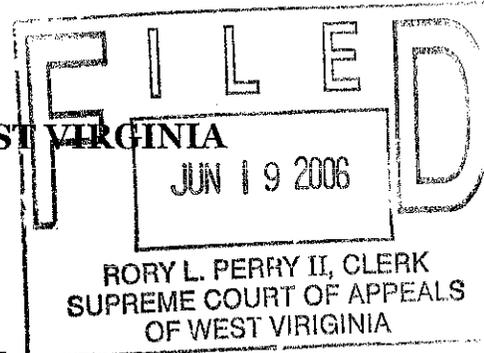


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 33095



**State of West Virginia ex rel.  
WEST VIRGINIA DEPARTMENT OF  
TRANSPORTATION, DIVISION OF HIGHWAYS,  
a Public Corporation, and FRED VANKIRK, P.E.  
SECRETARY/COMMISSIONER OF HIGHWAYS, Petitioners**

**vs.**

**THE HONORABLE DONALD H. COOKMAN,  
Judge of the Circuit Court of Hardy County, and  
FORT PLEASANT FARMS, INC., Respondents**

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**RESPONSE TO PETITION FOR WRIT OF PROHIBITION**

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## I. INTRODUCTION

This is the response by the Respondent, Fort Pleasant Farms, Inc. [Fort Pleasant], to a petition for writ of prohibition by the Petitioners, the West Virginia Department of Transportation, Division of Highways [DOT], and Fred VanKirk, P.E., Secretary/Commission of Highways [Secretary VanKirk], arising from a ruling of the Respondent, the Honorable Donald H. Cookman, Judge of the Circuit Court of Hardy County [Judge Cookman], in a discovery dispute. Fort Pleasant respectfully submits that Judge Cookman did not abuse his discretion by ordering the production of relevant appraisals of neighboring properties in an condemnation proceeding.

## II. STATEMENT OF FACTS

On June 1, 2004, DOT condemned 48.24 acres of commercial land owned by Fort Pleasant located within the municipal limits of Moorefield and zoned C-3 (highway commercial). The acquisition was for Corridor H, a federally-assisted highway project. The taking severed diagonally Fort Pleasant's 160 acre parcel of land, landlocking 13.58 acres (south residue). The taking also included approximately 2.5 million yards of fine, fissel shale in a DOT designated quarry area, within part of land taken, as well as part of the residue.<sup>1</sup> The taking further damaged the remaining 98 acre north residue by preventing the use of the shale deposit for sale or use for fill, filling, eliminated one access road thereto, and diverted additional surface water onto the property.

Initially, on June 1, 2004, DOT deposited \$189,340 as estimated just compensation. Subsequently, the DOT deposited an additional \$102,200. Later, DOT deposited another

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<sup>1</sup>The shale is of good, road building quality, and was used to build the highway through Fort Pleasant's property.

\$73,386.16. Finally, on August 8, 2005, DOT made a fourth deposit of an additional \$35,743.79. The total of the DOT's deposits is currently \$400,855.95. No explanations were given for the changes in the estimated compensation.

In contrast to the approximately \$400,000 deposited by DOT, Fort Pleasant's valuations are between \$2.6 million and \$3 million for the fair market value of the commercial property taken, damaged, and landlocked, including a contributing overall mineral value of approximately \$1 million. Ultimately, a commissioners' hearing was conducted, resulting in a verdict of \$1,100,600, to which both parties filed exceptions.

In November 2004, Fort Pleasant filed its First Set of Interrogatories and Request for Production of Documents. In Interrogatory No. 2, Fort Pleasant asked Petitioners to identify every expert witness or potential expert witness with whom Petitioners had consulted or communicated, whether or not such person was intended to be used as a witness. DOT did not object to this interrogatory and identified several individuals in response thereto.

Fort Pleasant's Interrogatory No. 4 then asked DOT to identify each such person who appraised any other properties for the DOT located within one mile of the subject property, and requested a copy of all appraisal reports as to said properties. DOT objected to this interrogatory as "irrelevant and acceptably burdensome," arguing that it would have to produce copies of forty-six (46) appraisal reports. Eventually, Fort Pleasant withdrew Interrogatory No. 4, which requested appraisals of other properties within one mile of the subject property and, on October 27, 2005, filed interrogatories and request for production, which restated Interrogatory No. 1 as previously tendered, but limited the request contained in former Interrogatory No. 4 (now Interrogatory No. 2), to reports of witnesses herein, as

to other properties they appraised or evaluated for DOT, located within only one-half mile of the subject property. This time, however, DOT objected to Interrogatory No. 1, as well as to Interrogatory No. 2, which requested copies of all appraisal reports and evaluations from expected witnesses, as to properties within one-half mile of the subject property.

Fort Pleasant has reason to believe that DOT may be withholding reports or evaluations, or developing other appraisals or evaluations, in view of (1) the four separate deposits of estimated just compensation; (2) DOT's efforts in pleadings to distinguish "evaluations" from "appraisal" reports; and (3) DOT's request for further entry on the property for survey and other work in the quarry area, but refusal to provide specific reasons or provide the results or reports relating to this recent entry.

Accordingly, Fort Pleasant moved to compel answers to these interrogatories and the production of (1) all appraisal reports and other evaluations made on the subject property and (2) appraisal reports and evaluations made by DOT's expert witnesses herein as to properties located within one-half mile of the subject property.

This motion was granted on April 13, 2006. In his ruling, Judge Cookman found that such reports and evaluations, as well as the production of appraisals of other properties in close proximity to the subject property, and near in time to the date of taking, constituted proper discovery, regardless of whether or to what extent the same may be used at the jury trial. Further, Judge Cookman ruled that the obligation would be mutual and binding upon Fort Pleasant. The Respondent respectfully submits that, in a condemnation proceeding, Judge Cookman did not abuse his considerable discretion in granting access to this information.

### III. DISCUSSION OF LAW

#### A. THE STANDARD OF REVIEW.

A “writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has no jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers.” W. Va. Code § 53-1-1. After looking “to the adequacy of other available remedies such as appeal and to the over-all economy of effort and money among litigants, lawyers and courts,” Syl. pt. 1, in part, *State ex rel. Amy M. v. Kaufman*, 196 W. Va. 251, 470 S.E.2d 205 (1996) (quoting Syl. pt. 1, *Hinkle v. Black*, 164 W. Va. 112, 262 S.E.2d 744 (1979)), this Court will use prohibition “to correct substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate and that may be resolved independently of any disputed facts where there is a high probability that the trial will be completely reversed if the error is not corrected in advance,” *Id.* (quoting Syl. pt. 1, *Hinkle*).<sup>2</sup>

This Court applies a five-part test to determine whether issuance of a writ of prohibition is appropriate in a particular case:

In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1)

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<sup>2</sup>See also Syl. pt. 3, *State ex rel. State Auto Ins. Co. v. Risovich*, 204 W. Va. 87, 511 S.E.2d 498 (1998) (“The prohibition standard set out in [Syl. pt. 1, *Hinkle*], permits an original prohibition proceeding in this Court to correct substantial legal errors where the facts are undisputed and resolution of the errors is critical to the proper disposition of the case, thereby conserving costs to the parties and economizing judicial resources.” (citation omitted) (quoting Syl. pt. 1, *State ex rel. Allstate Ins. Co. v. Karl*, 190 W. Va. 176, 437 S.E.2d 749 (1993))).

whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

Syl. pt. 4, *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996).

This Court's standard for the exercise of its prohibition jurisdiction in matters involving discretionary discovery rulings is very deferential. See Syl. pt. 2, *State ex rel. Wausau Business Ins. Co. v. Madden*, 216 W. Va. 776, 613 S.E.2d 924 (2005) ("When a discovery order involves the probable invasion of confidential materials that are exempted from discovery under Rule 26(b)(1) and (3) of the West Virginia Rules of Civil Procedure, the exercise of this Court's original jurisdiction is appropriate." Syl. Pt. 3, *State ex rel. U.S. Fidelity and Guar. Co. v. Canady*, 194 W. Va. 431, 460 S.E.2d 677 (1995); Syl. 3, *Wausau, supra* ("A writ of prohibition is available to correct a clear legal error resulting from a trial court's abuse of its discretion in regard to discovery orders." Syl. Pt. 1, *State Farm v. Stephens*, 188 W. Va. 622, 425 S.E.2d 577 (1992)."). In the instant case, no confidential or privileged materials are involved and there was no clear legal error or abuse of discretion in the compelled disclosure of expert appraisals of neighboring properties.

Likewise, the five factors in *Hoover* are not present. First, DOT still has the remedy of a motion in limine to exclude the subject appraisals and/or evaluations of the neighboring

properties if appropriate under the Rules of Evidence. Second, if cross-examination is permitted using the documents in violation of the Rules of Evidence, DOT can have this Court address such issue in a subsequent appeal of any adverse judgment. Third, it cannot be said that Judge Cookman's ruling, based upon the liberal discovery provided by the Rules of Civil Procedure and the substantial discretion afforded trial judges in discovery matters, is "clearly erroneous as a matter of law." Fourth, there is no evidence that this case involves an oft-repeated error or that Judge Cookman has in any way demonstrated a persistent disregard for procedural or substantive law. Finally, as standards for discovery are well-established, this case presents no new or important problems of first impression. Accordingly, Fort Pleasant submits that this Court should decline to interfere in Judge Cookman's discovery ruling.

**B. JUDGE COOKMAN DID NOT ABUSE HIS DISCRETION BY ORDERING THE FULL AND FAIR DISCLOSURE OF ALL EXPERT APPRAISALS AND EVALUATIONS PERTAINING TO FORT PLEASANT'S AND NEIGHBORING PROPERTIES.**

**1. The Compelled Protection of DOT Evaluations and Appraisals Under the Circumstances of this Case is Consistent with Congressional Intent and the Sound Administration of Justice.**

Unlike other areas of the law, when government takes a landowner's home, business, or farm, the landowner is placed at a distinct disadvantage if he or she believes the government's offer is inadequate. In spite of the constitutional mandate that the government pay just compensation, the landowner bears the burden of proof to obtain just compensation. The landowner must retain and pay for attorneys, expert witnesses, and incur other expenses, which are not recoverable under West Virginia law. Accordingly, even if the landowner obtains a fair verdict and final judgment in excess of the government's offer,

the net award is offset by what are often substantial fees and expenses of proving the case. Accordingly, the landowner normally cannot obtain just compensation, even if he or she prevails.<sup>3</sup>

The Federal Uniform Relocation Assistance Act, however, codified in West Virginia law, does apply.<sup>4</sup> This Court has recognized that the application of this Act may help to level the playing field, pursuant to a Congressional mandate to insure fair treatment to landowners, and encourage an expeditious resolution without litigation. In a recent opinion, this Court held that the general purpose of the Act is “to encourage and expedite the acquisition of real property by agreements with owners, to avoid litigation and relieve congestion in the courts, to assure consistent treatments for owners in the many Federal programs, and to promote public confidence in Federal land acquisition practices . . . .” *West Virginia Department of Transportation v. Dodson Mobile Home Sales*, 218 W. Va. 121, 125, 624 S.E.2d 468, 472 (2005)(quoting 42 U.S.C. § 4651).

In the instant discovery dispute, Fort Pleasant requested that all experts consulted with or retained by DOT be identified, and that DOT produce all appraisals and other evaluations performed as to the subject property, regardless of whether or not such persons might be called as witnesses. Fort Pleasant believes the disclosure may encourage a resolution without the need for further litigation, and help level the playing field by ensuring

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<sup>3</sup>The playing field is leveled to some degree in federal takings, by the Equal Access to Justice Act, 28 U.S.C. § 2412, whereby a prevailing landowner can recover attorney fees and expenses in certain circumstances. This remedy is not afforded in a state condemnation.

<sup>4</sup>Uniform Relocation Assistance and Real Property Acquisition Policies for Federal and Federally Assisted Programs Property Acquisition Act, 42 U.S.C. §§ 4601-4655 (2000); W. Va. Code §§ 54-3-1 *et seq.*

that the DOT has produced, not just its lowest appraisal or only one of its mineral evaluations, but all of the appraisals and evaluations.<sup>5</sup>

In view of Congress' intent to assure fair treatment for landowners, the avoidance of litigation, the relief of court congestion, and the mitigation of the substantial disadvantage placed upon landowners, if good cause need be shown to compel the production of reports from non-testifying experts, then this mandate alone should provide such justification.

DOT concedes that this case is a complex one, Petition at 8, as confirmed by the four separate deposits of estimated compensation, the presence of complex mineral valuation issues, damage to residue issues, environmental and wetlands issues, and others. Discovery of the details of reports relating to the issues by way of interrogatory, or even deposition, without careful review of all reports associated therewith, would be virtually impossible.

Accordingly, Fort Pleasant believes that exceptional circumstances exist by virtue of (1) the application of the Uniform Relocation Assistance Act, (2) the complexities of the case at bar, and (3) the direct relevance of the requested discovery to the issue to be tried, to warrant the compelled production of these reports and evaluations.

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<sup>5</sup> In a recent Wood County case, *WV DOT v. Amsbary*, Civil Action No. 01-C-581, Judge Reed upheld a similar request and ordered the DOT to provide the landowner all appraisals made of the subject property, whether or not the appraiser would be utilized as a witness. Judge Reed found that in eminent domain cases, the landowner should be entitled to full and complete disclosure in this regard. Just days before trial, the DOT produced a competent and complete appraisal it had previously not disclosed, which concluded that the value of the subject property was exactly the same as the value of the property appraised by the landowner's expert witness. Upon this required disclosure, the case immediately settled for that amount, and would have settled much earlier with much less litigation and expense, had the DOT been forthcoming with its evaluations.

2. **The Compelled Protection of DOT Evaluations and Appraisals Under the Circumstances of this Case is Consistent with the Rules of Civil Procedure.**

DOT objects to providing appraisal reports performed by its experts for other properties acquired for this project which are located within one-half mile of the subject property. The intent of this request is to obtain and examine appraisals of other properties within or very close to the corporate limits of the City of Moorefield which were acquired for this project; to determine how the witnesses treated commercial property within or near city limits; to determine how sales were adjusted; and to determine the general effect on the value of properties within the city limits, having city utility services and other services, compared with more rural property not within city limits.

In spite of representing to the commissioners that the subject property was valued as commercial property, DOT's appraisals which have been produced show that the property was not appraised or valued as commercial property, but was valued using comparable sales of rural farmland, not even located in the same county. A comparison of methodologies and considerations afforded by DOT's witnesses, however, regarding neighboring properties, as compared with their findings, adjustments, or conclusions as to the subject property, is critically important.<sup>6</sup>

As noted in 32A CJS *Evidence* § 746: "An unrelated appraisal may be used to impeach the credibility of an expert valuation witness in a condemnation proceeding." As

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<sup>6</sup> As this Court has recognized, property outside the city limits should not be used as a comparable sale when valuing property which is located within the city limits. *Buckhannon & N.R.R. v. Great Scott Coal & Coke Company*, 75 W. Va. 423, 83 S.E. 1031 (1914).

further noted in *Sullivan v. State*, 292 N.Y.S.2d 244, 247 (1968): “[A]ll prior appraisals prepared by an expert witness called to testify or by the appraisal firm by whom that appraiser is employed must be produced upon proper demand. Such appraisals are admissible, if relevant and germane to the proceeding, when utilized to impeach said witness’ credibility by developing prior statements inconsistent with his testimony at the trial.” Further, as noted in 32 C.J.S. *Evidence* § 708: “In a proper case an appraiser may be cross-examined concerning the amount at which similar neighboring land was appraised by him at a time not too remote.” (citing *City of Chicago v. Merton Realty*, 424 N.E.2d 1326 (Ill. App. Ct. 1981); *Commonwealth Dep’t of Highways v. Eubank*, 369 S.W.2d 15 (Ky. Ct. App. 1963)).

It is well-established that evaluation of neighboring properties is a proper subject of an appraiser’s cross-examination. In *State v. Hartman*, 338 S.W.2d 302, 310 (Tex. Civ. App. 1960), for example, the court held that an expert witness in a condemnation action may be cross-examined with respect to a prior appraisal of property in the vicinity of the subject property if a foundation has been laid for comparison of the different tracts appraised. Likewise, as noted in *Board of County Commissioners v. H.A. Nottingham & Sons, Inc.*, 36 Colo. App. 265, 540 P.2d 1126, 1128 (1975): “Sufficient foundation for cross-examination of an expert as to the appraisals of other property which he has made in the area is laid where it is shown that (1) the appraisal is of a piece of property he has determined to be comparable or involves similar property in the neighborhood of the condemned property, and (2) the appraisal is not too remote in time.” (citations omitted). See also *Ryan v. Davis*, 109 S.E.2d 409, 413 (Va. 1959) (“May an expert witness be questioned on cross-examination

as to prior inconsistent appraisals? . . . It is elementary that such cross-examination was proper.”)(citing NICHOLS ON EMINENT DOMAIN).

In 5 NICHOLS ON EMINENT DOMAIN § 23-08[2], it is further noted, “Cross-examination of the expert as to other appraisals conducted by him of neighboring land at a time which is not too remote is permissible.” (Emphasis supplied). Citing *Nottingham, supra*, Professor Nichols noted the Court’s statement that: “One of the few means a condemnee has to question the credibility of the condemnor’s expert witness, other than by contradictory testimony by other witnesses, is to show that the expert has made other inconsistent appraisals of the comparable or of similar neighboring land at a time which is not too remote to provide a reasonable comparison.” *Id.* at 23-105. (Emphasis supplied). Plainly, there is considerable support for the proposition that an appraisers evaluations of neighboring properties is a proper subject of cross-examination.

Fort Pleasant cannot help but note the irony of the DOT’s reliance upon this Court’s decision in *Dept. of Highways v. Brumfield*, 170 W. Va. 677, 295 S.E.2d 917 (1982). Petition at 7. In *Brumfield*, the DOH presented expert testimony which the landowners discovered, following a trial, to have been fabricated:

Golden testified that the value of the appellants’ three parcels of property was \$50,500. He stated that he had reached his opinion by comparing sales of other property in the same vicinity as the appellants’. Although Golden indicated that he investigated approximately thirty sales, he testified as to four particular sales: the Reese to Riffe sale, the Welch to Bays sale; the Garrin to Brunton sale, and the Mynes to Mayes sale. For each sale, Golden testified that he spoke with the buyer and that the sale was an arms-length transaction, and in three cases, that the houses were in good condition, superior to that of the appellants’ structures. Upon comparing the sale prices and the

houses' conditions, Golden arrived at his opinion of the appellants' property's value.

After the trial, an investigation into Golden's testimony was made, and, upon that investigation, the appellants submitted deeds and affidavits representing newly-discovered evidence controverting and discrediting Golden's testimony. The affidavits and deeds represented the following, all in contradiction to Golden's testimony: (1) in the Welch to Bays sale, Golden had never spoken with Bays concerning his purchase, and the condition of the house when sold to Bays was poor; (2) in the Garrin to Brunton sale, the buyers had purchased the property at a public sale by auction at the Cabell County Courthouse and the sellers were in fact three special commissioners; (3) in the Mynes to Mayes sale, the applicable deed contained a reservation affecting the property, the property's condition was "terrible" and the sale was made in order to settle an estate.

*Id.* at 678, 295 S.E.2d at 919. This Court observed that this was permitted to happen because, at the time the case was litigated, the Rules of Civil Procedure did not apply to condemnation proceedings:

At the heart of the problem in this case is the fact that condemnation cases are not subject to any of the discovery provisions in our Rules of Civil Procedure (RCP). Consequently, the situation, as evidenced by this case, arises where neither side in a condemnation case has any ability to determine what theory the other party will advance at trial nor any advance knowledge of what the general fact basis will be for the other party's expert testimony. Because a condemnation case centers primarily over the value of the property taken, it has historically been a case in which experts in property values are called upon to give testimony.

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There is uniform agreement that one of the salutary purposes of discovery procedures is to enable parties to obtain relevant information about the other party's case. This is designed to prevent the trial from becoming one of ambush. In addition, pretrial discovery permits each party to make a realistic

evaluation of his case in light of the discovery obtained from the opposing party, promoting the possibility of settlement. Settlements will, of course, decrease the legal costs and fees to all parties and will result in judicial economy, all of which are desirable goals in any legal system. Finally, pretrial discovery also serves to expose spurious and exaggerated claims.

*Id.* at 681-83, 295 S.E.2d at 922-23. (Emphasis supplied and footnote omitted). Nevertheless, in the face of an exemption of condemnation proceedings from the Rules of Civil Procedure, this Court amended the Rules of Civil Procedure in the *Brumfield* opinion, holding in Syllabus Point 4 that, “The discovery rights contained in Rule 26(b)(4), West Virginia Rules of Civil Procedure, are extended to eminent domain cases, such rights are enforceable through the discovery sanctions contained in Rule 37, West Virginia Rules of Civil Procedure.” Shortly after the *Brumfield* opinion, this Court amended the Rules of Civil Procedure to completely abrogate Rule 81(c) and now, DOT’s “limited” discovery argument notwithstanding, all of the Rules of Civil Procedure apply to condemnation proceedings.

DOT also relies upon R. Civ. P. 26(b)(4)(B) which states, “A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.” This rule, however, offers the DOT little comfort in this case. Some of the appraisals and/or evaluations have undoubtedly been prepared by DOT experts whom the DOT will call as witnesses at trials in cases

involving the neighboring properties.<sup>7</sup> Moreover, the “exceptional circumstances” referenced in the rule are self-evident as there is no other way for Fort Pleasant to discern

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<sup>7</sup>With respect to these testifying experts, the “exceptional circumstances” standard does not apply:

Though the usual application of (b)(4)(A)(ii) is in ordering a deposition of an expert, see, e. g., *Herbst v. International Telephone & Telegraph Corp.*, 65 F.R.D. 528 (D. Conn. 1975), I see no reason not to apply the rule in the context of a Rule 34 document production request as well. Expert testimony will undoubtedly be crucial to the resolution of the complex and technical factual disputes in this case, and effective cross-examination will be essential. Discovery of the reports of experts, including reports embodying preliminary conclusions, can guard against the possibility of a sanitized presentation at trial, purged of less favorable opinions expressed at an earlier date.

*Quadrini v. Sikorsky Aircraft Division*, 74 F.R.D. 594, 595 (D. Conn. 1977)(footnote omitted); see also *Hewlett Packard Co. v. Bausch & Lomb, Inc.*, 116 F.R.D. 533, 536-37 (N.D. Cal. 1987)(“Many courts have construed this subparagraph to authorize orders compelling experts to disclose not only the opinions they hold, but also all the documents the expert generated or examined in the process of forming those opinions. See, e.g., *Quadrini v. Sikorsky Aircraft, supra*, and *Eliassen v. Hamilton*, 111 F.R.D. 396, 400, note 5 (N.D. Ill. 1986). In particular, this subparagraph has been used as the source of authority to order disclosure of drafts of reports or memoranda experts have generated as they develop the opinions they will present at trial. *Quadrini v. Sikorsky Aircraft, supra*. It is significant that the principal rationale for ordering disclosure of such material is to better equip opposing counsel to cross-examine the expert. . . . For example, in *Quadrini v. Sikorsky Aircraft, supra*, Judge Newman supported his disclosure order with the following observation: ‘Expert testimony will undoubtedly be crucial to the resolution of the complex and technical factual disputes in this case, and effective cross-examination will be essential. Discovery of the reports of experts, including reports embodying preliminary conclusions, can guard against the possibility of a sanitized presentation at trial, purged of less favorable opinions expressed at an earlier date.’ 74 F.R.D. at 595.”).

if the testifying experts in this case are using methodologies different from those used for neighboring properties without access to the appraisals and/or evaluations.<sup>8</sup>

It is also unclear, at this point, as to whether DOT's testifying experts may have been provided the appraisals and/or evaluations of its non-testifying experts. What is clear, however, is that if such documents have been provided, they would clearly be discoverable for purposes of the cross-examination of DOT's testifying experts. *See, e.g., Douglas v. University Hospital*, 150 F.R.D. 165 (D. Mo. 1993)(even where physician was originally retained as non-testifying expert, once medical malpractice plaintiff turned physician's letter over to trial expert, and expert reviewed letter in forming his opinion, letter became discoverable); *Heitmann v. Concrete Pipe Machinery*, 98 F.R.D. 740 (D. Mo. 1983)(non-testifying expert's report was subject to discovery where it was needed for effective cross-examination of testifying expert who relied upon the report).

Accordingly, Judge Cookman's ruling requiring the production of all appraisals made by DOT's experts of properties within one-half mile of the subject and one year before or after the date of take, should be sustained.<sup>9</sup>

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<sup>8</sup>Consequently, the cases relied upon by DOT such as *State ex rel. Michael v. Henry*, 177 W. Va. 494, 354 S.E.2d 590 (1987); *Barnes v. City of Parkersburg*, 100 F.R.D. 768 (S.D. W. Va. 1984); and *Marine Petroleum Co. v. Champlin Petroleum Co.*, 641 F.2d 984 (D.C. Cir. 1979), are completely inapposite.

<sup>9</sup>Indeed, the DOT should be willing and anxious to provide full and complete disclosure to all landowners affected by a public project, share with them the appraisals, and make every effort to avoid unnecessary litigation in many instances. In *West Virginia Dept. of Transp., Jefferson County Civil Action No. 04-C-159*, for example, the court addressed nearly the identical discovery issue, and referred the matter to a discovery commissioner, the Honorable Patrick G. Henry, III. In his Order entered on January 12, 2006, the Honorable Thomas W. Steptoe, Jr., ratified the discovery commissioner's ruling that the DOT must produce the appraisal performed in connection with the subject taking as well as the appraiser's valuations of any other properties within one-half mile of the subject property. [Ex. A].

**3. The Compelled Protection of DOT Evaluations and Appraisals Under the Circumstances of this Case Does Not Violate Federal Law and Will Have a Beneficial, Not a Deleterious Effect, on Condemnation Proceedings.**

DOT raises a number of arguments in an effort to prevent the full and fair disclosure of proper discovery to the landowner. Incredibly, DOT asserts that it is prohibited by federal law from providing the subject reports and evaluations. The provisions of the Uniform Relocation Assistance Act they cite do not so provide, however, and do not preclude proper discovery as otherwise provided by law. Indeed, the intent of the Act is to accomplish the exact opposite, i.e., to afford landowners full and fair treatment. DOT's contention that the Act does not require DOT to produce appraisals, while a correct statement, clearly is not a prohibition on the production of the appraisals. The Rules of Civil Procedure do not specifically require the production of tax records, medical records, employment records, accounting records, and a host of other categories of documents that are routinely produced in litigation. The fact that the Uniform Relocation Assistant Act does not specifically require the production of an appraiser's evaluations of neighboring properties, likewise, is a red herring.

Originally, DOT objected to the one-mile radius discovery because it would require the production of forty-six (46) reports, which DOT asserted, despite the advent of the photocopier, would be burdensome. In order to accommodate DOT's objection, however, Fort Pleasant narrowed its request to a one-half-mile radius, which implicates only thirteen (13) reports, which apparently will be less burdensome on the DOT's photocopier as it no longer objects on that ground. Instead, DOT now argues that to do so would result in

increased litigation and adversely affect efforts to negotiate the voluntary sale of properties. Just the opposite would be the case in the opinion of Fort Pleasant.

If DOT made a full and open disclosure to affected landowners, going over all of the appraisal reports with them, in the course of negotiations, there would be decidedly less need for litigation, and many more landowners would be satisfied with the integrity and fairness of the evaluation process. The DOT's current practices, however, create distrust and suspicion, and in fact produce the opposite result. In providing only a one page statement of just compensation, and refusing to even let the landowners look at appraisal reports, then threaten them with litigation at their expense if they do not sign, alienates landowners, and does nothing to instill confidence and trust in the system.

While full and open disclosure might lead to a modification in DOT policies, such as eliminating the often used practice of concealing higher or different appraisals from the landowners and using former DOT employees and retirees as "review appraisers" to "adjust" appraisal reports made by independent appraisers, such result would certainly not be improperly prejudicial, and would benefit all parties and the Court, in terms of more timely resolution of cases and the voluntary acquisition of many more properties without litigation.

Fort Pleasant understands that, at the present time, there are more than sixty (60) condemnation lawsuits pending in the Circuit Court of Hardy, West Virginia. Are all of these landowners simply greedy? Or, are these landowners so dubious of the DOT's offers when they cannot inspect the documentation upon which the DOT relies in making those offers. Just as consumers who equip themselves with the invoice price are better able to intelligently and efficiently negotiate the purchase of a new car with a dealership, a

landowner who has access to the DOT's information will be better equipped to negotiate that to which they are constitutionally-entitled.

Frankly, Fort Pleasant is somewhat perplexed as to the DOT's arguments. DOT asserts, "If left undisturbed, Respondent's rulings . . . will have a chilling effect upon Petitioners' statutory right to take private property for public use." Petition at 1. DOT never explains how giving landowners' access to DOT appraisals and evaluations of adjoining properties "will have a chilling effect." If DOT needs to take property, for example, to build a road, it is required to pay the property owner just compensation. In order to determine the amount of that just compensation, DOT employs qualified appraisers, who issue evaluations and appraisals based upon a substantial number of factors. If there is a subsequent disagreement between DOT and the landowner regarding valuations, providing a copy of any evaluation or appraisal of both the subject property and adjoining properties will increase the likelihood that the ultimate resolution of any dispute over valuation will be made with the most pertinent information available to both parties.

How will this process unfairly prejudice DOT? DOT states that, "Failing to recognize that each parcel of real estate is unique . . . condemnees, who are not generally schooled in the intricacies [sic] of valuation of real estate, will believe that their property should receive the same valuation as their neighbor's property." Petition at 2. This makes no sense when one considers that the production of reports on neighboring properties would arise only in litigation where property owners are usually represented by counsel and have hired their own appraisers. No one is suggesting that DOT has an obligation, upon request, to provide landowners a copy of evaluations or appraisals of neighboring properties. Rather, in the context of litigation where such evaluations or appraisals may, under the circumstances, be

relevant or may lead to the discovery of relevant evidence, it is within a trial court's discretion to order their disclosure.

Nothing will preclude DOT from presenting argument or evidence that adjoining properties have unique characteristics that make them more valuable. Likewise, nothing should preclude a landowner from presenting argument or evidence that such characteristics inadequately explain any differences in valuations asserted by DOT. It would indeed be ironic in a system where mass tort panels routinely involve multiple parties and the sharing of information for DOT to receive special protection from the obligation of disclosing relevant evidence regarding neighboring properties in a single, integrated project.

Fort Pleasant respectfully submits that the Supreme Court of Utah was correct when it engaged in the following analysis of how the rules of discovery should apply in condemnation proceedings:

It is the source of the information rather than the intent to make the communication confidential which determines whether it is privileged. A real estate appraiser who obtains his information by viewing the adversary's property by recourse to public records of permitted land use, and from comparable sales, is not transmitting a client's confidence. The condemnor's appraisal report is subject to pretrial discovery, and does not lie within the aegis of the attorney's work-product immunity. This is so because of the unique nature of a condemnation action.

. . . A condemnation case is unique in that the pleadings do not contain the parties' contentions as to compensation, hence there is no basis for discovery relating to pleading and in many respects the defendant is in the position of a plaintiff, since he has the burden of proof as to compensation. . . .

Discovery of a report prepared by an expert engaged by an adverse party has been denied on the basis of unfairness to the party who engaged the expert. This policy is reflected in Rule

26(b)(4)(A) U.R.C.P., where a party is allowed to discover the facts known and opinions held by an expert only upon a showing of exceptional circumstances or upon a showing that manifest injustice would result unless discovery is permitted.

However, this Court has acknowledged the special circumstances involved in a condemnation case, viz., the State is suing a private individual and undoubtedly has caused an appraisal of the property to be made. Under such circumstances, it is both practical and just that discovery be liberally permitted.

Further illustration is found in *Shell v. State Road Department*; the court ruled the appraisal reports of the State in a condemnation proceeding were subject to pretrial discovery. The court stated:

Nevertheless, conceding that in private litigation the reports and opinions of experts should be considered a "work product" exempt from compulsory discovery, we are convinced that the "work product" immunity should not extend to the type of information sought in this eminent domain proceeding. We realize that the rule pronounced herein with reference to condemnation proceedings is diametrically opposite to the prevailing rule in ordinary litigation. However we are convinced that there is no inconsistency because both rules are based upon sound public policy when the sphere in which each operates is properly analyzed.

The court cited the exhortation in its Rules of Civil Procedure, which is similar to Rule 1(a), U.R.C.P. that the rules "shall be (liberally) construed to secure the just, speedy, and inexpensive determination of every action." The court admonished that in a condemnation proceeding the property of the land owner is subject to taking by the condemnor without the owner's consent. The condemnee is a party neither through fault nor volition of his own. The court cited Florida's constitutional provision providing for just compensation to an owner for the taking. (Just compensation is required in Art. I, s 22, Constitution of Utah.) The court observed that in view of this constitutional provision, the awarding of just compensation should be the care of the condemning authority as well as that of the condemnee. The court further observed:

Unlike litigation between private parties condemnation by any governmental authority should not be a matter of "dog eat dog" or "win at any cost." Such attitude and procedure would be decidedly unfair to the property owner. He would be at a disadvantage in every instance for the reason that the government has unlimited resources created by its inexhaustible power of taxation. Moreover it should be remembered that the condemnee is himself a taxpayer and as such contributes to the government's "unlimited resources."

Considering the nature of the condemnation proceedings, we hold that there is no violation of the essential requirements of law in compelling the State Road Department to produce in advance of trial information bearing on the issue of "just" compensation.

We do not believe this procedure will place the State Road Department at a disadvantage in trying its case. We can envisage no "unfairness" to this governmental agency. If the governmental unit or agency is seeking to effectuate the "summum bonum," as it should in every condemnation suit, there is no justification for cutting corners or being secretive to the possible detriment of the individual land owner whose property is being taken from him against his will.

It may be that the condemnor will derive an advantage by disclosing these pertinent matters prior to trial. It might develop that the condemnee, after learning the basis for the evaluation of his property, will decide to settle the issues without going to trial, thereby resulting in a "speedy and inexpensive determination" of the case.

*Utah Dept. of Transportation v. Rayco Corp.*, 599 P.2d 481, 492-93 (Utah 1979)(emphasis supplied and footnotes omitted). The foregoing analysis stands in stark contrast to the "dog eat dog" and "win at any cost" attitude of the DOT in this case.

Likewise, in *State v. Leach*, 516 P.2d 1383, 1384-86 (Alaska 1973), the Supreme Court of Alaska engaged in a similar analysis under circumstances nearly identical to the instant case:

Petitioner filed a condemnation action against property owned by respondent Leach. Prior to the filing of the discovery motion now questioned, the state had provided respondents with an appraisal report on the condemned property made by an appraiser whom the state intended to call as a witness at trial. The state refused, however, to provide respondents with any appraisal reports pertaining to the condemned property prepared by experts whom the state had retained but did not intend to call as witnesses. Thereafter respondents sought, pursuant to Alaska's discovery rules, an order for the production of all expert appraisal reports concerning the condemned property in the possession of petitioner.

The superior court granted the motion and entered an order directing the state to furnish respondents with copies of all expert appraisals regarding the property in question. We have determined to grant petitioner's request for review of the superior court's discovery order.

Alaska Civil Rule 26(b)(4)(B) provides:

A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of *exceptional circumstances* under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(emphasis added).

Petitioner argues that under that portion of Rule 26(b)(4)(B) which requires a showing of 'exceptional circumstances' as a prerequisite for discovery of the expert's opinions, the showing made in the case at bar simply is not supportive of the discovery ordered by the lower court.

We conclude, as did the superior court, that the very nature of a condemnation case in and of itself constitutes 'exceptional circumstances' within the intendment of Civil Rule 26(b)(4)(B) and therefore justifies the superior court's discovery order. . . .

Support for the trial court's ruling is found in *United States v. Meyer*, 398 F.2d 66 (9th Cir. 1968). Meyer was a federal condemnation case which was decided before adoption of the 1970 amendments to the federal rules of discovery, but considered these amendments in its reasoning. The court in Meyer concluded that condemnation cases possess uniqueness because of their reliance upon expert opinion as to value. There the court noted that in a condemnation case it will rarely be possible to make a showing of 'exceptional circumstances' under which it is impracticable to obtain other opinions on the same subject because a litigant will not know what facts the opposing party's experts have discovered and what opinions they have formed. By way of dicta, Judge Browning in Meyer observed that:

(A)ppraisers not called as witnesses may have discovered facts, applied techniques, or arrived at opinions which, though not acceptable to the government, were nevertheless relevant to the subject matter of the litigation and helpful to the landowner. It would be intolerable to allow a party to suppress unfavorable evidence by deciding not to use a retained expert at trial.

We also call attention to Chief Justice Ervin's dissenting opinion in *Pinellas County v. Carlson*, 242 So.2d 714, 720 (Fla.1970). The Chief Justice noted that 'disclosure in a condemnation case of the information possessed by an adverse party's appraiser no doubt comports with the overriding purpose of our procedural rules 'to secure the just, speedy and inexpensive determination of every action.' Id. at 721 (footnote omitted). The goal in a condemnation proceeding is the payment to the condemnee of 'just compensation' and not the withholding of relevant information to enhance the government's position in the litigation.

[Emphasis supplied and footnotes omitted]. Again, a condemnation proceeding is unique and, because of its constitutional nature, justifies any finding of the "exceptional

circumstances” necessary for the compelled disclosure of all of the government’s relevant appraisals and reports.

DOT further argues that the appraisals and other evaluations are confidential, and cannot be produced pursuant to Federal law, citing 49 C.F.R. § 24.9, Petition at 17. This argument is without merit. The regulation states, “The Agency shall maintain adequate records of its acquisition and displacement activities in sufficient detail to demonstrate compliance with this part. These records shall be retained for at least 3 years after each owner of a property and each person displaced from the property receives the final payment to which he or she is entitled under this part, or in accordance with the applicable regulations of the Federal funding Agency, whichever is later.” 49 C.F.R. § 24.9(a). Thus, the regulations contemplate that records be maintained. Presumably, one of the reasons for maintaining those records is for the purpose of any litigation or subsequent discovery. The regulation also states, “Records maintained by an Agency in accordance with this part are confidential regarding their use as public information, unless applicable law provides otherwise.” 49 C.F.R. § 24.9(b). This “public information” confidentiality goes only to the accessibility of these records to third parties via Freedom of Information Act requests. Obviously, it would be inappropriate for information purveyors, for example, to gain access to these records for compilation, distribution, and private profit.<sup>10</sup> On the other hand, the language “unless applicable law provides otherwise” was intended to allow the disclosure of this information, for example, in the context of civil or criminal litigation under the applicable procedural rules. *See, e.g., Syl. pt. 3, Martino v. Barnett*, 215 W. Va. 123, 595 S.E.2d 65 (2004)(“Through a judicial process exception, the Gramm-Leach-Bliley Act and

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<sup>10</sup>*See, e.g., City of Reno v. Reno Gazette-Journal*, 63 P.3d 1147 (Nev. 2003).

the Privacy Rule of the West Virginia Insurance Commission allow the use of any judicial process expressly authorized by statute or court rule, whether by way of discovery or for any other purpose expressly authorized by law, to obtain information relevant to the proceeding to which the judicial process relates from an insurance company that would otherwise fall within the privacy protections under the Act or the Rule. However, trial courts have a right and a duty to fashion protective orders which limit access to necessary information only and uphold such principles of nondisclosure as attorney-client privilege and work product immunity.”).

DOT also argues that if the discovery at issue is permitted, it should be restricted to exclude any appraisals and evaluations of other properties which are still in litigation. Fort Pleasant believes that this argument should be rejected, since it would lead to little or no production of any reports, allowing DOT to control the production thereof by manipulating schedules and filing dates. As DOT well knows, the total market value of other properties acquired, is not admissible to prove the total fair market value of the property at issue, nor can the ultimate values be introduced or used by way of impeachment. What is admissible and very important for impeachment purposes, are the multitude of comments, conclusions, and treatments afforded to properties based on their location within the city limits, the commercial nature of the properties, and the highest and best use, which Fort Pleasant believes are proper for impeachment purposes, as noted above.

**4. DOT Evaluations and Appraisals of Neighboring Properties Are Clearly Relevant or Could Lead to the Discovery of Relevant Evidence.**

DOT's last ditch effort in its petition to preclude access to evaluations and/or appraisals of neighboring properties is to argue that they are not relevant. Petition at 18.

Had the landowners in *Brumfield* had access to the evaluations and/or appraisals of DOT's expert in that case, he would not have been able to apparently testify falsely about the manner in which he performed his appraisal. It is also ironic that DOT cites Wright & Miller in support of its argument. The United States Supreme Court and Congress have been so concerned with the integrity of expert testimony in civil cases that Fed. R. Civ. P. 26(a)(2)(B) has been amended to provide as follows:

Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

(Emphasis supplied). Any experienced litigator well understands the value of having written reports prepared or sworn testimony given by an opponent's expert in similar cases. "Cross-examination," this Court has noted, "is the engine for truth." See *Hicks v. Ghaphery*, 212 W. Va. 327, 338, 571 S.E.2d 317, 328 (2002); *State v. Thomas*, 187 W. Va. 686, 691, 421 S.E.2d 227, 232 (1992). And, there is no lubricate for the "engine of truth" for an expert witness like information regarding his or her opinions in similar circumstances.<sup>11</sup>

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<sup>11</sup>Finally, Fort Pleasant notes the irony of DOT's reliance on *Ex Parte Shepperd*, 513 S.W.2d 813 (Tex. 1974). In *Shepperd*, the court approved the discovery in a condemnation proceeding of an expert's appraisal reports for comparable properties prepared for prior condemnation proceedings. The court held that these reports were discoverable because the government would rely on this appraiser at trial and "it would totally be unrealistic to hold

#### IV. CONCLUSION

There is no need, in Fort Pleasant's view, for this Court to intervene in a discovery dispute involving thirteen (13) evaluations and/or appraisals of neighboring properties in a condemnation proceeding. If DOT wants some special protection, it should seek the same from the Legislature, not from this Court. Article III, § 9 of the West Virginia Constitution provides, "Private property shall not be taken or damaged for public use, without just compensation . . . ." "This provision of our Constitution," this Court remarked in *Board of Educ. v. Campbells Creek R. Co.*, 138 W. Va. 473, 476, 76 S.E.2d 271, 273 (1953), "and the due process clauses of both the State and Federal Constitutions are limitations upon the authority of the sovereignty to take private property for public use." Thus, courts should take particular care in protecting the rights of landowners in condemnation proceedings.

Judge Cookman and the other Circuit Judges who have rules similarly, have properly mandated full and fair disclosure in eminent domain proceedings, thereby leveling the playing field to insure more fair treatment to affected landowners facing the taking of their properties by the heavy hand of government. Instead of trickery, concealment and less than full disclosure, Fort Pleasant maintains that government has, or ought be found to have, an obligation to work openly and forthrightly with the landowner to complete the painful process, and willingly pay full just compensation and resorting to litigation only as a last resort.

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that their credibility is not a material issue" "[i]n view of the central role which appraisal witnesses play in a condemnation proceeding." *Shepperd*, 513 S.W.2d at 816. The limitations placed on the discovery of reports prepared for cases in negotiation or litigation in *Sheppard* and *State v. Bentley*, 752 S.W.2d 602 (Tex. Ct. App. 1988), are the product of evidentiary rulings that some of the reports sought involved "dissimilar tracts," not rulings regarding their discoverability.

DOT's argument that only "limited discovery" applies in condemnation proceedings relies upon authority that has been abrogated by amendment to the Rules of Civil Procedure. DOT's argument that production of the appraisals and/or evaluations of neighboring property owners fails to take into account the unique nature of neighboring properties, confuses the weight of evidence with its discoverability and admissibility.<sup>12</sup> DOT's argument that disclosure is precluded by R. Civ. P. 26(b)(4)(B) ignores the unique nature of condemnation proceedings and the exceptional circumstances presented in the instant case, as there is no other way for Fort Pleasant to discern if the testifying experts in this case are using methodologies different from those used for neighboring properties, without access to the appraisals and/or evaluations.<sup>13</sup> DOT's arguments regarding some sort of "qualified privilege" in appraisals, the production of which it admits would not be onerous, have no support in West Virginia law and the Texas case upon which DOT relies involved evidentiary rulings that some of the reports sought involved "dissimilar tracts," not rulings regarding their discoverability. Finally, DOT's arguments are inconsistent with the conclusions of leading commentators and cases involving landowners' access to all relevant appraisals and/or evaluations in condemnation proceedings in which the rights of the landowners are constitutionally protected.

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<sup>12</sup>Indeed, as DOT acknowledges, "[R]espondent has not determined that he will allow evidence related to appraisals of other property to be introduced as evidence at trial." Petition at 19.

<sup>13</sup>DOT's argument that exceptional circumstances are not present because Fort Pleasant "has its own experts who can provide this information" ignores the fact that Fort Pleasant's experts cannot know what valuations were placed or methodologies were employed regarding neighboring properties by DOT's experts.

WHEREFORE, the Respondent, Fort Pleasant Farms, Inc., respectfully requests that this Court decline to issue a writ of prohibition and interfere with Judge Cookman's discovery ruling.

**FORT PLEASANT FARMS, INC.**

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**VERIFICATION**

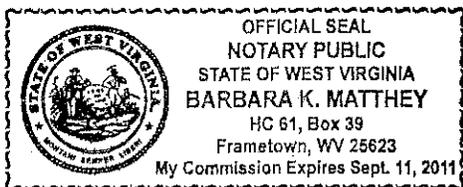
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COUNTY OF KANAWHA, TO-WIT:

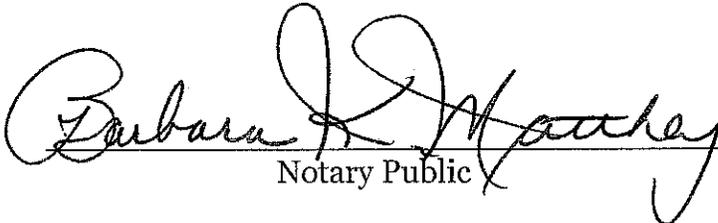
I, Ancil G. Ramey, being first duly sworn, state that I have read the foregoing Response to Petition for a Writ of Prohibition, that the factual representations contained therein are true, except so far as they are stated to be on information and belief, and that insofar as they are stated to be on information and belief, I believe them to be true.

  
Ancil G. Ramey

Taken, subscribed and sworn to before me this 19<sup>th</sup> of June, 2006.

My commission expires: Sept. 11, 2011



  
Notary Public