claimants' insurance deductible was $500.00 at the time of this incident, 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 County Route 3/19. 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 rock that was embedded in the road which claimants' vehicle struck and that the rock 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 $500.00.

Award of $500.00.

OPINION ISSUED DECEMBER 22, 2009

DISKRITER INC.
V.
DEPARTMENT OF HEALTH AND
HUMAN RESOURCES
(CC-09-0498)

Edwin J. Hull, Attorney at Law, for claimant.
Joshua R. Martin, 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 $69,011.05 for medical transcription outsourcing services provided at the request of Welch Community Hospital.

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 $69,011.05.

Award of $69,011.05.

OPINION ISSUED DECEMBER 22, 2009

JAMES D. AMICK
V.
DIVISION OF HIGHWAYS

(CC-09-0336)

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 1999 Ford Taurus struck a hole in the main traveled portion of County Route 44/2, in Leivasy, Nicholas County. County Route 44/2 is a public 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 June 6, 2009. County Route 44/2 is a tar and chip road. At the time of the incident, the claimant was driving at approximately fifteen miles per hour when his vehicle struck a hole that was approximately eighteen inches long and twenty inches wide. The hole was located in an area where a culvert extends under the road. Claimant testified that the culvert, which was located approximately five feet below the surface of the road, needed to be replaced. As a result of this incident, claimant's vehicle sustained damage to one tire, one sway bar link, and the vehicle needed to be re-aligned, totaling $254.87.

The position of the respondent is that it did not have actual or constructive notice of the condition on County Route 44/2. 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. 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 $254.87.

Award of $254.87.

OPINION ISSUED DECEMBER 22, 2009

KATRINA S. KELLEY AND MICHEL L. KELLEY
V.
DIVISION OF HIGHWAYS
(CC-09-0306)

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 Chevrolet HHR struck a rock embedded in the surface of County Route 24 in Spencer, Roane County. Katrina Kelley was the driver at the time of the incident. County Route 24 is a public 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 March 31, 2009. County Route 24 is a one-lane, tar and chip road. The speed limit is twenty miles per hour. At the time of the incident, Ms. Kelley was returning home from picking up her granddaughter at school. She was driving around a curve on County Route 24 and was proceeding downhill at between fifteen and twenty miles per hour when their vehicle struck a rock that was embedded in the road. Since County Route 24 was not level and there were numerous ruts on both sides of the road, Ms. Kelley was unable to avoid the rock located in a high spot between the ruts. She stated that oil and gas companies have brought heavy equipment onto this road for drilling which has created the ruts and the high spot located in the center of the road. Ms. Kelley travels this road on a daily basis and stated that the road has been in this condition for approximately two years. Claimants did not call respondent regarding the condition of the road prior to this incident. As a result, claimants' vehicle sustained damage to its oil pan and the vehicle needed to be re-aligned totaling $538.73. Since claimants' insurance deductible at the time of the incident was $500.00, 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 County Route 24. Frank McQuain Jr., Highway Administrator for respondent in Roane County, testified that at the time of the incident, he was the Crew Supervisor for respondent in Roane County. He stated that he is familiar with County Route 24 and testified that it is a third priority road in terms of its maintenance. He stated that drilling trucks have caused problems with this road. According to Mr. McQuain, 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 condition on County Route 24. The Court finds that the road was in disrepair at the time of this incident. The driver was unable to avoid striking the rock with the vehicle due to 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 the claimants in the amount of $500.00.

Award of $500.00.

OPINION ISSUED JANUARY 19, 2010

GARY ALLEN KETTERMAN
V.
DIVISION OF HIGHWAYS
(CC-06-0110)

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 1990 Chevrolet Cavalier struck a rock while his daughter, Felicia Ketterman was driving on US Route 220 near Petersburg, Grant County. US Route 220 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 7:50 p.m. on January 3, 2006. The speed limit on US Route 220 is fifty-five miles per hour. At the time of the incident, sixteen-year-old Felicia Ketterman was driving north from Moorefield to Petersburg, and she had two passengers in the vehicle. Ms. Ketterman stated that it was dark and raining. She was driving at approximately forty miles per hour near Welton Park, commonly known as Eagle's Nest Gap, when the vehicle struck a rock that was obstructing the northbound lane of traffic. The rock was approximately two feet long and two and a half feet wide. Ms. Ketterman testified that she could not have avoided striking the rock with the vehicle due to an oncoming tractor trailer that was traveling in the southbound lane. Ms. Ketterman stated that respondent failed to place a fence or barrier at this location to protect motorists from falling rocks. Although Ms. Ketterman stated that she is familiar with US Route 220 and was aware of rock falls in this area, she testified that she had never seen rocks on the roadway at this location.

Claimant further stated that he travels this road on a daily basis and testified that rocks frequently fall along US Route 220. He explained that there is a fence to protect motorists from rock falls approximately 150 yards north from the area where this incident occurred.

Claimant testified that he purchased the vehicle involved in this incident three days prior to the accident for $5,148.00. Claimant purchased a vehicle from a junk yard for $1,800.00 and used the parts to repair the vehicle involved in this incident. Claimant testified that the cost of labor was $1,000.00. He also purchased a windshield and had the vehicle re-aligned, amounting to $300.00. Claimant's costs to repair the vehicle totaled $3,100.00.

The position of the respondent is that it did not have actual or constructive notice of the rock that was obstructing the northbound lane near Welton Park on US Route 220. Asa Kisamore Jr. testified that he has been the Highway Administrator 2 for respondent in Grant County for four years. Mr. Kisamore stated that he is responsible for the maintenance of approximately 380 miles of road and has twenty-eight employees that assist him in the maintenance of the roads in the county. Mr. Kisamore testified that he is familiar with US Route 220 and stated that it is a high priority road in terms of its maintenance. In 2003, respondent installed "Falling Rock" signs in the general area where this incident occurred. During a road widening project, respondent placed a retaining wall and guardrails approximately 150 to 200 feet from the scene of the accident. Mr. Kisamore stated that approximately once a

month or once every six weeks, rocks fall onto the roadway at this location. He stated that wild goats cause and exacerbate the rock falls in this area. Mr. Kisamore testified that he has requested that a fence be placed in the area where claimant's incident occurred but is uncertain what action will be taken by respondent. He considers the need to place a fence in this particular area a priority as compared to other potential rock fall areas in the county.

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 instant case, the Court is of the opinion that respondent had constructive notice of rocks likely to fall at this location on US Route 220. The Court finds that although respondent placed "Falling Rock" signs on US Route 220, respondent failed to take further measures to protect the traveling public at this location. Although a fence is located 150 to 200 feet away from the area involved in this claim, there are no barriers located along the rock strata where claimant's incident occurred. According to Mr. Kisamore's testimony, rocks fall onto the roadway in this area approximately once a month or every six weeks. Mr. Kisamore also opined that he considers placing a barrier at this location a priority. The Court concludes that since respondent failed to take additional measures to protect the traveling public at this location, respondent is liable for the damages to claimant's vehicle.

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 $3,100.00.

Award of $3,100.00.

OPINION ISSUED JANUARY 19, 2010

STANLEY E. POWERS AND FRANCIS POWERS
V.
DIVISION OF HIGHWAYS
(CC-06-0045)

J. Kristofer Cormany, Attorney at Law, for Claimants.
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 West Virginia Route 80 in Mingo County, West Virginia.

2. On or around February 3, 2004, Stanley E. Powers was operating his

motor vehicle on West Virginia Route 80 near Gilbert in Mingo County, West Virginia, when his vehicle was struck by a rock that had fallen from the adjacent hillside.

3. Mr. Powers was injured as a result of the accident and required medical treatment for his injuries.

4. Claimants allege that Respondent was negligent in its maintenance of the portion of West Virginia Route 80 where Mr. Powers' accident occurred.

5. For the purposes of settlement, Respondent acknowledges culpability for the preceding accident.

6. Both the Claimants and Respondent believe that in this particular incident and under these particular circumstances that an award of Fifty Thousand Dollars ($50,000.00) would be a fair and reasonable amount to settle this claim.

7. The parties to this claim agree that the total sum of Fifty Thousand Dollars ($50,000.00) to be paid by Respondent to the Claimants in Claim No. CC-06-045 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 this claim and finds that Respondent was negligent in its maintenance of West Virginia Route 80 on the date of this incident; that the negligence of Respondent was the proximate cause of Mr. Power's injuries; and that the amount of damages agreed to by the parties is fair and reasonable. The Court further finds that the amount of $50,000.00 is a fair and reasonable amount to settle this claim. It is the opinion of the Court of Claims that the Claimants should be awarded the sum of $50,000.00.

Award of $50,000.00.

OPINION ISSUED JANUARY 19, 2010

MARILYN T. HARGETT
V.
DIVISION OF HIGHWAYS
(CC-07-0175)

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 Ford Escort struck a hole as she was driving on Wilson Lane in Elkins, Randolph County. Wilson Lane is a public 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 May 16, 2007. Wilson Lane is a paved, two–lane road with a center line and edge lines. The speed limit is fifteen miles per hour. Claimant testified that she was driving on Wilson Lane at less than fifteen miles per hour when her vehicle struck a hole located in the center of the road. Claimant was unable to avoid the hole due to oncoming traffic. Claimant testified that the hole had existed on the road for approximately one month before her

vehicle struck it. As a result of this incident, claimant's vehicle sustained damage to its tire in the amount of $57.19.

The position of the respondent is that it did not have actual or constructive notice of the condition on Wilson Lane. Raymond W. Yeager, Highway Administrator for respondent in Randolph County, testified that he is familiar with the area where claimant's incident occurred. He testified that Wilson Lane is a HARP road, which means that it was incorporated into the state's system. Unfortunately, according to Mr. Lane, respondent has limited materials available to perform maintenance on HARP roads. Mr. Yeager further stated that Wilson Lane is a third priority road in terms of its maintenance. Prior to May 16, 2007, respondent did not receive complaints regarding the condition of Wilson Lane.

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 hole's location in the center of the road leads the Court to conclude that respondent had notice of this hazard. 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 $57.19.

Award of $57.19.

OPINION ISSUED JANUARY 19, 2010

BOBBY P. DARNELL
V.
DIVISION OF HIGHWAYS
(CC-08-0404)

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 August 29, 2008, claimant's daughter, Tina A. Weaver, was driving the claimant's 1998 Chevrolet Silverado truck on State Route 20 South, approximately four miles north of Hinton, Summers County, when a portion of a dead tree fell on the vehicle.

2. Respondent is responsible for the maintenance of State Route 20 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

$2,366.55. Claimant had liability insurance only.

4. Respondent agrees that the amount of $2,366.55 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 State 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 damages agreed to by the parties is fair and reasonable. Thus, claimant may make a recovery for his loss.

It is the opinion of the Court of Claims that the claimant should be awarded the sum of $2,366.55 on this claim.

Award of $2,366.55.

OPINION ISSUED JANUARY 19, 2010

KEVIN FARLEY
V.
DIVISION OF HIGHWAYS
(CC-08-0242)

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 April 12, 2008, claimant's 2005 Chevrolet Uplander struck a hole on State Route 85 west of Van, Boone County.

2. Respondent is responsible for the maintenance of State Route 85 which it failed to maintain properly on the date of this incident.

3. As a result, claimant seeks to recover $461.00 for the damage sustained to his vehicle's wheel. Since claimant's insurance deductible was $250.00, claimant's recovery is limited to that amount.

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 State Route 85 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 damages agreed to by the parties is fair and reasonable. Thus, claimant may make a recovery for his loss.

It is the opinion of the Court of Claims that the claimant should be awarded the sum of $250.00 on this claim.

Award of $250.00.

OPINION ISSUED JANUARY 19, 2010

STEPHEN J. GAWTHROP
V.

DIVISION OF HIGHWAYS
(CC-08-0465)

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 August 28, 2008, claimant's 2004 Hyundai Elantra struck a piece of concrete that had fallen onto the road from the overpass on I-79 North, past the Weston Exit in Lewis County.

2. Respondent is responsible for the maintenance of I-79 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 $249.19. 4. Respondent agrees that the amount of $249.19 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-79 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 damages agreed to by the parties is fair and reasonable. Thus, claimant may make a recovery for his loss.

It is the opinion of the Court of Claims that the claimant should be awarded the sum of $249.19 on this claim.

Award of $249.19.

OPINION ISSUED JANUARY 19, 2010

GERALD E. GREENE
V.
DIVISION OF HIGHWAYS
(CC-08-0420)

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 3, 2008, claimant was crossing the bridge on State Route 16/61 in Mount Hope, Fayette County, when he reached an area of the bridge where respondent had placed steel plates. The steel plates were loose, exposing the bridge's steel re-bar rods. Claimant's vehicle struck the protruding re-bar rods, which caused damage to the vehicle's tire.

2. Respondent is responsible for the maintenance of State Route 16/61 which it failed to maintain properly on the date of this incident.

3. As a result, claimant's vehicle sustained damage to its tire in the amount

of $205.75. Claimant's insurance deductible was $1,000.00.

4. Respondent agrees that the amount of $205.75 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 State Route 16/61 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 damages agreed to by the parties is fair and reasonable. Thus, claimant may make a recovery for his loss.

It is the opinion of the Court of Claims that the claimant should be awarded the sum of $205.75 on this claim.

Award of $205.75.

OPINION ISSUED JANUARY 19, 2010

CHARLES GREGORY
V.
DIVISION OF HIGHWAYS
(CC-08-0211)

Claimant testified via telephone conference call.
Andrew F. Tarr, Attorney at Law, for Respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when his 2006 Alpha motor home struck a barrel on I-68 East near Coopers Rock, Preston County. I-68 is a public 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 8:30 a.m. on April 22, 2008. Claimant was driving in the left lane of I-68 East at approximately thirty-five miles per hour when his vehicle struck a loose barrel. Claimant testified that respondent's employees were on the highway repairing a bridge at this location, and there were barrels blocking the right lane of traffic. Claimant saw the barrel rolling to the left and he maneuvered his vehicle to the right in an effort to avoid this hazard, but the left side of his vehicle struck the barrel. Claimant stated that he could not have avoided striking the barrel with his vehicle because there was an oncoming truck traveling between seventy-five to one hundred yards in front of his motor home. As a result of this incident, claimant's vehicle sustained damage in the amount of $8,774.60. Since claimant's insurance deductible was $1,000.00, claimant's recovery is limited to that amount.

The position of respondent is that it did not have actual or constructive notice of the loose barrel on I-68 East. Ronny Burge, I-68 Supervisor for respondent, testified that respondent had closed a lane of traffic at this location in order to patch the road and repair an expansion beam on the bridge. According to Mr. Burge, respondent's employees were not working at the site at the time of this incident. Mr. Burge stated that shortly after the incident, he arrived on the scene and removed the barrel that was lodged under claimant's motor home. Then, a prison crew that assists with road maintenance, came to the scene to reset the barrels that had been knocked down. Mr. Burge stated that between three and four barrels were detached from their bases.

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 claimant's vehicle struck on I-68 East. The Court finds that the plastic barrel was not adequately secured to its base. Since the loose barrel was the proximate cause of the damages sustained to claimant's vehicle, the Court finds that respondent was negligent.

It is the opinion of the Court of Claims that the claimant should be awarded the sum of $1,000.00 in this claim.

Award of $1,000.00.

OPINION ISSUED JANUARY 19, 2010

GAIL S. ROBBINS
V.
DIVISION OF HIGHWAYS
(CC-08-0452)

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 Toyota 4Runner struck gravel and sustained damage to its windshield while she was traveling on a portion of I-81 that was being resurfaced in Martinsburg, Berkeley County. I-81 is a public 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 September 23, 2008. At the time of the incident, the road was being resurfaced and vehicles were required to drive on a temporary roadway surfaced with gravel. Due to the resurfacing project, the speed limit was reduced from seventy miles per hour to fifty-five miles per hour. Claimant testified that she was driving at approximately fifty-five miles per hour when the tires from the vehicle immediately in front of her spun up a piece of gravel which struck claimant's windshield. Claimant stated that she was driving between three to four car lengths behind the vehicle. As a result of this incident, claimant seeks to recover $50.00 for the damage to her windshield.

The position of the respondent is that it did not have actual or constructive notice of the excess gravel on the road due to the resurfacing project on I-81. Respondent did not present a witness 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 excess gravel on I-81. Since vehicles were required to drive on an area of highway with excessive gravel which caused the damage to claimant's vehicle, the Court finds respondent negligent. Thus, claimant may make a recovery for the damage to her vehicle.

It is the opinion of the Court of Claims that the claimant should be awarded the sum of $50.00 in this claim.

Award of $50.00.

OPINION ISSUED JANUARY 19, 2010

LOYD DALE SPOTLOE
V.
DIVISION OF HIGHWAYS
(CC-08-0424)

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 August 28, 2008, claimant's 1989 Ford F150 pickup truck struck a hole on Hickory Flat Road in Buckhannon, Upshur County, and caused damage to the rear spring of his vehicle.

2. Respondent is responsible for the maintenance of Hickory Flat Road 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 $543.68.

4. Respondent agrees that the amount of $543.68 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 Hickory Flat Road in Upshur County on the date of this incident; that the negligence of respondent was the proximate cause of the damage 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.

It is the opinion of the Court of Claims that the claim should be awarded in the amount of $543.68.

Award of $543.68.

OPINION ISSUED JANUARY 19, 2010

CARL BAWGUS
V.
DIVISION OF HIGHWAYS

(CC-09-0028)

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 Cadillac El Dorado struck a hole as he was driving on the Pettus Bridge on State Route 3 in Raleigh County. The Pettus Bridge on State Route 3 is a public 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 9:00 p.m. on December 22, 2008. The Pettus Bridge is a two-lane bridge with one lane traveling in each direction. The speed limit is fifty-five miles per hour. At the time of the incident, claimant was driving from Whitesville toward Beckley at between forty and forty-five miles per hour. His wife and great granddaughter were passengers in the vehicle. As claimant was driving on the Pettus Bridge, his vehicle struck a hole in the bridge's deck that was approximately one and half feet long, two feet wide, and between three to four inches deep. Mr. Bawgus was unable to see the hole before his vehicle struck it. He stated that he could not have avoided the hole due to oncoming traffic on the bridge. Although claimant had driven on the bridge one week prior to this incident, he did not notice this particular hole on the prior occasion. As a result, claimant's vehicle sustained damage to one rim in the amount of $571.20. Since claimant's insurance deductible was $500.00, 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 the Pettus Bridge on State Route 3. Robert Anthony Walters testified that he is the Repair Crew Supervisor for respondent's District 10 Bridge Department. Mr. Walters stated that the Pettus Bridge is a steel bridge with a concrete deck that is over fifty years old. Although a crew from respondent's Bolt Headquarters in Raleigh County placed cones and a barrel around the hole at this location, respondent's Bridge Department did not have notice of the hole prior to January 9, 2009, when the hole was patched. Mr. Walters testified that respondent has not replaced the deck of the Pettus Bridge due to budget constraints.

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 failed to patch the hole in a timely manner. Thus, claimant may make a recovery for the damage to his vehicle.

It is the opinion of the Court of Claims that the claimant should be awarded the sum of $500.00.

Award of $500.00.

OPINION ISSUED JANUARY 19, 2010

CLIFFORD RICE
V.
DIVISION OF CORRECTIONS
(CC-09-0616)

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 to recover $28.00 for tobacco products that were stolen from their storage location in the prison. Claimant was permitted to use the tobacco products for religious purposes.

In conformity with the Court's decisions relating to the tobacco products that were stolen from the prison, respondent, in its Answer, admits liability in this claim in the amount of $28.00. In *McClain v. Div. of Corrections*, CC-08-0533 (Opinion Issued July 24, 2009), the Court found that the claimant was entitled to recover the value of his tobacco products which where not adequately secured at the prison. *See also Posey v. Div. of Corrections*, CC-09-0068 (Opinion Issued July 24, 2009).
It is the opinion of the Court of Claims that the claimant should be awarded the sum of $28.00 on this claim.
Award of $28.00.

OPINION ISSUED JANUARY 19, 2010

RICOH AMERICAS CORPORATION
V.
DIVISION OF CORRECTIONS
(CC-09-0505)

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 $4,631.29 in unpaid invoices billed on office supplies.
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.
It is the opinion of the Court of Claims that the claimant should be awarded the sum of $4,631.29.

Award of $4,631.29.

OPINION ISSUED JANUARY 19, 2010

VERIZON
V.
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
(CC-09-0042)

Julie B. Solomon, Attorney at Law, for claimant.
Harry C. Bruner 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 to recover $5,172.17 for services provided to respondent.

In its Answer, respondent admits the claim in the amount of $5,042.93 and states that sufficient funds were expired at the end of the fiscal year in which the claim could have been paid. Respondent further states that it denies payment in the amount of $129.24 since the State is tax exempt. Claimant agrees to the amended amount.

It is the opinion of the Court of Claims that the claimant should be awarded the sum of $5,042.93.

Award of $5,042.93.

OPINION ISSUED JANUARY 19, 2010

JAMES W. ELLIOTT
V.
DIVISION OF HIGHWAYS
(CC-09-0307)

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 May 30, 2009, claimant’s vehicle struck a hole on Marshville Road, which is located approximately 200 yards from U.S. Route 50, west of Clarksburg, Harrison County.

2. Respondent is responsible for the maintenance of Marshville Road which it failed to maintain properly on the date of this incident.

3. As a result, claimant’s vehicle sustained damage to its tire and needed to be re-aligned in the amount of $145.54.

4. Respondent agrees that the amount of $145.54 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 Marshville 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.

It is the opinion of the Court of Claims that the claim should be awarded in the sum of $145.54.

Award of $145.54.

OPINION ISSUED JANUARY 19, 2010

GARY EDWARD ORNDORFF AND KATHRYN ORNDORFF
V.
DIVISION OF HIGHWAYS
(CC-09-0135)

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 Pontiac Grand Prix struck a piece of asphalt that had come out of a hole on Tub Run Hollow Road in Berkeley County. Tub Run Hollow Road, designated as County Route 45/11, is a public 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 a.m. on February 23, 2009. The speed limit on County Route 45/11 is fifty-five miles per hour. At the time of the incident, Mr. Orndorff was driving his granddaughter to Back Creek Elementary School. Mr. Orndorff was driving at between thirty and thirty-five miles per hour when the vehicle struck a piece of asphalt that had come out of a hole. The piece of asphalt was approximately four inches thick. Mr. Orndorff testified that the road had deteriorated and was covered with holes and alligator cracking. He stated that the road had been in poor condition for approximately one month prior to this incident. Although Mr. Orndorff was aware of the condition of the road, he did not report its condition to respondent prior to this incident. As a result of this incident, claimants' vehicle sustained damage in the amount of $1,631.70. Since claimants' insurance deductible was $500.00, claimants' recovery is limited to that amount.

The position of respondent is that it did not have actual or constructive notice of the condition on County Route 45/11. Respondent did not present a witness 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 conditions of County Route 45/11 which caused the damages to claimants' vehicle and that the deteriorated condition of the road

presented a hazard to the traveling public. Since the road was in disrepair at the time of this incident, the Court finds respondent negligent. Thus, claimants may make a recovery for the damage to their vehicle. Notwithstanding the negligence of respondent, the Court is also of the opinion that Mr. Orndorff was negligent in his operation of the vehicle. Mr. Orndorff was aware that this stretch of road had holes and alligator cracking, yet he failed to further reduce his speed due to the road conditions. In West Virginia, the negligence of a claimant can reduce or bar recovery in a claim. Based on the above, the Court finds that the negligence of claimant equals thirty-percent (30%) of claimants' loss. Thus, claimants may recover seventy-percent (70%) of the loss sustained, which in this case is limited to the extent of the deductible feature on their collision insurance.

It is the opinion of the Court of Claims that the claimants should be awarded the sum of $350.00.

Award of $350.00.

OPINION ISSUED JANUARY 19, 2010

CAROL WHITE AND NANCY WHITE
V.
DIVISION OF HIGHWAYS
(CC-09-0351)

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 hole as claimant Carol White was driving on Stewartstown Road, designated as County Route 67, in Morgantown, Monongalia County. County Route 67 is a public 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 10:30 a.m. on June 26, 2009. Ms. White testified that she was driving on County Route 67 when claimants' vehicle struck a hole on the road's white edge line. The hole was between six and eight feet long and was approximately twelve inches deep. Ms. White could not recall whether oncoming traffic forced her to drive onto the white edge line. She stated that she traveled this road frequently and had avoided this hazard on prior occasions. As a result of this incident, claimants' vehicle sustained damage to its rear passenger side tire and rim in the amount of $432.68. 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 County Route 67. Kathy Westbrook, Highway Administrator for respondent, testified that she is responsible for overseeing the maintenance of the roads in Monongalia County. Ms. Westbrook stated that County Route 67 is a secondary road in terms of its maintenance. It has an average daily traffic count of 5,900 vehicles. According to Ms. Westbrook, water washed away the edge of the road at this location. She testified that the ditch needs to be maintained and a small shoulder needs to be placed in this area. She stated 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 hole which claimants' vehicle struck and that the hole presented a hazard to the traveling public. Since the edge of the road was in disrepair, the Court finds respondent negligent. Notwithstanding the negligence of respondent, the Court is further of the opinion that Ms. White was also negligent in her operation of the vehicle. Ms. White was driving on the white edge line instead of the main travel portion of the road where previously she had driven to avoid this hazard. Further, she could not recall whether oncoming traffic forced her to drive on the edge of the road. In West Virginia, the negligence of a claimant can reduce or bar recovery. The Court finds that claimant's negligence equals twenty-percent (20%) of their loss. Thus, claimants therefore, may recover eighty-percent (80%) of the loss sustained in the amount of $346.15.

It is the opinion of the Court of Claims that the claimants should be awarded the sum of $346.15.

Award of $346.15.

OPINION ISSUED JANUARY 19, 2010

REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY
VS.
DIVISION OF CORRECTIONS
(CC-09-0627)

Chad Cardinal, General Counsel, for claimant.

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 $2,131,927.32 in per diem charges for housing inmates at its facilities during the 2009 fiscal year. Inmates were housed at the Central, Eastern, North Central, Northern, Potomac Highlands, South Central, Southern, Southwestern, Tygart Valley and Western Regional Jails.

Respondent, in its Answer, asserts that payment of this claim must be awarded in accordance with the principles established by the Court in *County Comm'n of Mineral County v. Div. of Corrections*, 18 Ct. Cl. 88 (1990), wherein the Court found that the claimant was entitled to be compensated for its expenses in housing inmates who were actually wards of the respondent.

The Court, having reviewed the claim and the Answer filed by the respondent, has determined the claimant should be awarded the sum of $2,131,927.32

in this claim.

Award of $2,131,927.32.

OPINION ISSUED JANUARY 19, 2010

ROBERT L. SUMMERS
V.
DIVISION OF HIGHWAYS
(CC-07-0369)

Ted M. Kanner and Otis R. Mann Jr., 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. Respondent is responsible for the maintenance of U.S. Route 61 in Charleston, West Virginia.

2. On or around April 15, 2006, Claimant alleges that he fell as a result of a clogged drain which was covered with debris and obscured by water at the corner of U.S. Route 61 and 51st Street. Further, he alleges that as a result of the fall, he suffered a left ankle sprain, contusion on his right knee, a wrist sprain, and a torn rotator cuff in his right shoulder which required surgery.

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 forty-five thousand dollars ($45,000.00) would be a fair and reasonable amount to settle this claim.

5. The parties to this claim agree that the total sum of forty-five thousand ($45,000.00) to be paid by Respondent to the Claimant in Claim No. CC-07-0369 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 and damage 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 U.S. Route 61 on the date of this incident; that the negligence of Respondent was the proximate cause of the personal injury sustained to the Claimant; and that the amount of forty-five thousand dollars ($45,000.00) is a fair and reasonable amount to settle this claim. It is the opinion of the Court of Claims that the claim should be awarded in the sum of $45,000.00.

Award of $45,000.00.

OPINION ISSUED MARCH 10, 2010

DEBORA E. MARSH
V.
DIVISION OF HIGHWAYS

(CC-08-0052)

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 Chrysler Sebring struck a rock while she was traveling on State Route 57 in Barbour County. State Route 57 is a public 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 8:00 a.m. on December 23, 2007. At the time of the incident, claimant was traveling south on State Route 57 towards Clarksburg. The claimant testified that there is a steep cliff on the side of the road. The speed limit on State Route 57 is fifty-five miles per hour. Claimant was driving at the speed limit when she noticed a rock in the middle of the road. By the time that claimant noticed the rock, her vehicle was too close to it for her to stop. Since there was oncoming traffic, claimant was unable to maneuver her vehicle into the other lane of traffic to avoid the rock. Claimant stated that she does not travel this road on a regular basis, but she has seen rocks along the side of the road on prior occasions. As a result of this incident, claimant's vehicle sustained damage to its oil pan in the amount of $339.05, and claimant incurred towing expenses in the amount of $50.00. Thus, claimant's damages total $389.05.

The position of the respondent is that it did not have notice of the rock that fell onto State Route 57. John Tanner, Highway Administrator for respondent in Barbour County, testified that State Route 57 is a first priority road in terms of its maintenance. Mr. Tanner stated that there are a couple of rock ledges along State Route 57, but it is not considered a rock fall area. Respondent did not receive complaints regarding rock falls on this road prior to December 23, 2007. In addition, respondent did not have notice of the particular rock that claimant's vehicle struck.

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 proof 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 State Route 57 in Barbour County. Mr. Tanner testified that State Route 57 is not an area known for rock falls. In addition, Mr. Tanner stated that respondent did not have notice of the particular rock that claimant's vehicle struck. Thus, 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 MARCH 10, 2010

RONALD WAUGAMAN AND CHERYL WAUGAMAN
V.
DIVISION OF HIGHWAYS
(CC-08-0228)

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 Ford Taurus struck a hole on the berm as Ronald Waugaman was driving on State Route 7 in Masontown, Preston County. State Route 7 is a public 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 March 5, 2008. Mr. Waugaman testified that he was driving towards Masontown, near the Valley District Volunteer Fire Department, when their vehicle struck a hole in the road that was approximately six inches deep. Mr. Waugaman stated that he does not travel this road frequently and did not notice the hole prior to this incident. Cheryl Waugaman testified that she was in the vehicle at the time of the incident and the hole was located on the road's white edge line. As a result, claimants' vehicle sustained damage to its wheel and required a re-alignment at a total cost of $378.90.

The position of the respondent is that it did not have actual or constructive notice of the particular condition on State Route 7 at the site of claimants' accident on the date in question. Larry Weaver, Highway Administrator for respondent in Preston County, testified that State Route 7 is a first priority road in terms of its maintenance. He stated that hole was located outside of the road's white edge line. Mr. Weaver testified that respondent's main priority during this time of year was snow removal and ice control. The DOH 12, a record of respondent's daily activities, indicates that the hole was patched on March 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 of the berm at this location. The Court finds that Mr. Waugaman was at least fifty percent negligent, and his negligence is a complete bar to the claimants' 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 MARCH 10, 2010

STEVEN ALLEN SPONAUGLE AND KANDICE LEE SPONAUGLE

V.
DIVISION OF HIGHWAYS
(CC-06-0022)

Claimants appeared *pro se*.
Jason C. Workman, Attorney at Law, for Respondent.

PER CURIAM:

Claimants brought this action for vehicle damage which occurred when Steven A. Sponaugle's pickup truck struck a tree that fell on State Route 72 as a result of a landslide. Mr. Sponaugle's 16-year-old daughter, Kandice Lee Sponaugle, was the driver of the vehicle. The incident occurred near Parsons, Tucker County. State Route 72 is a public 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 10:00 p.m. on January 6, 2006. At the time of the incident, Ms. Sponaugle was driving from Parson's Shop N Save, where she worked, to her home. The speed limit on State Route 72 is fifty-five miles per hour. Due to the rain and snow, Ms. Sponaugle was traveling at approximately forty miles per hour. Ms. Sponaugle testified that she was driving up a hill when she noticed motorists from several vehicles stopped along a wide spot in the road. As she glanced over at the motorists to see what had happened, her vehicle struck a tree that had fallen, presumably as the result of a landslide. She stated that there is a steep incline located along the side of the road. Apparently, repetitive forces of freezing and thawing dislodged the rocks on the hillside, which caused the tree to fall. Ms. Sponaugle testified that she did not notice the tree before the vehicle struck it. The tree had fallen onto both lanes of travel, and she later discovered that one or more of the motorists who had pulled off to the side of the road had also struck the tree with their vehicles. Ms. Sponaugle stated that she is familiar with the roadway and had noticed rocks that had fallen on the road prior to this incident. Ms. Sponaugle stated that the landslide occurred approximately five or ten minutes before her vehicle struck the tree.

Also testifying at the hearing was Steven A. Sponaugle, who was driving behind his daughter at the time of the incident. Mr. Sponaugle stated that he had seen rocks along the roadway and on the side of the road, but he had never seen a tree that had fallen on State Route 72 prior to this incident. He testified that shortly after his daughter's accident, respondent arrived to the scene to clean up the tree and debris. Mr. Sponaugle stated that there was extensive damage to the vehicle, and he paid $1,786.57 for the repairs. Ms. Sponaugle reimbursed him for the damages.

The position of the respondent is that it did not have actual or constructive notice of the condition on State Route 72. Terry Simmons, Equipment Operator 2 for respondent in Tucker County, testified that State Route 72 is a first priority road in terms of its maintenance. Mr. Simmons stated that he was familiar with this incident and that he ran the end loader to clean up the debris from the landslide. He testified that he was not aware of any other instances where a tree became uprooted and came down the hill, covering the road with debris. He explained that this instance was an isolated situation. However, he stated that rocks fall onto the roadway approximately twice a month at this location. Mr. Simmons also stated that, on the night of the incident, he responded to the incident approximately one half hour after he became aware of the problem.

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 condition on State Route 72. Although there have been rock falls at this location, this landslide was an isolated incident. In addition, respondent responded to the incident as soon as it became aware of the problem. 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 MARCH 10, 2010

KENNETH W. TENNEY
V.
DIVISION OF HIGHWAYS
(CC-05-0405)

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 2002 Saturn struck the berm as he was traveling on US Route 20, one quarter mile south of the Johnstown Exit, in Harrison County. US Route 20 is a public 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 2:30 p.m. on September 29, 2005. The speed limit on US Route 20 is fifty-five miles per hour. At the time of the incident, claimant was driving at approximately fifty miles per hour. There was a tractor trailer and another vehicle in front of the tractor trailer traveling slowly in front of him. Claimant was watching the tractor trailer to see if it was going to pass the vehicle, but it could not do so due to oncoming traffic. The claimant became distracted, and his vehicle drifted over to the edge of the road. Consequently, claimant's vehicle's right front tire dropped off the blacktop and onto the berm. The berm was between nine and ten inches below the surface of the road. When claimant's vehicle struck the berm, the vehicle turned over sideways and flipped on its top. Claimant testified that he travels this road on a daily basis and was aware of the condition of the berm. Claimant's vehicle was totaled as a result of this incident.

When asked whether the he was forced over the edge of the road, the claimant responded, "No, no. I did it and I'll take that responsibility. I mean I know that I drove the car over to the edge of the road. I was totally in control."

The position of the respondent is that since the berm was not used in an emergency situation, respondent cannot be held liable. 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).

The Court has previously held the Division of Highways liable where the driver of the vehicle was forced to use the berm in an emergency situation, and the berm was in disrepair. *See Handley v. Division of Highways*, CC-08-0069 (issued October 6, 2008); *Warfield v. Division of Highways*, CC-08-0105 (issued August 4, 2008). Be that as it may, the Court cannot hold respondent liable for failure to maintain the berm when the berm was not used in an emergency situation. *See Daugherty v. Division of Highways*, CC-08-0175 (issued October 1, 2009). In the instant case, claimant testified that he was distracted when his vehicle's tire dropped off the surface of the road. Thus, 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 APRIL 1, 2010

KENNETH L. CONNETT
V.
DIVISION OF HIGHWAYS
(CC-07-0113)

Claimant appeared *pro se*.

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

CECIL, JUDGE.

Claimant brought this action for property damage to his residence which he alleges occurred as a result of Respondent's negligent maintenance of a drainage system on State Route 62. Claimant's residence is located at 601 6th Avenue South, Hometown, Putnam County, West Virginia. Claimant asserts that water flows across State Route 62 and onto his property and contends that the water has caused damage to the duct work and furnace under his house. State Route 62 is a public road maintained by Respondent. The Court is of the opinion to deny the claim for the reasons more fully stated below.

Claimant testified that rain events occurring on September 13, 2006, October 17, 2006, October 27, 2006, and April 1, 2007, caused flooding onto Claimant's yard and into the crawl space beneath his home. Claimant's property is located to the south and parallel to State Route 62. Claimant testified that a third party property owner, whose property is located on the opposite side and to the north of State Route 62, installed a driveway which reduced the width of the original ditch line. The runoff from the watershed, located behind that property, then flows into pipes that cannot contain that volume of water, which rises out of the channel. Since this ditch is no

longer large enough to hold the run-off and the natural lay of the land has been altered by third party property owners, the water now flows across State Route 62 and onto Claimant's property. Although Respondent took measures in October of 2009 to alleviate the excessive drainage, the problem persisted. Claimant stated that his neighbors located to the south of State Route 62 have also sustained damage to their properties. However, Claimant contends that his property incurred the most damage.

Claimant has not filed suit against the third party property owners for diverting water onto his property. Claimant asserts that Respondent is responsible for failing to prevent the water from flowing south and across State Route 62 and onto his property. Thus, Claimant seeks to recover $6,369.00 for the cost of repairing the damage to his property.

Respondent contends that the water drainage problems were caused by third party property owners who re-directed the water onto the Claimant's property.[8] Testifying as Respondent's expert was Darrin Andrew Holmes, a professional civil engineer who has worked for Respondent as a hydraulics engineer for the past five years. Holmes visited Claimant's property on January 13, 2010, and reviewed aerial photographs, mapping data, and Claimant's photographs in reaching his opinions regarding the cause of the water flow problems onto Claimant's property.

Holmes opined, to a reasonable degree of engineering certainty, that the cause of the water problems was the re-routing of the natural drainage course to a point alongside State Route 62. He explained that a natural drainage course is the path that run-off would take from the highest point in the watershed to the lowest point or its outlet. He stated that the two natural drainage sources are located to the north of State Route 62 across from Claimant's property. Access Road One is a private driveway that leads to a trailer located parallel to State Route 62 to the northeast of Claimant's property. Access Road Two is a private driveway located to the left and up the hill to a home that sits to the north of State Route 62. There is a 12-inch pipe under Access Road Two that carries the water south. Before the third party property owner re-directed the course of the water on Access Road Two, the water would flow into a two-foot wide by three-foot deep box culvert located beneath State Route 62 was adequate to handle normal drainage.

In addition, the natural lay of the land was disturbed when a second driveway on Access Road One was created north of State Route 62. This third party property owner placed a trailer on the northeast hillside, creating an additional obstruction to the natural flow of water off the mountain.

After the third party property owner expanded his driveway on Access Road Two, a flume was created by diverting the natural course of the water, to a point where the 24-inch and 18-inch pipes on the private driveways were inadequate to accommodate the volume of run-off. The re-routed channel is constricted and much smaller in comparison to the original natural channel.

In October of 2009 Respondent replaced the existing 18-inch ditch line with a new 24-inch ditch line and increased the depth of the ditch from two to four feet. In spite of that replacement, the run-off of water still flows across State Route 62 and onto Claimant's property. Holmes further opined that the only solution is to restore the natural drainage course to its original state so that the run-off would be directed into the two-foot by three-foot box culvert. According to Holmes, Respondent is

[8]Respondent stipulates to the facts as presented by the Claimant.

unable to resolve the problem because it would require placing culverts under private property.

This Court has held that Respondent has a duty to provide adequate drainage of surface water, and drainage devices must be maintained in a reasonable state of repair. *Haught v. Dep't of Highways*, 13 Ct. Cl. 237 (1980). In claims of this nature, the Court will examine whether Respondent negligently failed to protect a Claimant's property from foreseeable damage. *Rogers v. Div. of Highways*, 21 Ct. Cl. 97 (1996).

Bryant v. Div. of Highways, 25 Ct. Cl. 235 (2005) involved facts similar to those in the instant case. In *Bryant*, water flowed onto Claimant's property not only from State maintained roadways but also from private property located across the street from Claimant's property on the hillside. *Id.* at 237. The Court held as follows:

> Claimants have failed to establish that Respondent maintained the drainage structures on Sidney Street in Raleigh County in a negligent manner. The evidence establishes that water flows onto Claimants' property not only from the State maintained roadways but also from a private property located across the street from Claimants' property on the hillside where new construction is ongoing. There are more sources of the water flowing on Sidney Street than just that from the road itself. Consequently, there is no evidence of negligence on the part of Respondent upon which to base an award. *Id.*

As in *Bryant*, the Court in the instant case finds that the water problems were caused by the actions of third party property owners and not Respondent. The evidence established that the third party property owners disturbed the natural flow of the water in this area, causing run-off to overflow onto State Route 62 and onto Claimant's property. The Court cannot hold Respondent liable when the third party property owners created the water problems by expanding the driveway, constricting the natural flow of run-off, and altering the original lay of the land. As Holmes indicated, Respondent cannot remedy the problem when its originates on private property. Thus, there is insufficient evidence of negligence on the part of Respondent upon which to base an award.

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

Claim disallowed.

OPINION ISSUED APRIL 1, 2010

LISA R. FARLEY
V.
DIVISION OF HIGHWAYS
(CC-07-0170)

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 Chevrolet Monte Carlo struck rocks while she was traveling on State Route 54 in Mullens, Wyoming County. State Route 54 is a public 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 3:45 a.m. on February 21, 2007. State Route 54 is a two-lane road, with one lane traveling in each direction, and the speed limit is forty-five miles per hour. Claimant was proceeding on State Route 54 at approximately forty-five miles per hour when she encountered rocks in the road that had fallen from the hillside. Claimant stated that the rain and fog contributed to the poor visibility. Although claimant travels this stretch of road on a daily basis, she did not notice the rocks before her vehicle struck them. However, she stated that rocks occasionally fall in this area. As a result of this incident, claimant's vehicle sustained damages over the amount of her insurance deductible, which was $1,000.00.

The position of the respondent is that it did not have actual or constructive notice of the rocks on State Route 54. Thomas Joseph Cook, Equipment Operator for respondent in Wyoming County, testified that he is familiar with the area where claimant's incident occurred. He stated that State Route 54 is a first priority road in terms of its maintenance. Mr. Cook stated that rocks occasionally fall during the winter months, and there are falling rock signs located in this area. The DOH 12, a record of respondent's daily work activities, indicates that respondent cleaned up the rocks on February 21, 2007.

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 State Route 54 in Wyoming County. The Court cannot hold respondent liable for the spontaneous falling of rocks. 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 APRIL 1, 2010

NED SIZEMORE
V.
DIVISION OF HIGHWAYS
(CC-09-0059)

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 26, 2009, Claimant was driving east on State Route 62, from Ripley to Cottageville, when his 2007 Buick Lucerne struck a hole in the road. Claimant was unable to avoid the hole due to oncoming traffic.

2. Respondent is responsible for the maintenance of State Route 62 which it failed to maintain properly on the date of this incident.

3. As a result, Claimant's vehicle sustained damage to its tire and rim. Claimant seeks to recover the amount of his insurance deductible, which was $500.00.

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 State Route 62 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 damages agreed to by the parties is fair and reasonable. Thus, Claimant may make a recovery for his loss.

It is the opinion of the Court of Claims that the Claimant should be awarded the sum of $500.00 on this claim.

Award of $500.00.

OPINION ISSUED APRIL 15, 2010

ATLANTIC BROADBAND GROUP LLC
V.
EDUCATIONAL BROADCASTING AUTHORITY
(CC-10-0129)

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 to recover $9,650.15 for unpaid invoices for the lease of a cable tower located on Cacapon Mountain. The unpaid invoices were incurred during the 2004-2005; 2005-2006; 2006-2007; 2007-2008; and 2008-2009 fiscal years.

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 years from which the invoices could have been paid.

It is the opinion of the Court of Claims that the Claimant should be awarded the sum of $9,650.15.

Award of $9,650.15.

OPINION ISSUED APRIL 15, 2010

DOUGLAS D. HATFIELD AND DARLENE F. HATFIELD
V.
DIVISION OF HIGHWAYS
(CC-06-0159)

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. Respondent is responsible for the maintenance of U.S. Route 52 in McDowell County, West Virginia.

2. On or around April 15, 2006, Darlene H. Hatfield was operating her motor vehicle on U.S. Route 52 near Iaeger in McDowell County, West Virginia, when her vehicle struck a tree that had fallen onto the road.

3. Claimants allege that Respondent was negligent in its maintenance of the portion of U.S. Route 52 in McDowell County, West Virginia.

4. For the purposes of settlement, Respondent acknowledges culpability for the preceding accident.

5. Both the Claimants and Respondent believe that in this particular incident and under these particular circumstances that an award of Seven Hundred Twenty-Seven Dollars and Sixty-Seven Cents ($727.67) would be a fair and reasonable amount to settle Claimants' claim for damages.

6. The parties to this claim agree that the total sum of Seven Hundred Twenty-Seven Dollars and Sixty-Seven Cents ($727.67) to be paid by Respondent to the Claimants in Claim No. CC-06-0159 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 U.S. Route 52 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 $727.67.

Award of $727.67.

OPINION ISSUED APRIL 15, 2010

MICHAEL G. KUKOLECK
V.
DIVISION OF HIGHWAYS
(CC-06-0067)

William A. McCourt Jr., Attorney at Law, for claimant.

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

HACKNEY, JUDGE:

Claimant Michael G. Kukoleck brought this action against Respondent Division of Highways for injuries resulting from a motor vehicle accident that occurred on Route 82 near the community of Birch River in Nicholas County. Claimant alleges that Respondent Division of Highways was negligent as a result of its failure to remove a rock which was purportedly obstructing the roadway. The threshold issue is whether the evidence of record supports Claimant's allegation of negligence. Because we hold that it does not, it is unnecessary to address any issue concerning Claimant's injuries.

Claimant, who at the time, lived approximately five miles from the community of Birch River in Webster County, left his house on February 24, 2004, at approximately 6:00 a.m. and entered Route 82 in the direction of Summersville. Thereafter, upon arriving at the juncture with Route 19 he diverged onto Route 19 into Beckley with the ultimate goal of purchasing plumbing supplies for a residential construction project he was undertaking. After obtaining the plumbing supplies, he returned from Beckley on Route 19 and at Birch River he reentered Route 82 heading east toward his residence, the site of the construction project. Claimant testified he entered a bend in the road after leaving a reduced speed school zone and encountered a large rock which completely obstructed the lane of travel in which he was proceeding.[13] Claimant testified a log truck and coal truck were proceeding toward him in the opposite lane and, as a consequence, he was unable to avoid hitting the rock with his vehicle.[14] Claimant indicated that as a result of the collision, the rock was split in two and claimant's vehicle tumbled into a ditch, hit a culvert and rolled over. The time of the collision was approximately 1:20 p.m. To the extent claimant had a lengthy and substantial history involving pre-existing spinal and nerve-related injuries, he presented credible evidence that he sustained spondylolisthesis[15] and disk herniation to his thoracic spine, both of which, according to uncontested chiropractic

[13]Claimant indicated on the Notice of Claim he filed with the Court that "[h]e noticed a rock on the side of the road on the white line." This statement appears consistent with the observation of the eye-witness, Doyle McCoy, who testified *via* telephone. Mr. McCoy, who was proceeding in a westerly direction on Route 82 at the time of Claimant's accident, indicated the rear end of Claimant's truck was equipped with "dual wheels" which appeared to hit a rock which was situated on or near the edge of the roadway where the white fog line was located. Mr. McCoy did not notice the rock until Claimant's rear tires hit it. Mr. McCoy further indicated the portion of Route 82 wherein the accident occurred is very narrow ("barely wide enough" for two vehicles to pass) and that Claimant did not have time to react to the rock.

[14]Doyle McCoy was proceeding toward the Claimant's vehicle in a coal truck with a load of stone.

[15]Anterior slippage of a spinal body in the lumbar region onto the sacrum.

testimony, were consistent with trauma from the wreck.

Other than Claimant's own testimony, the evidence presented in support of Claimant's allegation of Respondent's negligence was principally obtained from the testimony of Michael Ray Atkinson, a thirty-five to forty-year acquaintance of the Claimant. Mr. Atkinson testified under direct examination that on the day in question, at approximately 9:00 a.m., he saw a large rock lying in the road in the vicinity where Claimant's accident later occurred. He indicated he went to Birch River and called the Division of Highways to report the rock. He proceeded on to Summersville and upon returning at approximately 11:30 a.m. on the same day, he noticed the rock was still there. He testified that he, therefore, called the Division of Highways a second time to report the rock. During both telephone conversations, according to Mr. Atkinson, he spoke with an unknown person or persons who indicated the Division would come out and remove the rock.

Under cross-examination, he indicated he didn't remember the exact date he called. Nor did he remember where he was going to in Summersville when he first observed the rock. He couldn't remember from where he called to report the rock, but indicated it was either the local Go-Mart or Sunoco station in Birch River. Also under cross examination, he estimated the size of the rock to be eight feet in width. He further indicated it completely obstructed the easterly lane of travel on Route 82 while protruding into the westerly lane of travel as well.[16] He couldn't remember which Division of Highways office he called,[17] nor from where he obtained the telephone number.

In response to the testimony of Mr. Atkinson, the Respondent Division of Highways called John Jarrell, a thirty-two-year employee familiar with Route 82 who for the last eleven years has worked as the Highway Administrator in Nicholas County. Division headquarters for Nicholas County is located in Summersville. According to Mr. Jarrell, Route 82 is a first priorty road which is paved and which has approximately twenty feet of clearance from side to side in the area of the accident. The posted speed limit is 45 miles per hour and the ADT (i.e., average daily traffic) consists of four hundred to six hundred vehicles. Mr. Jarrell testified that his office has no record of any call made concerning the existence of the subject rock. Based on his experience as a Highway Administrator and in consideration of the average volume of daily traffic on Route 82, he opined that it would have been exceedingly unusual not to have received telephone reports concerning a rock the size as described by Mr. Atkinson and the Claimant obstructing the roadway for nearly four and one half hours. During his tenure as Highway Administrator in Nicholas County he cannot recall any rock slides occurring in the specific area of Claimant's accident. However, according to Mr. Jarrell, falling rock warning signs exist approximately one quarter to one half mile on either side of the location of the instant accident.

Claimant also called Doyle McCoy as a witness. Mr. McCoy, the driver of

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[16]Inconsistently, on redirect examination, the witness testified the rock did not cover the entire lane, but made the lane "impassable."

[17]The closest Division of Highways Offices are located in Muddlety and Summersville. While the Muddlety Office is geographically closer to the location of the accident, it is in Webster County, not Nicholas - the County in which the accident occurred.

the coal truck that was proceeding on Route 82 in the opposite direction of Claimant's vehicle at the time of the accident, observed Claimant's pick-up truck coming towards him. Mr. McCoy indicated the Claimant's truck had dual rear wheels that caused the truck to be wider at the rear axle than in the front. Though he did not see a rock blocking Claimant's lane of travel, he did see the rear dual wheels on the passenger side of Claimant's truck hit a rock that was situated on or near the white fog line on the edge of the road. This caused the Claimant to lose control - precipitating the wreck. According to Mr. McCoy, the Claimant did not have time to react to the rock. Further, it appeared the Claimant was attempting to avoid Mr. McCoy's truck as it came towards him.

On cross-examination, Mr. McCoy reiterated the rock was "almost on the white line," i.e., it was on the "edge" of the road. Also on cross-examination, Mr. McCoy indicated the Claimant was not forced over to the edge because of his oncoming coal truck because the coal truck was located substantially "down the road" from Claimant's vehicle at the time of the accident. Mr. McCoy estimated the Claimant's vehicle came to a halt approximately fifty yards past the rock. Further, when Claimant's vehicle struck the rock, he was 200 feet in front of Mr. Doyle's truck, which was proceeding toward the Claimant at a speed between fifteen to twenty miles per hour.

Paul Kutcher of the Nicholas County Sheriff's Department investigated the accident. Deputy Kutcher stated that shortly after his arrival on the scene he observed what appeared to be the rock involved in the accident positioned off the roadway and outside the white fog line on the side of the road "going toward Cowan."[18] Deputy Kutcher estimated the size of the rock to be approximately that of "a small waste paper basket" - "a couple feet wide." Deputy Kutcher also indicated that based on Mr. McCoy's description of the accident taken at the scene, if Claimant had actually hit the rock "it wouldn't have moved very far" to where Deputy Kutcher first encountered it.

It is the 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). 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 (1985).

In the instant case, the testimony of Michael Ray Atkinson, while facially appearing to justify an award to the Claimant, is suspect. This testimony cannot be reconciled with other seemingly credible testimony and the reasonable inferences drawn therefrom which cause the former testimony to appear lacking in trustworthiness.

The Court finds that the testimony of Mr. Atkinson, fails to provide a basis upon which a finding of negligence on the part of the Respondent can be premised - for several reasons.

First, Mr. Atkinson's stated memory of the events surrounding the telephone calls he purportedly made to Respondent is extremely poor. He doesn't remember which Office of the Respondent he called, from where he called, how he obtained Respondent's telephone number, or with whom he talked. While his longstanding

[18]That is, on the side of the road from which easterly travel proceeds, next to the hillside.

acquaintanceship with Claimant is not a disqualifying factor, it is a matter to be considered in view of the existence of other testimony from seemingly disinterested witnesses. In this case, such disinterested witnesses include Doyle McCoy and Deputy Paul Kutcher. It is not possible to reconcile Mr. Atkinson's testimony (or the Claimant's) with the contrasting testimony of these eyewitnesses. The most obvious discrepancies involve the size of the alleged rock and where it was positioned in the roadway. In order to believe Mr. Atkinson's account of rock size and its position on the road, one must not only discount the eyewitness accounts of Doyle McCoy and Deputy Kutchner, but one must also believe that the existence of a boulder - blocking the entire eastbound lane of traffic for nearly four and one half hours on a priorty one road where between four hundred to six hundred vehicles pass on a daily basis - would go unreported for that length of time.[19] Therefore, this Court concludes that credible evidence does not exist to support Claimant's assertion of negligence against Respondent.

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

Claim disallowed.

OPINION ISSUED AUGUST 26, 2009

CALVIN G. GRAY
V.
DIVISION OF CORRECTIONS
(CC-08-0321)

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, a facility of the respondent, brought this claim to recover the value of certain personal property items that he alleges were improperly removed from his cell. The Court is of the opinion to deny this claim for the reasons more fully stated below.

Claimant testified at the hearing of this matter that on June 12, 2008, respondent performed a search of all cells in the Pine Hall living quarters where he resided at the time. During the search, respondent removed forty-eight compact discs (valued at $19.00 each, totaling $912.00), fifteen Play Station games (valued at $20.00 each, totaling $300.00), a rug (valued at $20.00), and twenty magazines (valued at $5.00) from the claimant's cell. Claimant stated that the total value of his property that was seized by the respondent amounts to $1,237.00.

On August 7, 2008, claimant was called to the State Shop to review his

[19]While some suggestion exists in the record that a concerned citizen would most likely have contacted Respondent's Office in Muddlety in Webster County due to geographical closeness to the accident, neither party saw fit to present the records from that Office.

belongings. When respondent presented the claimant with a bag full of items, the claimant stated, "I can't touch this because you never gave me an S-1 [seizure form] for it."

Janet Payne, an employee at the Mount Olive Correctional Complex, testified that the purpose of the search was to check the cells to remove any property that was in excess of allowable items. There was a new operational procedure in place with amended property limits. She stated that when there is a new warden in the prison, the warden may decide to update the prison's operational procedures. Under the new rules, each inmate is limited to keeping fifteen compact discs, ten Play Station games, and five magazines in their cell.

Peggy Giacomo, an employee at respondent's State Shop, testified that the State Shop stores property belonging to inmates, including property seized from inmates. Ms. Giacomo stated that the State Shop is presently holding the majority of the claimant's property consisting of forty-three compact discs, four Play Station games, and one rug. She testified that if an inmate has exceeded the limit of allowable property, there are two options: 1) The inmate mails the excess property to someone outside the prison, or 2) the excess property will be destroyed. Since the claimant currently has fifteen compact discs and ten Play Station games, he is not permitted to have the property that was seized by the respondent. Ms. Giacomo stated that the State Shop normally holds the inmate's property for thirty days. If the respondent does not receive instruction from the inmate to hold the property after the thirty-day time period, the property is destroyed.

Jason Wooten, officer for respondent, testified that he conducted the search that occurred on June 12, 2008, in which claimant's property was seized. Mr. Wooten testified that respondent took at least one dozen Play Station games and approximately forty-eight compact discs from the claimant's cell. Mr. Wooten stated that he did not fill out a seizure form with respect to the items taken from the claimant's cell. Since he was searching the whole pod for excess property, another individual was responsible for filling out the forms. He explained that normally, the officers or counselors that search the cell are supposed to fill out an S-1 form which provides documentation of the items taken from an inmate's cell.

Charles Johnson, an inmate at the Mount Olive Correctional Complex, testified that approximately one and a half months after Pine Hall was searched, he recalled seeing some of respondent's compact discs being sold on the yard.

Operational Procedure Number 4.03 (dated April 1, 2009) sets forth the Inmate Property and State Shop Procedures. Under Attachment Number 1, Approved Inmate Property At MOCC, Section J states as follows:

> Cassettes, Musical Compact Discs, Play Station Games & Storage Boxes: Cassettes, Musical Compact Disks, Play Station Games and Storage boxes must be purchased through the MOCC Commissary or approved catalog. The total number of cassettes and/or compact disks in any combination shall not exceed a total of fifteen (15) and the total number of Play-Station games shall not exceed a total of ten (10). The overall total of Cassette Tapes/Compact Disks and Play Station Games shall therefore not exceed twenty-five (25). One (1) storage box shall be permitted for each inmate.

Further, under Operational Procedure Number 4.03, Attachment Number 1, Approved Inmate Property at MOCC, Section M, Number 3 states, as follows: "In-Cell possession limit of newspapers and magazines is five (5) total..."

The Court finds that the respondent is currently storing the majority of the claimant's property since he is limited in the number of allowable items he is permitted to keep in his cell. The claimant has the option of informing the respondent if he chooses to have the property mailed to someone or if he elects to have the property destroyed. The Court cannot hold the respondent liable for enforcing prison rules as set forth in Operational Procedure Number 4.03. Thus, the Court finds that the claimant is not entitled to compensation for the property that was seized from his cell.

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

Claim disallowed.

OPINION ISSUED NOVEMBER 11, 2009

JOHN HOLT BEAVER
V.
DIVISION OF HIGHWAYS
(CC-08-0380)

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 Dodge Ram extended cab struck a piece of steel on the I-64/I-77 interchange in Charleston, Kanawha County. The I-64/I-77 interchange is a public 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 a.m. on August 12, 2008. Claimant testified that the speed limit in this area is either fifty-five or sixty miles per hour. At the time of the incident, claimant was traveling in the left lane of the I-64/I-77 interchange, and his speed was within the speed limit. As he was driving around a curve, he noticed that the driver of the vehicle in front of him swerved into the right lane to avoid a piece of steel in the road. Claimant stated that there was no space for him to pull over, and due to the traffic, he was unable to switch lanes to avoid this hazard. Thus, his vehicle struck the piece of steel, which was between six to eight feet long and four inches wide. As a result of this incident, claimant's vehicle sustained damage to its right tires in the amount of $368.79. Claimant's insurance deductible was $1,000.00 at the time of this incident.

The position of the respondent is that it did not have actual or constructive notice of the condition on the I-64/I-77 interchange. Stephen Wayne Knight, Transportation Crew Supervisor II for respondent on I-64, testified that he is familiar with the area where this incident occurred. He stated that at approximately 8:08 a.m., he received a telephone call from respondent's radio dispatcher that a vehicle had struck a piece of steel in the roadway. Mr. Knight immediately responded to this incident and removed the steel from the roadway. Mr. Knight was uncertain where the piece of steel came from. When he traveled to work on I-64 at approximately 7:20 a.m. that morning, he did not see the piece of steel on the road. He further stated that this is an area known for trucks leaving debris 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 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, it is uncertain where the piece of steel came from, and respondent responded to this incident in a timely manner. Thus, there is insufficient evidence of negligence upon which to base an award.

Claim disallowed.

OPINION ISSUED AUGUST 26, 2009

DIANE E. CLAYTON AND WILLIAM D. CLAYTON
V.
DIVISION OF HIGHWAYS
(CC-08-0025)

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 Cadillac
CTS struck a hole while claimant Diane E. Clayton was driving south on I-79, just past the Pleasant Valley overpass, near Fairmont, Marion County. I-79 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 2:00 p.m. on January 7, 2008. The speed limit on I-79 is seventy miles per hour. Ms. Clayton testified that she was driving southbound in the passing lane at between sixty-eight to seventy miles per hour when her vehicle struck a hole in the road. Ms. Clayton testified that the hole extended across her lane of traffic and was approximately twelve inches deep. As a result of this incident, claimants' vehicle sustained damage to its rim in the amount of $476.97.

The position of the respondent is that it did not have actual or constructive notice of the condition on I-79 at the site of claimant's accident for the date in question. Norman Cunningham, Transportation Crew Supervisor for respondent, testified that he is responsible for maintenance of I-79 at this location. He testified that in the area where this incident occurred, there is a bridge between two slight inclines. Mr. Cunningham stated that he first became aware of the problem at approximately 2:00 p.m. when he received a call from the West Virginia State Police. Around 2:00 p.m., he dispatched an inmate crew to patch the hole with perma patch, a material that is used as a temporary repair. On January 8, 2008, respondent sent crews to this area to patch the hole with hot mix. Mr. Cunningham stated that the hole covered the width of the lane of traffic, and he believed that the blunt end of the bridge joint caused the damage to the claimants' vehicle. Mr. Cunningham further stated that Ms. Clayton reported the incident to respondent at approximately 3:00 p.m. that day.

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 at this location. Respondent's crews responded to the incident as soon as they were informed of the problem. When they received the telephone call from the State Police at approximately 2:00 p.m., a crew was sent immediately to patch the hole. 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 AUGUST 26, 2009

EARL R. DAUGHERTY AND MARY DAUGHERTY
V.
DIVISION OF HIGHWAYS
(CC-08-0175)

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 1998 Pontiac Bonneville struck a depressed area on the berm as their daughter, Amanda Daugherty, was driving on Pike Street in South Parkersburg, Wood County. Pike Street, designated as W.Va. Route 14, 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 9:30 p.m. on February 2, 2008. W.Va. Route 14 consists of three-lanes of traffic including a center left turning lane. Amanda Daugherty testified that she was stopped in the outside right hand lane at the traffic light, and the vehicle at the traffic light in the center left turning lane was overcrowding the claimants' vehicle in the right lane. She further stated that when the light changed, she drove onto the berm to avoid the vehicle waiting in the left turning lane, and the vehicle she was driving struck a depressed area on the berm. She estimated that the depressed area was between three to four inches deep. As a result of this incident, the tires needed to be remounted and balanced, and claimants' vehicle sustained damage to its front and rear wheel, valve stem, front tire suspension, hub bearing, and its front end alignment in the amount of $847.08.

The position of the respondent is that it did not have actual or constructive notice of the condition on W.Va. Route 14. Curtis Richards, Crew Supervisor for respondent in Wood County, testified that W.Va. Route 14 is a high priority road in terms of its maintenance. He stated that prior to February 2, 2008, respondent did not

receive any complaints regarding the berm 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 finds that respondent did not have notice of the condition of the berm on W.Va. Route 14. The Court has previously held respondent liable where the driver of the vehicle was forced to use the berm in an emergency situation, and the berm was in disrepair. *See Handley v. Division of Highways*, CC-08-0069 (issued October 6, 2008); *Warfield v. Division of Highways*, CC-08-0105 (issued August 4, 2008). In the instant case, claimants' daughter chose to drive onto the berm to avoid the vehicle in the center left turning lane that was overcrowding the vehicle that she was driving. The Court cannot hold respondent liable for failure to maintain the berm when the berm was not used in an emergency situation. Thus, there is insufficient evidence of negligence upon which to base an award.

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

Claim disallowed.

OPINION ISSUED AUGUST 26, 2009

LORETTA HOLLEY
V.
DIVISION OF HIGHWAYS
(CC-08-0182)

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 Chevrolet Blazer struck a hole on Beverlin Fork Road, designated as County Route 1, near Center Point, Doddridge County. County Route 1 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 between 9:00 p.m. and 9:30 p.m. on February 22, 2008. County Route 1 is a one-lane, unpaved road. Claimant testified that she was proceeding before the bridge on County Route 1 at approximately fifteen miles per hour when her vehicle struck a hole in the road. The hole was approximately two feet wide in this area. Claimant stated that trucks used for drilling frequently travel on this road. As a result of this incident, claimant's vehicle sustained damage to its frame. Claimant testified that the value of the vehicle was $500.00 before this incident.

Larry Williams, Assistant Superintendent for respondent in Doddridge County, testified that County Route 1 is a low priority road in terms of its maintenance. He stated that between fifty to sixty percent of the roads in Doddridge County are unpaved. Mr. Williams testified that unpaved secondary roads such as

County Route 1 are respondent's lowest priority in terms of its maintenance. Although school buses travel on this road, Mr. Williams stated that respondent was unaware of any complaints regarding the condition of the road prior to this incident. In addition, few families live 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 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 condition on County Route 1. Since County Route 1 is a rural, low priority road in terms of its maintenance, the Court finds that respondent did not have the manpower available during the winter months to patch holes at this particular location. Thus, the Court finds that there is insufficient evidence of negligence upon which to base an award.

Claim disallowed.

OPINION ISSUED AUGUST 26, 2009

RACHEL E. JOHNSON
V.
DIVISION OF HIGHWAYS
(CC-08-0529)

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 Chevrolet Cobalt struck a hole while she was traveling on Foster Ridge Road, designated as County Route 32, near Ripley, in Jackson 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 12:00 p.m. on July 15, 2008. According to the claimant, County Route 32 extends for seven to ten miles and there are between twenty to twenty-five residences in this area. As claimant was driving on County Route 32, her vehicle struck a hole in the road that was between two to three inches deep. Claimant stated that she was driving between ten to fifteen miles per hour because this portion of County Route 32 is a dirt road. Although claimant stated that she was familiar with the road, she had not traveled on this particular portion of the road for two weeks prior to this incident. She decided to travel through this area because it is a shortcut to Ripley. She stated her belief that the holes in the road formed due to the rain, but she had not seen the holes at this location before this incident occurred. As a result, claimant's vehicle sustained damage to its oil pan in the amount of $375.18.

The position of the respondent is that it did not have actual or constructive notice of the condition on County Route 32. Mike Donohew, Crew Supervisor for respondent in Jackson County, testified that he is familiar with the area where claimant's incident occurred. He stated that there are approximately seven residences,

not including the houses located off of County Route 32, in this area. He testified that County Route 32 is a third priority road in terms of its maintenance. He stated that he must follow respondent's Core Maintenance Plan, which sets forth the maintenance schedule for a six-month period. The DOH12s, records of respondent's work activity, indicate that respondent performed maintenance on this road as part of the Core Maintenance Plan on April 14-17, 2008. Mr. Donohew testified that respondent lacks the resources to maintain the road more frequently. He further stated that he was not aware of complaints regarding this particular hole 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 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 hole that claimant's vehicle struck prior to this incident. Since County Route 32 is a third priority road and respondent was unaware of the hole, the Court cannot find respondent liable for the damage to the claimant's vehicle.

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

Claim disallowed.

OPINION ISSUED SEPTEMBER 10, 2009

RICHARD E. MORGAN AND SHIRLENE L. MORGAN
V.
DIVISION OF HIGHWAYS
(CC-08-0370)

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 Nissan Maxima struck an unknown object as claimant Richard Morgan was driving on I-64 in Huntington, Cabell County. I-64 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 10:00 p.m. on April 5, 2008. The speed limit on I-64 is sixty-five miles per hour. At the time of the incident, Mr. Morgan testified that he was traveling west on I-64 between mile marker three and five. As he was driving in the right lane at approximately sixty-five miles per hour, his vehicle struck an unknown object in the road. Mr. Morgan did not return to the area where this incident occurred to locate and identify what his vehicle struck. As a result of this incident, claimants' vehicle sustained damage to its tire and wheel in the amount of $950.72.

The position of the respondent is that it did not have actual or constructive notice of the condition on I-64. Ronald Lee Bowen, Transportation Crew Supervisor for respondent in Huntington, testified that he is familiar with the area where

claimants' incident occurred. He stated that the road was resurfaced in 2007. Mr. Bowen testified that he was not aware of any problems on this portion of I-64 on April 5, 2008. Respondent did not receive any complaints regarding holes 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 did not have notice of the object which claimant's vehicle struck. It is the claimants' burden to prove that respondent had notice of the object in the roadway and failed to take corrective action. The Court cannot resort to speculation in determining what caused the damage to the claimants' vehicle. In any case, it is more likely than not that the claimants' vehicle struck a foreign object in the roadway for which respondent did not have notice. Therefore, 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 SEPTEMBER 10, 2009

RONALD A. NORMAN
V.
DIVISION OF HIGHWAYS
(CC-08-0310)

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

PER CURIAM:

Claimant brought this action for damage to his motorcycle which occurred when his motorcycle struck a hole on State Route 26 in Albright, Preston County. State Route 26 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 June 12, 2008. State Route 26 is a paved, two-lane road with yellow center lines and white edge lines. The travel lanes are between twelve to fourteen feet in width. Claimant was riding his motorcycle up a hill at approximately thirty miles per hour when his motorcycle struck a hole on State Route 26. The hole was situated at a location that had once been a railroad crossing where the tracks had been overlaid with asphalt. The claimant testified that a portion of the railroad's track was exposed inside the hole. Claimant was not aware of the condition of the road prior to this incident.

Larry Jenkins testified that he was also riding his motorcycle in the area on the day of the incident. However, he was not present when the claimant's incident occurred, and he did not ride through this area until the claimant called him after the incident. Mr. Jenkins observed that the hole was approximately nine feet wide and between six to eight inches deep. As a result of this incident, claimant's motorcycle

sustained damages in the amount of $720.12. 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 State Route 26. Larry Weaver, Highway Administrator for respondent in Preston County, testified that State Route 26 is a first priority road in terms of its maintenance. He stated that more than five years ago, there were two sets of railroad tracks at this particular location. Then, CSX had a private contractor overlay the southbound tracks with asphalt. Mr. Weaver contacted the supervisor for the private contractor to request that the northbound tracks also be overlaid. However, the contract between CSX and the private contractor only provided for the removal of the southbound tracks. According to Mr. Weaver, a road may exhibit this type of unraveling between five to ten years after it is overlaid with asphalt.

Although Charlie Bailer, respondent's foreman, notified Mr. Weaver that there were some areas where the pavement had unraveled to reveal the railroad tracks, he was not aware of any problems at this particular location prior to the claimant's incident. After the claimant reported the problem to the respondent, Mr. Bailer investigated the condition of the road in this area. Respondent discovered that the area of the road that was deteriorating was on CSX's right-of-way, and respondent is not authorized to work on CSX's right-of-way. Mr. Weaver instructed Mr. Bailer to notify CSX of the problem. Initially, CSX declined ownership of the right-of-way, but then CSX acknowledged that this area was on their right-of-way. Currently, Mr. Weaver testified that respondent is in the process of working with CSX to resolve this situation. While the issue is being resolved, respondent has maintained this area and performed temporary repairs on the right-of-way on an emergency basis. Respondent continues to monitor the condition of the road 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 finds that respondent cannot be held liable for this particular portion of the road because it is situated on CSX's right-of-way. Respondent is only permitted to perform maintenance on CSX's right-of-way in emergency situations. Since respondent responded to the situation in a timely manner, the Court is of the opinion that respondent took all the necessary steps to ensure the safety of the traveling public at this location. The responsibility for the maintenance of this portion of the road lies with CSX. Thus, there is insufficient evidence of negligence on the part of respondent upon which to base an award.

Claim disallowed.

OPINION ISSUED DECEMBER 22, 2009

MARY E. RENO
V.
DIVISION OF HIGHWAYS
(CC-07-0363)

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 Ford Taurus struck railroad ties that were scattered across County Route 56 between Independence Road and Country Club Road in Jackson County. County Route 56 is a public 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 6:00 p.m. on November 12, 2007. The speed limit on County Route 56 is fifty-five miles per hour. At the time of the incident, claimant was traveling from Ripley to Ravenswood. She was driving on County Route 56 at approximately forty-five miles per hour when she noticed an object on the road. When she maneuvered her vehicle to the right, her vehicle struck what she later discovered were railroad ties that were scattered across the road. Claimant was unable to see the railroad ties before her vehicle struck them due to the rain and darkness that existed at the house. As a result of this incident, claimant's vehicle sustained damage to two tires, two rims, and the vehicle needed to be re-aligned, totaling $297.95.

The position of the respondent is that it did not have actual or constructive notice of the condition on County Route 56 at the site of claimant's accident for the date in question. William R. Whited, Crew Supervisor for respondent in Jackson County, testified that he is familiar with County Route 56. He stated that it is a high priority road in terms of its maintenance. He stated that he received a telephone call regarding this incident at approximately 10:15 p.m. that evening. Mr. Whited responded in a timely manner and a crew removed the railroad ties from the road. He stated he did not know the origin of the railroad ties, but that trucks frequently travel this roadway. He further stated that respondent did not have notice of the subject railroad ties 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 notice of the railroad ties that were scattered across County Route 56 prior to this incident. Respondent did not receive notice until after this incident occurred but responded in a timely manner and removed the railroad ties. 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 JUNE 1, 2010

CARROLL D. GARNES JR.
V.
DIVISION OF HIGHWAYS

(CC-09-0266)

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when a pine tree fell onto his parked 1998 Ford Escort. Claimant asserts that Respondent was notified that the tree was leaning dangerously over County Route 16, but Respondent failed to remove the tree prior to the Claimant's incident. The Court is of the opinion to make an award in this claim for the reasons stated more fully below.

The incident giving rise to this claim occurred on May 3, 2009. Claimant's vehicle was parked at his parents' residence, which is located on Clendenin Creek Road, designated as County Route 16, in Liberty, Putnam County. County Route 16 is a paved road that is approximately one lane and a half wide. A wooded lot, owned by the Claimant's uncle, is located across the street from his parents' residence. Two weeks prior to the incident, Claimant's father, Carroll Garnes Sr., notified two of Respondent's employees, who were cutting brush approximately two feet beyond the location of the tree's trunk, that the tree needed to be cut and removed.

On the date of this incident, Claimant and his family were out of town when they were notified by a neighbor that the tree had fallen onto the Claimant's vehicle. Claimant testified that the tree damaged the vehicle's windows and the weather stripping. As a result of this incident, Claimant's vehicle sustained damage in the amount of $549.19. Claimant had liability insurance only.

Claimant contends that Respondent should have removed the tree shortly after Mr. Garnes Sr., notified Respondent of the problem two weeks prior to this incident. Claimant asserts that the tree was on Respondent's right-of-way.

Respondent contends that the tree was not on its right-of-way, and thus, it is not responsible for the damage caused to Claimant's vehicle. Raine Beller, Crew Supervisor I for Respondent in Putnam County, testified that he could not state with certainty that the tree was on Respondent's right-of-way. Mr. Beller stated that County Route 16 is a second priority road in terms of its maintenance. He stated that he and one other employee responded to the tree fall on the date of the incident and removed the tree. Mr. Beller testified that he did not have knowledge that Mr. Garnes Sr., had reported the condition of the tree to Respondent prior to the incident.

In cases involving falling trees or tree limbs, the Court has held that a claimant must establish that respondent knew or had reason to know that the tree in question posed a risk of harm to motorists. *Widlan v. Dep't of Highways,* 11 Ct. Cl. 149 (1976). The general rule is that if a dead tree located on respondent's right-of-way poses an apparent risk, then the respondent may be held liable. *Hamby v. Div. of Highways*, 24 Ct. Cl. 184 (2002). 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 of negligence upon which to justify an award. *Gerritsen v. Dep't of Highways*, 16 Ct. Cl. 85 (1986). In *May v. Div. of Highways*, CC-05-0056 (2008), the Court held, "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."

In the present claim, the Court finds that Respondent had notice of the tree's condition two weeks prior to the incident in question. Mr. Garnes Sr., informed Respondent's employees that the tree needed to be removed because it was close

enough to the highway to pose a danger of falling onto County Route 16. Mr. Garnes Sr., testified that Respondent's employees were cutting brush approximately two feet beyond the tree's trunk, which suggests that the tree was on Respondent's right-of-way. Although Respondent cannot be held liable for every tree that falls near a highway, the Court finds that the Respondent had actual notice that this tree posed a hazard. Thus, the Court finds Respondent negligent, and Claimant may recover $549.19 for the damage to his vehicle.

Accordingly, the Court makes an award to Claimant in the amount of $549.19.

Award of $549.19.

OPINION ISSUED JUNE 1, 2010

CHANTEL J. BLACK
V.
DIVISION OF HIGHWAYS
(CC-09-0337)

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 2009 Scion TC struck a raised drain cover on MacCorkle Avenue in Charleston, Kanawha County. MacCorkle Avenue, designated as State Route 60, is a public 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 1:30 p.m. on July 9, 2009. State Route 60 is a four-lane road with two lanes traveling in each direction. The speed limit is thirty-five miles per hour. Claimant testified that she was traveling westbound towards St. Albans at approximately thirty-five miles per hour when her vehicle struck a drain cover that was raised approximately six inches above the pavement. The road had been milled at this location. Claimant had not traveled on this road for approximately one or two months prior to this incident, and she did not encounter the raised drain cover on a prior occasion. Claimant further stated that she was unable to avoid this hazard due to traffic. As a result, Claimant's vehicle sustained damage to its tire and rim in the amount of $557.46. Since Claimant's insurance deductible was $500.00, 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 State Route 60 at the time of the incident. Barbara Engelhardt, Highway Administrator II for Respondent, testified that she is familiar with the area where Claimant's incident occurred. She stated that West Virginia Paving had milled the road before it was paved. Ms. Engelhardt stated that there were several "Bump Ahead" signs that were placed at this location by West Virginia Paving. She further stated that West Virginia Paving agreed to hold Respondent harmless under the contract.

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, Claimant must prove that Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways*, 16 Ct. Cl. 8 (1985); *Chap man 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 raised drain cover which Claimant's vehicle struck and that it presented a hazard to the traveling public. The Court finds respondent negligent, and Claimant may make a recovery for the damage to her vehicle. The Court is aware that Respondent had a hold-harmless agreement with a third-party contractor. Thus, Respondent may seek to be reimbursed for any damages for which it is found responsible.

Award of $500.00.

OPINION ISSUED JUNE 1, 2010

RICHARD C. ATENCIO
V.
DIVISION OF HIGHWAYS
(CC-09-0340)

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 Dodge Ram pickup truck struck a ditch on County Route 21 near Sissonville, Kanawha County. County Route 21 is a public 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 9:00 p.m. on July 12, 2009. County Route 21 is a paved, two-lane road with one lane traveling in each direction. The speed limit is forty miles per hour. Claimant testified that he was driving at approximately thirty-five miles per hour when his vehicle struck a ditch that was cut across the road. The ditch was approximately 24 inches long and five inches deep. Claimant stated that he had driven on this road ten days prior to the incident. Although Claimant was aware that there were ditches being cut across the road, he had not seen the ditch at this particular location. Further, he stated that the ditches that he had seen prior to this incident were covered with metal plates. He stated that there were no warning signs at the location of this incident. As a result, Claimant needed to have the vehicle re-aligned totaling $74.85.

The position of the Respondent is that it did not have actual or constructive notice of the condition on County Route 21at the time of the incident. Danny Tucker, Highway Administrator II for Respondent in the North Charleston section of Kanawha County, testified that he is familiar with the area where Claimant's incident occurred. He stated that West Virginia American Water had created cross cuts in the road to replace the water lines. The DOH 12, a record of Respondent's daily work activity, indicates that on July 18, 2009, a crew was called to cover a cross cut on County

Route 21 with stone. He stated that, normally, the contractor is responsible for placing metal plates over the cross cuts. Mr. Tucker was unaware of whether Respondent had a hold harmless provision in its permit with West Virginia American Water.

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, Claimant must prove that Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways*, 16 Ct. Cl. 8 (1985); *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 ditch which Claimant's vehicle struck and that it presented a hazard to the traveling public. The size of the ditch and its location on the travel portion of the road leads the Court to conclude that Respondent was negligent. The Court is aware that Respondent's permit with the third-party contractor may have a hold harmless or indemnity clause. Thus, Respondent may seek to be reimbursed for any damages for which it is found responsible.

It is the opinion of the Court of Claims that the Claimant should be awarded the sum of $74.85. Award of $74.85.

OPINION ISSUED JUNE 1, 2010

KENNETH DUTCHESS AND ELIZABETH DUTCHESS
V.
DIVISION OF HIGHWAYS
(CC-09-0346)

Claimants appeared *pro se*.
Andrew F. Tarr, Attorney at Law, for Respondent.

PER CURIAM:

Claimants brought this action for property damage which occurred when Respondent used tar and chips to repair the pavement on Kentuck Road, designated as County Route 19, in Kenna, Jackson County. The tar was not adequately covered with sand to prevent vehicles traveling on County Route 19 from splattering tar onto Claimants' concrete driveway located on 464 Kentuck Road. 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 in March of 2009 when Respondent was paving the holes on County Route 19 with "tar and chip." Claimants allege that when the tar reached a certain temperature, it would "boil up," and passing traffic would splash the hot tar onto their driveway. In addition, the Claimants' own vehicles would track tar onto the driveway. Claimants built their home on Kentuck Road four years ago and the driveway was in new condition. Claimant Kenneth Dutchess was unable to determine the width of Respondent's right-of-way in front of his residence. He further stated that he did not obtain a permit from Respondent when he constructed the driveway. Although Mr. Dutchess has cleaned the driveway himself, he has been unable to remove all of the tar stains. As a result, Claimants seek to recover $3,000.00 for the damage to their driveway. Claimants' homeowner's

insurance policy indicates that their deductible was $1,000.00.

The position of the Respondent is that it did not have actual or constructive notice of the damage that the tar caused to Claimant's driveway on County Route 19. Calvin Donohew, Jackson County Crew Supervisor for Respondent, testified that County Route 19 is a second priority road in terms of maintenance. Mr. Donohew was unable to determine the width of Respondent's right-of-way at the location of Claimant's residence. Mr. Donohew stated that due to budget constraints, Respondent used tar and chip, which is a less expensive method of road repair than cold mix. In any case, cold mix was not available during that time of year because it had been used up during the winter months. The DOH 12's, records of Respondent's work activities, indicate that Respondent had engaged in patching activities using tar and chip on March 31, 2009, April 23, 2009, and April 24, 2009. Mr. Donohew recalled returning to the area on different occasions to place sand to prevent the tar from splattering on the 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 condition on Kentuck Road. The Court finds that Respondent failed to cover the holes with an adequate amount of sand to prevent the tar from splattering onto Claimants' driveway when vehicles traveled on this road. Thus, the Court finds Respondent negligent and Claimants may make a recovery for the damage to their driveway. Since Claimants' insurance deductible was $1,000.00, Claimants' recovery is limited to that amount.

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 JUNE 1, 2010

KIMBERLY LYNN JARRELL AND ELISHA MOORE
V.
DIVISION OF HIGHWAYS
(CC-09-0407)

Claimants appeared *pro se*.
Andrew F. Tarr, Attorney at Law, for Respondent.

PER CURIAM:

Claimants brought this action for damage to their 2003 Oldsmobile Alero which occurred as the result of a rock slide on State Route 85 in Madison, Boone County. State Route 85 is a public 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 August 1, 2009. At the time of the incident, Ms. Jarrell was driving and her two children were passengers in the vehicle. State Route 85 is a paved, two-lane road with white edge lines and yellow center lines. The speed limit is forty miles per hour. Ms. Jarrell stated that she and her children were traveling to Camden Park in clear conditions. The incident occurred between the Benjamin Price Bridge and McDonald's. Ms. Jarrell testified that she was driving on a straight stretch of road on State Route 85 when she observed between twenty and twenty-five small rocks that were falling from the hillside adjacent to the roadway. Although Ms. Jarrell slowed the vehicle down to between twenty and twenty-five miles per hour, she was unable to avoid a very large boulder that was falling onto the roadway. The boulder that fell caused damage to the vehicle, which rendered it a total loss. There were no falling rock signs in the area. Claimants seek to recover $5,000.00 for the value of the vehicle plus Ms. Jarrell's work loss. Claimants had liability insurance only.

The position of the Respondent is that it did not have actual or constructive notice of the rock slide on State Route 85 at the time of the incident. Respondent did not present a witness 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).

This Court has consistently held that the unexplained falling of a boulder or rock debris on the road surface is insufficient to justify an award. *Coburn v. Div. of Highways,* 16 Ct. Cl. 69 (1986); *Hammond v. Dep't of Highways,* 11 Ct. Cl. 234 (1977). In order to establish liability on behalf of Respondent, the evidence must establish that Respondent had notice of the dangerous condition posing the threat of injury to property and a reasonable time to take suitable action to protect motorists. *Alkire v. Div. of Highways,* 21 Ct. Cl. 173 (1997).

In the instant case, the Court is of the opinion that Respondent had at least constructive notice that this particular area on State Route 85 was prone to rock slides. Although Respondent cannot be held responsible for every rock that falls onto a highway, the size of the boulder leads the Court to conclude that Respondent should have inspected and maintained the hillside to prevent such a hazard to the traveling public. Since the berm is narrow at this location, it is foreseeable that rocks could fall onto the roadway. Respondent did not present a witness to rebut Ms. Jarrell's testimony that there were no falling rock signs in the area. Therefore, the Court is of the opinion that Respondent was negligent. The Court has determined that $3,683.80 is a fair and reasonable amount to compensate the Claimants for their loss. This amount represents the Blue Book value of the vehicle plus Ms. Jarrell's work loss.

In accordance with the findings of fact and conclusions of law as stated herein above, the Court is of the opinion to and does make an award to the Claimants in the amount of $3,683.80.

Award of $3,683.80.

OPINION ISSUED JULY 9, 2010

KIMBERLY R. MORRIS

V.
DIVISION OF HIGHWAYS
(CC-09-0483)

Claimant appeared *pro se*.
C. Brian Matko, Attorney at Law, for Respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when her 2001 Lincoln Continental struck a hole as it was being driven by her son, Keith V. Morris, off the exit ramp and onto the Kanawha Turnpike in South Charleston, Kanawha County. The Kanawha Turnpike is a public 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 10:40 a.m. on September 15, 2009. Keith Morris testified that he was driving off the exit ramp at approximately twenty miles an hour when the vehicle struck a hole between the exit ramp and the roadway. Mr. Morris estimated that the hole was approximately three feet wide. Mr. Morris stated that the road was under construction, and he saw a "Bump" sign prior to encountering this hazard, but he was unable to avoid the hole. Mr. Morris had driven on this road approximately three months prior to the incident. Claimant's vehicle sustained damage to its wheel and tire in the total amount of $421.20. 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 hole located between the exit ramp and the Kanawha Turnpike. Respondent did not present a witness 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 amount of time to take corrective action. *Pritt v. Dep't of Highways*, 16 Ct. Cl. 8 (1985); *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 between the exit ramp and the roadway leads the Court to conclude that Respondent was negligent. Thus, Claimant may make a recovery for the damage to her vehicle.

It is the opinion of the Court of Claims that the Claimant should be awarded the sum of $421.20.

Award of $421.20.

OPINION ISSUED JULY 9, 2010

CATHY PARSLEY HUNTER
V.
DIVISION OF HIGHWAYS
(CC-09-0585)

Claimant's brother, Douglas Scott Parsley, appeared *pro se*.
C. Brian Matko, Attorney at Law, for Respondent.

PER CURIAM:

Claimant's brother, Douglas Scott Parsley, brought this action for vehicle damage which occurred when the Claimant's 1995 Volkswagen Passat struck debris on I-77 north before the Fairplain Exit in Jackson County.[20] I-77 is a public 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 1:00 p.m. on November 6, 2009. At the time of the incident, Douglas S. Parsley testified that he was driving to Ripley on I-77 north at between sixty-five and sixty-eight miles per hour when the vehicle struck what Claimant thought was a hole or debris from a hole in the middle of the road near mile marker 128. Since Mr. Parsley was unable to see a hole in the roadway, he could not state with certainty what the vehicle struck. As a result of this incident, Claimant's vehicle sustained damage to two tires in the amount of $401.40.

The position of the Respondent is that it did not have actual or constructive notice of a hazard on I-77 north near mile marker 128 prior to this incident. Joseph E. Weekley, Crew Supervisor I for Respondent at the Sissonville Headquarters, testified that he was performing routine maintenance on I-77 and checking for road hazards on the day of this incident. Mr. Weekley recalled seeing the Claimant's vehicle stopped on the side of the road with two flat tires. He stated that there were no holes in this area, but he saw metal debris and wood pallets on the road that could have fallen from a vehicle. Mr. Weekley stated that he picked the debris off the road. Mr. Weekley testified that Respondent did not have notice of the debris 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. *Pritt v. Dep't of Highways*, 16 Ct. Cl. 8 (1985); *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 prior notice of a hazard near mile marker 128 on I-77. According to Mr. Weekley's testimony, there were no holes at this location. Although Claimant's vehicle could have struck debris on the road, Respondent did not have notice of the debris prior to this incident. 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.

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[20] Although Cathy Parsley Hunter was not present at the hearing of this matter, the Court amended the style of the claim to reflect that she was the owner of the vehicle during the time of the incident.

OPINION ISSUED JULY 9, 2010

ANDREW J. ROGERS
V.
DIVISION OF HIGHWAYS
(CC-10-0012)

Claimant appeared *pro se*.
C. Brian Matko, 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. At approximately 3:00 p.m. on August 9, 2009, Claimant's 2003 Harley Davidson motorcycle struck a hole on U.S. Route 119 between Elkview and Clendenin. 2. Respondent is responsible for the maintenance of U.S. Route 119 which it failed to maintain properly on the date of this incident.

3. As a result, Claimant's vehicle sustained damage to its tire and wheel in the amount of $1,196.42. Claimant's insurance deductible was $500.00.

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 U.S. Route 119 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 damages agreed to by the parties is fair and reasonable. Thus, Claimant may make a recovery for his loss.

It is the opinion of the Court of Claims that the Claimant should be awarded the sum of $500.00 on this claim.

Award of $500.00.

OPINION ISSUED JULY 9, 2010

PATRICK POE
V.
DIVISION OF HIGHWAYS
(CC-06-0164)

Claimant appeared *pro se*.
C. Brian Matko, Attorney at Law, for Respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when his 1994 Ford pickup truck struck the stud from a sign post on State Route 21in Jackson County. State Route 21is a public 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 1, 2006. Claimant testified that he was driving on State Route 21 when his vehicle struck the stud from

a "Stop" sign. The sign post was located in the middle of the two lanes of traffic. Claimant stated that another vehicle had knocked down the sign post, which left the stud exposed on the highway. As Claimant drove his vehicle over this area, the stud damaged his vehicle's tire. Claimant stated that he observed that the vehicle that had knocked down the sign post was still parked at the side of the road when Claimant's incident occurred. As a result of this incident, Claimant's vehicle sustained damage to its tire in the amount of $193.34.

The position of the Respondent is that it did not have actual or constructive notice of the exposed stud from the sign post on State Route 21. 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, Claimant must prove that Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways*, 16 Ct. Cl. 8 (1985); *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 stud that caused damage to the Claimant's vehicle. The sign post was knocked down just prior to the Claimant's incident, and the Claimant failed to establish that Respondent knew that the stud was exposed on the roadway. Thus, there is insufficient evidence of negligence upon which to base an award.

Accordingly, the Court denies this claim.

Claim disallowed.

OPINION ISSUED JULY 9, 2010

CLYDE BLACKBURN
V.
DIVISION OF HIGHWAYS
(CC-09-0004)

Claimant testified via telephone conference call.

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when his 2006 Cadillac STS struck a hole on U.S. Route 52 near Tolsia, Wayne County. U.S. Route 52 is a public 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 6:30 a.m. on December 16, 2008. U.S. Route 52 is a paved, two-lane road. In the area where Claimant's incident occurred, the speed limit is twenty miles per hour. At the time of the incident, Claimant was traveling with his wife to the VA Hospital for a doctor's appointment. Claimant testified that he was driving north on U.S. Route 52 at approximately fifty-five miles per hour when his vehicle struck a hole in the road. The hole, which was located 1/4 mile south of Copley's Truck Stop, was

approximately two feet wide and eight inches deep. Since the hole was filled with water, the Claimant did not see it before his vehicle struck it. As a result of this incident, Claimant's vehicle sustained damage to its rim in the amount of $716.60.

The position of the Respondent is that it did not have actual or constructive notice of the hole on U.S. Route 52 prior to the Claimant's incident. Randolph Smith, Highway Administrator II/County Supervisor for Respondent in Wayne County, testified that he is familiar with the area where Claimant's incident occurred. Mr. Smith stated that there are "Rough Road" signs and "20 M.P.H." signs in that area. Mr. Smith testified that he did not recall receiving complaints regarding the condition of the road 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 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 amount of time to take corrective action. *Pritt v. Dep't of Highways,* 16 Ct. Cl. 8 (1985); *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 hole which Claimant's vehicle struck and that the hole presented a hazard to the traveling public. 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 Claimant was at least fifty percent negligent in driving over the speed limit, and the negligence of the Claimant is a complete bar to his 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 JULY 9, 2010

BELINDA M. HAIRSTON
V.
DIVISION OF HIGHWAYS
(CC-10-0009)

Claimant appeared *pro se*.
C. Brian Matko, Attorney at Law, for Respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when her 2003 Dodge Neon struck an irregularity in the pavement on Washington Street East in Charleston, Kanawha County. Washington Street is a public 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 12:30 p.m.

on December 22, 2009. Washington Street is a paved, two-lane road with one lane traveling in each direction. Claimant was driving near the Dollar General Store on Washington Street, East, at approximately twenty-five miles per hour when her vehicle struck an uneven section of gravel where a large cut was made in the road. Although Claimant was familiar with the condition of the road, she was unable to avoid this area due to oncoming traffic.

Ella Smith, Claimant's aunt, who was a passenger in the vehicle, stated that traffic caused the gravel to be kicked up, exposing the cap of a gas valve. According to Ms. Smith, Claimant's vehicle struck the cap, causing damage to her vehicle. Claimant could not state with certainty whether her vehicle struck the gas valve's cap, but she was certain that her vehicle struck an accumulation of gravel in this area. As a result of this incident, Claimant's vehicle sustained damage in the amount of $570.17. Claimant's insurance deductible was $250.00.

The position of the Respondent is that it was not responsible for repairing the irregularity in the pavement on Washington Street. Thomas Hively, Acting Utility Supervisor for Respondent in District One, testified that he is responsible for processing utility orders and scheduling inspections with Respondent's utility inspectors. Mr. Hively stated that he is familiar with the area where this incident occurred, and that the gas company dug a hole at this location to repair an emergency leak. He stated that according to the agreement between Respondent and the utility company, the utility company is responsible for restoring the road to Respondent's satisfaction. Mr. Hively further stated that Respondent received complaints regarding the condition of the road, and, as a result, he contacted the gas company to inform them they needed to perform repairs. He testified that Respondent is responsible for ensuring that the utility company repaired the road in an expeditious manner. Mr. Hively could not determine when the repairs were made in this area. Larry Vasarhelyi, Chief Investigator for Respondent's Claims Division, testified that he is unaware of an indemnity agreement between the utility company and 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, Claimant must prove that Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways*, 16 Ct. Cl. 8 (1985); *Chapman v. Dep't of Highways*, 16 Ct. Cl. 103 (1986).

In the instant case, the Court finds that the utility company was responsible for performing the repairs at this location, not Respondent. Since Respondent notified the gas company when it received complaints regarding the condition of the road, there is insufficient evidence of negligence on the part of Respondent upon which to base an award. Claimant may seek reimbursement from the utility company for her loss.

It is the opinion of the Court of Claims that the claim should be denied.

Claim disallowed.

OPINION ISSUED JULY 9, 2010

KRISTEN HUSSELL AND SCOTT HUSSELL

V.
DIVISION OF HIGHWAYS
(CC-09-0047)

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 Volkswagen Beetle struck a pothole while Kristen Hussell was traveling North on State Route 62 in Mason County. State Route 62 is a public 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 December 24, 2008. State Route 62 is a two-lane highway at the area of the incident involved in this claim. The speed limit is fifty-five miles per hour. Kristen Hussell testified that she was driving within the speed limit near the Riverside Golf Club when her vehicle struck a pothole in the road. She was unable to avoid the pothole due to oncoming traffic. Claimant testified that she drives this road on a daily basis and was aware that there was a "rough patch" of road in this area. As a result, Claimants' vehicle sustained damage to its front, right tire and rim totaling $506.39.

The position of the Respondent is that it did not have actual or constructive notice of the condition on State Route 62 prior to the date of this incident. Brian Herdman testified that he is currently the County Supervisor for Respondent in Mason County and, at the time of this incident, he was the Crew Supervisor for Respondent. Mr. Herdman stated that State Route 62 is a first priority route in terms of its maintenance. The DOH12s, records of Respondent's daily work activities, indicate that Respondent's crews had been patching potholes with cold mix on State Route 62 on the following dates: December 2, 2008; December 15, 2008; December 18, 2008; December 23, 2008; and December 26, 2008. He stated that there is a lot of truck traffic on this road. Due to the nature of cold mix, he conjectured that the hole could have been patched on a prior occasion and the material could have come out of the hole.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins 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. *Pritt v. Dep't of Highways*, 16 Ct. Cl. 8 (1985); *Chapman v. Dep't of Highways*, 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that Respondent was not negligent in its maintenance of State Route 62. The DOH12s indicate that Respondent had maintained the road on a regular basis during the weeks leading up to this incident. Further, the evidence established that the Claimant knew of the condition on State Route 62 prior to this incident and that there was an opportunity for her to further reduce her speed in accordance with the road conditions. Consequently, the Court is of the opinion that Claimant was at least fifty percent negligent in this claim, and therefore 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 JULY 9, 2010

LORI MCCORMICK
V.
DIVISION OF HIGHWAYS
(CC-09-0053)

Claimant appeared *pro se*.
C. Brian Matko, Attorney at Law, for Respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when her 2008 Nissan Maxima struck a hole on State Route 214 in Alum Creek, Lincoln County. State Route 214 is a public 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 p.m. on January 1, 2009. State Route 214 has a speed limit of forty-five miles per hour. Claimant testified that she was driving north on State Route 214 at between thirty-five and forty miles per hour when her vehicle struck a hole in the road. She was unable to avoid the hole due to oncoming traffic. The hole occupied a significant portion of the northbound lane and damaged her vehicle's passenger side wheel and tire. Claimant stated that had she veered her vehicle to the right, she would have driven off the roadway, and the driver's side front wheel would have struck the hole. Claimant testified that the last time prior to this incident that she had driven on this road was in November of 2008, and she did not recall seeing the hole at that time. As a result of this incident, Claimant's vehicle sustained damage in the amount of $340.79. Claimant's insurance deductible was $1,000.00 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 State Route 214 at the time of the incident. Donald Snodgrass, Crew Leader for Respondent in Lincoln County, testified that he is familiar with State Route 214 and stated that it is a primary road in terms of its maintenance. The DOH 12s, records of Respondent's daily work activities, indicate that Respondent had patched the holes on State Route 214 with cold mix on December 22, 2008, January 5, 2009, and January 6, 2009. Cold mix is a temporary repair that is used during the winter months when the hot mix plants are closed. He stated that the cold mix came out of the hole between the time the road was patched on December 22, 2008, and January 5, 2009. Mr. Snodgrass was uncertain as to whether Respondent was alerted of this hole prior to the Claimant's incident. He stated that the road was not inspected on a regular basis.

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, Claimant must prove that Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways*, 16 Ct. Cl. 8 (1985); *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 the hole in question occupied a significant portion of the northbound lane of traffic on this primary road. Since the road was in disrepair at the time of Claimant's incident, the Court finds Respondent negligent. Thus, Claimant may make a recovery for the damage to her vehicle.

It is the opinion of the Court of Claims that the Claimant should be awarded the sum of $340.79.

Award of $340.79.

OPINION ISSUED JULY 9, 2010

JOHN ANDREW BELL
V.
DIVISION OF HIGHWAYS
(CC-09-0366)

Claimant appeared *pro se*.
C. Brian Matko, Attorney at Law, for Respondent.

PER CURIAM:

Claimant brought this action against Respondent for flood damage to a rental property that he formerly owned at 580 Whittington Road, Charleston, Kanawha County. The Court is of the opinion to deny the claim for the reasons more fully stated below.

In July of 2008, Claimant's rental home was flooded during a storm event. Claimant alleges that Respondent had cut down trees or cleaned out the ditch lines, which caused the flooding on his rental property.[21] The documentation submitted to Claimant's insurance company indicates that the damage to the house was caused by a storm. Although the Claimant submitted an invoice for the cost to perform the repairs, the majority of the items listed are not related to water damage. Claimant did not specify the cost to repair the items that are related to this incident. Further, Claimant indicated that he no longer owns the property and did not perform the repairs.

Respondent contends that it is not responsible for the flooding which

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[21] Q. Do you know what kind of work they were doing, Department of Highways?
A. No.
Q. Do you know what they did?
A. No. The only thing I can tell you is what my sister told me and the neighbors and the guy that rented from me, was that they were clearing out maybe a ditch and cut trees
down.

occurred at 580 Whittington Road. Mike Welch, Crew Supervisor for Respondent, testified that he is familiar with the work that Respondent performed in July of 2008 near Whittington Road. Mr. Welch stated that Respondent cleaned out a ditch line and removed small trees that were blocking the ditch line.

In the instant case, the Claimant has failed to demonstrate that Respondent was negligent in its maintenance activities near Whittington Road. Claimant is unaware of whether the flooding was the result of Respondent's activities or a storm. Since Claimant has failed to establish that Respondent's negligence was the proximate cause of the damages sustained to the property at
580 Whittington Road, the claim must be denied. Even if the Claimant had established the Respondent was negligent, Claimant has not proven his damages. In Syllabus Point 4 of *Konchesky v. S.J. Groves and Sons Co.*, 135 S.E.2d 299 (W.Va. 1964), the Supreme Court of Appeals of West Virginia held, "Damages cannot be awarded for injury done to property where the evidence is speculative, conjectural or uncertain as to the amount of damages."

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

Claim disallowed.

OPINION ISSUED JULY 9, 2010

SUSAN GUINTHER
V.
DIVISION OF HIGHWAYS
(CC-09-0334)

Claimant appeared *pro se*.
C. Brian Matko, Attorney at Law, for Respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when her 2008 Honda Accord struck a broken section of pavement on Utah Road in Ravenswood, Jackson County. Utah Road is a public 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 12:00 p.m. on July 6, 2009. Utah Road is a paved, two-lane road that has a center line and no edge lines. Claimant testified that the width of the eastbound lane is six feet, two inches wide, and the width of the westbound lane is seven feet, eight inches wide. At the time of the incident, Claimant was traveling eastbound on Utah Road at approximately ten miles per hour when she noticed a van in the westbound lane that had crossed into her lane of travel. As Claimant maneuvered her vehicle over in her lane of travel to provide more space between her vehicle and the oncoming van, her vehicle struck a broken section of pavement on the edge of the road. The hole was approximately seventeen inches long and ten inches deep. Claimant stated that Respondent had previously removed a culvert in this area and paved over it, and she indicated that the hole had existed for over one year. Claimant stated that she travels this road on a daily basis and had contacted Respondent regarding the condition of the

road prior to this incident. Claimant's vehicle sustained damage in the amount of $795.08. Since Claimant's insurance declaration sheet indicates that she had a $500.00 deductible at the time of the incident, 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 Utah Road. William Whited, Crew Supervisor for Respondent in Jackson County, testified that he had no records indicating that Respondent had received complaints regarding the hole prior to this incident. Mr. Whited was uncertain how long the hole had existed at this location before it was patched.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins 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. Given that the width of the eastbound lane was one foot and six inches shorter than the width of the westbound lane, the hole further limited the space available for drivers on the eastbound lane. Claimant was unable to avoid this hazard due to the fact that there was an oncoming vehicle in the westbound lane. In addition, Claimant indicated that the hole had existed at this location for over one year. Thus, the Court finds that Respondent was 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 JULY 9, 2010

BRUCE F. HAUPT
V.
DIVISION OF HIGHWAYS
(CC-09-0457)

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 2009 BMW struck a two and half inch rise between a milled portion and a paved section of the Kanawha Turnpike exit ramp from I-64 in Charleston, Kanawha County. The Kanawha Turnpike exit ramp is a public 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 9:00 a.m. on September 6, 2009. At the time of the incident, Claimant was driving to Thomas

Memorial Hospital. The Kanawha Turnpike exit ramp is a paved, one-lane road that descends downward and curves to the right. It has a speed limit of thirty-five miles per hour. As Claimant was driving down the exit ramp, his vehicle encountered a cut, two feet wide, where the road was milled and the surface was rough. Claimant's vehicle struck the discontinuity between the milled portion of the road and the paved surface. The difference in height between the milled area and the paved area was approximately two and one half inches. There was a "Bump" sign at that location, but there were no other signs leading up to this area that indicated that there was road work ahead. Although Claimant travels this road on a daily basis, he had not encountered this hazard on a previous occasion. As a result of this incident, Claimant's vehicle sustained damage to its left, front tire and wheel in the amount of $743.35. Since Claimant's insurance provides for a deductible of $500.00, 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 the Kanawha Turnpike exit ramp from I-64 prior to this incident. Lori Saunders Jarvis, District One Resurfacing Coordinator for Respondent, testified that she supervises activities relating to contract paving in Kanawha, Boone, Putnam, Clay, and Mason Counties. Ms. Jarvis testified that she was familiar with the project on the Kanawha Turnpike exit ramp, and indicated the paving work was being performed from the Fort Hill Bridge to the South Charleston off ramp on I-64. She stated that a third-party contractor was responsible for performing the paving work. Under the indemnification provision in the contract between the third-party contractor and Respondent, as between those two parties, the contractor assumed all responsibility for work on the road during the construction process. She stated that the ramp was in disrepair for approximately one week due to rain in the area that kept the third-party contractor from completing the project. Ms. Jarvis stated that Respondent received several complaints regarding the condition of the road in this area, but she could not recall the dates of the complaints. She stated that the third-party contractor placed cold patch in this area before the road was re-paved in an effort to decrease the discrepancy of the pavement height.

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, Claimant must prove that Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways*, 16 Ct. Cl. 8 (1985); *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 that the Kanawha Turnpike ramp was in disrepair for approximately one week. Since the condition of the road created a hazard to the traveling public, the Court finds Respondent negligent. The Court is aware that Respondent's agreement with the third-party contractor had an indemnity provision. Thus, Respondent may seek to be reimbursed from the third-party contractor for any damages arising from this claim.

It is the opinion of the Court of Claims that the Claimant should be awarded the sum of $500.00.

Award of $500.00.

OPINION ISSUED JULY 9, 2010

VICKI L. BLACK
V.
DIVISION OF HIGHWAYS
(CC-08-0485)

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 July 8, 2008, Claimant's 2007 Toyota Camry was struck by a falling rock in the Bluestone Dam area of State Route 20 in Summers County.

2. Respondent is responsible for the maintenance of State Route 20 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 $550.84. 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 in addition to a $181.00 charge for a rental vehicle.

The Court has reviewed the facts of the claim and finds that Respondent was negligent in its maintenance of State 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 damages agreed to by the parties is fair and reasonable. Thus, Claimant may make a recovery for her loss.

It is the opinion of the Court of Claims that the Claimant should be awarded the sum of $431.00 on this claim.

Award of $431.00.

OPINION ISSUED JULY 9, 2010

JOHN M. CALDWELL
V.
DIVISION OF HIGHWAYS
(CC-09-0371)

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when a tree limb fell onto his 1996 Jeep Grand Cherokee as Claimant's son, Tonio John Caldwell, was driving on State Route 817 in Putnam County. State Route 817 is a public 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 5:30 p.m. on

July 11, 2009. State Route 817 is a paved, two-lane road with one lane for travel in each direction. The speed limit is fifty-five miles per hour. At the time of the incident, Tonio Caldwell and his father were on State Route 817 approximately two and a half miles north of the State Route 34 intersection. Tonio Caldwell testified that he was driving between thirty-five and forty miles per hour in the rain and under windy conditions when a tree limb struck the vehicle's bumper and hood before it was knocked underneath the vehicle. It is uncertain from which tree on a hillside the tree limb fell. After the tree limb struck the Claimant's vehicle, it dented the guardrail on the side of the road. As a result of this incident, Claimant's vehicle sustained damage to its front bumper, hood, grill, and air conditioning system, totaling $3,497.74. Claimant's insurance declaration sheet indicates that he had liability insurance only.

The position of the Respondent is that it did not have actual or constructive notice of the tree limb on State Route 817 that caused damage to Claimant's vehicle. James E. Smithers, Transportation Crew Supervisor for Respondent in Putnam County, testified that he is familiar with the area where this incident occurred. He testified that prior to July 11, 2009, Respondent did not receive any calls regarding an issue with a tree at or near this location. He stated that the Volunteer Fire Department responded to the scene.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims*, 130 W.Va. 645, 46 S.E.2d 81 (1947). In *May v. Division of Highways*, CC-05-0056 (2008), this Court held that it would not place a burden on Respondent with respect to trees surrounding its highways unless the tree poses an obvious hazard to the traveling public.

In the instant case, the Court is of the opinion that Respondent had no notice that the tree limb at issue posed an apparent risk to the traveling public. Furthermore, the Claimant failed to establish that the tree limb fell from a tree growing on Respondent's right-of-way. Consequently, 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 JULY 9, 2010

ALBERT BROOKS AND JULIE BROOKS
V.
DIVISION OF HIGHWAYS
(CC-08-0437)

Claimants testified via telephone conference call.
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 August 2, 2008, Claimants were traveling west on Interstate 64 near

Huntington, Cabell County, when their vehicle struck concrete in the road that had fallen from an overpass causing damage to the vehicle.

2. Respondent is responsible for the maintenance of Interstate 64 which it failed to maintain properly on the date of this incident.

3. As a result, Claimants' vehicle sustained damage in the amount of $7,845.08. Claimants' insurance deductible was $500.00. Thus, Claimants' recovery is limited to that amount.

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 Interstate 64 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 JULY 9, 2010

H. GORDON "BUCK" FLYNN
VS.
DIVISION OF HIGHWAYS
(CC-09-0631)

Claimant appeared *pro se*.
C. Brian Matko, Attorney at Law, for Respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when his 2002 Chevrolet Tahoe struck a piece of tire on I-64 East between Cross Lanes and Dunbar. I-64 is a public 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 between 2:00 p.m. and 3:00 p.m. on September 25, 2009. I-64 is a paved, four-lane road with two lanes traveling in each direction. The pertinent speed limit is sixty miles per hour. Claimant stated that he was driving at approximately fifty-five miles per hour and was following an 18-wheel truck when the truck struck a piece of tire that was laying on the road. The piece of tire flipped up and struck Claimant's vehicle. Claimant stated that he was uncertain where the tire came from or how long it had been situated on the roadway. As a result of this incident, Claimant's vehicle sustained damage to its mirror, door, fender, and running board in the amount of $1,000.00.

The position of the Respondent is that it did not have actual or constructive notice of the piece of tire on I-64 between Cross Lanes and Dunbar. 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. *Pritt v. Dep't of Highways*, 16 Ct. Cl. 8 (1985); *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 piece of tire which Claimant's vehicle struck. It is the Claimant's burden to prove that Respondent had notice of the object in the roadway and failed to take corrective action. Since Claimant's vehicle struck a foreign object in the roadway of which Respondent did not have notice, there is no 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 AUGUST 20, 2010

STACEY T. GRANGE
V.
DIVISION OF HIGHWAYS
(CC-09-0629)

Claimant appeared *pro se*.
C. Brian Matko, Attorney at Law, for Respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when his friend, Marnetta E. Daniels, was driving his 2005 Volvo eastbound on MacCorkle Avenue and the wind knocked a highway sign and its post onto the vehicle. MacCorkle Avenue is a public road maintained by Respondent in 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 1:10 p.m. on December 9, 2009. MacCorkle Avenue is a paved, four-lane road with two lanes traveling in each direction. Marnetta Daniels testified that she was driving on MacCorkle Avenue near the Charleston Area Medical Center when the wind blew a sign and its post onto the Claimant's vehicle. The sign was originally located in the median between the two eastbound and the two westbound lanes. Ms. Daniels stated that she was unable to avoid this hazard due to the traffic. As a result of this incident, Claimant's vehicle sustained damage in the amount of $3,114.49. Claimant had liability insurance only. Likewise, Ms. Daniels' insurance on her personal vehicle afforded coverage for liability claims only.

The position of the Respondent is that it is not responsible for the damage sustained to Claimant's vehicle as a result of this incident. Darrell Black, Crew Leader Three For Respondent's Nitro Sign Shop, testified that he was responsible for installing the sign in question. He stated that the "Keep Right" sign was placed onto a ten-foot aluminum post. The post was mounted onto a turtle back piece that was bolted into the concrete. As a safety measure, a break-away component was installed into the turtle back piece to ensure that the turtle back piece would not break off. This design also enabled the sign and its post to break off and fall backwards if it were hit by a vehicle. Mr. Black stated that Respondent could not have taken any measures

to prevent the wind from blowing the sign onto the Claimant's vehicle.

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, Claimant must prove that Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways*, 16 Ct. Cl. 8 (1985); *Chapman v. Dep't of Highways*, 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that the sign was not adequately secured at the time of this incident. There is no evidence that the force of the wind blowing at the time of this incident could not have been reasonably anticipated by the Respondent. Thus, the Court finds Respondent negligent and Claimant may make a recovery for the damage to his vehicle.

It is the opinion of the Court of Claims that the Claimant should be awarded the sum of $3,114.49.

Award of $3,114.49.

OPINION ISSUED AUGUST 20, 2010

PEGGY H. BRANHAM AND HOWARD BRANHAM
V.
DIVISION OF HIGHWAYS
(CC-09-0405)

Claimants appeared *pro se.*
C. Brian Matko, 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 9:00 p.m. on July 31, 2009, Peggy H. Branham was driving Claimants' 2002 Lincoln on County Route 65/5 in Delbarton, Mingo County, when their vehicle struck a broken section of the berm.

2. Respondent is responsible for the maintenance of this area which it failed to maintain properly on the date of this incident.

3. As a result, Claimants' vehicle sustained damage to its tire and rim in the amount of $491.84. Claimants' insurance deductible was $1,000.00.

4. Respondent agrees that the amount of $491.84 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 County Route 65/5 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 to the Claimants in the amount of $491.84.

Award of $491.84.

OPINION ISSUED AUGUST 20, 2010

GLENN W. MORGAN AND DIANE L. MORGAN
V.
DIVISION OF HIGHWAYS
(CC-10-0090)

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 Saturn Aura struck a hole while Claimant Glenn W. Morgan was driving south on I-77 between mile marker 8.0 and 8.6. I-77 is a public 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 1:15 p.m. on February 14, 2010. I-77 is a paved, four lane road with two lanes traveling in each direction. The speed limit is sixty-five miles per hour. Glen Morgan testified that he was driving south on I-77 at approximately sixty-five miles per hour when his vehicle struck a hole in the road. Mr. Morgan stated that there were multiple holes on both lanes of travel. As a result of this incident, Claimants' vehicle sustained damage to its rim and wheel cover, and the vehicle needed to be re-aligned totaling damages in the amount of $312.92. 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 I-77 between mile marker 8.0 and 8.6. 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. *Pritt v. Dep't of Highways*, 16 Ct. Cl. 8 (1985); *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 hole was located on the interstate, where vehicles travel at high speeds, the Court finds Respondent negligent. Further, there were multiple holes at his location. Thus, 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 $312.92.

Award of $312.92.

OPINION ISSUED AUGUST 20, 2010

CHARLES W. MATHES
V.

DIVISION OF HIGHWAYS
(CC-09-0446)

Claimant appeared *pro se*.
C. Brian Matko, 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 5, 2009, Claimant's 2008 Chevrolet Silverado 300 struck a broken sign post at the intersection of Pretty Glade Road and Denison Run Road in Cowen, Webster County.

2. Respondent is responsible for the maintenance of the Denison Road intersection which it failed to maintain properly on the date of this incident.

3. As a result, Claimant's vehicle sustained damage to its tires and rims in the amount of $326.70. Claimant's insurance deductible was $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 the Denison Road intersection 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 damages agreed to by the parties is fair and reasonable. Thus, Claimant may make a recovery for his loss.

It is the opinion of the Court of Claims that the Claimant should be awarded the sum of $250.00 on this claim.

Award of $250.00.

OPINION ISSUED OCTOBER 8, 2010

ANDREA WARD
V.
DIVISION OF HIGHWAYS
(CC-07-0215)

Claimant appeared *pro se*.
C. Brian Matko, Attorney at Law, for Respondent.

PER CURIAM

Claimant brought this action for vehicle damage which occurred when her 1999 Dodge Neon struck a manhole cover on Harvey Street in Williamson, Mingo County. Harvey Street is a public road under the State highway system. 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 June 5, 2007. Claimant was driving on Harvey Street when her vehicle struck a manhole cover. The Claimant had not seen the manhole cover prior to this incident. As a result, the Claimant's vehicle sustained damage in the amount of $1,836.53.

The position of the Respondent is that it is not responsible for the maintenance of the manhole cover on Harvey Street in Williamson, Mingo County.

Thomas Meddings, Respondent's Utility Permit Supervisor in District Two, testified that there are two manhole covers at this location. One manhole cover is part of the sewer system and the other is part of the water system. He stated that the manhole covers are maintained by a contractor hired by the City of Williamson.

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, the Claimant must prove that Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways*, 16 Ct. Cl. 8 (1985); *Chapman v. Dep't of Highways*, 16 Ct. Cl. 103 (1986).

As to the parties involved, the Respondent bears the responsibility for the maintenance of the roads. The Respondent took this road under its system. If there is another entity such as the City of Williamson that, by agreement, assumes this responsibility, then the Respondent has the right to seek reimbursement from the City of Williamson for the damages arising from this claim. *See Fields v. Division of Highways*, CC-07-0240.

It is the opinion of the Court of Claims that the Claimant should be awarded the sum of $1,836.53.

Award of $1,836.53.

OPINION ISSUED OCTOBER 8, 2010

VERN THOMPSON JR.
V.
DIVISION OF HIGHWAYS
(CC-09-0380)

Claimant appeared *pro se*.
C. Brian Matko, Attorney at Law, for Respondent.

PER CURIAM:

The Claimant brought this action for vehicle damage which occurred when the berm gave way beneath his 1999 Jeep Grand Cherokee on Shaver's Fork Road, designated by the Respondent as County Route 6, in Randolph County. County Route 6 is a public road maintained by the 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 5:00 p.m. on July 3, 2009. County Route 6 is a gravel road that is between twelve and fourteen feet wide. The Claimant testified he and his two minor sons, who were passengers in the vehicle, were returning from a fishing trip. The Claimant noticed an oncoming vehicle and reduced his speed to less than twenty miles per hour. When he maneuvered his vehicle over onto the berm, the berm gave way. The Claimant's vehicle rolled over the bank and came to rest on its top against a tree. Fortunately, the Claimant and his sons were not injured, but the vehicle was totaled. The Claimant stated that he was familiar with this road and could have stopped at a wide spot in the road that was located just prior to the area where the incident occurred. The Claimant

had liability insurance only. The Kelley Blue Book Value of the vehicle is $7,390.00.

The position of the Respondent is that it did not have actual or constructive notice of the condition on County Route 6. Raymond Yeager, Randolph County Administrator for the Respondent, testified that he is familiar with the area where the Claimant's incident occurred. He stated that there have been other similar accidents where motorists have pulled too closely to the edge of the road on County Route 6. Mr. Yeager stated that the safest way for two vehicles to pass each other in this area is to wait until there is a wide spot in the road. Mr. Yeager stated that he did not see the accident occur. However, he did not believe the berm gave way as alleged by the Claimant because if it had, the vegetation in the area from which the Claimant's vehicle rolled would have been disturbed.

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 amount of time to take corrective action. *Pritt v. Dep't of Highways*, 16 Ct. Cl. 8 (1985); *Chapman v. Dep't of Highways*, 16 Ct. Cl. 103 (1986).

In the instant case, the Court finds that the Respondent had, at the least, constructive notice of the condition of the berm on County Route 6. Since the Claimant needed to pull over to the side of the road due to an oncoming vehicle and the berm created a hazard to the traveling public, the Court finds the Respondent negligent. Notwithstanding the negligence of the Respondent, the Court is also of the opinion that the Claimant was twenty-five (25%) percent negligent in failing to pull over at a wide spot in the road. Since the negligence of the Claimant is not greater than or equal to the negligence of the Respondent, the Claimant may recover seventy-five (75%) percent of the loss sustained, which amounts to $5,542.50.

In view of the foregoing, the Court is of the opinion to make an award in the amount of $5,542.50.

Award of $5,542.50.

OPINION ISSUED OCTOBER 8, 2010

GEORGE V. PIPER
V.
DEPARTMENT OF ENVIRONMENTAL PROTECTION AND
STATE TAX DEPARTMENT
(CC-10-0141)

Claimant appeared *pro se*.
Gretchen A. Murphy, Assistant Attorney General, for Respondents.

PER CURIAM:

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

Claimant seeks to recover $180.00 from the Department of Environmental Protection and $150.00 from the State Tax Department for an error that was made regarding Claimant's increment tenure pay. The Department of Environmental

Protection owes the Claimant $180.00 for the years 1987, 1988, 1989, 1990, and 1991. The State Tax Department owes the Claimant $150.00 for the years 2000, 2001, and 2002.

In its Amended Answer, the Respondent, Department of Environmental Protection, admits the validity of the claim in the amount of $180.00, and the Respondent, State Tax Department, admits the validity of the claim in the amount of $150.00. The Respondents further find that the amount claimed is fair and reasonable.

It is the opinion of the Court of Claims that the Claimant should be awarded $180.00 owed by the Department of Environmental Protection and $150.00 owed by the State Tax Department.

Award of $180.00 owed by the Department of Environmental Protection.

Award of $150.00 owed by the State Tax Department.

Total award of $330.00.

OPINION ISSUED OCTOBER 8, 2010

POMEROY IT SOLUTIONS
V.
PUBLIC SERVICE COMMISSION
(CC-10-0431)

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 to recover $695.40 for technological services it provided to Respondent. The invoices were never received 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.

It is the opinion of the Court of Claims that the Claimant should be awarded the sum of $695.40.

Award of $695.40

OPINION ISSUED OCTOBER 8, 2010
GINA L. HOUSER
V.
DIVISION OF HIGHWAYS
(CC-09-0060)

Claimant appeared *pro se*.
C. Brian Matko, Attorney at Law, for Respondent.

PER CURIAM:

The Claimant brought this action for vehicle damage which occurred when

her 2004 Dodge Durango was damaged after the vehicle encountered ruts on Limestone Road, an unimproved road, in St. Marys, Pleasants 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, 2008. The Claimant had been living on Limestone Road since November of 2008. The Claimant contends that the Respondent rarely maintains this road despite numerous complaints that she and her husband have made regarding the road's condition. A creek crosses under the road which washes out the gravel, contributing to the defective condition of the road. On the day of the incident, Claimant's vehicle's tires sunk into a rut causing the vehicle to edge over into a ditch. As a result, the Claimant's vehicle sustained damage to its running board in the amount of $259.70.

The Claimant contends that the Respondent should have installed a culvert or placed additional gravel to improve the general condition of the road. The Claimant stated that in spite of a representation made by an employee of Respondent that the road would be maintained after her house was built in 2008, the Respondent has failed to do so.

The Claimant's father-in-law, William Houser, testified that he also lives on Limestone Road. He stated at the time that the Claimant and her husband were building their home, he contacted the Respondent regarding the condition of the road. Mr. Houser stated that he has lived at his residence on Limestone Road since 1979 where his son grew up. He further stated that his son was aware that the Respondent did not actively maintain Limestone Road. He contends that the Respondent has failed to take measures to repair the road. He explained that the road has problems with water drainage, creating dangerous conditions in the winter due to the slope of the road.

The position of the Respondent is that it is not responsible for the maintenance of an unimproved road. Kaye Ballway, Highway Administrator for the Respondent in Pleasants County, testified that she spoke to the Claimant's husband, Arnold Hauser, regarding the maintenance of the road on June 12, 2007. Ms. Ballway explained to Mr. Hauser that Limestone Road is an unimproved road. She explained to him that he needed to apply for a permit to bring the road up to the Respondent's specifications before the Respondent could maintain it. Ms. Ballway stated that no maintenance has been performed on Limestone Road during the 31 years that she has been the Highway Administrator in Pleasants County.

Christopher Weekley testified that he works for the Respondent's permit department in District Three (encompassing Pleasants County). Mr. Weekley testified that the Respondent does not allocate money for maintaining unimproved roads because of the extremely infrequent use by motorists. If an individual moves into an area next to an unimproved road, he or she can apply for a permit to bring the road within the Respondent's maintenance schedule. The individual, however, must first bring the road up to the Respondent's specifications before the Respondent will maintain the road. The evidence of record indicates the Claimant has not filed for a permit.

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. *Pritt v. Dep't of Highways*, 16 Ct. Cl. 8 (1985); *Chapman v. Dep't of Highways*, 16 Ct. Cl.

103 (1986).

In the instant case, the Court is of the opinion that the Respondent was not negligent in its maintenance of Limestone Road. Homeowners are first required to obtain a permit to bring an unimproved road up to the Respondent's specifications before the Respondent will maintain the road. Since the Claimant has failed to do so, the Respondent cannot be held responsible for any damage to the Claimant's vehicle that resulted from the condition of this unimproved road.

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

Claim disallowed.

OPINION ISSUED OCTOBER 8, 2010

GREGORY R. RHODES
V.
DIVISION OF HIGHWAYS
(CC-09-0226)

Claimant appeared *pro se*.
C. Brian Matko, Attorney at Law, for Respondent.

PER CURIAM:

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

1. On April 25, 2009, Claimant's 2008 Mazda struck a hole in the roadway on Clear Fork Road in Raleigh County.

2. Respondent is responsible for the maintenance of Clear Fork Road which it failed to maintain properly on the date of this incident.

3. As a result, Claimant's vehicle sustained damage to its tires and rims in the amount of $494.51. Claimant's insurance deductible was $500.00.

4. Respondent agrees that the amount of $494.51 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 Clear Fork 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 damages agreed to by the parties is fair and reasonable. Thus, Claimant may make a recovery for his loss.

It is the opinion of the Court of Claims that the Claimant should be awarded the sum of $494.51 for this claim.

Award of $494.51.

OPINION ISSUED OCTOBER 8, 2010

GENEVA BOWEN
V.
DIVISION OF HIGHWAYS

(CC-09-0263)

Claimant appeared *pro se*.
C. Brian Matko, Attorney at Law, for Respondent.

PER CURIAM:

The Claimant brought this action for vehicle damage which occurred when her 2005 Chrysler Town and Country struck a storm drain on State Route 2 in Paden City, Wetzel County. The Court is of the opinion to deny this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred on May 18, 2009. The Claimant testified that she drove to the curb of State Route 2 to park her vehicle in front of the Quality Aluminum store when her passenger side tires and rims were damaged on the opening to a storm drain. Although the main portion of the drain was situated on the curb of the road, the opening for the drain was located on the pavement where there was a drop in the road surface. The Claimant testified that there were no metal bars covering the opening for the storm drain at that time. The Claimant's friend, Linda Leasure, testified that in her opinion the storm drain posed a hazard to pedestrians who could easily fall into this hole between the pavement and the curb. As a result of this incident, the Claimant's vehicle sustained damage to its tires and rims in the amount of $938.10. The Claimant also had to rent a vehicle, totaling $110.10, which was not covered by her insurance. The Claimant's insurance deductible was $1,000.00 at the time of the incident.

The position of the Respondent is that it did not have actual or constructive notice of the hazardous condition created by the storm drain on State Route 2. Charles Miller, Crew Leader for the Respondent, testified that the drain was installed at that location during the summer of 2004 according to the specifications adopted by the State Road Commissioner and the Division of Highways. He stated that the metal bars were included in the specifications for the construction of this drain. Mr. Miller could not state with certainty that the metal bars were covering the drain on the day of the incident, but he stated that, according to the specifications, the bars were supposed to be there. Mr. Miller does not have any records that the bars were installed after the Claimant's incident. He further stated that there was nothing obstructing the view of the storm drain.

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 the Respondent liable for road defects of this type, a Claimant must prove that the Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways*, 16 Ct. Cl. 8 (1985); *Chapman v. Dep't of Highways*, 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that the Respondent's storm drain at this location on State Route 2 was designed according to DOH's specifications. Photographs admitted into evidence depict the grate at the edge of the curb with a small gap between the pavement edge and the grate at the curb. This appears to the Court to be necessary for water to flow from the road surface into the drainage structure. The drainage structure does not appear to pose a hazard to the traveling public parking a vehicle at the edge of the curb at a normal distance from the curb. Further, there was nothing obstructing the view of the drain's opening which created a small drop in the paved surface of the road. Accordingly, the Court finds

that there is insufficient evidence of negligence on the part of the 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 OCTOBER 8, 2010

KAREN ELAINE NESTOR AND RANDY GLENN NESTOR
V.
DIVISION OF HIGHWAYS
(CC-08-0323)

Claimants appeared *pro se*.
C. Brian Matko, Attorney at Law, for Respondent.

PER CURIAM:

Claimants brought this action for vehicle damage which occurred when their 2007 Mustang struck excess gravel on State Route 38 in Tucker County. State Route 38 is a public 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 11:00 a.m. on June 17, 2008. At the time of the incident, Claimant Karen Elaine Nestor was driving and her daughter and two granddaughters were passengers in the vehicle. They were returning from a dental appointment in Morgantown and were traveling from Morgantown to Parsons. Ms. Nestor testified that she was traveling around a curve on State Route 38 when their vehicle struck excess gravel in the road. The vehicle lost traction, and Ms. Nestor lost control of the vehicle. Ms. Nestor veered to the right, and the vehicle crossed the highway and hit the bank before it finally came to rest in a ditch. Ms. Nestor, her daughter, and granddaughters were able to escape from the vehicle, but her daughter sustained injuries to her neck as a result of this incident.

Claimants seek to recover $15,807.15 as a result of this incident. Although Claimants were reimbursed for the value of their vehicle by their insurance company, they seek reimbursement in the amount of $6,912.15 for car payments made on their 2007 Mustang. Claimants' insurance deductible was $500.00 at the time of the incident. Ms. Nestor also seeks to recover $300.00 for her lost wages. Claimants also incurred $95.00 for Court-related expenses. In addition, Claimants seek to recover $8,000.00 on behalf of her daughter that was injured.[22]

Although the weather conditions were clear on the date of this incident, Ms. Nestor testified that Tucker County had experienced heavy rains during the month of June, and the roads were washed out in many locations throughout the County. She stated that she had never seen the roads in such a state of disrepair in the 47 years that she has lived in Tucker County.

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[22] The Court notes that Claimants' 30-year-old daughter did not have an ownership interest in the vehicle.

The position of the Respondent is that it responded to this incident in a timely manner. Robert Byron Cooper, Highway Administrator for Respondent in Tucker County, testified that State Route 38 is a primary road in terms of its maintenance. Mr. Cooper was present at the location of the accident that evening and stated that there was excess gravel on the shoulder. He explained that the excess gravel was caused by the storms during the month of June. Due to the extensive damage sustained to the roads across Tucker County, Respondent had to maintain the US highways before it could maintain State Route 38. In addition, Respondent had to maintain some of the secondary routes that were impassible before it could clean up the excess gravel on State Route 38. Respondent's crews were working overtime to ensure that the roads were cleaned up after the storms. Respondent is responsible for maintaining approximately 100 miles of primary roads in Tucker County and had 34 employees available at that time to perform road maintenance. According to Respondent's DOH12s, records of its daily work activities, Respondent had maintained State Route 38 on June 4, 10, 11, and 16, 2008, and had removed the excess gravel from the roadway on June 19, 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 amount of time to take corrective action. *Pritt v. Dep't of Highways*, 16 Ct. Cl. 8 (1985); *Chapman v. Dep't of Highways*, 16 Ct. Cl. 103 (1986).

The Court is of the opinion that Respondent was not negligent in its maintenance of State Route 38 on the date of this incident. Due to the storms during the month of June, there were many roads in disrepair throughout Tucker County. Respondent's crews made a good faith effort to clean up the debris from the storm and had to address the problems on the US highways and on the secondary routes that were impassible before it could maintain State Route 38. The DOH12s indicate that Respondent cleaned up the excess gravel on State Route 38 in a timely manner. Thus, there is insufficient evidence of negligence on the part of Respondent upon which to base an award.

Claim disallowed.

OPINION ISSUED OCTOBER 8, 2010

PAMELA MARCHETTI AND EUGENE L. MARCHETTI III
V.
DIVISION OF HIGHWAYS
(CC-09-0414)

C. Brian Matko, Attorney at Law, for Respondent.

PER CURIAM:

Claimants brought this action for vehicle damage which occurred when their 2005 Suzuki Forenza struck a hole as Claimant Pamela Marchetti was driving on Waverly Road, designated as State Route 1, in Williamstown, Wood County. State Route 1 is a public 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 7:30 p.m. on June 28, 2009. State Route 1 is a paved, two-lane road. Pamela Marchetti testified that she was driving on State Route 1 towards Williamstown when her vehicle struck a hole in the road. Ms. Marchetti stated that there were numerous holes at this location. She further stated that there was oncoming traffic and a steep bank on the other side of the road which prevented her from avoiding the hole. She stated that the hole was on the right side of her lane of travel and was approximately one foot from the road's edge line. As a result of this incident, Claimant's vehicle sustained damage to two tires, two rims and two valves needed to be replaced, the tires mounted and balanced, and the vehicle also needed to be re-aligned, totaling $514.29. Since Claimants' insurance deductible was $500.00, Claimants' recovery is limited to that amount.

The position of the Respondent is that it did not have actual or constructive notice of the holes on State Route 1. Curtis Richards, Crew Supervisor for Respondent in Wood County, testified that State Route 1 is a second priority road in terms of its maintenance. He explained that the freezing and thawing that occurs during the winter months causes the blacktop to break apart, creating holes in the road. He stated that Respondent patches holes in the winter months with a temporary patch because the asphalt plants do not open until April or May. Mr. Richards stated that the Respondent did not have notice of the subject hole prior to the Claimants' incident. The DOH 12, a record of Respondent's daily work activities, indicates that the holes on State Route 1 were patched on July 9, 2009.

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, Claimant must prove that Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways*, 16 Ct. Cl. 8 (1985); *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 there were numerous holes at this location, the Court finds Respondent negligent. Thus, Claimants may make a recovery for the damage to their vehicle.

It is the opinion of the Court of Claims that the Claimants should be awarded the sum of $500.00.

Award of $500.00.

OPINION ISSUED OCTOBER 8, 2010

LINDA GIBSON
V.
DIVISION OF HIGHWAYS
(CC-09-0362)

Claimant appeared *pro se*.
C. Brian Matko, Attorney at Law, for Respondent.

PER CURIAM:

Claimant brought this action for damage to her 2005 Jeep Grand Cherokee which occurred when she was backing out of her driveway and onto County Route 3/5, and her vehicle struck a guardrail. Claimant alleges that the guardrail, which was located between County Route 3/5 and her driveway, was leaning too far over onto her driveway. County Route 3/5 is a public road maintained by Respondent in Dingess, Mingo 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 around June 1, 2009, between 5:00 and 6:00 p.m. County Route 3/5 is a paved, two-lane road with yellow center lines. Claimant's private driveway leading to her residence is located off of County Route 3/5. As Claimant was backing out of her driveway to travel onto County Route 3/5, the back left portion of her vehicle struck the guardrail. She recalls hearing a loud noise at night a few days prior to this incident which lead her to conclude that a vehicle might have hit the guardrail. However, she was not aware of the fact that the guardrail was leaning over onto her driveway prior to this incident. She stated that there is another road that provides ingress and egress onto her residence, but she did not take that route because traveling on County Route 3/5 was closer to her destination. Claimant did not provide an estimate for the damage to her vehicle.

The position of the Respondent is that it did not have actual or constructive notice of the condition of the guardrail on County Route 3/5. Michael Spry, Transportation Crew Supervisor for Respondent in Mingo County, testified that County Route 3/5 is a second priority road in terms of its maintenance. Mr. Spry is familiar with the area in question and stated that he responded to the Claimant's call regarding the condition of the guardrail. Although the road appears to be broken off in this area, Mr. Spry indicated that he did not believe that the road's condition caused the guardrail to lean over because the guardrail's posts are located deep in the ground. He stated that it was more likely that the guardrail was leaning over due to the fact that it was hit by a vehicle. Prior to this incident, Respondent did not receive complaints regarding the condition of the guardrail on County Route 3/5.

The Court notes that Respondent also raised the fact that Claimant was backing her vehicle out of the driveway which is not in conformance with W.Va. Code § 17C-14-2(a) which provides as follows: "The driver of a vehicle shall not back the same unless such movement can be made with reasonable safety and without interfering with other traffic."

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. *Pritt v. Dep't of Highways*, 16 Ct. Cl. 8 (1985); *Chapman v. Dep't of Highways*, 16 Ct. Cl. 103 (1986).

In the instant case, the Court finds that the Respondent was unaware of the condition of the guardrail on County Route 3/5 prior to this incident. Respondent did not have notice of the condition of the guardrail until the Claimant notified Respondent. 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 OCTOBER 8, 2010

GARY LEE SAMPLES AND MARY L. SAMPLES
V.
DIVISION OF HIGHWAYS
(CC-09-0150)

Kelly R. Reed, Attorney 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. Respondent is responsible for the maintenance of Chipps Hollow Road in Star City, Monongalia County, West Virginia.

2. On or around February 28, 2008, Gary Lee Samples was operating his motor vehicle on Chipps Hollow Road in or near Star City, West Virginia, when his vehicle began sliding on ice, struck an area of guardrail on the bridge that was in disrepair, rolled off the bridge and into the creek below the bridge.

3. While exiting his vehicle, Gary Lee Samples slipped and fell on some icy rocks in the creek and injured his right shoulder.

4. Mr. Samples' injury to his right shoulder required surgery.

5. Claimants allege that Respondent was negligent in its maintenance of the road and guardrail on the date of the accident.

6. Under the specific facts and circumstances of this claim and for the purposes of settlement, Respondent acknowledges culpability for the preceding accident.

7. Both the Claimants and Respondent agree that in this particular incident and under these particular circumstances that an award of Fifty Thousand Dollars ($50,000.00) would be a fair and reasonable amount to settle this claim.

8. The parties to this claim agree that the total sum of Fifty Thousand Dollars ($50,000.00) to be paid by Respondent to the Claimants in Claim No. CC-09-0150 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 the Respondent was negligent in its maintenance of Chipps Hollow Road in Star City, Monongalia County on the date of this incident; that the negligence of the Respondent was the proximate cause of Mr. Samples' personal injury; 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 to the Claimants in the amount of $50,000.00.

Award of $50,000.00.

OPINION ISSUED OCTOBER 8, 2010

HILLARY BRUER
V.
DIVISION OF HIGHWAYS
(CC-09-0178)

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 March 23, 2009, Claimant's 1998 Lincoln Navigator struck a pothole in the roadway of 8th Avenue in Huntington in Cabell County.

2. Respondent is responsible for the maintenance of 8th Avenue which it failed to maintain properly on the date of this incident.

3. As a result, Claimant's vehicle sustained damage to its tires and rims in the amount of $1,016.52. Claimant held liability insurance only at the time of the incident.

4. Respondent agrees that the amount of $1,016.52 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 8th 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 damages agreed to by the parties is fair and reasonable. Thus, Claimant may make a recovery for her loss.

It is the opinion of the Court of Claims that the Claimant should be awarded the sum of $1,016.52 on this claim.

Award of $1,016.52.

OPINION ISSUED OCTOBER 8, 2010

DAVID HARDY
V.
DIVISION OF HIGHWAYS
(CC-09-0317)

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 5, 2009, Claimant's 2008 Mercedes struck a pothole in the roadway of State Route 61 in Kanawha County.

2. Respondent is responsible for the maintenance of State Route 61which it

failed to maintain properly on the date of this incident.

3. As a result, Claimant's vehicle sustained damage to its tires and rims in the amount of $1,501.76. Claimant's insurance deductible was $1,000.00.

4. Respondent agrees that the amount of $1,000.00 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 State Route 61on 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 damages agreed to by the parties is fair and reasonable. Thus, Claimant may make a recovery for his loss.

It is the opinion of the Court of Claims that the Claimant should be awarded the sum of $1,000.00 on this claim.

Award of $1,000.00.

OPINION ISSUED OCTOBER 8, 2010

NORMA FIELDS
V.
DIVISION OF HIGHWAYS
(CC-07-0240)

Claimant appeared *pro se*.
C. Brian Matko, Attorney at Law, for Respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when her 1995 Dodge Neon struck a manhole cover on Harvey Street in Williamson, Mingo County. Harvey Street is a public road under the State highway system. 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 June 25, 2007. Claimant was driving on Harvey Street when her vehicle struck a manhole cover. The Claimant had not seen the manhole cover prior to this incident. As a result, the Claimant's vehicle, valued at $1,000.00, was totaled. The Claimant had liability insurance coverage.

The position of the Respondent is that it is not responsible for the maintenance of the manhole cover on Harvey Street in Williamson, Mingo County. Michael Spry, Crew Supervisor for Respondent in Mingo County, testified that he is familiar with the area where the Claimant's incident occurred. He stated that the City of Williamson maintains that portion of the road. The City of Williamson has a private contractor that performs maintenance for the City. Mr. Spry stated that Respondent was unaware of the defect in the manhole cover prior to this incident.

Also testifying at the hearing for Respondent was Thomas Meddings, Respondent's Utility Permit Supervisor in District Two. Mr. Meddings testified that he is not aware of a maintenance permit or contract between the City of Williamson and Respondent wherein the City agreed to hold the Respondent harmless for damages arising from its work performed at this location.

Mr. Meddings stated that on November 3, 1978, the Respondent entered into

an agreement with the City of Williamson wherein the Respondent agreed to include Harvey Street under the State highway system. Clause IV of the agreement states:

> Duties and responsibilities of the City shall be as follows:
> 1. Sweeping and/or flushing of pavement.
> 2. Placing and maintenance of street name signs.
> 3. Maintenance of all curbs and sidewalks except for those on the bridge as stated in Article III 7 above.
> 4. Maintenance of all City owned sanitary sewer and waterlines.

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, the Claimant must prove that Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways*, 16 Ct. Cl. 8 (1985); *Chapman v. Dep't of Highways*, 16 Ct. Cl. 103 (1986).

As to the parties involved, the Respondent bears the responsibility for the maintenance of the roads. The Respondent took this road under its system. If there is another entity such as the City of Williamson that, by agreement, assumes this responsibility, then the Respondent has the right to seek reimbursement from the City of Williamson for the damages arising from this claim.

It is the opinion of the Court of Claims that the Claimant should be awarded the sum of $1,000.00.

Award of $1,000.00.

OPINION ISSUED OCTOBER 8, 2010

MARY RICHTER
V.
DIVISION OF HIGHWAYS
(CC-08-0265)

Claimant appeared *pro se*.
C. Brian Matko, Attorney at Law, for Respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when her 2005 Ford Free Style struck a barrel on State Route 892 in Wood County. State Route 892 is a public 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 4:00 p.m. on April 1, 2008. State Route 892 is a paved, two-lane road with one lane traveling in each direction. Claimant testified that she was driving on State Route 892 when her vehicle struck a barrel. The wind blew the barrel in front of her vehicle, and she was unable to avoid it. She stated that there were between three to four barrels along the side of the road that were not secured with weights. Claimant travels this road on a daily basis and had noticed that the barrels were unsecured for approximately one week prior to this incident. She notified Respondent and was informed that a contractor might have been responsible for the barrels at this location. The contractor

informed her that the barrels were the responsibility of Respondent.

The position of Respondent is that it did not have actual or constructive notice of the barrel that rolled in front of Claimant's vehicle on State Route 892. Steve Carson, Highway Administrator for Respondent in Wood County, testified that he is familiar with the area where Claimant's incident occurred. He stated that a contractor was working on the new Blennerhassett bridge across the Ohio River. He testified that Respondent has inspectors that ensure that the contractors perform the work to Respondent's specifications. He stated that the barrels at this location belonged to the contractor.

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 amount of time to take corrective action. *Pritt v. Dep't of Highways*, 16 Ct. Cl. 8 (1985); *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 Claimant's vehicle struck on State Road 892. The Court finds that the plastic barrels located along the side of the road were not adequately secured to prevent a hazard to the traveling public. Although a contractor was responsible for the work performed at this location, the Respondent had inspectors on site to oversee the work of the contractor. 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 sustained to Claimant's vehicle, the Court concludes that Respondent was negligent. However, the Claimant has not been able to produce documentation establishing damages to the vehicle. Since the Court cannot speculate to damages in the above stated claim, the Claim will be denied.

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

Claim disallowed.

OPINION ISSUED OCTOBER 8, 2010

JANETT S. STEVENS AND JOHN H. STEVENS
V.
DIVISION OF HIGHWAYS
(CC-09-0600)

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 Nissan Altima struck a hole as Claimant Janett Stevens was driving on Camp Creek Road in Lavalette, Wayne County. Camp Creek Road is a public 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 9:30 p.m. on October 20, 2009. Camp Creek Road is a narrow, two-lane road. Janett Stevens testified that she was traveling in the rain when her vehicle struck a hole that was forty-seven inches long, twenty-two inches wide and ten inches deep. The hole was located near the center of this unmarked road. Although Ms. Stevens had seen the hole before, she was unable to avoid it because it was dark and the hole was filled with water. She had contacted Respondent on two occasions prior to this incident to report the hole. Camp Creek Road is the only route that Claimants can take to travel to and from their residence. Claimants indicated that the hole had existed for several months. As a result of this incident, Claimants' vehicle sustained damage to its front, driver's side wheel and tire in the amount of $1,050.65. Since Claimants' insurance deductible was $500.00, 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 Camp Creek 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 amount of time to take corrective action. *Pritt v. Dep't of Highways*, 16 Ct. Cl. 8 (1985); *Chapman v. Dep't of Highways*, 16 Ct. Cl. 103 (1986).

Since Janett Stevens had notified Respondent of the hole prior to this incident, Respondent had actual notice of the hole at this location. Further, the size of the hole and the fact that it had existed for several months leads the Court to conclude that Respondent was negligent. Thus, Claimants may make a recovery for the damage to their vehicle.

It is the opinion of the Court of Claims that Claimants should be awarded $500.00 in this claim.

Award of $500.00.

OPINION ISSUED OCTOBER 8, 2010

WALTER S. HUGHES AND KELLY D. HUGHES
V.
DIVISION OF HIGHWAYS
(CC-08-0487)

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 Pontiac Grand Prix struck a hole as Kelly D. Hughes was driving on Ashton Upland Road in Ashton, Mason County. Ashton Upland Road, designated as County Route 41, is a public 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 3:35 p.m. on November 4, 2008. County Route 41 is a paved, two-lane road with white edge lines and yellow

center lines, and the speed limit is thirty-five miles per hour. Kelly Hughes was traveling on County Route 41 at approximately thirty-five miles per hour when her vehicle struck a hole in the road that was approximately three feet long, eighteen inches wide, and between three and four inches deep. She was unable to avoid the hole due to oncoming traffic. Ms. Hughes testified that she travels this road often. She stated that there are holes all over County Route 41, but she had never noticed the hole in question prior to this incident. As a result, Claimants' vehicle sustained damage to one tire and two rims in the amount of $1,908.42. Since Claimants' insurance deductible was $500.00, 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 County Route 41. Brian Herdman, presently the County Administrator for Respondent in Mason County, testified that at the time of this incident, he was the Crew Supervisor for Respondent in Mason County. He stated that County Route 41 is a secondary road in terms of its maintenance. Mr. Herdman testified that Respondent did not have knowledge of the pothole prior to this incident. Further, Respondent did not have maintenance records for County Route 41 near the time 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. *Pritt v. Dep't of Highways*, 16 Ct. Cl. 8 (1985); *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 lead the Court to conclude that Respondent had notice of this hazardous condition. 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 the driver was negligent since she was aware that there were holes in the road and failed to further reduce her speed in accordance with the road conditions. In a comparative negligence jurisdiction such as West Virginia, the driver's negligence may reduce or bar recovery in a claim. Based on the above, the Court finds that the driver's negligence equals fifteen-percent (15%) of the Claimants' loss. Since the negligence of the driver is not greater than or equal to the negligence of the Respondent, Claimants may recover eighty-five percent (85%) of their insurance deductible.

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 $425.00.

Award of $425.00.

OPINION ISSUED OCTOBER 8, 2010

ROBERT F. KANTHACK AND SHIRLEY KANTHACK
V.
DIVISION OF HIGHWAYS

(CC-08-0288)

Claimants testified via telephone conference call.
C. Brian Matko, Attorney at Law, for Respondent.

PER CURIAM:

Claimants brought this action for vehicle damage which occurred when Claimants' 2002 Ford pickup truck struck a sign as they were traveling west on I-64. I-64 is a public 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 May 18, 2008. Robert Kanthack testified that at the time of the incident, he and his wife, Shirley Kanthack, were traveling on a bridge in a construction zone on I-64. Strong winds caused a metal directional sign to break off of its stand and blow onto the front end of the Claimants' truck. Since Mr. Kanthack was driving at approximately fifty-five miles per hour and only one lane of traffic was open at that time, he could not have avoided the sign. As a result, Claimants' vehicle sustained damage to its brush guard, grill, bug deflector, and front bumper in the amount of $2,164.12. Since Claimants' insurance deductible was $100.00, Claimants' recovery is limited to that amount.

The position of the Respondent is that it is not responsible for the damage sustained to Claimants' vehicle. Charlene Pullen, I-64 Supervisor for Respondent, testified that Claimants' incident occurred on I-64 west near Exit 8 at the location of the 16th Street overpass bridge. She stated that a section of the bridge was closed for replacement. The sign in question was a merge sign, notifying travelers that the two-lane road became a one-lane road in this area. Ms. Pullen stated that a contractor was performing road work in this area, and Respondent was not involved in placing the traffic control sign at this location. Ms. Pullen stated that Respondent did not have notice of this hazard.

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, Claimant must prove that Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways*, 16 Ct. Cl. 8 (1985); *Chapman v. Dep't of Highways*, 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that the sign was not adequately secured at the time of this incident. *See Grange v. Div. of Highways*, CC-09-0629. Since a contractor was responsible for the installation of the sign, Respondent may seek indemnity from the contractor for the amount of this claim. Thus, Claimants may make a recovery for the damage to their vehicle.

It is the opinion of the Court of Claims that the Claimants should be awarded the sum of $100.00.

Award of $100.00.

OPINION ISSUED OCTOBER 8, 2010

BRYAN A. POWELL
V.

DIVISION OF HIGHWAYS
(CC-08-0087)

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 Ford F-150 pickup truck struck a piece of concrete while he was traveling westbound on the Interstate 64 bridge, near Milton, Cabell County. I-64 at the interstate bridge is an interstate highway maintained by Respondent. The Court is of the opinion to deny this claim for the reasons more fully set forth below.

The incident giving rise to this claim occurred on December 29, 2007, at approximately 9:45 a.m. The speed limit on I-64 at the interstate bridge is sixty-five miles per hour. On the morning in question, Claimant was traveling on Interstate 64 at approximately seventy miles per hour when he came upon a piece of concrete the size of a halved basketball laying in the left lane of the roadway in which he was traveling. Although Claimant tried to avoid the piece of concrete, he was unable to do so because there were vehicles traveling in the other lane. Claimant testified that he noticed a hole in the pavement and believed that another vehicle could have hit the hole, causing the piece of concrete to come out of the hole and onto the road surface. As a result of this incident, Claimant's vehicle sustained damage to its right front tire and wheel in the amount of $681.74.

The position of the Respondent is that it did not have notice of the piece of concrete on I-64. Ms. Charlene Pullen, I-64 Supervisor for Respondent in Huntington, testified that she is familiar with the area where this incident occurred. The DOH 12s, records of Respondent's daily work activities, indicate that Respondent had patched the holes on I-64 with cold mix on December 21, 2007, and Respondent patched the hole in question in response to an emergency call on December 29, 2007.

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. *Pritt v. Dep't. of Highways*, 16 Ct. Cl. 8 (1985); *Chapman v. Dep't. of Highways*, 16 Ct. Cl. 103 (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 Interstate 64. The Court finds that Respondent responded to this incident as soon as it was made aware of the problem. While the Court is sympathetic to the 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 8, 2010

JENNIFER BAYS
V.
DIVISION OF HIGHWAYS
(CC-09-0490)

Claimant appeared *pro se*.
C. Brian Matko, Attorney at Law, for Respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when her 2007 Dodge Caliber struck uneven sections of pavement on State Route 10 in Logan County. State Route 10 is a public 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 p.m. on June 29, 2009. State Route 10 is a paved, two-lane road with a yellow center line and white edge lines. The speed limit is fifty-five miles per hour. At the time of the incident, Claimant was traveling north on State Route 10, with Jeremy Frazier as a passenger in the vehicle. Claimant was driving at approximately fifty-five miles per hour at Three Mile Curve when her vehicle struck uneven sections of pavement. Claimant stated that there were portions of the pavement that had been removed from the road, creating a drop of approximately four inches from the surface of the highway. Jeremy Frazier testified that there were three cuts in the roadway that were situated approximately forty to fifty feet apart from each other, and each cut extended from the yellow center line to the white edge line. Mr. Frazier stated that he had seen DOH employees working in this area the week prior to the incident. Claimant traveled on this road approximately one week prior to the incident but did not notice any road work at that time. Both the Claimant and Mr. Frazier stated that there were no warning signs at this location. As a result of this incident, Claimant's vehicle sustained damage to four tires, rims, struts, and the sway bar in the amount of $1,978.55. Claimant had liability insurance only 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 State Route 10. Ronnie Stollings, Crew Leader for Respondent in Logan County, testified that he is familiar with the area where Claimant's incident occurred. He stated that Respondent was engaged in milling activities on June 29, 2009. He explained that Respondent's crews were unable to fill the cuts in the road on that day because the asphalt plant was not open. The DOH 12, a record of Respondent's daily work activity, indicates that there were flaggers at the location of the cuts to warn the traveling public. In addition, Mr. Stollings stated that Respondent had placed "Rough Road" signs at that location. He stated that Respondent's crews stopped working at 5:30 p.m. that day, and when he left the work area, the signs were in place. He did not notice that one of the signs had been knocked down until the following day.

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, Claimant must prove that Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways*, 16 Ct. Cl. 8 (1985); *Chapman v. Dep't of Highways*, 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that the Claimant was not adequately warned of the uneven sections of pavement on State Route 10. Although Respondent had placed warning signs in this area, the signs were not adequately secured at the time of this incident. Thus, the Court finds Respondent negligent, and Claimant may make a recovery for her loss.

It is the opinion of the Court of Claims that the Claimant should be awarded the sum of $1,978.55.

Award of $1,978.55.

OPINION ISSUED OCTOBER 8, 2010

GARY ALLEN SWEENEY
V.
DIVISION OF HIGHWAYS
(CC-09-0127)

Claimant appeared *pro se*.
C. Brian Matko, Attorney at Law, for Respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when a rock fell on his 2003 GMC Yukon on State Route 10 in Logan County. State Route 10 is a public 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 5:20 p.m on February 27, 2009. State Route 10 is a paved, four-lane road with two lanes traveling in each direction. At the time of the incident, Claimant's wife, Jennifer Sweeney, the operator of the Yukon, was traveling eastbound on State Route 10 at approximately forty miles per hour. A rock cliff, created by the Respondent while widening State Route 10, was located to the right of Mrs. Sweeney's lane of travel, and a two-foot high concrete barrier had been erected by Respondent between the cliff and the roadway, in an effort to prevent falling rocks from rolling onto the road.

As Mrs. Sweeney was proceeding past the rock cliff, she heard a rock fall onto the back of the vehicle. Ms. Sweeney stated that she never saw the rock and only heard the noise. When she reached her destination, she noticed an indentation on the top of the vehicle. Ms. Sweeney travels on State Route 10 approximately once every two weeks and every third time she travels on this road, she has seen rocks on the roadway. As a result of the incident, Claimant's vehicle sustained body damage in the amount of $653.52. Claimant had an insurance deductible of $1,000.00.

The position of the Respondent is that it did not have actual or constructive notice of the condition on State Route 10 in Logan County. Troy Belcher, Supervisor One for Respondent in Logan County, testified that he is familiar with State Route 10 and stated that it is a heavily traveled highway. He testified that there is an 8-foot wide berm with a concrete barrier adjacent to the roadway at this location to prevent rocks from falling onto the road. He testified that rocks fall onto the roadway on State Route 10 approximately once a year. He explained that cold weather and rain affect the frequency of rock falls. Mr. Belcher is not aware of any other rock falls on this

road. He further stated that the rock cliff was not terraced 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). This Court has consistently held that the unexplained falling of a boulder or rock debris on the road surface in insufficient to justify an award. *Coburn v. Dep't of Highways*, 16 Ct. Cl. 68 (1986). In order to establish liability on behalf of Respondent, the evidence must establish that Respondent had notice of the dangerous condition posing the threat of injury to property and a reasonable amount of time of take suitable action to protect motorists. *Alkire v. Div. of Highways*, 21 Ct. Cl. 173 (1997).

In the instant case, the Court is of the opinion that Respondent has failed to take adequate measures to prevent rock falls on this heavily traveled road. The rock cliff is not terraced, and there is no netting to keep rocks off the roadway. The Court finds that the two foot concrete barrier is insufficient to protect the traveling public from rock falls at this location. 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 as stated herein above, it is the opinion of the Court of Claims to make an award in the amount of $653.52.

Award of $653.52.

OPINION ISSUED OCTOBER 8, 2010

TARA LESTER
V.
DIVISION OF HIGHWAYS
(CC-09-0635)

Claimant appeared *pro se*.
C. Brian Matko, Attorney at Law, for Respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when her 2007 Chevrolet Cobalt struck a dead deer on US Route 119 in Logan County. US Route 119 is a public 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 6:30 a.m. on November 16, 2009. US Route 119 is a paved, four-lane road with a speed limit of sixty-five miles per hour. Claimant was traveling in the left lane at approximately sixty-five miles per hour when her vehicle struck a dead deer on the road. Claimant was unable to avoid the dead deer due to the fact that there was a cement wall adjacent to her lane of travel and a vehicle with its flashers lit was parked on the side of the road. Claimant could not establish that Respondent was alerted of the presence of the dead deer on the road prior to her incident. As a result of this incident, Claimant's vehicle sustained damage in the amount of $4,139.27. Claimant's

insurance deductible was $1,000.00.

The position of the Respondent is that it did not have actual or constructive notice of the dead deer on US Route 119. Michael Spry, Transportation Crew Supervisor for Respondent in Mingo County, testified that Respondent was not notified of the dead deer on the roadway 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. *Pritt v. Dep't of Highways*, 16 Ct. Cl. 8 (1985); *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 dead deer which Claimant's vehicle struck on US Route 119 prior to the Claimant's incident. Therefore, 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 OCTOBER 8, 2010

STEVEN A. HARMON
V.
DIVISION OF HIGHWAYS
(CC-10-0042)

Claimant appeared *pro se*.
C. Brian Matko, Attorney at Law, for Respondent.

PER CURIAM:

Claimant brought this action for vehicle damage when a rock slide occurred on State Route 49 in Lynn, Mingo County, causing damage to his 2000 Chevrolet S-10 truck. State Route 49 is a public 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 4:35 a.m. on December 23, 2009. State Route 49 is a paved, two-lane road with a yellow center line and white edge lines. At the time of the incident, Claimant was driving to work. As he was traveling around a curve in the right lane of travel, rocks fell onto the roadway approximately fifty feet from the top of the hill side to his left. One of the rocks that fell onto the roadway was the size of a 4-wheeler. Claimant testified that there were no warning signs in this area. After the incident, the Claimant stayed at the scene of the rock slide to warn other drivers of this hazard. Claimant stated that he travels this road on a regular basis, and this was the first rock slide that he had seen in this area. Claimant incurred towing expenses, and his vehicle sustained damage to its two tires, idle arm, front bumper air dam, and inspection plate, totaling $542.00.

Claimant had only liability insurance coverage.

The position of the Respondent is that it did not have actual or constructive notice of the condition on State Route 49 in Mingo County. Michael Spry, Transportation Crew Supervisor for Respondent in Mingo County, testified that he is familiar with this rock slide incident. It was declared that Mingo County was in a state of emergency due to the snow storm that had occurred that week. The DOH 12, a record of Respondent's daily work activity, indicates that Respondent received an emergency call and responded to the rock slide on December 23, 2009. There were no rock fall warning signs 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 v. Sims*, 130 W.Va. 645; 46 S.E.2d 81 (1947). This Court has consistently held that the unexplained falling of a boulder or rock debris on the road surface in insufficient to justify an award. *Coburn v. Dep't of Highways*, 16 Ct. Cl. 68 (1986). In order to establish liability on behalf of Respondent, the evidence must establish that Respondent had notice of the dangerous condition posing the threat of injury to property and a reasonable amount of time of take suitable action to protect motorists. *Alkire v. Div. of Highways*, 21 Ct. Cl. 173 (1997).

In the instant case, the Court finds that Respondent did not have notice of the rock slide on State Route 49. Rock slides are infrequent in this area. Respondent responded to this incident as soon as it was made aware of the problem. Thus, there is insufficient evidence of negligence on the part of Respondent upon which to base an award.

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

Claim disallowed.

OPINION ISSUED OCTOBER 19, 2010

ROBERT C. MEANS
V.
DIVISION OF HIGHWAYS
(CC-09-0354)

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

PER CURIAM:

The Claimant brought this action for vehicle damage which occurred when his 2004 Ford Focus struck a series of holes on the entrance ramp onto State Route 2 near Benwood, Marshall County. State Route 2 is a public road 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 incident giving rise to this claim occurred between 8:30 and 9:00 a.m. on June 24, 2009. State Route 2 has a speed limit of forty-five miles per hour. At the time of the incident, the Claimant was traveling north on State Route 2 and was driving within the speed limit. The Claimant stated that road work was being performed in this area to replace the road's center dividers. Although State Route 2 is a two-lane road, the traffic was limited to one lane due to the construction. As the

Claimant was traveling onto the interstate from the entrance ramp from McMechen, his vehicle struck holes in the road. The Claimant stated that he was driving up the hill and was unable to see the holes due to the incline. The Claimant tried to avoid the holes but was unable to do so. The Claimant did not recall which hole caused the damage to his vehicle, but he stated that the holes were approximately six inches wide and between eight to ten inches deep. He stated that he had not traveled on the road while it was under construction. As a result of this incident, the Claimant's vehicle sustained damage to its front, passenger side tire in the amount of $116.60.

The position of the Respondent is that it did not have actual or constructive notice of the condition on State Route 2 near Benwood in Marshall County. Rick D. Poe, County Administrator for the Respondent in Marshall County, testified that he is familiar with the area where the Claimant's incident occurred. He stated that Karl Kelley Paving & Construction, a contractor, was replacing the median wall at this location. Mr. Poe further stated that the contractor had placed "road construction" signs, "single lane ahead" signs, and barrels in this area. Mr. Poe testified that the Respondent had received complaints regarding the general condition of the roadway, but he did not recall receiving complaints regarding the series of holes that Claimant's vehicle struck. He stated that Larry Jones, an inspector for the Respondent, was responsible for contacting the contractor and having the contractor repair defective roadway conditions. If the contractor was unavailable, then the Respondent would perform the repairs.

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 the Respondent liable for road defects of this type, a Claimant must prove that the Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dept of Highways*, 16 Ct. Cl. 8 (1985); *Chapman v. Dept of Highways*, 16 Ct. Cl. 103 (1986).

In the instant case, the Court finds that the Respondent had, at the least, constructive notice of the condition of the roadway on State Route 2. The Court finds that although a contractor was performing maintenance at this location, the Respondent was also responsible for patching holes on this road. Since the road was in disrepair at the time of this incident, the Court finds the Respondent negligent. Thus, the Claimant may make a recovery in this claim in the amount of $116.60.

It is the opinion of the Court of Claims that the Claimant should be awarded the sum of $116.60.

Award of $116.60.

OPINION ISSUED OCTOBER 19, 2010

RONALD L. TAYLOR
V.
DIVISION OF HIGHWAYS
(CC-09-0313)

Claimant appeared *pro se*.
C. Brian Matko, Attorney at Law, for Respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when his 1998 Plymouth Voyager struck an inlet grate as he was traveling on US Route 219 in Pocahontas County. US Route 219 is a public 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 1:00 p.m. and 1:30 p.m. on June 17, 2009. Claimant was traveling on US Route 219 when he drove on an uneven section of pavement which caused his vehicle to veer towards the side of the road and strike a deep inlet grate. The road did not have edge lines at that time. As a result of this incident, Claimant's vehicle sustained damage to its transmission in the amount of $2,930.90. Since Claimant's insurance deductible was $500.00, 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 US Route 219 at the time of the incident. Kevin Guy Lewis, Construction Inspector for Respondent, testified that he is responsible for ensuring that contractors hired by Respondent perform their work according to Respondent's specifications. He stated that, at the time of Claimant's incident, a contractor was paving approximately three and a half miles of US Route 219, which is a primary road in terms of its maintenance. Mr. Lewis placed an orange and white striped barrel at the location of the inlet on June 11, 2009. He testified that someone removed the barrel from that location, but he could not recall the date when he first realized that the barrel was missing. James McCoy, Pocahontas County Administrator for Respondent, testified that he received a call from the Claimant on June 17, 2009, regarding this incident, and Respondent's crews re-placed a safety barrel and installed delineators at the location of the inlet grate. Prior to June 17, 2009, Respondent did not have notice that the barrel had been removed from the site of the inlet grate.

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, Claimant must prove that Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dept of Highways*, 16 Ct. Cl. 8 (1985); *Chapman v. Dept 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 exposed inlet grate. Since this incident occurred on a primary road and the exposed inlet grate created a hazard to the traveling public, the Court finds Respondent negligent. Thus, Claimant may recover for the damages sustained to his vehicle.

It is the opinion of the Court of Claims that the Claimant should be awarded the sum of $500.00.

Award of $500.00.

OPINION ISSUED OCTOBER 19, 2010

MONICA BAYLES AND BILLY JOE BAYLES
V.
DIVISION OF HIGHWAYS

(CC-09-0569)

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 October 21, 2009, Claimants were traveling on Route 77 in Williamstown in Wood County, when their vehicle struck a hole causing damage to a tire.

2. Respondent is responsible for the maintenance of this area which it failed to maintain properly on the date of this incident.

3. As a result, Claimants' vehicle sustained damage in the amount of $310.62. Claimant's insurance deductible was $250.00.

4. Respondent agrees that the amount of $50.00 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 77 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 to the Claimants in the amount of $50.00.

Award of $50.00.

OPINION ISSUED OCTOBER 19, 2010

ALBERT H. POSTLEWAIT JR.
V.
DIVISION OF HIGHWAYS
(CC-09-0411)

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

PER CURIAM:

The Claimant brought this action for vehicle damage which occurred when his 2001 Chevrolet Impala struck a hole on North Fork Road, designated as County Route 9, in Wheeling, Ohio County. County Route 9 is a public road maintained by the 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 1:00 p.m. on October 29, 2008. At the time of the incident, the Claimant was turning onto County Route 9 from County Route 1. He was towing a four by six foot trailer behind his vehicle. The trailer weighed approximately 235 pounds and was carrying a load of 1,000 pounds. The Claimant stated that this was not the first time that he had hauled

a load of this weight with the vehicle. As he drove around the turn and onto County Route 9, the vehicle and trailer struck a hole in the road, damaging the trailer's tire and rim. The hole was approximately 61 inches long, 24 inches wide, and between 5 and 8 inches deep. The Claimant proceeded to drive home, which was approximately four miles away. When he reached the driveway to his residence, the transmission locked up. The vehicle was towed to Warble Transmission LLC, where the Claimant had the transmission repaired. The Claimant testified that he was not familiar with this road. As a result of this incident, the Claimant seeks to recover $52.99 for the damage to the trailer's rim and tire, $50.00 in towing expenses, and $1,828.50 for the costs associated with repairing the vehicle's transmission. Thus, the Claimant's damages total $1,931.49. The Claimant also seeks to recover interest, but interest is not recoverable in claims of this nature. The Claimant had liability insurance only.

The Respondent admits liability in this claim but contests the Claimant's damages. The Respondent contends that the Claimant caused the damage to his vehicle's transmission when he continued to drive the vehicle for four miles when the trailer had a flat tire. The Claimant could have called a wrecker service instead of placing a strain on the vehicle's transmission.

The Court finds that the Claimant is entitled to recover the damages that were proximately caused by the Respondent's negligent maintenance of County Route 9, which include the costs associated with repairing the tire and rim, totaling $52.99. The Claimant is not entitled to recover the cost of towing the vehicle due to the transmission failure or for repairing the vehicle's transmission. The Court finds that the transmission was damaged due to the strain that the Claimant placed on the vehicle by driving it home for four miles after the trailer's tire was damaged. The Respondent's liability is limited to only such harms that are related to the Respondent's negligence. The transmission costs and towing expense are not within the scope of the Respondent's liability.

It is the opinion of the Court of Claims that the Claimant should be awarded the sum of $52.99.

Award of $52.99.

OPINION ISSUED OCTOBER 19, 2010

STEVE OBERMEYER
V.
DIVISION OF HIGHWAYS
(CC-09-0365)

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 Blazer struck a ditch that was situated outside of the white edge line on Cross Lanes Drive. Cross Lanes Drive is a public road maintained by the 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 8:15 a.m. on

July 18, 2009. Cross Lanes Drive is a paved, two-lane road with a double yellow line and white edge lines. The speed limit is 35 miles per hour. At the time of the incident, the Claimant was driving from Poca to Cross Lanes at approximately 45 miles per hour. The Claimant was traveling eastbound on Cross Lanes Drive under windy conditions when the vehicle drifted outside the road's white edge line and struck a ditch. Although there was oncoming traffic, the other vehicle did not cross the road's double yellow line. The Claimant stated that he was talking on his cellular phone at the time of the incident. The Claimant testified that he does not travel on Cross Lanes Drive on a regular basis and was not aware of the condition of the road prior to this incident. As a result, the Claimant's vehicle was totaled. The Claimant's insurance deductible was $500.00.

The position of the Respondent is that it did not have actual or constructive notice of the condition on Cross Lanes Drive at the time of the incident. Danny L. Tucker testified that he is currently the Highway Administrator for Respondent in the North Charleston area. Prior to this position, Mr. Tucker was the Crew Supervisor for Respondent in Putnam County. Mr. Tucker testified that he is familiar with Cross Lanes Drive and stated that it is a well-maintained road. Mr. Tucker does not recall any instances of high wind during July of that year. He stated that the ditch was located off of the roadway. He testified that each lane of travel was between 12 and 14 feet wide, and there were no defects on the travel portion of the road. He testified that a heavy rain could have caused the road's white edge line to have washed out in this area, but he was not aware of the road's condition 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 the Respondent liable for road defects of this type, the Claimant must prove that the Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways*, 16 Ct. Cl. 8 (1985); *Chapman v. Dep't of Highways*, 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that the Claimant's vehicle drifted too far over onto the side of the road. The Court has previously held the Respondent liable where the driver of the vehicle was forced to use the berm in an emergency situation, and the berm was in disrepair. *See Handley v. Division of Highways*, CC-08-0069 (Issued October 6, 2008); *Warfield v. Division of Highways*, CC-08-0105 (Issued August 4, 2008). The Court cannot hold the Respondent liable for failure to maintain the berm when the berm was not used in an emergency situation. The Claimant had more lane width than usual on this particular roadway to avoid the hazard at the edge of the road. Thus, there is insufficient evidence of negligence on the part of the Respondent upon which to base an award.

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

Claim disallowed.

OPINION ISSUED OCTOBER 19, 2010

LINDA K. MARCUM,
Administrator of the Estate of Stephanie Marcum
V.
DIVISION OF HIGHWAYS

(CC-08-0192)

Edwin E. Schottenstein, Scott Messer, and Brian L. Ooten, Attorneys 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. Respondent is responsible for the maintenance of the Crum 4 Lane, which is a four lane by-pass road located in or near Crum, Wayne County, West Virginia.

2. Linda K. Marcum is the mother of Stephanie Marcum, the administrator of Stephanie Marcum's estate and the sole heir and beneficiary of any settlement paid in this claim.

3. On or around April 27, 2006, Stephanie Marcum was operating her motor vehicle on the Crum 4 Lane when she was unexpectedly confronted by a very sharp curve which resulted in her vehicle striking a low lying rock cliff located just off the roadway.

4. Stephanie Marcum was killed as a result of the accident.

5. The sharp curve where Stephanie Marcum's accident occurred is approximately ninety degrees (90°).

6. The low lying rock cliff that Stephanie Marcum's vehicle struck is located immediately off the road at the point where a vehicle is coming out of the curve.

7. Although the West Virginia Uniform Traffic Crash Report for Stephanie Marcum's accident makes a reference to open containers of alcohol being in Stephanie Marcum's vehicle, the laboratory/toxicology report for Stephanie Marcum was negative for both alcohol and drugs.

8. The death certificate for Stephanie Marcum lists the cause of death as blunt force trauma as a result of her vehicle striking the rock cliff.

9. Claimant alleges that Respondent was negligent in its maintenance, marking and signing of the portion of the Crum 4 Lane where Stephanie Marcum's accident occurred.

10. Under the specific facts and circumstances of this claim and for purposes of settlement of said claim, Respondent acknowledges responsibility for the accident involving Stephanie Marcum.

11. Both the Claimant and Respondent agree that in this particular incident and under these particular circumstances that an award of Nine Hundred Fifty Thousand Dollars ($950,000.00) would be a fair and reasonable amount to settle this claim.

12. In agreeing to settle this claim for Nine Hundred Fifty Thousand Dollars ($950,000.00), Respondent has factored into its agreement to settle the claim the issue of whether or not Ms. Marcum was wearing a seatbelt at the time of the accident.

13. The parties to this claim agree that the total sum of Nine Hundred Fifty Thousand Dollars ($950,000.00) to be paid by Respondent to the Claimant in Claim No. CC-08-0192 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, marking, and signing of the portion of Crum 4 Lane in

or near Crum, Wayne County, where Stephanie Marcum's accident occurred; that the negligence of Respondent was the proximate cause of the accident leading to Stephanie Marcum's death; 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.

It is the opinion of the Court of Claims that the Claimant should be awarded the sum of Nine Hundred Fifty Thousand Dollars ($950,000.00) in this claim.

Award of $950,000.00.

OPINION ISSUED OCTOBER 19, 2010

ANGELA WALTERS
V.
ATTORNEY GENERAL'S OFFICE
(CC-10-0530)

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.

The Claimant, an Assistant Attorney General, seeks to recover $2,740.00 that is owed to her due to an error in her increment pay that occurred from July 2003 through July 2009.

In its Answer, Respondent admits the validity of the claim as well as the amount and further states that the amount claimed is fair and reasonable. Sufficient funds to pay the claim were not appropriated for the fiscal year in question.

It is the opinion of the Court of Claims that the Claimant should be awarded the sum of $2,740.00.

Award of $2,740.00. .

OPINION ISSUED OCTOBER 29, 2010

LINDA K. MARCUM,
Administrator of the Estate of Stephanie Marcum
V.
DIVISION OF HIGHWAYS
(CC-08-0192)

Edwin E. Schottenstein, Scott Messer, and Brian L. Ooten, Attorneys 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. Respondent is responsible for the maintenance of the Crum 4 Lane, which

is a four lane by-pass road located in or near Crum, Wayne County, West Virginia.

2. Linda K. Marcum is the mother of Stephanie Marcum, the administrator of Stephanie Marcum's estate and the sole heir and beneficiary of any settlement paid in this claim.

3. On or around April 27, 2006, Stephanie Marcum was operating her motor vehicle on the Crum 4 Lane when she was unexpectedly confronted by a very sharp curve which resulted in her vehicle striking a low lying rock cliff located just off the roadway.

4. Stephanie Marcum was killed as a result of the accident.

5. The sharp curve where Stephanie Marcum's accident occurred is approximately ninety degrees (90°).

6. The low lying rock cliff that Stephanie Marcum's vehicle struck is located immediately off the road at the point where a vehicle is coming out of the curve.

7. Although the West Virginia Uniform Traffic Crash Report for Stephanie Marcum's accident makes a reference to open containers of alcohol being in Stephanie Marcum's vehicle, the laboratory/toxicology report for Stephanie Marcum was negative for both alcohol and drugs.

8. The death certificate for Stephanie Marcum lists the cause of death as blunt force trauma as a result of her vehicle striking the rock cliff.

9. Claimant alleges that Respondent was negligent in its maintenance, marking and signing of the portion of the Crum 4 Lane where Stephanie Marcum's accident occurred.

10. Under the specific facts and circumstances of this claim and for purposes of settlement of said claim, Respondent acknowledges responsibility for the accident involving Stephanie Marcum.

11. Both the Claimant and Respondent agree that in this particular incident and under these particular circumstances that an award of Nine Hundred Fifty Thousand Dollars ($950,000.00) would be a fair and reasonable amount to settle this claim.

12. In agreeing to settle this claim for Nine Hundred Fifty Thousand Dollars ($950,000.00), Respondent has factored into its agreement to settle the claim the issue of whether or not Ms. Marcum was wearing a seatbelt at the time of the accident.

13. The parties to this claim agree that the total sum of Nine Hundred Fifty Thousand Dollars ($950,000.00) to be paid by Respondent to the Claimant in Claim No. CC-08-0192 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, marking, and signing of the portion of Crum 4 Lane in or near Crum, Wayne County, where Stephanie Marcum's accident occurred; that the negligence of Respondent was the proximate cause of the accident leading to Stephanie Marcum's death; 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.

It is the opinion of the Court of Claims that the Claimant should be awarded the sum of Nine Hundred Fifty Thousand Dollars ($950,000.00) in this claim.

Award of $950,000.00.

OPINION ISSUED NOVEMBER 17, 2010

BRUCE L. WILEY
V.
DIVISION OF HIGHWAYS
(CC-06-0154)

Claimant appeared *pro se*.
C. Brian Matko, Attorney at Law, for Respondent.

PER CURIAM

Claimant seeks to recover $2,253.71 for structural damage to the bridge located on his residential property at 3980 Main Hewett Creek in Logan County.[23] The claim was heard on June 10, 2010, after which this matter was taken under advisement. The Court has reviewed the entire record in this action, including the transcript of the hearing, and is of the opinion that the claim should be denied.

Claimant has a private bridge which crosses from State Route 7 over Hewett Creek and onto his property in order to access his residence. State Route 7, a primary two-lane road, runs parallel to Hewett Creek for approximately three or four miles. An eight-inch gas main stretches across Hewett Creek at an angle and is located upstream from the Claimant's property. The gas main extends from the Ison Bridge past the Claimant's bridge, where it then extends under the road.

Kathleen Ragan, who has resided with the Claimant on the property since 2006, testified that, in her opinion, Respondent is responsible for the structural damage to the bridge on the Claimant's property. She stated that in August of 2005, the Respondent, during its mowing activities, cut brush from the creek bank on State Route 7 and negligently discarded debris into Hewett Creek. Ms. Ragan contends that the debris accumulated along the gas main on Hewett Creek, and diverted the water. She further asserts that the water washed out the creek bank at the location of the Claimant's bridge, and the bridge's pillars were damaged as a result of the erosion.

Ms. Ragan testified that the erosion that occurred at the pillars of the Claimant's bridge was also the result of a flood event in May of 2006. Prior to the flood event, the creek bank covered a portion of the bridge's square pillars. Although Ms. Ragan was not present during the flood event in May of 2006, she stated that she visited the property the weekend after the flood, and she noticed that the water had risen to the top of the Claimant's bridge. She observed that the pillars had further shifted away from the bank, and the bridge's pillars had weakened due to the lack of support from the creek bank.

Ms. Ragan also testified that the Claimant has had problems with small amounts of debris accumulating at the gas main in Hewett Creek whenever the water rises due to a rain event. Ms. Ragan stated that the build-up of debris has been a continuous problem.

Troy Belcher, Supervisor One for Respondent, testified that Respondent is not responsible for the accumulation of debris at this location. He testified that Respondent's crews perform mowing activities twice a year on State Route 7. He stated that Respondent's crews never discard debris into the creek. Large debris is

[23]The Claimant has resided at this location for forty-four years. He acquired the property from his parents in 2002.

chopped into finer pieces. He stated that the type of brush that accumulated at the gas pipe was not the same type of brush generated from Respondent's mowing activities. He observed that garbage, paper, and other objects have collected at the gas main.

Ronnie Stollings testified that he is currently the Superivsor One Crew Leader for Respondent in Logan County. During the summer of 2005 and spring of 2006, he was an Equipment Operator Three and operated the mower along State Route 7.[24] Mr. Stollings stated that he never discarded brush into the creek. If he came across larger brush, he would mow it into smaller pieces and lay it on the creek bank. He stated that it is not Respondent's responsibility to collect naturally occurring debris on the creek bank. He testified that seventy-percent of the debris in this area is naturally occurring debris or man-made debris. He stated that the only way that debris from Respondent's mowing activities could have entered the creek is if the water rose and washed the debris off of the bank.

Kevin Quinlan, Investigator for Respondent's Legal Division, assisted in the investigation of this matter. Prior to working for Respondent, Mr. Quinlan was a member of the the West Virginia State Police and was assigned numerous duties including working on flood details. He was also trained as an underwater scuba search and rescue diver. In his experience, a creek will carry debris downstream from the hill side to the creek's lowest point. He stated that if debris is left on the creek bank and the level of water in the creek rises, the water will carry the debris downstream.

In order for the Claimant to receive an award in this claim, the Claimant must establish that Respondent is legally responsible for the accumulation of debris on the gas main in Hewett Creek, which the Claimant alleges diverted the water and washed out the creek bank. The Claimant has failed to meet this burden. There is no credible evidence that the brush left on the side of the creek bank during Respondent's mowing activities was the proximate cause of the damage to the Claimant's bridge. It is unclear to the Court what caused the erosion at this location. The Court finds that a rain event could have been responsible for washing out the creek bank irrespective of the debris at this location. Since the Court cannot engage in speculation in determining what caused the damage to the Claimant's bridge, the Court finds 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 as stated herein, the Court is of the opinion to and does deny this claim.

Claim disallowed.

OPINION ISSUED NOVEMBER 17, 2010

PAULA E. BARKER AND GREGORY A. BARKER
V.
DIVISION OF HIGHWAYS
(CC-08-0002)

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[24]The DOH 12s, records of Respondent's daily work activities, indicate that Mr. Stollings had mowed on State Route 7 on August 2, 2005; August 3, 2005; August 4, 2005; August 10, 2005; August 11, 2005; August 23, 2005; August 24, 2005; August 25, 2005; September 6, 2005; and September 8, 2005.

Claimants appeared *pro se*.
C. Brian Matko, Attorney at Law, for Respondent.

PER CURIAM.

Claimants brought this action for damage to their residential property. The Court heard the claim on June 9, 2010, after which the matter was taken under advisement. The Court has reviewed the entire record in this action, including the transcript of the hearing, and is now of the opinion that the claim should be denied.

Claimants reside at 112 Armory Road, which is located in Monaville, Logan County, West Virginia. Their one acre lot consists of the residence and certain other improvements, including an in-the-ground swimming pool. Island Creek crosses under Armory Road at that place and is the side boundary line of Claimants' property. A lesser creek, the "tributary stream," constitutes Claimants' rear lot line and flows into Island Creek at the rear corner of the subject lot.

On April 15, 2007, at 1:30 a.m., muddy water flooded Claimants' property, resulting in the damages complained of. The principal complaint is that the flood water collapsed the cover of the swimming pool and filled it with mud. Claimants dug the mud out by hand to avoid shovel marks on the pool liner.

Claimants produced evidence that their damages totaled $1,603.99. However, on April 18, 2007, their comprehensive coverage deductible was $1,000.00. Thus, $1,000.00 is the maximum amount that the Court could award in this claim.

In order for the Claimants to receive an award in this claim, they have the burden of establishing that Respondent is legally responsible for the flooding of their property. This they failed to do.

Claimant Paula E. Barker was the only witness called by the Claimants at the hearing. She testified as follows:

Although it had been raining for more than one day, when her property flooded, at 1:30 a.m. on April 15, 2007, Island Creek had not come out of its banks. Thus, the water that flooded her property came from the area drained by the tributary stream.

A one-lane alley intersects Armory Road about ten houses from the Claimants' residence. That alley, locally known as Mountain Peak Road, goes into a hollow which is drained by the tributary stream and this tributary, at one point, flows through a culvert under the alley.

Ms. Barker opines that at some time shortly before 1:30 a.m. this particular culvert beneath the alley became blocked by mud and other debris, diverting the water in the tributary stream from its bed, through the hollow where it then flowed onto Claimants' property. She submitted these arguments to support this premise. First, a flood event occurred three years prior to 2007, when the Claimants were negotiating for the purchase of the subject property. She was told by the neighbors at that time that the cause of that prior incident was a blockage in the same culvert in the hollow during a heavy rainfall.

Second, the flood water at 1:30 a.m. suddenly rose "knee deep" in her yard. Third, the neighbors on April 15, 2007, again told Ms. Barker that the cause of her loss was the blockage of the culvert.

This Court cannot consider unsworn statements made out of the hearing

room by disinterested third parties as evidence in this case.[25] The Respondent must be given an opportunity to cross-examine such witnesses. Thus, the statements of the neighbors must be disregarded by the Court in rendering its decision, unless the neighbors appear at the hearing and submit to questioning by both parties under oath.

With the hearsay statements of the neighbors excluded, there remains no credible evidence as to what caused the flood on Claimants' property. Likewise, there is no credible evidence that the alley is part of the State Highway system, or that the culvert's maintenance is Respondent's responsibility, or that the culvert was in fact blocked. Respondent did not present a witness at the hearing with personal knowledge of any of these issues.

This Court has held that Respondent has a duty to provide adequate drainage of surface water, and drainage devices must be maintained in a reasonable state of repair. *Haught v. Dep't of Highways*, 13 Ct. Cl. 237 (1980). In claims of this nature, the Court will examine whether Respondent negligently failed to protect a Claimant's property from foreseeable damage. *Id.*

One other factor that also supports the position of the Court that there should be no recovery by the Claimants in this action. Ms. Barker testified that, before Claimants purchased the property, the exact same flooding occurred during a period of heavy rainfall. Her only justification for going ahead with the purchase of the property was that she and her husband "wanted the home." It could be said with some justification that Claimants, by proceeding with the purchase, may have assumed the risk of the flooding that occurred in 2007.

Thus, the Court concludes that Claimants have failed to establish that Respondent was responsible for the flood damages sustained to their property in 2007. In accordance with the findings of fact and conclusions of law as stated herein, the Court is of the opinion to and does deny this claim.

Claim disallowed.

OPINION ISSUED NOVEMBER 17, 2010
ERMA TATAR
V.
DIVISION OF HIGHWAYS
(CC-10-0013)

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

PER CURIAM:

The Claimant brought this action for vehicle damage which occurred when her 2008 Pontiac GT6 struck a hole on Mozart Road, designated as County Route 3, in Wheeling, Marshall County. County Route 3 is a public road 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 incident giving rise to this claim occurred at approximately 6:00 p.m. on December 26, 2009. County Route 3 is a paved, two-lane road with a yellow center line and no edge lines. The speed limit is twenty-five miles per hour. The Claimant

[25]This is known as "hearsay evidence."

was driving on Mozart Road when her vehicle struck a hole approximately 1/8 mile from the Mt. Olivet ball park. The Claimant was unable to see the hole before her vehicle struck it because it was dark and the hole was filled with water. As a result of this incident, the Claimant's vehicle sustained damage to a tire in the amount of $161.25. Since Claimant's insurance deductible at the time of the incident was $100.00, 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 hole on County Route 3. Rick D. Poe, Highway Administrator for Marshall County, testified that he is familiar with County Route 3 and stated that it is a second priority road in terms of its maintenance. Mr. Poe stated that he did not have notice of the hole at the time of the incident. He stated that the road was in poor condition in December of 2009, and the road has since been re-paved. Mr. Poe testified that during the winter months, cold mix is the only material available to patch holes, and it is 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 the Respondent liable for road defects of this type, a Claimant must prove that the Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways*, 16 Ct. Cl. 8 (1985); *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. Since County Route 3 was generally in poor condition, the Court finds the Respondent negligent. Thus, Claimant may make a recovery for the damage to her vehicle.

It is the opinion of the Court of Claims that the Claimant should be awarded the sum of $100.00.

Award of $100.00.

OPINION ISSUED DECEMBER 16, 2010

JUDITH ALLEN
V.
DIVISION OF HIGHWAYS
(CC-07-0329)

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

PER CURIAM:

Claimant brought this action for damage to her 2004 Pontiac Grand Prix. Two incidents occurred on different dates and at different locations on McCorkle Road, near Sod, Lincoln County. This road is maintained by the Respondent in Lincoln County. The Court is of the opinion to make an award in this claim for the reasons stated more fully below.

The first incident giving rise to this claim occurred on November 28, 2006, at approximately 11:30 a.m. Claimant, Judith Allen, testified that she was traveling south on McCorkle Road from her home in Sod, WV, when a black Chevrolet pickup

truck came around a curve on her side of the road. Ms. Allen stated that the portion of the road in question was narrow, and that she had to swerve off the road and into a drainage ditch to avoid colliding with the truck. As a result of the incident, Claimant's front passenger wheel was damaged in the amount of $652.91. Since Claimant's insurance declaration sheet indicates that her deductible is $500.00, Claimant's recovery is limited to that amount for this incident.

The second incident giving rise to this claim occurred on August 11, 2007, at approximately 2:00 p.m. Claimant testified that she was driving towards Alum Creek up an incline and around a steep curve on McCorkle Road when a dark pickup truck came around the curve at a high rate of speed across the double yellow line. According the Ms. Allen, she maneuvered her car off the berm to avoid the oncoming traffic. The berm at the area in question is jagged concrete and drops off steeply. The impact caused damage to the front passenger tire and rim. Claimant submitted an estimate for the repairs to the wheel in the amount of $1,657.84, along with receipts for $22.79 and $38.16 for work already done. Again, since Claimant's insurance deductible is $500.00, her recovery is limited to that amount for this incident.

Claimant contends that the Respondent failed to provide a safe and adequate berm at the location of both incidents on McCorkle Road. Claimant contends that the drainage ditch and steep drop off presented hazardous conditions and that they were the proximate cause of the damage to her vehicle.

Respondent's position is that it did not have notice of any hazardous condition regarding the berm at either location. Respondent did not provide 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 v. Sims*, 130 W.Va. 645; 46 S.E.2d 81 (1947). In order to hold Respondent liable for road defects of this type, Claimant must prove that Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways*, 16 Ct. Cl. 8 (1985); *Chapman v. Dep't of Highways*, 16 Ct. Cl. 103 (1986). The Court has previously held that the berm or shoulder area must be maintained in a reasonably safe condition for use when the occasion requires, and liability may ensue when a motorist is forced to use the berm in an emergency such as avoiding oncoming traffic. *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 steep berms that damaged Claimant's vehicle when she was forced off the road to avoid oncoming vehicles in both incidence, and that these conditions produced hazards to the traveling public.

Accordingly, the Court is of the opinion to and does make an award to the Claimant for each incident for a total award of $1,000.00.

Award of $1,000.00.

OPINION ISSUED DECEMBER 16, 2010

DEMPSEY JONES and VIRGINIA JONES
V.
DEPARTMENT OF ENVIRONMENTAL PROTECTION
(CC-08-0038)

Johnson W. Gabhart, Attorney at Law, for Claimants.
Jon C. Frame, 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. For several decades preceding June 23, 2003, Respondent agency leased from Claimants office space located at 1201 Greenbrier Street in Charleston, Kanawha County.

2. On or about June 23, 2003, the premises at issue were subjected to a flood and Respondent provided Claimants written notification of its intent to cancel the lease agreement.

3. Claimants allege that, based upon the terms of their agreement to cancel the lease, Respondent was obligated, but failed, to remove its equipment, furnishings, and trash from the premises, and repair certain damages.

4. Claimants contend that the cost to return the premises to the condition anticipated by the lease agreement totals $66,611.72.

5. Respondent admits that it agreed to pay for certain repairs, but denies liability for all the damages alleged by Claimants.

6. Claimants and Respondent agreed to stipulate that the amount of $27,500.00 would be a fair and reasonable amount to settle this claim.

The Court has reviewed the facts of the claim and finds that the amount of the damages 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 $27,500.00.

Award of $27,500.00.

OPINION ISSUED DECEMBER 16, 2010

TOMMY DALE POWERS AND EARNESTINE MESSER POWERS
V.
DIVISION OF HIGHWAYS
(CC-08-0159)

Ronald J. Rumora, Attorney at Law, for claimants.
C. Brian Matko, 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. Claimants own property located approximately one half mile up State Route 65/9.

2. Five Mile Creek runs between Claimants' property and State Route 65/9.

3. Respondent is responsible for the maintenance of State Route 65/9 in Mingo County.

4. In the mid-1980s the flow of Cartwright Branch, a small waterway that feeds into Five Mile Creek, was altered from entering a culvert located downstream

of the Claimants' property to entering a culvert, constructed by the Division of Highways, upstream of the Claimants' property.

5. Claimants asserted that as a result of where Cartwright Branch enters Five Mile Creek the banks of the creek adjacent to Claimants' property began to erode.

6. In either June or July 2006, in order to shore up the stream bank adjacent to State Route 65/9 and prevent further erosion, the Division of Highways installed gabion baskets along the banks of the creek directly across from the Claimants' property.

7. In May 2007, a heavy rain storm caused the water to rise in Five Mile Creek, which while insufficient to overflow the creek

3. As a result, claimants' vehicle sustained damage in the amount of $944.67. Claimants' insurance deductible was $500.00. Thus, claimants' recovery is limited to that amount.

4. Claimant and respondent agree that the amount of $1500.00 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 State Route 62 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 16, 2010

MARY GAIL JUSTICE
and CURTIS N. JUSTICE
V.
DIVISION OF HIGHWAYS
(CC-08-0382)

Claimants appeared *pro se*.

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

PER CURIAM:

Claimants brought this action for vehicle damage to their 2008 Toyota Camry when debris fell from the I-64 bridge construction site while Claimant Mary Justice traveled beneath it on State Route 60 in South Charleston, Kanawha County. State Route 60 and Interstate 64 are public roads 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 7:55 a.m. on August 4, 2008. At the time of the incident, Mrs. Justice was driving to work along State Route 60 in South Charleston, underneath the construction of the I-64 bridge. Claimant testified that before she drove beneath the bridge she observed workmen on top of the bridge and items hanging off the sides. As Claimant proceeded under the bridge she heard a loud thump, and although she was unable to identify the object that fell on her car she did not see anything in the road that she could have run over. Claimant proceeded to work, less than a mile away, without stopping, because

concrete barriers prevented her from pulling off the road. Claimant stated that, after arriving at work, one of her co-workers pointed out where something had fallen on the roof of her car. Immediately thereafter Mrs. Justice called the Respondent to report the incident and was instructed to contact the Court of Claims. As a result of this incident, Claimants' vehicle sustained damage to the roof in the amount of $494.38. Claimants' insurance declaration sheet indicates that their collision deductible is $1,000.00.

The position of the Respondent is that it did not have actual or constructive notice of the condition on Rt. 60 beneath the I-64 bridge construction prior to this incident. Barbara Engelhardt, Highway Administrator Two, testified that she is responsible for road safety. Ms. Engelhardt testified that she is familiar with the I-64 bridge construction, and indicated the construction was being performed by a third-party contractor. According to Ms. Engelhardt, all contracts between respondent and third-party contractors provide for an indemnification provision whereby the contractor assumes all liability during the construction process. Ms. Engelhardt stated that had she received Mrs. Justice's telephone call she would have referred her to the contractor.

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, Claimants must prove that respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways*, 16 Ct. Cl. 8 (1985); *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 that construction was taking place on the I-64 bridge above Rt. 60. Since the construction of the bridge created a hazard to the traveling public below, the Court finds respondent negligent. The Court is aware that respondent's agreement with the third-party contractor has an indemnity provision. Thus, respondent may seek to be reimbursed from the third-party contractor for any damages arising from this claim.

It is the opinion of the Court of Claims that the Claimants should be awarded the sum of $500.00.

Award of $500.00.

OPINION ISSUED DECEMBER 16, 2010

JUDY A. RIDENOUR
V.
DIVISION OF HIGHWAYS
(CC-09-0044)

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 Saturn Ion struck a hole on County Route 33, locally designated Bunners Ridge Road, in Fairmont, Marion County. County Route 33 is a public 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. in July of 2008. At the location of the incident, County Route 33 is a narrow two-lane road with one lane of traffic in each direction and a 15 mile per hour curve with a guardrail on the right side. Claimant testified that she travels this route regularly and was familiar with the defect in the pavement prior to the incident at issue, and usually maneuvers her vehicle around the hole by driving in the middle of the road. However, on the date in question, Claimant approached the hole in her lane when oncoming traffic approached in the opposite lane. Claimant stated that she could not avoid her vehicle striking the hole by driving to the right, because of the guardrail, or to the left, because of oncoming traffic, but she could not recall whether she would have been able to avoid the defect by braking her vehicle. As a result of this incident, Claimant's vehicle sustained damage to the front and rear driver's side rims, requiring their replacement and a wheel alignment in the amount of $324.85. Since Claimant's insurance declaration sheet indicates that her collision deductible is $250.00, her recovery is limited to that amount.

The position of the Respondentis that it did not have actual or constructive notice of the condition on County Route 33 at the time of the incident. Michael Roncone, Highway Administrator for Respondent in Marion County, testified that he is familiar with County Route 33 and the location of the defect struck by Claimant's vehicle. Mr. Roncone stated that at the time and location of the incident there was utility work in progress, which Respondent was waiting to be completed before paving 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 v. Sims*, 130 W.Va. 645; 46 S.E.2d 81 (1947). In order to hold Respondent liable for road defects of this type, Claimant must prove that Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dept of Highways*, 16 Ct. Cl. 8 (1985); *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 condition on County Route 33. Since the defect in the traveling portion of the road created a hazard to the traveling public, the Court finds Respondent negligent. However, in a comparative negligence jurisdiction, such as West Virginia, the negligence of a Claimant may reduce or bar recovery of a claim. In accordance with the finding of fact and conclusions of law stated herein above, the Court has determined that Claimant was 25% negligent for the incident that occurred. Since Respondent's negligence was greater than the negligence of Claimant, Claimant may recover seventy-five percent (75%) of her loss.

It is the opinion of the Court of Claims that the Claimant should be awarded the sum of $187.50.

Award of $187.50.

OPINION ISSUED DECEMBER 16, 2010

JANET SMITH
V.
DIVISION OF HIGHWAYS

(CC-09-0183)

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 2001 Jeep Grand Cherokee and her 2005 Dodge 1500 truck were damaged as a result of traveling on County Route 44 in Leon, Mason County. County Route 44 is a public 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 around November 9, 2008; December 16, 2008; February 17, 2009; and March 8, 2009. The speed limit on County Route 44 is 25 miles per hour. Although Claimant drives between five and ten miles per hour on County Route 44, she has been unable to avoid striking the holes with her vehicles due to the numerous holes on this road. Claimant lives off of County Route 44 and must take County Route 44 in order to leave her residence. As a result of these incidents, her vehicles have sustained damage in the amount of $1,081.91.

The position of the Respondent is that it did not have actual or constructive notice of the condition on County Route 44 at the time of the incident. Brian Herdman, Highway Administrator for Respondent in Mason County, testified that he was the Crew Supervisor for Respondent in Mason County at the time of this incident. He stated that County Route 44 is a tar and chip road, and it is a third priority in terms of its maintenance. County Route 44 does not fall within Respondent's Core Maintenance Plan, but it is a school bus route. According to Respondent's DOH12s, records of its daily work activities, Respondent had maintained County Route 44 on May 9, 2008; May 14, 2008; May 21, 2008; October 29, 2008; November 7, 2008; and November 17, 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, Claimant must prove that Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways*, 16 Ct. Cl. 8 (1985); *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. Since there were numerous holes on the road and County Route 44 is a school bus route, the Court finds Respondent negligent in its maintenance of this road. Thus, Claimant may make a recovery for the damage to her vehicle.

It is the opinion of the Court of Claims that the Claimant should be awarded the sum of $1,081.91.

Award of $1,081.91.

OPINION ISSUED DECEMBER 16, 2010

LARRY J. HAYES

V.
DIVISION OF HIGHWAYS
(CC-09-0445)

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 Chevrolet Cobalt struck a hole on Hillcrest Road, designated as County Route 23/1, in Fairmont, Marion County. Hillcrest Road is a public 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 August 24, 2009. Hillcrest Road is a curvy, hilly, and highly traveled secondary road that leads to Fairmont State University and Fairmont General Hospital. At the time of the incident, Claimant's wife, Patricia Belle Hayes, was driving home from Fairmont General Hospital. Mrs. Hayes testified that she drives Hillcrest Road infrequently, and the last time she drove the road - three weeks prior to this incident - she had not noticed the hole in question. Mrs. Hayes stated that she saw the hole before her vehicle struck it, but was unable to avoid it because there was oncoming traffic preventing her from swerving, and following traffic preventing her from stopping. As a result of this incident, Claimant's vehicle sustained damage to the front axle spindle and both front rims in the amount of $317.95. Claimant's insurance declaration sheet indicates that his collision deductible is $500.00.

The position of the Respondent is that it did not have actual or constructive notice of the condition on Hillcrest Road at the time of the incident. Michael Roncone, Highway Administrator for Respondent in Marion County, testified that he is familiar with Hillcrest Road, a secondary road. Mr. Roncone acknowledged that he was aware of a hole on Hillcrest Road prior to the date of the incident. However, according to Mr. Roncone, there had been rain in the area washing material out of the hole, and preventing Respondent crews from re-filling the hole.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims*, 130 W.Va. 645; 46 S.E.2d 81 (1947). In order to hold Respondent liable for road defects of this type, Claimant must prove that Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways*, 16 Ct. Cl. 8 (1985); *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 Hillcrest Road. Since a hole in the travel portion of the road created a hazard to the traveling public, the Court finds respondent negligent.

In view of the foregoing, it is the opinion of the Court of Claims that the Claimant should be awarded the sum of $317.95

Award of $317.95.

OPINION ISSUED DECEMBER 16, 2010
CORNELIOUS JONES

V.
DIVISION OF HIGHWAYS
(CC-09-0608)

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

PER CURIAM:

Claimant brought this action for vehicle damage that occurred when his 1997 Jaguar struck a one and a half inch discontinuity between the asphalt and metal expansion joint on I-64 East just prior to the Nitro bridge in Scott Depot, Kanawha County. Interstate 64 is a public 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 6:30 p.m. on September 27, 2009. At the time of the incident, Claimant, Cornelious Jones, was driving easthound on I-64 towards Charleston. The area in question is a two-lane road that converges with the St. Albans ramp on the right just prior to the Nitro bridge. Claimant testified that as he proceeded towards the bridge his vehicle struck a metal bridge joint protruding an inch and a half higher than the preceding pavement. Claimant stated that he did not see the gap between the asphalt and metal bridge until his vehicle was on top of it. Although Claimant travels this road on a daily basis, he had not encountered this hazard on a previous occasion. As a result of this incident, Claimant's vehicle sustained damage to the left front and right front and rear tires and wheels in the amount of $1,544.32. Since Claimant's insurance declaration sheet indicates that his deductible was $500.00, 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 I-64 E at the time of the incident. Rick Hazelwood, Maintenance Supervisor for the Department of Highways at the Scary office, testified that he oversees maintenance repairs in the area in question. Mr. Hazelwood stated that he was familiar with the resurfacing project on I-64 East, and indicated that paving work was being conducted from the 42 mile marker through the 40th Street overpass. He stated that the night prior to the incident the asphalt had been ground out up to the expansion joint at the bridge. According to Mr. Hazelwood there were no warning signs erected to advise drivers of the work.

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, Claimant must prove that Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dept of Highways*, 16 Ct. Cl. 8 (1985); *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 protruding metal bridge joint which Claimant's vehicle struck and that the condition of the road presented a hazard to the traveling public. The fact that the pavement was ground down on the travel portion of the road up to the bridge expansion joint and that no warning signs were erected leads the Court to conclude that Respondent was negligent. Thus, Claimant may make a recovery for the damage to his vehicle.

It is the opinion of the Court of Claims that the Claimant should be awarded the sum of $500.00.

Award of $500.00.

OPINION ISSUED DECEMBER 16, 2010

JASON PALMER
V.
DIVISION OF HIGHWAYS
(CC-09-0643)

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 Chevrolet Malibu was covered with what he alleged to be solidified cement dust that had fallen from Third Street Bridge construction above Merchant Street in Fairmont, Marion County. The Third Street Bridge is a public 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 sometime overnight between the evening and early morning hours of November 19-20, 2009. Claimant, Jason Palmer, arrived home from work on October 19th at approximately 6:00 p.m. and parked his vehicle beneath the Third Street Bridge, as he does every day. When Claimant returned to his car the next morning at approximately 5:50 a.m. he discovered the vehicle covered with stipples of what appeared to be concrete dust particles that had bonded and solidified after coming in contact with moisture Claimant testified that after his father informed him that construction was taking place on the Third Street Bridge, Claimant found the construction supervisor and together they identified where the particles had dripped from the bottom of the bridge and onto Claimant's vehicle. As a result of this incident, Claimant's vehicle sustained damage to roof, windshield, passenger window, hood, back windshield, and rear bumper in the amount of $507.53. Since Claimant's insurance declaration sheet indicates that his collision deductible is $500.00, Claimant's recovery is limited to that amount.

The position of the Respondent is that it did not have actual or constructive notice of material dripping off of the Third Street Bridge at the time of the incident. Michael Roncone, Highway Administrator for Respondent in Marion County, was the supervisor that Claimant approached after he discovered the concrete dust on his vehicle. Mr. Roncone testified that the Third Street Bridge, part of Route 310, is maintained by Respondent, while Merchant Street (where Claimant's car was parked) is maintained by the City of Fairmont. Mr. Roncone stated his crews had begun construction work on the bridge a few days before the incident, which involved jack hammering out three to four inches of concrete on the bridge deck for later patching – a dusty process. According to Mr. Roncone, after being approached by Claimant on the day of the incident, he observed Claimant's vehicle parked under the bridge with a filmy white substance spilled on the hood, roof, windows, and down the sides

of the car. Mr. Roncone testified that it was unlikely that whatever material was present on Claimant's car came from the bridge, because there were no expansion cracks or drainage vessels on the bridge, above where Claimant's car was parked.

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, Claimant must prove that Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dept of Highways*, 16 Ct. Cl. 8 (1985); *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 construction that was taking place on the Third Street Bridge, and that jack hammering on the bridge deck kicked up concrete dust. Since the resolidification of concrete dust on top of vehicles, permitted to park beneath the Third Street Bridge, during bridge construction created a foreseeable harm to the public, the Court finds Respondent negligent.

It is the opinion of the Court of Claims that the Claimant should be awarded the sum of $500.00.

Award of $500.00.

OPINION ISSUED DECEMBER 16, 2010

NICHOLAS A. GRAPHERY JR.
V.
DIVISION OF HIGHWAYS
(CC-10-0041)

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 or about January 21, 2010, Claimant's 2006 Buick Lucerne CXS struck a hole on the Oglebay Pike Exit of I-70 in Ohio County.

2. Respondent is responsible for the maintenance of I-70 which it failed to maintain properly on the date of this incident.

3. As a result, Claimant's vehicle sustained damage to its tires and rims in the amount of $551.20. Claimant's insurance deductible was $1,000.00.

4. Respondent agrees that the amount of $551.20 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-70 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 damages agreed to by the parties is fair and reasonable. Thus, Claimant may make a recovery for this loss.

It is the opinion of the Court of Claims that the Claimant should be awarded the sum of $551.20 on this claim.

Award of $551.20.

OPINION ISSUED DECEMBER 16, 2010

JEFFERY W. ALPAUGH
V.
DIVISION OF HIGHWAYS
(CC-10-0249)

Claimant appeared *pro se*.
Michael Folio, Attorney at Law, for Respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when his 1999 Dodge Dakota struck a hole on Ewart Avenue in Beckley, Raleigh County. Ewart Avenue is a public 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 p.m. on March 24, 2010, a wet evening. Ewart Avenue is a narrow two-lane road. At the time of the incident, Claimant Jeffrey Alpaugh was delivering groceries to a friend. Mr. Alpaugh stated that as he drove southwest on Ewart Ave towards Harper Road a truck approached him from the opposite direction with its high beams on. Claimant testified that he regularly drives this route and was aware of the hole on Ewart, approximately two feet in diameter and five inches deep, and he was usually able to maneuver his car around it. However, according to Mr. Alpaugh, on this occasion he was temporarily blinded by the lights of the oncoming vehicle and was forced to decide between his vehicle striking the hole, hitting the oncoming vehicle, or risk driving his vehicle into a treacherous ditch on the side of the road. Claimant's vehicle struck the hole with the passenger side tires. As a result of this incident, Claimant's vehicle sustained damage to the front wheel knuckle and caliper pin in the amount of $935.96. Claimant had liability insurance only.

Kathleen Loving, a resident of Ewart Avenue, testified on behalf of the Claimant. Ms. Loving stated that she is familiar with the hole Claimant's vehicle struck, and she was aware of its existence prior to March 24, 2010. Ms. Loving agreed with Claimant's representation of the hole as being very deep. Ms. Loving also concurred with Claimant's assertion that if a driver attempts to avoid the hole by driving to the right on the berm, their vehicle will likely end up in the ditch. She stated that the only way to avoid hitting the pothole is to drift to the left over the center lane line, which would be impossible if there is oncoming traffic.

The position of the Respondent is that it did not have actual or constructive notice of the condition on Ewart Avenue at the time of the incident. Brian Ramplewich, Crew Supervisor for Respondent in Raleigh County, testified that to the best of his knowledge no one had reported the pothole in question prior to the March 24, 2010. Mr. Ramplewich stated that the past winter was unusually harsh, and caused over a thousand potholes in Raleigh County. According to Mr. Ramplewich, Ewart Avenue is classified as a secondary road and is not a high priory for repairs.

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, claimant must prove that Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways*, 16 Ct. Cl. 8 (1985); *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 pothole on Ewart Ave. Since a large pothole on a narrow road creates a hazard to the traveling public, the Court finds Respondent negligent. However, in a comparative negligence jurisdiction, such as West Virginia, the negligence of a Claimant may reduce or bar recovery of a claim. In accordance with the finding of fact and conclusions of law stated herein above, the Court has determined that Claimant was 40% negligent for the incident that occurred. Since Respondent's negligence was greater than the negligence of Claimant, Claimant may recover sixty per cent (60%) of his loss.

In view of the foregoing, it is the opinion of the Court of Claims that the Claimant should be awarded the sum of $561.58.

Award of $561.58 .

OPINION ISSUED DECEMBER 16, 2010

DEXTER E. ASBURY and ESTHER K. ASBURY
V.
DIVISION OF HIGHWAYS
(CC-10-0251)

Claimants appeared *pro se*.
Michael Folio, Attorney at Law, for Respondent.

PER CURIAM:

Claimants brought this action for vehicle damage which occurred when their 2009 Chevrolet Malibu struck a hole on West Virginia Route 19, locally designated as Flat Top Road, in Cool Ridge, Raleigh County. WV Route 19 is a public 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 March 30, 2010. At the location of the incident, Route 19 is a two-lane road with highly worn and barely visible white edge lines with a 55 mile per hour speed limit. At the time of the incident, Claimant Dexter Asbury was driving to Beckley behind a school bus. Mr. Asbury stated that he drives this route at least twice a week, and he was aware of a large hole, approximately the length and width of a small car, two to three inches deep, extending from the middle of the road into the lane he was driving in near the Mt. View Road intersection. According to Mr. Asbury, he attempted to maneuver his car to the right to avoid the pothole in the road when his vehicle struck a hole on the berm, about eight to ten inches deep, that he had not seen before. As a result of this incident, Claimants' vehicle sustained damage to front and rear passenger side tires and rims in the amount of $583.60. Since Claimants' insurance declaration sheet indicates that their collision deductible is $500.00, 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 Route 19 at the time of the incident, and further that repairs would have been impossible given the time of year. Brian Ramplewich, Crew Supervisor for Respondent in Raleigh County, testified that he is familiar with the area of the incident. Mr. Ramplewich stated that based on the time of year of the incident and photographs taken by Claimant demonstrating that the hole in question was full of water, it was his belief that Respondent could not have patched the hole because cold mix would not adhere. Nevertheless, Mr. Ramplewich conceded that the Respondent's crew in Raleigh County had just begun using new heated remix equipment that possibly could have repaired the hole.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims*, 130 W.Va. 645; 46 S.E.2d 81 (1947). In order to hold Respondent liable for road defects of this type, Claimant must prove that Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dept of Highways*, 16 Ct. Cl. 8 (1985); *Chapman v. Dept of Highways*, 16 Ct. Cl. 103 (1986). The State owes a duty of reasonable care and diligence in the maintenance of a highway. *Parsons v. State Road Comm'n.*, 8 Ct. Cl. 35 (1969). The Respondent also has a duty to maintain the berm of a highway in a reasonably safe condition for use when the occasion requires. *Compton v. Div. of Highways*, 21 Ct. Cl. 18 (1995). Liability may ensue when a motorist is forced onto the berm in an emergency or otherwise necessarily uses the berm of the highway and it fails. *Sweda v. Dept 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 condition on W.V. Route 19. Since the presence of a deep hole in the berm adjacent to a hole within the traveling portion of the road created a hazard to the traveling public, the Court finds Respondent negligent.

In view of the foregoing, it is the opinion of the Court of Claims that the Claimants should be awarded the sum of $500.00.

Award of $500.00.

OPINION ISSUED JANUARY 3, 2011

STEVEN BRENT PETERS and MARIANNE PETERS
V.
DIVISION OF HIGHWAYS
(CC-02-0158)

Mark R. Staun, Attorney 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 April 7, 2000, Steven Brent Peters was driving his automobile north on WV Route 2, just south of the Alternate Route 2 intersection in or near Moundsville in Marshall County, WV, when he struck a large boulder that had fallen from the hillside and rolled into the center of the northbound lanes.

2. Respondent is responsible for the maintenance of the portion of WV Route 2 where Steven Brent Peters' accident occurred.

3. Mr. Peters' impact with the boulder caused him to lose control of his vehicle, cross the southbound lanes of traffic, and collide with the guardrail on the southbound side of WV Route 2.

4. Claimants allege that Respondent 1) had constructive and actual knowledge of the hazardous rock fall condition at the location at issue; and 2) failed to take adequate steps prior to April 7, 2000, to remedy the hazardous condition.

5. As a result of the accident, Mr. Peters suffered severe traumatic injuries to his left leg and ankle, requiring four major surgeries and extensive rehabilitation.

6. As a result, Mr. Peters' medical expenses, and additional expenses for home renovations and other services to make the same accessible, totaled $111,101.48.

7. Both the Claimants and Respondent agree that the award of $320,000.00, to be paid to Steven Brent Peters, would be a fair and reasonable amount to settle this claim. Marianne Peters waives any claim to damages in this action.

The Court has reviewed the facts of the claim and finds that the amount of the damages 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 $320,000.00.

Award of $320,000.00.

OPINION ISSUED JANUARY 12, 2011

HUONG THI PHUNG
V.
REGIONAL JAIL AND CORRECTIONAL
FACILITY AUTHORITY
(CC-10-0649)

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, Huong Thi Phung, an inmate at the Eastern Regional Jail at the time of the incident, seeks to recover $15,100.00 for seven pieces of 18 karat gold and diamond jewelry that she alleges were entrusted to Respondent but which have not been returned to her.

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 is of the opinion to make an award to the Claimant herein in the amount of $15,100.00

Award of $15,100.00.

OPINION ISSUED JANUARY 18, 2011

NANCY B. MILLER and ROBERT H. MILLER II
V.
DIVISION OF HIGHWAYS
(CC-98-0413)

Robert H. Miller II, Attorney 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 around November 27, 1996, Claimant, Nancy B. Miller, was operating her motor vehicle on US Route 19 near Bluefield, Mercer County, when she lost control of the vehicle, causing her to go off the road and collide with a parked dump truck.

2. Respondent is responsible for the maintenance of US Route 19 in Mercer County.

3. Claimants allege that Respondent's inadequate maintenance of the road and shoulder at the location of Nancy B. Miller's accident caused or contributed to her accident.

4. For the purpose of this settlement, Respondent does not dispute the allegations contained in paragraph 3 of this stipulation.

5. Ms. Miller was injured as a result of the accident and required medical treatment for her injuries.

6. Robert H. Miller, II, co-Claimant in this action, waives any claim for damages arising out of the accident in this case.

7. All settlement moneys in this claim will be awarded to Nancy B. Miller only for past pain and suffering she incurred as a result of the injuries suffered in the accident.

8. Claimants and Respondent agreed that an award of $60,000.00 is a fair and reasonable amount to settle this claim.

The Court has reviewed the facts of the claim and finds that the amount of the damages agreed to by the parties is fair and reasonable. Thus, the Court is of the opinion to and does make an award to Nancy B. Miller in the amount of $60,000.00.

Award of $60,000.00.

OPINION ISSUED JANUARY 18, 2011

CONNIE MARINO
V.
DIVISION OF HIGHWAYS
(CC-08-0417)

J. Miles Morgan, Attorney at Law, for Claimant.
Michael J. Folio, Attorney at Law, for Respondent.

PER CURIAM:

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

1. On or about December 5, 2006, Claimant, Connie Marino, sustained an injury while attempting to walk across County Route 60/14, which had recently been resurfaced and was elevated above a recessed inlet.

2. Respondent is responsible for the maintenance of County Route 60/14, which connects St. Albans with Route 60 in Kanawha County.

3. Claimant alleges that Respondent was negligent, *inter alia*, for failing to appropriately supervise the resurfacing of County Route 60/14 and failing to redress or cause to be redressed the recessed inlet.

4. As a result of the accident, Claimant sustained a fracture dislocation of her left shoulder requiring surgery and intense physical therapy. Her injuries have resulted in significant decreased range of motion in her left shoulder and associated weakness.

5. Dr. David L. Soulsby, M.D., an orthopedic surgeon, has examined Claimant and has determined that as a result of the aforesaid injury Claimant requires future aggressive medical management and surgery.

6. As a direct and proximate result of her injuries, Claimant has incurred expenses of at least $36,264.72. Dr. Soulsby projects that Claimant will incur additional future medical expenses of between $58,900.00 and $83,900.00. In all, based on available medical evidence, Claimant is likely to incur expenses between $95,164.72 and $120,164.72.

7. Claimant and Respondent agreed that the total sum of $199,000.00 is a fair and reasonable amount to settle this claim.

The Court has reviewed the facts of the claim and finds that the amount of the damages 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 $199,000.00

Award of $199,000.00.

OPINION ISSUED JANUARY 18, 2011

ANTHONY R. WHITE
V.
DIVISION OF CORRECTIONS
(CC-09-0617)

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 $304.00 for items of personal property that he alleges were entrusted to respondent but which have not been returned to him. Claimant stated that respondent stored some personal items and despite claimant's attempts to recover the property, respondent has failed to produce the items.

At the hearing, respondent stipulated to damages in the amount of $304.00.

This Court has taken the position in prior claims that respondent is responsible for property of an inmate which is taken while inmate is 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 in the amount of $304.00, and claimant may make a recovery for the loss.

Accordingly, the Court is of the opinion to and does make an award in the amount of $304.00.

Award of $304.00.

OPINION ISSUED JANUARY 18, 2011

LARRY EVANS
V.
DIVISION OF CORRECTIONS
(CC-09-0202)

Claimant appeared *pro se*.
John Boothroyd, Assistant Attorney General, for Respondent.

PER CURIAM:

Claimant, an inmate at Mount Olive Correctional Complex, a facility of the Respondent, brought this claim to recover the value of personal property that he alleges was negligently destroyed by Respondent. Claimant placed a value of $355.00 on his personal property.

A hearing was conducted by the Court in this claim on October 21, 2010, at which time the Claimant testified as to the facts and circumstances giving rise to the claim. Mr. Evans was living in a double cell with another inmate in Oak Hall until January 14, 2009, when he was disciplined and sent to Paugh Hall, designated "Loss of Privileges pod" or "LOP," for thirty (30) days. On the date of his transfer, Mr. Evans was instructed to pack his appliances for storage in a closet in LOP while he was in lock-up. Mr. Evans stated that he packed his 13-inch Sharp flat panel TV and remote in a five-gallon plastic trash bin and placed it in the corner of the storage closet to protect the screen during storage. Claimant testified that he had watched his TV the day of transfer and it was in fine working order when he left it in storage. According to Mr. Evans, from his cell in LOP he could observe people entering and exiting the storage closet. Upon being released from LOP, Claimant reclaimed his TV, which he alleged had been moved. Mr. Evans stated that when he returned to his cell and plugged in his TV he noticed the LCD panel was damaged and notified Unit Manager William Kincaid.

Claimant submitted into evidence Operational Procedure # 4.03, which provides Respondent's policies regarding inmate property and State Shop procedures. *West Virginia Division of Corrections Operational Procedure No. 4.03, Inmate Property & State Shop Procedures* (June 1, 2009). According to the operational procedure, when an inmate is moved from his cell, "all property located within the cell will be searched, inventoried and stored within the State Shop Property Room." *Id.* § V(E)(7)(d). It further states that "[s]torage for thirty (30) calendar days or less will be provided for inmate property by the [Respondent's] State Shop," which

is "designed for the safe and secure storing . . . of . . . inmate property." *Id.* § § IV; V(A).

It is Claimant's position that Respondent was responsible for his personal property once it was placed in Respondent's possession for storage, that a bailment relationship was created when Claimant no longer had control or possession of his property, and that Respondent's violation of its operational procedures for storage of inmate property by using a closet rather than the State shop resulted in the destruction of Claimant's personal property.

Respondent contends that it was not responsible for Claimant's property and that it followed proper procedures in storing his personal property during his time in LOP.

Joshua Vaughn Ward, Unit Manager for Respondent, testified that at the time of the incident, lost privilege inmates had no choice but to store their appliances in the LOP storage room; although Claimant was not required to place his TV in a trash can. Mr. Ward was not present when Claimant placed his TV in storage and never inspected the TV.

William Harlow Kincaid, Unit Manager for Respondent, testified that when Claimant returned to his cell from LOP, he was alerted by Claimant that there had been damage to Claimant's TV. Mr. Kincaid could not remember the specific damage, but stated that the TV was broken across the front.

This Court has held that a bailment situation is created when Respondent takes the personal property of an inmate, and keeps it for storage or other purpose. *Page v. Division of Corrections*, 23 Ct. Cl. 238 (2000).. Once bailment has been established, West Virginia law "imposes upon the bailee the obligation to exercise reasonable and ordinary care for the safety of the property so delivered." *Barnette v. Casey*, 124 W. Va. 143, 146; 19 S.E.2d 621, 623. In the present claim, the evidence adduced at hearing established that: Claimant placed his TV in LOP storage as required by Respondent; Respondent had control and possession of the TV and was responsible for safeguarding it; and that when the TV was returned to Claimant it had been damaged. The Court has determined that Respondent failed to adequately care for Claimant's personal property since Respondent did not adhere to its operational procedure for the secure storage of inmate property within the State Shop, and thus, Respondent was negligent in its duties as a bailee. The Court is of the opinion to make an award to the Claimant for the value of the damaged TV. Since Claimant ordered a replacement TV and universal remote from the commissary for $180.00, and agreed that an award of such an amount would be satisfactory, the Court is of the opinion that $180.00 represents a fair and reasonable reimbursement to Claimant for the damaged property.

Accordingly, the Court is of the opinion to and does make an award to the Claimant in the amount of $180.00.

Award of $180.00.

OPINION ISSUED JANUARY 18, 2011

CHRISTOPHER BLACKWELL
V.
DIVISION OF CORRECTIONS
(CC-09-0175)

Claimant appeared *pro se*.
John Boothroyd, Assistant Attorney General, for Respondent.

PER CURIAM:

Claimant, an inmate at Mount Olive Correctional Complex, a facility of the Respondent, brought this claim to recover the value of certain personal property items that he alleges were lost by the Respondent. Claimant was serving a term of confinement in lock-up for thirty (30) days. When he was released from lock-up and returned to the mainline population, several items of his personal property were missing. Claimant placed a value of $429.99 on his personal property. The Court is of the opinion to make an award in this claim for the reasons stated more fully below.

A hearing was conducted by the Court in this claim on October 21, 2010, at which time the Claimant testified as to the facts and circumstances giving rise to the claim. On or about October 1, 2008, Mr. Blackwell was transferred from his single-cell in the mainline prison population to segregated lock-up. Mr. Blackwell testified that when a single-cell inmate is transferred to lock-up it is prison procedure for state shop workers to enter the inmate's cell, inventory and collect the inmate's personal property, and transfer the property to the state shop for storage while the inmate is in lock-up. It is Mr. Blackwell's allegation that contrary to Respondent's procedure a correctional officer entered his cell to retrieve paint for another inmate and allowed at least one inmate to enter his cell and steal his personal property. Mr. Blackwell testified that upon re-entering the mainline population he realized that certain items of personal property where missing, including: one pair of Wolverine boots ($150.00), one pair Reebok high top basketball shoes ($60.00), one set of Sony headphones ($20.00), one Play Station II game - Supreme Commander II ($29.99), one Play Station II memory card ($25.00), one pair of Oakley sunglasses ($35.00), two velour blankets ($40.00), one large trash can ($10.00), and one Sony CD/AM/FM walkman ($60.00). After he was released from lock-up, Mr. Blackwell was informed by another inmate that some of his property had been sold in the yard by other inmates. Claimant stated that the inmate who was accused of stealing his property, George Watts, admitted to Claimant that he entered Claimant's cell to retrieve and hold onto property for Claimant, but that he was afraid of getting into trouble and sold it.

Edwin Mack Taylor, an inmate at Respondent's facility, testified that around January or February of 2010, he was placed in lock-up one cell away from Claimant. Mr. Taylor stated that around that time he overheard a conversation between the Claimant and an inmate located one cell above him, wherein the other inmate (unknown to Mr. Taylor) admitted to entering Claimant's cell and stealing a blanket, a rug, and other personal property, and then selling it.

Joshua Vaughn Ward, Unit Manager for Respondent, testifying on behalf of Claimant, stated that Counselor Crowder informed him that Claimant's Sony CD Walkman was stolen out of storage and that it should be replaced for Claimant. Unit Manager Ward stated that to his knowledge Claimant has not received a replacement portable CD player or compensation for his loss.

Claimant filed at least one "G-1" grievance concerning his missing personal property, which Respondent denied as without merit on the grounds that no one other than the state shop workers entered Claimant's cell after he was sent to lock-up. Claimant also filed a "G-2" grievance appeal, which was denied as untimely and without merit.

Claimant asserts that Respondent was responsible for his personal property once he was removed from his single-cell and sent to lock-up, and that a bailment relationship existed at the time when he no longer had control or possession of his property.

Respondent contends that it was not responsible for Claimant's property and that it followed proper procedures in removing his property from the cell to the state shop. Respondent submitted into evidence three "Resident's Personal Property Form(s)," respectively dated March 7, 2008; March 10, 2008; and October 6, 2008. The first and second property forms corroborate Claimant's testimony that prior to being locked-up on October 1, 2008, he was in possession of at least one blanket, Wolverine boots, Sony headphones, Play Station II accessories, five (5) Play Station II games, a trash can, and a Sony CD Walkman. The third property form, applicable to this incident, is dated six days after Claimant was sent to lock-up. According the October 2008 property form, Claimant no longer possessed any boots or blankets, and only possessed four (4) Play Station II games. The third property form does, however, indicate that Claimant still possessed Sony headphones and a Sony Walkman CD player. Claimant testified that although he signed the third property form when he was released from lock-up on October 31, 2008, he was not given an opportunity to look over his property to make sure it was all there before signing the form.

This Court has held that bailment exists when Respondent records the personal property of an inmate and takes it for storage purposes, and then has no satisfactory explanation for not returning it. *Page v. Division of Corrections*, 23 Ct. Cl. 238 (2000); *Heard v. Division of Corrections*, 21 Ct. Cl. 151 (1997). In the present claim, the evidence adduced at the hearing establishes that the Claimant had, at the least, one pair of Wolverine boots, one blanket, Sony headphones, Play Station II accessories, five (5) Play Station II games, a trash can, and a Sony CD Walkman in his possession while an inmate at Mt. Olive. However, when Claimant was released from lock-up none of these items were found and returned to him. The property was in the control and possession of Respondent while the Claimant was in lock-up, and Respondent has no plausible explanation for what happened to the missing property items. Respondent was in a position to safeguard Claimant's property once he was removed from his cell and should have secured the property immediately after the Claimant was removed from his single-cell. However, the October property form indicates that Respondent waited six days before securing and inventorying Claimant's property. The Court finds that Respondent was responsible for securing the Claimant's property and failed to take the appropriate action to do so. Therefore, the Court is of the opinion to make an award to the Claimant for the value of his Wolverine boots, one (1) blanket, Sony headphones, Play Station II memory card, one (1) Play Station II game, trash can, and Sony CD Walkman. No evidence was presented that Claimant had a pair of Reebok basketball shoes, a second blanket, or Oakley sunglasses in his possession while an inmate at Mt. Olive. The Court is of the opinion that $314.99 represents a fair and reasonable reimbursement to Claimant for the lost property.

Accordingly, the Court is of the opinion to and does make an award to the Claimant in the amount of $314.99.

Award of $314.99.

OPINION ISSUED JANUARY 18, 2011

STACY STOWERS and TIM STOWERS
V.
DIVISION OF HIGHWAYS
(CC-09-0578)

Claimants appeared *pro se*.
Michael J. Folio, Attorney at Law, for Respondent.

PER CURIAM:

Claimants brought this action for vehicle damage which occurred when their 2009 Chevrolet Malibu struck a deep manhole on U.S. Route 60 in South Charleston, Kanawha County. U.S. Route 60 is a public road maintained by Respondent. The Court is of the opinion to make an award this claim for the reasons more fully stated below.

The incident giving rise to this claim occurred at approximately 7:00 p.m. on July 9, 2009. Claimant Stacy Stowers was driving from Charleston along U.S. Route 60 back to her home in Hurricane. Claimant stated that she was in Charleston for a professional exam, and she does not frequently use this route. Claimant testified that at the time of the incident construction workers were placing construction barrels in the middle lane on Route 60, traffic was bumper-to-bumper, and cars were parked along the right side of the road. Claimant acknowledged that she saw the deep manhole prior to the incident, but stated that because of construction and heavy traffic there was no way to maneuver around it, and her vehicle struck it. As a result of this incident, Claimants' vehicle sustained damage to the front and rear passenger side rims in the amount of $265.01. Claimants' insurance declaration sheet indicates that their collision deductible is $500.00.The position of the respondent is that it did not have actual or constructive notice of the condition on U.S. Route 60 at the time of the incident. Barbara Engelhardt, Highway Administrator for Respondent in St. Albans, testified that she is familiar with the area where Mrs. Stowers alleges her incident occurred. Ms. Engelhardt stated that Respondent's investigators could not locate any indentation or other abnormality with the pavement at the location 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, Claimants must prove that Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways*, 16 Ct. Cl. 8 (1985); *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 manholes on U.S. Route 60. Since the presence of deep manholes on the travel portion of the road within a construction site created a hazard to the traveling public, the Court finds Respondent negligent. It is the opinion of the Court of Claims that the Claimants should be awarded the sum of $265.01.

Award of $265.01.

OPINION ISSUED JANUARY 18, 2011

GINGER BROWN
V.
DIVISION OF HIGHWAYS
(CC-09-0565)

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 2001 Chevrolet Blazer struck a broken section of culvert on County Route 26/3, locally designated as Mouse Creek Road, in Mt. Nebo, Nicholas county. County Route 26/3 is a public 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 August 6, 2009. County Route 26/3 is a one-lane dirt road with a metal culvert running perpendicular under the road. Claimant, Ginger Brown, stated that she lives on the road in question and drives it every day. Ms. Brown stated that, prior to the incident, she was aware that a piece of the metal culvert that runs across the road was broken and sharp. Ms. Brown testified that she called Respondent to report the broken culvert and that within a few days it had been covered with a sheet of metal. At the time of the incident, Ms. Brown was driving home with her daughter. Ms. Brown stated that they drove approximately one tenth of a mile beyond the culvert before two of her vehicle's tires went flat, forcing the Claimant and her daughter to walk home. Claimant stated that when she returned to look at the culvert the metal sheet which had been covering the broken section had been moved. As a result of this incident, Claimant's vehicle sustained damage to two tires, requiring that they be replaced in the amount of $135.90. Claimant's insurance declaration sheet indicates that her collision deductible is $1000.00.

It is Claimant's position that Respondent knew or should have known about broken culvert on County Route 26/3 which created a hazardous condition to the traveling public and that Respondent was negligent in failing to properly maintain County Route 26/3 prior to the incident.

The position of the Respondent is that it did not have actual or constructive notice of the condition on County Route 26/3 at the time of the incident. Respondent presented no 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 v. Sims*, 130 W.Va. 645; 46 S.E.2d 81 (1947). In order to hold Respondent liable for road defects of this type, Claimant must prove that Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways*, 16 Ct. Cl. 8 (1985); *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 on County Route 26/3. Since a sharp section of broken culvert created a hazard to the traveling public, the Court finds Respondent negligent.

In view of the foregoing, it is the opinion of the Court of Claims that the Claimant should be awarded the sum of $135.90.

Award of $135.90.

OPINION ISSUED JANUARY 18, 2011

CHELSEA STUBERG
V.
DIVISION OF HIGHWAYS
(CC-09-0368)

Claimant appeared *pro se*.
Michael J. Folio, 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 5, 2009, Claimant's 2001Mercury Sable struck a hole in the roadway of Route 7 in Monongalia County.

2. Respondent is responsible for the maintenance of Route 7 which it failed to maintain properly on the date of this incident.

3. As a result, Claimant's vehicle sustained damage to its tires and rims in the amount of $180.18. Claimant's insurance deductible was $500.00 at the time of the incident.

4. Respondent agrees that the amount of $180.18 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 7 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 damages agreed to by the parties is fair and reasonable. Thus, Claimant may make a recovery for the loss.

It is the opinion of the Court of Claims that the Claimant should be awarded the sum of $180.18 on this claim.

Award of $180.18.

OPINION ISSUED JANUARY 18, 2011

FREELAND KENT MILLER
V.
DIVISION OF HIGHWAYS
(CC-09-0436)

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

PER CURIAM:

Claimant brought this action for motorcycle damage which occurred when his 2006 Suzuki Katana 600 struck a hole on Hillcrest Road, designated as County Route 23/1, in Fairmont, Marion County. Hillcrest Road is a public 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 9:00 p.m. on August 6, 2009. The evening was dark and foggy. Hillcrest Road is a hilly and curvy road. At the time of the incident, Claimant, Freeland Kent Miller, was driving home on his motorcycle. Mr. Miller testified that he was familiar with Hillcrest Road and the defect in the pavement; however, he is used to driving the area in an automobile rather than on a motorcycle. Claimant testified that on the night in question he was riding downhill and around a curve on Hillcrest road when his motorcycle struck the hole in the asphalt, approximately fourteen inches long by three feet wide and six inches deep. As a result of this incident, Claimant's motorcycle sustained damage to the front tire and rim in the amount of $769.54. Claimant's vehicle had liability insurance only.

The position of the Respondent is that it did not have actual or constructive notice of the condition on Hillcrest Road at the time of the incident. Michael Roncone, Highway Administrator for Respondent in Marion County, testified that he is familiar with Hillcrest Road, a secondary road. Mr. Roncone acknowledged that he was aware of a hole on Hillcrest Road prior to the date of the incident. However, according to Mr. Roncone, there had been rain in the area washing material out of the hole, and preventing Respondent crews from re-filling the hole.

The well-established principle of law in West Virginia is that the State is neither an insurer nor a guarantor of the safety of travelers upon its roads. *Adkins v. Sims*, 130 W.Va. 645; 46 S.E.2d 81 (1947). In order to hold Respondent liable for road defects of this type, Claimant must prove that Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways*, 16 Ct. Cl. 8 (1985); *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 in the road on Hillcrest Road. Since a defect in the pavement in the driving portion of the lane created a hazard to the traveling public, the Court finds respondent negligent. However, in a comparative negligence jurisdiction, such as West Virginia, the negligence of a Claimant may reduce or bar recovery of a claim. In accordance with the finding of fact and conclusions of law stated herein above, the Court has determined that Claimant was 30% negligent for the incident that occurred. Since Respondent's negligence was greater than the negligence of Claimant, Claimant may recover seventy per cent (70%) of his loss.

It is the opinion of the Court of Claims that the Claimant should be awarded the sum of $538.68.

Award of $538.68.

OPINION ISSUED JANUARY 18, 2011

STEFANIE STARCHER
V.
DIVISION OF HIGHWAYS
(CC-09-0469)

Claimant appeared *pro se*.
C. Brian Matko, 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 May 10, 2009, Claimant's 2008 Ford Focus struck a hole in the roadway of Oil Ridge Road in Sistersville in Tyler County.

2. Respondent is responsible for the maintenance of Oil Ridge Road which it failed to maintain properly on the date of this incident.

3. As a result, Claimant's vehicle sustained damage to its tires and rims in the amount of $316.39. Claimant's insurance deductible was $500.00.

4. Respondent agrees that the amount of $316.39 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 Oil Ridge 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 damages agreed to by the parties is fair and reasonable. Thus, Claimant may make a recovery for his loss.

It is the opinion of the Court of Claims that the Claimant should be awarded the sum of $316.39 on this claim.

Award of $316.39.

OPINION ISSUED JANUARY 18, 2011

JEFFERY W. COLLINS
V.
DIVISION OF HIGHWAYS
(CC-09-0300)

Claimant appeared *pro se*.

C. Brian Matko, 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 May 29, 2009, Claimant's 2005 Pontiac Grand Am struck a hole in the roadway of Route 19 in Oak Hill in Fayette County.

2. Respondent is responsible for the maintenance of Rt. 19 which it failed to maintain properly on the date of this incident.

3. As a result, Claimant's vehicle sustained damage to its tires and rims in the amount of $366.00. Claimant's insurance deductible was $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 the Rt. 19 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 damages agreed to by the parties is fair and reasonable. Thus, Claimant may make a recovery for the loss.

It is the opinion of the Court of Claims that the Claimant should be awarded the sum of $250.00 on this claim.

Award of $250.00.

OPINION ISSUED JANUARY 18, 2011

JANE HARDMAN
V.
DIVISION OF HIGHWAYS
(CC-09-0056)

Claimant appeared *pro se*.
C. Brian Matko, 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. Around January 2008, Claimant's fence line at 3003 Linden Street in Parkersburg was struck with a falling tree during the removal of certain trees located on the Respondent's right of way.
2. Respondent is responsible for the maintenance of the property surrounding the property of 3003 Linden Street in Parkersburg.
3. As a result, Claimant's fence sustained damage in the amount of $619.00.
4. Respondent agrees that the amount of $619.00 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 property surrounding 3003 Linden Street, Parkersburg, 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 damages agreed to by the parties is fair and reasonable. Thus, Claimant may make a recovery for her loss.

It is the opinion of the Court of Claims that the Claimant should be awarded the sum of $619.00 on this claim.

Award of $619.00.

OPINION ISSUED JANUARY 18, 2011

TYLER R. DAVIS AND SANDRA TOLER
V.
DIVISION OF HIGHWAYS
(CC-09-0347)

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 Claimant and Respondent wherein certain facts and circumstances of the claim were agreed to as follows:

1. On or around June 26, 2010, Claimants 2002 Toyota Sequoia stuck a hole while traveling on Kopperston Mountain in Pineville in Wyoming County.

2. Respondent is responsible for the maintenance of Kopperston Mountain Road which it failed to maintain properly on the date of this incident.

3. As a result, Claimants vehicle sustained damage to its tires and rims in the amount of $600.57. Claimants held liability insurance only at the time of the incident.

4. Respondent agrees that the amount of $600.57 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 Kopperson Mountain 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 this loss.

It is the opinion of the Court of Claims that the Claimants should be awarded the sum of $600.57 on this claim.

Award of $600.57.

OPINION ISSUED JANUARY 18, 2011

GRACIE L. NEIL
V.
DIVISION OF HIGHWAYS
(CC-09-0562)

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 2003 GMC Sonoma struck a broken section of culvert on County Route 26/3, locally designated as Mouse Creek, in Mt. Nebo, Nicholas County. County Route 26/3 is a public 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 in mid July of 2009. County Route 26/3 is a one-lane dirt road. Claimant, Gracie L. Neil, stated that she lives on the road in question and drives it every day. According to Ms. Neil, County Route 26/3 has been in a state of disrepair for many years, and prior to the incident she frequently called Respondent to request maintenance. At the time of the incident, Ms. Neil was driving home and when she arrived home she could hear air escaping her tire. Claimant contends that her tire was punctured by a section of culvert that had been scraped by a snow plow during winter and had subsequently rusted over. As a result of this incident, Claimant's vehicle sustained damage to the front passenger side tire requiring its replacement in the amount of $112.36. Claimant's insurance declaration sheet indicates that her collision deductible is $500.00.

The position of the Respondent is that it did not have actual or constructive notice of the broken culvert on County Route 26/3 at the time of the incident. Respondent presented no 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 v. Sims*, 130 W.Va. 645; 46 S.E.2d 81 (1947). In order to hold Respondent liable for road defects of this type, Claimant must prove that Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways*, 16 Ct. Cl. 8 (1985); *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 on County Route 26/3. Since a sharp section of broken culvert created a hazard to the traveling public, the Court finds Respondent negligent.

In view of the foregoing, it is the opinion of the Court of Claims that the Claimant should be awarded the sum of $112.36.

Award of $112.36.

OPINION ISSUED JANUARY 18, 2011

MICHELLE A. GABBERT and STEVEN C. GABBERT
V.
DIVISION OF HIGHWAYS
(CC-10-0018)

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 2009 Lincoln MKS struck holes in two incidents on County Road 85, locally designated Brewer Road, in Morgantown, Monongalia County. County Route 85 is a public 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 first incident giving rise to this claim occurred on July 9, 2009. County Route 85 is a mile long two-lane paved road with one lane of traffic in each direction, but without any lane markings. At the time of the first incident, Claimant, Michelle Gabbert, was driving her daughter to band. Ms. Gabbert testified that she is familiar with County Route 85 because she lives on it and travels it several times a day. Ms. Gabbert stated that there have always been issues with this road, which she attributes to the fact that it is a bus route. According to Ms. Gabbert, as she drove down County Route 85 a car approached her from the opposite direction and crossed into her lane. In order to miss the car, Ms. Gabbert swerved to her right and her vehicle struck a pothole. As a result of this incident, Claimants' vehicle sustained damage to front passenger side rim requiring that it be replaced in the amount of $634.94.

The second incident occurred on November 22, 2009. Ms. Gabbert testified that she was traveling home along County Route 85 and was driving around the last blind curve before she reached her driveway when an oncoming car approached her in her lane. Ms. Gabbert stated that the only way to avoid the oncoming traffic was

to swerve to the left, or in other words, to drive in the lane designated for traffic traveling the opposite direction. As soon as Ms. Gabbert entered the wrong lane to avoid hitting oncoming traffic her vehicle struck a hole in pavement. As a result of this incident. Claimants' vehicle sustained damage to the front drivers's side tire which had to be replaced for a total of $237.39. Since Claimants' insurance declaration sheet indicates that their collision deductible is $500.00, Claimants' recovery is limited to that amount for each incident.

Warren S. Elliott, Claimant Michelle Gabbert's father, testified that he has lived on County Route 85 since 1974 and that it has been in disrepair for years. Mr. Elliott stated that, prior to these incidents, he personally placed several calls to Respondent to report problems on the road.

The position of the Respondent is that it did not have actual or constructive notice of the condition on County Route 85 prior to either incident. Larry Weaver, Highway Administrator for Respondent in Monongalia County, testified that he is familiar with County Route 85, which he stated is priority three rural country road with a tar and chip surface. Respondent introduced a DOT-12, or a daily work report, to show that Respondent had conducted patching operations on Country Road 85 two days prior to Claimants' second incident, on November 20, 2009, wherein they used 8.32 tons of hot mix material.

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, Claimants must prove that Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways*, 16 Ct. Cl. 8 (1985); *Chapman v. Dep't of Highways*, 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that prior to the first incident in July 2009 Respondent had, at the least, constructive notice of the defects in the pavement on Country Route 85. Since a hole on the edge of the travel portion of the road created a hazard to the traveling public, the Court finds Respondent negligent in that incident. However, based on evidence adduced at hearing, the Court is of the opinion that prior to the second incident, Respondent took reasonable corrective actions, and thus cannot be found negligent.

In view of the foregoing, it is the opinion of the Court of Claims that the Claimants should be awarded the sum of $500.00.

Award of $500.00.

OPINION ISSUED JANUARY 18, 2011

WV REGIONAL JAIL AND CORRECTIONAL
FACILITY AUTHORITY
V.
DIVISION OF CORRECTIONS
(CC-10-0676)

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 $5,945,942.90 to recover the per diem costs associated with housing and providing services to prisoners who have been sentenced to a State penal institution, but due to circumstances beyond the control of the Claimant, have remained in the regional jails.

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 $5,945,942.90.

Award of $5,945,942.90.

OODER ISSUED JANUARY 18, 2011

DAVID DUFFIELD,
Claimant,

v. CLAIM NO. CC-10-0006

DIVISION OF HIGHWAYS,
Respondent.

O R D E R

On this day the above-referenced claim came on for consideration by the Court upon correspondence from counsel for the Respondent, Michael A. Folio, wherein the Court was informed that this claim has been determined to be a moral obligation of the Respondent consistent with the provisions in W. Va. Code §14-2-12, and,

The Court, having reviewed the file in this claim and having duly considered the matter, hereby ORDERS that the claim be and the same is hereby found to be a moral obligation of the State and an award is made in this claim in the amount of **$135.68**, and further, the Court directs the Clerk of the Court to include this claim in the Report of the Court of Claims to be submitted to the Legislature for inclusion in the Claims Bill.

Enter this 18th day of January, 2011:

OPINION ISSUED JANUARY 18, 2011

MELISSA R. BAILEY and SHAWN L. BAILEY
V.
DIVISION OF HIGHWAYS
(CC-10-0217)

Claimants appeared *pro se*.
Michael J. Folio, Attorney at Law, for Respondent.

PER CURIAM:

Claimants brought this action for vehicle damage which occurred when their 2010 Nissan Xterra was struck by a piece of concrete kicked up by another vehicle on Interstate 77 bridge in Edens Fork, Kanawha County. Interstate 77 is a public 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 29, 2010. At the time of the incident, Claimant, Melissa Bailey, was driving to work on Interstate 77 southbound. Ms. Bailey testified that she was driving one to two car lengths behind another vehicle over the Edens Fork Bridge when the vehicle in front of her hit a deep broken hole in the pavement. Ms. Bailey stated that she had seen the hole before and estimated that it had been there a few weeks. According to Ms. Bailey, the force of the vehicle in front of her hitting the hole caused a piece of concrete to fly up and hit Claimants' vehicle in the front fender. As a result of this incident, Claimants' vehicle sustained damage to front bumper and fog light in the amount of $525.09. Since Claimants' insurance company covered all but $100.00, Claimants' 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 Interstate 77 at the time of the incident. Joseph Weekley, crew leader for Respondent, testified that he is familiar with Interstate 77, a priority one road, and the location of this incident. Mr. Weekley stated that he usually drives this section of Interstate 77 two to three times per week to look for road hazards, but had not seen this hole prior to the incident. Furthermore, Mr. Weekley stated that Respondent had not received any complaints about this roadway 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 v. Sims*, 130 W.Va. 645; 46 S.E.2d 81 (1947). In order to hold Respondent liable for road defects of this type, Claimants must prove that Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways*, 16 Ct. Cl. 8 (1985); *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 broken section of pavement on Interstate 77 that when struck by another vehicle caused a piece concrete to fly up and hit Claimants' vehicle, and that such a condition created a hazard to the traveling public. Photographs in evidence depict the hazardous nature of the defect on the Edens Fork Bridge on Interstate 77. The size of the hole, its crumbled and broken character, and location in the center of the driving portion of the road leads the Court to conclude that Respondent had notice of this hazardous condition and 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 view of the foregoing, it is the opinion of the Court of Claims that the Claimants should be awarded the sum of $100.00.

Award of $100.00.

OPINION ISSUED JANUARY 18, 2011

CASSVILLE UNITED METHODIST CHURCH
V.
DIVISION OF HIGHWAYS
(CC-10-0539)

Claimant appeared *pro se*.
Michael J. Folio, 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. In May of 2010, Claimant incurred the expense of cutting down a tree that was located on Cassville Mt. Morris Road that was in danger of falling onto the structure of the church located in Monongalia County.

2. Respondent is responsible for the maintenance of clearing trees after road construction which it failed to maintain properly on the date of this incident.

3. As a result, Claimant incurred the expense of having the tree removed.

4. Respondent agrees that the amount of $200.00 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 Cassville Mt. Morris 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 damages agreed to by the parties is fair and reasonable. Thus, Claimant may make a recovery for the loss.

It is the opinion of the Court of Claims that the Claimant should be awarded the sum of $200.00 on this claim.

Award of $200.00.

OPINION ISSUED JANUARY 18, 2011

BRODIS R. BROWN
V.
DIVISION OF HIGHWAYS
(CC-10-0143)

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 Dodge Ram 1500 struck a hole on County Route 36/1 near Wallback, Clay

county. County Route 36/1 is a public 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 February 18, 2010. County Route 36/1 is a one-lane paved rural road. Claimant, Brodis R. Brown, testified that he drives County Route 36/1 everyday and is familiar with it and the particular defect in question, which he stated had been there for at least six months. Mr. Brodis stated that he had previously reported the hole to Respondent, but no remedial measures had been taken. At the time of the incident, a dog wandered into the road in front of Claimant, and as Claimant swerved to avoid the dog, his vehicle struck the hole in the pavement, causing a piece of asphalt to break off. As a result of this incident, Claimant's vehicle sustained damage in the form of a scarred rim, requiring a cosmetic replacement in the amount of $768.50. Since Claimant's insurance declaration sheet indicates that his collision deductible is $500.00, Claimant's recovery is limited to that amount.

It is Claimant's position that Respondent knew or should have known about condition on County Route 36/1 which created a hazardous condition to the traveling public and that Respondent was negligent in failing to properly maintain County Route 36/1 prior to the incident.

The position of the Respondent is that it did not have actual or constructive notice of the condition on County Route 36/1 at the time of the incident. Respondent presented no 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 v. Sims*, 130 W.Va. 645; 46 S.E.2d 81 (1947). In order to hold Respondent liable for road defects of this type, Claimant must prove that Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways*, 16 Ct. Cl. 8 (1985); *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 defect in the pavement on County Route 36/1. Since a hole in the travel portion of the road created a hazard to the traveling public, the Court finds Respondent negligent.

In view of the foregoing, it is the opinion of the Court of Claims that the Claimant should be awarded the sum of $500.00.

Award of $500.00.

OPINION ISSUED JANUARY 18, 2011

ERIC L. RUNYON
V.
DIVISION OF HIGHWAYS
(CC-10-0361)

Claimant appeared *pro se*.
Michael J. Folio, Attorney at Law, for Respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when his 2007 Chrysler Aspen struck a hole on WV Route 85 in Uneeda, Boone County. West Virginia Route 85 is a public 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 9:00 p.m. April 6, 2010. WV Route 85 is a two-lane paved road with one lane of traffic in each direction, and is marked with a yellow center lane line and white edge lines on the sides. The speed limit on WV Route 85 is 40 miles per hour. At the time of the incident, Claimant's wife, Julie Runyon, was driving home with her children as passengers asleep in the back seat. Mrs. Runyon testified that she is familiar with this stretch of road and that there were defects in the pavement at the location of the incident. According to Mrs. Runyon, she was driving approximately 42 miles per hour when she encountered a large hole on the right side of her lane and an oncoming school bus followed by two other cars in the opposing lane. Mrs. Runyon stated that she attempted to tap on the brakes, nonetheless, Claimant's vehicle struck the hole, approximately nine inches deep.

As a result of this incident, Claimant's vehicle sustained damage to the front and rear passenger side rims and tire, requiring that they be replaced and a wheel alignment in the amount of $1,472.29. Since Claimant's insurance declaration sheet indicates that his collision deductible is $500.00, Claimant's recovery is limited to that amount.

It is Claimant's position that Respondent knew or should have known about condition on WV Route 85 which created a hazardous condition to the traveling public and that Respondent was negligent in failing to properly maintain WV Route 85 prior to the incident.

The position of the Respondent is that it did not have actual or constructive notice of the condition on WV Route 85 at the time of the incident. Chet Burgess, Administrator for Respondent in Boone county, testified that he is familiar with WV Route 85 and acknowledged that it was in poor condition in early April because of the especially harsh winter. Mr. Runyon stated that on the date of the incident the only material available to patch asphalt was cold mix, which is only a temporary patch; the asphalt plant that produces hot mix did not open until April 15th. Mr. Runyon testified that Respondent attempted to patched WV Route 85 through the winter, but that without hot mix the condition could not be eliminated permanently.

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, Claimant must prove that Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways*, 16 Ct. Cl. 8 (1985); *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 defects in the pavement on WV Route 85. Since a deep jagged hole in the travel portion of the lane created a hazard to the traveling public, the Court finds Respondent negligent. However, in a comparative negligence jurisdiction, such as West Virginia, the negligence of a Claimant may reduce or bar recovery of a claim. *See Bradley v. Appalachian Power Company*, 163 W.Va. 332, 256 S.E.2d 879 (1979). In accordance with the finding of fact and conclusions of law stated herein above, the Court has determined that Mrs. Runyon was 10% negligent for the incident that occurred. Since Respondent's negligence was greater than the

negligence of Mrs. Runyon, Claimant may recover ninety per cent (90%) of his loss.

In view of the foregoing, it is the opinion of the Court of Claims that the Claimant should be awarded the sum of $450.00.

Award of $450.00.

OPINION ISSUED JANUARY 18, 2011

SHIRLEY ANN WILSON
V.
DIVISION OF HIGHWAYS
(CC-10-0112)

Claimant appeared *pro se*.
Michael Folio, 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 25, 2010, Claimant's 2006 Subaru Forrester struck a hole at the intersection of Route 3 and Route 311 in Monroe County.

2. Respondent is responsible for the maintenance of said intersection which it failed to maintain properly on the date of this incident.

3. As a result, Claimant's vehicle sustained damage to its tires and rims in the amount of $185.81. Claimant's insurance deductible was $100.00 at the time of the incident and is limited to that recovery amount.

4. Respondent agrees that the amount of $100.00 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 intersection of Route 3 and Route 311 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 damages agreed to by the parties is fair and reasonable. Thus, Claimant may make a recovery for the loss.

It is the opinion of the Court of Claims that the Claimant should be awarded the sum of $100.00 on this claim.

Award of $100.00.

OPINION ISSUED JANUARY 18, 2011
PHILLIP AND MARGARET ARABIA
V.
DIVISION OF HIGHWAYS
(CC-10-0055)

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 Claimant and Respondent wherein certain facts and circumstances of the claim were agreed to as follows:

1. On December 11, 2009, Claimant's 1998 Dodge Neon struck rocks from a rock fall on the mountainside of Route 119 in Roane County.

2. Respondent is responsible for the maintenance of Route 119 which it failed to maintain properly on the date of this incident. Respondent was aware that this area was in fact a rock fall prone area but did not have rock fall signs up at the location where this accident occurred.

3. As a result, Claimant's vehicle sustained damage in the amount of $1,300.00 totaling the vehicle. Claimant's insurance deductible was $500.00 at the time of the incident but also incurred the expense of $120.00 for towing the vehicle from the scene. 4. Respondent agrees that the amount of $620.00 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 Route 119 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 damages agreed to by the parties is fair and reasonable. Thus, Claimant may make a recovery for the loss.

It is the opinion of the Court of Claims that the Claimant should be awarded the sum of $620.00 on this claim.

Award of $620.00.

OPINION ISSUED JANUARY 18, 2011

RAYMOND FRANKHOUSER
V.
DIVISION OF HIGHWAYS
(CC-10-0086)

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 Toyota Corolla struck hole at the intersection of County Road 857, locally designated Cheat Road, and US Route 119, locally designated Point Marion Road in one direction and Mileground Road in the other, in Morgantown, Monongalia County. Both County Road 857 and US Route 119 are public roads 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 10:40 p.m. on February 21, 2010. At the time of the incident, Claimant Raymond Frankhouser was driving to work at Easton Elementary School. Claimant was driving north on County Road 857 until he reached the traffic light at the US Route 119 intersection and when he drove into the left turn lane. Mr. Frankhouser testified that he was behind a few other cars at the intersection, and that when the light changed he slowly followed them in turning onto US Route 119/ Mileground Road. However, while he was still in the intersection, his vehicle struck a deep defect in the pavement.

Claimant stated that because it was dark he had not seen the hole prior to his vehicle striking it. As a result of this incident, Claimant's vehicle sustained damage to one of the front tires in the amount of $93.76. Claimant's insurance declaration sheet indicates that his collision deductible is $500.00.

The position of the Respondent is that it did not have actual or constructive notice of the hole in pavement at the intersection of Country Road 857/ US 119 at the time of the incident. Larry Weaver, Highway Administrator for Respondent in Monongalia County, testified that he is familiar with US Route 119 and described it as a priority one road. Mr. Weaver stated that Respondent's highest priority in February was Snow Removal and Ice Control (SRIC). During SRIC Respondent would attempt to patch holes when feasible, but only the very temporary cold-mix patch material was available. Respondent submitted into evidence two DOT-12 daily work reports that indicated Respondent's employees patched holes on US Route 119 on February 17th and 23rd; however, Mr. Weaver did not know where Claimant's incident occurred along US Route 119, and, therefore, he was unable to testify as to whether work was performed at that location 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, Claimant must prove that Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways*, 16 Ct. Cl. 8 (1985); *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 at the intersection of County Road 857 and US Route 119. Since a defect in the pavement on the travel portion of the road created a hazard to the traveling public, the Court finds Respondent negligent.

In view of the foregoing, it is the opinion of the Court of Claims that the Claimant should be awarded the sum of $93.76.

Award of $93.76.

OPINION ISSUED JANUARY 18, 2011

HARVEY H. COLLINS II
V.
DIVISION OF HIGHWAYS
(CC-10-0028)

Claimant appeared *pro se*.
Michael J. Folio, 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 11, 2008, Claimant's 2005 Ford Explorer struck a road construction barrel that was in the roadway of Interstate 64 in Putnam County .

2. Respondent is responsible for the maintenance of 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 $1,301.17 totaling out the vehicle. Claimant's insurance deductible was $500.00 at the time of the incident.

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 Interstate 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 damages agreed to by the parties is fair and reasonable. Thus, Claimant may make a recovery for the loss.

It is the opinion of the Court of Claims that the Claimant should be awarded the sum of $500.00 on this claim.

Award of $500.00.

OPINION ISSUED JANUARY 18, 2011

STEVE SINCLAIR and ROBIN SINCLAIR
V.
DIVISION OF HIGHWAYS
(CC-10-0231)

Claimants appeared *pro se*.
Michael J. Folio, Attorney at Law, for Respondent.

PER CURIAM:

Claimants brought this action for vehicle damage which occurred when their 2008 Chrysler Sebring struck a hole on US Route 250 in Fairmont, Marion County. Route 250 is a public 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 p.m. on January 31, 2010. US Route 250 is a two-lane paved road with a lane of traffic in each direction and a double yellow center lane line. There had been a few snow flurries on the day of incident and patches of snow were still on the ground. Claimant, Robin Sinclair, testified that at the time of the incident she was driving home from Wal-Mart along Route 250 north with her husband and co-Claimant, Steve Sinclair, as a passenger. Mrs. Sinclair stated that as she was driving her vehicle's front passenger side tire struck a hole in the pavement, approximately one and a half feet wide by one foot long and 6 inches deep, which she could not see because it was filled in with snow. According to Mrs. Sinclair her tire light immediately went on, and she was forced to the side of the road, where Mr. Sinclair replaced the damaged front passenger tire with the spare tire.

As a result of this incident, Claimants' vehicle sustained damage to front passenger side tire requiring that it be replaced in the amount of $157.94. Claimants also provided an estimate for repairs to their front bumper, which was cracked during the incident, in the amount of $891.99. Additionally, Mrs. Sinclair testified that a few weeks after having the front passenger tire replaced, Claimants' learned that the front driver's side tire also needed to be replaced in the amount of $157.94. Since Claimants' insurance declaration sheet indicates that their collision deductible is $500.00, Claimants' recovery is limited to that amount.

It is the Claimants' position that Respondent knew or should have known about the defects in the pavement on Route 250 which created a hazardous condition to the traveling public and that Respondent was negligent in failing to properly maintain Route 250 prior to the incident.

The position of the Respondent is that it did not have actual or constructive notice of the condition on Route 250 at the time of the incident; furthermore, at the time of the incident it was operating in snow removal and ice control ("SRIC") mode, considered an emergency condition during which all employees work to remove snow and ice from the roads with all other activities suspended.

Michael Roncone, Highway Administrator for Respondent in Marion County, testified that he is familiar with Route 250 and that it is a priority one road. Mr. Roncone stated that the incident occurred between several of the season's snow falls, and that Respondent's crews were dedicated to SRIC activites. According to Mr. Ronconce, Respondent is generally engaged in SRIC from the middle of November until the middle of April.

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, Claimants must prove that Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways*, 16 Ct. Cl. 8 (1985); *Chapman v. Dep't of Highways*, 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that Respondent was negligent in its maintenance of US Route 250. Although the evidence adduced at the hearing establish that Respondent was operating under SRIC conditions, photos depicting the sizeable nature of the hole and its location in the travel portion of the road lead the Court to conclude that the condition existed prior to the snowfall and created a hazard to the traveling public. The Court is of the opinion that Respondent had, at the least, constructive notice of the condition on Route 250 and adequate time to make the necessary and reasonable repairs.

In view of the foregoing, it is the opinion of the Court of Claims that the Claimants should be awarded the sum of $500.00.

Award of $500.00.

OPINION ISSUED JANUARY 18, 2011

DEAN A. GREER
V.
DIVISION OF HIGHWAYS
(CC-10-0429)

Claimant appeared *pro se*.
Michael J. Folio, Attorney at Law, for Respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when his 2007 Subaru Legacy GT Limited struck an unevenly milled portion of the road on US Route 250 near Whitehall, Marion county. Route 250 is a public 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 9:48 p.m. on June 11, 2010. At the location of the incident, Route 250 is a two-lane paved road with one lane of traffic in each direction and a speed limit of 45 miles per hour. At the time of the incident, Claimant, Dean A. Greer, was driving south on Route 250 at approximately 30 miles per hour towards his home Fairmont. Mr. Greer testified that the lane he was driving in had recently been milled, but that it appeared to be completely refilled with asphalt; however, the pavement came to an abrupt end and the road remained milled and unfinished for approximately 100 meters. According to Claimant, there were no signs or cones to warn the traveling public of the unfinished surface. Claimant stated that he attempted to avoid the roughly milled pavement by maneuvering his vehicle into the opposing lane, but when he encountered oncoming traffic he was forced back into his lane, where his vehicle struck a four to five inch abrupt incline between where the asphalt was milled and where the milling ended.

As a result of this incident, Claimant's vehicle sustained damage to the front passenger side rim and tire pressure sensor requiring their replacement and a wheel alignment in the amount of $383.61. However, because the particular rims on Claimant's vehicle had been discontinued he seeks compensation for the replacement of all four rims, which, in addition to the other damages, totaled $820.60. Claimant acknowledged that replacement of all four rims was a stylistic choice and not functionally necessary. Since Claimant's insurance declaration sheet indicates that his collision deductible is $500.00, Claimant's recovery is limited to that amount.

It is Claimant's position that Respondent knew or should have known about the unfinished and unmarked lane on Route 250 which created a hazardous condition to the traveling public, and that Respondent was negligent in failing to properly maintain the road or provide proper warning to the traveling public of the hazardous condition prior to the incident.

The position of the Respondent is that it provided proper warning to the traveling public of the unfinished road work on Route 250 at the time of the incident. Michael Roncone, Administrator for Respondent in Marion county, testified that he is familiar with Route 250 and the milling project at issue in this case. Mr. Roncone stated that it is Respondent's custom and habit to erect signs warning the traveling public of road work prior to a work area, and that those signs are customarily left up whenever a work area is left open and there is a drop in the pavement of one and a half inches or more. Mr. Roncone testified that he had no personal knowledge as to whether warning signs were present at the location and on the date of the incident in this case.

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, Claimant must prove that Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways*, 16 Ct. Cl. 8 (1985); *Chapman v. Dep't of Highways*, 16 Ct. Cl. 103 (1986). To be actionable, Respondent's negligence must be the proximate cause of the injuries of which the Claimant complains. *Roush v. Johnson*, 139 W.Va. 607; 80 S.E.2d 857 (1954). Proximate cause requires: 1) the doing of an act or the failure to do an act that a person of ordinary prudence could foresee may naturally or probably produce injury to or the death of another; and 2)

that such act or omission did in fact produce the injury or death. *Matthews v. Cumberland & Allegheny Gas Co.*, 138 W.Va. 639; 77 S.E.2d 180 (1953). "[W]hen the injury complained of is not reasonably foreseeable, in the exercise of due care, the party whose conduct is under investigation is not answerable therefor." *Hartley v. Crede*, 140 W.Va. 133, 146; 82 S.E.2d 672, 680 (1954).

In the instant case, the Court is of the opinion that Respondent had actual knowledge of the road work on Route 250 and that it failed to provide adequate notice of the roughly milled portion of the road. Since an unmarked steep incline between the unfinished and finished travel portion of the road created a hazard to the traveling public, the Court finds Respondent negligent. However, the Court is of the opinion that Claimant may only recover those damages actually caused by the hazardous condition. Since Respondent could not reasonably foresee that the rims on Claimant's vehicle would be discontinued, Claimant may only recover the cost of replacing the one broken rim, and not all four.

In view of the foregoing, it is the opinion of the Court of Claims that the Claimant should be awarded the sum of $383.61.

Award of $383.61.

OPINION ISSUED JANUARY 18, 2011

WARREN L. COMPTON and JUDITH A. COMPTON
V.
DIVISION OF HIGHWAYS
(CC-10-0432)

Claimants appeared *pro se*.
Michael J. Folio, Attorney at Law, for Respondent.

PER CURIAM:

Claimants brought this action for vehicle damage which occurred when their 2009 Lexus 350 GS struck an unevenly milled portion of the road on US Route 250 near Whitehall, Marion county. Route 250 is a public 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, 2010. At the location of the incident, Route 250 is a two-lane paved road with one lane of traffic in each direction and a speed limit of 45 miles per hour. At the time of the incident, Claimant, Judith A. Compton, was driving south on Route 250 with her husband and co-Claimant, Warren L. Compton, as a passenger. Mrs. Compton testified that Respondent had been milling portions of Route 250 for months, and that she had been careful to dodge those sections. However, Mrs. Compton stated that on the date of the incident, there were no cones or signs to warn of road work or uneven surfaces, and that it appeared Respondent had finished paving. According to Mrs. Compton, she was driving approximately 30-35 miles per hour when she noticed a small section of the recently milled portion of the road had not been refilled asphalt. Mrs. Compton testified that the presence of oncoming traffic prevented her from maneuvering her vehicle to avoid the deeply milled section of road, but that she was able to slow her vehicle to 20 miles per hour before it struck a five inch abrupt incline between where the road was milled and where the milling

ended. As a result of this incident, Claimants' vehicle sustained damage to front driver side tire requiring replacement in the amount of $339.20. Claimants' insurance declaration sheet indicates that their collision deductible is $1000.00.

It is the Claimants' position that Respondent knew or should have known about unfinished and unmarked section on Route 250, that it created a hazard to the traveling public, and that Respondent was negligent in failing to properly maintain the road or provide proper warning to the traveling public of the hazardous condition prior to the incident.

The position of Respondent is that it did not have actual or constructive notice of the defect in the pavement that Claimants' vehicle struck on Route 250 at the time of the incident. Michael Roncone, Administrator for Respondent in Marion county, testified that he is familiar with Route 250 and the milling project at issue in this case. Mr. Roncone stated that it was his belief that Mrs. Compton must have driven off the road to the right in order for her vehicle to have struck the milled section of the road with her left front tire.

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, Claimants must prove that Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways*, 16 Ct. Cl. 8 (1985); *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 road work on Route 250, and that it failed to provide adequate warning of the roughly milled portion of the road. Since an unmarked steep incline between the unfinished and finished travel portion of the road created a hazard to the traveling public, the Court finds Respondent negligent.

In view of the foregoing, it is the opinion of the Court of Claims that the Claimants should be awarded the sum of $339.20.

Award of $339.20.

OPINION ISSUED JANUARY 18, 2011

PHILLIP COX AND ROBIN COX
V.
DIVISION OF HIGHWAYS
(CC-10-0244)

Claimants appeared *pro se*.
Michael J. Folio, 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. In March of 2010, Claimant's 1997 Cadillac Seville struck a hole in the roadway of Grandview Road in Raleigh County.

2. Respondent is responsible for the maintenance of said roadway which it failed to maintain properly on the date of this incident.

3. As a result, Claimant's vehicle sustained damage to its tires and rims in the amount of $476.68. Claimant's held liability insurance only at the time of the incident.

4. Respondent agrees that the amount of $476.68 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 Grandview 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 damages agreed to by the parties is fair and reasonable. Thus, Claimant may make a recovery for the loss.

It is the opinion of the Court of Claims that the Claimant should be awarded the sum of $476.68 on this claim.

Award of $476.68.

OPINION ISSUED JANUARY 18, 2011

BECKY STEWART
V.
DIVISION OF HIGHWAYS
(CC-10-0097)

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

PER CURIAM:

Claimant brought this action for vehicle damage which occurred to her rental car, a 2010 Chevrolet Cobalt, when she drove over a pile of snow and asphalt on County Route 19/63, locally designated Locust Estates, in Sutton, Braxton County. County Route 19/63 is a public 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 5:45 p.m. on February 8, 2010. At the location of the incident, County Route 19/63 transitions from a one-lane paved road into a one-lane gravel road that leads to Claimant's property. Claimant, Becky Stewart, testified that Respondent had plowed snow off the paved portion of the road and left a pile of snow mixed with asphalt patches (extracted during snow removal) across the gravel road. At the time of the incident, Ms. Stewart was driving home in a rental car. She attempted to drive cautiously over the pile of snow, but pieces of asphalt patch scrapped the rental car's underside. As a result of this incident, Claimant's rental vehicle sustained damage to the oil pan, requiring its replacement in the amount of $309.60. Claimant's insurance declaration sheet indicates that her collision deductible is $500.00.

The position of Respondent is that it did not have actual or constructive notice of the pile of snow and asphalt on County Route 19/63 at the time of the incident. Jack D. Belknap, Administrator Two for Respondent in Braxton County, testified that he is familiar with County Route 19/63 where the road transitions from asphalt to gravel, and that Respondent is responsible for the maintenance of both portions of the road. Mr. Belknap testified that it is the customary practice of Respondent to remove snow on the paved portion of the road, and then turn around where the gravel begins (without leaving a pile of snow). Mr. Belknap stated that

there was no particular reason why Respondent customarily did not plow the gravel road. However, Mr. Belknap testified that, based on the maintenance records he consulted, on February 7, the day before the incident, Respondent had plowed Route 19/63 with a single-axel dump truck, which is larger than a ton truck and harder to turn around.

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, Claimant must prove that Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways*, 16 Ct. Cl. 8 (1985); *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 pile of snow and asphalt on County Route 19/63. Since Respondent's snow removal activities left behind a pile of snow and asphalt shards in the travel portion of the road, which created a hazard to the traveling public, the Court finds Respondent negligent.

In view of the foregoing, it is the opinion of the Court of Claims that the Claimant should be awarded the sum of $309.60.

Award of $309.60.

OPINION ISSUED JANUARY 18, 2011

THOMAS P. HARTMAN II and JESSAMY HARTMAN
V.
DIVISION OF HIGHWAYS
(CC-09-0485)

Claimants appeared *pro se*.
Michael J. Folio, Attorney at Law, for Respondent.

PER CURIAM:

Claimants brought this action for vehicle damage which occurred when their 2005 Pontiac G6 1struck a one and a half inch discontinuity between the asphalt and metal expansion joint on I-64 east just prior to the Nitro Bridge in Scott Depot, Kanawha County. Interstate 64 is a public 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 September 28, 2009. At the time of the incident, Claimant Jessamy Hartman was driving eastbound on I-64 from Hurricane to Charleston. 1The area in question is a two-lane road that converges with the St. Albans ramp on the right just prior to the Nitro Bridge. 1Mrs. Hartman testified that she saw signs advising the traveling public of road work generally, but that no signs to indicate a bump or rough road. Claimant stated that because of bumper to bumper traffic she did not see the gap between the asphalt and bridge until her vehicle struck the metal bridge joint that protruded an inch and a half higher than the preceding pavement. Although Claimant travels this road on a daily basis, she had not encountered this hazard on a previous occasion. As a

result of this incident, Claimants' vehicle sustained damage to front passenger side wheel in the amount of $428.88. Claimants' insurance declaration sheet indicates that their collision deductible is $1000.00.

The position of the Respondent is that it did not have actual or constructive notice of the condition on I-64 at the time of the incident. 1Rick Hazelwood, Maintenance Supervisor for Respondent at the Scary office, testified that he oversees maintenance repairs in the area in question. Mr. Hazelwood stated that he was familiar with the resurfacing project on I-64 East, and indicated that paving work was being conducted from the 42 mile marker through the 40th Street overpass. He stated that two days prior to the incident the asphalt had been ground out up to the expansion joint at the bridge. According to Mr. Hazelwood there were warning signs erected, as per Respondent's protocol, to advise drivers of the work.

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, claimant must prove that respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways*, 16 Ct. Cl. 8 (1985); *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 protruding metal bridge joint which Claimants' vehicle struck and that the condition of the road presented a hazard to the traveling public. Since the pavement was ground down on the travel portion of the road leading up to the bridge expansion joint without sufficient warning signs, the Court finds Respondent negligent.

It is the opinion of the Court of Claims that the Claimants should be awarded the sum of $428.88.

Award of $428.88.

OPINION ISSUED JANUARY 18, 2011

ANDY GARRETT
V.
DIVISION OF HIGHWAYS
(CC-09-0054)

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 1995 Oldsmobile Cutlass Supreme struck a hole while he was driving on County Route 3, locally designated Coal River Road, in St. Albans, Kanawha County. County Route 3 is a public 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 6:30 p.m. on January 17, 2009. Route 3 is a two-lane paved road with a speed limit between forty-five and fifty miles per hour. On the date of the incident there was snow on the ground beside the road. Claimant testified that he regularly drives the road in

question during the summer, but that he had not driven the road for several months before the incident. Claimant stated that the he was driving south on Route 3 towards Tornado, about a mile from Main Street, at approximately forty miles per hour when his vehicle struck a hole three to four inches deep located in the middle of the road in a straight area of the roadway. According to Mr. Garrett, the impact of hitting the hole caused his vehicle's timing belt to break and the engine to immediately seize. Claimant stated that he purchased his vehicle a year before with just over 100,000 miles on it, and he had had it subsequently tuned. As a result of this incident, Claimant's vehicle sustained damage to its engine in the amount of $1,540.00. Claimant's insurance declaration sheet indicated that he had liability insurance only.

The position of the Respondent is that it did not have actual or constructive notice of the condition on County Route 3 at the site of the Claimant's accident, and further that this was not the actual or proximate cause of the damage. Barbara Engelhardt, Highway Administrator for the Respondent in Kanawha County, testified that at the time of Claimant's incident, crews for Respondent were involved in snow removal and ice control. According to Ms. Engelhardt, Respondent agency was aware of the condition of the road and patched the holes with cold mix as quickly as possible, but that the snow plows would remove patches during snow removal. Based on photographs taken by the Claimant, and admitted into evidence, it was Ms. Engelhardt's position that the hole could only be approximately two inches deep and would not cause a jolt or interfere with driving.

Harold Hazlewood, Lead Mechanic for the Respondent in Kanawha County, testified that he is responsible for the repair and preventative maintenance of all Respondent's transportation vehicles, including passenger vehicles. Mr. Hazlewood stated that in the 38 years he has been a mechanic he has never seen an incident where hitting a hole has caused a timing chain to break. According to Mr. Hazlewood, the most likely cause of such damage would be excessive wear on the timing chain caused by high mileage. However, Mr. Hazlewood conceded that wear on a timing chain would show up during a regular tune up.

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. *Pritt v. Dep't of Highways*, 16 Ct. Cl. 8 (1985); *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 broken section of pavement which Claimant's 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 County Route 3. The size of the broken section of pavement which covered most of the lane being traversed by the Claimant leads the Court to conclude that Respondent had notice of this hazardous condition and that Respondent had an adequate amount of time to take corrective action. Additionally, the Court is not convinced that the hazard present was not, in fact, a proximate cause of the damage to Claimant's vehicle. Thus, the Court finds Respondent negligent and Claimant may make a recovery for the damage to his vehicle.

It is the opinion of the Court of Claims that the Claimant should be awarded the sum of

$1,540.00.

Award of $1,540.00.

OPINION ISSUED JANUARY 18, 2011

JAMES R. DAVIS
V.
DIVISION OF CORRECTIONS
(CC-10-0657)

Claimant appeared *pro se*.

Charles P. Houdyschell Jr., Senior Assistant Attorney General, for Respondent.

PER CURIAM:

This claim was submitted for decision without a hearing based upon the allegations in the Notice of Claim and Respondent's Answer.

Claimant, an inmate at the Mount Olive Correctional Complex, seeks to recover $22.80 for tobacco products that were stolen from their storage location in the prison. Claimant was permitted to use the tobacco products for religious purposes.

In conformity with the Court's decisions relating to the tobacco products that were stolen from the prison, Respondent, in its Answer, admits liability in this claim in the amount of $22.80. In *McClain v. Div. of Corrections,* CC-08-0533 (2009), the Court found that the Claimant was entitled to recover the value of his tobacco products which were not adequately secured at the prison. *See also Posey v. Div. of Corrections,* CC-09-0068 (2009).

It is the opinion of the Court of Claims that the Claimant should be awarded the sum of $22.80 on this claim.

Award of $22.80.

OPINION ISSUED JANUARY 18, 2011

MONICA J. LOUGH
V.
DIVISION OF HIGHWAYS
(CC-10-0025)

Claimant appeared *pro se*.

Michael Folio, Attorney at Law, for Respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when her 1998 Chevrolet Lumina struck a poorly marked median separating the entrance to and exit from WV Route 16, locally designated Robert C. Byrd Drive, in Mabscott, Raleigh County. WV Route 16 and its entrances and exits are public roads 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 March 10, 2009. It was drizzling rain. There was no artificial lighting. At the time

of the incident, Claimant was driving up the entrance ramp to WV Route 16, leaving Mabscott and heading towards Crab Orchard. The entrance/exit ramp to WV Route 16 is a two-lane road, with one lane of traffic entering Route 16 and one lane exiting Route 16. Claimant stated that she was unfamiliar with this road, because she was new to the area. Claimant testified that as she neared the entrance to Route 16, her vehicle suddenly struck the median dividing the entrance and exit lanes to and from WV Route 16, throwing the vehicle into the opposite lane. Claimant stated that the median was unmarked and that the yellow lane line on the her side of the median was worn off, but that a sharp metal rod protruded from the median (presumably from an earlier sign), causing serious damage the underneath part of Claimant's vehicle, including its alternator. Claimant presented the Court with a towing receipt for $235.00. Claimant's vehicle, which was purchased six months earlier for $1,800, was totaled as a result of this incident. Claimant also testified that she paid $600 to put new tires on the vehicle just prior to the incident. Claimant's insurance declaration sheet indicates that her vehicle had liability insurance only.

The position of the Respondent is that it did not have actual or constructive notice of the unmarked median on the WV Route 16 entrance ramp at the time of the incident. Brian Ramplewich, Crew Supervisor for Respondent in Raleigh County, testified that he is familiar with the stretch of road and median involved in this claim, and stated that it was his belief that a yellow lane line was present on the date of Claimant's incident. Mr. Ramplewich conceded that the rod protruding from the median which caused damage to Claimant's vehicle was likely a directional sign, although he was unaware of how long it had been missing. In addition, Respondent presented evidence that the fair market value of Ms. Lough's vehicle, given its high mileage, would have been no more than $1,400.

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, Claimant must prove that Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways*, 16 Ct. Cl. 8 (1985); *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 poorly demarcated median on the WV Route 16 entrance/exit ramp in Mabscott. Since the stub of a sign protruded from the unmarked median and created a hazard to the traveling public, the Court finds Respondent negligent.

In view of the foregoing, it is the opinion of the Court of Claims that the Claimant should be awarded the sum of $2,235.00, for the fair market value of her vehicle, plus the cost of her new tires and towing.

Award of $2,235.00.

OPINION ISSUED JANUARY 18, 2011

SHEILA F. BOKKON and ROBERT G. BOKKON
V.
DIVISION OF HIGHWAYS
(CC-10-0328)

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 2009 Subaru Legacy struck a hole on WV Route 39, locally designated as Turnpike Road, in Swiss, Nicholas County. West Virginia Route 39 is a public 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 May 2, 2010. West Virginia Route 39 is a two-lane paved road with one lane of traffic in each direction, and a double yellow lane line in the middle of the road and white edge lines. Claimant, Robert Bokkon, testified that he was driving home from visiting his mother-in-law at the time of the incident, and that his wife and co-Claimant was a passenger in the vehicle. Mr. Bokkon stated that his familiar with the road in question. According to Mr. Bokkon, he was driving east on WV Route 39 on a straightaway when he spotted a dog on the right side of the road. Mr. Bokkon testified that he instinctively swerved his vehicle away from the dog and towards the center of the road, where his vehicle struck a defect in the pavement, approximately eight inches wide by three or four feet long. As a result of this incident, Claimants' vehicle sustained damage to front driver's side tire in the amount of $98.58. Mr. Bokkon testified that Claimants' collision deductible is $500.00, which Respondent accepted as true.

The position of the Respondent is that it did not have actual or constructive notice of the defect in the pavement on WV Route 39 at the time of the incident. Respondent presented no 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 v. Sims*, 130 W.Va. 645; 46 S.E.2d 81 (1947). In order to hold Respondent liable for road defects of this type, Claimants must prove that Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways*, 16 Ct. Cl. 8 (1985); *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 on WV Route 39. Since a defect in the pavement three or four feel long and wide enough for a tire located in the center of the road created a hazard to the traveling public, the Court finds Respondent negligent.

In view of the foregoing, it is the opinion of the Court of Claims that the Claimants should be awarded the sum of $98.58.

Award of $98.58.

OPINION ISSUED DECEMBER 16, 2010

DORIS RUNYON
V.
DIVISION OF HIGHWAYS
(CC-06-0132)

Cecil C. Varney, 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. Claimant owns property located on the south side of County Route 6 in Red Jacket, Mingo County, West Virginia.

2. Respondent is responsible for the maintenance of County Route 6 in Mingo County.

3. Claimant alleges that Respondent's maintenance of the drainage structures along County Route 6 has caused flooding and damage to her property.

4. Under the facts and circumstances of this claim, for the purpose of settlement, Respondent does not dispute the allegations contained in paragraph 3.

5. Claimant and Respondent agree that an award of $80,000.00 is a fair and reasonable amount to settle this claim.

The Court has reviewed the facts of the claim and finds that the amount of the damages 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 $80,000.00.

Award of $80,000.00.

OPINION ISSUED JANUARY 21, 2011

ONE-GATEWAY ASSOCIATES,
A LIMITED LIABILITY COMPANY
V.
DIVISION OF HIGHWAYS
(CC-09-0153)

Jonathan E. Halperin and Jeffry A. Pritt, Attorneys at Law, for Claimant.
Thomas W. Smith, Assistant Attorney General, for Respondent.

SAYRE, JUDGE:

Claimant, One-Gateway Associates, a Limited Liability Company (hereinafter "OGA"), entered into a contract (hereinafter "the Contract") with Respondent, the West Virginia Department of Transportation, Division of Highways (hereinafter "DOH"), dated January 27, 1998. OGA alleges that while it fulfilled all of its obligations under the Contract, DOH failed to perform its reciprocal obligations thereunder. OGA asserts that as a consequence it is entitled to damages in the amount of $3,705,000.00 from DOH for breach of contract. Conversely, DOH argues that it has fully performed all of its obligations under the Contract. The Court is of the opinion to make an award in this claim for the reasons more fully stated below.

U.S. Route 19 is a heavily traveled, four lane, limited access state highway running generally north and south through the middle of West Virginia.[26] As it passes through Summersville in Nicholas County, U.S. Route 19 has made it possible for a considerable amount of commercial development to take place adjacent to both its east and west sides. While there are no interchanges, there are a number of at-grade intersections affording these commercially developed properties access to U.S. Route

[26] It is a segment of John F. Kennedy's "Appalachian Development Highway System."

19. Traffic lights control certain of these intersections, but not all of them.

Analysis of traffic data by DOH concerning traffic volumes and accident rates, both present and projected, indicates that the U.S. Route 19 intersections in the vicinity of Summersville (whether controlled with traffic lights or not) are inadequate to serve the traveling public without some modifications, such as frontage roads. To this end, DOH has caused environmental studies to be made and preliminary engineering work to be performed.[27]

OGA was formed in 1994 to participate in the opportunities for commercial development afforded by U.S. Route 19 as it passes through Summersville. Consequently, OGA acquired a 26 acre tract (hereinafter "the OGA Site") suitable for development. The OGA Site abuts the west side of U.S. Route 19 and extends along U.S. Route 19 from an at-grade intersection, designated "Professional Park Drive," north to a another at-grade intersection, designated "Industrial Drive".

When OGA purchased its 26 acre Site, it lacked access to U.S. Route 19, either via Industrial Drive or via Professional Park Drive. Accordingly, extensive negotiations took place between OGA and DOH, resulting in a preliminary agreement which afforded the OGA site ingress and egress to and from U.S. Route 19 via Industrial Drive, the northern intersection. Nevertheless, with this single access to U.S. Route 19 a significant portion of the OGA Site was developed by the leasing and construction of several businesses, including a Wal-Mart store.

OGA continued to seek ingress and egress to and from U.S. Route 19 for its Site via Professional Park Drive, the southern intersection. These negotiations culminated in the Contract at issue. For its part, DOH agreed to use its "best efforts" to acquire a small tract of land (containing 5,000 square feet) from OGA's neighbor to the south, Retain Designs, Inc. (hereinafter "the Retail Designs Tract") by agreement if possible or, failing that, by instituting an eminent domain proceeding in the Circuit Court of Nicholas County. After DOH obtained title to the Retail Designs Tract (by either means), a five-lane entrance, controlled by the traffic light, would then be constructed across the Retail Designs Tract, providing access from the Professional Park Drive intersection to both the OGA Site and property belonging to Retail Designs, Inc., to the south of the OGA Site.

For its part, OGA agreed to construct a frontage road across the front of its Site, extending from Industrial Drive to Professional Park Drive, at its expense but according to plans and specifications provided by DOH; and to then transfer title of the new frontage road to DOH. Further, OGA agreed to also convey to DOH the 1.76 acres of its 26 acre Site upon which it had constructed the frontage road.

As it agreed to do, OGA constructed the frontage road according to DOH's plans and specifications. The work was accepted by DOH. The 1.76 acre tract, including the frontage road, was then transferred by OGA to DOH and is now part of the State Road System. Thus, OGA has fully performed its part of the contract.

The parties have stipulated that the actual cost to OGA of the frontage road and improvements was $554,000.00, and that the fair market value of the 1.76 acres on the date of its transfer to DOH was $429,000.00.

DOH also agreed to transfer a parcel of "excess" DOH right-of-way (containing 0.815 of an acre) to OGA. There was no evidence presented by either party as to the fair market value of this excess right-of-way. However, DOH's deed

[27] *Retail Designs, Inc. v Div. of Highways,* 213 W. Va. 494, 583 S.E.2d 449(2003). See also the Petition for Appeal filed by DOH by the Director and Assistant Director of its Legal Division, cited by Justice Davis in her opinion.

to this excess right-of-way specifies that it is a deed of exchange for OGA's 1.76 acre tract. The DOH deed was delivered to OGA, which accepted it and recorded it in the Nicholas County Clerk's Office.

Retail Designs, Inc., the owner of the 5,000 square foot tract that was the subject of the Contract, refused to voluntarily convey its tract to DOH. Accordingly, as it had agreed to do in the Contract, DOH filed a suit in the Circuit Court of Nicholas County to obtain an Order of Entry for the Retail Designs Tract, by condemnation. This action too was resisted by Retail Designs, Inc., which argued that its property was being condemned for a private purpose, i.e., to provide ingress and egress to and from the Wal-Mart store site.

The case was heard in the Circuit Court by Judge Gary Johnson, who agreed with Retail Designs, Inc., and dismissed the condemnation proceeding on the ground that DOH had authority to take private property by eminent domain only for a public purpose.

This adverse ruling was not appealed by DOH. OGA argues that DOH's failure to appeal constitutes a breach of the provision of the Contract wherein DOH promised to exert its "best efforts" to obtain the Retail Designs Tract. Further, OGA contends that DOH also failed to exert its "best efforts" by assigning a less experienced attorney to prosecute the eminent domain proceeding in the Circuit Court.

This Court, having considered the arguments of counsel for both of the parties to this claim, is of the opinion that there is no basis for the argument that DOH did not use its "best efforts" to obtain the Retail Designs Tract and to construct the contemplated five-lane entrance to the OGA Site via Professional Park Drive.

There are many factors that must be considered before appealing an adverse ruling from a lower court. For instance, West Virginia, unlike most states (and the federal court system), does not have "appeal as a matter of right." One must first petition to be allowed to appeal. (More often than not, the West Virginia Supreme Court of Appeals does not grant petitions to be allowed to appeal).

It cannot be said that DOH agreed to appeal "no matter what." No evidence was presented on the question of the amount of experience possessed by the DOH attorney who handled the condemnation proceeding. Further, to argue that a more experienced attorney should have been assigned to the case would require evidence either that the attorney assigned the case was without experience or that a more experienced attorney would have obtained a result favorable to DOH (and, by extension, to OGA). And no one suggests that the attorney assigned the case failed to use **his** best efforts.

Specifically, Paragraph XIV of the Contract reads in part:

XIV. If neither One-Gateway Associates, a Limited Liability Company, nor West Virginia Department of Transportation, Division of Highways, can obtain the land required for construction of the frontage road on or before June 1, 1998, the West Virginia Department of Transportation, Division of Highways, shall immediately initiate an eminent domain proceeding in the Circuit Court of Nicholas County, West Virginia, for the purpose of condemning the land required for construction of the frontage road in accordance with the plans for the construction of the project approved by the West Virginia Department of Transportation, Division of Highways, and **shall use its best efforts to obtain a right of entry** so that construction of the frontage road can proceed in accordance with the construction schedule prepared by One-Gateway Associates . . . .

(Emphasis supplied).

What did the two parties to the Contract mean when they agreed that DOH

"shall use its best efforts to obtain a right of entry"? This Court concludes that both of the parties believed that the phrase "best efforts" meant that DOH **would** obtain the necessary right of entry, even if it found it necessary to condemn the Retail Designs Tract. Certainly OGA did not consider the possibility that Judge Johnson might refuse to grant the Order of Entry, when it agreed to construct the frontage road.

Importantly, for the Contract to be valid, DOH **had** to also believe that it **would** obtain the right of entry.

See *McGinnis v. Cayton*, 173 W. Va. 102, 312 S.E.2d 765 (1984); and *Meadows v. American Eagle Fire Ins. Co.*, 104 W. Va. 580, 140 S.E. 552 (1927).[28]

Essentially, OGA agreed to construct the frontage road for DOH and to transfer both the new road and the land under it to DOH so that it could be made a part of the State road system. The parties have stipulated that the cost to OGA of performing its part of the Contract was $983,000.00. In exchange for this major expenditure, OGA had every right to expect the agreed ingress and egress over the Retail Design Tract to and from its Site via Professional Park Drive by means of the five-lane entrance.

The Court also finds that if OGA had the agreed ingress and egress to and from its Site from both the north and south by the Professional Park Drive and the Industrial Drive intersections on U.S. Route 19, the newly constructed frontage road would serve no real purpose to OGA. Certainly the customers of its business tenants would not use the frontage road whether coming from the north or the south (or across U.S. 19 from the east).

Of course, Judge Johnson instead denied DOH its Order of Entry and dismissed its eminent domain proceeding. Judge Johnson's decision was not appealed and is now final. As a consequence, the five-lane entrace to the OGA Site at the Professional Park Drive intersection via the Retail Designs Tract did not come into being. In other words, it is not possible for DOH to keep its part of the Contract.

See *Bell v. Kanawha Tractraction & Elec. Co.*, 83 W. Va. 640, 98 S.E. 885 (1919) and *Dorr v. Chesapeake & Ohio Ry Co.*, 78 W. Va. 150, 88 S.E. 666 (1916).[29]

See also *Kelley v. Thompson Land Co.*, 112 W. Va. 454, 164 S.E. 667 (1932).[30]

The Court finds that the Contract was lawful when it was entered into but that, after OGA had fully performed the obligations it assumed upon entering into the Contract, DOH's performance of its reciprocal obligations was rendered impossible when, first, Retail Designs, Inc., refused to sell the Retail Designs Tract to DOH and then DOH failed to obtain the right of entry from the Circuit Court of Nicholas

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[28] 4A *Michies Jurisprudence* Contracts §26 (2007) says, in part:

"[T]he contract must be based on a mutual agreement. The minds of the parties thereto must meet and come together on every essential element thereof . . . nothing is clearer than the doctrine that a contract founded in a mutual mistake of the fact constituting the very basis or essence of it will avoid it." (Emphasis added.)

[29] 4A *Michies Jurisprudence* Contracts §67 says, in part:

"If a contract is lawful at the time it is entered into, but before it has been fully executed, its further performance is rendered impossible by a valid legislative act or by some other supervening cause over which the parties have no control, they will be excused from its further performance.

[30] And *id*. §69 says:

"If one renders beneficial services to another under a contract which is unenforceable but not illegal, he or she may recover for the benefits conferred.

County.

OGA is seeking an award of the following items:

1. Its expenses in the construction of the frontage road, stipulated as being in the amount of $554,000.00;
2. The fair market value of its 1.76 acre tract, stipulated as being in the amount of $429,000.00;
3. Attorney's fees and costs in the amount of $202,000.00; and
4. The loss of opportunity to develop the land used for the frontage road in the amount of $2,520,000.00.

As to item No. 2, the evidence was that the 1.76 acre tract was exchanged for the "excess" right-of-way conveyed by DOH to OGA. No evidence was presented as to the fair market value of this .815 of an acre. In any case, where, as here, the Court finds that there **was** a consideration supporting the conveyance of the 1.76 acres, the Court cannot consider the **sufficiency** of the consideration. Therefore, the Court has determined that there can be no award for this item.

As to item No. 3, the general rule in court actions is that each litigant bears his or her own attorney fees absent express statutory, regulatory or contractual authority.[31] Accordingly, in the absence of such express authority, this Court does not award attorneys fees. In any case, the request for attorney fees in this claim is for an entirely different case litigating a different set of facts. Since OGA obligated itself for the attorney fees in a separate action from the facts in this claim, the Court has determined that there can be no award for this item.

As to item No. 4, in the first place, the fair market value of the 1.76 acre tract utilized for the frontage road was stipulated by OGA as being $429,000.00. This, of course, is the subject of Item No. 2. As to any **damages to the residue** of the OGA 26 acre tract, there was no credible evidence that the value of the residue was reduced. And what evidence that was given was purely speculative. Therefore, the Court has determined that there can be no award for this item. However, as to item No. 1, in accordance with the findings of fact and the conclusions of law enumerated herein, the Court is of the opinion and does make an award to OGA for the cost of constructing the frontage road which is now a part of the State road system. The parties stipulated the cost of constructing that road as being in the amount of $554,000.00.

Accordingly, the Court is of the opinion to and does make an award to OGA in the amount of $554,000.00.[32]

Award of $554,000.00

The Honorable John G. Hackney Jr., former Presiding Judge, took part in the hearing and decision in this claim, but not in the written Opinion.

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[31] See *Geary Land Co. v. Conley*, 175 W. Va. 809, 338 S.E.2d 410 (1985) and *Nelson v. W. Va. Pub. Employees Ins. Bd.*, 171 W. Va. 445, 300 S.E. 2d 86 (1982).

[32] It should be noted that, had the Contract been VOID because the minds of the parties did not meet, under the principles of the law of Restitution with the facts of this case, the Court would have made an award in the same amount, based on the doctrine of "unjust enrichment." *See CSX Transp. Inc.* v. *Div. of Highways*, 27 Ct. Cl. 223 (2009).

OPINION ISSUED JANUARY 24, 2011

VERIZON NETWORK INTEGRATION CORP.
V.
DEPARTMENT OF HEATH AND HUMAN RESOURCES
(CC-11-0009)

J. David Fenwick and James A. Kirby, Attorneys at Law, for Claimant.
Harry C. Bruner 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 to recover $18,205.75 for equipment, installation services, maintenance services, and professional services rendered to Respondent, but for which Claimant has not received payment.

In its Answer, Respondent admits the validity of the claim as well as the amount of $14,766.66. Respondent states that there were sufficient funds expired in that appropriate fiscal year from which the invoice could have been paid. Claimant agrees that the amount of $14,766.66 is fair and reasonable, and is willing to accept it as full satisfaction for this claim.

It is the opinion of the Court of Claims that the Claimant should be awarded the sum of $14,766.66.

Award of $14,766.66.

OPINION ISSUED FEBRUARY 24, 2011

SABRINA L. LAWHORN
V.
DIVISION OF HIGHWAYS
(CC-09-0184)

Claimant appeared *pro se*.
Michael J. Folio, Attorney at Law, for Respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when Claimant's 2004 Ford Explorer Sport Trac struck a patch of ice and slid into a tree on Timber Hill Drive in Princeton, Mercer County. Timber Hill Drive is a public 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 10:30 a.m. on February 27, 2010. It had been snowing heavily prior to the incident and there was snow and ice on Timber Hill Drive, which is a two-lane paved road with a downhill curve at the location of the incident involved in this claim. At the time of the incident, Celina Treadaway was driving Claimant's front-wheel drive vehicle to work. Ms. Treadaway stated she had been snowed in at her house for many days prior to the incident and that the road had not been plowed all winter, but neither Claimant nor Ms. Treadaway had contacted Respondent. Ms. Treadaway testified that was approximately a quarter of a mile from her house, driving 10-15 miles per hour, when

Claimant's vehicle struck a patch of ice and Ms. Treadaway lost control of the vehicle. Ms. Treadaway stated that she attempted to tap the breaks and steer to the left around the curve, but she was unable to regain control of the vehicle and it collided head-on with a tree.

As a result of this incident, Claimant's vehicle sustained damage in the amount of $7,151.32, and was a total loss. Claimant testified that she only carried liability insurance at the time of the incident.

It is the Claimant's position that Respondent knew or should have known about icy conditions on Timber Hill Drive which created a hazard to the traveling public, and that Respondent was negligent in failing to properly maintain Timber Hill Drive prior to the incident.

The position of the Respondent is that it did not have actual or constructive notice of ice posing a risk to the traveling public on Timber Hill Drive at the time of the incident.

The position of the Respondent is that its employees were involved in snow and ice removal on the high priority roads in Wood County for the date in question.

Michael McMillion, Highway Admninistrator for Respondent in Mercer County, testified that at the time of Claimant's incident crews for Respondent were involved in snow and ice removal. Mr. McMillion stated that Timber Hill Drive is part tar and chip and part gravel road that is low priority in terms of maintenance. He testified that due to its low priority, it would be one of the last roads to be worked on during snow and ice removal periods. Mr. McMillion further stated that at the time of Ms. Treadaway's incident there was a lot of snow throughout the area and the crews had to perform snow and ice removal on the main routes until they were clean.

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); *Chapman v. Dep't of Highways*, 16 Ct. Cl. 103 (1986). With regard to ice claims, this Court has held that Respondent must direct its attention to the primary routes during periods of snow and ice, and failure to clear low priority roads and county routes without notice from the public is an insufficient basis upon which to find liability. *Buchanan v. Div. of Highways*, 26 Ct. Cl. 13 (2005).

In the instant case, the evidence established that the Respondent was involved in snow and ice removal throughout Wood County on the date of Claimant' incident. Consequently, there is insufficient evidence of negligence upon which to justify an award. The Court is well aware that during periods of snow and ice Respondent directs its attention to the primary routes. It is not able to address all county routes but attempts to maintain all road hazards when it receives notice from the public. While Respondent did receive notice from the Claimant of the conditions on Timber Hill Drive, there was evidence that there had been snowy and icy conditions for two weeks prior to the incident. The Court will not impose an impossible duty upon Respondent during periods when its crews must be attending to the maintenance of ice and snow on the State's highways. Therefore, the Court has determined that 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 FEBRUARY 24, 2011

WENDELL ASH
V.
DIVISION OF CORRECTIONS
(CC-09-0197)

Claimant appeared *pro se*.
John Boothroyd, Assistant Attorney General, for Respondent.

PER CURIAM:

Claimant, an inmate at Mt. Olive Correctional Complex, brought this action to recover the value of certain personal property that was mailed out of the facility and could not be returned to the Claimant in accordance with prison policy. The Court is of the opinion to deny this claim for the reasons more fully stated below.

A hearing was conducted by the Court in this claim on October 21, 2010, at which time the Claimant testified as to the facts and circumstances giving rise to his claim. On or about March 26, 2009, Claimant Wendell Ash was moved from his cell in the general prison population to lock-up. Because Claimant was being transferred to lock-up for longer than 30 days, Mr. Ash's personal property was inventoried and Respondent provided him with an "Evidence/Property Seizure Receipt" indicating that certain items were to be mailed out of the facility or destroyed. Mr. Ash testified that he chose to have his seized property mailed to his mother with the understanding that if the box remained unopened outside the facility it could be returned to him after he was released from lock-up. Claimant acknowledged that his package was mailed from the Respondent's facility to his designated recipient; however no one was home when it was delivered by the United States Postal Service. The package was allegedly placed between the storm door and the front door where it was soaked by rain. Claimant stated that unknown to him one of his family members opened the box to allow the contents to dry, and as a result, the contents, which included 98 cassette tapes and 12 CDs that Claimant valued at $363.33, could not be returned to him.

Claimant's position is that Respondent was responsible for his property once he turned it over to be mailed out of the facility in accordance with prison policy and that a bailment relationship existed at the time when he no longer had control or possession of his property.

Respondent contends that it followed proper procedure in mailing Claimant's package to the designated recipient for storage during Claimant's period in lock-up, and that it is not liable for the recipients failure to follow prison policy by opening the package.

The Court has held that a bailment situation exists when Respondent takes the personal property of an inmate and keeps it for storage or other purposes and then has no satisfactory explanation for not returning it. *Heard v. Div. of Corrections*, 21 Ct. Cl. 151 (1997); *Edens v. Div. of Corrections*, 23 Ct. Cl. 221 (2000).

In the present claim, the Court is of the opinion that no bailment relationship existed when Claimant was deprived of his personal property. The Court finds that the bailment situation, which was created when Claimant's property was seized, ended when Respondent placed the package into the possession of the US Postal Service for delivery to Claimant's designated recipient. Claimant has not established that Respondent acted in a wrongful manner. The policies in place at Mt. Olive

Correctional Complex were followed by the facility and Claimant was well aware of the policies.

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

Claim disallowed.

OPINION ISSUED FEBRUARY 24, 2011

MICHAEL STEWART
V.
DIVISION OF HIGHWAYS
(CC-09-0454)

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 G30 van bottomed out on a low water bridge on County Route 2, locally designated Copen Road, in Copen, Braxton County. County Route 2 is a public 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 in the afternoon on August 8, 2009. County Route 2 is a one-lane unpaved road that crosses over a creek with a low water concrete bridge at the location of the incident. At the time of the incident, Claimant's wife, Avonda D. Stewart, was driving Claimant's van, with her mother-in-law as a passenger. Ms. Stewart testified that she was crossing the creek on the one-lane bridge to reach a yard sale on the other side of the creek when irregularities in the bridge surface caused the van to teeter, cracking the running boards on both sides of the van. The van was a low standing conversion van with fiberglass running boards approximately five inches off the ground,.

As a result of this incident, Claimant estimated that his vehicle sustained damage to the running boards in the amount of $956.92. Since Claimant's insurance declaration sheet indicates that his collision deductible is $500.00, any recovery is limited to that amount. However, rather than replace the running boards, the Claimant testified his insurance provider declared the van at issue to be a total loss and Claimant received a total of $7,456.92 from his insurer for the van. Claimant testified that he had purchased the van a few months before the incident for $4,000.00.

It is the Claimant's position that Respondent knew or should have known about dips on the low water bridge on County Route 2 which created a hazardous condition to the traveling public and that Respondent was negligent in failing to properly maintain County Route 2 prior to the incident.

The position of the Respondent is that it did not have actual or constructive notice of the condition on County Route 2 at the time of the incident. Jack D. Belknap, Highway Administrator Two for Respondent in Braxton County, testified that his familiar with the particular stretch of County Route 2 at issue, which he describes as a gravel treated third or forth priority road that has been deteriorating over the past 10 years. Mr. Belknap described the low water bridge as a simple structure under 20 feet in length consisting of concrete poured over a culvert pipe with

a swell in the middle. Mr. Belknap stated that the front or back end of a long low lying vehicle may drag as it is driven over the swell 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, Claimant must prove that Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways*, 16 Ct. Cl. 8 (1985); *Chapman v. Dep't of Highways*, 16 Ct. Cl. 103 (1986).

In the instant case, the evidence established that Respondent was aware of the ongoing hazardous conditions on County Route 2. The Court is of the opinion that Respondent had not taken reasonable steps to ensure the safety of motorists traveling on County Route 2. Consequently, there is sufficient evidence of negligence upon which to base an award. Nevertheless, the Court is also of the opinion that Ms. Stewart was negligent in her operation of Claimant's van over rough terrain unsuitable for a low standing vehicle. In a comparative negligence jurisdiction, such as West Virginia, the driver's negligence may reduce or bar recovery in 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 SE2d 879, 885 (1979). In the instant case, the Court finds that the negligence of the Ms. Stewart 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 FEBRUARY 24, 2011

GARY D. LOVEJOY
V.
DIVISION OF HIGHWAYS
(CC-09-0596)

Claimant appeared *pro se*.
Michael J. Folio, Attorney at Law, for Respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when his 2009 Chevrolet Impala struck a hole on the berm on WV Route 25, locally designated 1st Avenue, in Nitro, Kanawha County. Route 25 is a public 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 in the late afternoon on November 4, 2009. WV Route 25 is a two lane paved road with one lane of traffic in each direction, a yellow center line and two white edge lines. Claimant, Gary Lovejoy, testified that he was driving along Route 25, with his wife and grandchildren as passengers in the vehicle, when suddenly the passenger side wheels of his vehicle struck a deep and jagged hole in the berm. Mr. Lovejoy stated that he is familiar with this road, but that he had never seen this hole before. As a result of this incident, Claimant's vehicle sustained damage to the front and rear passenger side struts, tires,

and rims in the amount of $955.70. Since Claimant's insurance declaration sheet indicates that his collision deductible is $500.00, any recovery is limited to that amount.

The position of the Respondent is that it did not have actual or constructive notice of the condition of the berm on WV Route 25 at the time of the incident. Additionally, Respondent argues that it should not be liable for the damages to Claimant's vehicle since he was not forced onto the berm out of necessity, but rather, voluntarily drove off the road. Respondent presented no witnesses.

It is a well-established principle that the State is neither an insurer nor a guarantor of the safety of motorists on its roads and highways. *Adkins v. Sims*, 130 W.Va. 645; 46 S.E.2d 81 (1947). To hold Respondent liable, Claimant must prove that Respondent had actual or constructive notice of the defect in question 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). The State owes a duty of reasonable care and diligence in the maintenance of a highway. *Parsons v. State Road Comm'n*., 8 Ct. Cl. 35 (1969). The Respondent also has a duty to maintain the berm of a highway in a reasonably safe condition for use when the occasion requires. *Compton v. Div. of Highways*, 21 Ct. Cl. 18 (1995). Liability may ensue when a motorist is forced onto the berm in an emergency or otherwise necessarily uses the berm of the highway and it fails. *Sweda v. Dep't of Highways*, 13 Ct. Cl. 249 (1980).

In the instant case, the Court finds that Respondent did not have notice of the condition of the berm on WV Route 25. It is also the opinion of the Court that Claimant chose to drive on the berm and was not forced to use the berm in an emergency situation or to avoid oncoming traffic. The Court cannot hold respondent liable for failure to maintain the berm when the use of the berm was not an emergency There is insufficient evidence of negligence upon which to base an award.

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

Claim disallowed.

OPINION ISSUED FEBRUARY 24, 2011

DONALD CRAFT
V.
DIVISION OF HIGHWAYS
(CC-09-0632)

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 1979 Chevrolet C-20 pickup truck struck a culvert on County Route 46, locally designated Laurel Fork, in Spencer, Roane County. County Route 46 is a public 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 3:50 p.m. on October 8, 2009. At the location of the incident, County Route 46 is a single-lane gravel road curving downhill to the left. At the bottom of the hill a culvert crosses

under Route 46 at a right angle. Claimant Donald Craft testified that the ditches parallel to Route 46, as well as the culvert, had been in a state of disrepair for years. Mr. Craft alleged that when Respondent's crews would grade the road the grader blade would scrape and cut the culvert, creating sharp, dangerous edges. Claimant testified that he had reported the broken to culvert to Respondent on numerous occasions, and although crews went out to look at the culvert the condition remained the same. At the time of the incident, Claimant was returning to his house after picking his son up from the bus stop when his tire struck the culvert. As a result of this incident, Claimant' vehicle sustained damage to the front passenger tire in the amount of $195.48. Claimant's vehicle had liability insurance only.

It is the Claimant's position that Respondent knew about the exposed and damaged culvert on County Route 46 which created a hazardous condition to the traveling public and that Respondent was negligent in failing to properly maintain Route 46 prior to the incident.

The position of the Respondent is that it did not have notice of the broken culvert on County Route 46 prior to Claimant's incident, and that it was not the proximate cause of Claimant's tire damage. Gary Alvis, Highways Administrator for Respondent in Roane County, testified that he is familiar with County Route 46, a priority four road, as well as the particular culvert in question and he had personally gone out to look at it after the incident in this claim was reported to him in December of 2009. Mr. Alvis agreed with the testimony of Claimant that the top of the culvert is damaged, although he contends that the metal curves down and inward and would not have been in a position to cut a tire. Mr. Alvis testified that the culvert pipe is currently nonfunctional and that it is essentially part of the road bed. Respondent considered removing the culvert, but because it is located in bed rock it would require blasting to remove the culvert which would probably expose sharp rock edges which would place the public in even more danger.

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, Claimant must prove that Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways*, 16 Ct. Cl. 8 (1985); *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 broken culvert on County Route 46 prior to Claimant's incident. Furthermore, the Court finds that the evidence failed to establish negligence on the part of Respondent. The Court is of the opinion that the witnesses' conflicting testimony lead to the conclusion that the proximate cause of Claimant's damage is speculative. While the Court is sympathetic to Claimant's plight, the fact remains that there is no evidence of negligence on the part of the 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 FEBRUARY 24, 2011

KIMBERLY FETTY
V.

DIVISION OF HIGHWAYS
(CC-09-0637)

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 2009 Mazda 3 struck a rock on WV Route 131, locally designated Saltwell Road, in Shinnston, Harrison County. Route 131 is a public 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 9:45 p.m. on December 8, 2009. WV Route 131 is a two-lane paved road with one lane for traffic in each direction. At the time of the incident, Claimant Kimberly Fetty was driving home from her mother's house. Ms. Fetty stated that it was a dark night with fog and rain. Ms. Fetty testified that she was driving up an incline near the end of Route 131 when she observed what she believed to be a brown paper bag in the road in her right lane. In fact the "paper bag" was a large rock, which her van struck. Ms. Fetty stated that she would have attempted to avoid striking the object if she had known it was a rock. Ms. Fetty stated that there was no on coming traffic in the opposite lane. Claimant drives this road frequently and could not recall seeing rocks in the road before the incident.

As a result of the incident, Claimant's van sustained damage to the right front wheel and tire in the amount of $7,213.89. Since Claimant had an insurance deductible of $500.00, any recovery is limited to that amount.

The position of the Respondent is that it did not have actual or constructive notice of the rock on WV Route 131. David Cava, Highway Administrator for Respondent in Harrison County, testified that he is familiar with WV Route 131 and stated that at the location of Claimant's incident there is a high rock wall. Mr. Cava testified that Respondent is aware of the potential for rock falls on Route 131 and attempted to warn drivers by erecting "falling rock" signs. Mr. Cava stated that the signs were installed prior to December 2009. Mr. Cava stated that he could only recall two instances in the last four years when Respondent's crews were sent to remove rocks for the road, and that Respondent was not notified about the rock in question before 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). 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 instant case, Claimant has not established that Respondent failed to take adequate measures to protect the safety of the traveling public on Route 131. Respondent placed "falling rock" signs to warn the traveling public of the potential for rock falls at this location. Although the rock created a dangerous condition on the

road, there is no evidence that Respondent had notice of this hazard. While the Court is sympathetic to the 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 as stated herein above, it is the Court is of the opinion to and does deny this claim.

Claim Disallowed.

OPINION ISSUED FEBRUARY 24, 2011

ANGELA S. ELLIS and JIMMY D. ELLIS
V.
DIVISION OF HIGHWAYS
(CC-10-0531)

Claimants appeared *pro se*.
Michael Folio, 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 July 22, 2010, Claimants' 2008 Ford Pickup struck a patch of rough and uneven pavement on US Route 119 near Chapmanville, Logan County.
2. Respondent is responsible for the maintenance of US Route 119 which it failed to properly maintain prior to this incident.
3. As a result, Claimants' vehicle sustained damage to its tires and rims in the amount of $362.52.
4. Respondent agreed that payment of the lesser of Claimants' insurance deductible or the amount of damages put forth would be fair and reasonable.

The Court has reviewed the facts of the claim and finds that Respondent was negligent in its maintenance of US Route 119 prior to the date of this incident, and that the negligence of Respondent was the proximate cause of the damages sustained to Claimants' vehicle. However, at the hearing of this matter, the Court requested that Claimants provide a copy of their insurance declaration page to verify the amount of his insurance deductible. Claimants failed to provide the insurance declaration page for the Court to review. Therefore, the Court is of the opinion to and does deny this claim.

Claim Disallowed.

OPINION ISSUED FEBRUARY 25, 2011

TERRENCE WINFORD HOPE III
V.
DIVISION OF HIGHWAYS
(CC-10-0344)

Claimant appeared *pro se*.
Michael J. Folio, Attorney at Law, for Respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when his 2007 Chevrolet Tahoe struck a low hanging branch on WV Route 49 just outside Williamson, Mingo County. WV Route 49 is a public 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 9:25 a.m. on May 12, 2010. County Route 49 is a two-lane paved road with one lane of traffic in each direction, a center yellow line, white edge lines, and a speed limit of 45 miles per hour. At the time of the incident, Claimant Terrence Winford Hope III, was driving to work with a passenger in his vehicle. Claimant stated that he drives this road every day. Claimant testified that just prior to the incident a large work truck approached him from the opposite direction crowding the center line. Mr. Hope stated that he maneuvered his vehicle slightly to the right, but remained on the paved surface, to avoid the oncoming truck when suddenly what he believed to be a branch hanging from a tree on the cliff bordering the road, struck his vehicle. Claimant did not notice the tree limb before he struck it. He did not return to inspect it, and, therefore, he could not testify as to whether it was hanging down, loose, or dead.

As a result of this incident, Claimant's passenger side window was shattered and Claimant presented an estimate for repairs in the amount of $339.39. Claimant's insurance declaration sheet indicates that his collision deductible is $1000.00.

It is the Claimant's position that Respondent knew or should have known about tree limb overhanging WV Route 49 which created a hazardous condition to the traveling public and that Respondent was negligent in failing to properly maintain WV Route 49 prior to the incident.

The position of the Respondent is that it did not have actual or constructive notice of a tree limb posing a risk to the traveling public on WV Route 49 at the time of the incident. John Marcum, Crew Supervisor for Respondent in Mingo County, testified that he is familiar with WV Route 49 and the particular location of Claimant's incident. Mr. Marcum testified that, to his knowledge, Respondent had not received any complaints about low-hanging tree limbs on this particular roadway 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 v. Sims*, 130 W.Va. 645; 46 S.E.2d 81 (1947). In order to hold Respondent liable for road defects of this type, Claimant must prove that Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways*, 16 Ct. Cl. 8 (1985); *Chapman v. Dep't of Highways*, 16 Ct. Cl. 103 (1986). With regard to tree claims this Court has held that if a tree is dead and poses an apparent risk, then the Respondent may be held liable. However, when an apparently healthy tree causes property damage, the Court has held that there is insufficient evidence of negligence upon which to justify an award. *Wiles v. Div. of Highways*, 22 Ct. Cl. 170 (1999); *Gerritsen v. Dep't of Highways*, 16 Ct. Cl. 85 (1986).

In the instant case, the Court is of the opinion that Respondent did not have notice that a tree limb posed an apparent rick to the traveling public on WV Route 49. Furthermore, the evidence adduced at the hearing established that the Claimant was not entirely sure what struck and damaged his vehicle. The Court will not speculate as to the nature of the object that Claimant's vehicle struck, or as to the health or risk posed, if, in fact, it was a tree limb.

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

claim.

Claim disallowed.

OPINION ISSUED MARCH 21, 2011

NEIL WILLIAMS
V.
DIVISION OF CORRECTIONS
(CC-09-0413)

Claimant appeared *pro se*.
John Boothroyd, Assistant Attorney General, for Respondent.

PER CURIAM:

Claimant, an inmate at the Mt. Olive Correctional Complex, a facility of Respondent, seeks to recover the sentimental and religious value of a hand-carved wooden tobacco pipe that was stolen from its storage location in the prison's chapel. The Court is of the opinion to deny this claim for the reasons stated more fully below.

A hearing was conducted by the Court in this claim on October 21, 2010, at which time the Claimant testified as to the facts and circumstances giving rise to his claim. Tobacco products have been banned from the prison with the exception of religious purposes. Claimant Neil Williams participated in Native American worship services at the prison's chapel and was permitted to use tobacco products during religious services. Mr. Williams testified that he owned a wooden ceremonial tobacco pipe, approximately 18 inches long with three sections and a painted fox icon, that had been hand carved by a fellow inmate and blessed within the prison. Claimant testified that on February 29, 2008, prison officials took possession of his tobacco pipe pursuant to prison policy and placed it in a locked metal cabinet in the prison's chapel, along with other inmates' tobacco related products. On or about November 29, 2008, the tobacco products, including Claimant's pipe, were stolen from the prison's chapel. Claimant placed a value of $500.00 on his wooden tobacco pipe, which he stated includes the pipe's sentimental and religious value as well as his "attorney fee" for filing this claim.

Michael Motto, and inmate at Mt. Olive Correctional Complex, testified on behalf of the Claimant. Mr. Motto testified that he hand carved and painted a number of ceremonial tobacco pipes for fellow inmates, including the Claimant. Mr. Motto stated that he could not place a value on the Claimant's pipe because he did not charge for it; the sentimental value would be personal to the Claimant; and while he estimated that the materials used to construct a similar pipe would range from $150-200 he obtained the materials for this particular pipe for free. Mr. Motto further testified that his personal pipe had not been stolen during the theft because he had been informed at a prayer meeting that he could retrieve his pipe and store it in his cell.

It is Claimant's position that Respondent is responsible for the loss of his personal property because a bailment relationship existed at the time his pipe was removed from his cell and transferred to the chapel for storage and Claimant no longer had control or possession of his property.

Respondent contends that it was not responsible for Claimant's property because Claimant was free to retrieve his pipe from the chapel prior to the theft. Respondent introduced into evidence Respondent's Operational Procedure #5.08,

dated September 1, 2008, which states that sacred prayer pipes were permitted to be stored "In-Cell" by inmates. Respondent further argued that Claimant overstated the sentimental and religious value of his pipe by pointing out that he did not attempt to check on or retrieve the pipe for seven months after the theft, and no longer participated and in the tobacco prayer rituals.

This Court has held that bailment exists when Respondent records the personal property of an inmate and takes it for storage purposes, and then has no satisfactory explanation for not returning it. *Page v. Division of Corrections*, 23 Ct. Cl. 238 (2000); *Heard v. Division of Corrections*, 21 Ct. Cl. 151 (1997). In other tobacco related claims, this Court has found Respondent liable to inmates whose tobacco products were stolen from Respondent's storage in the prison. *McClain v. Div. of Corrections*, CC-08-0533 (2009). However, in the present claim the Court is of the opinion that no bailment relationship existed. Unlike claims for the loss of tobacco products that were required to be stored in the prison's chapel, two months prior to the theft Claimant was free to retrieve his pipe from Respondent's possession and store it in his cell. Bailment ended when Claimant was free to retrieve his personal property from Respondent, and thus, Respondent cannot be held liable for Claimant's loss.

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

Claim disallowed.

OPINION ISSUED MARCH 21, 2011

MIGUEL DELGADO
V.
DIVISION OF CORRECTIONS
(CC-09-0623)

Claimant appeared *pro se*.

John Boothroyd, Assistant Attorney General, for Respondent.

PER CURIAM:

Claimant, an inmate at the Mt. Olive Correctional Complex, a facility of Respondent, seeks back payment for his participation in an educational program. The Court is of the opinion to deny this claim for the reasons stated more fully below.

A heaing was conducted by the Court in this claim on October 21, 2010, at which time the Claimant testified as to the facts and circumstances giving rise to his claim. On or October 29, 2009, Claimant Miguel Delgado was placed on administrative segregation within the prison facility. Mr. Delgado testified that inmates in administrative segregation are required to participate in a Quality of Life Program that includes an educational component. Mr. Delgado testified that the educational component consists of watching videos and completing an educational packet. Mr. Delgado estimated that on a given day he would watch a one hour-long video and complete a short question set in five minutes or less. Mr. Delgado argues that he should be paid for participating in the Quality of Life program based on Respondent's Policy Directive 501, which states that "[i]nmates who are involved in full-time academic or CTE classes shall be paid at the established rate for the Education category." Mr. Delgado testified that none of the inmates in administrative segregation are paid; however, inmates in general population have been paid for

completing the same educational packet. Claimant contends that he should receive $16 per month in back pay since he started the program.

It is Claimant's position that Respondent has violated its Policy Directive by failing to compensate him for his participation in the Quality of Life program.

The position of Respondent is that educational component of the Quality of Life program does not, by itself, qualify for monetary compensation. Respondent presented no witnesses.

In the instant case, the Court is of the opinion that Respondent did not violate its operational procedures by refusing to compensate Mr. Delgado for the educational component of the Quality of Life program. Based on the evidence adduced at hearing, the Court is of the opinion that an hour-long educational video followed by a five minute questionnaire does not constitute "full-time academic or CTE classes" as required for monetary compensation under Policy Directive 501. The Policy Directive goes on to state that "[i]nmates who are involved in part-time academic/CTE classes and who also work part-time shall receive a monthly salary equal to the higher of the two." While the Quality of Life program may constitute part-time academic work, Mr. Delgado failed to provide evidence that he was engaged in part-time work to satisfy the requirements for monetary compensation. Thus, the Court has determined that Claimant may not make a recovery for back pay in this claim.

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

Claim disallowed.

OPINION ISSUED MARCH 21, 2011

BETH OLINZOCK and JUSTIN OLINZOCK
V.
DIVISION OF HIGHWAYS
(CC-10-0010)

Claimants appeared *pro se*.
Michael J. Folio, Attorney at Law, for Respondent.

PER CURIAM:

Claimants brought this action for vehicle damage which occurred when their 1997 GMC Chevrolet Suburban struck a downed tree on County Route 12/7, locally designated Savage Road, in Bruceton Mills, Preston County. County Route 12/7 is a public 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 6:30 a.m. on February 19, 2009. County Route 12/7 is a gravel road that varies in width from two-lanes at its widest and one-lane at its narrowest. Claimant Beth Olinzock testified that on the date of the incident there was approximately four feet or more of snow on the ground. Mrs. Olinzock stated that at the time of the incident she lived on County Route 12/7, which she described as a remote road with only a few residents and in such poor condition that neither the school bus nor the U.S. postal service would come down the road. Mrs. Olinzock testified that three days prior to the incident giving rise to this claim she contacted Respondent's shed in Bruceton Mills to report a downed tree on County Route 12/7, and was informed that they would come out and look at

it as soon as possible. At the time of the incident, Mrs. Olinzock was driving her children to the bus stop. Believing that the tree had not been removed, and unable to see it because of the snow, Mrs. Olinzock attempted to drive around where she knew the tree had fallen. However, the tree had, in fact, been moved to the opposite side of the road and Mrs. Olinzock drove over a portion of the tree, approximately a foot and a half in diameter. Mrs. Olizock was not aware that the tree had been moved and does not know who moved it.

As a result of this incident, Claimants' vehicle sustained damage to the tie rod ends, running boards, and front fender in the amount of $5,124.54. Since Claimants' insurance declaration sheet indicates that their collision deductible is $500.00, Claimants' recovery is limited to that amount.

It is the Claimants' position that Respondent knew or should have known about the tree in the road on County Route 12/7 which created a hazardous condition to the traveling public and that Respondent was negligent in failing to properly maintain County Route 12/7 or provide proper warning to the traveling public of the known hazardous condition prior to the incident.

The position of the Respondent is that it did not have actual or constructive notice of the condition on County Route 12/7 at the time of the incident. Larry Weaver, Highway Administrator for Respondent in Preston County, testified that he is familiar with County Route 12/7, which he described as a priority four road. Mr. Weaver agreed with Mrs. Olinzock's testimony that Route 12/7 is a remote road in very bad condition. Mr. Weaver testified that on the date of the incident, Respondent's crews were focused on snow removal and maintenance on the County's priority one roads, including the US Highways and WV Routes, and not the priority four roads which are given the lowest priority. Mr. Weaver also stated that he had not been informed of Mrs. Olinzock's report of the downed tree, but stated that there is often a small delay in the relay of complaints.

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, Claimants must prove that Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways*, 16 Ct. Cl. 8 (1985); *Chapman v. Dep't of Highways*, 16 Ct. Cl. 103 (1986). 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).

In the instant case, the Court is of the opinion that Claimants failed to establish by a preponderance of the evidence that Respondent was negligent in the maintenance of County Route 12/7 at the time of the incident. The evidence establishes that Mrs. Olinzock was operating under the assumption that neither the snow nor the tree had been removed from the road, and nevertheless she assumed the risk of driving on County Route 12/7. The evidence further establishes that Respondent was operating under Snow Removal and Ice Control (SRIC) at the time of the incident due to the significant amount of snow accumulation in Preston County. The Court is well aware that during periods of snow and ice Respondent directs its attention to the primary routes and is not able to address all county routes. While sympathetic to Claimants' loss, the Court will not impose an impossible duty upon Respondent during periods when its attention must be the control of ice and snow on the State's highways. Therefore, the Court has determined that 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 MARCH 21, 2011

JOSEPH J. MARTIN
V.
DIVISION OF HIGHWAYS
(CC-10-0419)

Claimant appeared *pro se*.
Michael J. Folio, Attorney at Law, for Respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when his 2008 Hyundai Sonata struck a construction cone on I-79 somewhere between south Clarksburg and the US Route 19 Summersville exit. Interstate 79 is a public road maintained by Respondent. The Court is of the opinion to deny this claim for the reasons more fully stated below.

According to the claim form submitted by Claimant Joseph J. Martin, the incident giving rise to this claim occurred between 10:00 a.m. and 2:00 p.m. on September 17, 2009, somewhere in the 139 mile stretch between Morgantown, WV and Summersville, WV. At the hearing of this claim, Mr. Martin narrowed the location of this incident down to a 65 mile stretch between south Clarksburg, WV and the US Route 19 exit towards Summersville, WV. Mr. Martin testified that he notice emergency construction cones on the berm to the right of the road as he was driving along I-79. According to Mr. Martin, one of the cones ended up in the right lane and was sucked under the truck directly in front of the Claimant before being flipped out in front of the Claimant's vehicle. Mr. Martin testified that he attempted to straddle the cone with his vehicle because he did not have time to avoid it altogether. When he reached his destination, Mr. Martin got out of the car and noticed a crack in the middle of his front fender. As a result of this incident, Claimant's vehicle sustained damage to front fender in the amount of $716.89. Since Claimant's insurance declaration sheet indicates that his collision deductible is $500.00, Claimant's recovery is limited to that amount.

It is the Claimant's position that Respondent knew or should have known about the emergency cone in the travel portion of I-79 which created a hazardous condition to the traveling public and that Respondent was negligent in failing to properly maintain I-79 prior to the incident.

The position of the Respondent is that Claimant did not plead his claim with particularity such as to allow Respondent a fair opportunity to prepare a defense in this claim, and that Respondent did not have actual or constructive notice of the condition on I-79 at the time of the incident. Respondent was unable to present a witness in this claim since the location of the incident could not be determined.

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, Claimant must prove that Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective

action. *Pritt v. Dep't of Highways*, 16 Ct. Cl. 8 (1985); *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 emergency road cone in the travel portion of the road on I-79 prior to the incident giving rise to this claim. Although this Court does not require Claimants to plead their claims with the level of particularity required by the Federal and Circuit courts of this state, it is nevertheless the Claimants' duty to provide the location of the incident giving rise to the claim within a reasonable degree of certainty in order to provide Respondents a fair opportunity to defend against such actions in this Court. Since Claimant failed to provide a location for this incident or demonstrate that Respondent had notice of the cone in the road on I-79, the Court must deny this claim.

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

Claim disallowed.

OPINION ISSUED MARCH 21, 2011

ANNA KNIGHT LAYMAN
V.
DIVISION OF HIGHWAYS
(CC-10-0320)

Claimant appeared *pro se*.
Michael J. Folio, Attorney at Law, for Respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when a sharp rock punctured a tire on her 2004 Lincoln LS on Haymond Street in Fairmont, 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 at approximately 1:50 p.m. on May 3, 2010. Haymond Street was under construction and had a gravel surface at the location of the incident. Claimant Anna Knight Layman testified that at the time of the incident, she was driving slowly through the construction zone on Haymond Street with her mother following her in another car. Ms. Layman testified that she could hear a hissing sound coming from her tire. When she pulled over, Ms. Layman discovered that a sharp rock had punctured and remained lodged in one of her vehicle's tires. As a result of this incident, Claimant's vehicle sustained damage to the rear left tire requiring its replacement in the amount of $127.31. Claimant's insurance declaration sheet indicates that her collision deductible is $500.00.

It is the Claimant's position that Respondent knew or should have known about the sharp gravel on Haymond Street which created a hazardous condition to the traveling public and that Respondent was negligent in failing to properly maintain Haymond Street prior to the incident.

The position of the Respondent is that it did not have actual or constructive notice the condition on Haymond Street and that the contractor performing the construction at the location of the incident was responsible for maintenance at the time of the incident. Michael Roncone, Highway Administrator for Respondent in Marion County, testified that he is familiar with Haymond Street, which he stated is owned by the City of Fairmont and not Respondent. Mr. Roncone testified that at the

location of the incident, construction was under way on a the Gateway Connector connecting I-79 with Fairmont. Mr. Roncone acknowledged that the contractor working on the Gateway Connector project, Kanawha Stone, was contracted by Respondent, but testified that their contract contained an indemnity provision wherein the contractor assumed all responsibility for work on the road during the construction process.

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, Claimant must prove that Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways*, 16 Ct. Cl. 8 (1985); *Chapman v. Dep't of Highways*, 16 Ct. Cl. 103 (1986).

In the instant case, the Court is of the opinion that Respondent cannot be expected to inspect every piece of gravel rock that is used by its contractors during road construction and that 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 MARCH 24, 2011

RICOH AMERICAS CORPORATION
V.
DIVISION OF CORRECTIONS
(CC-10-0051)

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 $452.82 for services rendered to Respondent and documented by two unpaid invoices for $370.00 and $82.80.

In its Answer, Respondent admits the validity of the claim as well as the amount with respect to the services rendered in the sum of $370.00, and states that there were sufficient funds expired in that appropriate fiscal year from which the invoice could have been paid. Respondent denies the claim with respect to the remaining $82.80. Claimant has agreed to waive its claim for the remaining $82.80.

It is the opinion of the Court of Claims that the claimant should be awarded the sum of $370.00.

Award of $370.00.

OPINION ISSUED MAY 9, 2011

EUGENE R. DYE and JUDY L. DYE
V.
DIVISION OF HIGHWAYS
(CC-09-0397)

Claimants appeared *pro se*.
Andrew F. Tarr, Attorney at Law, for Respondent.

PER CURIAM:

Claimants brought this action for flood damage to their real property which they allege was caused by Respondent's negligent maintenance of the drainage system adjacent to Claimants' property. Claimants' property is located on Country Route 24, locally designated Seng Creek Road, in Whitesville, Boone County. County Route 24 is a public road maintained by the Respondent. Upon consideration of all the evidence presented at hearing, the Court is of the opinion to deny this claim for the reasons stated more fully below.

In 1984, Claimants purchased a vacant lot adjacent to Route 24 in Boone County upon which they placed a double-wide trailer. Between 1988 and 1989, Claimants constructed a driveway onto their property and a 20 x 40 feet in-ground pool. Claimants' property is situated in a hollow with a hillside directly behind their residence and a creek flowing on the opposite side of the road. There is a drainage ditch between Claimants' property and the road and the nearest culvert is on the upper end of Claimants' property, approximately 300 feet from their house, and extends underneath Route 24 to drain water coming off of the mountain into Seng Creek.

The incident giving rise to this claim occurred on August 2, 2009. A heavy rainfall occurred on and just prior to August 2, 2009, that resulted in flooding to Claimants' property which they allege damaged their swimming pool. Claimant Judy Dye testified that on the date of the incident heavy rainfall washed debris off of the hillside behind their house clogging the culvert underneath Country Route 24, thereby preventing the water from flowing into Seng Creek and diverting it down County Route 24, over Claimants' driveway and into their swimming pool. Mrs. Dye could not state whether the culvert was clogged or clear prior to the date of the incident. She testified that although the pool was covered on the day of the flood, debris got under the cover and ripped the liner of the pool along with causing other unspecified damage.

Mrs. Dye testified that prior to 2009 she could not recall their property flooding. Mrs. Dye stated that during the last large flood in 2000 the properties on the opposite side of Route 24 (on the Seng Creek side) flooded, but that the culvert at issue in this case functioned properly by allowing water to flow off the hillside and drain underneath Route 24 into Seng Creek. Mrs. Dye speculated that during the 2000 flood Respondent used a machine to clear out the culvert.

Claimant Eugene Dye testified that the culvert had been installed at an inadequate angle allowing debris to flow through it. Mr. Dye stated that rocks and debris would enter the culvert and stack up, causing the culvert to clog. Both Claimants' testified that neither of them had notified Respondent of problems with the culvert or requested maintenance to it prior to the incident.

Claimants seek to recover the cost of repairing the damage to their swimming pool. Claimants submitted into evidence an estimate from AAA Pools & Spas which states that the cost to replace the pool liner, cover, pump, motor, filter, and light, including labor amounts to $17, 023.60.

The Claimants' position is that the Respondent negligently caused an unusally large amount of water to flow onto their property, damaging their swimming pool. The Claimants' contend that if Respondent had properly maintained the culvert underneath Route 24 on or prior to the date of the flood, the water would have flowed into Seng Creek rather than flooding their property.

The position of Respondent is that it did not have notice of a problem with the drainage system on County Route 24 prior to the incident. The Respondent further contends that it is not responsible for the flood related damage to Claimants' property as the property is prone to flooding.

Douglas Kirk, a civil engineer and unit leader for the hydraulic and drainage unit of Respondent agency, testified that he visited Claimants' property on two occasions to analyze the cause of the flood on Claimants' property. Kirk described the culvert under County Route 24 as a 24 inch concrete framed culvert lined with corrugated metal at a 9% slope. Kirk further testified that Claimants' property is located between a steep hill side, with a slope of approximately 55%, and a creek at a fairly low elevation.

Using a topographical map, Kirk estimated that Claimants' property is situated near the bottom of a 71 acre watershed. Kirk testified that in the event of a flash flood or major storm event sediment, rocks, and debris will typically deposit at the bottom of a hill where it levels out, which, in this case, is next to Seng Creek. Kirk also testified that Claimants' driveway slopes down from Route 24, with the effect of diverting water that is flowing on the road and in the ditch in front of Claimant's residence to flow onto Claimants' property and towards the lowest point - their swimming pool.

Kirk stated that there was a large amount of flooding on the day of the incident and that Respondent's crews were actively cleaning out drains and dealing with landslides; however, he stated it was impossible for the crews to clean out every culvert during the event. In Kirk's professional opinion, even if the culvert were completely clear prior to August 2, 2009, the flood event would have filled the culvert and caused water to overflow.

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 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 to Claimants' property. The Court finds that the steep elevation between the hill side and Seng Creek forms a natural drainage area towards the culvert beneath Route 24, which in the case of a severe storm event includes sediment and debris. The evidence suggests that if the culvert were to become clogged and overflow, the slope of Claimants' driveway permits the diversion of water onto Claimants' property and into their pool from the roadway. The Court concludes from the testimony and evidence presented at hearing that the water flow and flooding Claimants' property would have been the same regardless of actions undertaken by Respondent prior to August 2, 2009. Further, no evidence was presented that Respondent knew or should have known of a problem with its culvert prior to the incident involved in this claim.

The Court finds that Claimants have not satisfied their burden of proving that Respondent's negligent maintenance of the culvert underneath County Route 24 in Boone County was a proximate cause of the flooding problems. Although the Court is sympathetic to Claimants' plight, there is insufficient evidence of negligence upon which to base on award. In view of the foregoing, the Court is of the opinion to and does deny this claim.

Claim disallowed

OPINION ISSUED MAY 9, 2011

DARRELL SPURLOCK
V.
DIVISION OF HIGHWAYS
(CC-10-0343)

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 Harley Davidson motorcycle struck a hole on Hunter Road in Charleston, Kanawha County. Hunter Road is a public 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 April 19, 2010. Hunter Road is, at the site of the incident, a one-lane paved road, approximately ten feet wide, without lane lines or markings. The speed limit was 30 miles per hour. At the time of the incident the weather was sunny and Claimant Darrell Spurlock was riding his motorcycle home. Mr. Spurlock testified that he was riding at approximately 25 miles per hour when a Pontiac Grand Am suddenly appeared around a curve 20 feet in front of him, coming in the opposite direction at approximately 30 miles per hour. Mr. Spurlock further testified that the oncoming vehicle remained in the middle of the one-lane road, forcing him to ride to the right edge of the pavement although he knew there to be a hole in the roadway, approximately a foot wide and ten inches deep. Otherwise he risked leaving the roadway entirely and loosing control of his vehicle. Claimant's motorcycle struck the hole, resulting in damage to the front rim, tire, and tube, requiring their replacement in the amount of $871.22. Since Claimant's insurance deductible is $250.00, Claimant's recovery is limited to that amount.

It is Claimant's position that Respondent knew or should have known about the defect in the pavement on Hunter Road which created a hazardous condition to the traveling public and that Respondent was negligent in failing to properly maintain Hunter Road prior to the incident.

The position of the Respondent is that it did not have actual or constructive notice of the condition on Hunter Road at the time of the incident. Respondent presented no 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 v. Sims*, 130 W.Va. 645; 46 S.E.2d 81 (1947). In order to hold Respondent liable for road defects of this type, Claimant must prove that Respondent had actual or

constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways*, 16 Ct. Cl. 8 (1985); *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 on Hunter Road. Since a large defect in the pavement on a one-lane road created a hazard to the traveling public, the Court finds Respondent negligent.

In view of the foregoing, it is the opinion of the Court of Claims that the Claimant should be awarded the sum of $250.00.

Award of $250.00.

OPINION ISSUED MAY 9, 2011

DOLORES HALBURN
V.
DIVISION OF HIGHWAYS
(CC-11-0088)

Claimant appeared *pro se*.
Michael J. Folio, Attorney at Law, for Respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred when her 2010 Nissan Sentra struck a hole on Interstate 64 between Dunbar and Nitro, Kanawha County. I-64 is a public 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 2:15 p.m. on January 26, 2011. There had been heavy sleet-like rain on the day of the incident and I-64 was covered in water. At the time of the incident, Claimant was driving westbound on I-64 between Dunbar and Nitro. Claimant testified that she was driving approximately 60 miles per hour when her vehicle struck a large hole in her lane. Claimant stated that she saw the hole seconds before her vehicle struck it and she had could not avoid it. According to Claimant, after her vehicle struck the hole it began pulling to the right so she took this Nitro exit, and, by the time she parked her vehicle, the right front tire was deflated. As a result of this incident, Claimant's vehicle sustained damage to right front tire and rim requiring their replacement in the amount of $487.09. Claimant's insurance declaration sheet indicates that her collision deductible is $500.00.

It is Claimant's position that Respondent knew or should have known about the hole on I-64 which created a hazardous condition to the traveling public and that Respondent was negligent in failing to properly maintain I-64 prior to the incident.

The position of the Respondent is that it did not have actual or constructive notice of the condition on I-64 at the time of the incident. Respondent presented no 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 v. Sims*, 130 W.Va. 645; 46 S.E.2d 81 (1947). In order to hold Respondent liable for road defects of this type, Claimant must prove that Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective

action. *Pritt v. Dep't of Highways*, 16 Ct. Cl. 8 (1985); *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 on I-64. Since a large hole in the travel portion of a high volume road created a hazard to the traveling public, the Court finds Respondent negligent.

In view of the foregoing, it is the opinion of the Court of Claims that the Claimant should be awarded the sum of $487.09

Award of $487.09.

OPINION ISSUED MAY 25, 2011

DAVID P. GILLISPIE
V.
DIVISION OF HIGHWAYS
(CC-10-0521)

Claimant appeared *pro se*.
Michael J. Folio, Attorney at Law, for Respondent.

PER CURIAM:

Claimant brought this action for vehicle damage which occurred to his 2005 Toyota Avalon when he drove over a patch of freshly paved road on I-77 near Parkersburg, Wood County. I-77 is a public 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 1:30 p.m. on July 24, 2010. I-77 is a six-lane interstate highway with three lanes of traffic in each direction. On the day of the incident all three lanes in the direction Claimant was driving on I-77 between exits 172 and 176 were being repaved, two lanes were closed and traffic was funneled through one lane. Claimant testified that it was hot day, between 96 and 98 degrees Fahrenheit. Claimant testified that he traveled the same stretch of road on Saturday and Sunday to watch his grandson play in an All-Star baseball tournament. On Monday he noticed what he initially thought was dirt, but turned out to be tar, splashed on his windshield, headlights, hood, grill, mirrors, and along the bottom of his vehicle. As a result of driving on the freshly repaved road, Claimant's vehicle required a professional cleaning and buffing in the amount of $351.92. Since Claimant's insurance declaration sheet indicates that his deductible is $100.00, Claimant's recovery is limited to that amount.

It is Claimant's position that Respondent knew or should have known about the wet tar on I-77 which created a hazardous condition to the traveling public and that Respondent was negligent in failing to properly maintain I-77 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 I-77 at the time of the incident. Respondent presented no 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 v. Sims*, 130 W.Va. 645; 46 S.E.2d 81 (1947). In order to hold Respondent liable for

road defects of this type, Claimant must prove that Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways*, 16 Ct. Cl. 8 (1985); *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 that paving an interstate highway on such a hot day could result in tar splashing onto vehicles traveling the road and create a hazardous condition. Thus, the Court finds Respondent negligent.

In view of the foregoing, it is the opinion of the Court of Claims that the Claimant should be awarded the sum of $100.00.

Award of $100.00.

OPINION ISSUED MAY 25, 2011

JOEL ABBOTT
V.
DIVISION OF HIGHWAYS
(CC-10-0126)

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 6, 2009, Claimant's 2008 Chevrolet Avalanche struck a sunken drainage grate on US Route 60, locally designated Lee Street, in Charleston, Kanawha County.

2. Respondent is responsible for the maintenance of Route 60 which it failed to maintain properly on the date of this incident.

3. As a result, Claimant's vehicle sustained damage to the front and rear right tires and rims in the amount of $2,495.78.

4. Claimant's insurance declaration sheet indicates that he has a collision deductible of $500.00; however, his policy does not cover loss from road hazards.

5. Respondent agrees that the amount of $2,495.78 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 60 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 damages agreed to by the parties is fair and reasonable. Thus, Claimant may make a recovery for his loss.

It is the opinion of the Court of Claims that the Claimant should be awarded the sum of $2,495.78 on this claim.

Award of $2,495.78.

OPINION ISSUED MAY 25, 2011

JAY REED CARPER and DONNA E. CARPER

V.
DIVISION OF HIGHWAYS
(CC-10-0459)

Claimants appeared *pro se*.
Michael J. Folio, Attorney at Law, for Respondent.

PER CURIAM:

Claimants brought this action for vehicle damage which occurred when their 2001 Chevrolet Silverado struck a section of guardrail on US Route 119, locally designated Spencer Road, in Clendenin, Clay County. US Route 119 is a public 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 April 17, 2010. At the location of the incident, US 119 is a two-lane, paved road that curves to the right and is bordered on the right side by a guardrail. Claimant Jay Carper testified that he is familiar with and frequently drives on US 119. However, according to the Claimant, the road had been resurfaced prior to this incident and was not marked with lane lines or warning signs. Mr. Carper testified that he approached the curve at the same time as oncoming traffic, and as he drove through the curve he stayed towards the right edge of the road, but his vehicle remained on the pavement. Mr. Carper testified that although he was still on the road, he could hear the guardrail scrape the right side of his vehicle. It is Claimant's allegation that when US 119 was resurfaced it was also widened causing the guardrail end cap to protrude approximately 35 inches over the pavement. When Claimant returned to take pictures of the guardrail approximately one month after the incident, he asserts that the end cap had been removed and the guardrail had been extended along the road, and the original end cap was placed farther down the guardrail away from the pavement. As a result of this incident, Claimants' vehicle sustained a dent, a quarter of an inch to an inch deep, from the front passenger fender through the bed of the truck costing $1,482.30 to repair. Claimants' vehicle had liability insurance only.

It is the Claimants' position that Respondent knew or should have known about protruding guardrail end cap on US Route 119 which created a hazardous condition to the traveling public and that Respondent was negligent in failing to properly maintain US Route 119 or provide proper warning to the traveling public of the known hazardous condition prior to the incident.

The position of Respondent is that it did not have actual or constructive notice of the condition on US Route 119 at the time of the incident. Kevin Quinlan, Investigator for the Legal Division of Respondent, testified to having 20 years of experience investigating motor vehicle accidents as a State Trooper prior to being employed by Respondent. Quinlan's expert opinion is that if Claimant were driving 35 miles per hour and scraped the side of his truck from the front to the back on the guardrail, then Claimant must have cut the apex of the curve and driven in a straight line, which probably would have resulted in Claimant crashing his vehicle into a telephone pole approximately 100 feet away. Quinlan conceded, however, that he was unaware of variables such as Claimant's vehicle's weight and braking distance which could have made it possible for Claimant to avoid hitting the nearby pole.

Quinlan testified that he could find no record of the work to the road surface and guardrail on US 119 because it was performed under a yearly contract by a contractor who is not required to notify Respondent when they do work. David Fisher, Highway Administrator for Respondent in Clay County, testified that he is

generally familiar with the resurfacing work that was performed on US 119 and that it was performed by contractors, although he did not know the dates. Fisher estimated that the resurfacing work may have taken up to two weeks to complete and that during the project there were warning signs to alert motorists of road work.

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, Claimants must prove that Respondent had actual or constructive notice of the defect and a reasonable amount of time to take corrective action. *Pritt v. Dep't of Highways*, 16 Ct. Cl. 8 (1985); *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 that its contractors were performing work on the pavement and guardrails on US 119. The evidence presented at hearing leads the Court to conclude that the surface of the roadway was widened as a result of resurfacing , and the location and condition of the end of the original guardrail supports Claimant's contention that the end cap protruded slightly over the edge of the pavement prior to being repositioned. 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 in driving too near the edge of the unmarked 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 thirty-five percent (35%) of his loss. Since the negligence of the Claimant is not equal to or greater than the negligence of the Respondent, Claimant may recover sixty-five percent (65%) of the loss sustained.

In view of the foregoing, it is the opinion of the Court of Claims that the Claimants should be awarded the sum of $963.50.

Award of $963.50.

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COURT OF CLAIMS

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— VENDOR – Denied because of insufficient funds
— W. VA. UNIVERSITY

The following is a compilation of head notes representing decisions from July 1, 2009 to June 30, 2011. 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

ALLEN V. DIVISION OF HIGHWAYS (CC-07-0329)

Claimant brought this action for vehicle damage which occurred when her 2004 Pontiac Grand Prix struck the jagged edge of the berm in two locations on McCorkle Road near Sod, Lincoln County. Since Claimant was forced to use the berm to avoid

oncoming traffic, and the berm was not adequately maintained at the time of this incident, the Court finds Respondent negligent.
Award $1,000.00 . . . . . p. 172

BRANHAM V. DIVISION OF HIGHWAYS (CC-09-0405)

The parties stipulated as follows: On July 31, 2009 Claimants' vehicle was damaged when it struck a broken section of berm on County Route 65/5 in Delbarton, Mingo County. Respondent failed to maintain the area properly on the date in of this incident, and agrees that the amount of damages put forth by the Claimants is fair and reasonable. Award $491.84. . . . . p. 133

DAUGHERTY V. DIVISION OF HIGHWAYS (CC-08-0175)

Claimants brought this action for vehicle damage which occurred when their 1998 Pontiac Bonneville struck a depressed area on the berm as their daughter, Amanda, was driving on Pike Street in South Parkersburg, Wood County. The Court cannot hold Respondent liable for failure to maintain the berm when the berm was not used in an emergency situation. Claim disallowed . . . . . p. 104

GUINTHER V. DIVISION OF HIGHWAYS (CC-09-0334)

Claimant brought this action for vehicle damage which occurred when her 2008 Honda Accord struck a broken portion of the berm on Utah Road in Ravenswood, Jackson County. Claimant maneuvered her vehicle over a broken section of the berm to avoid an oncoming van that had crossed into her lane. Respondent had, at least, constructive knowledge of the hole, which presented a hazard to the traveling public. Thus, the Court finds Respondent was negligent. Award $500.00. . . . . p. 126

LOVEJOY V. DIVISION OF HIGHWAYS (CC-09-0596)

Claimant brought this action for vehicle damage that occurred when his vehicle struck a hole on the berm of WV Route 25, locally designated 1st Avenue, in Nitro, Kanawha County. Claimant testified that there was no oncoming traffic. The Court is of the opinion that Claimant chose to drive on the berm, and Respondent cannot be held liable for failure to maintain the berm when it is used for purposes other than emergencies. Claim disallowed . . . . . p. 231

OBERMEYER V. DIVISION OF HIGHWAYS (CC-09-0365)

Claimant brought this action for vehicle damage which occurred when his vehicle struck a ditch situated outside the white edge line on Cross Lanes Drive in Cross Lanes, Kanawha County. At the time of the incident, Claimant stated that there were windy conditions and oncoming traffic, although the other vehicle did not cross into Claimant's lane. The Court is of the opinion that Claimant drove his vehicle too far onto the side of the road without necessity, and therefore Respondent cannot be held liable. Claim disallowed. . . . . p. 163

TENNEY V. DIVISION OF HIGHWAYS (CC-05-0405)

Claimant brought this action for vehicle damage which occurred when his 2002 Saturn struck the berm as he was traveling on US Route 20, one quarter mile south of the Johnstown Exit, in Harrison County. The Court cannot hold Respondent liable for failure to maintain the berm when the berm was not used in an emergency situation. Thus, the Court finds that there is insufficient evidence of negligence on the part of Respondent upon which to base an award. Claim disallowed. . . . . p. 90

THOMPSON V. DIVISION OF HIGHWAYS (CC-09-0380)

Claimant brought this action for vehicle damage which occurred when the berm gave way beneath his 1999 Jeek Grand Cherokee on County Route 6, designated as Shaver's Fork Road, in Randolph County. The Court is of the opinion that Respondent at, at the least, constructive knowledge of the condition of the berm on Route 6, and that when Claimant needed to pull off the side of the road to avoid oncoming traffic the berm created a hazard to the traveling public. Thus, the Court finds Respondent negligent. The Court is also of the opinion that Claimant was 25% negligent in failing to pull over at a wide spot, and thus his award is reduced accordingly.
Award $5,542.50 . . . . . p. 136

WAUGAMAN V. DIVISION OF HIGHWAYS (CC-08-0228)

Claimants brought this action for vehicle damage which occurred when their 2000 Ford Taurus struck a hole on the berm as Ronald Waugaman was driving on State Route 7 in Masontown, Preston County. The Court finds that Mr. Waugaman was at least fifty percent negligent, and his negligence is a complete bar to the Claimants' recovery in this claim. Claim disallowed. . . . . p. 89

BRIDGES

HARTMAN V. DIVISION OF HIGHWAYS (CC-09-0485)

Claimants brought this action for vehicle damage which occurred when there 2005 Pontiac G6 struck a one and a half inch discontinuity between the asphalt and a metal expansion joint on I-64 East just prior to the Nitro Bridge in Scott Depot, Kanawha County. Since the pavement was ground down on the travel portion of the road leading up to the bridge expansion joint without sufficient warning signs, the Court finds Respondent negligent. Award $428.88. . . . . p. 216

JONES V. DIVISION OF HIGHWAYS (CC-09-0608)

Claimant filed this action for vehicle damage which occurred when his 1997 Jaguar struck a one and a half inch discontinuity between the asphalt and metal expansion joint on I-64 East just prior to the Nitro bridge in Scott Depot, Kanawha County. Since no warning signs were present to warn the traveling public of the hazardous condition created by the milled pavement in the travel portion of the road leading up to a protruding metal bridge joint, the Court finds Respondent negligent.
Award $500.00 . . . . . p. 179

JUSTICE V. DIVISION OF HIGHWAYS (CC-08-0382)

Claimants brought this action for vehicle damage which occurred when debris fell from the I-64 bridge construction site and onto their 2008 Toyota Camry while Claimant, Mary Justice, traveled beneath it on WV Route 60 in South Charleston, Kanawha County. Since the construction of the bridge created a hazard to the traveling public below, the Court finds Respondent negligent. Respondent may seek indemnification from the third-party contractor performing the bridge construction.
Award $494.38. . . . . p. 175

PALMER V. DIVISION OF HIGHWAYS (CC-09-0643)

Claimant brought this action for vehicle damage which occurred when his 2006 Chevrolet Malibu was covered with what he alleged to be solidified cement dust that had fallen from the Third Street Bridge construction above Merchant Street in Fairmont, Marion County. The Court is of the opinion that Respondent had notice of the

construction taking place on the Third Street bridge, and that jack hammering on the bridge deck kicked up concrete dust. Since the solidification of concrete dust on the top of vehicles permitted to park beneath the bridge during construction created a foreseeable harm to the public, the Court finds Respondent negligent.
Award $500.00 . . . . . p. 181

SAMPLES V. DIVISION OF HIGHWAYS (CC-09-0150)
The parties stipulated to the following: On or around February 28, 2008, Claimant was operating his vehicle on Chipps Hollow Road near Star City, Monongalia County, when his vehicle began to sliding on ice, struck a section of guardrail on the bridge that was in disrepair, and rolled off the bridge into the creek below. While exiting his vehicle, Claimant slipped and fell on some icy rocks in the creek and injured his right shoulder, requiring surgery. Respondent is responsible for the maintenance of Chipps Hollow Road, and acknowledges culpability for this accident. Claimants and Respondent agree that an award of $50,000.00 is a fair and reasonable amount to settle this claim. Award $50,000.00. . . . . p. 146

WILEY V. DIVISION OF HIGHWAYS (CC-06-0154)
Claimant brought this action to recover for property damages to a private bridge used to access Claimant's residential property on Hewett Creek in Logan County. Claimant alleges that Respondent is legally responsible for erosion damage to his bridge, which he believes was caused by Respondent's mowing and clearing crews discarding debris into the creek that built up along the gas main above Claimant's property, which he asserts diverted the flow of water resulting in flooding and damage to his bridge. The evidence adduced at hearing failed to establish that Respondent's mowing activities were the proximate cause of the damage to Claimant's brige, thus the Court found insufficient evidence of negligence on the Respondent's part upon which to base an award. Claim disallowed. . . . . p. 167

COMPARATIVE NEGLIGENCE - See also Berms; Falling Rocks and Rocks; Negligence & Streets and Highways

ALPAUGH V. DIVISION OF HIGHWAYS (CC-10-0249)
Claimant brought this action for vehicle damage which occurred when his 1999 Dodge Dakota struck a hole on Ewart Avenue in Beckley, Raleigh County. The size of the hole and its location in the driving portion of the road lead the Court to conclude that Respondent had notice of the hazardous condition. However, the driver was also negligent since he was aware of the condition of the road. The Court is of the opinion that Claimant was forty percent (40%) negligent, and the award was reduced accordingly. Award $561.58. . . . . p. 183

HUGHES V. DIVISION OF HIGHWAYS (CC-08-0487)
Claimants brought this action for vehicle damage which occurred when their 2007 Pontiac Grand Prix struck a hole on Ashton Upland Road in Ashton, Mason County. The size of the hole and its location in 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. The Court is also of the opinion that the driver was negligent since she was aware of holes in the road and failed to reduce her speed in accordance with the road conditions. As a result, Claimants' recovery is reduced 15%.
Award $425.00. . . . . p. 151

MILLER V. DIVISION OF HIGHWAYS (CC-09-0436)

Claimant brought this action for motorcycle damage which occurred when his 2006 Suzuki Katana 600 struck a hole on County Route 23/1, designated Hillcrest Road, in Fairmont, Marion County. The Court is of the opinion that Respondent had notice of the defect in the pavement, which presented a hazard to the traveling public, prior to the incident, and thus, finds Respondent negligent. However, the Court is also of the opinion that since Claimant had knowledge of the defect prior to the incident he was 30% negligent and his award was reduced accordingly. Award $538.68. . . . p. 195

RIDENOUR V. DIVISION OF HIGHWAYS (CC-09-0044)

Claimant brought this action for vehicle damage which occurred when her 2006 Saturn Ion struck a hole on County Route 33 in Fairmont, Marion County. The Court is of the opinion that Respondent had, at the least, constructive notice of the defect in the travel portion of the road at the location of this incident, and thus is negligent. The Court also determined that Claimant was twenty-five percent (25%) negligent for the incident given her knowledge of the road defect, and her award was reduced accordingly. Award $187.50 . . . . . p. 176

RUNYON V. DIVISION OF HIGHWAYS (CC-10-0361)

Claimant brought this action for vehicle damage which occurred when his vehicle struck a hole on WV Route 85 in Uneeda, Boone County. The Court is of the opinion that Respondent had constructive notice of the defects in the pavement on Route 85, a school bus route. Since a deep jagged hole in the travel portion of the road creates a hazard to the traveling public, the Court finds Respondent negligent. However, the Court has determined Claimants was 10% negligent in the incident, since she, too, had prior notice of the defect; thus, the award is reduced accordingly.
Award $450.00 . . . . . p. 205

STEWART V. DIVISION OF HIGHWAYS (CC-09-0454)

Claimant brought this action for vehicle damage that occurred when his 2000 Chevrolet G30 van bottomed out on a low water bridge on Country Route 2, locally designated Copen Road, in Copen, Braxton County. The Court is of the opinion that Respondent was aware of the ongoing hazardous condition on Country Route 2 and had not taken reasonable steps to ensure the safety of motorists. However, the Court is also of the opinion that Claimant was negligent in operation of the low standing van over rough terrain. The Court finds the negligence of Claimant was equal to or more than the negligence of the Respondent, and thus the Claimant may not make a recovery. Claim disallowed. . . . . p. 230

CONTRACTS

ONE GATEWAY ASSOCIATES LLC V. DIVISION OF HIGHWAYS (CC-09-0153)

Claimant, a developer, brought this action to recover over $3,000,000.00 for alleged breach of contract by Respondent when the parties entered into a contract for the exchange of property, construction by Respondent of an expanded intersection, and agreement by Claimant to construct a frontage road abutting US 19 in Summersville. Claimant constructed the frontage road in accordance with the design approved by Respondent, and then Claimant deeded the property(1.76 acres) under the roadway and the completed roadway to Respondent. Respondent, however, was unable to provide an expanded intersection and access road to Claimant's development when a condemnation action for 5,000 sq. ft. of land was not successful.

Claimant asserted that Respondent did not use its "best efforts" as stated in the contract since Respondent did not appeal an adverse ruling in the condemnation action in circuit court to the Supreme Court of Appeals of WV Further, Claimant claimed loss of use of property for additional development when it built the frontage road on its property and that road was not necessary for its development but only for Respondent which planned a continuous frontage road along US 19 for the public. Claimant also alleged it should be compensated for the property which it deeded to Respondent with the frontage road and for attorney fees it incurred for another issue of the access road to its property in a successful appeal to the Supreme Court of Appeals. The Court denied recovery by Claimant for the loss of use since this was based upon speculation and for the attorney fees since Claimant made a determination to expend its resources separate and apart from the contract in question.

This Court found that the contract between the parties was impossible for Respondent to perform when the action in circuit court failed. Respondent was unable to construct the anticipated intersection through no fault of its own.

However, the Court also determined that Respondent received a completed section of roadway built in accordance with its plans and specifications and accepted by it as part of the State highway system which was constructed and completed by Claimant per the terms of the contract. Thus, one party (Respondent) to the contract received what it anticipated to receive while the other party (Claimant) did not.

Accordingly, the Court made an award for the construction cost of the frontage road completed by Claimant and received by Respondent per the terms of the contract which the parties agreed was in the amount of $554,000.00.

Award of $554,000.00 . . . . . p. 222

RLI INSURANCE COMPANY V. DIVISION OF HIGHWAYS (CC-07-0079)

RLI Insurance Company (RLI) brought this claim to recover monies that it asserts were wrongfully transmitted by the Respondent to a construction company known as Roberts Construction. When Highways found Roberts to be in default, it called on Roberts' surety, RLI, to complete the project and pay the expenses for labor and materials. At and after that point, in legal effect, the contractor was RLI. As such, the monies that are the subject of this claim became the sole property of RLI which directed that they be deposited in the Trust Account. Highways must assume the risk and the loss for failing to ensure that RLI's direction was understood and followed by the State Auditor. Further, RLI's right of equitable subrogation is superior to the interest of any other subsequent lien or claim against the original contractor, Roberts. Award $167,634.95. . . . . p. 11

DAMAGES

POSTLEWAIT V. DIVISION OF HIGHWAYS (CC-09-0411)

Claimant brought this action for vehicle damage which occurred when his vehicle struck a hole on County Route 9in Wheeling, Ohio County. At the time of the incident, Claimant was towing a six-foot trailer. Claimant alleged damages to his trailer's rims and tires ($52.99) and his vehicle's transmission ($1,931.49). Respondent admitted liability in this claim, but contested Claimant's damages. The Court finds that Claimant is entitled to recover only those damages that were proximately caused by Respondent's negligent maintenance of County Route 9 (i.e., the tires and rims). Claimant is not entitled to recover for the repair of his transmissions, since the Court finds that such damages were caused by the strain Claimant placed on his vehicle by continuing to haul the trailer with damaged rims and tires. Award $52.99. . p. 162

RICHTER V. DIVISION OF HIGHWAYS (CC-08-0265)
Claimant brought this action for vehicle damage which occurred when her vehicle struck a barrel on WV Route 892 in Wood County. Although the Court found negligence on the part of Respondent in this claim, Claimant was unable to produce documentation establishing damages to her vehicle. Since the Court cannot speculate as to damages, the claim must be denied. Claim disallowed. . . . . p. 149

DRAINS and SEWERS - See also Flooding

BLACK V. DIVISION OF HIGHWAYS (CC-09-0337)
Claimant brought this action for vehicle damage which occurred when her 2009 Scion struck a raised drain cover on MacCorkle Avenue in Charleston, Kanawha County. The Court is of the opinion that Respondent had at least constructive notice of the raised drain cover which Claimant's vehicle struck and that it presented a hazard to the traveling public. Award of $500.00. . . . . p. 112

BOWEN V. DIVISION OF HIGHWAYS (CC-09-0263)
Claimant brought this action for vehicle damage which occurred when her vehicle struck an opening on a storm drain on State Route 2 in Paden City, Wetzel County. Based on photographs depicting the drainage grate, the Court is of the opinion that the small gap between the pavement edge and the grate on the curb was necessary for water to flow from the road surface and did not appear to pose a hazard to the traveling public. Claim disallowed. . . . . p. 141

BROWN V. DIVISION OF HIGHWAYS (CC-09-0565)
Claimant brought this action for vehicle damage which occurred when her 2001 Chevrolet Blazer struck a broken section of culvert on County Route 26/3, designated Mouse Creek Road, in Mt. Nebo, Nicholas County. The Court is of the opinion that Respondent has, at the least, constructive notice of the condition of the culvert on Country Route 26/3, and that sharp sections of broken culvert created a hazard to the traveling public. The Court finds Respondent negligent.
Award $135.90. . . . . p. 193

CONNETT V. DIVISION OF HIGHWAYS (CC-07-0113)
Claimant brought this action for property damage to his residence which he alleges occurred as a result of Respondent's negligent maintenance of a drainage system on State Route 62. The Court cannot hold Respondent liable when the third party property owners created the water problems by expanding the driveway, constricting the natural flow of run-off, and altering the original lay of the land.
Claim disallowed. . . . . p. 91

CRAFT V. DIVISION OF HIGHWAYS (CC-09-0632)
Claimant brought this action for vehicle damage which occurred when his pickup truck struck a culvert on County Route 46, locally designated Laurel Fork, in Spencer, Roane County. A witness for Respondent testified that the culvert Claimant identified was broken, but that the metal was curved inwards and could not have caused the tire damage that Claimant alleged. The Court is of the opinion that the conflicting testimony leads to the conclusion that the proximate cause of Claimant's damages is speculative, and without evidence of negligence there is no basis to justify an award.
Claim disallowed. . . . . p. 0232

NEIL V. DIVISION OF HIGHWAYS (CC-09-0562)

Claimant brought this action for vehicle damage which occurred when her 2003 GMC Sonoma struck a broken section of culvert on County Route 26/3, designated Mouse Creek, in Mt. Nebo, Nicholas County. The Court is of the opinion that Respondent had, at the least, constructive notice of the condition on County Route 26/3. Since a sharp section of broken culvert created a hazard to the traveling public, the Court finds Respondent negligent. Award $112.36. . . . . p. 199

POWERS V. DIVISION OF HIGHWAYS (CC-08-0159)

The parties stipulated to the following: Claimants own property located on WV Route 65/9, and Five Mile Creek flows between their property and Route 65/9. Respondent is responsible for the maintenance of Route 65/9. In the mid-1980s Respondents constructed a culvert downstream from Claimants' property, which altered the flow of Five Mile Creek. Claimants assert that said construction resulted in the erosion of the banks of the creek adjacent to their property. In June or July 2006, Respondent installed gabion baskets along the banks of the creek to prevent further erosion. In May 2007, a heavy rain storm caused the water to rise in Five Mile Creek and wash away a portion of Claimants' property. Claimants expended $3,018.77 to repair the damage to their property. The parties agree that $1,500.00 is a fair and reasonable amount to settle this claim. Award $1,500.00 . . . . . p.174

RUNYON V. DIVISION OF HIGHWAYS (CC-06-0132)

The parties stipulated to the following: Claimant owns property located on the south side of County Route 6 in Red Jacket, Mingo County. Respondent is responsible for the maintenance of County Route 6 in Mingo County. Claimant alleges, and Respondent does not dispute, that Respondent's maintenance of the drainage structures along County Route 6 has caused flooding and damage to her property. The parties agree that $80,000.00 is a fair and reasonable amount to settle this claim. Award $80,000.00 . . . . . p. 221

FALLING ROCKS AND ROCKS - See also Comparative Negligence and Negligence

BLACK V. DIVISION OF HIGHWAYS (CC-08-0485)

The parties stipulated to the following: On July 8, 2008, Claimant's 2007 Toyota Camry was damaged by a falling rock in the Bluestone Dam area of WV Route 20 in Summers County. Respondent is responsible for the maintenance of WV Route 20, which it failed to maintain properly on the date of the incident. Respondent agrees that the amount of $250.00 for the damages of Claimant is fair and reasonable in addition to $181.00 for a rental vehicle. Award $431.00. . . . . p. 129

CARDWELL V. DIVISION OF HIGHWAYS (CC-09-0108)

Claimant brought this action for vehicle damage which occurred when her 2001 Pontiac Grand Am struck rocks on U.S. Route 52 in Bluewell, Mercer County. The Court finds that Respondent knew that this area is prone to rock falls. However, no warning signs were placed at this location. Thus, the Court finds Respondent negligent. The Court also finds that Claimant was negligent in failing to reduce her speed when she was aware that rocks fall at this location. The Court finds that Claimant's negligence equals twenty-five (25%) percent of her loss.
Award $187.50. . . . . p. 041

FARLEY V. DIVISION OF HIGHWAYS (CC-07-0170)

Claimant brought this action for vehicle damage which occurred when her 2006 Chevrolet Monte Carlo struck rocks while she was traveling on WV Route 54 in Mullens, Wyoming County. The Court cannot hold Respondent liable for the spontaneous falling of rocks. Claim disallowed. . . . . p. 93

FETTY V. DIVISION OF HIGHWAYS (CC-09-0637)

Claimant brought this action for damage to her vehicle which occurred when she struck a rock in the middle of WV Route 131, locally designated Saltwell Road, in Shinnston, Harrison County. Claimant testified that she drove over the large rock believing it to be a paper bag. Respondent placed "falling rock" signs to warn the traveling public of the potential for rock falls in this location, and without notice of this particular rock the Court finds insufficient evidence of negligence on the part of Respondent upon which to base an award. Claim disallowed. . . . . p. 234

HARMON V. DIVISION OF HIGHWAYS (CC-10-0042)

Claimant brought this action for damage to his vehicle when a rock slide occurred on WV Route 49 in Lynn, Mingo County. The Court found that Respondent did not have notice of this rock slide; rock slides are infrequent in this area; and Respondent responded to this condition as soon as it was made aware of the problem. Thus, there is insufficient evidence of negligence on the part of Respondent upon which to base on award. Claim disallowed. . . . . p. 158

MOORE V. DIVISION OF HIGHWAYS (CC-09-0407)

Claimants brought this action for damage to their 2003 Oldsmobile Alero which occurred as the result of a rock slide on WV Route 85 in Madison, Boone County. Although Respondent cannot be responsible for every rock that falls onto a highway, the size of the boulder leads the Court to conclude that Respondent should have inspected and maintained the hillside to prevent such a hazard to the traveling public. Award of $3,683.80. . . . . p. 115

KUKOLECK V. DIVISION OF HIGHWAYS (CC-06-0067)

Claimant brought this action for injuries resulting from a motor vehicle accident that occurred on Route 82 near the community of Birch River in Nicholas County. Claimant alleges that Respondent was negligent as a result of its failure to remove a rock which was purportedly obstructing the roadway. The Court finds that there is insufficient evidence of negligence upon which to base an award. Claim disallowed. . . . . p. 96

LAYMAN V. DIVISION OF HIGHWAYS (CC-10-0320)

Claimant brought this action for tire damage which resulted from driving over a gravel surface in a construction zone on Haymond Street in Fairmont, Marion County. In the instant case, the Court is of the opinion that Respondent cannot be expected to inspect every piece of gravel rock used by its contractors during road construction, and thus insufficient evidence of negligence upon which to base an award. Claim disallowed. . . . . p. 242

MARSH V. DIVISION OF HIGHWAYS (CC-08-0052)

Claimant brought this action for vehicle damage which occurred when her 2002 Chrysler Sebring struck a rock while she was traveling on WV Route 57 in Barbour County. Respondent did not have notice of the particular rock that Claimant's vehicle struck. Claim disallowed. . . . . p. 87

SWEENEY V. DIVISION OF HIGHWAYS (CC-09-0127)
Claimant brought this action for vehicle damage which occurred when a rock fell on his 2003 GMC Yukon on WV Route 10 in Logan County. The Court is of the opinion that Respondent failed to take adequate measures to prevent rock falls on this heavily traveled road and that the two foot concrete barrier is insufficient to protect the traveling public from rock falls at this location. Thus, the Court finds Respondent negligent. Award $653.52. . . . . p. 156

FLOODING

BARKER V. DIVISION OF HIGHWAYS (CC-08-002)
Claimants brought this action for property damage which occurred to their residential property at 112 Armory Road, in Monaville, Logan County. In June 2010, Claimants' property was flooded during a storm event. Claimants allege that Respondent is legally responsible for the damage which they believe was caused by a blockage to a culvert which flows under an alley behind Claimant's property. The evidence adduced at hearing failed to prove that Respondent was the proximate cause of Claimants' damages. Since Claimants purchased the property at issue with knowledge that a previous flood event caused substantially similar damages, they may be said to have assumed the risk. Claim disallowed. . . . . p. 169

BELL V. DIVISION OF HIGHWAYS (CC-09-0366)
Claimant brought this action for property damage which occurred to rental property he formerly owned at 580 Whittington Road, in Charleston, Kanawha County. In July 2008, Claimant's property was flooded during a storm event. The Court is of the opinion Claimant failed to establish that Respondent was negligent in its maintenance activities near Whittington Road, furthermore Claimant failed to prove damages. Claim disallowed. . . . . p. 125

DYE V. DIVISION OF HIGHWAYS (CC-09-0397)
Claimants brought this action for flood damage to their real property which they allege was caused by Respondent's negligent maintenance of the drainage system adjacent to Claimants' property located on County Route 24, locally designated Seng Creek, in Whitesville, Boone County. The evidence adduced at hearing indicates that a combination of factors contributed to the flooding and water damage to Claimants' property, and the Court finds that Claimants did not satisfy their burden of proving that Respondent's negligent maintenance of the culvert was a proximate cause. Claim disallowed. . . . . p. 244

JURISDICTION

LEASES

JONES V. DEPARTMENT OF ENVIRONMENTAL PROTECTION (CC-08-0038)
The parties stipulated to the following: For several decades preceding June 23, 2003, Respondent leased from Claimants office space located at 1201 Greenbrier Street in Charleston, Kanawha County. On or about June 23, 2003, the premise at issue flooded and Respondent provided Claimants written notification of intent to cancel the lease agreement. Claimants allege that, based upon the terms of their agreement to cancel the lease, Respondent was obligated to remove its equipment, furnishings, and trash from the premises, and repair certain damages, which it failed to do. Claimants contend that it will cost $66,611.72 to return the premises to the condition anticipated

by the lease agreement. The parties agreed to stipulate that the amount of $27,500.00 would be fair and reasonable to settle this claim. The Court concludes that $27,500.00 is a fair and reasonable settlement of this claim. Award $27,500.00 . . . . . p. 173

MOTOR VEHICLES

HALSTEAD V. DIVISION OF MOTOR VEHICLES (CC-08-0396)

Claimant seeks to recover for a privilege tax that Respondent mistakenly charged the Claimant on his 2002 Mercury Sable when the Claimant registered the vehicle in this State. The Court finds that under the principle of unjust enrichment, the Claimant is entitled to recover the amount of the tax that he was improperly charged. Award $292.50. . . . . p. 28

JARVIS-HALSTEAD V. DIVISION OF MOTOR VEHICLES (CC-08-0400)

Claimant seeks to recover for a privilege tax that Respondent mistakenly charged the Claimant on her 2005 Toyota Avalon when the Claimant registered her vehicle in this State. The Court finds that under the principle of unjust enrichment, the Claimant is entitled to recover the amount of the tax that she was improperly charged. Award $989.00. . . . . p. 27

NEGLIGENCE - See also Berms; Falling Rocks and Rocks & Streets and Highways

POWELL V. DIVISION OF HIGHWAYS (CC-08-0087)

Claimant brought this action for vehicle damage which occurred when his pickup truck struck a piece of concrete on the I-64 bridge near Milton, Cabell County. Evidence presented at hearing indicates that Respondent took immediate action to rectify the hazardous condition as soon as it was made aware of the problem. Since Claimant took adequate measures to protect the safety of the traveling public on I-64, there is no evidence of negligence on the part of Respondent upon which to base an award. Claim disallowed. . . . . p. 154

NOTICE

FLYNN V. DIVISION OF HIGHWAYS (CC-09-0631)

Claimant brought this action for vehicle damage which occurred when his 2002 Chevrolet Tahoe was struck by a piece of tire on I-64 East between Cross Lanes and Dunbar, Kanawha County. Since Claimant's vehicle was struck by a foreign object in the roadway of which Respondent did not have notice, there is no evidence of negligence on the part of Respondent upon which to base on award. Claim disallowed. . . . . p. 131

GIBSON V. DIVISION OF HIGHWAYS (CC-09-0362)

Claimant brought this action for vehicle damage which occurred when she was backing out of her driveway onto County Route 3/5 and her vehicle struck a guardrail in Dingess, Mingo County. Claimant alleges that the guardrail was leaning too far over her driveway. The Court finds that Respondent was unaware of the condition of the guardrail on County Route 3/5 prior to this incident. Thus, there is insufficient evidence of negligence on the part of Respondent upon which to base an award. Claim disallowed. . . . . p. 144

LAWHORN V. DIVISION OF HIGHWAYS (CC-09-0184)

Claimant brought this action for vehicle damage which occurred when her 2004 Ford Explorer slid on a patch of ice and struck a tree on Timber Hill Drive in Priceton, Mercer County. The evidence established that Respondent was involved in snow and ice removal throughout Mercer County on the date of the incident. While the Claimant notified Respondent of the icy condition on Timber Hill Drive prior to the incident, the Court will not impose an impossible duty upon Respondent during periods when its crews must be attending the maintenance of the State's highways. Claim disallowed. . . . . .p. 227

POE V. DIVISION OF HIGHWAYS (CC-06-0164)

Claimant brought this action for vehicle damage which occurred when his 1994 Ford pickup truck struck the stud from a "Stop" sign post on State Route 21 in Jackson County. Just prior to the incident, Claimant observed another vehicle knocking the sign over, thus the Court cannot find that Respondent had notice of the exposed stud in the roadway. Claim disallowed. . . . . p. 119

STEVENS V. DIVISION OF HIGHWAYS (CC-09-0600)

Claimants' brought this action for vehicle damage which occurred when their 2005 Nissan Altima struck a hole on Camp Creek Road in Lavalette, Wayne County. As a result, Claimants' vehicle was damaged in the amount of $1,050.65, however, their recovery is limited by their $500.00 insurance deductible. Since Claimant notified Respondent of the hole prior to the incident, the Court is of the opinion that Respondent had actual knowledge that it presented a hazard to the traveling public, and finds Respondent negligent. Award $500.00. . . . . p. 150

PEDESTRIANS

ANTHONY V. DIVISION OF HIGHWAYS (CC-07-0325)

The parties stipulated to the following: On or around September 24, 2007, Claimant fell in a hole and broke her leg in the rest area parking lot at Mineral Wells. Respondent is responsible for the maintenance of state rest area parking lots which it failed to maintain properly on the date of this incident. As a result, Claimant sustained a broken leg. Respondent agrees the amount of damages put forth by the Claimant is fair and reasonable. Award $2,000.00. . . . . p. 45

MARINO V. DIVISION OF HIGHWAYS (CC-08-0417)

The parties stipulated to the following: On December 5, 2006, Claimant sustained an injury while attempting to walk across County Route 60/14, which had recently been resurfaced and was elevated above a recessed inlet. Respondent is responsible for the maintenance of County Route 60/14. Claimant alleges that Respondent was negligent in failing to appropriately supervise the resurfacing of the road and failing to redress or cause to be redressed the recessed inlet. Claimant sustained a fracture dislocation to her left shoulder which will require future medical management and surgery. Claimant and Respondent agree that a total sum of $199,000.00 is fair and reasonable to settle this claim.
Award $199,000.00. . . . . p. 187

PRISONS AND PRISONERS

ALLEN V. DIVISION OF CORRECTIONS (CC-08-0403)

Claimant, an inmate at the Mt. Olive Correctional Complex, a facility of Respondent, brought this claim to recover the value of certain personal property items

that he alleges were lost by the Respondent. Respondent admits liability in this matter. Award $113.65. . . . . p. 36

ASH V. DIVISION OF CORRECTIONS (CC-09-0197)

Claimant, an inmate at Mt. Olive Correctional Complex, a facility of Respondent, seeks to recover the value of certain personal property items that were mailed out of the facility and could not be returned to the Claimant in accordance with prison policy. The Court finds that bailment, which was created when Claimant's property was seized, ended when Respondent placed the package in the possession of the USPS for delivery to Claimant's designated recipient. The Court is of the opinion that Respondent followed the policies in place and did not act in a wrongful manner. Claim disallowed. . . . . p. 229

BLACKWELL V. DIVISION OF CORRECTIONS (CC-09-0175)

Claimant, an inmate at Mt. Olive Correctional Complex, a facility of Respondent, seeks to recover the value of certain personal property that he alleges were lost by the Respondent while Claimant was serving a 30 day term of confinement in lock-up. The Court finds that the Claimant's property was not adequately secured at the time of the incident, and the Claimant is entitled to recover the value of his lost property. Award $314.99. . . . . p. 190

DAVIS V. DIVISION OF CORRECTIONS (CC-10-0657)

Claimant, an inmate at Mt. Olive Correctional Complex, a facility of Respondent, filed this claim to recover $22.80 for personal property that was kept in the Respondent's possession and was stolen. In its Answer, Respondent admits the validity of the claim. Award $22.80. . . . . p. 219

DELGADO V. DIVISION OF CORRECTIONS (CC-09-0018)

Claimant, an inmate at the Mt. Olive Correctional Complex, a facility of the Respondent, brought this claim to recover the value of certain personal property items that were seized and destroyed by the Respondent. The Court finds in the Claimant's favor. Award $40.00. . . . . p. 37

DELGADO V. DIVISION OF CORRECTIONS (CC-09-0623)

Claimant, an inmate at Mt. Olive Correctional Complex, a facility of Respondent, seeks payment for his participation in an educational program. The Court is of the opinion that Claimant did not qualify for payment under Respondent's operational procedures and thus could not make a recovery for back pay. Claim disallowed. . . . . p. 238

EVANS V. DIVISION OF CORRECTIONS (CC-09-0202)

Claimant, an inmate at Mt. Olive Correctional Complex, a facility of Respondent, seeks to recover $355.00 for the value of personal property he alleges was negligently destroyed by Respondent. The Court is of the opinion that Respondent failed to adequately care for Claimant's personal property by not adhering its operational procedure for storage of inmate property. The Court is of the opinion that $180.00 represents a fair and reasonable reimbursement to Claimant for the damaged property. Award $180.00. . . . . p. 189

GLOCK INC. V. DIVISION OF CORRECTIONS (CC-09-0432)

Claimant seeks to recover for a bench mat purchased by Respondent. Claimant has not received payment for this item. In its Answer, Respondent admits the validity

of the claim as well as the amount, and states that sufficient funds expired in that appropriate fiscal year from which the invoice could have been paid.
Award $24.00. . . . . p. 53

GRAY V. DIVISION OF CORRECTIONS (CC-08-0321)

Claimant, an inmate at the Mt. Olive Correctional Complex, a facility of the Respondent, seeks to recover the value of certain personal property items that he alleges were improperly removed from his cell. The Court finds that the Respondent is currently storing the majority of the Claimant's property since he is limited in the number of allowable items he is permitted to keep in his cell. The Claimant has the option of informing the Respondent if he chooses to have the property mailed to someone or if he elects to have the property destroyed. Claim disallowed. . . . . …p. 100

MCCLAIN V. DIVISION OF CORRECTIONS (CC-08-0533)

Claimant, an inmate at the Mt. Olive Correctional Complex, a facility of the Respondent, seeks to recover the value of property that was kept in the Respondent's possession and was stolen. Respondent contends that it made reasonable efforts to secure the property. The Court finds that the Claimant's property was not adequately secured at the time of the incident, and the Claimant is entitled to recover the value of his lost property. Award $28.55. . . . . p. 23

MONONGAHELA POWER COMPANY dba ALLEGHENY POWER v. DIVISION OF CORRECTIONS (CC-09-0350)

Claimant seeks to recover for emergency repair services that it performed at the Pruntytown Correctional Center, a facility of Respondent, for which it did not receive payment. In its Amended 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 $1,012.40 . . . . . p. 50

PHUNG V. REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY (CC-10-0649)

Claimant, an inmate at the Eastern Regional Jail at the time of the incident, seeks to recover $15,100.00 for seven pieces of 18 karat gold and diamond jewelry that she alleges were entrusted to Respondent but which were not returned to her. Respondent admits the validity of this claim and that the amount is fair and reasonable. The Court is of the opinion that a bailment situation was created and thus, Claimant should make a recovery. Award $15,100.00. . . . . p. 186

POSEY V. DIVISION OF CORRECTIONS (CC-09-0068)

Claimant, an inmate at the Mt. Olive Correctional Complex, brought this claim to recover the value of personal property that was kept in the Respondent's possession and was stolen. Respondent contends that it made reasonable efforts to secure the property and is not responsible for the actions of thieves. The Court finds that the Claimant's property was not adequately secured at the time of the incident, and the Claimant is entitled to recover the value of his lost property.
Award $32.90. . . . . p. 22

RICE V. DIVISION OF CORRECTIONS (CC-09-0616)

Claimant, an inmate at the Mt. Olive Correctional Complex, seeks to recover for personal property that was stolen from Respondent's facility. Respondent, in its Answer, admits liability in this claim. Award $28.00. . . . . p. 81

RICOH AMERICAS CORPORATION V. DIVISION OF CORRECTIONS (CC-09-0505)

Claimant seeks to recover unpaid invoices billed on office supplies. 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 $4,631.29. . . . . p. 81

WHITE V. DIVISION OF CORRECTIONS (CC-09-0617)

Claimant, an inmate at Mt. Olive Correctional Complex, a facility of Respondent, seeks to recover $304.00 for items of personal property that were entrusted to Respondent but have not been returned to him. At hearing, Respondent stipulated to damages in the amount of $304.00. The Court is of the opinion that Respondent is liable for the loss of Claimant's property. Award $304.00. . . . . p. 188

WILLIAMS V. DIVISION OF CORRECTIONS (CC-09-0413)

Claimant, an inmate at Mt. Olive Correctional Complex, seeks to recover the sentimental and religious value of a hand-carved wooden tobacco pipe that was stolen from storage in the prison's chapel. The Court is of the opinion that in this claim, unlike other tobacco related prisoner claims, no bailment relationship existed because Claimant was free to retrieve his pipe from Respondent's possession two months prior to the theft. Claim disallowed. . . . . p. 237

WV REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY V. DIVISION OF CORRECTIONS (CC-09-0627)

Claimant seeks to recover per diem charges for housing inmates at its facilities during the 2009 fiscal year. Inmates were housed at the Central, Eastern, North Central, Northern, Potomac Highlands, South Central, Southern, Southwestern, Tygart Valley, and Western Regional Jails. Respondent, in its Answer, asserts that payment of this claim must be awarded in accordance with the principles established by the Court in County Comm(n of Mineral County v. Div. of Corrections, 18 Ct. Cl. 88 (1990), wherein the Court found that the Claimant was entitled to be compensated for its expenses in housing inmates who were actually wards of the Respondent. Award $2,131,927.32. . . . . p. 85

WV REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY V. DIVISION OF CORRECTIONS (CC-10-0676)

Claimant seeks to recover $5,945,942.90 for the cost of housing and providing associated services to prisoners who had been sentenced to a state penal institutions but remained in the regional jails. In its Answer, Respondent admits the validity of this claim. The Court determined that Respondent is liable to Claimant for these costs. Award $5,945,942.90 . . . . . p. 201

PUBLIC EMPLOYEES

PIPER V. DEPARTMENT OF ENVIRONMENTAL PROTECTION (CC-10-0141)

Claimant seeks to recover $180.00 from Respondent, Department of Environmental Protection, for an error that was made regarding his increment tenure pay for the years of 1987 through 1991. Respondent admits the validity of this claim and the amount. Award $180.00. . . . . p. 137

WALTERS V. ATTORNEY GENERAL'S OFFICE (CC-10-0530)

Claimant seeks to recover $2,740.00 that is owed to her due to an error in her increment pay that occurred from July 2003 through July 2009. Respondent admits the validity of this claim as well as the amount, and states that sufficient funds to pay this claim were not appropriated for the fiscal year in question.
Award $2,740.00. . . . . p. 166

STATE AGENCIES

ATLANTIC BROADBAND GROUP LLC V. EDUCATIONAL BROADCASTING AUTHORITY (CC-10-0129)

Claimant seeks to recover $9,650.15 in unpaid invoices for the lease of a cable tower located on Cacapon Mountain. 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 years from which the invoices could have been paid. Award of $9,650.15. . . . . p. 95

POMEROY IT SOLUTIONS V. PUBLIC SERVICE COMMISSION (CC-10-0431)

Claimant seeks to recover $695.40 for technological services it provided to Respondent. In it's 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 $695.40. . . . . p. 138

STIPULATED CLAIMS

ABBOTT V. DIVISION OF HIGHWAYS (CC-10-0126)

The parties stipulated to the following: Claimant's vehicle struck a sunken drainage grate on US Route 60, locally designated Lee Street, in Charleston Kanawha County, which Respondent is responsible for maintaining. As a result of Respondent's failure to maintain the road, Claimant's vehicle sustained damage in the amount of $2,495.78. Claimant had a collision deductible of $500.00, however his policy did not cover loss from road hazards. Award $2,495.78 . . . . . p. 249

ARABIA V. DIVISION OF HIGHWAYS (CC-10-0055)

The parties stipulated to the following: On December 11, 2009, Claimant's 1998 Dodge Neon struck rocks on Route 119 in Roane County. Respondent is responsible for the maintenance of Route 119, which it failed to properly maintain prior to the incident. Claimant's vehicle sustained damage in the amount of $1,300.00. Respondent agrees that $620.00, the amount of Claimant's collision deductible ($500.00) plus the cost of towing ($120.00), is fair and reasonable to settle this claim. Award $620.00 . . . . . p. 207

BAYLES V. DIVISION OF HIGHWAYS (CC-09-0569)

The parties stipulated to the following: On October 21, 2009, Claimants' vehicle struck a hole on Route 77 in Williamstown, Wood County. Respondent is responsible for the maintenance of this road, which it failed to maintain properly on the date of this incident. Claimants' vehicle sustained damages in the amount of $310.62, however Claimants' insurance deductible was $50.00, which Respondent agrees is a fair and reasonable amount. Award $50.00. . . . . p. 161

BRUER V. DIVISION OF HIGHWAYS (CC-09-0178)

The parties stipulated to the following: On March 23, 2009, Claimant's 1998 Lincoln Navigator struck a hole on 8th Avenue in Huntington, Cabell County. Respondent failed in its responsibility to properly maintain the road on the date of this

incident. As a result, Claimant's vehicle sustained damage in the amount of $1,016.52. Claimant only had liability insurance at the time of the incident. Respondent agrees that the amount of damages put forth by the Claimant is fair and reasonable.
Award $1,016.52. . . . . p. 147

COLLINS V. DIVISION OF HIGHWAYS (CC-10-0028)

The parties stipulated to the following: On December 11, 2009, Claimant's vehicle struck a construction barrel on Interstate 64 in Putnam County. Respondent failed in its responsibility to properly maintain I-64 prior to the incident. Claimant's vehicle sustained damage in the amount of $1,301.17. Respondent agrees that $500.00, the amount of Claimant's insurance deductible, is fair and reasonable to settle this claim.
Award $500.00. . . . . p. 209

DAVIS V. DIVISION OF HIGHWAYS (CC-09-0347)

The parties stipulated to the following: On June 26, 2009, Claimant's vehicle struck a hole on Kopperston Mountain in Pineville, Wyoming County. Respondent is responsible for the maintenance of said road, which it failed to properly maintain prior to the date of this incident. Respondent agrees that $600.57, the amount of damages put forth by the Claimant, is fair and reasonable to settle this claim.
Award $600.57 . . . . . p. 198

ELLIS V. DIVISION OF HIGHWAYS (CC-10-0531)

The parties stipulated to the following: On July 22, 2010, Claimant's pickup struck a patch of rough and uneven pavement on US Route 119 near Chapmanville, Logan County. Respondent stipulated to liability in this claim and agreed to the payment of the lesser of Claimants' insurance deductible or the damages put forth by the Claimant. However, Claimant failed to submit a copy of his insurance declaration page to the Court for review. Claim disallowed. . . . . p. 235

GRAPHERY V. DIVISION OF HIGHWAYS (CC-10-0041)

The parties stipulated to the following: On or about January 21, 2010, Claimant's 2006 Buick Lucerne CXS struck a hole on the Oglebay Pike Exit of Interstate 70 in Ohio County. Respondent is responsible for the maintenance of I-70, including the entrances and exits, which it failed to maintain properly on the date of this incident. Respondent agrees that the amount of $551.20 for the damages put forth by the Claimant is fair and reasonable. Award $551.20 . . . . . p. 182

HARDY V. DIVISION OF HIGHWAYS (CC-09-0317)

The parties stipulated to the following: On February 5, 2009, Claimant's 2008 Mercedes struck a hole on WV Route 61 in Kanawha County. Respondent failed in its duty to properly maintain WV Route 61 on the date of this incident. As a result, Claimant's vehicle sustained damage in the amount of $1,501.76. Respondent agrees that $1,000, the amount of Claimant's insurance deductible, is fair and reasonable to settle this claim. Award$1,000.00. . . . . p. 147

MARCUM V. DIVISION OF HIGHWAYS (CC-08-0192)

The parties stipulated to the following: On April 27, 2006 Stephanie Marcum was operating her motor vehicle on the Crum 4 Lane in Crum, Wayne County, when she confronted a sharp curve resulting in her vehicle striking a low lying rock cliff just off the road. Ms. Marcum was killed as a result of this accident, and Claimant is her mother, estate administrator, and sole heir. Respondent acknowledges responsibility for the

accident. Both the Claimant and Respondent agree that under the circumstances an award of $950,000.00 is fair and reasonable.
Award $950,000.00. . . . . p. 164

MATHES V. DIVISION OF HIGHWAYS (CC-09-0446)

The parties stipulated to the following: On September 5, 2009, Claimant's vehicle struck a broken sign post at the intersection of Pretty Glade Road and Denison Run Road in Cowen, Webster County. Respondent failed in its responsibility to maintain Denison Run Road properly on the date of the incident. Damage to Claimant's vehicle's tires and rims totaled $326.70, but Claimant had an insurance deductible of $250.00. Respondent agrees that the amount of $250.00 is fair and reasonable.
Award $250.00. . . . . p. 135

MILLER V. DIVISION OF HIGHWAYS (CC-98-0413)

The parties stipulated tot the following: On November 27, 1996, Claimant, Nancy, was driving on US Route 19 near Bluefield, Mercer County, when she lost control of her vehicle, causing her to go off the road and collide with a dump truck. Respondent is responsible for the maintenance of US Route 19. Claimants allege that Respondent's inadequate maintenance of the road and shoulder at the location of the incident caused or contributed to the accident. Nancy was injured as a result of the accident and requiring medical treatment. Claimants and Respondent agree that an award of $60,000.00 to be paid to Nancy is fair and reasonable. Award $60,000.00. . . . . p. 186

PETERS V. DIVISION OF HIGHWAYS (CC-02-0158)

The parties stipulated to the following: On April 7, 2000, Claimant Steven Brent Peters was driving north on WV Route 2 near Moundsville, Marshall County, when he struck a large boulder in the center of the northbound lane. Respondent is responsible for the maintenance of Route 2. Claimant sustained severe traumatic injuries to his left leg, requiring ongoing medical care and treatment. Claimants allege that Respondent had constructive notice of the hazardous rock fall conditions at the location at issue and failed to take adequate steps to remedy the hazardous condition. Claimants and Respondent agree that an award of $320,000.00, to be paid to Claimant Steven Brent Peters, would be fair and reasonable to settle this claim. Award $320,000.00. . . . . p. 185

RHODES V. DIVISION OF HIGHWAYS (CC-09-0226)

The parties stipulated to the following: On April 25, 2009, Claimant's vehicle struck a hole on Clear Fork Road in Raleigh County. Respondent is responsible for, but failed to, maintain Clear Fork Road on the date of this incident. As a result, Claimant's vehicle sustained damage in the amount of $494.51. Respondent agrees that the amount of damages put forth by the Claimant is fair and reasonable.
Award $494.51 . . . . . p. 140

STUBERG V. DIVISION OF HIGHWAYS (CC-09-0368)

The parties stipulated to the following: On June 5, 2009, Claimant's vehicle struck a hole on Route 7 in Monongalia County. Respondent is responsible for the maintenance of Route 7 which it failed to properly maintain prior to the date of this incident. Respondent agrees that $180.18, the amount of damages put forth by the Claimant, is fair and reasonable to settle this claim. Award $180.18. . . . . p. 195

WILSON V. DIVISION OF HIGHWAYS (CC-10-0112)

The parties stipulated to the following: On February 25, 2010, Claimant's vehicle struck a hole at the intersection of Route 3 and Route 311 in Monroe County.

Respondent is responsible for the maintenance of said intersection, which it failed to properly maintain prior to the date of this incident. Respondent agrees that $100.00, the amount of Claimant's insurance deductible, is fair and reasonable to settle this claim. Award $100.00. . . . . p. 207

STREETS AND HIGHWAYS - See also Comparative Negligence and Negligence
CLAIMS AGAINST DIVISION OF HIGHWAYS

AMICK V. DIVISION OF HIGHWAYS (CC-09-0336)

Claimant brought this action for vehicle damage which occurred when his 1999 Ford Taurus struck a hole in the main traveled portion of County Route 44/2 in Leivasy, Nicholas County. The Court found Respondent negligent.
Award $254.87. . . . . p. 69

ARMSTRONG V. DIVISION OF HIGHWAYS (CC-08-0469)

Claimant brought this action for vehicle damage which occurred when her vehicle struck a hole on the edge of East Dailey Road in Dailey, Randolph County. Since the edge of the road was in disrepair, the Court finds Respondent negligent. The Court also finds that Claimant was negligent since her vehicle drifted towards the berm even though there was no oncoming traffic. The Court finds that Claimant's negligence equals thirty-five percent (35%) of her loss. Award $217.94. . . . . p. 59

ASBURY V. DIVISION OF HIGHWAYS (CC-10-0251)

Claimants filed this claim for vehicle damage which occurred when their 2009 Chevrolet Malibu struck a hole in the berm on WV Route 19 in Cool Ridge, Raleigh County. The Court is of the opinion that the size of the hole on the berm and its location adjacent to a hole on the travel portion of the road created a hazard to the traveling public. Award $500.00. . . . . p. 184

ATENCIO V. DIVISION OF HIGHWAYS (CC-09-0340)

Claimant brought this action for vehicle damage which occurred when his 2004 Dodge Ram truck struck a ditch on County Route 21 near Sissonville, Kanawha County. The Court is of the opinion that Respondent had, at the least, constructive notice of the ditch which Claimant's vehicle struck and that it presented a hazard to the traveling public. Award of $74.85. . . . . p. 113

BAILEY V. DIVISION OF HIGHWAYS (CC-10-0217)

Claimants brought this action for vehicle damage which occurred when their 2010 Nissan Xterra struck a piece of concrete kicked up by another vehicle on the Interstate 77 bridge in Edens Fork, Kanawha County. The Court is of the opinion that Respondent had, at the least, constructive notice of the broken section of pavement in I-77, that such a condition created a hazard to the traveling public, and Respondent had an adequate amount of time to take corrective action. Thus, the Court finds Respondent negligent. Award $100.00. . . . . p. 202

BANEY V. DIVISION OF HIGHWAYS (CC-08-0184)

Claimant brought this action for vehicle damage which occurred when her 2006 Ford 500 struck a hole on Mount Harmony Road, designated as County Route 73/1 in Fairmont, Marion County. The size of the hole leads the Court to conclude that Respondent had notice of this condition. Thus, the Court finds Respondent negligent. Award $ 250.00. . . . . p. 38

BAWGUS V. DIVISION OF HIGHWAYS (CC-09-0028)

Claimant brought this action for vehicle damage which occurred when his 2000 Cadillac El Dorado struck a hole as he was driving on the Pettus Bridge on WV Route 3 in Raleigh County. The Court finds that Respondent failed to patch the hole in a timely manner. Award $500.00. . . . . p. 80

BAYS V. DIVISION OF HIGHWAYS (CC-09-0490)

Claimant brought this action for vehicle damage which occurred when her 2007 Dodge Caliber struck uneven sections of pavement on WV Route 10 in Logan County. Although Claimant placed warning sings in this area, the Court is of the opinion that the signs were not adequately secured at the time of this incident and Claimant was not warned of the uneven sections of pavement. Thus, the Court finds Respondent negligent. Award $1,978.55. . . . . p. 155

BEAVER V. DIVISION OF HIGHWAYS (CC-08-0380)

Claimant brought this action for vehicle damage which occurred when his 2003 Dodge Ram extended cab struck a piece of steel on the I-64/I-77 interchange in Charleston, Kanawha County. It is uncertain where the piece of steel came from, and Respondent responded to this incident in a timely manner. Thus, there is insufficient evidence of negligence upon which to base an award. Claim disallowed. . . . p. 102

BELL V. DIVISION OF HIGHWAYS (CC-08-0495)

Claimant brought this action for vehicle damage which occurred when her 1999 Cadillac struck a loose delineator on I-79 North at mile post 22 near Clendenin, Kanawha County. The Court finds that Respondent had, at the least, constructive notice of the delineator which Claimant's vehicle struck and that it presented a hazard to the traveling public. Thus, the Court finds Respondent negligent.
Award $240.40. . . . . p. 60

BLACKBURN V. DIVISION OF HIGHWAYS (CC-09-0004)

Claimant brought this action for vehicle damage which occurred when his 2006 Cadillac STS struck a hole on U.S. Route 52 near Tolsia, Wayne County. The Court is of the opinion that Claimant's negligence, in driving fifty-five miles per hour over a patch of road with "Rough Road" and "20 M.P.H" signs, exceeded any negligence of Respondent barring recover. Claim disallowed. . . . . p. 120

BLANKENSHIP V. DIVISION OF HIGHWAYS (CC-06-0263)

Claimant brought this action for vehicle damage which occurred when her 2002 Ford Thunderbird struck loose pieces of asphalt on I-64 East in Institute, Kanawha County. The Court is of the opinion that Respondent had, at the least, constructive notice of the loose pieces of asphalt which Claimant's vehicle struck and that this condition presented a hazard to the traveling public. Award $951.36. . . . . p. 44

BOKKON V. DIVISION OF HIGHWAYS (CC-10-0328)

Claimants brought this action for vehicle damage which occurred when their 2009 Subaru Legacy struck a hole on WV Route 39, designated Turnpike Road, in Swiss, Nicholas County. The Court is of the opinion that Respondent had notice, at the least, constructive notice of the condition on WV Route 39. Since a three to four feet long defect in the pavement created a hazard to the traveling public, the Court finds Respondent negligent. Award $98.58 . . . . . p. 220

BOUGHNER V. DIVISION OF HIGHWAYS (CC-08-0121)

Claimants brought this action for vehicle damage which occurred when their 2002 Pontiac Grand Prix struck a hole while Claimant Brenda L. Boughner was driving on State Route 31, approximately two miles from Williamstown, in Wood County. The size of the hole and its location lead the Court to conclude that Respondent had notice of this hazardous condition. The Court is also of the opinion that the driver was negligent since she was aware of the condition of the road and did not notify Respondent. Thus, the driver(s negligence equals ten percent (10%), and the award was reduced accordingly. Award $317.07. . . . . p. 61

BROOKS V. DIVISION OF HIGHWAYS (CC-08-0437)

The parties stipulated to the following: On August 2, 2008, while Claimants were traveling west on I-64 near Huntington, Cabell County, their vehicle struck concrete in the road that had fallen from an overpass causing damage to their vehicle. Respondent is responsible for the maintenance of I-64, which it failed to maintain properly on the date of this incident. Respondent agrees that the allowable damages put forth by the Claimants is fair and reasonable. Award $500.00. . . . . p. 130

CANTIS V. DIVISION OF HIGHWAYS (CC-07-0208)

The parties stipulated to the following: On June 8, 2007, the Claimants' son, Dean Cantis, was traveling toward Morgantown, Monongalia County, on WV Route 81 when the 1998 Chevrolet Blazer he was driving struck a twenty-inch piece of metal joiner strip located on the interstate overpass bridge. Respondent is responsible for the maintenance of WV Route 81 which it failed to maintain properly on the date of this incident. Respondent agrees that the amount for the damages put forth by the Claimant is fair and reasonable. Award $500.00. . . . . p. 32

CARPER V. DIVISION OF HIGHWAYS (CC-10-0459)

Claimants brought this action for vehicle damage which occurred when their Chevrolet Silverado struck a section of protruding guardrail on US Route 119, locally designated Spencer Road, in Clendenin, Clay County. The Court concludes that the surface of the roadway was widened as a result of resurfacing and that the original end cap on the guardrail was likely protruding over the edge of the pavement prior to being repositioned. The Court finds that Claimant contributed (35%) to his loss by driving too near the edge of an unmarked road. Award $963.50 . . . . . p. 250

CHUMLEY V. DIVISION OF HIGHWAYS (CC-08-0314)

Claimant brought this action for vehicle damage which occurred when his 2008 Harley Davidson motorcycle struck two holes on the entrance ramp as he was merging on I-79 South from the Meadowbrook Exit in Bridgeport, Harrison County. Although Respondent had performed maintenance at this location, the patchwork proved inadequate at the time of the incident. Thus, the Court finds Respondent negligent. Award $250.00. . . . . p. 35

CLAYTON V. DIVISION OF HIGHWAYS (CC-08-0025)

Claimants brought this action for vehicle damage which occurred when their 2005 Cadillac CTS struck a hole while Claimant Diane E. Clayton was driving south on I-79, just past the Pleasant Valley overpass, near Fairmont, Marion County. Respondent's crews responded to the incident as soon as they were informed of the problem. Thus, there is insufficient evidence of negligence on the part of Respondent upon which to base an award. Claim disallowed. . . . . p. 103

COMPTON V. DIVISION OF HIGHWAYS (CC-10-0432)

Claimants brought this action for vehicle damage which occurred when their 2009 Lexus 350 GS struck an unevenly milled portion of the road on US Route 250 near Whitehall, Marion County. The Court is of the opinion that Respondent had, at the least, constructive notice of the road work on Route 250, and that it failed to provide adequate warning of the roughly milled portion of road. Since an unmarked steep incline between the unfinished and finished travel portion of the road created a hazard to the traveling public, the Court finds Respondent negligent. Award $339.20. . . . . p. 213

CORCOGLIONITI V. DIVISION OF HIGHWAYS (CC-08-0129)

Claimant brought this action for vehicle damage which occurred when Claimant maneuvered his 2008 Honda Accord onto the curb to avoid holes on Virginia Avenue in Bridgeport, Harrison County. The Court is of the opinion that Respondent had, at the least, constructive notice of the holes in this particular area and that the holes created a hazardous condition to the traveling public. The Court is also of the opinion that the Claimant over-corrected the vehicle when his vehicle struck the curb. The Court finds that the Claimant's negligence equals twenty-percent (20%).
Award $200.00. . . . . p. 33

DAY V. DIVISION OF HIGHWAYS (CC-07-0310)

Claimant brought this action for vehicle damage which occurred when his 2002 Ford Mustang struck a piece of concrete while he was driving across the bridge on WV Route 60 past the Huntington Mall in Cabell County. The size of the loose piece of asphalt 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. Award $442.29. . . . . p. 24

DRAKE V. DIVISION OF HIGHWAYS (CC-07-0218)

The parties stipulated to the following: On July 10, 2007, Claimant's vehicle struck a broken-off sign post at the Cottageville intersection in Jackson County. Respondent is responsible for the maintenance of the road at the Cottageville intersection. As a result of this incident, Claimant's vehicle sustained damage to its bumper and tires. Claimant's recovery is limited to the amount of the deductible. Respondent agrees that the amount for damages put forth by the Claimant is fair and reasonable.
Award $100.00. . . . . p. 57

DUTCHESS V. DIVISION OF HIGHWAYS (CC-09-0346)

Claimants brought this action for property damage which occurred when Respondent used tar and chips to repair the pavement on Kentuck Road, designated as County Route 19, in Kenna, Jackson County. The tar was not adequately covered with sand to prevent vehicles on County Route 19 from splattering tar onto Claimants' driveway. Thus, the Court finds Respondent negligent.
Award of $1,000.00 . . . . . p. 114

ELKO V. DIVISION OF HIGHWAYS (CC-08-0307)

Claimant brought this action for vehicle damage which occurred when his 2006 Hyundai Tiburon struck a washed out section of Mount Clare Road, designated as WV Route 25, near Lost Creek, Harrison County. The Court is of the opinion that Respondent had, at the least, constructive notice of the washed out portion of the road which the Claimant's vehicle struck. Although Respondent was performing work to clear the roads due to flooding at the time of this incident, the Court finds that the

condition of WV Route 25 created a hazard to the traveling public. Thus, the Court finds Respondent negligent. Award $196.73. . . . . p. 39

ELLIOTT V. DIVISION OF HIGHWAYS (CC-09-0307)

The parties stipulated to the following: On May 30, 2009, Claimant's vehicle struck a hole on Marshville Road, which is located approximately 200 yards from US Route 50, west of Clarksburg, Harrison County. Respondent is responsible for the maintenance of Marshville Road which it failed to maintain properly on the date of this incident. Respondent agrees that the amount for the damages put forth by the Claimant is fair and reasonable. Award $145.54. . . . . p. 82

FARLEY V. DIVISION OF HIGHWAYS (CC-08-0242)

The parties stipulated to the following: On April 12, 2008, Claimant's 2005 Chevrolet Uplander struck a hole on WV Route 85 west of Van, Boone County. Respondent is responsible for the maintenance of WV Route 85 which it failed to maintain properly on the date of this incident. As a result, Claimant seeks to recover for the damage sustained to his vehicle's wheel. Respondent agrees that the amount for the damages put forth by the Claimant is fair and reasonable and limited to the insurance deductible. Award $250.00. . . . . p. 75

FIELDS V. DIVISION OF HIGHWAYS (CC-07-0240)

Claimant seeks compensation for the value of her vehicle which was totaled when it struck a manhole cover on Harvey Street in Williamson, Mingo County. Because Respondent took this road under its system it bears responsibility for the road's maintenance. The Court concludes that Respondent was negligent in its maintenance. However, if another entity agreed to assume responsibility for this road, then Respondent has the right to seek reimbursement from the other entity.
Award $1,000.00. . . . . p. 148

FINLEY V. DIVISION OF HIGHWAYS (CC-08-0536)

Claimant brought this action for vehicle damage which occurred when her 2008 Subaru Legacy struck a hole on I-64 West, one half mile before the Teays Valley Exit, in Putnam County. Since there were a series of holes at this location, the Court finds Respondent negligent. Award $580.00. . . . . p. 52

FLING V. DIVISION OF HIGHWAYS (CC-08-0156)

The parties stipulated to the following: On March 20, 2008, Claimants were traveling in their 1998 Honda Civic in the center lane of 5th Street in Parkersburg, Wood County, when their vehicle struck two holes in the road. Respondent is responsible for the maintenance of 5th Street which it failed to maintain properly on the date of this incident. As a result, Claimants' vehicle sustained damage. Respondent agrees that the amount of the damages put forth by the Claimants is fair and reasonable.
Award $250.00. . . . . p. 62

FLOYD V. DIVISION OF HIGHWAYS (CC-08-0199)

Claimants brought this action for vehicle damage which occurred when her 2005 Pontiac GT struck a hole on US Route 33, designated as West Second Street, in Weston, Lewis County. The Court finds that the road hazard sign should have preceded the location of the road work in order to adequately warn the traveling public of this hazard. Thus, the Court finds Respondent negligent.
Award $1,555.05. . . . . p. 32

FORD V. DIVISION OF HIGHWAYS (CC-09-0031)

Claimant brought this action for vehicle damage which occurred when his 2008 Mercedes Benz struck several holes on I-64, near the Teays Valley entrance ramp, in Putnam County. Since there were numerous holes in Claimant's lane of traffic on the interstate, the Court finds Respondent negligent.
Award $200.87. . . . . p. 53

FRANKHOUSER V. DIVISION OF HIGHWAYS (CC-10-0086)

Claimant brought this action for vehicle damage which occurred when his 2008 Toyota Corolla struck a hole at the intersection of Country Road 857, designated Cheat Road, and US Route 119, designated Point Marion Road and Mileground Road, in Morgantown, Monongalia County. The Court is of the opinion that Respondent had, at the least, constructive notice of the defect in the pavement at the intersection of County Road 857 and US Route 119, which created a hazard to the traveling public. The Court finds Respondent negligent. Award $93.76 . . . . . p. 208

FRESHWATER V. DIVISION OF HIGHWAYS (CC-08-0482)

Claimant brought this action for vehicle damage which occurred when his 2006 Mazda III struck a hole on Eldersville Road, designated as Alternate Route 27, in Follansbee, Brooke County. Although Respondent had performed maintenance in this area, the patchwork proved inadequate at the time of Claimant's incident. Thus, the Court finds Respondent negligent. Award $250.00. . . . . p. 47

GABBERT V. DIVISION OF HIGHWAYS (CC-10-0018)

Claimants filed this claim to recover for vehicle damage which occurred when their 2009 Lincoln MKS struck holes in two incidents on Country Route 85, designated Brewer Road, in Morgantown, Monongalia County. The Court is of the opinion that prior to the first incident, Respondent had, at the least, constructive notice of the defects in the pavement on County Route 85, and thus, finds Respondent negligent. However, prior to the second incident, the Court is of the opinion that Respondent took reasonable corrective actions and thus cannot be found negligent. Award $500.00 . . . . p. 200

GARRETT V. DIVISION OF HIGHWAYS (CC-09-0054)

Claimant brought this action for vehicle damage which occurred when his 1995 Oldsmobile Cutlass Supreme Struck a hole on County Route 3, designated Coal River Road, in St. Albans, Kanawha County. The size of the broken section of pavement, which covered most of the lane being traversed by Claimant, leads the Court to Conclude that Respondent had notice of the hazardous condition and an adequate amount of time to take corrective action. Award $1,540.00. . . . . p. 217

GAWTHROP V. DIVISION OF HIGHWAYS (CC-08-0465)

The parties stipulated to the following: On August 28, 2008, Claimant's 2004 Hyundai Elantra struck a piece of concrete that had fallen onto the road from the overpass on I-79 North, past the Weston Exit in Lewis County. Respondent is responsible for the maintenance of I-79 which it failed to maintain properly on the date of this incident. As a result, Claimant's vehicle sustained damage. Respondent agrees that the amount of damages put forth by the Claimant is fair and reasonable.
Award $249.19. . . . . p. 76

GILLISPIE V. DIVISION OF HIGHWAYS (CC-10-0521)

Claimant brought this action to recover for damage to his vehicle that occurred when tar splashed off of a freshly paved patch of road on I-77 near Parkersburg, Wood County. The Court is of the opinion that Respondent had, at the least, constructive notice that paving an interstate highway on such a hot day could result in tar splashing on vehicles traveling the road and create a hazardous condition.
Award $100.00 . . . . . p. 248

GRANGE V. DIVISION OF HIGHWAYS (CC-09-0629)

Claimant brought this action for vehicle damage which occurred when a friend, Ms. Daniels, was driving his 2005 Volvo eastbound on McCorkle Avenue and was struck by a road sign that had been forced over in the wind. Since there was no evidence that the force of the wind blowing at the time of this incident could not have been reasonably anticipated by the respondent, the Court finds Respondent negligent in not adequately securing the sign. Award $3,114.49. . . . . p. 132

GREENE V. DIVISION OF HIGHWAYS (CC-08-0128)

Claimant brought this action for vehicle damage which occurred when his 2000 Audi S4 sedan struck a raised section of pavement on US Route 50, east of Bridgeport, Harrison County. Since the condition on US Route 50 created a hazard to the traveling public, the Court finds Respondent negligent.
Award $694.94. . . . . p. 48

GREENE V. DIVISION OF HIGHWAYS (CC-08-0420)

The parties stipulated to the following: On September 3, 2008, Claimant was crossing the bridge on State Route 16/61 in Mount Hope, Fayette County, when he reached an area of the bridge where Respondent had placed steel plates. The steel plates were loose, exposing the bridge's steel re-bar rods. Claimant's vehicle struck the protruding re-bar rods, which caused damage to the vehicle's tire. Respondent is responsible for the maintenance of State Route 16/61 which it failed to maintain properly on the date of this incident. As a result, Claimant's vehicle sustained damage to its tire. Respondent agrees that the amount of the damages put forth by the Claimant is fair and reasonable. Award $205.75. . . . . p. 76

GREER V. DIVISION OF HIGHWAYS (CC-10-0429)

Claimant brought this action to recover for vehicle dmamge which occurred when his vehicle struck an unevenly milled portion of the road on US Route 250 near Whitehall, Marion County. The Court is of the opinion that Respondent had, at the least, constructive notice of the road work on Route 250, and that it failed to provide adequate warning of the roughly milled portion of road. Since an unmarked steep incline between the unfinished and finished travel portion of the raod created a hazard to the traveling public, the Court finds Respondent negligent.
Award $383.61. . . . . p. 211

GREGORY V. DIVISION OF HIGHWAYS (CC-08-0211)

Claimant brought this action for vehicle damage which occurred when his 2006 Alpha motor home struck a barrel on I-68 East near Coopers Rock, Preston County. The Court finds that the plastic barrel was not adequately secured to its base. Since the loose barrel was the proximate cause of the damages sustained to Claimant's vehicle, the Court finds Respondent negligent. Award $1,000.00. . . . . p. 77

HAIRSTON V. DIVISION OF HIGHWAYS (CC-10-0009)

Claimant brought this action for vehicle damage which occurred when her 2002 Dodge Neon struck loose gravel on Washington Street E. in Charleston, Kanawha County. The Court finds that the irregular pavement was the responsibility of the gas company, who dug a hole to repair an emergency leak, to repair the road to Respondent's satisfaction. Thus, Respondent was not negligent, and Claimant may seek reimbursement from the utility company for her loss. Claim disallowed. . . . p. 121

HARGETT V. DIVISION OF HIGHWAYS (CC-07-0175)

Claimant brought this action for vehicle damage which occurred when her 1998 Ford Escort struck a hole as she was driving on Wilson Lane in Elkins, Randolph County. The hole's location in the center of the road leads the Court to conclude that Respondent had notice of this hazard. Thus, the Court finds Respondent negligent. Award $57.19. . . . . p. 73

HATFIELD V. DIVISION OF HIGHWAYS (CC-06-0159)

On or around April 15, 2006, Darlene H. Hatfield was operating her motor vehicle on U.S. Route 52 near Iaeger in McDowell County, West Virginia, when her vehicle struck a tree that had fallen onto the road. For the purposes of settlement, Respondent acknowledges culpability for the preceding accident.
Award of $727.67. . . . . p. 96

HAUPT V. DIVISION OF HIGHWAYS (CC-09-0457)

Claimant brought this action for vehicle damage which occurred when his 2009 BMW struck a two and a half inch discontinuity between the milled portion of the road and the paved surface on the Kanawha Turnpike exit ramp from I-64 in Charleston, Kanawha County. Since Respondent had, at least, constructive notice of the disrepair for atleast one week, the Court finds Respondent negligent.
Award $500.00. . . . . p. 127

HAYES V. DIVISION OF HIGHWAYS (CC-09-0445)

Claimant brought this action for vehicle damage which occurred when his 2006 Chevrolet Cobalt struck a hole on County Route 23/1 in Fairmont, Marion County. Since a hole in the travel portion of a heavily traveled secondary road created a hazard to the traveling public, the Court finds Respondent negligent.
Award $317.95 . . . . . p. 178

HELMICK V. DIVISION OF HIGHWAYS (CC-07-0255)

Claimant brought this claim for damage to the driveway of his property, located in Clarksburg, Harrison County, which he alleges occurred as a result of Respondent's negligent maintenance of the ditch lines on Strother Lane. Claimant asserts that when there is a heavy rain, water flows from Strother Lane onto County Route 7 and then washes onto thirty feet of his driveway, making it impassible. Since the failure to maintain adequate drainage was the proximate cause of the damages sustained to Claimant's property, the Court finds Respondent negligent. The Court further finds an amount that is fair and reasonable to compensate the Claimant for the damages to his property. Award $1,158.10. . . . . p. 45

HICKS V. DIVISION OF HIGHWAYS (CC-08-0145)

Claimant brought this action for vehicle damage which occurred when his 2000 Chrysler Concord struck a hole as he was driving on I-64 in Cabell County at the 16th Street overpass. The size of the hole and its location leads the Court to conclude that

Respondent had notice of this hazardous condition. Thus, the Court finds Respondent negligent. Award $250.00. . . . . p. 25

HOLLEY V. DIVISION OF HIGHWAYS (CC-08-0182)

Claimant brought this action for vehicle damage which occurred when her 1999 Chevrolet Blazer struck a hole on Beverlin Fork Road, designated as County Route 1, near Center Point, Doddridge County. Since County Route 1 is a rural, low priority road in terms of its maintenance, the Court finds that Respondent did not have the manpower available during the winter months to patch holes at this particular location.
Claim disallowed. . . . . p. 105

HOLLEY V. DIVISION OF HIGHWAYS (CC-08-0065)

Claimant brought this action for vehicle damage which occurred when his 1994 Ford Aspire struck rocks while he was traveling north on WV Route 2 in Mason County. Although there are falling rock signs located in this area, the Court finds that Respondent could have taken further measures to protect the safety of the traveling public at this location. Thus, the Court finds that Respondent is liable for the damages to Claimant's vehicle. The Court also finds that the Claimant was twenty-percent (20%) negligent, and the award was reduced accordingly. Award $352.56. . . . . p. 25

HOUSER V. DIVISION OF HIGHWAYS (CC-09-0060)

Claimant brought this action for vehicle damage which occurred on Limestone Road, an unimproved road in St. Marys, Pleasant County. The Court found that homeowners on Limestone Road were first required to obtain a permit to bring the road up to the Respondent's specifications before the Respondent was required the maintain the road. Since the proper permits were never obtained Respondent cannot be held responsible for any damage that resulted from the condition of this unmaintained road.
Claim disallowed. . . . . p. 138

HUNTER V. DIVISION OF HIGHWAYS (CC-09-0585)

Claimant brought this action for vehicle damage which occurred when her 1995 Volkswagen Passat, being driven by her brother, struck debris of unknown origin on I-77 North before the Fairplain Exit in Jackson County. Respondent's crew encountered Claimant's brother on the side of the road and observed wooden plats and piece of metal in the road, but no hole. Because this was the first time Respondent became aware of the debris in the roadway there is insufficient evidence of negligence on the part of Respondent upon which to base an award.
Claim disallowed. . . . . p. 117

HUSSELL V. DIVISION OF HIGHWAYS (CC-09-0047)

Claimants brought this action for vehicle damage which occurred when their 2006 Volkswagen Beetle struck a hole on WV Route 62 in Mason County. Since it was established that Respondent's crews placed "Rough Road" signs and repaired holes in the location of the incident on five occasions during the month of Claimants' incident, and Claimants were aware of the condition on WV Route 62, the Court finds that Claimants' were at least fifty percent negligence and therefore Claimants are barred from recovery. Claim disallowed. . . . . p. 123

HYRE V. DIVISION OF HIGHWAYS (CC-08-0405)

Claimant brought this action for vehicle damage which occurred when his 2005 Ford 500 struck a hole on River Road, designated as County Route 26/1, in Webster

County. Since there were a series of holes in this area, the Court finds Respondent negligent. Award $111.25. . . . . p. 63

IDDINGS V. DIVISION OF HIGHWAYS (CC-08-0381)

Claimant brought this action for vehicle damage which occurred when her 2005 Nissan Altima struck chunks of concrete on I-64 near the 5th Street Exit in Huntington, Cabell County. In Lawrence v. Div. of Highways, CC-08-0390 (Issued July 8, 2009), Claimant's vehicle struck chunks of concrete on I-64 as he was traveling under the 5th Street Bridge, in Huntington, Cabell County. The Court found that Respondent had, at the least, constructive notice of the potential deterioration of the concrete haunches on the bridge on I-64 and that this condition posed a hazard to the traveling public. Based upon the Court's decision in Lawrence, the Court finds Respondent negligent. Award $144.16. . . . . p. 40

JOHNSON V. DIVISION OF HIGHWAYS (CC-08-0529)

Claimant brought this action for vehicle damage which occurred when her 2006 Chevrolet Cobalt struck a hole while she was traveling on Foster Ridge Road, designated as County Route 32, near Ripley, in Jackson County. Since County Route 32 is a third priority road and Respondent was unaware of the hole, the Court cannot find Respondent liable for the damage to the Claimant's vehicle. Claim disallowed. . . . . p. 64

JOHNSON V. DIVISION OF HIGHWAYS (CC-08-0225)

Claimants brought this action for vehicle damage which occurred when their 2002 Pontiac Grand Am GT struck a hole while Claimant Rose Anna Johnson was driving on Walker Road in Wood County. Since there were a series of holes at this location, the Court finds Respondent negligent. Notwithstanding the negligence of the Respondent, the Court is also of the opinion that the driver was negligent since she could have taken precautions to avoid the hole at this location. The Court finds that the driver's negligence equals ten-percent (10%) of their loss. Award $232.60. p. 106

KANTHACK V. DIVISION OF HIGHWAYS (CC-08-0288)

Claimants brought this action for vehicle damage which occurred when a sign struck their vehicle on I-64 west. Claimants' vehicle sustained damage in the amount of $2,164.12, but they had an insurance deductible of $100.00. The Court finds that Claimants' may make a recovery for the amount of their deductible since the sign was not adequately secured at the time of this incident. Award $100.00. . . . . p. 153

KATINY V. DIVISION OF HIGHWAYS (CC-08-0334)

The parties stipulated to the following: On June 30, 2008, Claimant was driving around a curve on US Route 119 in Chapmanville, Logan County, when his 2008 Subaru Outback struck a chunk of concrete that was situated in his lane of travel. Although Claimant tried to maneuver his vehicle around the chunk of concrete, he was unable to do so due to the traffic. Respondent was responsible for the maintenance of US Route 119 which it failed to maintain properly on the date of this incident. As a result, Claimant's vehicle sustained damage to its tire and rim. Respondent agrees that the amount for the damages put forth by the Claimant is fair and reasonable. Award $454.61. . . . . p. 20

KELLEY V. DIVISION OF HIGHWAYS (CC-09-0306)

Claimants brought this action for vehicle damage which occurred when their 2007 Chevrolet HHR struck a rock embedded in the surface of Route 24 in Spencer, Roane County. The Court finds that the road was in disrepair at the time of this incident. The driver was unable to avoid striking the rock with the vehicle due to the condition of the road. Thus, the Court finds Respondent negligent.
Award $500.00. . . . . p. 69

KETTERMAN V. DIVISION OF HIGHWAYS (CC-06-0110)

Claimant brought this action for vehicle damage which occurred when his 1990 Chevrolet Cavalier struck a rock while his daughter, Felicia Ketterman, was driving on US Route 220 near Petersburg, Grant County. The Court is of the opinion that Respondent had constructive notice of the likelihood of rock falls at this location on US Route 220. The Court finds that although Respondent placed 'Falling Rock' signs on US Route 220, Respondent failed to take further measures to protect the traveling public at this location. Thus, Respondent is liable for the damages to Claimant's vehicle.
Award $3,100.00. . . . . p. 71

KINDER V. DIVISION OF HIGHWAYS (CC-04-0010)

The parties stipulated to the following: Respondent is responsible for the maintenance of Route 3 at or near Seth, Braxton County. Claimant alleges that she was injured when her vehicle while traveling on Route 3, hit black ice on the roadway surface causing her to lose control of the vehicle, and run off the roadway on the northern side and strike a tree. In addition, Claimant alleges that the Respondent was notified of black ice in the area prior to the Claimant's accident, and that Respondent had not properly treated the area prior to Claimant's accident. Respondent acknowledges culpability for the preceding incident. Claimant and Respondent believe that an award of a fair and reasonable amount to settle this claim. Award $30,000.00. . . . . p. 26

KISER, AS ADMINISTRATRIX OF THE ESTATES OF MELVIN KISER AND MICHAEL KISER, DECEASED AND ROBERT WOODS, INDIVIDUALLY V. DIVISION OF HIGHWAYS (CC-06-0238)

The parties stipulated to the following: On or about October 23, 2005, Claimant Donna Kiser's decedents, Melvin Kiser and Michael Kiser, and Claimant Robert Woods were involved in an accident on Interstate 64 near the 15 mile marker in Cabell County. Respondent is responsible for the maintenance of Interstate 64 in Cabell County. The Claimant's automobile was struck in the rear end by a tractor trailer. The incident occurred approximately 2 miles from a bridge repair construction project that Ahern & Associates, Inc. was performing for the Respondent. Melvin and Michael Kiser suffered critical injuries and died as a result of the accident. Robert Woods suffered injuries to his cervical spine and right hip as a result of the accident. The Claimants allege that the traffic control plan was inadequate due to traffic routinely backing up beyond the farthest warning sign of the construction project. Moreover, Respondent failed to install a sufficient number of warning signs to notify the traveling public of the backup. For the purposes of settlement, Respondent acknowled culpability for the preceding incident. Award $300,000.00 and $610,000.00. . . . . p. 55

LAWRENCE V. DIVISION OF HIGHWAYS (CC-08-0390)

Claimant brought this action for vehicle damage which occurred when his 1998 Ford Mustang struck chunks of concrete on I-64 as he was traveling under the 5th Street Bridge in Huntington, Cabell County. The Court is of the opinion that Respondent had notice of the potential deterioration of the concrete haunches on the I-64 bridge and this

condition posed a hazard to the traveling public. Since Claimant sustained damage through not fault of his own, the Court finds Respondent negligent and Claimant may make a recovery for the damage to his vehicle. Award $2,497.41. . . . . p. 19

LESTER V. DIVISION OF HIGHWAYS (CC-09-0635)

Claimant brought this action for vehicle damage which occurred when her vehicle struck a dead deer on US Route 119 in Logan County. The Court is of the opinion that Respondent did not have notice of the dead deer which Claimant's vehicle struck prior to the Claimant's incident; therefore, there is insufficient evidence of negligence on the part of Respondent to justify an award. Claim disallowed. p. 157

LOUGH V. DIVISION OF HIGHWAYS (CC-10-0025)

Claimant brought this action for vehicle damage which occurred when her 1998 Chevrolet Lumina struck a poorly marked median separating the entrance to and exit from WV Route 19, designated Robert C. Byrd Drive, in Mabscott, Raleigh County. The Court is of the opinion that Respondent had notice of the poorly demarcated median on the WV Route 16 entrance/exit ramp in Mabscott, and that the sign stub protruding from the median created a hazard to the traveling public. Thus, the Court finds Respondent negligent. Award $2,235.00. . . . . p. 219

MARCHETTI V. DIVISION OF HIGHWAYS (CC-09-0414)

Claimants brought this action for vehicle damage which occurred when their 2005 Suzuki Forenza struck a hole on Waverly Road, designated WV Route 1, in Williamstown, Wood County. Since there were numerous holes at this location, the Court finds Respondent negligent. Thus, Claimants may make a recovery for the damage to their vehicle in the amount of their insurance deductible.
Award $500.00. . . . . p. 143

MARTIN V. DIVISION OF HIGHWAYS (CC-10-0419)

Claimant brought this action to recover for damage which occurred when his vehicle struck a construction cone on I-79 somewhere between south Clarskburg and the US Route 19 Summersville exit. Although this Court does not require Claimants to plead their claims with the level of particularity required by the Federal and Circuit courts of this state, it is nevertheless the Claimant's duty to provide the location of the incident within a reasonable degree of certainty to provide Respondent a fair opportunity to defend against such actions in this Court. Claim disallowed . . . . . p. 241

MCCORMICK V. DIVISION OF HIGHWAYS (CC-09-0053)

Claimant brought this action for vehicle damage which occurred when her 2008 Nissan Maxima struck a hole on State Route 214 in Alum Creek, Lincoln County. The Court is of the opinion that Respondent had, at least constructive notice of the hole which occupied a significant portion of the northbound lane of traffic on a primary road, resulting in Claimant's vehicle damage. Thus, the Court finds Respondent negligent. Award $340.7. . . . . p. 124

MEANS V. DIVISION OF HIGHWAYS (CC-09-0354)

Claimant brought this action for vehicle damage which occurred when his vehicle struck a series of holes on the WV Route 2 entrance ramp near Benwood, Marshall County. At the time of the incident, road work was being performed by a contractor on WV Route 2. The Court finds that although a contractor was performing maintenance at this location, the Respondent had, at least, constructive notice of the

condition of entrance ramp onto WV Route 2, and was therefore responsible for repairing defective roadway conditions. Award $116.60. . . . . p. 159

MERIGO V. DIVISION OF HIGHWAYS (CC-03-0161)

The parties stipulated to the following: On or around April 2, 2001, Michele Merigo was operating her motor vehicle on WV Route 27 in Brooke County when her vehicle struck a rock that had fallen in the roadway from the adjacent hillside. Respondent is responsible for the maintenance of WV Route 27 in Brooke County. Ms. Merigo was injured as a result of the accident and required medical treatment for her injuries. Respondent acknowledges culpability for the preceding accident. Both the Claimant and Respondent believe that an award in the amount of $122,500.00 would be a fair and reasonable amount to settle this claim. Award $122,500.00. . . . . p. 51

MILLER V. DIVISION OF HIGHWAYS (CC-08-0438)

Claimant brought this action for vehicle damage which occurred when her 2003 Hyundai Elantra struck a piece of asphalt on WV Route 2 in Wheeling, Ohio County. The Court is of the opinion that Respondent had, at the least, constructive notice of the loose piece of asphalt which Claimant's vehicle struck. The Court finds that the defect presented a hazard to the traveling public on this heavily traveled road. Thus, the Court finds Respondent negligent. Award $496.76. . . . . p. 49

MORGAN V. DIVISION OF HIGHWAYS (CC-08-0370)

Claimants brought this action for vehicle damage which occurred when their 2004 Nissan Maxima struck an unknown object as Claimant Richard Morgan was driving on I-64 in Huntington, Cabell County. It is the Claimants' burden to prove that Respondent had notice of the object in the roadway and failed to take corrective action. The Court cannot resort to speculation in determining what caused the damage to the Claimants' vehicle. In any case, it is more likely than not that the Claimants' vehicle struck a foreign object in the roadway for which Respondent did not have notice. Therefore, there is insufficient evidence of negligence on the part of Respondent upon which to base an award. Claim disallowed. . . . . p. 107

MORGAN V. DIVISION OF HIGHWAYS (CC-10-0090)

Claimants brought this action for vehicle damage which occurred when their 2008 Saturn Aura struck a hole on I-77 South, between mile marker 8.0 and 8.6, causing damage to its rim and wheel. Since the hole was located on the interstate, where vehicles travel at high speeds, and surrounded by multiple other holes, the Court finds Respondent negligent. Award $312.92. . . . . p. 134

MORRIS V. DIVISION OF HIGHWAYS (CC-09-0483)

Claimant brought this action for vehicle damage which occurred when her 2001 Lincoln Continental struck a hole on the exit ramp of the Kanawha Turnpike 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. The Court finds that the defect presented a hazard to the traveling public on this heavily traveled road. Thus, the Court finds Respondent negligent. Award $421.20.. . . . . p. 117

MYERS V. DIVISION OF HIGHWAYS (CC-07-0165)

The parties stipulated to the following: Claimants' 1999 Ford Escort was damaged when it struck an uneven surface on the Sugarlands Bridge near St. George in Tucker County causing damage to their vehicle. Respondent is responsible for the

maintenance of the Sugarlands Bridge which it failed to maintain properly on the date of this incident. As a result, Claimants' vehicle sustained damage. Claimants agree on an amount that would be a fair and reasonable amount to settle this claim. Award $400.00. . . . . p. 58

NESTOR V. DIVISION OF HIGHWAYS (CC-08-0323)

Claimants brought this action for vehicle damage which occurred when their vehicle struck excess gravel and veered off the road on WV Route 38 in Tucker County. Storms during the month of June caused many roads in Tucker County to be in disrepair. Since Respondent's crews made a good faith effort to clean up debris from the storm in a timely manner, there is insufficient evidence of negligence on the part of Respondent upon which to base an award. Claim disallowed. . . . . p. 142

NORMAN V. DIVISION OF HIGHWAYS (CC-08-0310)

Claimant brought this action for damage to his motorcycle which occurred when his motorcycle struck a hole on WV Route 26 in Albright, Preston County. The Court finds that Respondent cannot be held liable for this particular portion of the road because it is situated on CSX's right-of-way. Claim disallowed. . . . . p. 108

ONEY V. DIVISION OF HIGHWAYS (CC-05-0420)

Claimant brought this action for vehicle damage which occurred when her 2002 Ford Taurus struck a construction barrel on I-64 between the Hal Greer and 29th Street Exits in Huntington, Cabell County. The Court is of the opinion that Respondent had, at the least, constructive notice of the construction barrel which Claimant's vehicle struck on I-64 East. The Court finds that the plastic barrel in question was not adequately secured to prevent a hazard to the traveling public. Since the barrel was the proximate cause of the damages sustained to Claimant's vehicle, the Court concludes that Respondent was negligent. Award $500.00. . . . . p. 18

ORNDORFF V. DIVISION OF HIGHWAYS (CC-09-0135)

Claimants brought this action for vehicle damage which occurred when their 2005 Pontiac Grand Prix struck a piece of asphalt that had come out of a hole on Tub Run Hollow Road in Berkeley County. Since the road was in disrepair at the time of this incident, the Court finds Respondent negligent. The Court is also of the opinion that Mr. Orndorff was negligent in his operation of the vehicle, and the negligence of Claimant equals thirty-percent (30%) of Claimants' loss. Award $350.00. . . p. 83

POST V. DIVISION OF HIGHWAYS (CC-08-0430)

Claimant brought this action for vehicle damage which occurred when her 1993 940 Volvo struck a drainage trench on Wildcat Road in Lewis County. The Court is of the opinion that Respondent had, at the least, constructive notice of the drainage trench which Claimant's vehicle struck and that it presented a hazard to the traveling public. The Court is also of the opinion that the Claimant was negligent, and Claimant's negligence equals forty percent (40%) of her loss. Award $530.43. . . . . p. 65

POWERS V. DIVISION OF HIGHWAYS (CC-06-0045)

The parties stipulated to the following: Respondent is responsible for the maintenance of WV Route 80 in Mingo County. On or around February 3, 2004, Stanley E. Powers was operating his motor vehicle on WV Route 80 near Gilbert in Mingo County. Mr. Powers was injured as a result of the accident and required medical treatment for his injuries. Claimants allege that Respondent was negligent in its

maintenance of the portion of WV Route 80 where Mr. Powers' accident occurred. For the purposes of settlement, Respondent acknowledges culpability for the accident. Award $50,000.00. . . . . p. 72

PRITT V. DIVISION OF HIGHWAYS (CC-08-0044)

Claimant brought this action for vehicle damage which occurred when she was driving on Walker's Branch Road in Wayne County and her 2005 Volvo struck an area on the edge of the road which was eroded. The Court is of the opinion that Respondent had, at the least, constructive notice of the eroded area and that it presented a hazard to the traveling public. Since vehicles are frequently forced to drive on the edge of the road due to oncoming traffic at this narrow location on Walker's Branch Road, the Court finds that this area should have been maintained more frequently than every three years. Thus, the Court finds Respondent negligent. Award $22.74. . . . . p. 17

RENO V. DIVISION OF HIGHWAYS (CC-07-0363)

Claimant brought this action for vehicle damage which occurred when her 1999 Ford Taurus struck railroad ties that were scattered across County Route 56 between Independence Road and Country Club Road in Jackson County. Respondent did not receive notice until after this incident occurred but responded in a timely manner and removed the railroad ties. Claim disallowed. . . . . p. 109

ROBBINS V. DIVISION OF HIGHWAYS (CC-08-0452)

Claimant brought this action for vehicle damage which occurred when her 2006 Toyota 4Runner struck gravel and sustained damage to its windshield while she was traveling on a portion of I-81 that was being resurfaced in Martinsburg, Berkeley County. The Court is of the opinion that Respondent had, at the least, constructive notice of the excess gravel on I-81. Thus, the Court finds Respondent negligent. Award $50.00. . . . . p. 78

ROGERS V. DIVISION OF HIGHWAYS (CC-10-0012)

The parties stipulated to the following: On August 9, 2009, Claimant's 2003 Harley Davidson struck a hole on U.S. Route 119 between Elkview and Clendenin. Respondent is responsible for the maintenance of U.S. Route 119, which it failed to maintain properly on the date of this incident. As a result, Claimant's motorcycle sustained damage to one tire and one rim. Respondent agrees that the amount for the damages put forth by the Claimants is fair and reasonable.
Award $1,196.42. . . . . p. 119

SCHLINGMANN V. DIVISION OF HIGHWAYS (CC-05-0329)

The parties stipulated to the following: Respondent is responsible for the maintenance of WW Route 67 in Brooke County. On or around January 4, 2004, Claimants' property, including their house, hillside, and property value, suffered damage as a result of a landslide adjacent to their property along WV Route 67. The Claimants allege that the landslide was caused by Respondent's installation of a culvert and gabion wall along Route 67. For the purposes of settlement, Respondent acknowledges culpability for the preceding incident. Award $68,250.00. . . . . p. 43

SHANNON V. DIVISION OF HIGHWAYS (CC-09-0174)

The parties stipulated to the following: Claimant was traveling north on WV Route 2 near New Martinsville, Wetzel County, when her vehicle was struck by falling debris from the overpass bridge, damaging the vehicle's windshield. Respondent is

responsible for the maintenance of WV Route 2 which it failed to maintain properly on the date of this incident. Respondent agrees that the amount for the damages put forth by the Claimant is fair and reasonable. Award $5,436.13. . . . . p. 42

SINCLAIR V. DIVISION OF HIGHWAYS (CC-10-0231)

Claimants brought this action for vehicle damage which occurred when their 2008 Chrysler Sebring struck a hole on US Route 250 in Fairmont, Marion County. The Court is of the opinion that, although Respondent was operating in snow removal and ice control (SRIC) mode on the date of this incident, the size of the hole and its location in the travel portion of the road lead the Court to conclude that the condition existed prior to the snowfall and that Respondent had adequate time to make necessary repairs to remedy the hazardous condition. The Court finds Respondent negligent. Award $500.00. . . . . p. 210

SIZEMORE V. DIVISION OF HIGHWAYS (CC-09-0059)

On January 26, 2009, Claimant was driving east on State Route 62, from Ripley to Cottageville, when his 2007 Buick Lucerne struck a hole in the road. Respondent agrees that the amount of $500.00 for the damages put forth by the Claimant is fair and reasonable. Award of $500.00. . . . . p. 94

SMITH V. DIVISION OF HIGHWAYS (CC-09-0183)

Claimant brought this action for vehicle damage which occurred when her 2001 Jeep Grand Cherokee and her 2005 Dodge 1500 truck were damaged as a result of striking holes on County Route 44 in Leon, Mason County. The Court finds that County Route 44 is a school bus route with numerous holes in the travel portion of the road, and that Respondent was negligent in its maintenance of the road.
Award $1,081.91. . . . . p. 177

SPOTLOE V. DIVISION OF HIGHWAYS (CC-08-0424)

The parties stipulated to the following: Claimant's 1989 Ford F150 pickup truck struck a hole on Hickory Flat Road in Buckhannon, Upshur County, and caused damage to the rear spring of his vehicle. Respondent is responsible for the maintenance of Hickory Flat Road which it failed to maintain properly on the date of this incident. As a result, Claimant's vehicle sustained damage. Respondent agrees that the amount for the damages put forth by the Claimant is fair and reasonable.
Award $543.68. . . . . p. 79

SPURLOCK V. DIVISION OF HIGHWAYS (CC-10-0343)

Claimant brought this action for motorcycle damage which occurred when his 2003 Harley Davidson struck a hole on Hunter Road in Charleston, Kanawha County. The Court is of the opinion that Respondent had, at the least, constructive notice of the condition on Hunter Road. Since a large defect in the pavement on a one-lane road crated a hazard to the traveling public, the Court finds Respondent negligent.
Award $252.00. . . . . p. 246

STARCHER V. DIVISION OF HIGHWAYS (CC-09-0469)

The parties stipulated to the following: On May 10, 2009, Claimant's vehicle struck a hole on County Route 1, designated Oil Ridge Road, in Sisterville, Tyler County. Respondent is responsible for the maintenance of County Route 1, which it failed to properly maintain prior to the date of this incident. Respondent agrees that

$316.39, the amount of damages put forth by the Claimant, is fair and reasonable to settle this claim. Award $316.39. . . . . p. 196

STEWART V. DIVISION OF HIGHWAYS (CC-10-0097)

Claimant brought this action for vehicle damage which occurred when she drove a rental car over a pile of snow and asphalt on County Route 19/63, designated Locust Estates, in Sutton, Braxton County. The Court is of the opinion that Respondent had, at the least, constructive notice that its snow removal activities left behind a pile of snow and asphalt shards across the travel portion of the road on County Route 19/63, which created a hazard to the traveling public. The Court finds Respondent negligent. Award $309.60. . . . . p. 215

STOWERS V. DIVISION OF HIGHWAYS (CC-09-0578)

Claimants brought this action for vehicle damage which occurred when their vehicle struck a deep manhole on US Route 60 in South Charleston, Kanawha County. The Court is of the opinion that Respondent had constructive notice of the deep manholes located within a construction site on US Route 60; and that such holes in the travel portion of the road created a hazard to the traveling public. The Court finds Respondent negligent. Award $ 265.01. . . . . p. 192

SUMMERS V. DIVISION OF HIGHWAYS (CC-07-0369)

The parties stipulated to the following: Respondent is responsible for the maintenance of U.S. Route 61 in Charleston, West Virginia. On or around April 15, 2006, Claimant alleges that he fell as a result of a clogged drain which was covered with debris and obscured by water at the corner of U.S. Route 61 and 51st Street. Further, he alleges that as a result of the fall, he suffered a left ankle sprain, contusion on his right knee, a wrist sprain, and a torn rotator cuff in his right shoulder which required surgery. 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 a fair and reasonable amount is warranted to settle this claim. Award $45,000.00. . . . . p. 86

SWECKER V. DIVISION OF HIGHWAYS (CC-08-0454)

Claimants brought this action for vehicle damage which occurred when their 2004 Chevrolet Cavalier struck an uneven surface on the berm of Corridor H, designated as US Route 33, near Elkins, Randolph County. The Court is of the opinion that Respondent had, at the least, constructive notice of the condition of the berm at this location. The Court is also of the opinion that the driver was 10% negligent. Award $441.54. . . . . p. 66

TATAR V. DIVISION OF HIGHWAYS (CC-10-0013)

Claimant brought this action for vehicle damage which occurred when her 2008 Pontiac GT6 struck a hole on County Route 3, designated as Mozart Road, in Wheeling, Marshall County. The Court is of the opinion that Respondent had, at least constructive notice of the condition of the hole, and that it presented a hazard to the traveling public. Claimant's damages were $161.25, but her insurance deductible was $100.00. Award $100.00. . . . . p. 171

TAYLOR V. DIVISION OF HIGHWAYS (CC-09-0313)

Claimant brought this action for vehicle damage which occurred when his vehicle struck a deep inlet grate on US Route 219 in Pocahontas County. The Court is

of the opinion that Respondent had, at the least, constructive notice of the exposed inlet grate, and thus was negligent. Claimant's damages were $2,930.90, but his insurance deductible was $500.00. Award $500.00. . . . . p. 160

TENNANT V. DIVISION OF HIGHWAYS (CC-09-0111)

The parties stipulated to the following: On January 30, 2009, Claimant was driving his 2006 Chevrolet Colorado truck east on State Route 7 on the Clovis Bridge in Pentress, Monongalia County, when his truck struck a metal plate, damaging his vehicle's tire. According to the Claimant, the plate had been plowed off the side of the bridge by Respondent's snow plow. Respondent is responsible for the maintenance of State Route 7 which it failed to maintain properly on the date of this incident. As a result, Claimant's vehicle sustained damage to its right, rear tire. Respondent agrees that the amount for the damages put forth by the Claimant is fair and reasonable.
Award $90.58 . . . . . p. 31

WARD V. DIVISION OF HIGHWAYS (CC-07-0215)

Claimant brought this action for vehicle damage which occurred when her 1999 Dodge Neon struck a manhole cover on Harvey Street in Williamson, Mingo County. The Court is of the opinion that because Respondent took this road into its system Respondent bears the responsibility for its maintenance, which it failed to properly maintain on the date of this incident. Award $1,836.53 . . . . . p. 135

WHITE V. DIVISION OF HIGHWAYS (CC-09-0351)

Claimants brought this action for vehicle damage which occurred when their 2006 Chevrolet HHR struck a hole as Claimant Carol White was driving on Stewartstown Road, designated as County Route 67, in Morgantown, Monongalia 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. The Court also finds that the driver was 20% negligent in her operation of the vehicle. Award $346.15. . . . . p. 84

WHITTAKER V. DIVISION OF HIGHWAYS (CC-07-0368)

The parties stipulated to the following: Respondent is responsible for the maintenance of U.S. Route 460 in Mercer County, West Virginia. On October 4, 2007, Ruth Whittaker was operating an automobile on U.S. Route 460. Ms. Whittaker's automobile struck a metal expansion joint, which had come loose on a bridge located along U.S. Route 460. Claimant and Respondent believe that in this particular incident and under these particular circumstances that an award of a fair and reasonable amount would be warranted to settle this claim.
Award $4,000.00. . . . . p. 10

WILFONG V. DIVISION OF HIGHWAYS (CC-08-0494)

Claimant brought this action for vehicle damage which occurred when he was riding his 1999 California Motorcycle Company Wide Rider, and his motorcycle struck an uneven section of the roadway on State Route 7 near Kingwood, Preston County. Since Respondent's warning sign was down at the time of the incident, the Court finds that motorists were not warned of the hazard in this high traffic area. Thus, the Court finds Respondent negligent. Award $897.75. . . . . p. 29

WRIGHT V. DIVISION OF HIGHWAYS (CC-08-0243)

Claimants brought this action for vehicle damage which occurred when their 2007 Chevrolet Cobalt struck a rock that was embedded in Narrow Gauge Road, designated as County Route 3/19, in Wood County. The Court is of the opinion that Respondent had, at the least, constructive notice of the rock that was embedded in the road which Claimants' vehicle struck and that the rock presented a hazard to the traveling public. Thus, the Court finds Respondent negligent.
Award $500.00. . . . . p. 67

TREES and TIMBER

ALLEN V. DIVISION OF HIGHWAYS (CC-07-0149)

The parties stipulated to the following: Respondent is responsible for the maintenance of U.S. Route 40 in Wheeling, Ohio County. On or around May 13, 2005, Claimant's house suffered damage as a result of a tree fall. The Claimant alleges that said tree was suffering from decay. For the purposes of settlement, Respondent acknowledges culpability for the preceding incident. The parties agree that an award to a fair and reasonable amount to settle this claim.
Award $19,000.00. . . . . p. 56

CALDWELL V. DIVISION OF HIGHWAYS (CC-09-0371)

Claimant brought this action for vehicle damage which occurred when a tree limb fell onto his 1996 Jeep Grand Cherokee, while being driven by Claimant's son on State Route 817 in Putnam County. The Court is of the opinion that Respondent had no notice that the tree limb at issue posed an apparent risk to the traveling public. Thus, there is insufficient evidence of negligence on the part of Respondent upon which to base an award. Claim disallowed. . . . . p. 129

CASSVILLE UNITED METHODIST CHURCH V. DIVISION OF HIGHWAYS (CC-10-0539)

The parties stipulated to the following: In May of 2010, Claimant incurred the expense of cutting down a tree located on Cassville Mt. Morris Road that was in danger of falling onto the structure of Claimant's church, located in Monongalia County. Respondent is responsible for clearing trees after road construction, which it failed it failed to adequately do prior to this incident. Respondent agrees that the amount of $200.00 for the damages put forth by the Claimant is fair and reasonable.
Award $200.00 . . . . . p. 204

DARNELL V. DIVISION OF HIGHWAYS (CC-08-0404)

The parties stipulated to the following: On August 29, 2008, Claimant's daughter, Tina A. Weaver, was driving the Claimant's 1998 Chevrolet Silverado truck on WV Route 20 South, approximately four miles north of Hinton, Summers County, when a portion of a dead tree fell on the vehicle. Respondent is responsible for the maintenance of WV Route 20 which it failed to maintain properly on the date of this incident. Respondent agrees that the amount for the damages put forth by the Claimant that is fair and reasonable. Award 2,366.55. . . . . p. 74

GARNES V. DIVISION OF HIGHWAYS (CC-09-0266)

Claimant brought this action for vehicle damage which occurred when a pine tree fell onto his parked 1998 Ford Escort. Claimant asserts that Respondent was notified that the tree was leaning dangerously over County Route 16, but Respondent failed to remove the tree prior to the Claimant's incident. Two weeks prior to the

incident, Claimant's father notified two of Respondent's employees, who were cutting brush approximately two feet beyond the location of the tree's trunk, that the tree needed to be cut and removed. The Court found that Respondent had actual notice that this tree posed a hazard. Award $549.19 . . . . . p. 111

HARDMAN V. DIVISION OF HIGHWAYS (CC-09-0056)

The parties stipulated to the following: Around January 2008, Claimant's fence line at 3003 Linden Street in Parkersburg was struck with a falling tree during the removal of certain trees located on Respondent's right of way. Respondent is responsible for the maintenance of property surrounding the property of 3003 Linden Street. Claimant's fence sustained damage in the amount of $619.00, which Respondent agrees is fair and reasonable. Award $619.00. . . . . p. 198

HOPE V. DIVISION OF HIGHWAYS (CC-10-0344)

Claimant brought this action for vehicle damage which occurred when his vehicle struck what he believed to be a low-hanging branch on WV Route 49 near Williamson, Mingo County. The Court will not speculate as to the nature of the object that Claimant's vehicle struck, and since Respondent did not have notice that a tree limb posed an apparent risk to the traveling public, the Court must deny this claim. Claim disallowed. . . . . p. 235

OLINZOCK V. DIVISION OF HIGHWAYS (CC-10-0010)

Claimants brought this action for vehicle damage which occurred when their SUV struck a downed tree that was covered by four feet of snow on County Route 12/7, locally designated Savage Road, in Bruceton Mills, Preston County. The Court will not impose an impossible duty upon Respondent during periods when its attention must be the control of snow and ice on the State's main highways.
Claim disallowed. . . . . p. 239

SPONAUGLE V. DIVISION OF HIGHWAYS (CC-06-0022)

Claimants brought this action for vehicle damage which occurred when Claimant's pickup truck struck a tree that fell on State Route 72 as a result of a landslide. Although there have been rock falls at this location, this landslide was an isolated incident. In addition, Respondent responded to the incident as soon as it became aware of the problem. Thus, there is insufficient evidence of negligence on the part of Respondent upon which to base an award. Claim disallowed. . . . . p. 89

VENDOR

DISKRITER INC. V. DEPARTMENT OF HEALTH AND HUMAN RESOURCES (CC-09-0498)

Claimant seeks payment for medical transcription outsourcing services provided at the request of Welch Community Hospital. 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 $69,011.05. . . . . p. 68

RICOH AMERICAS CORP. V. DIVISION OF CORRECTIONS (CC-10-0051)

Claimant seeks to recover $452.82 for services rendered to Respondent and documented by two invoices for $370.00 and $82.80. Respondent admits the validity of the claim as well as the amount with respect to the services rendered for $370.00, but

denies the claim with respect to the remaining $82.80. Claimant agrees to waive its claim for the remaining $82.80. Award $370.00 . . . . . p. 243

VERIZON V. DEPARTMENT OF HEALTH AND HUMAN RESOURCES (CC-09-0042)

Claimant seeks to recover for services provided to Respondent. In its Answer, Respondent admits the claim in the amount and states that sufficient funds were expired at the end of the fiscal year in which the claim could have been paid. Respondent further states that it denies payment since the State is tax exempt. Claimant agrees to the amended amount. Award $5,042.93. . . . . p. 82

VERIZON V. DEPARTMENT OF HEALTH AND HUMAN RESOURCES (CC-11-0009)

Claimant seeks to recover $18,205.75 for equipment, installation services, maintenance services, and professional services rendered to Respondent, but for which Claimant has not recieved payment. Respondent admits the claim in the in the amount of $14,766.66 and states that sufficient funds were expired at the end of the fiscal year in which claim could have been paid. Claimant agrees that $14,766.66 is fair and reasonable satisfaction for this claim. Award $14,766.66. . . . . p. 227

VENDOR - Denied because of insufficient funds.

ORDERS

Crime Victims Compensation Fund

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Crime Victims Compensation Fund

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

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Meighan B. Carter
(CV-08-0499-X)

O R D E R

Kurt Winter, Attorney at Law, for the claimant.
Thomas W. Smith, Managing Deputy Attorney General, for the State of West Virginia.

SAYRE, JUDGE:

The claimant, Meighan B. Carter, filed her application for an award under the West Virginia Crime Victims Compensation Act on August 15, 2008. The report of the Claim Investigator, filed December 8, 2008, recommended that no award be granted, to which the claimant filed a response in disagreement. An Order was issued on April 23, 2009, upholding the Investigator's recommendation and denying the claim, in response to which the claimant's request for hearing was filed May 20, 2009. This matter came on for hearing September 16, 2009, the claimant appearing by counsel, Kurt Winter, and Managing Deputy Attorney General Thomas W. Smith for the State of West Virginia. The twenty-one-year-old claimant was the victim of criminally injurious conduct on June 20, 2008. The claimant testified that she had gone out for dinner and drinks with Christina Mendenhall and David Griffith (the offender). Afterwards, they returned to the claimant's residence where Ms. Mendenhall and the offender were spending the night. The claimant testified that Ms. Mendenhall and the offender were intoxicated when they reached her house, but they continued to drink beer at there. As the claimant was getting ready for bed, she heard Ms. Mendenhall and the offender arguing outside in her yard. The claimant asked them to stop arguing because they were going to disturb her neighbors. Ms. Mendenhall and the offender began yelling at the claimant. The offender threatened to break items in the claimant's house and harm her. The claimant told them that they needed to leave, and then and locked her door.

Ms. Mendenhall and the offender proceeded to pound on the claimant's door. The claimant grabbed a knife to intimidate them and make them leave. The offender kicked the door open and threw the claimant to the ground. He took the knife from her and cut her on the throat and chin. The offender then pulled the claimant off the ground, pushed her against several objects in her house and threw beer bottles at her.

As he was pushing the claimant, the offender accidentally knocked Ms. Mendenhall onto the floor. He then told the claimant, "Look what you did. Look what you made me do." The offender again pushed the claimant, this time against the railing on her porch and she fell over the railing and onto the concrete steps. At that point, the offender kicked her in the back and went into the house and kicked her dog. He came outside, carrying Ms. Mendenhall, and said, "I hope you die."

After the offender had left, the claimant drove to the nearest gas station to call her boyfriend to take her to the hospital. The claimant spoke to a police officer at the

hospital. She was treated for four fractured vertebra, a right hip contusion, and cuts on her throat and chin.

The Court's Order denying this claim was based on the fact that the record did not establish that the claimant was in fact free from any contributory misconduct. W.Va. Code § 14-2A-3(l) defines contributory misconduct as follows:

> "Contributory misconduct" means any conduct of the claimant, or of the victim through whom the claimant claims an award, that is unlawful or intentionally tortious and that, without regard to the conduct's proximity in time or space to the criminally injurious conduct, has causal relationship to the criminally injurious conduct that is the basis of the claim and shall also include the voluntary intoxication of the claimant, either by the consumption of alcohol or the use of any controlled substance when the intoxication has a causal connection or relationship to the injury sustained.

The Court hereby determines that the claimant has satisfied her burden of proving that she was an innocent victim of crime. It is evident that the claimant did not commit any unlawful or tortious acts. The evidence adduced at the hearing establishes that the claimant was not the aggressor in this incident and did not provoke the attack. The Court is constrained by the evidence to reverse its previous ruling. The Claim Investigator is hereby ordered to complete an economic analysis of the claimant's unreimbursed allowable medical expenses for further review by the Court.

Marilyn A. Hale
(CV-05-0623)

O R D E R

Claimant appeared *pro se.*
Gretchen A. Murphy, Assistant Attorney General, for the State of West Virginia.

SAYRE, JUDGE:

On March 2, 2002, the claimant was the victim of criminally injurious conduct in Charles Town, Jefferson County. The claimant was driving her friend's vehicle on WV Route 340 when a vehicle being driven by a drunk driver collided with the rear of the vehicle she was driving. The claimant filed an application for compensation under the Crime Victims Compensation Act on December 16, 2005. Since the claim was filed more than two years from the date of the criminally injurious conduct, the Claim Investigator recommended that the claim be denied. On September 28, 2006, the Court issued an Order denying the claim on the basis that the statute of limitations had expired.

A hearing was held on November 3, 2009. The main issue before the Court on appeal is whether the claimant's application was filed within the two-year statute of limitations.

W.Va. Code § 14-2A-14(a) states as follows:

> Except as provided in subsection (b), section ten of this article, the judge or commissioner may not approve an award of compensation to a claimant who did not file his or her application for an award of compensation within two years after the date of the occurrence of the criminally injurious conduct that caused the injury or death for which he or she is seeking an award of compensation.

The claimant testified that she filed an application for compensation under the Crime Victims Compensation Act sometime in 2002. When she did not receive a response from the Crime Victims Compensation Fund, she re-sent her application, which was received on October 6, 2005. (The application was signed April 16, 2004.) The claimant testified that she was ill after the incident but was certain that she sent in the original application in 2002 because she needed money to pay for expenses. The claimant stated that she has moved three times since the incident and does not have a copy of the original application which she asserts was filed in 2002.

After the hearing, the claimant was given the opportunity to submit documentation to substantiate that her claim was filed in a timely manner. On November 16, 2009, the Crime Victims Compensation Fund received a letter from the claimant in which she again stated that she sent her original application in 2002. No additional documentation was provided.

Although the Court is sympathetic to the claimant, no evidence has been submitted to establish that the claim was filed prior to the expiration of the two-year statute of limitations. Thus, the Court must deny this claim.

Claim disallowed.

Warren D. Wyatt
(CV-06-0303-Y)

O R D E R

Claimant appeared in person.
Gretchen A. Murphy, Assistant Attorney General, for the State of West Virginia.

SAYRE, JUDGE:

An application of the claimant, Warren D. Wyatt, for an award under the West Virginia Crime Victims Compensation Act, was filed June 8, 2006. The report of the Claim Investigator, filed November 3, 2006, recommended that no award be granted.

An Order was issued on January 10, 2007, upholding the Investigator's recommendation and denying the claim, in response to which the claimant's request for hearing was filed January 23, 2007. This matter came on for hearing November 20, 2009, the claimant appearing in person and the State of West Virginia by counsel, Gretchen A. Murphy, Assistant Attorney General.

On May 19, 2005, the 45-year-old claimant was the victim of criminally injurious conduct in Beckley, Raleigh County. The claimant testified that while he was at the psychiatrist's office with his wife, he went outside to smoke a cigarette. While outside, the claimant saw Vernon Channel, who works for Gary Clay at Clay Roofing Company, who was on site to provide an estimate to repair the roof of the building. The claimant stated that he has had past altercations with Mr. Channel. According to the claimant, Mr. Channel was swearing at the claimant and told him to meet him in the parking lot. When the claimant walked around the building to the parking lot, Mr. Channel ran from the scene. . . . . .

According to the claimant, Gary Clay, who was also on site, was calling the claimant derogatory names. Mr. Clay and his nephew got in the truck and tried to leave. As Mr. Clay attempted to exit the parking lot in the truck, the claimant tried to stop him. Mr. Clay stated, "Move out of my way," and the claimant answered, "No way 'til the law gets here." Then, Mr. Clay bumped the claimant with the truck, causing the claimant to fall. When the claimant got up, he and Mr. Clay exchanged

words. Then, Mr. Clay bumped the claimant a second time with the vehicle, knocking him to the ground. The claimant was able to roll out of the vehicle's path.

When asked why he decided to go to the back of the building with Mr. Channel, the claimant responded, "Because he was calling me names and before we had had altercations, like I said, and he called me out. I know that was foolish but that's the way it happened."

The claimant's wife, Hazel Wyatt, testified that she went outside and saw that Mr. Clay was swearing at her husband, and that he had a pistol. She testified that after Mr. Clay bumped her husband with the truck the first time, she threw a piece of wood at the truck to protect her husband. She further stated that the claimant was not trying to stop Mr. Clay from leaving the area, but rather he was yelling "stop" to prevent Mr. Clay from knocking him down with the truck. Ms. Wyatt called the police. After the incident, Ms. Wyatt took the claimant to the Beckley Appalachian Regional Hospital where he was treated for arm and shoulder pain.

Testifying at the hearing for respondent was Seneca Webb, the police officer who responded to the incident. Officer Webb testified that Mr. Channel informed him that the claimant picked up a brick and chased him around the building. Since Mr. Channel and Mr. Clay brought two trucks to the work site, Mr. Channel gave the keys of the vehicle to Mr. Clay, and Mr. Channel ran from the area. . . . . Officer Webb indicated that Mr. Clay was trying to leave the scene in the truck, and the claimant prevented him from doing so. During the altercation, a brick was thrown at the truck. Mr. Clay was concerned for his safety. In an attempt to leave, Mr. Clay bumped the claimant with the vehicle. Mr. Clay then drove the vehicle and parked it on the other side of the parking lot. Then, he picked up Mr. Channel in the other vehicle and returned to the property. Officer Webb stated that no charges were filed regarding the incident.

The claim was initially denied on the basis of contributory misconduct. The Claim Investigator's findings indicate that the claimant was not an innocent victim of crime.

> W.Va. Code § 14-2A-3(l) defines contributory misconduct as follows:
> "Contributory misconduct" means any conduct of the claimant, or of the victim through whom the claimant claims an award, that is unlawful or intentionally tortious and that, without regard to the conduct's proximity in time or space to the criminally injurious conduct, has causal relationship to the criminally injurious conduct that is the basis of the claim and shall also include the voluntary intoxication of the claimant, either by the consumption of alcohol or the use of any controlled substance when the intoxication has a causal connection or relationship to the injury sustained.

In the instant claim, the Court finds that the claimant voluntarily engaged in the verbal and physical altercation with the offenders. Since the claimant failed to retreat, it is the Court's determination that the claimant was not an innocent victim of crime.

Based on the foregoing, the Court is constrained by the evidence to uphold its previous ruling. Claim disallowed.

Michael A. Weaver
(CV-06-0633-Y)

O R D E R

Claimant appeared in person and by counsel, Thomas G. Steele.
Gretchen A. Murphy, Assistant Attorney General, for the State of West Virginia.

HACKNEY, JUDGE:

The Claimant, Michael A. Weaver, filed an application for an award under the West Virginia Crime Victims Compensation Act on November 27, 2006. The Report of the Claim Investigator, filed on June 5, 2007, recommended that the claim be denied upon findings that the Claimant had voluntarily participated in the violence that resulted in his injuries and that he, being under legal drinking age, had illegally consumed beer. An Order was issued on July 12, 2007, upholding the Investigator's recommendation, to which the Claimant filed a response in opposition on October 15, 2007. This matter came on for hearing on November 5, 2009, at which time the Claimant appeared through counsel, Thomas G. Steele, and the Crime Victims Fund also appeared by counsel, Assistant Attorney General, Gretchen A. Murphy.

The facts giving rise to the claim are as follows. On October 8, 2006, the Claimant (at the time, 20 years of age), was the victim of criminally injurious conduct near Sardis in Harrison County, West Virginia. In the early morning of October 8, 2006, the Claimant and others, including Seneca Garrett, Robert Gelpi, Patrick Ellisher, Greg Cottrill, Amy Whited and Megan Cox, were en route to an isolated location called Mars Mines, a rural strip mining site. Their intended destination at Mars Mines was the summit of a particular hill.

The group proceeded in two separate vehicles, all intending to engage in festivities commensurate with the birthday of Seneca Garrett. Consequently, a quantity of beer was also in tow.

One of the vehicles, a Chevy Trailblazer, belonged to the mother of Amy Whited. When they arrived at the base of the hill at Mars Mines, Ms. Whited decided to park her mother's truck rather than drive further, presumably to avoid any wear and tear that might ensue from a steep and bumpy, unpaved roadway. The group, therefore, continued to the summit in the second vehicle, a truck belonging to Mr. Cottrill.

Once at the top, they built a bonfire and consumed their beer. The Claimant, who at the time was below the legal age to drink beer, stood five feet three inches tall and weighed about one hundred thirty-five pounds. He consumed approximately five beers in a time span encompassing two to three hours. Once the beer was consumed, they extinguished the fire and departed, descending the hill in Mr. Cottrill's truck. When they reached the bottom they observed that Ms. Whited's mother's Blazer had been severely damaged as the result of vandalism.

The driver's side of the vehicle was caved in bearing extensive damage after having been rammed by trucks driven by Lloyd Dodd and John Powers, two brutish individuals bent on criminal mischief who, at the time, were not known by the Claimant nor by the others in his group. As the Claimant and the others examined the damage they heard a vehicle being driven from the site in what seemed as an effort to flee. Additionally, the vehicle's motor sounded like it was having mechanical difficulties.[33]

A snap decision was made that Amy Whited and Megan Cox would remain with the damaged Trailblazer while the males in the group, including the Claimant, gathered in Mr. Cottrill's truck to pursue the presumed vandals, in order to learn their identities.

[33]Presumably, Lloyd Dodd's truck was making the noise the Claimant and those in his party heard, as Mr. Powers wrecked his truck while fleeing, while Mr. Dodd's truck broke down as the result of mechanical malfunction.

While fleeing, John Powers' truck became disabled after striking a guide wire affixed to a utility pole. Lloyd Dodd, in an effort to assist Mr. Powers' escape, drove back to the disabled vehicle and picked Powers up. Dodd's truck, however, broke down on Sardis Road, approximately one quarter of a mile from the location of Mr. Powers' truck, and less than half a mile from Ms. Whited's mother's damaged Chevrolet Blazer.

When the Claimant and the others riding in Mr. Cottrill's truck came upon Mr. Dodd's broken down truck, they observed two males run up a hill into a wooded area as two females remained behind. The Claimant and Mr. Gelpi chased one of the males, later identified as John Powers, up the hill, but were unable to catch him.

In the meantime, Mr. Elischer confronted one of the women who had remained behind (later determined to be Mr. Dodd's wife, Rebecca), and struck her, knocking her down.[34] Ms. Dodd, apparently not unaccustomed to violent confrontations, rose and fetched a jack handle out of the back of her husband's truck and began chasing Mr. Elischer, who retreated to the relative safety of Mr. Cottrill's truck.

Sometime during the melee, John Powers returned from the woods armed with a 4x4 landscaping timber he found under a storage box located near the scene of the crime. Mr. Dodd also returned. Mr. Powers struck Seneca Garrett in the head with the timber, killing him. Mr. Elischer, after observing the brutal attack on Mr. Garrett, drove away in Mr. Cottrill's truck to get help. The Claimant, however, remained and upon seeing his friend, Mr. Garrett, down on the ground, went to his aid and attempted to shield him from further attacks. Thereafter, Lloyd Dodd assaulted the Claimant, striking him first with his fists and then kicking him in the face with his work boots.

The kicking which the Claimant endured broke bones in his neck and face while also rendering him unconscious with a closed head injury. Claimant also sustained injuries to his lower lumbar vertebrae, elbows, and left knee.

Claimant's injuries required emergency medical procedures, including air-evacuation to a level one trauma center at Ruby Memorial Hospital in Morgantown, West Virginia. The Claimant testified that he incurred approximately $23,000.00 in unpaid medical bills as the result of the incident. Claimant's blood alcohol content was recorded in the medical chart as being .153%.

This Court's Order denying the claim was based on the Claim Investigator's finding that the claimant engaged in "contributory misconduct." W. Va. Code § 14-2A-3(1) defines "contributory misconduct" as follows:

. . . any conduct of the claimant . . . that is unlawful or intentionally tortious and that, without regard to the conduct's proximity in time or space to the criminally injurious conduct, has [a] causal relationship to the criminally injurious conduct that is the basis of the claim and shall also include the voluntary intoxication of the claimant, either by the consumption of alcohol or the use of any controlled substance when the intoxication has a causal connection or relationship to the injury sustained.

The State takes the position that awarding the claim would be improper because the Claimant, under the circumstances, cannot be considered "an innocent victim." Further, the State argues that -

a reasonably prudent person should have foreseen that such a consequence of a criminal injurious nature was foreseeable and probable under the facts as they existed and, . . . in addition to the intoxication, Alex could have stayed at the vehicle with the

[34]There is no evidence that Mr. Elisher's striking of Rebecca Dodd was in any way induced or encouraged by the Claimant.

two young women that stayed behind but he chose to pursue these perceived perpetrators and unfortunately was hurt.[35]

Seemingly incongruous to the original denial of the instant claim, this Court authorized an award to the decedent's claimant, Terry A. Garrett, as a result of the death of Seneca A. Garrett. *See In the Matter of Terry A. Garrett* (CV-06-566-X). There, the Court found that the victim's actions in chasing the offenders did not merit the offenders' unjustified and excessive force. Close scrutiny of the instant record does not unearth any meaningful distinction that would justify different treatment of the instant claimant. While the evidence, including the Claimant's blood alcohol level in conjunction with being less than a year shy of legal drinking age, justifies a finding that his consumption of beer was, indeed, "unlawful," it does not, in isolation, justify a finding that it had "a causal connection or relationship to the injury sustained." Nor does this evidence, considered in combination with the instant circumstances, justify such a finding.

While the State urges that Claimant could have avoided his injuries by remaining with the two young females at the vandalized vehicle, he was under no duty to do so. The Claimant's actions, taken collectively with the others, to assist finding the identities of the perpetrators were not unjustified.[36] Except for the singular tidbits of Claimant's underage consumption of beer and his blood alcohol content, the record is devoid of any suggestion that Claimant's conduct was illegal or motivated by any ignoble, corrupt, or otherwise tainted or unjustified purpose. Further, while some can argue persuasively that the better course would have been to allow the criminal actors to escape and avoid confrontation, the law does not require such a course. "On the other hand, there is a policy against making one act a cowardly and humiliating role." *Handbook on Criminal Law* (LaFave & Scott 1977). Once the chase ended and the physical confrontation ensued, with the armed and larger aggressors appearing on the scene, the Claimant's actions were clearly justified, if not heroic or courageous. Being of small stature and unarmed, it would have been totally understandable had Claimant fled rather than stand the ground and protect and defend his mortally wounded friend against further vicious onslaughts from thugs. While this Court does not condone nor encourage confrontation with violent criminals, even when such confrontation is justified and not the product of vigilantism, we will not deny an award merely because a claimant had the audacity to chase criminals in an attempt to learn their identities as they flee from their malicious acts. Nor will we deny an award because a claimant exposes his or her person to harm's way while defending a fallen and helpless comrade who has been savagely and brutally attacked.

> Further, under the pertinent provision of W.Va. Code § 14-2A-3(k) "Victim" means a person who suffers personal injury or death as a result of any one of the following: (1) Criminally injurious conduct; (2) the good faith effort of the person to prevent criminally injurious conduct; or (3) the good faith effort of the person to apprehend a person that the injured person has observed engaging in criminally injurious conduct, or who the injured person has reasonable cause to believe has engaged in criminally injurious conduct immediately prior to the attempted apprehension...

[35]The Assistant Attorney's General closing remarks taken from the November 5, 2010 hearing transcript.

[36]Ascertaining the identities of the wrongdoers was warranted, first in a public interest perspective to bring criminals to justice; and, second, in order to provide a framework in which civil proceedings could be brought against tortfeasors in order to recoup monetary damages for the senseless destruction they caused.

We believe the perpetrators' conduct in this matter constituted "criminally injurious conduct" and that the claimant herein had "reasonable cause to believe" these perpetrators had engaged in such conduct "immediately prior to the attempted apprehension." We therefore find that Claimant specifically meets the criteria under the Act to justify an award.

Thus, in accordance with the foregoing, the Court is constrained by the evidence to reverse its previous ruling denying the claim while finding that the Claimant was an innocent victim of crime. The Claim Investigator is hereby directed to prepare an economic loss analysis to ascertain Claimant's unreimbursed allowable expenses pertaining to the incident. It is hereby ORDERED that an award be made in accordance with the Claim Investigator's economic analysis.

Debbie Pounds
(CV-08-0199-X)

O R D E R

Claimant appeared in person and by counsel, Harold Wolfe.
Gretchen A. Murphy, Assistant Attorney General, for the State of West Virginia.

SAYRE, JUDGE:

An application of the claimant, Debbie Pounds, for an award on behalf of her deceased son, Brandon R. Perrine, under the West Virginia Crime Victims Compensation Act, was filed March 31, 2008. The report of the Claim Investigator, filed October 23, 2008, recommended that no award be granted, to which the claimant filed a response in disagreement. An Order was issued on January 28, 2009, upholding the Investigator's recommendation and denying the claim, in response to which the claimant's request for hearing was filed February 10, 2009. This matter came on for hearing November 20, 2009, the claimant appearing in person and by counsel, Harold Wolfe, and the State of West Virginia by counsel, Gretchen A. Murphy, Assistant Attorney General.

On September 1, 2007, the claimant's 29-year-old son, Brandon R. Perrine, was the victim of criminally injurious conduct in Bluewell, Mercer County. The claimant testified that she was not present when the events occurred. She stated that the victim was drinking at the Fox Rocks Bar. He accepted a ride from the offender, Michael Galligher Jr., who was an acquaintance. The offender, who was intoxicated, borrowed a vehicle and proceeded on US Route 52 towards the claimant's house. A deputy sheriff noticed that the driver of the vehicle was speeding and attempted to stop the vehicle. The offender led the officer on a high speed chase, which ended when the offender lost control of the vehicle and struck a tree. Claimant's son was ejected from the vehicle and suffered fatal injuries.

The offender's blood alcohol content was .188%. The offender pled guilty to driving under the influence causing death and fleeing from an officer while driving under the influence. He was sentenced to 2-10 years in prison. The sentence was suspended in favor of six months to two years in the Anthony Correctional Center.

The claimant contends that the victim was not guilty of contributory misconduct within the meaning of the statute.

W.Va. Code § 14-2A-3(l) defines "contributory misconduct" as follows:

> "Contributory misconduct" means any conduct of the claimant, or of the victim through whom the claimant claims an award, that is

> unlawful or intentionally tortious and that, without regard to the conduct's proximity in time or space to the criminally injurious conduct, has causal relationship to the criminally injurious conduct that is the basis of the claim and shall also include the voluntary intoxication of the claimant, either by the consumption of alcohol or the use of any controlled substance when the intoxication has a causal connection or relationship to the injury sustained.

In the instant claim, the Claim Investigator found the victim's blood alcohol content to have been .30%. In addition, the autopsy report indicates that the victim had cocaine in his system. The issue remains whether the victim's conduct in accepting a ride from an intoxicated driver constituted contributory misconduct.

The Court is sympathetic to the claimant for the loss of her son in this very tragic incident. However, the Court has previously held that a victim who voluntarily accepts a ride from an intoxicated driver cannot be considered an entirely innocent victim of crime. *See In re Townsend,* CV-02-241 (2003). The rationale for the Court's decision is that the purpose of the Crime Victims Compensation Act is to compensate *innocent* victims of crime. The Court recognizes that the victim's actions in accepting a ride from an intoxicated driver do not fall within the express meaning of "contributory misconduct" as defined by W.Va. Code § 14-2A-3(l). However, the intent of the Legislature would be subverted if victims who voluntarily accepted a ride from an intoxicated driver were found to be entirely innocent victims. Such a result would be contrary to public policy. In the instant case, the Court finds that the victim's actions warrant a reduction in recovery in the amount of 40%. . . . . .

Based on the foregoing, the Court is constrained by the evidence to reverse its previous ruling. The Claim Investigator is hereby directed to prepare an economic loss analysis, taking into account the 40% reduction in the award, for further review by the Court.

Connie E. Wise
(CV-08-0455-Y)

O R D E R

Claimant appeared in person and by counsel, James J. Matzureff.
Gretchen A. Murphy, Assistant Attorney General, for the State of West Virginia.

HACKNEY, JUDGE:

The Claimant, Connie E. Wise, filed an application on July 28, 2008, related to the injuries suffered by her daughter, Sarah L. Hutzler, and the death of her other daughter, Dawnelle R. Hutzler. She seeks awards under the West Virginia Crime Victims Compensation Act for medical and funeral expenses.

The Claim Investigator filed her reports on November 18, 2008, recommending that no award be granted in either claim on the basis that the victims' actions were contributory. The Claimant filed responses in opposition. This Court issued Orders on May 29, 2009, upholding the Investigator's recommendations denying the claims. On June 15, 2009, the Claimant requested a hearing. On November 3, 2009, a hearing was conducted, at which time the Claimant appeared through counsel, James J. Matzureff, and the Crime Victims Fund appeared through its Counsel, Assistant Attorney General Gretchen A. Murphy.

Claimant's daughter, Sarah L. Hutzler, who was 24 years old at the time, was the victim of criminally injurious conduct in a motor vehicle accident near Inwood,

Berkeley County, West Virginia, on March 8, 2008. As a result, she was severely injured, and she endures a permanently disabling condition. The Claimant's other daughter, 27-year-old Dawnelle R. Hutzler, died as a result of the same accident. Sarah has no recollection of the accident, nor of the events leading up to it. Two other individuals, unrelated to the Claimant, were also injured in the accident.

The facts underlying the claim are as follows. On the evening of March 7, 2008, at approximately 8:30 p.m., the Claimant and her sister, Rebecca N. Stinebaugh, went to a local tavern in Berkeley County called "My Bar." Their purpose in going related to the Claimant's participation in a karaoke contest. Between 9:30 and 9:45 p.m., Claimant's two daughters, Dawnelle and Sarah, arrived at "My Bar" after catching a ride there with their father. The Claimant and both of her daughters drank some beer while at "My Bar." Ms. Stinebaugh, a teetotaller at the time, was the intended designated driver.

Sometime between 11:30 p.m. and 12:30 a.m., Mr. Corbin arrived at "My Bar."[37] The Claimant and Ms. Stinebaugh left the bar for home no later than 1:40 a.m.[38] During the time Claimant and Ms. Stinebaugh were concurrently present at "My Bar" with Mr. Corbin, they observed him and, on occasion, spoke with him. While Claimant testified she never observed Mr. Corbin taking any drinks, Ms. Stinebaugh testified that during the course of the evening, she observed him with one beer only. Both Claimant and Ms. Stinebaugh testified that Mr. Corbin's actions and demeanor appeared absolutely normal, and he did not exhibit any signs of being under the influence of alcohol.

When the Claimant and Ms. Stinebaugh were preparing to leave, the Claimant's daughters each indicated they wanted to stay longer in order to shoot pool with Mr. Corbin and his friends. Consequently, Mr. Corbin offered to give Claimant's daughters a ride home, prompting an inquiry from Ms. Stinebaugh concerning whether Mr. Corbin was fit to drive. Mr. Corbin, still holding the lone beer Ms. Stinebaugh had earlier observed him with, replied he was fine and that he had not had "that much" to drink.[39] He also told the Claimant not to worry and that he would make sure the Claimant's daughters got home safely.

According to testimony, last call for drinks was at 2:30 a.m., and by 3:00 a.m. the bar closed. Due to the proximity of the location of the accident to "My Bar" relative to the time the accident occurred (i.e., 3:24 a.m. on March 8, 2008), it is presumed that Mr. Corbin, Claimant's two daughters, and the other two passengers departed in Mr. Corbin's vehicle very near to closing time.

Between the time the Claimant and Ms. Stinebaugh left for home at approximately 1:40 a.m. until the time Mr. Corbin and the others left when the bar closed at 3:00 a.m., an unaccounted-for period of approximately one hour and twenty minutes exists in which there is no eyewitness testimony concerning the volume of alcohol consumption by Mr. Corbin. Though Sarah survived the accident, she has no recollection of the events that occurred during the applicable time period in the early

[37]Claimant testified she and Ms. Stinebaugh arrived at "My Bar" around 8:30 p.m. and were there "like three or four hours before [Mr. Corbin] came in." Ms. Stinebaugh testified, "It might have been 12 [when Corbin arrived], a little after or something."

[38]While the Claimant testified she and Ms. Stinebaugh left at 2:30 a.m., Ms. Stinebaugh indicated in her testimony the Claimant was mistaken and that she and the Claimant left the bar no later than 1:40 a.m.

[39]Taken from the transcript of the November 3, 2009, testimony of Rebecca Stinebaugh.

morning hours of March 8, 2008. Her lack of memory is a result of the head trauma she suffered in the subject automobile accident.

The only eyewitness account,[40] included in the record concerning how the accident occurred, is taken from the accident report, in which one of the passengers, 17-year-old Kevin Vanmetre, stated, "Ricky started to show off to the girl next to him.[41] He took his eyes off the road and we went down over a little hill and hit a couple of mailboxes and then we hit a tree." Neither Sarah nor Dawnelle was restrained by seat belts. Dawnelle was partially ejected from the vehicle and when Emergency Medical Service personnel arrived, she was pronounced dead. It was later determined by the Berkeley County Medical Examiner's Office that Dawnelle died from blunt force trauma to the head. The Medical Examiner's toxicology report indicated "alcohol intoxication" existed based on a blood alcohol content of .09%. Sarah, too, was ejected from the vehicle and she suffered a multitude of serious injuries, including traumatic brain injury resulting from intracranial hemorrhage, a pulmonary contusion with adjacent rib fractures, fractures of the right femur and right elbow, multiple pubic fractures, a liver laceration, and pancreatic injury. She remained unconscious for two weeks and required extensive treatment and rehabilitation.

Sarah's brain injury consisted of multi-faceted manifestations, including memory loss, auditory hallucinations, inability to focus attention, and behavioral disturbances (including self- mutilation and loss of control during episodes of anger).

Medical records from the Winchester Medical Center in Winchester, Virginia, where Sarah was transported for emergency medical treatment, document a blood alcohol content of .155%.

The driver of the vehicle, Mr. Corbin, was taken to a local hospital for treatment where blood work analysis recorded a BAC level of .099%.

The Claimant, thereafter, filed companion claims on behalf of her daughters, which were denied by this Court in accordance with the Investigator's recommendations. The instant claims must be denied or reduced if this Court finds the victims' actions during the early morning hours in question constituted "contributory misconduct." Therefore, the threshold question that must be addressed[42] is whether the record supports a finding or inference that their acceptance of a ride with Mr. Corbin constituted "contributory misconduct" under the provisions of W. Va. Code § 14-2A-3(l).

"Contributory misconduct" means any conduct of the claimant, or of the victim through whom the claimant claims an award, that is *unlawful or intentionally tortious* and that, without regard to the conduct's proximity in time or space to the criminally injurious conduct, *has causal relationship* to the criminally injurious conduct that is the basis of the claim and shall also include the *voluntary intoxication of the claimant, either by the consumption of alcohol* or the use of *any controlled substance when the intoxication has a causal connection or relationship to the injury* sustained. (Emphasis added.)

The Claim Investigator would deny the claim because she believes the terms "intentionally tortious" encompass situations in which a victim breaches a legal duty of due care for his or *her own safety* by voluntarily entering a vehicle being driven by

[40]Erick W. Arthur, a passenger in the vehicle, also provided a statement to the police. He stated, "I remember getting in the car and sitting down but I don't remember anything after that. Next thing I remember is waking up in the field."

[41]*I.e.*, the Decedent, Dawnelle Hutzler

[42]Other provisions contained in Article 2A imply grounds other than "contributory misconduct" that may justify a reduction or denial of an award.

a person the victim knew, or should have known, was under the influence of drugs or alcohol. The Court does not disagree that an award should be denied to victims who are victimized after voluntarily accepting rides from persons they know or should know are materially impaired due to drug or alcohol consumption; however, such a claim, as here, cannot be denied on the basis of "intentionally tortious" conduct. Nor, for that matter, can such a claim be denied on the basis of the broader concept of "contributory misconduct," as that concept also encompasses "unlawful conduct."

Under the laws of this State, the mere act of accepting a ride with an impaired person can only be considered "unlawful" if the person accepting the ride has an ownership interest in the vehicle being driven.[43] Clearly, this is not the case in the instant circumstances.

As for tortious conduct, it is axiomatic that a tort must necessarily be directed toward another person, not one's self. "Three elements of every tort action are: Existence of legal duty *from defendant to plaintiff*, breach of duty, and damage as proximate result." *Blacks Law Dictionary* (1979) citing *Joseph v. Hustad Corp*., 454 P.2d 916, 918. (Emphasis added.)

When evidence demonstrates that a victim without an ownership interest in the vehicle being driven accepted a ride from the driver, knowing that the driver was impaired, the appropriate basis for denial is not that the victim committed a tort against himself or herself, or that his or her conduct was unlawful, but rather that he or she "assumed the risk" by accepting the ride.[44] This Court has, on occasion, reduced

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[43]In West Virginia it is unlawful to permit an impaired person to drive a vehicle (whether or not one accepts a ride from the person) in narrowly prescribed circumstances. Under W.Va. Code § 17C-5-2(g) Any person who:

(1) Knowingly permits *his or her vehicle* to be driven in this State by any other person who:

(A) Is under the influence of alcohol;

(B) Is under the influence of any controlled substance;

(C) Is under the influence of any other drug;

(D) Is under the combined influence of alcohol and any controlled substance or any other drug;

(E) Has an alcohol concentration in his or her blood of eight hundredths of one percent or more, by weight;

(2) Is guilty of a misdemeanor and, upon conviction thereof, shall be confined in jail for not more than six months and shall be fined not less than one hundred dollars nor more than five hundred dollars. (Emphasis added.)

Also, W.Va. Code § 17C-5-2(h) states:

Any person who knowingly permits *his or her vehicle* to be driven in this State by any other person who is an habitual user of narcotic drugs or amphetamine or any derivative thereof is guilty of a misdemeanor and, upon conviction thereof, shall be confined in jail for not more than six months and shall be fined not less than one hundred dollars nor more than five hundred dollars. (Emphasis added.)

[44]The doctrine of assumption of risk, also known as *volenti non fit injuria*, means legally that a plaintiff may not recover for an injury to which he assents, *i.e.*, that a person may not recover for an injury received when he voluntarily exposes himself to a known and appreciated danger. The requirements for the defense of *volenti non fit injuria* are that (1) the plaintiff has knowledge of facts constituting a dangerous condition, (2) he knows the condition is dangerous, (3) he appreciates the nature or extent of the danger, and (4) he voluntarily exposes himself to the danger. An exception may be applicable even though the above factors have entered into a

awards in crime victim cases explicitly on the basis of "comparative fault" analysis rather than "contributory misconduct," though no specific statutory provision under Article 2A, Chapter 14 provides authority to do so.[45] Clearly, the authority to adjust awards on the basis of "comparative fault" or to deny them altogether on the basis of "assumption of risk," is implied - emanating from other statutory provisions included in Article 2A.

W. Va. Code § 14-2A-2, in pertinent part, indicates that crime victim awards are "an expression of a *moral obligation* of the State to provide partial compensation to the *innocent* victims of crime for injury suffered to their person or property." (Emphasis added.) If a crime victim is comparatively at fault due to negligent behavior (i.e., rather than "intentionally tortious" or "unlawful" behavior) or otherwise assumes the risk relative to his or her status as a crime victim, the moral obligation of the State (and, perhaps the innocence of the victim) fades or altogether ceases.

The Claimant correctly points out that there is no direct evidence to suggest that her daughters were impetuous on the night and early morning in question, nor that they otherwise engaged in "contributory misconduct" as that term is defined under W. Va. Code § 14-2A-3(l). There is no suggestion that Sarah's consumption of alcohol had a "causal relationship to the criminally injurious conduct." This likewise applies to Dawnelle in spite of the medical examiner's toxicology record documenting blood alcohol content of .09%. Nor is there direct evidence (whether due to their alcohol consumption or otherwise) that demonstrates they were comparatively at fault or that they knowingly assumed the risk. The only evidence that bears on this issue (i.e., Mr. Corbin's recorded BAC) is circumstantial.

The Claimant cites this Court's decision in *In Re: Thomas*, CV-00-0068 as supporting her claim while indicating "[t]he facts in the present claim are strikingly similar [to that claim]."[46]

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plaintiff's conduct if his actions come within the rescue or humanitarian doctrine. *Blacks Law Dictionary* (1979) citing *Clarke v. Brockway Motor Trucks*, 372 F.Supp. 1342, 1347 (E.D. Pa. 1974).

[45]*In the Matter of: Debbie Pounds*, CV-08-0199-X (2010), the Court reduced an award by 40% where the victim voluntarily accepted a ride from an intoxicated driver.

[46] In that claim:

The 19-year-old claimant was injured as a passenger in a motor vehicle accident in 1998.

This Court's initial denial of an award was based on a finding of "contributory misconduct" on the part of the claimant. The offending driver was arrested and charged with DUI, but the claimant was also legally intoxicated at the time. This Court found it to be against public policy to award a claim when the victim was aware of, or should have been aware of, the driver's impaired condition.

At the hearing, the Claimant testified that he accepted a ride from Jason Mercer, who at the time appeared to be unimpaired. Claimant witnessed Mr. Mercer consume one beer prior to accepting the ride. Claimant, however, admitted that he consumed "four or five beers."

According to the Claimant, Mr. Mercer did not drive erratically for the greater portion of the drive. However, there came a time he started driving at an excessive rate of speed and lost control.

The Court found that the Claimant's own intoxicated condition did not amount to "contributory misconduct."

The instant case, while containing similarities to *In Re: Thomas*, also contains significant differences. First and foremost, an approximate period of one hour and twenty minutes exists in the instant claim in which there is no account of the criminal perpetrator's activities while he was at "My Bar" with Dawnelle and Sarah.[47] We are deprived of Sarah's eyewitness account due to her memory loss. Given Mr. Corbin's documented blood alcohol level, it is entirely feasible that Mr. Corbin may have consumed a significant quantity of alcohol in the presence of the instant victims during the unaccounted for time period., i.e.,well beyond the one beer Ms. Stinebaugh observed him with before she and the Claimant left. However, there is no *direct* evidence one way or the other during this significant time period.

While this Court is profoundly sympathetic to the Claimant and the plight she must constantly endure from the aftermath of this tragedy, we remain mindful of the law's requirement that it is the Claimant's burden, by a preponderance of evidence, that is required as a condition precedent to an award from the Crime Victims Fund.[48]

The provisions of §14-2A-15 - *Hearings* - vests this Court with leeway "not [to] be bound by the usual common law or statutory rules of evidence" and to "accept and weigh, in accordance with its evidential value, any information that will assist the court in determining the factual basis of a claim."[49] Still, there is no statutory license to employ intuition or otherwise fill in the blanks with conjecture in reaching a decision.

The evidence that bears on Mr. Corbin's consumption of alcoholic beverages and his demeanor while at "My Bar" is two-fold, consisting of direct, eyewitness testimony on one hand, and circumstantial evidence on the other. The eyewitness accounts of the Claimant and her sister, Ms. Stinebaugh, provide direct evidence that Mr. Corbin appeared unimpaired and consumed only a small quantity of beer while in their presence. On the other hand, the blood alcohol measurement of .099, obtained after the accident when Mr. Corbin was hospitalized, provides contrasting, if not contradicting, circumstantial evidence on this question.

In view of Mr. Corbin's BAC level and considering it is Claimant's burden of proof to meet, the lack of direct evidence concerning Mr. Corbin's alcohol consumption and demeanor during the unaccounted-for time period leads this Court to conclude that the Claimant has not met the prescribed burden of proof.

While there is unquestionably a public policy against granting crime victim awards to persons who knowingly accept rides with persons materially impaired, the greater consideration herein concerns whether the Claimant, pursuant to W. Va. Code § 14-2A-5, demonstrated by a preponderance of the evidence, that Sarah and/or Dawnelle did not know or have reason to believe that Mr. Corbin was materially impaired during the entire applicable time-frame - not just a portion of it. While Sarah and Dawnelle's blood alcohol levels are irrelevant (unless a causal connection is established that their alcohol consumption contributed to the criminal event), the perpetrator's blood alcohol level is not. Given Mr. Corbin's documented BAC level, without direct and credible evidence that Mr. Corbin didn't consume alcohol or exhibit signs of impairment during the subject one hour and twenty minute time period, this Court cannot make the required finding that is a condition precedent to the granting of an award (i.e., that Sarah or Dawnelle did not "assume the risk" by accepting the ride).

If credible evidence had existed that Mr. Corbin's consumption of alcohol remained minimal and he continued to appear unimpaired during the unaccounted-for

[47]The Claimant and Ms. Stinebaugh left no later than 1:40 a.m. and the bar didn't close until 3:00 a.m. with last call being at 2:30 a.m.

[48]*See* W. Va. Code § 14-2A-5.

[49]*See* West Virginia Code § 14-2A-15(g).

time period, a reasonable inference might have existed, in spite of the .099 blood alcohol level, that the victims "did not know nor should have known" that they shouldn't accept a ride from him. There is, however, no such evidence.

Based on the foregoing, the Court must affirm its original denial of the claim. Therefore, constrained by the evidence to do so, the Court hereby affirms its previous denial of the claim and orders that no award be made in either claim.

Christopher J. Norman
(CV-08-0599)

O R D E R

Jerry Sklavounakis, Attorney at Law, for the claimant.
Thomas W. Smith, Managing Deputy Attorney General, for the State of West Virginia.

SAYRE, JUDGE:

An application of the claimant, Christopher J. Norman, for an award under the West Virginia Crime Victims Compensation Act, was filed September 24, 2008. The report of the Claim Investigator, filed January 6, 2009, recommended that no award be granted, to which the claimant filed a response in disagreement. An Order was issued on June 9, 2009, upholding the Investigator's recommendation and denying the claim, in response to which the claimant's request for hearing was filed June 26, 2009. This matter came on for hearing September 16, 2009, the claimant appearing by counsel, Jerry Sklavounakis, and Managing Deputy Attorney General Thomas W. Smith for the State of West Virginia.

On July 19, 2008, the thirty-year-old claimant was the victim of criminally injurious conduct in Wheeling, Ohio County. At the time of the incident, the claimant and his fiancee, Michelle Gorby, were traveling from the Ye Old Alpha bar toward their home. The claimant testified that he had two beers at the bar and had had five or six beers earlier that evening at a barbecue at a friend's house. Michelle Gorby did not have any alcoholic beverages at the bar. Ms. Gorby was the designated driver that evening, and the claimant was a passenger in her vehicle. The offender, Shawn Binkowski, proceeded to follow them in an aggressive manner in his vehicle. Although the offender had not been at the bar that evening, he had been harassing the claimant on a regular basis for over one year and had attempted to drive the claimant off the road on previous occasions.

During the incident, the offender blocked Ms. Gorby's vehicle from entering onto the road leading toward their home. Michelle Gorby drove in reverse into an alley, and the offender drove down a nearby alley to block them with his vehicle. At that point, the vehicles were situated near the Ye Old Alpha bar. The claimant exited the vehicle in an attempt to talk to the offender. The claimant testified that he did not intend to start a fight with the offender, and that he knew that there was an officer on duty at the Ye Old Alpha bar.

When the claimant approached the offender's vehicle, the offender, who was still in his vehicle, kicked the claimant in the face, causing him to fall to the ground. Although the claimant and Ms. Gorby had originally approached the offender to request that he stop following them, the claimant testified that he did not exchange any words to provoke the offender. The offender, who had lost his shoe when he kicked the claimant, exited his vehicle to retrieve his shoe. The claimant tried to return to his

fiancee's vehicle, but the offender pushed the claimant then struck him several times with his fist. As the claimant was trying to defend himself, he accidentally kicked the offender's vehicle. The offender then knocked the claimant unconscious. As a result, the claimant sustained nasal fractures, head injuries, and a laceration.

Michelle Gorby testified that she works with the offender at Greco's restaurant, and the offender had expressed his animosity toward the claimant in the past. On prior occasions, Ms. Gorby stated that the offender had tried to run the claimant off the road with his vehicle while their children were in the vehicle. Further, the claimant's nephew, a minor, testified that he was in the claimant's vehicle on one occasion when a vehicle tried to run them off the road.

On the night of July 19, 2008, Ms. Gorby did not want to be involved in a wreck, so she stopped the vehicle. Soon after they walked up to his vehicle, the offender kicked the claimant and attacked him. Although Ms. Gorby tried to intervene, she could not prevent the claimant from being attacked.

Subsequent to the hearing, the Court received Ms. Gorby's written statement that was taken by the Wheeling Police Department. Her written statement corroborates her testimony in Court.

The Court's Order denying this claim was based on the fact that the record did not establish that the claimant was in fact free from any contributory misconduct. W.Va. Code § 14-2A-3(l) defines contributory misconduct as follows:

"Contributory misconduct" means any conduct of the claimant, or of the victim through whom the claimant claims an award, that is unlawful or intentionally tortious and that, without regard to the conduct's proximity in time or space to the criminally injurious conduct, has causal relationship to the criminally injurious conduct that is the basis of the claim and shall also include the voluntary intoxication of the claimant, either by the consumption of alcohol or the use of any controlled substance when the intoxication has a causal connection or relationship to the injury sustained...

The Court hereby determines that the claimant has satisfied his burden of proving that he was an innocent victim of crime. The Court finds that the claimant did not provoke the physical altercation with the offender. Thus, the claimant was not guilty of contributory misconduct. The Court is constrained by the evidence to reverse its previous ruling. Therefore, an award of $6,250.95 is hereby granted for the claimant's unreimbursed medical expenses pursuant to the Investigator's memorandum of September 22, 2009.

Robert Oxley Sr.
(CV-08-0656-Y)

O R D E R

Claimant appeared in person and by counsel, W. Dale Greene.
Benjamin F. Yancey III, Assistant Attorney General, for the State of West Virginia.

HACKNEY, JUDGE:

An application of the Claimant, Robert Oxley Sr., for an award under the West Virginia Crime Victims Compensation Act, was filed October 27, 2008. The report of the Claim Investigator, filed December 8, 2008, recommended that no award be granted, to which the Claimant filed a response in disagreement. An Order was

issued on July 9, 2009, that upheld the Investigator's recommendation and denied the claim. The claimant responded by filing a request for a hearing on July 14, 2009. This matter came on for hearing October 23, 2009, the Claimant appearing in person and by counsel, W. Dale Greene, and the State of West Virginia appearing by counsel, Benjamin F. Yancey III, Assistant Attorney General.

On April 21, 2008, the Claimant's property located at Route 8, Box 501A, Garden Heights Road, Kanawha County, was searched by police. Living there at the time were the Claimant's son, Robert Oxley Jr., and his girlfriend, Denise Cottrill. The residence was found to have been contaminated by the manufacture of methamphetamine.

Robert Oxley Jr. was arrested and charged with operating a clandestine drug laboratory, conspiracy, obstructing a police officer, and supplying false information. Denise Cottrill was also arrested.

As a result of the criminal activity, the claimant incurred expenses in excess of the $5,000.00 maximum award available under the Crime Victims Compensation Act for the cleanup of real property damaged by a methamphetamine laboratory. The Claim Investigator recommended that no award be granted based on the conclusion that the Claimant likely was aware of his son's illegal activities. Based upon a review of the entire record, including the testimony adduced at the hearing held on October 23, 2009, and the arguments of counsel, the Court is constrained by the evidence to reverse its previous ruling; therefore, an award of $5,000.00 is hereby granted as set forth below.

Claimant, who was 73 years old at the time of the hearing held in this matter, testified that he owned the residential property where his son and his son's girlfriend resided during the subject events. The Claimant testified that he was unaware his son was involved in methamphetamine production until sometime subsequent to his son's arrest.[50] Claimant also testified that this house was located "about four-fifths of a mile" away from his own residence and, therefore, was not within his range of vision. During the time-frame in question, Claimant indicated that he visited his son "about once every month or so" and that during these visits the house appeared clean, and he didn't smell anything out of the ordinary.

The Claimant estimated the property to have been valued at approximately $85,000.00 during the time in question.

After his son's arrest, the Claimant learned that the residence was condemned by the County authorities due to the existence of suspected methamphetamine residue which rendered it a health hazard for prospective occupants. The County gave Claimant the option to have the residence tested for methamphetamine residue or the County would demolish it. An environmental contractor - Astar Abatement, Incorporated - was retained by Claimant for testing purposes at a cost of $680.00.[51]

According to Greg Pauley, an environmental contractor with Astar Abatement, the testing was conducted on May 21, 2008, and test results indicated that the structure, for purposes of "reoccupation limits," was contaminated with unacceptable levels of methamphetamine residue throughout. The levels ranged from

[50]While Claimant's wife was present at the hearing, she did not testify. The Crime Victim's Fund did not present any witnesses.

[51]Greg Pauley, an employee of Astar Abatement, testified that the cost of testing for contamination is an essential and integral part of the cleanup process and, therefore, is justified as a cleanup expense.

10 times to 120 times above acceptable limits. The subject dwelling contained approximately 1500 to 2000 square feet of space.

As a result of the positive findings, Claimant obtained estimates to decontaminate the structure with the aim of preserving the dwelling. These estimates were in contrast to costs associated with demolishing the premises and hauling away the resulting debris.

The estimate given by Astar Abatement for the cost of decontamination was $18,285.00 - an amount substantially above the ultimate cost Claimant would be forced to incur for demolition and, in any event, cost-prohibitive.[52] Consequently, Claimant obtained an estimate for demolition of the premises from West Virginia Demolition, a company approved for such purpose by the government authorities, in an amount of $5,902.16.[53] This amount was in addition to the amount previously paid to Astar Abatement for testing. Claimant was therefore forced to incur total expenses for testing and demolition of the subject premises in the amount of $6,582.16.[54] The demolition process of the Claimant's property involved the total dismantling of the property and the removal of all dismantled materials and debris to a landfill where it was, presumably, bulldozed underground.

Charles Grishaber, an employee of the Kanawha County Commission, Planning Department, testified that the instant demolition process essentially resulted in cleanup of the premises from the viewpoint of the County authorities.

The Court first addresses the threshold issue of whether any reasonable inference exists in the record that Claimant's testimony concerning his purported lack of knowledge of his son's methamphetamine-related activities is untrustworthy. In the event the Court finds no such inference exists, the Court must address the additional issue of first impression involving whether the cost of demolishing the structure is an

[52]Mr. Pauley testified that the cost of abatement was related to the intensity of contamination, the kinds and qualities of materials that were contaminated, and the size of the structure in question. Specifically, he stated, "If there's severe contamination or very high contamination, it's very difficult for us to clean and cleaning it once, so we end up going back multiple times and cleaning the structure." Also, "[i]f it's painted dry wall, it can remain in place and it can be cleaned. If it's unfinished or anything like that, then it has to come out. All appliances come out of a structure, whether it's a refrigerator, dishwashers, ranges, everything like that, all electronics. Anything porous, carpeting, all of that comes out of a structure and is disposed of, including the HVAC system and duct work."

[53]Claimant requested permission from the Kanawha County Planning Commission to demolish the residence himself with the assistance of his brother-in-law. He explained that he had a dump truck and end loader at his disposal which would have provided the opportunity for him to perform this activity. However, he was properly denied permission by the Planning Commission due to his lack of training and qualifications in handling materials containing potentially hazardous chemical residue.

[54]From the testimony adduced at the hearing in this matter, it appears the County paid the $5,902.16 payment required for demolition, and that Claimant is repaying the County at the rate of $98.37 per month until the entire sum is paid. A portion of the amount paid for demolition went toward a title search of the premises and asbestos testing.

allowable expense for purposes of making an award "for cleanup of real property damaged by a methamphetamine laboratory . . ." *See* W. Va. Code § 14-2A-3(f)(3)(A).

As to the threshold issue, the Court finds the record sufficiently establishes Claimant did not have prior knowledge about the use or manufacture of methamphetamine on the subject premises and that no reasonable inference otherwise may be gleaned from the record that he did. While the record establishes that Claimant's son had a criminal record, a portion of which involved illegal drugs, this fact, in and of itself, does not rebut nor discredit Claimant's sworn testimony concerning his lack of knowledge. Further, the record establishes that the Claimant, an elderly person at the time of the illegal activities, lived well outside of observable limits of the subject property. While he testified he visited his son about once a month, he also testified he never noticed anything out of the ordinary during those visits. Claimant's testimony in this regard is plausible and, essentially, unchallenged. In view of the foregoing, the Court must address whether the demolition of Claimant's property, under the circumstances of this case, justifies an award under the West Virginia Crime Victims Compensation Act.

The Respondent points out that the statute *sub judice* (W.Va. Code § 14-2A-1, *et seq.*) does not define "cleanup" nor "cleanup of real property" as those terms are used for purposes of authorizing an award to an innocent property owner who is forced to endure costs related to decontaminating real property tainted by the manufacture of methamphetamine. In so doing, Respondent cites the "Property Maintenance Code of Kanawha County" which "differentiates between the terms 'cleanup/clean' and 'decontamination,' which it treats as synonymous terms, and the term 'demolition'."[55]

It may be helpful to consider how the County ordinance distinguishes the relevant terms; however, the Court is not constrained to accept the ordinance's use or interpretation of such terms as precedent in determining the issue at hand as that is not the principal legal authority that is subject to interpretation in this case.

The Court, however, concludes that a more helpful authority in aid of proper interpretation is a contemporary volume of Webster's Dictionary, as it is the "common, ordinary and accepted meaning" of the terms that must be ascertained in the instant circumstances. *See Wooddell v. Dailey*, 160 W.Va. 65, 230 S.E.2d 466 (1976). The operative term that must be interpreted is "cleanup," a verb; i.e., a word that expresses action and occurrence. The most common meaning of "cleanup" is "an act or instance of cleaning." Webster's Dictionary and Thesaurus (2010). Synonyms of "clean" include "mop, tidy, neat, dustless, clear, unsoiled, immaculate, unstained, untainted, pure, dust, vacuum, scour, *decontaminate*, wipe, sterilize, cleanse, scrub, purify, wash, [and] sweep." *Id.* (Emphasis added.) Upon ascertaining the common, ordinary and accepted meaning of the term, it must be viewed within the context of the activity at issue and the result reached as a result of the activity.[56]

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[55]This quoted text is taken from Respondent's Brief.

[56]The terms used throughout these proceedings to describe the activity for which Claimant seeks an award are "demolish" and "demolition." Common meanings of the word "demolish" are "to tear down" or "to raze." Synonyms of "demolish" include "ruin, devastate, ravage, annihilate, wreck, destroy, raze, exterminate, [and] obliterate." *Id.* Nowhere does the Court find an additional element to the definition that includes carrying away or disposal to another site of the thing demolished. Be that as it may, the word "demolish" is not the term subject to interpretation - it is merely the term used throughout these proceedings to describe

In effect, the activity claimant was forced to undertake rendered the property completely decontaminated of methamphetamine residue. The record substantiates that cleanup of a structure, even when leaving it intact, may involve the destruction and removal of materials, including unfinished dry wall, "[a]ny thing porous, carpeting, *all of that comes out of a structure and is disposed of*, including the HVAC system and duct work."[57] Consequently, this Court finds no meaningful distinction from the activity for which Claimant seeks partial reimbursement vis-a-vis the activity in decontaminating a structure while preserving the structure's structural integrity for purposes of determining whether or not to grant an award. This is particularly the case in view of the fact that the result of either activity produces the same, desired end result, decontamination.

Based on the foregoing, the Court is constrained by the evidence to reverse its previous ruling; therefore, an award of $5,000.00 is hereby granted as set forth below.

Harvey Allen Fleck
(CV-08-0664-X)

O R D E R

Claimant appeared in person.
Benjamin F. Yancey III, Assistant Attorney General, for the State of West Virginia.

HACKNEY, JUDGE:

An application of the claimant, Harvey Allen Fleck, for an award under the West Virginia Crime Victims Compensation Act, was filed October 29, 2008. The report of the Claim Investigator, filed January 20, 2009, recommended that no award be granted, to which the claimant filed a response in disagreement. An Order was issued on June 24, 2009, upholding the Investigator's recommendation and denying the claim, in response to which the claimant's request for hearing was filed July 1, 2009. This matter came on for hearing September 3, 2009, claimant appearing *pro se* and the State of West Virginia by counsel, Benjamin F. Yancey III, Assistant Attorney General.

On September 24, 2008, officials of the Kanawha County Sheriff's Department arrived at property owned by the claimant on Kelley's Creek Road and discovered items used for the making of methamphetamine. The residence was occupied by the claimant's stepson, William Pauley, who was arrested and charged with operating a clandestine drug laboratory.

The claimant testified that he and his wife, who lived next-door to the residence, had no knowledge of any drug-making activity there. The offender was permitted to live at the residence, which was the family home, and the claimant visited about once per week. He stated that he worked nights, and was unaware of his

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the activity for which Claimant seeks partial reimbursement. In fact, the activity at issue is more accurately described as "cleanup of real property."

[57]Greg Pauley, the employee of Astar Abatement, testified thus concerning the required removal of various materials, items and appliances from contaminated structures.

stepson's activities. The claimant further revealed that he didn't even know what methamphetamine was, nor did he have any idea of what materials were used to make it.

Also testifying was the claimant's wife, Rosia Fleck. She confirmed the claimant's version of the events. She stated that her work schedule was a day shift at the Microtel, and that she, too, seldom had occasion to visit the residence of the offender.

Admitted into evidence as Exhibit #4 was an invoice from Astar Abatement, Inc., indicating that the cost to the claimant for the cleanup of the methamphetamine contamination and subsequent testing was $9,675.00.

In the present case, the Claim Investigator's finding was that since the claimant lived in close proximity to the residence where the drug-making paraphernalia was discovered, it was unlikely that he did not know that a clandestine drug laboratory was in operation. It therefore became the claimant's burden to prove by a preponderance of the evidence that he was in fact oblivious to the illegal activity.

Based upon the evidence adduced at the hearing, the Court finds that the claimant has met his burden of proof, and is therefore entitled to an award of $5,000.00, representing the maximum allowed under W.Va. Code §14-2A-3(f)(3)(A) for the cleanup of real property damaged by a methamphetamine laboratory as set out below.

Peter S. Vaughan III
(CV-08-0666-Z)

O R D E R

Claimant appeared in person and by counsel, Douglas Reynolds.
Benjamin F. Yancey III, Assistant Attorney General, for the State of West Virginia.

CECIL, JUDGE:

An application of the claimant, Peter S. Vaughan III, for an award under the West Virginia Crime Victims Compensation Act, was filed October 30, 2008. The report of the Claim Investigator, filed March 6, 2009, recommended that no award be granted, to which the claimant filed a response in disagreement. An Order was issued on July 8, 2009, upholding the Investigator's recommendation and denying the claim, in response to which the claimant's request for hearing was filed November 9, 2009. This matter came on for hearing December 4, 2009, claimant appearing in person and by counsel, Douglas Reynolds, and the State of West Virginia by counsel, Benjamin F. Yancey III, Assistant Attorney General.

On October 29, 2006, the 55-year-old claimant was approaching his vehicle in the Kroger parking lot in Huntington, Cabell County, when he witnessed a purse-snatching. The claimant intervened by chasing and tackling the thief, who was riding a bicycle. During the foray, the claimant suffered injuries to his knees and right shoulder.

It is evident that the claimant was an innocent victim who was injured while attempting in good faith to prevent criminally injurious conduct. At issue is whether his application for compensation was timely filed.

W.Va. Code § 14-2A-14(a) states in part: "... the judge or commissioner may not approve an award of compensation to a claimant who did not file his or her

application for an award of compensation within two years after the date of the occurrence of the criminally injurious conduct that caused the injury or death for which he or she is seeking an award of compensation."

In the present case, the Claim Investigator's finding was that the incident occurred on October 29, 2006, but that the claimant did not file his application for an award until October 30, 2008.

At the hearing, the claimant stated that he knew of the crime victims statute but did not know that it would apply to him until he had a conversation with a state delegate. The delegate asked about his shoulder injury and advised the claimant that he would qualify.

The claimant further testified that he was employed as an electrician and "got sidetracked with working on a lot of elections at the time." Finally, in the middle of that election time in October, he remembered that he had a claim. He then went to the Cabell County Prosecutor's Office "three days before" and spoke with the advocate, Donna (sic) Drown. Ms. Drown advised the claimant that she would complete the application, and he could come back the next day and she would have everything ready to go. The claimant asked her if the two-year time limit was met since she was the "agent," or did it have to be received by the Crime Victims Compensation office. Ms. Drown told him that the Crime Victims staff had to receive it within the two-year period, but that she would fax it if she had to. The claimant testified that he did not know what transpired after that until he received the decision denying the claim.

The Court is not without sympathy toward the claimant, whose actions in coming to another's aid were certainly commendable. However, the record shows that the application received by the Crime Victims Compensation Fund arrived by regular mail on October 30, 2008, one day past the filing deadline. The statute is very clear as to the time period in which claims are to be filed

As no new evidence was put forth demonstrating compliance with W.Va. Code § 14-2A-14(a), the Court must stand by its previous ruling and deny the claim. Claim denied.

Tina M. Underwood
(CV-08-0678-Z)

O R D E R

Claimant appeared in person.
Benjamin F. Yancey III, Assistant Attorney General, for the State of West Virginia.

CECIL, JUDGE:

An application of the claimant, Tina M. Underwood, for an award under the West Virginia Crime Victims Compensation Act, was filed November 3, 2008. The report of the Claim Investigator, filed December 18, 2008, recommended that no award be granted, to which the claimant filed no response. An Order was issued on July 8, 2009, upholding the Investigator's recommendation and denying the claim, in response to which the claimant's request for hearing was filed August 28, 2009. This matter came on for hearing December 4, 2009, claimant appearing *pro se* and the State of West Virginia by counsel, Benjamin F. Yancey III, Assistant Attorney General.

On or about August 29, 2008, certain property in Elkview, Kanawha County, was damaged by the operation of a methamphetamine laboratory. No award was

recommended by the Claim Investigator nor granted by the Court because it was believed that an award would unjustly benefit the offender, Karla Underwood, sister of the claimant. Karla and Mike Balser were arrested and charged with operating a methamphetamine laboratory.

Testifying at the hearing of this matter, claimant Tina M. Underwood stated that the property had belonged to her mother, Sandra Underwood, who died on November 10, 2006. In her will, she left the property to the claimant and her sister Karla. However, the property was never transferred to them. It was damaged by the methamphetamine lab on August 29, 2008, and then condemned.

The claimant revealed that she had been paying all of the bills and debts on the home from November 2006 to August 2008, totaling $29,000.00. After the meth lab damage, the claimant contacted a foreclosure agent at Branch Banking & Trust, who advised her that the bank did not want to touch the property, that they were going to write off the loan and then release the lien. Believing that there might have been some salvage value, the claimant paid $9,500.00 to have the property remediated. The home had gone into foreclosure several times, and was redeemed by the claimant. The final time was November 7, 2008, when the claimant decided that she could not take it anymore and abandoned it. The home was sold for real property taxes on the court house steps November 16, 2009.

W.Va. Code §14-2A-3(f)(3)(A) includes in the definition of "allowable expense" a charge "not to exceed $5,000, for cleanup of real property damaged by a methamphetamine laboratory... ." It is clear from the record in this case that the claimant incurred unreimbursed allowable expenses in excess of $5,000 resulting from criminal conduct. At issue is whether she qualifies as a "claimant" under the statute such that reimbursement may be made to her.

W.Va. Code §14-2A-3(a) lists six definitions of "claimant," including "a person who owns real property damaged by the operation of a methamphetamine laboratory without the knowledge or consent of the owner of the real property." The evidence herein establishes that when the damage to the property occurred, it was still in the name of the claimant's mother, who had died nearly two years before. Although the claimant had continued to pay the mortgage, insurance, and other expenses, she was not in fact the "owner."

Another definition of "claimant" under the Crime Victims Compensation Act is "a third person, other than a collateral source, who legally assumes or voluntarily pays the obligations of a victim...which obligations are incurred as a result of the criminally injurious conduct that is the subject of the claim." W.Va. Code §14-2A–3(a)(3). The claimant herein has demonstrated that she in fact voluntarily paid the obligations of her deceased mother, the owner of the subject property. In addition, the Court finds that Karla Underwood, sister of the claimant, would not unjustly benefit from an award. Therefore, it is the finding of this Court that the claimant does qualify, and is entitled to an award in the sum of $5,000.00 as set out below.

George M. Gloucester
(CV-09-0175-X)

O R D E R

Claimant appeared by counsel, Charles Love IV.

Benjamin F. Yancey III, Assistant Attorney General, for the State of West Virginia.

CECIL, JUDGE:

An application of the claimant, George M. Gloucester, for an award under the West Virginia Crime Victims Compensation Act, was filed October 30, 2008. The report of the Claim Investigator, filed April 2, 2009, recommended that no award be granted, to which the claimant filed a response in disagreement. An Order was issued on September 25, 2009, upholding the Investigator's recommendation and denying the claim, in response to which the claimant's request for hearing was filed October 16, 2009. This matter came on for hearing December 4, 2009, the claimant appearing by counsel, Charles Love IV, and the State of West Virginia by counsel, Benjamin F. Yancey III, Assistant Attorney General.

On September 29, 2008, the 56-year-old claimant was the victim of criminally injurious conduct in Charleston, Kanawha County. The claimant was struck by a motor vehicle as he was crossing the street. As the car sped away, the claimant was dragged over 300 feet, tearing off his ear. He was also treated for a closed head injury, multiple rib and facial fractures, lacerations, and burns. The offending driver, Eric McIntyre, was charged with hit and run, failure to render aid, failure to maintain control, reckless driving, and two counts of driving left of center.

The claim was initially denied on the basis of contributory misconduct. The Claim Investigator's finding was that the claimant was intoxicated and walking in the middle of the street when he was struck by the vehicle.

Counsel for the claimant contends that, although his client may have had a high blood alcohol content, there is no basis for a finding that his intoxication had a causal relationship to the injuries sustained.

W.Va. Code § 14-2A-3(l) defines "contributory misconduct" as "any conduct of the claimant...that is unlawful or intentionally tortious and that, without regard to the conduct's proximity in time or space to the criminally injurious conduct, has causal relationship to the criminally injurious conduct that is the basis of the claim and shall also include the voluntary intoxication of the claimant, either by the consumption of alcohol or the use of any controlled substance when the intoxication has a causal connection or relationship to the injury sustained."

In the instant claim, the Claim Investigator found that the claimant's blood alcohol to have been .28%, nearly three times the legal limit of .08%. W.Va. Code § 60-6-9 provides that a person shall not "appear in a public place in an intoxicated condition." Violation of that section of the Code is a misdemeanor; hence, the claimant's conduct was *unlawful*. The issue remains whether that unlawful behavior had a *causal connection* to the claimant's subsequent injuries.

Counsel for the Fund contends that the claimant was not only intoxicated, but his drug screen revealed the existence of Benzodiazepine and opiates. That, and the fact that he was walking in the middle of the southbound lane was the cause of his being struck by the vehicle.

Counsel for the clamant introduced into evidence an affidavit from Corporal J. T. Garten which stated that the claimant was "walking in the intersection and was hit by a motor vehicle." (Exhibit 3.) Counsel contends that the claimant was a pedestrian who was within his rights to cross the street, especially at an intersection.

Claimant herein was clearly the victim of a crime. Based upon the evidence, he did in fact contribute to his injuries by venturing out onto the city streets in an impaired condition. However, of concern to this Court is the claimant's location when he was struck.

There was nothing introduced at the hearing to refute the corporal's affidavit regarding the claimant being in the intersection. In addition, the fact remains that the driver was cited for driving left of center. This alone would put any pedestrian at risk of injury.

The Court is constrained by the evidence to reverse its previous ruling; therefore, the Claim Investigator is hereby directed to prepare an economic loss analysis of the claimant's unreimbursed allowable expenses for further review by this Court.

Jody A. Miller
(CV-09-0212-Y)

O R D E R

Donald Tennant Jr., Attorney at Law, for the claimant.
Thomas W. Smith, Managing Deputy Attorney General, for the State of West Virginia.

SAYRE, JUDGE:

An application of the claimant, Jody A. Miller, on behalf of her deceased daughter, Heather Miller, for an award under the West Virginia Crime Victims Compensation Act, was filed April 8, 2009. The report of the Claim Investigator, filed July 9, 2009, recommended that the decision be left to the Court. An Order was issued by the Court on July 24, 2009, recommending that no award be granted, in response to which the claimant's request for hearing was filed July 29, 2009. This matter came on for hearing September 16, 2009, the claimant appearing by counsel, Donald J. Tennant Jr., and Managing Deputy Attorney General Thomas W. Smith for the State of West Virginia.

On March 25, 2008, the claimant's daughter, Heather Miller, was the victim of criminally injurious conduct in Wheeling, Ohio County. The victim was traveling in a vehicle being operated by the alleged offender, Justin Kerns. They were traveling westbound on National Road when the vehicle left the roadway, struck a bus shelter, and rolled on its top. The victim was taken to the Ohio Valley Medical Center where she was treated for her injuries. She died on March 31, 2008, as a result of those injuries.

The total stipulated collateral source payment made to the estate as a result of the victim's death was $220,775.47.

The claimant contends that the victim was an innocent victim of crime. Her blood alcohol content when taken at the hospital was .292%, and the driver's blood alcohol content was .21%. It is the claimant's position that due to the victim's alcohol intoxication, she was unable to make a conscious decision as to whether to ride in a vehicle with an intoxicated driver. Further, West Virginia Code §14-2A-3(l), as it applied at the time of the incident, stated, "The voluntary intoxication of the victim is not a defense against the estate of the deceased victim."

The respondent does not contest the fact that the claimant's daughter was unable to make an informed decision whether to ride with the offender. Respondent avers that there is an issue as to whether the claimant is entitled to recover economic loss under the statute.

The claimant seeks to recover dependent's economic loss as a result of the incident. Claimant A. Miller, the victim's mother, testified that the victim was

approximately three weeks from obtaining a bachelor of science degree in nursing at the time of her death. The victim planned to work in a critical care unit which would further her ultimate goal of becoming a nurse anesthetist. Although the claimant and her husband were not dependent on the victim at the time of her death, the claimant testified that she and her husband would have depended on the victim to provide them with care during their elder years.

Anita Gray testified regarding the victim's lost wages during her work life. Anita Gray is employed by Career Search One, Inc., a business in Wheeling that specializes in recruiting employees to work for employers, and finding jobs for employees. Ms. Gray has worked in this field for seventeen years. Ms. Gray contacted various hospitals in the Morgantown, Wheeling, and Pittsburgh areas to determine the wages that a Registered Nurse would receive at various hospitals. The wages varied from $22.50 per hour to $25.18 per hour, not including benefits. An entry level nurse anesthetist would earn approximately $60.28 per hour. Over the victim's life expectancy, her earnings would have ranged from $1,879,438.50 to $2,103,300.51. If the victim would have become a nurse anesthetist, the lost wages over her work life would have been $4,659,149.70.

The issue before the Court is whether the claimant is entitled to recover economic loss as a result of this tragic incident. W.Va. Code § 14-2A-3(I)-(j) provides as follows:

(I) "Dependent's economic loss" means loss after a victim's death of contributions or things of economic value to his or her dependents, not including services they would have received from the victim if he or she had not suffered the fatal injury, less expenses of the dependents avoided by reason of the victim's death.

(j) "Dependent's replacement service loss" means loss reasonably incurred or to be incurred by dependents after a victim's death in obtaining ordinary and necessary services in lieu of those the victim would have performed for their benefit if he or she had not suffered the fatal injury, less expenses of the dependents avoided by reason of the victim's death and not subtracted in calculating dependent's economic loss.

W.Va. Code § 14-2A-14(f) states in part,

> ...The judge or commissioner shall reduce an award of compensation or deny a claim for an award of compensation that is otherwise payable to a claimant to the extent that the economic loss upon which the claim is based is or will be recouped from other persons, including collateral sources, or if the reduction or denial is determined to be reasonable because of the contributory misconduct of the claimant or of a victim through whom he or she claims...

The claimant testified that had the victim survived, she would have supported her and her husband when they reached retirement age, providing them with care as a nurse. Regardless of whether the claimant's daughter was an innocent victim of crime, there is a collateral source available to the claimant in the amount of $220,775.47, which exceeds the maximum award available for death benefits through the Fund ($35,000.00). Thus, the economic loss that claimant seeks to recover is not compensable under W.Va. Code § 14-2A-14(f). Although the Court is sympathetic to the claimant for the loss of her daughter, the Court is unable to make an award under the statute.

Claim disallowed.

Michael T. Chaney
(CV-09-0251-Y)

O R D E R

Claimant appeared in person.
Benjamin F. Yancey III, Assistant Attorney General, for the State of West Virginia.

HACKNEY, JUDGE:

An application of the Claimant, Michael T. Chaney, for an award under the West Virginia Crime Victims Compensation Act, was filed April 23, 2009. The report of the Claim Investigator, filed July 21, 2009, recommended that no award be granted, to which the Claimant filed a response in disagreement. An Order was issued on October 15, 2009, upholding the Investigator's recommendation denying the claim, in response to which the Claimant's request for hearing was filed November 6, 2009. This matter came on for hearing December 4, 2009, the Claimant appearing in person and the State of West Virginia appearing by counsel, Benjamin F. Yancey III, Assistant Attorney General.

On December 4, 2007, the Claimant, age 21 at the time, was the victim of criminally injurious conduct in Barboursville, Cabell County. The Claimant testified that he was hired as an electrician for Hurricane Plaza, and had been working there for three or four months. Approximately one month after the Claimant was terminated from this position, he went to the office of his former employer to have the offender, Rex Donahue, sign some paperwork. The offender refused to assist the Claimant. As the Claimant was exiting the office, he called the offender a "f****** piece of crap." The offender then ran after the Claimant. The Claimant shut the door on the offender's hands. Then, the offender punched the Claimant approximately three or four times in the mouth and head.

The Claimant sustained injuries to his head and lip and was taken to the emergency room at St. Mary's Medical Center in Huntington where he was treated for his injuries. The Claimant seeks to recover the cost of his medical bills related to the incident.

At the hearing, the Claimant was asked by counsel for respondent whether he believed that his use of profanity might have contributed to the offender's reaction. The Claimant responded, "Yes, sir, but I don't think it should have been, he shouldn't been able to hit me just because of what I called him."

The Court's Order denying this claim was based on the fact that the record did not establish that the claimant was in fact free from any contributory misconduct. W.Va. Code § 14-2A-3(l) defines contributory misconduct as follows:

> "Contributory misconduct" means any conduct of the claimant, or of the victim through whom the claimant claims an award, that is unlawful or intentionally tortious and that, without regard to the conduct's proximity in time or space to the criminally injurious conduct, has causal relationship to the criminally injurious conduct that is the basis of the claim and shall also include the voluntary intoxication of the claimant, either by the consumption of alcohol or the use of any controlled substance when the intoxication has a causal connection or relationship to the injury sustained.

In the instant case, the Court finds that the Claimant provoked the incident with the offender. The Claimant's use of profane language escalated the altercation.

Since the Claimant failed to retreat, the Court finds that the Claimant cannot be considered an innocent victim of crime. Therefore, constrained by the law and the evidence to stand by its previous ruling, this Court must deny the claim.

William C. Summers
(CV-06-0058)

O R D E R

Claimant appeared *pro se*.
Gretchen A. Murphy, Assistant Attorney General, for Respondent.

CECIL, JUDGE:

An application of the Claimant, William C. Summers, for an award under the West Virginia Crime Victims Compensation Act, was filed February 6, 2006. The report of the Claim Investigator, filed July 11, 2006, recommended that no award be granted, to which the Claimant filed a response in disagreement. An Order was issued on April 23, 2008, upholding the Investigator's recommendation and denying the claim, in response to which the Claimant's request for hearing was filed June 5, 2008. This matter came on for hearing May 10, 2011, Claimant appeared *pro se* and the State of West Virginia by counsel, Gretchen A. Murphy, Assistant Attorney General. Testimony was heard by Judge Robert Sayre who sat as hearing examiner.

On December 12, 2005, the Claimant, age 60 at the time, was the victim of criminally injurious conduct in Grant Town, Marion County. The Claimant, had been drinking at a local tavern, about a half-mile away from his home, for four hours when the alleged offender, Bob Jones, entered the bar and words were exchanged between the Claimant and Jones. According to witness statements provided to the Marion County Sheriff's Department, no one present at the bar knew "what started the fight or who threw the first punch," but many reported seeing both men on the floor with "Bobby [Jones] on top of Billy [Summers] pounding on him," "hitting Billy in the face with his fist." Summers testified that he suffered multiple contusions and fractures to his face, jaw, nose, and back, and lost four teeth as a result of this incident.

The Court's initial denial of an award was based on the Claim Investigator's finding that the facts surrounding the incident were unclear, and it could not be determined whether the Claimant met the statutory requirements of an innocent victim. The original Order upheld the Claim Investigator's finding, disallowing the claim. Thus, at hearing, it became the Claimant's burden to prove by a preponderance of the evidence that he was in fact an innocent victim.

The Claimant testified at the hearing that at the time of the incident, he had been sitting at the bar, known as the Millennium Club, for four hours and had consumed approximately seven eight-ounce draft beers. The alleged offender, Bob Jones, the Claimant's nephew-in-law, entered the bar and sat three or four bar stools from the Claimant. Claimant testified that after about 15 minutes Jones "started in on" him, calling him a "two-face son of a bitch." Claimant testified that words were exchanged back and forth and that he told the offender to "mind your own damn business. I'm not doing nothing to you. Leave me alone." Claimant stated that Jones got up from his seat at the bar and approached him, and as Claimant was in the process of turning to face Jones the alleged offender hit Claimant knocking him to the floor. Claimant could not remember much after hitting the ground, except that he believed

he may have been kicked. The Claimant testified that he never hit or touched the alleged offender during the altercation. Jones was indicted by a grand jury for battery, but according to Claimant the case was never prosecuted by the Marion County Prosecuting Attorney's Office.

Testifying at the hearing was Lieutenant Richard Danley, an officer with the Marion County Sheriff's Department who was assigned to investigate the December 12, 2005 incident. Lt. Danley and another detective assigned to the case obtained approximately 10 witness statements from individuals present at the bar at the time of this incident. Lt. Danley testified that one statement indicated that the Claimant may not have been an innocent victim. The statement came from Jim Perkins, the owner of the bar, who said that he "heard Bobby call Bill a two-faced mother f---er. Then Bill [Summers] got up with his fists clenched and approached Bobby [Jones]. Bobby hit Bill first. I think to protect himself." This statement came from a second interview of Perkins and appears to contradict his initial statement, given on the day of the altercation, in which he claimed to have heard Bob Jones say to the Claimant "You're about a two-faced mother f---er," as Perkins turned around he saw them both on the floor.

A day after the altercation, the offender was questioned by law enforcement and stated that "Bill started running his mouth to me, saying things about me. . . This isn't the first time. . . This time I just couldn't walk away. He was sitting about three bar stools away from me. He . . . came at me and took a swing at me. I hit him back and we both went to the floor." Jones told the detective that he also had been drinking that day at a Christmas party before he arrived at Millennium.

The Claim Investigator's original finding was that the victim may not have been an "innocent victim of crime" within the meaning of the statute. In a claim under the Crime Victims Compensation Act, a Claimant has the burden of proof to establish that he was an innocent victim of crime. If the Claimant establishes himself to be an innocent victim under the statute, then the burden of proof shifts to the Respondent to prove by a preponderance of the evidence that the victim was not innocent.

The evidence adduced at the hearing established that Summers was a " victim of criminally injurious conduct." Summers' stated that he only exchanged words with the offender and did not touch him. The only evidence indicating that Summers may have contributed this incident came from one whose statements appear inconsistent. The testimony shows that the offender beat Summers and was later criminally indicted by a grand jury for this incident.

Having found that Summers was a victim of criminally injurious conduct, the Court must determine whether the Claimant engaged in contributory misconduct.[58] W.Va. Code §14-2A-3(l) defines "Contributory misconduct" is defined as:

> "any conduct of the claimant . . . that is unlawful or intentionally tortious and that, without regard to the conduct's proximity in time or space to the criminally injurious conduct, has causal relationship to the criminally injurious conduct that is the basis of the claim and *shall also include the voluntary intoxication of the claimant*, either by the consumption of alcohol

[58] W. Va. Code §14-2A-14(f) states in part that: "The Judge or commissioner shall reduce an award of compensation or deny a claim . . . if the reduction or denial is determined to be reasonable because of the contributory misconduct of the claimant."

or the use of any controlled substance *when the intoxication has a causal connection or relationship to the injury sustained*." (Emphasis added).

Respondent contends that the Claimant cannot recover in this case because he was voluntarily intoxicated and that such intoxication contributed to the altercation. However, in order for voluntary intoxication to be contributory misconduct there must be a "causal connection or relationship to the injury sustained." While Summers was undoubtably drunk (his blood alcohol was .264 at the hospital), the evidence does not suggest that his inebriated state caused him to become aggressive or start a fight with the alleged offender. This Court has held that even when a victim is drunk and making obscene gestures, such conduct alone does not create a causal connection to a violent assault which would justify the denial of an award. In re Mabry, (CV-06-0357) (2007). Even in cases where the victim is the primary instigator, this Court has granted reduced awards when the offender uses excessive force. See In re Rayner, (CV-03-0409) (2008); In re Ginger (CV-07- 0327-Z) (2008).

The Court is of the opinion that while the Claimant was heavily intoxicated, which had a negative impact upon his judgment and resulted in a heated exchange with the offender, such contributory misconduct was not the cause of the subsequent altercation; therefore, an award should be granted. However, the Court will not ignore the fact that the victim's intoxication contributed to the verbal altercation resulting in the fight. Thus, the Court has determined that the Claimant's award should be reduced by forty percent (40%).

The Claim Investigator is hereby directed to prepare an economic loss analysis to ascertain the Claimant's unreimbursed allowable expenses relating to the incident for further review by this Court.

David J. Farley
(CV-09-0302-Y)

O R D E R

Claimant appeared *pro se*.
Gretchen A. Murphy, Assistant Attorney General, for the State of West Virginia.

HACKNEY, JUDGE:

An application of the Claimant, David J. Farley, for an award under the West Virginia Crime Victims Compensation Act, was filed May 26, 2009. The report of the Claim Investigator, filed July 28, 2009, recommended that no award be granted, to which the Claimant filed a response in disagreement. An Order was issued on November 5, 2009, upholding the Investigator's recommendation and denying the claim, in response to which the Claimant's request for hearing was filed November 19, 2009. This matter came on for hearing June 3, 2010, the Claimant appearing *pro se*, and the State of West Virginia by counsel, Gretchen A. Murphy, Assistant Attorney General.

On June 12, 2008, the 50-year-old Claimant was the victim of criminally injurious conduct in Ranson, Jefferson County. The Claimant, who resides in Fayetteville, Pennsylvania, was visiting his nephew, Nathan Farley, at his residence in Ranson. While the Claimant was there, Nathan Farley received a telephone call from Donnie Lindsay, who owed Nathan Farley $125.00. Nathan Farley asked the Claimant

if he wanted to ride with him to Donnie Lindsay's residence to collect the money. The Claimant testified that he believed that the money was owed for a baby shower. The Claimant agreed to go along.

When they arrived at Donnie Lindsay's residence, an argument ensued between Nathan Farley and Donnie Lindsay. Nathan Farley beat on the door and demanded that Donnie Lindsay pay him, and Donnie Lindsay refused. Words were exchanged and each party antagonized the other. Nathan Farley videotaped the argument. Instead of calling the police, Donnie Lindsay called his friends to the scene.

Approximately ten minutes later, the Claimant and Nathan Farley decided to leave. As the Claimant and Nathan Farley were walking toward their vehicle, three offenders - Wendy Combs, George Rose, and David Dillow - came around the vehicle. A physical altercation ensued, and there are different accounts of what happened from the parties involved. During the course of the altercation, the offenders struck the Claimant with a golf club, tire iron, stick, and flower pot, rendering the Claimant unconscious. After the altercation, Nathan Farley called the police. The offenders fled the scene. The Claimant sustained a nasal fracture, brain injury, and multiple cuts and contusions. Nathan Farley also sustained bruises and lacerations to the head.

The claim was originally denied on the basis that the Claimant was guilty of contributory misconduct. Under W.Va. Code § 14-2A-3(l), "contributory misconduct" is defined as follows:

> "Contributory misconduct" means any conduct of the claimant, or of the victim through whom the claimant claims an award, that is unlawful or intentionally tortious and that, without regard to the conduct's proximity in time or space to the criminally injurious conduct, has causal relationship to the criminally injurious conduct that is the basis of the claim and shall also include the voluntary intoxication of the claimant, either by the consumption of alcohol or the use of any controlled substance when the intoxication has a causal connection or relationship to the injury sustained.

In the instant case, the Claimant has not satisfied his burden of proving that he was an innocent victim of crime. The Claimant testified that he did not expect the altercation to occur, and only intended to accompany Nathan Farley, who was going to pick up money owed to him for a baby shower. The police report, however, indicates that Nathan Farley was actually going to Donnie Lindsay's residence to collect money owed for a drug debt.

Furthermore, Nathan Farley was not presented as a witness at the hearing to corroborate the Claimant's testimony. Had Nathan Farley testified that the Claimant had no knowledge that confronting Donnie Lindsay regarding his debt could lead to an altercation, then the Court could consider reversing its prior decision. Due to the conflicting accounts of the events that transpired that evening, the Court must deny this claim.

Claim disallowed.

Vicki L. Pleasant
(CV-09-0224)

O R D E R

Dwane L. Tinsley, Attorney at Law, for the Claimant.
Benjamin F. Yancey, III, Assistant Attorney General, for the State of West Virginia.

HACKNEY, JUDGE:

An application of the Claimant, Vicki L. Pleasant, for an award on behalf of her deceased son, Lawrence Booker, under the West Virginia Crime Victims Compensation Act, was filed April 14, 2009. The report of the Claim Investigator, filed July 8, 2009, recommended that no award be granted, to which the Claimant filed a response in disagreement. An Order was issued on October 8, 2009, upholding the Investigator's recommendation and denying the claim, in response to which the Claimant's request for hearing was filed on October 29, 2009. This matter came on for hearing April 30, 2010, the Claimant appearing by counsel Dwane L. Tinsley and the State of West Virginia by counsel, Benjamin F. Yancey, III, Assistant Attorney General.

In the evening hours of April 16, 2007, the Claimant's decedent, 24-year old Lawrence L. Booker, was involved in a sequence of events that resulted in his shooting death. This occurred in St. Albans, Kanawha County. Stephanie Holsinger, the decedent's girlfriend at the time, revealed to police that prior to this incident, Dexter Gilmore had robbed Justin Johnson at Mr. Johnson's residence, taking firearms and marijuana from him. Presumably, this past successful robbery of Mr. Johnson prompted Ms. Holsinger, Mr. Gilmore and the decedent to agree to a plot to rob him again.

It was determined in the police investigation that Ms. Holsinger had driven a presumably armed Mr. Booker to Mr. Johnson's residence, while Mr. Gilmore followed in a Cadillac.

Upon arrival at Mr. Johnson's place of residence - an apartment complex in St. Albans - Ms. Holsinger parked her vehicle and exited. She proceeded up some stairs leading to Mr. Johnson's apartment and summoned him to the front door. Upon encountering Mr. Johnson, she feigned the need for assistance by falsely stating her car had broken down. She then asked to make a phone call and Mr. Johnson handed her his cellular phone. She faked a telephone call, dialing what was later determined to be a defunct number.

Ms. Holsinger then asked Mr. Johnson for jumper cables, which he indicated he did not have. She faked another call, claiming she was trying to reach her father. She ultimately left Mr. Johnson's residence without knowing whether her ruse would lure him onto the street.

Mr. Johnson then asked his girlfriend if she thought he should help Ms. Holsinger and she responded he should. After placing a handgun in his coat pocket, he left his residence and proceeded outside to Ms. Holsinger's vehicle. After encountering her on the street he told her to try starting the vehicle, but she avoided doing so - being fully aware nothing was wrong with the vehicle.

Meanwhile, Claimant's decedent and Mr. Gilmore were hiding behind an Airstream camper situated at the rear of the apartment building. Mr. Booker walked up from behind Mr. Johnson and attacked him, grabbing him in a choke hold while placing a gun to his head. In the meantime, Mr. Gilmore darted out from behind the camper. Mr. Booker, while struggling with Mr. Johnson, attempted to force Mr. Johnson into the back seat of Ms. Holsinger's vehicle. He was, however, unsuccessful in the attempt. Mr. Gilmore then left the scene to retrieve his vehicle, and while he was gone, Mr. Johnson and the decedent continued to struggle. Eventually, Mr. Johnson was able to grab the decedent's arm and force him from his back. As the

decedent was falling Mr. Johnson fired two shots from the firearm he possessed, mortally wounding the decedent. Mr. Gilmore, having departed the scene prior to the shooting, was later informed by Ms. Holsinger that Mr. Booker had been shot.

In spite of the shooting, Mr. Johnson was not charged with a crime. Mr. Gilmore and Ms. Holsinger, on the other hand, both later pled guilty to robbery. Richard H. Kemp, a private investigator, was called by Claimant's counsel to testify in this matter. Mr. Kemp, prior to working as an investigator, was a special agent with the Bureau of Alcohol, Tobacco, and Firearms (ATF) for twenty-four and one-half years. His duties with ATF included investigating cases involving firearm violations as well as crime scene investigation - with particular emphasis on homicide crime scenes. Based on Mr. Kemp's past and present professional experience, the Court accepted him as an expert in firearm forensics and crime scene investigation.

In July of 2008, Mr. Kemp was retained by Claimant's Counsel to conduct a retrospective investigation into the death of Lawrence Booker. Mr. Kemp reviewed documents pertaining to the incident that were available at the Kanawha County Prosecutor's office. He also took a view of the crime scene. Among the documents he reviewed were statements from Stephanie Holsinger and Justin Johnson,[59] and the report of Officer Burdette.[60]

Mr. Kemp opined that the police officers who first arrived on the scene failed to adequately secure the area. He urged that if a crime scene is not sufficiently secured, evidence is more prone to being lost - either by misplacement or removal. Had Mr. Kemp been the investigator in charge he would have sealed the crime scene and required an officer to remain there overnight. Mr. Kemp conceded that he could not definitively conclude that the integrity of the crime scene had been compromised. Mr. Kemp acknowledged that two empty shell casings were found at the crime scene that were later matched to the gun retrieved from Mr. Johnson. Also recovered from the crime scene was a second gun; a Ruger .45 caliber semiautomatic pistol, later discovered to have been stolen. There was no proof that the Ruger belonged to Mr. Booker beyond Mr. Johnson's account that Mr. Booker had held a gun to his head. No fingerprints were found on this gun and, according to Mr. Kemp, this gun may not have been found until the day after the shooting. While Mr. Kemp suggested the second gun may have been planted, he conceded that no compelling reason existed to conclude definitively that that was the case.

According to Mr. Kemp, two possible theories may explain how Mr. Booker was shot. These theories are premised on the trajectory of the bullets as they entered Mr. Booker's body. First, it is possible that Mr. Johnson fired the gun from an upright position while Mr. Booker was in a lower position relative to the ground. Second, it is possible that Mr. Johnson fired the gun from a lower position from Mr. Booker while pointing the pistol upward toward Mr. Booker.

Mr. Kemp suggested the presence of gunshot residue - which would have "tattooed" the victim's skin - as well as stipples[61] on the victim's clothing, would have

[59]According to police, Mr. Johnson had been engaged as a narcotics dealer.
[60] The case agent from the St. Albans Police Department.
[61]I.e., the presence of dots and/or flicks of gunshot residue.

likely existed had the weapon been held at close proximity to the decedent when it discharged. However, neither gunshot residue nor stipples were detected.[62]

Claimant also called Elizabeth Lena as a witness. Ms. Lena, at the time of her testimony, was a forensic nurse consultant for Eckert Seamans, LLC, a law firm in Charleston, West Virginia, where Claimant's counsel practices law. Ms. Lena has been a registered nurse since 1973 and worked in a clinical setting until 1991 when she began her forensic work. Ms. Lena reviewed the medical records related to Mr. Booker's fatal gunshot wounds from Thomas Memorial Hospital and Charleston Area Medical Center (CAMC) - General Division. She also reviewed the autopsy report. Ms. Lena noted that two shots made contact with the victim but that no bullets were recovered. The victim was shot in the right thigh and in the upper back. The shot to the upper back struck a major blood vessel. After consulting with a forensic pathologist, Ms. Lena determined that the lack of soot and/or gunpowder stipples around the area of the wound indicated that the shots were not fired at close range. She concluded that the victim was, more likely than not, moving away from the shooter.

The Claimant is the mother of the decedent, Mr. Booker. She testified that the decedent's son was two years old when decedent was killed. Although this child lives with his mother in Virginia, the Claimant provides financial assistance to him. The Claimant filed this claim with the Crime Victims Fund due to her strong conviction that the victim was unjustly murdered - in spite of rather compelling evidence that suggests that decedent harbored the ignoble intent to commit robbery.

Indeed, Dexter Gilmore, who was with Mr. Booker during the incident, informed the Claimant that he and Mr. Booker had gone to Mr. Johnson's residence, during the night in question, to rob him.

According to Mr. Gilmore, Mr. Booker assaulted Mr. Johnson, choking him. At some point during the ensuing struggle, Mr. Booker tossed car keys to Mr. Gilmore so he could retrieve his (i.e., Mr. Gilmore's) car. While Mr. Gilmore was running to his car, he heard two or three shots. Shortly thereafter, he received a telephone call from Ms. Holsinger that Mr. Booker had been shot. The Claimant believes that Mr. Gilmore's account of the events is not accurate. Although she was informed by police that her son had a gun in his possession, she noted the gun in question did not have a bullet in its chamber. The Claimant also finds significance in the apparent fact that no fingerprints were found on "the second gun"[63] that would tie it to her son.

The Claimant was clearly dissatisfied with the police investigation. She believed that the police unreasonably refused to consider the possibility that the offender had not acted in self-defense in view of the fact the entry wounds found on her son's body were positioned in the back portion of his body. The fact that Mr. Gilmore and Ms. Holsinger pled guilty to robbery as a result of this incident did not sway her belief.

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[62]The Court interprets Mr. Kemp's testimony to mean that the absence of tattooing and stipples suggests the shooting did not occur while the combatants were struggling in close physical proximity. Rather, such absence suggests that Mr. Johnson and the decedent were separated by a significant distance at the time of the shooting - leading to the deduction that Mr. Booker was not shot as the result of self-defense. Even if this were the case, the Court would likely reach the same result based on the Court's reading of W. Va. Code §14-2A-3(1) and prior precedent. *See In re Bridges*, CV-05-0387, 27 Ct. Cl. 326 (2007).

[63]I.e., the Ruger .45 not connected to Mr. Johnson.

The Claimant seeks to recover $32,300.00 in expenses she has paid to support her grandson. Her grandson was born on July 5, 2004. From the time that her grandson was born until 2005, her son was in college. Because Mr. Booker was not working at the time of his death, he was not paying child support. The Claimant made an agreement with her grandson's mother that she would assist her in supporting the child.

Mark Burdette, a police officer with the St. Albans Police Department, was called by the Respondent to testify. Officer Burdette stated that he has worked for the St. Albans Police Department for the past fifteen years. At the time of his testimony, he was working in the drug unit of the police force. In April 2007, Officer Burdette was assigned to the Kanawha Bureau of Investigation, a multi-jurisdictional joint task force affiliated with the Kanawha County Sheriff's Department. On April 16, 2007, Officer Burdette received a telephone call from Lieutenant Matthews, the shift commander with the St. Albans Police Department, regarding a shooting that occurred on Holly Street in St. Albans, Kanawha County. Officer Burdette was the lead investigator in this incident.

According to Officer Burdette, the shooting took place at around 12:00 a.m. Officer Burdette arrived at the scene 20 to 30 minutes after the incident. Lieutenant Matthews, shift commander with the St. Albans Police Department, had already taped off the crime scene. Officer Burdette testified there was no reason to suspect the crime scene had been compromised, and concluded that no evidence had been removed or planted.

Officer Page of the St. Albans Police Department spoke with Justin Johnson concerning the incident, and while questioning Mr. Johnson procured a firearm from him. He placed Mr. Johnson's gun in his police car for safekeeping. Mr. Johnson stated that this was the firearm used to shoot Mr. Booker.

Thomas Memorial Hospital contacted Officer Thomas of the Charleston Police Department concerning Mr. Booker's gunshot wounds, as required by law, and Officer Thomas proceeded to the hospital to investigate. Although the incident occurred in St. Albans, the Charleston Police Department was initially contacted due to a mistaken belief that the incident occurred on Patrick Street in Charleston. Officer Thomas, upon arrival at the hospital, intended to interview Stephanie Holsinger as well as the mortally wounded Mr. Booker. Though he was successful in obtaining two statements from Ms. Holsinger, Mr. Booker had to be transferred to the General Division of CAMC due to the severity of his injuries. Consequently, Officer Thomas never had an opportunity to speak with him. Mr. Booker later succumbed to his injuries at CAMC.

Officer Burdette testified that he conducted an appropriate and thorough investigation. He explained that, contrary to the Claimant's perspective, he believed the shooting occurred during a struggle between the decedent and Mr. Johnson. He believed that the absence of fingerprints on the second gun may have been due to the tendency of fingerprints to dissipate over time. He also opined that exposure to the elements can, over time, cause fingerprints to dissipate from the exterior surface of a gun. He also testified that the clip from the second gun was fully loaded even though there was no bullet in the chamber.[64] Officer Burdette concluded that the decedent was shot as a direct result of his attempt to rob Mr. Johnson. The police investigation

[64]This testimony was apparently offered for clarification purposes to the extent that Claimant earlier testified that no bullet had lodged in the "second" gun's chamber.

concluded that Mr. Johnson was acting in self-defense, and this was the primary factor in reaching the decision not to prosecute Mr. Johnson.

Previous precedent from this Court concerning the concept of "contributory misconduct," as that term is defined under W. Va. Code §14-2A-3(l), leads the Court to conclude that an award is not warranted in the instant case.

> "Contributory misconduct" means *any conduct* of the claimant, or *of the victim through whom the claimant claims an award, that is unlawful or intentionally tortious* and that, *without regard to the conduct's proximity in time or space to the criminally injurious conduct*, has causal relationship to the criminally injurious conduct that is the basis of the claim . . .

W. Va. Code §14-2A-3(l) (2010).

In *Bridges*, a case presenting facts substantially less compelling than the instant case,relative to a finding of "contributory misconduct," this Court upheld the original denial of the claim. There, in pertinent part, the Court stated thusly:

The victim was sitting in a vehicle at the ["Park and Ride"] on Goshen Road when the offender . . . attempted to rob Mr. Bridges [i.e., the son of the Claimant] and fatally shot him.

According to the police report, Mr. Bridges and [the offender] had met at the Park and Ride . . . and that [the offender] had gotten into Mr. Bridges' vehicle. The police report further stated that [the offender] attempted to rob Mr. Bridges and then shot him in the chest. Ms. Bridges [the Claimant and victim's mother] stated that her son's telephone records indicated that he had received several telephone calls from [the offender] that day, but that he had not answered the telephone. Ms. Bridges testified that it was her belief that her son had been lured to the area and that he never would have met [the offender] otherwise.

Trooper Eric Hudson testified that on the date of the crime . . . while he was exiting I-79 at Goshen Road, a young black male stumbled in front of his police cruiser. The young man, Mr. Bridges, told Trooper Hudson that he had been shot by Dwayne Jones. . . . Mr. Jones [later] stated [to Trooper Hudson] that he met the victim for a marijuana sale. [Trooper Hudson] further testified there were two small bags of marijuana found in Mr. Bridge's (sic) vehicle. *In re Bridges*, 27 Ct. Cl. 387-388.

As aforesaid, *Bridges* presents a significantly less compelling set of facts upon which to uphold a denial of an award on the basis of "contributory misconduct" than does the case at bar. This is self-evident and does not require meticulous or tedious comparison. It is sufficient to point out that the facts in *Bridges* suggest that the victim therein was killed while being robbed (rather than robbing) and that the victim's death occurred within the backdrop of a drug deal gone bad. By contrast, in the instant case there is substantial evidence that the decedent was engaged in a robbery attempt - while armed with a loaded firearm - and that, but for the decedent's criminally aggressive conduct, he would not have been killed.

While this Court commends the excellent presentation of the Claimant's case by Claimant's counsel, still, the Court cannot make the required finding that the decedent was an innocent victim of crime - a prerequisite for justifying an award. The evidence compels the factual conclusion that Mr. Booker intended to commit felonious criminal mischief, to the extent he intended to perpetrate the crime of robbery. Neither existing precedent, pertinent statutory provisions, nor public policy considerations can justify an award in this otherwise tragic set of circumstances.

Accordingly, being constrained by the evidence, the Court must uphold its previous ruling to deny this claim.

Claim disallowed.

Reba Kaye Frost
(CV-07-0498-Z)

O R D E R

Claimant appeared in person.
Gretchen A. Murphy, Assistant Attorney General, for the State of West Virginia.

SAYRE, JUDGE:

An application of the claimant, Reba Kaye Frost, for an award under the West Virginia Crime Victims Compensation Act, was filed September 17, 2007. The report of the Claim Investigator, filed April 2, 2008, recommended that no award be granted, to which the claimant filed a response in disagreement. An Order was issued on June 5, 2008, upholding the Investigator's recommendation and denying the claim, in response to which the claimant's request for hearing was filed June 23, 2008. This matter came on for hearing November 20, 2009, claimant appearing in person and the State of West Virginia by counsel, Gretchen A. Murphy, Assistant Attorney General.

In the early morning hours of April 30, 2007, the claimant's 21-year-old son, Jonathan W. Shively, was the victim of criminally injurious conduct in Fairdale, Raleigh County. Mr. Shively was killed during an altercation with Joe Frost II ("little Joe"), who had been his stepbrother at one time.

Although she was not present at the scene, the claimant testified that she received a telephone call from Jonathan, who asked her to hurry home because he had had an altercation with "little Joe" and had dialed 911 for help. According to the claimant, her son told dispatchers that if they didn't come to help him, he was going to "end up killing some of them." At that point, little Joe had left the trailer.

The claimant further stated that after they hung up the telephone, her older son called back and spoke with Jonathan. After that conversation, the claimant again called Jonathan and overheard him tell little Joe, who had returned, to leave him alone. She heard the telephone hit the floor and Jonathan yelling for help. The claimant then called 911.

Also testifying at the hearing was Margaret Agee, the assistant director of emergency services at 911. Ms. Agee provided the 911 tape upon which the telephone calls were made during the incident in question, as well as the written log. Both were admitted into evidence by the respondent.

It is the claimant's opinion that her son was killed because of his relationship with little Joe's ex-wife. Nevertheless, it is the Court's duty to ascertain whether or not at the time of the crime, there was any action on the part of the victim that could be construed as "contributory misconduct." Such action would in no way excuse the brutal attack upon the victim, but would only serve to assist the Court in deciding whether or not to grant an award.

Under W.Va. Code § 14-2A-3(l), "contributory misconduct" is defined as follows:

> "Contributory misconduct" means any conduct of the claimant, or of the victim through whom the claimant claims an award, that is unlawful or intentionally tortious and that, without regard to the conduct's proximity in time or space to the criminally injurious

> conduct, has causal relationship to the criminally injurious conduct that is the basis of the claim and shall also include the voluntary intoxication of the claimant, either by the consumption of alcohol or the use of any controlled substance when the intoxication has a causal connection or relationship to the injury sustained.

In the instant case, the Court finds that the victim was mutually combative. In addition, the toxicology report indicates that alcohol was present in the victim's blood at a concentration of .10%, and the sedatives diazepam, nordiazepam, and 7-aminoclonazepam were also present. Although the Court is sympathetic to the claimant for the loss of her son in this tragic incident, the Court is constrained by the evidence to stand by its previous ruling; therefore, this claim must be, and is hereby, denied.

Pamela L. Harmon
(CV-07-0422-Y)

O R D E R

Claimant appeared in person.
Benjamin F. Yancey III, Assistant Attorney General, for the State of West Virginia.

HACKNEY, JUDGE:

The Claimant, Pamela L. Harmon, filed an application on August 9, 2007, related to the death of her daughter, Victoria Michelle Harmon, wherein she seeks an award under the West Virginia Crime Victims Compensation Act for funeral expenses.

The Claim Investigator filed her report on January 22, 2008, recommending that no award be granted, to which the Claimant filed a response in opposition. This Court issued an Order on August 24, 2009, upholding the Investigator's recommendation denying the claim. On September 14, 2009, the Claimant requested a hearing. Thereafter, (i.e., on December 4, 2009) a hearing was conducted, at which time the Claimant appeared *pro se* and the Crime Victims Fund appeared through its counsel, Benjamin F. Yancey III, Assistant Attorney General.

The facts constituting the claim are thus. On June 2, 2007, the claimant's 23-year-old daughter, Victoria M. Harmon, died after being subjected to criminally injurious conduct in Danville, Boone County, West Virginia. One Nicholas Alan Ball pled guilty to voluntary manslaughter and delivery of a controlled substance in connection with Ms. Harmon's death.

On the night in question, June 1, 2007, Amanda Kersey drove to the decedent's residence in Danville, Boone County, West Virginia, and picked up Ashley Burgess and the decedent and proceeded to the 19th Hole, a local bar. While there, they encountered Mr. Ball. Later, Amanda Kersey gave the decedent and Mr. Ball a ride to Mr. Ball's apartment where Mr. Ball retrieved fentanyl patches.[65] The three then proceeded to the

[65]The fentanyl trans dermal patch is intended for trans dermal use only. It is comprised of a strong medication intended to address moderate to severe chronic pain. Specifically, these patches contain a high concentration of a potent Schedule II opioid agonist, fentanyl. Schedule II opioid substances which include fentanyl, hydromorphine, methadone, morphine, oxycodone, and oxymorphone have the

decedent's residence where they arrived at approximately 11:00 p.m. The facts are sketchy from this point.

Mr. Ball was so severely intoxicated at the time, he had very little memory of the events as they transpired. According to the Boone County Sheriff's Report, Ms. Kersey dropped Mr. Ball and the decedent off at the decedent's residence, but Mr. Ball did not immediately go into the residence. The decedent telephoned Roy "Bub" Akers and Tera Smoot about 2:30 to 3:30 a.m. and advised them that "Nick Ball had given her two 'patches.'"

Deborah Walton, the decedent's aunt, testified that on the morning in question, she heard a strange voice in the decedent's residence upon awakening after spending the night. She asked who was speaking and the offender, Nicholas Ball, was heard repeatedly asking for help as he was unable to awaken the decedent.

Ms. Walton got out of bed and went to the living room where she observed the decedent lying on the floor. A pillow had been placed under the decedent's head and a blanket was situated in proximity to her lower extremities. Ms. Walton administered CPR after being unable to discern a pulse. Ms. Walton called 911 and an ambulance soon arrived. Paramedics at the scene determined that Ms. Harmon was deceased. Ms. Walton, in her dismay, struck the offender twice, as she frantically questioned him concerning his perceived failure to decisively act in time. According to Ms. Walton, Mr. Ball did not respond, seemingly because he was "so messed up." Consequently, the police assisted him out of the residence.

Ms. Walton had never met Mr. Ball before the subject incident and was otherwise unaware of his relationship to the decedent. Ms. Walton was not present at any time when her niece ingested controlled substances and, consequently, did not know whether the decedent had voluntarily ingested the substances or not.

While Mr. Ball testified at his plea hearing that he had no recollection of the events surrounding the death of Claimant's daughter, at sentencing, he described how he cut open Fentanyl patches, extracted the gel, and delivered it to the decedent for ingestion by rubbing it on her mouth.

The Boone County Sheriff's report includes a statement from Amanda Kersey, indicating that on the evening in question (i.e., June 1, 2007), the decedent snorted two hydrocodone pills. Additionally, the death certificate notes that the decedent had ingested other drugs and alcohol, in addition to fentanyl.[66] While the decedent's Aunt, Debra Walton, testified that the decedent had been lawfully prescribed medication for pain and depression, the statement of Ms. Kersey concerning the ingestion of hydrocodone by means of snorting, provides a seemingly credible and essentially unchallenged account of drug abuse by the decedent - prior to the fatal ingestion of fentanyl - whether or not the hydrocodone was prescribed.[67]

The Claimant (decedent's mother) indicates that her husband, Richard Fowler, the decedent's stepfather, paid funeral expenses in an amount of $5,879.59.

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highest potential for abuse and associated risk of fatal overdose due to respiratory depression. It is widely recognized that fentanyl is subject to criminal diversion and the high content of fentanyl in the patches is a prime target for abuse and diversion.

[66]Specifically, the immediate cause of death is attributed to "[c]ombined fentanyl, alprazolam diazepam and alcohol intoxication."

[67]Ms. Walton indicated the decedent was afflicted with emotional problems stemming from a series of deaths of persons to whom she had emotional ties, including her father and uncle (murder victims), her grandfather and her fiance.

This Court absolutely sympathizes with this Claimant. This tragedy, unquestionably, causes her to endure the utter grief and despair that relentlessly accompanies the horrible and untimely death of a child. However, this Court is constrained by the law and the evidence that exists in the case. The evidence of record does not support an inference that the Claimant's decedent was forcibly administered the fatal quantity of controlled substances attributed to her death. The more plausible inference is that the decedent partook in the voluntary use of alcohol and other controlled substances, in combination with fentanyl, leading to her death, and that this had a causal relationship to the criminally injurious conduct at issue in the claim.[68]

Without question, the evidence substantiates that the offender, Nicholas Alan Ball, was an unsavory character who was an extraordinarily bad influence in the decedent's life. However, it also suggests that Mr. Ball and the decedent were voluntarily in each other's company during the subject events and that they mutually and consensually engaged in the illegal consumption of controlled substances in combination with alcohol. Therefore, constrained by the law and the evidence to stand by its previous ruling, this Court must deny the claim.

Matthew Paul Himmelright
(CV-08-0782-Y)

O R D E R

Claimant appeared in person.
Gretchen A. Murphy, Assistant Attorney General, for the State of West Virginia.

CECIL, JUDGE:

The claimant, Matthew Paul Himmelright, filed his application for an award under the West Virginia Crime Victims Compensation Act on December 29, 2008. The report of the Claim Investigator, filed March 24, 2009, recommended that no award be granted, to which the claimant filed a response in disagreement. An Order was issued on June 24, 2009, upholding the Investigator's recommendation and denying the claim, in response to which the claimant's request for hearing was filed June 29, 2009. This matter came on for hearing November 3, 2009, the claimant appearing in person, and the State of West Virginia by counsel, Gretchen A. Murphy, Assistant Attorney General.

The twenty-one-year-old claimant was the victim of criminally injurious conduct on November 19, 2008, in Berkeley County. While sitting in his vehicle at Lindsey Terrace Apartments in Martinsburg, the claimant was shot in the leg by Nelson D. Rodriguez. The offender was arrested for malicious wounding and attempted murder.

There is no question that the claimant was the victim of criminal conduct. At issue, however, is his own behavior prior to the incident, and whether it constituted "contributory misconduct" as defined by W.V. Code §14-2A-3(l).

Testifying in his own behalf at the hearing, the claimant explained that he and Mr. Rodriguez were friends at one time, but Mr. Rodriguez got involved with drugs and his personality changed. He accused the claimant of talking behind his back. He and the claimant had three different arguments over text messages. The claimant ignored Mr.

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[68]*See* W.Va. Code §14-2A-3(l).

Rodriguez for a while. Then one day during a telephone conversation, out of nowhere, Mr. Rodriguez began cursing and threatening the claimant.
He told the claimant that he would "beat him down" the next time he saw him.

Three or four days later, the claimant agreed to give his friend Angel Pagan a ride to the Lindsey Terrace Apartments so that Mr. Pagan could drop off some sodas and retrieve his belongings. The claimant was hesitant to go, since he and Mr. Rodriguez had been arguing, but Mr. Pagan advised that as long as Mr. Rodriguez stayed inside and the claimant remained in his vehicle, there wouldn't be a problem.

The claimant did give Mr. Pagan a ride, but parked two apartments down from Mr. Rodriguez to prevent him from seeing the car. The claimant was sitting in the car talking on the telephone when suddenly Mr. Rodriguez appeared, pounded on the window, and yelled, "Get the f— out of the car." The claimant stated that he couldn't just drive away, because he was facing a dead end, so he opened the door and shoved Mr. Rodriguez with his foot to get him away from the vehicle. After the claimant asked him, "What the h— is your problem," Mr. Rodriguez pulled out a gun, shot the claimant, and fled to his car.

The claimant further testified that Mr. Pagan, who had been staying with Mr. Rodriguez, revealed that Mr. Rodriguez was selling drugs for a while, and then began using them. It was at that point that Mr. Pagan wanted to move out.

The claimant was questioned by counsel for the State about the bag of marijuana he had on his lap when he was transported to the hospital. The claimant freely admitted that the marijuana belonged to him. When asked why he chose to open the car door and kick the offender, the claimant testified that he was only trying to shove him away from the car so that he wouldn't damage it.

Also present at the hearing was the claimant's mother, who stated that the claimant's medical bills, after insurance, totaled $4,645.00. They were admitted into evidence as Exhibit 1.

The Court's Order denying this claim was based on the fact that the record did not establish that the claimant was in fact free from any contributory misconduct. W.Va. Code § 14-2A-3(l) defines contributory misconduct as follows:

> "Contributory misconduct" means any conduct of the claimant, or of the victim through whom the claimant claims an award, that is unlawful or intentionally tortious and that, without regard to the conduct's proximity in time or space to the criminally injurious conduct, has causal relationship to the criminally injurious conduct that is the basis of the claim and shall also include the voluntary intoxication of the claimant, either by the consumption of alcohol or the use of any controlled substance when the intoxication has a causal connection or relationship to the injury sustained...

The Court hereby determines that the claimant has satisfied his burden of proving that he was an innocent victim of crime. It is evident that the claimant did not commit any unlawful or tortious acts. The evidence establishes that the claimant was not the aggressor, but was acting in self defense. Also, there was no causal connection to his having marijuana and the subsequent criminal conduct. The Court is constrained by the uncontested evidence to reverse its previous ruling. The Claim Investigator is hereby ordered to complete an economic analysis of the claimant's unreimbursed allowable medical expenses for further review by the Court.

Estelle Paige Matthews
(CV-07-0648)

O R D E R

J. Mark Sutton, Attorney at Law, for Claimant.
Gretchen A. Murphy, Assistant Attorney General, for the State of West Virginia.

SAYRE, JUDGE:

An application of the claimant, Estelle Paige Matthews, for an award on behalf of her deceased son, Luis "Joey" Paige, under the West Virginia Crime Victims Compensation Act, was filed November 30, 2007. The report of the Claim Investigator, filed September 3, 2008, recommended that no award be granted, to which the claimant filed a response in disagreement. An Order was issued on October 24, 2008, upholding the Investigator's recommendation and denying the claim, in response to which the claimant's request for hearing was filed November 14, 2008. This matter came on for hearing November 3, 2009, claimant appearing by counsel J. Mark Sutton and the State of West Virginia by counsel, Gretchen A. Murphy, Assistant Attorney General.

On October 27, 2007, the claimant's 25-year-old son, Luis "Joey" Paige, was the victim of criminally injurious conduct in Morgantown, Monongalia County. The victim was fatally shot in the stairwell of The District Apartments. The Claim Investigator originally recommended denial of the claim due to evidence that the victim's death was gang-related and the victim was a voluntary participant in the incident. The Court ordered that no award be made since it was impossible to determine whether the claimant's son was an innocent victim of criminal conduct. The Court, after considering the testimony presented at the hearing of this matter, has determined that the claimant is entitled to an award on behalf of her son for the reasons more fully stated below.

Testifying at the hearing on behalf of the claimant was Anthony Pooler, the victim's friend who was present with him on the evening of his death. Mr. Pooler testified that he had gone to a local bar in Morgantown with some friends. While at the bar, a group of four or five individuals confronted him about his friend, Hassan, with whom they had had a dispute the prior week. Mr. Pooler stated that he was not involved in the past dispute with these individuals and neither was the victim. Mr. Pooler testified that he did not see the victim involved in any type of argument or confrontation with the group.

Later that evening, Mr. Pooler drove the victim and three other friends to The District Apartments, where they planned to spend the night. Mr. Pooler pulled his vehicle to the front of the apartment building to drop his friends off while he parked. Approximately five or ten seconds later, he heard gunshots.

Mr. Pooler did not see the shooting, but he believed that the victim did not contribute in any way to the events that led to his death. Mr. Pooler stated that he had no knowledge that the group of individuals who had confronted him earlier that evening were at The District Apartments. It was not until after the incident that Mr. Pooler discovered that the group he had seen earlier at the bar were robbing his friend Hassan's apartment at The District.

After the shooting, Mr. Pooler went inside the apartment complex and found the victim lying on the ground. He had been fatally shot. Mr. Pooler believed that the victim was an innocent bystander and the offenders were seeking to retaliate against

another one of his friends, not the victim. Mr. Pooler testified "...They weren't meaning to go after him. They wanted another friend of mine and I guess Luis just happened to be there. Whoever I guess they seen, you know, they were going to get regardless..."

The Respondent did not present a witness at the hearing.

The Court's Order denying this claim was based on the fact that the record did not establish that the claimant was in fact free from any contributory misconduct. W.Va. Code § 14-2A-3(l) defines contributory misconduct as follows:

> "Contributory misconduct" means any conduct of the claimant, or of the victim through whom the claimant claims an award, that is unlawful or intentionally tortious and that, without regard to the conduct's proximity in time or space to the criminally injurious conduct, has causal relationship to the criminally injurious conduct that is the basis of the claim and shall also include the voluntary intoxication of the claimant, either by the consumption of alcohol or the use of any controlled substance when the intoxication has a causal connection or relationship to the injury sustained.

The Court is constrained by the evidence to reverse its previous ruling. The Court finds that the victim was an innocent bystander. He did not by his own actions contribute to the shooting that caused his death. Therefore, an award of $6,000.00 is hereby granted for the victim's funeral and burial expenses as set out below.

Brown Funeral Home Inc.
P.O. Box 821
Martinsburg WV 25402-0821
FEIN: 55-0514342
FIMS: 84287.....$5,883.89

Estelle Paige Matthews
516 Virginia Ave.
Martinsburg WV 25401
FIMS: 549244.....$ 116.11

Total.....$6,000.00

John H. Shaw
(CV-07-0211-X)

O R D E R

Claimant appeared *pro se*.
Gretchen A. Murphy, Assistant Attorney General, for the State of West Virginia.

HACKNEY, JUDGE:

An application of the Claimant, John H. Shaw, on behalf of his deceased son, Jonathan R. Shaw, for an award under the West Virginia Crime Victims Compensation Act, was filed April 23, 2007. The report of the Claim Investigator, filed December 19, 2007, recommended that no award be granted. An Order was issued on January 23, 2008, upholding the Investigator's recommendation and denying the claim, in response

to which the Claimant's request for hearing was filed July 21, 2008. This matter came on for hearing June 3, 2010, the Claimant appearing *pro se*, and the State of West Virginia by counsel, Gretchen A. Murphy, Assistant Attorney General.

The facts of the case are as follows: At approximately 10:21 p.m. on March 31, 2007, the Claimant's 21-year-old son, Jonathan R. Shaw, was the victim of criminally injurious conduct near Alpena, Randolph County. The victim was hosting a party at Lower Cheat, a well-known place in the community where it is common for young adults and teenagers to congregate and imbibe alcoholic beverages. The victim's younger brother, Robbie Shaw, was also present at the camp area.

Senior Trooper J.E. Kopec, the police officer that investigated the incident, testified that the offender, Austin Woods, and his friend, Danny Hamlin, were camping in a different area at Lower Cheat that night. The victim and Austin Woods had attended high school together and there was a history of animosity between them. The victim had a reputation for not backing down from violent confrontations, and Austin Woods, the perpetrator, did not like him. At approximately 9:00 or 10:00 p.m., Austin Woods and Danny Hamlin went to the victim's camp area. Danny Hamlin beckoned Robbie Shaw to follow him to the car he had arrived in under the pretext of giving Robbie some ramps.

Robbie Shaw agreed and walked to the vehicle with Danny Hamlin. Upon arriving at the vehicle, Austin Woods and Danny Hamlin propositioned Robbie Shaw for sexual favors. This prompted Robbie Shaw to run to his brother (the victim) and tell him about the proposition.

As a result, the victim and Justin Gibson went to confront Austin Woods. When Austin Woods saw them coming, he and Danny Hamlin entered the vehicle. The victim grabbed Austin Woods through the open window and told him to get out of the vehicle. The victim then drew back his fist, presumably in an effort to strike Mr. Woods through the open window. As a result, Austin Woods fatally shot the victim in the chest with a pistol and fled from the scene.

Claimant seeks to recover funeral expenses and dependent's economic loss for the victim's minor child. The claim was originally denied on the basis that the victim was guilty of contributory misconduct because the Claim Investigator found that the victim was the aggressor by confronting the offender. Under W.Va. Code § 14-2A-3(l), "contributory misconduct" is defined as follows:

> "Contributory misconduct" means any conduct of the claimant, or of the victim through whom the claimant claims an award, that is unlawful or intentionally tortious and that, without regard to the conduct's proximity in time or space to the criminally injurious conduct, has causal relationship to the criminally injurious conduct that is the basis of the claim and shall also include the voluntary intoxication of the claimant, either by the consumption of alcohol or the use of any controlled substance when the intoxication has a causal connection or relationship to the injury sustained.

In the instant case, the Claimant has established that Jonathan Shaw was an innocent victim of crime. The Court finds that the offender, who harbored animosity toward the victim, provoked the victim by propositioning his younger brother for sex, knowing full well this would incite a confrontation with the victim. The victim was unarmed when he approached the offender and justifiably took umbrage at the inappropriate solicitation. The victim's actions were predictable as far as the offender was concerned and a reasonable inference exists that the offender's behavior was

intended to inflame the passions of the victim given the history of animosity between the two that stemmed from high school days. Consequently, the Court finds that the victim was unjustifiably shot to death by the offender. The Court commends Senior Trooper J.E. Kopec for his insightful testimony and thorough investigation of the case. The Court finds that the victim was not guilty of contributory misconduct and is entitled to compensation under the Fund. The Claim Investigator is hereby directed to prepare an economic loss analysis for further review by this Court.

Thomas Fenton Smith Jr.
(CV-07-0497-Y)

O R D E R

The Claimant appeared *pro se.*
Harden C. Scragg Jr., Assistant Attorney General, for the State of West Virginia.

SAYRE, JUDGE:

An application of the Claimant, Thomas Fenton Smith Jr., for an award under the West Virginia Crime Victims Compensation Act, was filed September 17, 2007. The report of the Claim Investigator, filed June 16, 2008, recommended that an award be granted. Orders were issued on August 18, 2008, in the amount of $20.00,[69] and on December 19, 2008, in the amount of $3,203.09.[70] The sole issue before the Court on appeal is whether the Claimant is entitled to recover additional out-of-pocket expenses relating to this incident. This matter came on for hearing July 9, 2010, the Claimant appearing in person, and the State of West Virginia by counsel, Harden C. Scragg Jr., Assistant Attorney General. The Honorable John G. Hackney Jr. sat as hearing examiner in this claim.

On September 7, 2007, the 38-year-old Claimant was the victim of criminally injurious conduct in Pennsboro, Ritchie County. The alleged offender had been harassing the Claimant and his family prior to the date of the incident. The apparent reason for the dispute was due to the Claimant's family testifying against the alleged offender in a court hearing. On the day in question, the Claimant was outside working on his vehicle when he was approached by the offender. The offender pulled out a gun and pointed it at the Claimant's face. The Claimant was able to grab the end of the gun and push it away from his face. Then, the offender struck the Claimant with a hammer twice on the head and on the forearm. The offender had the hammer in his left hand and the gun in his right hand. The two men continued to struggle. The offender raised the gun to the Claimant's head and pulled the trigger while the Claimant tried to shove the

[69]The Court made an award for a medical co-pay and a prescription expense.

[70]Pursuant to the Claim Investigator's memorandum dated November 12, 2008, the Claim Investigator recommended an award for the Claimant's mileage expenses, medical supplies, building materials, and prescription costs in the amount of $3,203.09. The Claim Investigator did not recommend payment for the installation of a wheelchair accessible shower, two wheel chair ramps, a refrigerator, child care costs, and in-home health care expenses.

gun away. As a result, the Claimant was shot in the leg. He subsequently developed MRSA and lost part of his leg.

At the hearing, the Claimant indicated that the Veterans Administration has paid for the majority of his medical expenses. The Claimant is requesting reimbursement from the Fund for the following out-of-pocket expenses: (1) The cost of reconstructing his porch to make it wheelchair accessible ($4,485.00); (2) the cost of installing a shower in the lower level of his home ($710.65); (3) child care costs ($3,915.00); (4) in-home health care costs ($920.00); (5) the purchase of a refrigerator to store his medications ($84.42); (6) the cost of miscellaneous medical supplies; (7) vacation pay for his wife ($550.00); and (8) travel expenses related to his medical care.

The purpose of the Crime Victims Fund is to provide "*partial* compensation to the innocent victims of crime for injury suffered to their person or property." *See* W.Va. Code § 14-2A-2 (Emphasis added.) The Court must determine whether the out-of-pocket expenses incurred by the victim constitute an "allowable expense." W.Va. Code §14-2A-3(f)(1) defines "allowable expense" as follows:

> "Allowable expense" means reasonable charges incurred or to be incurred for reasonably needed products, services and accommodations, including those for medical care, mental health counseling, prosthetic devices, eye glasses, dentures, rehabilitation and other remedial treatment and care.

The Court finds that the Claimant is entitled to receive compensation for the following expenses: (1) The cost of reconstructing the porch to make it wheelchair accessible ($4,485.00) (See Claimant's Exhibit 3); (2) The cost of installing a shower in the lower level of the Claimant's home ($710.65) (See Claimant's Exhibit 2); and (3) The purchase of a small refrigerator to store the Claimant's medications in the lower level of his home ($84.42) (See Claimant's Exhibit 1).

The cost of reconstructing the porch and installing the shower constitute reasonable accommodations and should be paid. Although the Court normally does not reimburse victims for household appliances, under this limited circumstance, the refrigerator was necessary for the purpose of storing the Claimant's medication in the lower level of his residence. Since the Claimant is wheelchair-bound, having medications on the lower level of his home constitutes a reasonable accommodation.

Although the Claimant has requested reimbursement for child care and in-home health care, these services were provided by the Claimant's relatives and cannot be paid. In-home health care is considered an "allowable expense" when it is received from a certified provider. The Court must deny the Claimant's request for reimbursement of vacation pay for his wife as it is not an "allowable expense."

The Claimant also seeks to recover mileage expenses and costs that he incurred for medical supplies. Although the Claimant submitted lists of these expenses, they were not supported with the appropriate documentation. The Claimant should be mindful that receipts are needed for reimbursement of any medical supplies. Appointment ledgers, indicating the dates and reason for travel, are needed for the reimbursement of mileage expenses. These costs, as well as future allowable expenses, may be awarded if proper documentation is submitted.

In view of the foregoing, the Court ORDERS that an award be made to the Claimant in the amount of $5,280.07 as set out below.

Thomas F. Smith Jr.

207 First St.
Pennsboro WV 26415
FIMS: 488943 .....$5,280.07

Lois Carol Ward
(CV-03-0559)

O R D E R

Claimant appeared in person and by counsel, Keith Lively.
Gretchen A. Murphy, Assistant Attorney General, for the State of West Virginia.

SAYRE, JUDGE:

An application of the claimant, Lois Carol Ward, for an award under the West Virginia Crime Victims Compensation Act, was filed October 28, 2003. The report of the Claim Investigator, filed March 8, 2004, recommended that no award be granted, to which the claimant filed no response. An Order was issued on May 20, 2004, upholding the Investigator's recommendation and denying the claim, in response to which the claimant's request for hearing was filed August 21, 2008. Although the time for the filing of an appeal is twenty-one days after notification of the Court's decision pursuant to W.Va. Code §14-2A-15(a), the Court allowed the matter to come on for hearing May 28, 2009. The claimant appeared in person and by counsel, Keith Lively, and the State of West Virginia by counsel, Gretchen A. Murphy, Assistant Attorney General.

On August 19, 2002, the claimant's 33-year-old son, Kreggory Don Ward, was the victim of criminally injurious conduct in Pence Springs, Summers County. Mr. Ward was at the residence of his girlfriend, Clara Mitchell, when he was attacked and beaten to death by her son, Brandon Mitchell, a juvenile at the time.

The claimant testified at the hearing of this matter that Kreggory had been seeing Clara Mitchell for almost two years. However, Kreggory was afraid to go to Clara's house because her ex-husband might be there, her brother Ricky Slaten had threatened him, and her son Brandon did not like him. On the day of the incident, the claimant had several telephone conversations with Kreggory, the last one at 10:55 p.m. From his home, Kreggory advised his mother that Clara had been calling him because "that phone was blinking when I come in." Later that evening, claimant's other son came to her residence to inform her that Kreggory had been hurt. Nine days later, he died.

Claimant testified that her son had knowledge that dangerous activities, including drug usage and violent acts, had taken place at his girlfriend's residence. She further stated that she did not want her son going to his girlfriend's residence.

The claimant testified that her son Kreggory had been giving her approximately $50.00 per week, and would do numerous odd jobs for her. Upon his death, the claimant received life insurance proceeds of $10,000.00, which she used to pay his funeral and burial expenses and some of his utility bills. The claimant testified that her son's death nearly destroyed her. She suffered physically and emotionally, and is still receiving psychiatric counseling.

Upon questioning about her son's income, the claimant revealed that he was not working on the day of his death, and had not been working for approximately one

year and three months. He was receiving Worker's Compensation benefits. The claimant confirmed that Kreggory did not supply over one-half of her support, but only things that she needed.

The main issue for the Court to consider on appeal is whether the victim was guilty of contributory misconduct. Under W.Va. Code § 14-2A-3(l), "contributory misconduct" is defined as follows:

> "Contributory misconduct" means any conduct of the claimant, or of the victim through whom the claimant claims an award, that is unlawful or intentionally tortious and that, without regard to the conduct's proximity in time or space to the criminally injurious conduct, has causal relationship to the criminally injurious conduct that is the basis of the claim and shall also include the voluntary intoxication of the claimant, either by the consumption of alcohol or the use of any controlled substance when the intoxication has a causal connection or relationship to the injury sustained.

Claimant asserts that although the evidence indicates that the victim had alcohol and barbituates in his system, his intoxication was not causally related to his death. In addition, the evidence demonstrates that the victim was extricating himself from the situation when he was attacked from behind.

Respondent avers that the victim's intoxication was causally connected to the injury he sustained at the time of this incident. The hospital records indicate that the victim's blood alcohol level was 0.182. Respondent argues that the victim's intoxication prevented him from exercising caution for his own safety. A reasonable person would not have gone to his girlfriend's residence that evening knowing that he would be placing himself in harm's way.

In the instant case, the Court finds that the victim had knowledge of the illegal and dangerous activities that had taken place at his girlfriend's residence. The victim's intoxication inhibited the very real concern that he should have had for his own safety. A reasonably prudent person would not have gone to the residence under those circumstances. However, the Court finds that the victim was beaten without any provocation, and was trying to extricate himself from the situation when he was unjustifiably attacked. The Court is sympathetic to the claimant for the loss of her son in this tragic incident.

Based on the foregoing, the Court finds that the victim's actions warrant a reduction in the award by forty-five (45%) percent.

The claimant sustained unreimbursed funeral expenses of $4,000.00 and burial expenses of $771.70, for a total unreimbursed loss of $4,771.70. Reducing the amount by 45%, an award in the sum of $2,624.43 is hereby granted as set forth in the Investigator's memorandum of August 21, 2009.

Matthew T. Young
(CV-08-0131-Y)

O R D E R

Claimant appeared in person and by counsel, Benny G. Jones.
Gretchen A. Murphy, Assistant Attorney General, for the State of West Virginia.

SAYRE, JUDGE:

An application of the claimant, Matthew T. Young, for an award under the West Virginia Crime Victims Compensation Act, was filed February 25, 2008. The report of the Claim Investigator, dated September 2, 2008, indicated that further information was needed from the Beckley Police Department before the Investigator could make a recommendation. The Court issued an Order on February 23, 2009, denying the claim until the claimant could establish that he was an innocent victim free from contributory misconduct. By memorandum dated January 23, 2009, the Investigator recommended that no award be made based upon information provided by the Beckley Police Department that the claimant was guilty of contributory misconduct. An Order was issued on June 18, 2009, denying the claim, in response to which the claimant's request for hearing was filed July 14, 2009. The claimant appeared in person and by counsel, Benny G. Jones, and the State of West Virginia appeared by counsel, Gretchen A. Murphy, Assistant Attorney General.

On December 30, 2007, the 23-year-old claimant was the victim of criminally injurious conduct in Beckley, Raleigh County. According to the claimant's testimony, he and his girlfriend, Andrea Jones, arrived at Desoto's Lounge, located in the Beckley Mall, at between 12:00 a.m. and 12:30 a.m. They were accompanied by their friends, Ben McGraw and William Cayce Prunesti. The claimant stated that he had one beer at Desoto's Lounge, and he had one drink at another bar prior to arriving at Desoto's Lounge.

The claimant stated that the group stayed at the bar until closing. When they were getting ready to leave and were waiting in line by the door, the claimant stated that there were "words exchanged between some people in front of us and those words later got turned around on us." He testified, "At the time we didn't know why but we found out later why there was an argument." Although the claimant told the parties that he did not want any trouble and was just trying to get home safely, an altercation ensued in the parking lot.

The claimant stated that the "same guys who were angry inside started speaking to us again like using angry tones and we just told them again we didn't want any trouble. And I got Ben and told him to get in the car and as we were walking right after I told the guy we didn't want any trouble I got hit." The claimant stated that he did not provoke the incident by directing racial slurs at the three black, male offenders.

Andrea Jones corroborated the claimant's testimony. She stated that as they were walking out of the bar, one of the offenders, who was exiting the bar in front of them, inappropriately touched a woman, and the woman was upset. Ms. Jones stated that the offender may have thought that the woman was a part of their group of friends. He then directed his anger towards Ms. Jones and the claimant.

She stated that as they were walking towards their vehicle, the offender struck the claimant from behind. Ms. Jones recalled that when she looked over, the claimant was on the ground. The offender and his friends kicked the claimant in the face while he was unconscious. She stated that the claimant did not direct racial slurs toward the offenders that would have instigated the physical altercation.

Also testifying at the hearing on behalf of the claimant was William Cayce Prunesti. Mr. Prunesti stated that he was waiting for his group of friends when he saw that the offenders struck the claimant from behind. Mr. Prunesti then took the claimant to the hospital. Mr. Prunesti also testified that he did not hear the claimant direct racial slurs at the offenders which would have provoked the physical altercation.

The claimant was taken to Raleigh General Hospital where he was treated for multiple facial fractures. According to the claimant, the police arrived at the hospital at approximately 4:00 a.m., and the claimant fully cooperated with the investigation.

The claimant and his mother, Delcie Young, contacted the Beckley Police Department on numerous occasions to assist in the prosecution of the offenders, but no attempt was made by the police to further pursue the matter.

Robin Michelle Buck, owner of Desoto's Lounge, testified for the respondent regarding her recollection of the events that transpired on December 30, 2007. Ms. Buck stated that she was the bartender that evening, and she had served the claimant between four and five beers. Ms. Buck stated that the altercation began on the sidewalk outside the bar. Ms. Buck was standing by the exit to make sure that no one carried any drinks outside. Ms. Buck stated that she heard Mr. Prunesti direct racial slurs at one of the offenders. She stated that Mr. Prunesti's group of friends were standing beside him, laughing.

Then, she witnessed the altercation which occurred in the parking lot. Mr. Young and Ms. Jones were standing by their vehicle. The offenders were walking to their vehicle, which was parked close by. It is important to note that at this juncture the claimant was standing next to the side of his vehicle, as were the offenders. On the other hand, Mr. Prunesti was on the opposite side of the vehicle where he was not easily accessible to the offenders. Ms. Buck stated that Mr. Prunesti said something to one of the offenders. The offenders then said something to Mr. Young, and Mr. Young responded. Ms. Buck stated that she was too far away to hear what the parties said to one another, but she saw one of the offenders strike Mr. Young. She then saw another one of the offenders kick him. Ms. Buck and the bouncer tried to break up the fight. Ms. Buck grabbed one of the offenders and pushed him away. The bouncer grabbed Mr. Prunesti, whom she stated was running around the vehicle with his fists drawn yelling racial slurs at the offenders.

Jeffrey Shumate, detective with the Beckley Police Department, was also called as a witness for respondent. Detective Shumate stated that his investigation of the incident was limited because at the time, he was working in the narcotics unit. Detective Shumate testified that the claimant contacted him and was inquiring about receiving information from Corporal Nissan, the investigating officer. Detective Shumate contacted Ms. Buck in reference to the incident. Ms. Buck informed him that the claimant made a racial slur which caused the fight that evening. However, the detective stated that he did not document the conversation. He stated that no criminal charges were filed against the alleged offenders, and the names of the alleged offenders were not documented in the incident report.

The issue for the Court to consider on this appeal is whether the victim was guilty of contributory misconduct. Under W.Va. Code § 14-2A-3(l), "contributory misconduct" is defined as follows:

> "Contributory misconduct" means any conduct of the claimant, or of the victim through whom the claimant claims an award, that is unlawful or intentionally tortious and that, without regard to the conduct's proximity in time or space to the criminally injurious conduct, has causal relationship to the criminally injurious conduct that is the basis of the claim and shall also include the voluntary intoxication of the claimant, either by the consumption of alcohol or the use of any controlled substance when the intoxication has a causal connection or relationship to the injury sustained.

The claimant asserts that he was not guilty of contributory misconduct. Claimant denies that he directed racial slurs at the offenders. He further asserts that

even if the Court finds that he did insult the offenders by using racial slurs, his conduct, as a matter of law, cannot be considered unlawful or intentionally tortious.

The Court finds that it is unnecessary to address the issue of whether uttering racial slurs constitutes contributory misconduct under the statute. There is credible evidence indicating that it was not the claimant who directed racial slurs at the offenders, even though the claimant was in the presence of a friend who may have used such language. The claimant testified that he was trying to avoid conflict with the offenders and was trying to de-escalate the situation. The testimony of the witnesses who were at the scene, including Ms. Young, Mr. Prunesti, and Ms. Buck, suggests that the claimant did not provoke the physical altercation.

Based on the foregoing, the Court finds that the claimant was an innocent victim of crime, free from contributory misconduct. Thus, the Court reverses its previous ruling, and the Claim Investigator is hereby directed to prepare an economic loss analysis for further review by the Court.

II. CRIME VICTIMS COMPENSATION FUND

West Virginia Crime Victims Compensation Fund
Reference to Opinions

- **CONTRIBUTORY MISCONDUCT/INNOCENT VICTIM**
- **ECONOMIC LOSS**
- **METHAMPHETAMINE**
- **STATUTE OF LIMITATIONS**

The following is a compilation of head notes representing decisions from July 1, 2009 to June 30, 2011.

CONTRIBUTORY MISCONDUCT/INNOCENT VICTIM

CARTER, MEIGHAN B. (CV-08-0499-X)

The 21-year-old Claimant was the victim of criminally injurious conduct on June 20, 2008. The Claimant testified that she had gone out for dinner and drinks with Christina Mendenhall and David Griffith (the offender). Afterwards, they returned to the Claimant's residence where Mendenhall and the offender were spending the night. The Claimant testified that the offender became disruptive and violent. The Claimant told them that they needed to leave, and locked her door. Mendenhall and the offender proceeded to pound on the Claimant's door. The Claimant grabbed a knife to intimidate them and make them leave. The offender kicked the door open and threw the Claimant to the ground. He took the knife from her and cut her on the throat and chin. The offender then pulled the Claimant off the ground, pushed her against several objects in her house and threw beer bottles at her. The Court determined that the Claimant satisfied her burden of proving that she was an innocent victim of crime, and did not commit any unlawful or tortious acts. The Claimant was not the aggressor in this incident and did not provoke the attack, thus, the Court was constrained by the evidence to reverse its previous ruling. Award of $14,954.90. . . . . p. 295

CHANEY, MICHAEL T. (CV-09-0251-Y)

The 21-year old Claimant was the victim of criminally injurious conduct on December 4, 2007, in Barboursville, Cabell County. The Claimant went to the office of his former employer (the offender) to have him sign some paperwork. The offender refused to assist the Claimant. As the Claimant was exiting the office, he directed profane language at the offender. The offender ran after the Claimant, and the Claimant shut the door on the offender's hands. Then, the offender punched the Claimant approximately three or four times in the mouth and head. The Court's Order denying the claim was based on the fact that the record did not establish that the Claimant was in fact free from any contributory misconduct. Since the Claimant provoked the incident with the offender, the Claimant could not be considered an innocent victim of crime. Claim disallowed. . . . . p. 321

FARLEY, DAVID J. (CV-09-0302-Y)

The 50-year-old Claimant was the victim of criminally injurious conduct on June 12, 2008, in Ranson, Jefferson County. The Claimant accompanied his nephew, Nathan Farley, to the residence of Donnie Lindsay to collect on a $125.00 debt. Claimant stated that he believed the money was owed for a baby shower, but the police report indicated that it was actually a drug debt. When Claimant and Nathan Farley arrived at Mr. Lindsay's residence, a fight ensued among them and the offenders - Wendy Combs, George Rose, and David Dillow. The Court found that Claimant did not satisfy the burden of proving that he was an innocent victim of crime free of contributory misconduct due to the conflicting accounts of the events that transpired that evening. Claim disallowed. . . . . p. 324

FROST, REBA KAYE (CV-07-0498-Z)

The Claimant's 21-year-old son, Jonathan Shively, was the victim of criminally injurious conduct on September 17, 2007, in Fairdale, Raleigh County. Claimant's son was killed during an altercation with his former stepbrother, Joe Frost II. The 911 tape revealed that the victim was mutually combative in the physical altercation. In addition, the toxicology report indicated that alcohol was present in the victim's blood at a concentration of .10%, and the sedatives diazepam, nordiazepam, and 7-aminoclonazepam were also present. The Court found that the Claimant was guilty of contributory misconduct. Claim disallowed. . . . . p. 331

GLOUCESTER, GEORGE M. (CV-09-0175)

On September 29, 2008, the 56-year-old Claimant was the victim of criminally injurious conduct in Charleston, Kanawha County, when he was struck by a motor vehicle while he crossed the street. The claim was initially denied on the basis of contributory misconduct based on the Investigator's finding that the Claimant was intoxicated and walking in the middle of the street when he was struck by the vehicle. Claimant introduced into evidence an affidavit of Corporal J.T. Garten which stated that Claimant was "walking in the intersection and was hit by a motor vehicle." Claimant herein was the victim of crime, and based upon the evidence he did in fact contribute to his injuries by venturing out onto the streets impaired. However, no evidence refuted the corporal's affidavit regarding the location of the Claimant at the time of the accident. The Court reversed its previous ruling. Award of $35,000.00. . . . . p. 317

HARMON, PAMELA L. (CV-07-0422-Y)

The Claimant's 23-year-old daughter, Victoria M. Harmon, died after being subjected to criminally injurious conduct in Danville, Boone County. On June 1, 2007, Amanda Kersey gave the decedent and Nicholas Ball a ride to Ball's apartment where Ball retrieved fentanyl patches. The three then proceeded to the decedent's residence where they arrived at approximately 11:00 p.m. In the early morning, the decedent's aunt heard Ball repeatedly asking for help as he was unable to awaken the decedent. Walton found the victim lying on the floor and called 911. The paramedics arrived and determined that Harmon was deceased. The Court found the victim voluntarily partook in the use of alcohol and controlled substances, in combination with fentanyl, leading to her death. Claim disallowed. . . . . p. 332

HIMMELRIGHT, MATTHEW PAUL (CV-08-0782-Y)

The 21-year-old Claimant was the victim of criminally injurious conduct on November 19, 2008, in Berkeley County. While sitting in his vehicle at Lindsey Terrace Apartments in Martinsburg, the Claimant was shot in the leg by Nelson D. Rodriguez. The offender was arrested for malicious wounding and attempted murder. The Court determined that the Claimant did not commit any unlawful or tortious acts. However, upon further evidence that was submitted, the Court reduced the Claimant's award by twenty-five (25%) percent. Award of $2,082.08. . . . . p. 334

MATTHEWS, ESTELLE PAIGE (CV-07-0648)

Claimant's 25-year-old son, Luis "Joey" Paige, was the victim of criminally injurious conduct in Morgantown, Monongalia County. The victim was fatally shot in the stairwell of The District Apartments. The victim's friend, Anthony Pooler, testified that the victim did not contribute in any way to the events that led to his death. The Court's Order denying the claim was based on the fact that the record did not establish that the victim was free from any contributory misconduct. The Court reversed its previous ruling and found that the victim was an innocent bystander. Award of $6,000.00. . . . . p. 336

NORMAN, CHRISTOPHER J. (CV-08-0599)

The 33-year-old Claimant was injured in an altercation in Wheeling, Ohio County. He and his fiancee, Michelle Gorby, had left a bar to go home in her vehicle when the offender began following them. At one point, he blocked her vehicle from entering the road leading toward their home. The Claimant exited the vehicle to talk with the offender. When the Claimant approached, the offender kicked the Claimant, who tried to return to the other vehicle. The offender pushed the Claimant and then struck him. The claim was initially denied on the basis of contributory misconduct. The Court reversed its decision, finding that the Claimant did nothing to provoke the incident, and granted an award for his medical expenses. Award of $6,250.95. p. 309

PLEASANT, VICKI L. (CV-09-0224)

Claimant's 24-year-old son, Lawrence Booker, was the victim of criminally injurious conduct on April 16, 2007, in St. Albans, Kanawha County. The victim was fatally shot outside the residence of the offender, Justin Johnson. The police report concluded that the victim, Dexter Gilmore, and Stephanie Holsinger had gone to the offender's apartment to rob him. Ms. Holsinger lured the offender outside where the victim placed a gun to his head. A struggle ensued between the victim and the offender, wherein the victim was shot. The police investigation concluded that the victim was shot as a direct result of his attempt to rob Mr. Johnson, who was acting in self-defense. The Court found that the decedent intended to commit felonious criminal mischief, to the extent he intended to perpetrate the crime of robbery, and thus, the Court could not make the required finding that the decedent was an innocent victim of crime. Claim disallowed. . . . . p. 325

POUNDS, DEBBIE (CV-08-0199-X)

On September 1, 2007, the Claimant's 29-year-old son, Brandon R. Perrine, was the victim of criminally injurious conduct in Bluewell, Mercer County. The Claimant testified that she was not present when the events occurred. She stated that the victim was drinking at the Fox Rocks Bar. He accepted a ride from the offender, Michael Galligher Jr., who was an acquaintance. The offender, who was intoxicated, borrowed a vehicle and proceeded on US Route 52 towards the Claimant's house. A deputy sheriff noticed that the driver of the vehicle was speeding, and attempted to stop the vehicle. The offender led the officer on a high-speed chase, which ended when the offender lost control of the vehicle and struck a tree. Claimant's son was ejected from the vehicle and suffered fatal injuries.

The Court recognized that the victim's actions in accepting a ride from an intoxicated driver did not fall within the express meaning of "contributory misconduct" as defined by W.Va. Code § 14-2A-3(l). However, the intent of the Legislature would be subverted if victims who voluntarily accepted a ride from an intoxicated driver were found to be entirely innocent victims. Such a result would be contrary to public policy. In the instant case, the Court found that the victim's actions warranted a forty percent (40%) reduction in recovery. Award of $3,494.87. . . . . p. 302

SHAW, JOHN H. (CV-07-0211-X)

At approximately 10:21 p.m. on March 31, 2007, the Claimant's 21-year-old son, Jonathan R. Shaw, was the victim of criminally injurious conduct near Alpena, Randolph County. The victim was hosting a party at Lower Cheat. The victim's younger brother, Robbie Shaw, was also present at the camp area. The offender, who harbored animosity toward the victim, provoked the victim by propositioning his younger brother for sex, knowing full well this would incite a confrontation with the victim. The victim was unarmed when he approached the offender and justifiably took umbrage at the inappropriate solicitation. The victim's actions were predictable as far as the offender was concerned and a reasonable inference exists that the offender's behavior was intended to inflame the passions of the victim given the history of animosity between the two that stemmed from their high school days. Consequently, the Court found that the victim was unjustifiably shot to death by the offender. Award of $13,918.20. . . . . p. 337

SUMMERS, WILLIAM C. (CV-06-0058)

The 60-year-old Claimant was a victim of criminally injurious conduct in Grant Town, Marion County on December 12, 2005. The Claimant was drinking at the bar of his local tavern when the offender entered and sat three bar stools away. Claimant testified that he and the offender got into a verbal exchange and the offender got up from his seat with fists raised. The Claimant testified that he never touched the offender during the altercation and only remembers falling to the ground. This claim was initially denied because the facts surrounding the incident were unclear, and it could not be determined whether the Claimant was an innocent victim. The Court was of the opinion that while the Claimant was heavily intoxicated, which had a negative impact upon his judgment and resulted in a heated exchange with the offender, such contributory misconduct was not the cause of the subsequent altercation; therefore an award was granted. However, because the victim's intoxication contributed to the verbal altercation resulting in the fight, the Claimant's award was reduced by forty percent (40%). . . . . p. 322

WARD, LOIS CAROL (CV-03-0559)

Claimant's 33-year old son, Kreggory Don Ward, was the victim of criminally injurious conduct in Pence Springs, Summers County. Mr. Ward was at the residence of his girlfriend, Clara Mitchell, when he was attacked and beaten to death by her son, a juvenile at the time. Claimant testified that her son had knowledge that dangerous activities, including drug usage and violent acts, had taken place at his girlfriend's residence. She further stated that she did not want her son going to his girlfriend's residence. Respondent averred that the victim's intoxication was causally connected to the injury he sustained at the time of this incident. The Court found that the victim had knowledge of the illegal and dangerous activities that had taken place at this girlfriend's residence. The victim's intoxication inhibited the very real concern that he should have had for his own safety. However, the Court found that the victim was beaten without any provocation, and was trying to extricate himself from the situation when he was unjustifiably attacked. Thus, the Court found that the victim's actions warranted a reduction in the award by forty-five (45%) percent. Award of $2,624.43. . p. 341

WEAVER, MICHAEL A. (CV-06-0633-Y)

The 20-year old Claimant was the victim of criminally injurious conduct near Sardis in Harrison County. In the early morning of October 8, 2006, the Claimant and Seneca Garrett, Robert Gelpi, Patrick Ellisher, Greg Cottrill, and Megan Cox were en route to an isolated location called Mars Mines, a rural strip-mining site. Their intended destination was the summit of a particular hill. The group proceeded in two separate vehicles, all intending to engage in festivities commensurate with the birthday of Garrett. After the festivities, they descended the hill in Cottrill's truck. When they reached the bottom they observed that the vehicle belonging to Whited's mother had been vandalized. The Claimant chased the offenders. One of the offenders struck Garrett with a 4x4 landscaping timber, killing him. The Claimant went to Garrett's aid and attempted to shield him from further attacks. The Court's initial denial was based on the Claim Investigator's finding that the Claimant engaged in contributory misconduct. While the Court does not condone nor encourage confrontation with violent criminals, the Court will not deny an award merely because the Claimant exposes his or her person to harm's way while defending a fallen and helpless comrade who has been brutally attacked. Award of $22,348.98. . . . . p. 298

WISE, CONNIE E. (CV-08-0455-Y)

The Claimant's daughter, Sarah L. Hutzler, was severely injured, and her other daughter, Dawnelle R. Hutzler, was killed in a tragic motor vehicle accident in Berkeley County. They had left a bar with the offender, who was later found to have been intoxicated. The claim was initially denied on the basis of the victims' contributory misconduct in accepting a ride with an impaired driver. On appeal, the Court found that the victims' actions were not unlawful nor intentionally tortious, and therefore did not constitute contributory misconduct. The Court ruled instead that the appropriate basis for denial was assumption of the risk - whether the Claimants' daughters were aware of the driver's impaired condition when they accepted a ride with him. Claimant testified that the offender appeared to be unimpaired a few hours before the accident; however, his blood alcohol level taken at the hospital indicated otherwise. The Court found that there was an unaccounted-for period of time during which there was no eyewitness testimony concerning the volume of alcohol consumed by the offender. Therefore,

absent a preponderance of evidence that the Claimants' daughters were unaware of his condition, the initial denial was upheld. Claim disallowed. . . . . p. 303

WYATT, WARREN D. (CV-06-0303-Y)

On May 19, 2005, the 45-year-old Claimant was the victim of criminally injurious conduct in Beckley, Raleigh County. The Claimant and the offenders had an altercation in the parking lot of a doctor's office. The Court found that the Claimant voluntarily engaged in the verbal and physical altercation with the offenders. Since the Claimant failed to retreat, it was the Court's determination that the Claimant was not an innocent victim of crime. Claim disallowed. . . . . p. 297

YOUNG, MATTHEW T. (CV-08-0131)

On December 30, 2007, the 23-year-old Claimant was the victim of criminally injurious conduct in Beckley, Raleigh County. The Claimant and his girlfriend were at a bar in the Beckley Mall with their friends. An altercation began on the sidewalk outside the bar. One of the Claimant's friends directed racial slurs at one of the offenders. One of the offenders struck the Claimant while another one of the offenders kicked him. The Claimant was taken to Raleigh General Hospital where he was treated for multiple facial fractures. There was credible evidence indicating that it was not the Claimant who directed racial slurs at the offenders, even though the Claimant was in the presence of a friend who may have used such language. The Claimant testified that he was trying to avoid conflict with the offenders and was trying to de-escalate the situation. Thus, the Court found that the Claimant was an innocent victim of crime, free from contributory misconduct. Award of $2,772.33. . . . . p. 342

ECONOMIC LOSS

MILLER, JODY A. (CV-09-0212)

Claimant's deceased daughter, Heather Miller, was a victim of criminally injurious conduct on March 25, 2008, in Wheeling, Ohio County. The victim was traveling in a vehicle being operated by the alleged offender, Justin Kerns, when the vehicle left the road and rolled. Both the victim and the offender were intoxicated at the time of the accident, and the victim died as a result of the injuries she sustained. The Claimant sought to recover dependents' economic loss because she and her husband would have depended on the victim to provide for them in their elder years. A collateral source was available to the Claimant upon the victim's death in the amount of $220,775.57, which exceeds the maximum award available for death benefits through the fund ($50,000). Thus, the economic loss that Claimant sought to recover is not compensable under W. Va. Code § 14-2A-14(f). Claim disallowed . . . . . p. 319

SMITH, THOMAS FENTON JR. (CV-07-0497)

The 38-year-old Claimant was shot in the leg by an assailant in Pennsboro, Ritchie County. He subsequently lost part of the leg due to infection. Awards totaling $3,203.09 were granted for the Claimant's medical expenses. At issue upon appeal was whether the Claimant was entitled to recover additional out-of-pocket expenses for:

reconstruction of his porch for wheelchair-accessibility; installation of a downstairs shower; child care costs; in-home health care costs; purchase of a refrigerator to store his medications; the cost of miscellaneous medical supplies; vacation pay for his wife; and travel expenses related to his medical care. The Court approved the costs for the porch reconstruction, downstairs shower, and refrigerator. The Court found that the child care and in-home health care were provided by relatives, not certified providers, and that the wife's vacation pay was not an allowable expense under the statute. Medical supplies and mileage expenses were ruled compensable if the proper documentation is later submitted. Award of $5,280.07. . . . . p. 339

METHAMPHETAMINE

FLECK, HARVEY ALLEN (CV-08-0664-X)

Claimant's property, which was occupied by his stepson, was found to have been contaminated by the manufacture of methamphetamine. No award was recommended because the Claim Investigator found that since the Claimant lived next door to the residence where the drug-making paraphernalia was discovered, it was unlikely that he did not know that a clandestine drug laboratory was in operation. Claimant testified that he rarely had occasion to visit the residence and did not know what methamphetamine was or the materials used to make it. The Court found that Claimant met his burden of proving by a preponderance of the evidence that he was in fact oblivious to the illegal activity, and therefore was entitled to an award. Award of $5,000.00. . . . . p. 315

OXLEY SR., ROBERT (CV-08-0656-Y)

Claimant's property, which was occupied by his son and the son's girlfriend, was found to have been contaminated by the manufacture of methamphetamine. The Claimant testified that he was unaware that his son was involved in methamphetamine production until sometime subsequent to his son's arrest. Since the cost to have the property demolished was substantially less than the cost to have the property decontaminated, Claimant decided to demolish the property. The Court found that Claimant did not have knowledge of his son's use or manufacture of methamphetamine. Further, the Court found that even though Claimant had the property demolished, Claimant was still entitled to an award. Award of $5,000.00. . . . . p. 310

UNDERWOOD, TINA M. (CV-08-0678-Z)

Claimant's deceased mother's property was damaged by the operation of a methamphetamine laboratory. No award was recommended by the Claim Investigator because it was believed that an award would unjustly benefit the offender, Karla Underwood, the sister of the Claimant, who occupied the property and was charged with operating a methamphetamine labratory. Claimant testified that her mother passed away in 2006 and willed her property to the Claimant and the offender; however, the property was never transferred to them. Although the Claimant was not in fact the owner of the property, she demonstrated that she voluntarily paid the obligations of her deceased mother, and thus qualified as a Claimant entitled to compensation. The Court further found that the offender, Claimant's sister, would not unjustly benefit from an award. Award of $5,000.00. . . . . p. 316

STATUTE OF LIMITATIONS

HALE, MARILYN A. (CV-05-0623)

On March 2, 2002, the Claimant was the victim of criminally injurious conduct in Charles Town, Jefferson County. The Claimant was driving her friend's vehicle on WV Route 340 when a vehicle being driven by a drunk driver collided with the rear of the vehicle she was driving. The Claimant filed an application for compensation under the Crime Victims Compensation Act on December 16, 2005. The Claim Investigator recommended that the claim be denied because it was filed more than two years from the date of the criminally injurious conduct. The Claimant testified that she filed a claim in 2002, but moved a number of times before filing this second claim in December 2005. The issue before the Court on appeal was whether the Claimant's application was filed within the two-year statute of limitations. Although the Court was sympathetic to the Claimant, no evidence was submitted to establish that the claim was filed prior to the expiration of the two-year statute of limitations. Claim disallowed. . . . . p. 296

VAUGHAN, PETER S. III (CV-08-0666-Z)

The 55 year-old Claimant was the victim of criminally injurious conduct on October 29, 2006, in Huntington, Cabell County. This claim was initially denied because the application was not filed until October 30, 2008, more than two years after the date of the criminally injurious conduct, beyond the statute of limitations. Claimant testified that he was aware of the two-year statute of limitations, and went to the Cabell County Prosecutor's Office to speak with a victim's advocate who advised the Claimant that she would prepare an application for him to sign the next day. Claimant testified that he discussed the statute of limitations with the victim advocate, who told him that she would fax the application if necessary. Although the Court was sympathetic to the Claimant, the evidence submitted established that the claim was received by the Court on October 30, 2008, one day past the filing deadline, by regular mail. Claim disallowed. . . . . p. 315