

BEFORE THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 33882

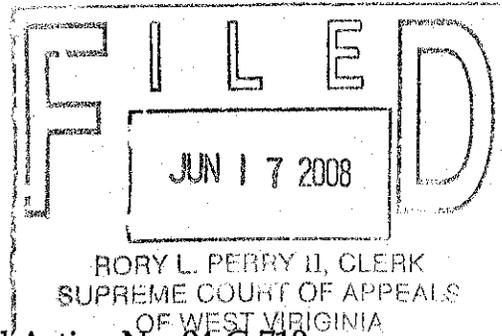
WEST VIRGINIA DEPARTMENT OF
TRANSPORTATION, DIVISION OF
HIGHWAYS, et al.

Appellee,

v.

PARKERSBURG INN, INC.,

Appellant.



Civil Action No. 04-C-710
Honorable Jeffrey B. Reed
Circuit Court of Wood County

BRIEF OF APPELLANT, PARKERSBURG INN, INC.

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I. KIND OF PROCEEDING AND NATURE OF RULING BELOW

This case concerns the taking or damage of the Holiday Inn at Parkersburg, West Virginia, by the West Virginia Department of Transportation, Division of Highways (hereinafter referred to as "DOH"). The design of what became Project No. APD-0282(127)C, an Appalachian Corridor project, began in 1998. In the period from September 2003 to November 2003, the Holiday Inn's access was cut off from what was direct access to the Interstate 77/Route 50 interchange and was re-arranged by the DOH. The Parkersburg Holiday Inn (hereinafter referred to as "Holiday Inn") alleged that the access with which it was left was so unreasonable that it had destroyed its business and that it had become an unprofitable business with a substantial loss in fair market value. Since the trial of this case in February 2007, the Holiday Inn has closed and is out of business as of July 30, 2007.

This proceeding was initiated as a petition for writ of mandamus to compel the DOH to institute a condemnation proceeding in Wood County, West Virginia, an inverse condemnation case. By Order dated October 5, 2004, the Wood County Circuit Court compelled the condemnation case to be filed. On October 29, 2004, the DOH filed its petition to have determined the issue of whether the Holiday Inn was entitled to compensation for damages caused by construction of Appalachian Corridor Project No. APD-0282(127)C.

The case was tried to a jury from January 30, 2007 to February 14, 2007, when the jury returned its verdict for the DOH and against the Holiday Inn.

This is an appeal of the Circuit Court's Order entered on June 27, 2007, and October 9, 2007, denying the Respondents' motion to set aside the verdict of the jury and award it a new trial.

II. STATEMENT OF FACTS

The Holiday Inn at Parkersburg, which operated as a hotel until July 30, 2007, was owned by the Parkersburg Inn, Inc., a West Virginia corporation. The Holiday Inn was a profitable full-service hotel with a full-service restaurant, banquet, and large indoor meeting and recreation atrium area totaling 134,000 square feet of space. It had been in business for approximately 23 years when its access was involuntarily changed by the West Virginia DOH in the period from September 2003 to November 2003.

The Holiday Inn complained that the DOH had unreasonably changed its access. Prior to the construction of the project, the Holiday Inn enjoyed direct access to the intersection of Route 50 and I-77. Its entrance was direct at grade to Route 50, and it was surrounded by numerous other commercial establishments, including service stations, restaurants, convenience stores, and other motels. Its access was only a few hundred feet from the entrance and exit to I-77. The site was chosen by the Holiday Inn because of its location and ease of access, its visibility, and its contiguity to other successful commercial enterprises.

The Holiday Inn complained that it had sustained an erosion of clientele over the four years after closure of its direct access to Route 50. It claimed that it was left on a dead-end road, which dead-ended in front of its access, with traffic directed onto its property. Route 50's grade was raised in front of its entrance and a controlled access

fence separated Route 50 from the dead-end road and the Holiday Inn property so that travelers had no way to exit Route 50 directly onto Holiday Inn property. Further, the access was confusing. A traveler on Route 50 had to go past the property and exit onto 7th Avenue on a new portion of roadway, make their way under an underpass where the Holiday Inn was not visible, and travel back down a road approximately one-half mile that had been Route 50 to get to what used to be the entrance to the Holiday Inn. It also cut part of Route 50's width diagonally across the roadway, directly in front of the Holiday Inn.

Both parties offered appraisal testimony. The Holiday Inn's testimony was that the fair market value had been substantially affected due to the roadway. The DOH appraisers testified that the roadway had not, in any way, adversely affected the fair market value. However, there was no denying that the Holiday Inn's occupancy rate and income had dropped over the time period from 2003 to 2007. Therefore, the DOH offered the defense that the reason the occupancy rate had dropped was due to a failure of the Holiday Inn management, not its roadway.

A. Testimony of Rodney Meers

The DOH presented an appraiser, Rodney Meers,¹ who was contracted specifically by the DOH as a defense expert to go to every interstate intersection in West Virginia and "analyze" the hotels and motels at those intersections. This analysis, however, did not include analyzing their rate structure; it was only to look at their location with respect to the interstate or other highways. The DOH offered Mr. Meers

¹ Mr. Meers was one of three hired expert appraisers with whom the DOH contracted.

to testify that the Holiday Inn management was responsible for the decline in sales and revenue, not the road access. The Holiday Inn had deposed Mr. Meers before trial and was aware that he was not qualified to testify about management decisions.² Not only did he not have qualifications but he had not even examined the issue at the Holiday Inn.

Real estate appraisers are not trained as experts in the managing and marketing of hotels and motels. Consequently, real estate appraisal standards require them to assume that the commercial property is properly managed when they do an appraisal. (Trial Transcript of Rodney Meers at pp. 59, 138.)

Nowhere in Mr. Meers' testimony did he establish his education or experience as an expert who had knowledge of hotel management, let alone how to determine the effect of raising rates. Purportedly, Mr. Meers was going to testify that the location of a

² Mr. Meers had testified in deposition that he never managed a hotel and never worked in the hotel industry. (See Holiday Inn's Memorandum in Support of Motion to Set Aside Verdict and Award a New Trial at pps. 22-25; Meers Deposition at pp. 20-21, 24-25, 44, 49.) He testified:

COUNSEL: What kind of knowledge have you acquired in hotel management? MEERS: Only -- only that which is necessary to analyze properties for the purpose of doing an appraisal. COUNSEL: Do you feel that you are qualified to render an opinion on whether a hotel manager is properly managing his hotel? MEERS: When I can compare it to the operations of other properties and notice differences, then I am qualified to note those differences. I do not say that they are necessarily incorrect, but I cannot say that they are correct either, just that they are different. Id. at 20.

Mr. Meers could not state to a reasonable degree of certainty anything about the hotel management. MEERS: I cannot say categorically that that is the case. . . ." Id. at 21. Further, Mr. Meers offered the opinion that the Holiday Inn was improperly managed when he knew nothing about the Holiday Inn plan. COUNSEL: Do you know anything about the plan that the Holiday Inn chose to implement? MEERS: No, I do not. Id. at 24.

MEERS: So based on the scope of this analysis, there is not the evidence to support any one conclusive conclusion that any one particular variable was the primary cause. Id. at 25.

MEERS: I am saying that you cannot prove a negative, that there is not enough evidence to make a case. Id. at 49.

COUNSEL: And you are just assuming that your reconstruction of room revenues are correct or is correct? *** MEERS: I estimated. It was from the occupancy tax records. You can generate the revenue per available room, and with the occupancy data, you could adjust the revenue per available room to mathematically derive the effective average daily rate. Id. at 44.

hotel close to an interstate interchange was not important. This was based upon his statewide, one-of-a-kind study of each interchange and hotels located in the vicinity. However, at trial, it became apparent that the primary issue for which he was offered was whether the Holiday Inn's raising of its rates between 2000 and 2007 caused the Holiday Inn's decrease in occupancy. In order to know the answer to that, one has to know a great deal about the market itself. Raising room rates does not mean that automatically the public will not come to a particular hotel. It is a complex issue requiring hotel market analysis. The Holiday Inn at Parkersburg relied on experts; a "guru" came in from the national Holiday Inn franchiser who provided that expertise. (Trial Transcript of David Ashley at p. 81.) The national Holiday Inn told the Parkersburg Holiday Inn what their rates should be.

Mr. Meers admitted in his testimony that he never managed a motel or hotel. (Trial Transcript of Rodney Meers at p. 193.) He never even appraised this hotel. Id. He never worked in a motel, never had to make a payroll, and never dealt in management issues in a motel. Id. When asked whether he knew what went on at the Holiday Inn, his answer was, "I know some aspects of what went on. I do not know precisely what their whole operating focus was, whether it was to maximize their income or what. I don't know that." Id. at 194.

The following is what Mr. Meers testified to at trial, which initially led to the Holiday Inn's objection and trial court's decision to overrule the objection:

Q. And would the Holiday Inn not fall in the category of hotels that a corporate traveler would probably consider an appropriate place to stay?

A. A corporate traveler would consider that as one of their options.

Q. The other options being some of the other hotels?

A. The Hampton Inn, yeah, and the Wingate. Depending on the level of corporate traveler, they can go down into other areas of the market.

Q. Okay. At the end of the year, is that when a manager can look back and say, "Okay. Over the course of this past year, we were able to collect X number of dollars for X number of rooms", and then calculate the average daily rate?

MR. MASTERS: Your Honor, I have an objection to -- he hasn't been qualified as a hotel manager, and is talking about management decision at hotels.

THE COURT: The objections' overruled. Let's keep it brief.

MS. CHAPPELL: Mr. Meers, we've also heard a term called a "RevPAR".

A. Yes, sir - yes, ma'am.

Q. What does that refer to?

A. That's the revenue per available room. That's probably one of the easier numbers to figure out. They would just - you take all of the revenue derived from the room sales over the course of the year and divide it by the number of rooms in the hotel.

Q. Okay. You said revenue from room sales -

A. Uh-huh, yes.

Q. -- divided by what?

A. The number of rooms sold.

Q. Okay. Is it based on the number of rooms that have actually been sold or the number of rooms that are available?

A. I'm sorry, the number of rooms that are available for sale.

Q. And how do occupancy rate and average daily rate play into the calculation of RevPAR?

A. Recognizing that the goal of any hotel manager is to maximize the value of their property, they do that by trying to make the most money per room. And to that end, they have to decide whether - what rate structure they can get the most people in that will generate the highest occupancy that will generate the highest level of income for a property.

Q. Is there a balance to be struck between trying to maximize your occupancy rate and trying to maximize the amount of money that you're making?

A. There is.

Q. How so?

A. Well, if you increase your rates too much, you'll chase away business and your occupancy will go down and your revenue per available room will go down also. Similarly, you can decrease your rates too much and you might run at full occupancy 100%, but you're still not making as much per available room because you're giving away too much. The trick is to find that ground in the middle where your property can position itself and claim that share of the pie as theirs.

Id. at 114-116.

Of course, included in the above is the Holiday Inn's objection. Id. at 115. Respondent again objected on page 122 when Mr. Meers was asked what impact the Wingate would have as competing properties.

Again, on pages 129-131, Mr. Meers testified about choosing the proper rate structure, something he knew nothing about. On page 131, the Holiday Inn objected to the foundation for his opinion on the rate structure. Id. at 130-132. On page 134, Mr. Meers admitted that his opinions with regard to business decisions were based upon evidence already excluded.

Q. Okay. And that [the excluded evidence] goes more to your opinions on how the Holiday Inn compared to these other motels in whether they made the right business decisions or not; correct?

A. Yes. The information that was given to me would show relevant trends and operations since the taxes that are collected are indicative of those same trends. (Emphasis added.)

Id. at 134.

The trial court granted Holiday Inn's objection and motion with regard to tax data. The trial court, on page 137, decided that Mr. Meers' opinions were, in part, based on the inadmissible data and ruled:

So any information, data, or conclusions based upon the information from the County Clerk is not admissible. I know that generally expert

opinions can be given even if the underlying facts are not admissible, but I do not believe that that circumvents Rule 403, which is unduly prejudicial and/or confusing. I think that that is the ultimate benchmark for any information, whether it comes from a lay witness or an expert witness.

Id. at 137 (emphasis added). But then, even after the court admonished DOH's counsel to advise Mr. Meers over the lunch break not to discuss the issues he had derived from the tax assessor's office,³ he volunteered in an answer as follows:

MR. MASTERS: Are you not aware, sir, that there was testimony already here, and I think I saw you back there, that the decrease in occupancy rate at the Holiday Inn went from 70.5% down to 47.1% from 2000 to 2006?

A. Yes, sir. And as I also testified, that is just one of the paintbrushes that could be used to paint the picture of a motel. There are other things, including the rates that they choose to charge for the rooms with the intent of maximizing whatever profit they can, positioning themselves properly in the market, maintaining the property as necessary to continue stabilized operations, and just generally keeping track of what's happening and reacting accordingly.

Q. I think my question was, were you aware that the percentage of occupancy dropped from 70.1% down to - 70.5% down to 47.1% from 2000 to 2006, were you aware of that or not?

A. Yes, I'm aware of that.

Id. at 190. Obviously, the question did not require the witness to comment on the Holiday Inn's decision to raise room rates. But he did. On top of that, counsel for the DOH, in redirect, again specifically asked about the management decision on room rates:

Q. Okay. And if in the face of declining occupancy the Holiday Inn was raising its room rates, what effect could that have?

A. That could have the effect of pushing down occupancy, even to the point of -- and further just pushing down the level of revenues for the property.

³ Trial Transcript of Rodney Meers at p. 138.

Q. Okay. Even if the increase were necessary to meet the expenses of the property?

A. You can't gauge a rate increase on expenses. The traveling public and the market has determined what they're willing to pay for a property. So, just because -

Q. When you say "for a property", you mean for a night -

A. For a night in a hotel room. When you have other properties up and down the interstate at varying rates, you have to match their rates, you can't match their expenses.

Q. And what did you find then when you considered this issue in the context of your analysis? And I'd ask you to just read on in your conclusion from page 57.

A. "That the ADR continued to increase while occupancy decreased and RevPAR plummeted leads to a conclusion that perhaps other problems are associated with any decline in operations."

Id. at 197-198.

This evidence was critical to the DOH's defense as is obvious from the defense's argument to the jury as the reason the Holiday Inn lost revenue and occupancy.

Defense counsel stated:

The Holiday Inn has made several other business decisions that, as you know, have been somewhat criticized by Mr. Meers, Mr. Gordon and Mr. Pope, and that is, at the time when occupancy rates were steadily falling, they raised their rates. They raised their - the room charges again and again and again. While it's true that it was in smaller percentages each year over a course of three or four years, it totaled a 22% increase. And nowadays, in the days of internet, checking on rates, Expedia.com, Hotels.com, the consumer can hit a couple of the buttons and compare rates. You can't afford not to compete on the basis of price.

If the Holiday Inn says, "Well, we had to raise our rates to meet expenses," that's fine. Again, that's their management judgment call, that is not the result of a road project.

(Trial Transcript of Rodney Meers at 405-406, emphasis added.)

B. Testimony of Jim Cochrane

The Holiday Inn called Jim Cochrane to testify concerning the suitability of the Holiday Inn property for a motel and the significance of the occupancy rate⁴ on the ability of a motel to survive. Mr. Cochrane was a resident of Wood County and a successful builder and developer. He had also owned and operated motels. Mr. Cochrane was not a paid expert but since the roadway had been constructed during the period 2000 to 2004, the entire landscape of the area was significantly changed. Also, Mr. Cochrane had been at the hotel and was familiar with its amenities. Therefore, he was an important witness to the Holiday Inn. He was clearly qualified to give his opinion as to the effect of the roadway on the hotel and to opine as to the profitability of the hotel after the change in access. The Holiday Inn first disclosed Jim Cochrane as a witness on January 5, 2006, in "Answers And Responses Of Parkersburg Inn, Inc. To First Set Of Interrogatories And Request For Production Of Documents By West Virginia Department Of Transportation And Fred Vankirk," which provided as follows:

52. Jim Cochran RCDI 422 Market Street Parkersburg, WV 26101	Will testify to damages and access problems. Did appraisal in 2001. Experience with access issues and can testify to effects.
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Mr. Cochrane was further disclosed in each subsequent pleading containing a list of witnesses, including depositions to be used at trial, up to the time of the trial. More importantly, however, Mr. Cochrane was deposed by the DOH on September 7, 2006.

⁴ Occupancy rate is simply the percent of available rooms rented over a stated period, e.g. 60% during March 2005, 70% over the calendar year 2005.

Mr. Cochrane's testimony was critical in that the Holiday Inn intended to proffer Mr. Cochrane to rebut Rodney Meers' testimony described above.

At Mr. Cochrane's deposition on September 7, 2006, he admittedly stated:

Q. Do you anticipate offering any expert opinions at the trial of this case?

A. I am not prepared to -- I haven't done any research or done any preparation or any type of analysis to give any type of expert opinion, no.

Q. So would it be fair to say that you do not intend to offer any expert opinions at the trial of this case?

A. Expert opinions as he defined those to me? Yes, that's fair.

Q. It's a fair statement?

A. Right. Now, can I give some fact opinions to specific questions that either you or their attorney may ask? Certainly.

Q. Do you know at this point what opinions, whether they be expert or otherwise, that you intend to offer at trial?

A. I'm here to answer your questions so I don't know. You know, I will have to wait and see what kind of opinions you-all would like for me to try to give an opinion on, so I can't answer that.

(Deposition Transcript of James Cochrane at pp. 6-7, emphases added.) Mr. Cochrane obviously did not understand the difference in expert testimony and fact testimony.⁵ And also, obviously, the DOH's attorney was aware that Mr. Cochrane was confused when she asked: "Do you know at this point what opinions, whether they be expert or otherwise, that you intend to offer at trial?" *Id.*, emphasis added. Mr. Cochrane said: "You know, I will have to wait and see what kind of opinions you-all would like for me to try to give an opinion on, so I can't answer that." If the DOH's counsel had stopped asking for opinions, the Holiday Inn would have clarified his testimony. But, the DOH

⁵ The deposition was filed with Holiday Inn's Motion to Set Aside Verdict and Award a New Trial and Memorandum in Support, dated March 8, 2007.

went forward and questioned Mr. Cochrane as an expert. Mr. Cochrane clarified that he definitely had opinions:⁶

Q. What portions of the McCracken & Associates report did you consider relevant to any opinions or testimony you might offer in this case?

A. The hotel occupancy report over a period from 1998 to 2005.

A. Well, it jumped out and it was very apparent that in the year 2000, for example, the hotel occupancy at the Holiday Inn was 70.5 percent at this specific Holiday Inn, while the market average for the entire Wood County was 53.7 percent.

In 2005 the overall market average was 48.7 percent, which was a variance of around five percent, but at the same time the market average -- or the actual occupancy for the Holiday Inn was only 51 percent.

So while you had a five percent decrease in market hotel occupancy of the overall market, the Holiday Inn, especially according to this table, had had a much greater impact than a five percent overall market decrease, and that was just -- it was very apparent by observing this table.

Id. at 11-12 (emphasis added).

Q. Do you have an opinion or a belief concerning the cause of the relatively larger drop in the occupancy rate for the Holiday Inn during that period of time?

A. Well, initially I wondered if it was a supply issue, but basically the Wingate Inn produced approximately the same number of rooms as the ... Ramada Inn. ... So it wasn't really a supply issue. In other words, there weren't a significant number of more rooms in 2005 than there were in 2000. You know, what other issues could have caused that, the drop on the Holiday Inn?

Id. at 12-13 (emphasis added).

Q. What do you consider your sources of information for any opinions that you may offer in this case?

⁶ See Holiday Inn's Motion to Set Aside Verdict and Award a New Trial and Memorandum in Support, dated March 8, 2007.

A. That of being a real estate developer. . . .

Id. at 15 (emphasis added).

Q. Do you have any actual knowledge what the traffic count was at the intersection of old Route 50 and Holiday Hills Drive immediately before the new construction began?

A. I may have at one time but, no, I haven't researched that. I have no recent knowledge of that. I'm sure it's a matter of record. I'm sure DOT keeps those records.

Q. Have you looked at it in preparation for forming any opinions in this case?

A. No.

Q. After the construction was done, what traffic count would you look at?

A. Well, it's interesting. You'd certainly look at the traffic count, you know, where it bypasses its former access. You'd look at that also.

Id. at 17 (emphasis added).

Q. ... Do you intend to offer any opinions at the trial of this case concerning the viability of the Holiday Inn site as a continued full service hotel/motel property?

A. Other than what I've just stated, I mean, in my opinion if I were to be looking to develop a new hotel, this is not a site that I would consider at this point. Okay?

Id. at 19 (emphases added).

Q. Do you have an opinion concerning the viability of this site for development as a hotel/motel property if you started with raw land? I'm just asking if you have an opinion.

A. With the access as it exists now?

Q. Yes.

A. I would consider it economically unfeasible.

Q. And is that the same opinion you have concerning the viability of this site as a hotel/motel property in its current state improved with a two-story hundred and fifty room motel on it?

A. ...[I]f I had an opinion as to long-term economic viability, this hotel as it exists with its access is that it's not an economically viable venture at 51 percent occupancy.

Id. at 20 (emphases added).

Q. ...What is your opinion concerning the continued viability of the Holiday Inn as a full service -- would you call it hotel or motel?

A. I'd call this a full service hotel.

Q. Hotel.

Q. What is your opinion concerning the continued viability of this Holiday Inn, the one that's the subject of this lawsuit, as a full service hotel?

A. Well, from the physical plant it's fine. From the occupancy standpoint . . . from my experience as a commercial real estate developer and of having owned and managed a motel, a hotel at 51 percent occupancy is not economically viable.

Id. at 26 (emphases added).

Q. Are you basing your opinion, the opinion you offered earlier, on anything other than the occupancy rate of 51 percent shown for the Holiday Inn in 2005?

A. Okay. Well, you've asked me a couple of different opinion questions, and the opinion of the site as a commercial real estate income producing property as it exists now, yeah, I'm basing that on my experience as a real estate developer.

Id. at 27 (emphases added).

Q. What do you base that opinion on other than the 51 percent occupancy rate for 2005?

A. As a commercial real estate developer, the only thing -- the driving force behind any property is what's its income and what's its expenses and what's its bottom line.

Q. And you don't have that information, do you?

A. I can conclude that information by looking at the occupancy that it's not economically viable. I have not seen any financial reports whatsoever. I know a hotel at 51 percent occupancy is not a viable entity.

Q. Do you have any factual information upon which you're basing your opinions other than the 51 percent occupancy rate for 2005?

A. ... Again, my opinion, fact opinion, not expert opinion regarding the viability of this hotel as an operating enterprise is based on its -- where it is positioned in terms of location and access now for any

commercial venture, let alone whether it be a hotel, shopping center, whatever, anything that is relying upon drive through traffic and easy access, for any commercial real estate venture I don't consider the site any longer to be economically viable.

And my answer regarding it specifically as a hotel is based solely and only on the information on Page 37 from the McCracken report for the West Virginia Department of Transportation which indicates a 51 percent occupancy, which is greater than a 20 percent variance from the year 2000.

I know from operating hotels at 51 percent occupancy, it's not economically viable, and those two points are the basis of which I formulate my **opinion** regarding this property.

Id. at 27-30 (emphases added).

Q. Okay. Then let me ask you about the **opinion** that you have concerning this site as it may be developed for other commercial ventures.

A. Okay.

Q. What facts do you **base your opinion** on that this site could not viably be developed for other commercial purposes?

A. I think it can be developed for other purposes, but in my **opinion**, being in business for 25 years now, it's no longer a commercial site. It's no longer a retail or hotel or restaurant site.

Id. at 30 (emphases added).

Q. Just taking that **opinion you just offered**, what facts do you **base that opinion** on?

A. The 25 years of experience of doing some very good properties and also having some that didn't work out too well, and knowing the qualities of what makes a -- the attributes of what makes a good real estate commercial site.

Id. at 31 (emphases added).

Q. ...You had given me an **opinion** concerning the viability of a full service hotel on this property, then you indicated you would also not consider it viable for any other commercial real estate venture, and you included retail, anything that required drive by access.

A. Well, you know, basically from a commercial standpoint, as residential or anything, you know, it was location, location, location, right? I mean, that's what drives -- that's an adage you hear from any

Realtor or any developer, and this one has visibility, visibility, visibility from the interstate but has terrible access.

When you took away the access, it obviously, from this report, impacted the occupancy. That in turn greatly decreased the economic viability of this project to sustain, to operate as a going concern. Those same reasons would apply whether it be a hotel, whether it be a restaurant, whether it be a Wal-Mart, whether it be, you know, anything of that sort.

When you greatly reduce a property's prior access, which is one of the reasons why it would locate there in the first place, it obviously has a negative impact on that commercial value.

Id. at 33-34 (emphasis added).

Q. -- are there any other factors that you'd take into account when **formulating your opinion**?

A. For this site being a -- that would be -- you know, given there's water, given there's sewer, given there's the topography allowed certain development, those are the kind of things you would look at as a commercial venture; what's it going to cost to excavate this site to make it work; is there adequate water; is there adequate sewage; what about the storm water; what about the soils.

All those issues now, that's a given that those were acceptable in this case because we have a business enterprise that's operated since probably around what, 1979, 1980, around in that period.

So those factors I would normally look at to determine the feasibility of a site are already a given acceptance at this site. The only negative, and the one that's apparently from this report it looks to me like it's impacted, has been the access.

Id. at 34-35 (emphasis added).

Q. ...[D]oes the fact that you don't have the actual traffic count numbers change the **opinions you gave** in any way?

A. No.

Q. And are you able to **base your opinions** on your personal knowledge and perceptions as a real estate agent and commercial developer?

A. Yeah, I'm not a real estate agent.

Q. I'm sorry. A real estate and commercial developer.

A. As a real estate developer. Yeah, my **opinions** are based on my experience.

Id. at 44-45 (emphases added). Therefore, on September 7, 2006, the DOH and the Holiday Inn were well aware that Mr. Cochrane had these opinions, "expert" or otherwise. The trial did not occur until January 30, 2007.

At the pretrial, the DOH handed the Holiday Inn's counsel a motion *in limine* to exclude Mr. Cochrane's opinion testimony for failure to disclose him as an expert. The motion was never brought on for hearing and, in fact, violated a scheduling order requiring the DOH to file their motions in advance of the pretrial. At trial, however, the DOH objected when Mr. Cochrane was asked the question:

Q. Okay. Do you -- can you explain to the jury what you look for when you, as a real estate developer/project developer, look for in a site for development into a commercial business enterprise?

MS. CHAPPELL: Objection, Your Honor. The witness appears to be asked -- to be being asked for expert testimony in some field relating to hotel development. He's never been disclosed as an expert. He specifically stated in his deposition he was not going to be offering expert opinions. Likewise, the appraisal that is mentioned in some of the disclosure as having been done by him was never disclosed.

(Cochrane Trial Transcript at pp. 8-9.) The court sustained the objection and refused to allow Mr. Cochrane to testify to the opinions disclosed in his deposition.

While the DOH complains about the disclosure of the Holiday Inn witnesses, the DOH's disclosure of experts was just as brief.⁷

⁷ In the DOH's response to the Holiday Inn's interrogatory asking for Rule 26(b) information on each expert witness on July 19, 2006, the DOH responded as follows with the following information on all 14 expert witnesses: (1) David Pope, Certified General Appraiser, Greensboro, North Carolina, Expert witness - Subject matter of his testimony, substance of the facts and opinions to be offered and the information and/or documents upon which he will rely will be set forth in his report, which has not yet been completed; (2) Steve Gordon, Certified General Appraiser, MAI, McCracken & Associates, Greensboro, North Carolina, Expert witness - Subject matter of his testimony, substance of the facts and opinions to be offered and the information and/or documents upon which he will rely are set forth in his report, which has not yet been completed; (3) John McCracken, Certified General Appraiser, MAI, McCracken & Associates, Greensboro, North Carolina, Expert witness - Subject matter of his testimony,

The trial was rescheduled from September 26, 2006 to January 30, 2007, by Order dated October 27, 2006. In the meantime, depositions were taken of both sides' experts leading up to trial. The Holiday Inn disclosed Mr. Cochrane as a witness to testify on the same issues again on the following dates: January 5, 2006, March 21, 2006, July 20, 2006, August 22, 2006, January 5, 2007, January 9, 2007, and January 22, 2007, and listed his deposition to be read to the jury.

substance of the facts and opinions to be offered and the information and/or documents upon which he will rely will be set forth in his report, which has been disclosed, and in his deposition; (4) Rodney Meers, Certified General Appraiser, MAI, McCracken & Associates, Greensboro, North Carolina, Expert witness - Subject matter of his testimony, substance of the facts and opinions to be offered and the information and/or documents upon which he will rely are set forth in his report, which has been disclosed; (5) Michael Hill, PE, Summit Engineering, 120 Prosperous Place, Lexington, KY, 40509, 859-264-9860, Expert witness - Subject matter of his testimony, substance of the facts and opinions to be offered and the information and/or documents upon which he will rely are set forth in his report and in his deposition; (6) Robert Pratt, MAI, 1223 Leone Lane, Dunbar, WV, 25064, 304-546-8791, Expert witness - Subject matter of his testimony, substance of the facts and opinions to be offered and the information and/or documents upon which he will rely are set forth in his report and in his deposition (yet to be taken); (7) Randall Epperly, PE, formerly Deputy State Highway Engineer for Project Development and Deputy State Highway Engineer for Construction & Materials, Oak Hill, WV, Expert - Will testify to the development, design, planning and engineering of Appalachian Corridor D in Wood County, West Virginia; (8) George Shinsky, PE, Assistant District Engineer, Construction, 624 Depot Street, Parkersburg, WV, 26101, Expert - Will testify to his knowledge of the circumstances under which the wing wall on the subject property was removed from the Petitioner's right of way and the circumstances under which paving occurred on the subject property after construction of Corridor D; (9) Curtis Carpenter, PLS, Rte. 1 Box 239, Charleston, WV, 25312, 304-343-2795, Expert (surveyor) and fact witness - Can testify to locating boundary of the Petitioner's right of way on old Route 50 during gas line relocation and for purposes of removing obstruction (wing wall) on Petitioner's right of way; (10) Michael G. Cronin, P.E., DOH District 3 Project Manager, 624 Depot Street, Parkersburg, WV, Expert witness - Can testify to removal of the Defendant's obstruction (wing wall) on Petitioner's right of way and to location of Petitioner's right of way on old Route 50; (11) David Bodnar, DOH engineer, 1900 Kanawha Boulevard East, Building 5, Charleston, WV, 25305-0430, Expert witness - Will testify to the development, design, planning and engineering of Appalachian Corridor D in Wood County, West Virginia; (12) David Cleavenger, DOH engineer, 1900 Kanawha Boulevard East, Building 5, Charleston, WV, 25305-0430, Expert witness - Will testify to the development, design, planning and engineering of Appalachian Corridor D in Wood County, West Virginia; (13) Rodney Holbert, PE, Burgess & Niple, 4424 Emerson Ave., Parkersburg, WV, 26101, (304) 485-8541, Expert witness - Will testify to the development, design, planning and engineering of Appalachian corridor D I Wood County, West Virginia; (14) Ronald L. Williams, PE, PS, 121 Cantley Drive, Charleston, WV, 25314, (304) 345-3005, Expert witness - Mr. Williams was an employee of parsons Transportation Group and was a review consultant for roadway, right of way and bridge. He performed the Right of Way review of the design plans prepared by Burgess & Niple. (DOH's Interrogatory Responses dated July 19, 2006; DOH's Disclosure of Witnesses dated August 7, 2006; and DOH's Amended Pretrial dated August 25, 2006.)

C. DOH Instruction No. 2

Over the Holiday Inn's objection, the trial court gave the following instruction to the jury:

The Respondents' right of access to public roads is not affected within the meaning of the guarantee against public encroachment so long as a convenient way of ingress and egress remains. The constitution does not undertake to guarantee a property owner the public maintenance of the most convenient route to his door. The law will not permit the Respondents to be cut off from the public thoroughfares, but they must content themselves with such route for outlet as the West Virginia Division of Highways may deem most compatible with the public welfare as long as access is reasonable and adequate. When the Respondents acquired property in the State of West Virginia, they did so in tacit recognition of these principles.

Jury Charge, DOH Instruction No. 2 at pp. 8-9. The Holiday Inn clearly objected to the instruction. At the final instruction stage, counsel for the Holiday Inn stated: "Under Petitioners' Instruction No. 2, of course, we object to that being given, but suggested putting, 'as long as access is reasonable and adequate'" (Excerpt of Trial Transcript, February 13, 2007, at p. 3.) Therefore, the objection was preserved for appeal.⁸

D. Other Appraisals

The Holiday Inn was a business that, in the regular course of business, had appraisals done for itself or banks had appraisals performed. The Holiday Inn had three such appraisal reports in its files. The importance of those reports was that when DOH's counsel was examining Holiday Inn's appraiser, Larry McDaniel, she asked him whether he had available a copy of Randy Reed's report. Mr. McDaniel replied, "At

⁸ The Holiday Inn had earlier objected to the instruction and attempted to blunt the error and damage as much as possible by requesting modification if it was to be given.

some point, yes. Actually, I had Mr. Reed's and someone else's." (Trial Transcript of Larry McDaniel at p. 21.)

Throughout the cross-examination, Mr. McDaniel was repeatedly referred to the appraisal report of Mr. Reed. Mr. Reed had testified that his opinion on October 31, 2002, was that the fair market value of the Holiday Inn was \$8.2 million. (Trial Transcript of Randy Reed at p. 38.) Mr. Reed testified that he did it for Wesbanco who was considering loaning money to the Holiday Inn. The Holiday Inn moved the admission of Mr. Reed's report after it was identified by Mr. Reed. Id. at 38-40, Exhibit 41.

Mr. McDaniel was asked by defense counsel if he reviewed Mr. Reed's income appraisal (Trial Transcript of Larry McDaniel at p. 22), whether he reviewed Mr. Reed's comparable sales approach (Id. at 43), and whether he had Mr. Reed's report before finishing his own. Id. at 60. Mr. McDaniel was asked to refer to Mr. Reed's report and comment on it. Id. at 60, 61 & 87. Since the DOH had raised the issue in front of the jury about other appraisals, it left the impression that the Holiday Inn was hiding something from the jury. The other appraisals were actually for \$7.828 million in 1987, \$7.565 million in 1994, and Mr. Reed's appraisal was \$8.2 million in 2002. Significantly, the DOH appraisals were for approximately \$5 million in 2003. One of the appraisals had been done in 1994, only nine years earlier by a West Virginia certified appraiser.

The Holiday Inn asked Mr. McDaniel if he had seen the appraisals. He indicated that he had, and he identified them. (Redirect Testimony of Larry McDaniel at p. 94.) When the witness was asked the amounts of the appraisals, the DOH objected and the

trial court sustained the objection. Id. at 95-96. Therefore, the jury did not have the benefit of Mr. Reed's report nor of the value found by prior appraisers, one of which was only nine years old and which were a part of the Holiday Inn files. The Holiday Inn did not ask Mr. McDaniel about the Reed appraisal report or the other appraisals on direct examination, but it was raised by DOH's counsel for the purpose of impeaching Mr. McDaniel, the only Holiday Inn appraiser.

III. ASSIGNMENTS OF ERROR

- A. THE COURT ERRED BY GIVING THE DOH'S INSTRUCTION NO. 2.**
- B. THE COURT ERRED BY PERMITTING RODNEY MEERS TO OFFER THE OPINION THAT THE DECREASE IN HOLIDAY INN REVENUE AND CUSTOMERS WAS CAUSED BY POOR MANAGEMENT DECISIONS WHEN MR. MEERS WAS NOT QUALIFIED TO GIVE ANY OPINIONS ON THE MANAGEMENT OF ANY HOTEL AND HAD NOT STUDIED THE ISSUE.**
- C. THE COURT ERRED BY SUSTAINING THE DOH'S OBJECTION TO TESTIMONY OF JIM COCHRANE, WHO WAS NOT A PAID EXPERT, BUT WHO HAD EXPERTISE IN HOTEL/MOTEL MANAGEMENT.**
- D. THE COURT ERRED BY SUSTAINING THE OBJECTIONS OF THE DOH TO THE OFFERING OF THE APPRAISAL OF RANDY REED AND TO THE OFFERING OF EVIDENCE AS TO THE AMOUNT FOR WHICH THOMAS MOTTA AND HARRY C. HARTLEBEN APPRAISED THE PROPERTY IN 1987 AND 1994.**

IV. POINTS AND AUTHORITIES RELIED UPON

- 1. [A]n erroneous instruction is presumed to be prejudicial and warrants a new trial unless it appears that the complaining party was not prejudice[d] by such

instruction.' Syllabus Point 2, Hollen v. Linger, 151 W.Va. 255, 151 S.E.2d 330 (1966). Syllabus Point 3, Honaker v. Mahon, 210 W.Va. 53, 552 S.E.2d 788 (2001).

2. An instruction embodying an abstract proposition of law without in any way connecting it with the evidence should not be given. Matthews v. Cumberland & Allegheny Gas Co., 138 W.Va. 639, 77 S.E.2d 180 (1953); Mulroy v. Co-operative Transit Co., 142 W.Va. 165, 95 S.E.2d 63 (1956). Abstract propositions of law, which can readily be applied by a trained legal mind do not aid but frequently mystify the jury. McDonald v. Cole, 46 W.Va. 186, 32 S.E. 1033 (1899); Parker v. National Mut. Bldg. & Loan Ass'n, 55 W.Va. 134, 46 S.E. 811 (1904); Morrison v. Roush, 110 W.Va. 398, 158 S.E. 514 (1931).

3. An instruction should not be given which tends to confuse or mislead the jury. Nicholas v. Kershner, 20 W.Va. 251, 1882 WL 3513 (1882). Instructions should not be inconsistent because it leaves the jury at liberty to decide according to an incorrect rule of law and renders it impossible for the court to determine upon what legal principle the verdict was founded. Zinn v. Cabot, 88 W.Va. 118, 106 S.E. 427 (1921); Gordon v. Graham, 137 W.Va. 553, 73 S.E.2d 132 (1952); John D. Stump & Assoc., Inc. v. Cunningham Memorial Park, Inc., 187 W.Va. 438, 419 S.E.2d 699 (1992).

4. Instructions must be correct statements of the law and supported by the evidence. Instructions which assume facts not in evidence should not be given to the jury and constitute reversible error. State v. Lowe, 21 W.Va. 782, 1883 WL 3221 (1883); State v. Brooks, 214 W.Va. 562, 591 S.E.2d 120 (2003).

5. Argumentative instructions that are prejudicial should not be given and constitute reversible error. "Argument must be left to counsel; it has no place in the court's instructions." 75 Am.Jur.2d § 1140; Gamble v. International Paper Realty Corp. of South Carolina, 474 S.E.2d 438 (S.C. 1996); Flemister v. Central Georgia Power, 79 S.E. 148 (Ga. 1913).

6. "This Court will use signed opinions when new points of law are announced and those points will be articulated through syllabus points as required by our state constitution." Syl. Pt. 2, Walker v. Doe, 210 W.Va. 490, 558 S.E.2d 290, 295 (2001). "This Court has also repeatedly cautioned against establishing precedent based upon dicta" and "a dissent to dicta is like the sound of one hand clapping." "Law must be written with care. It is meant to be an exercise of the mind, not a venting of the spleen." Woodrum v. Johnson, 210 W.Va. 762, 559 S.E.2d 908, 921 (2001)(quoting Pittsburgh Elevator Co. v. West Virginia Board of Regents, 172 W.Va. 743, 310 S.E.2d 675, 690 (1983) (Neely, J., concurring in part and dissenting in part)).

7. There are four factors a court must consider in determining whether the failure to supplement discovery requests under Rule 26(e) should require exclusion of evidence related to the supplementary material:

- (1) the prejudice or surprise in fact of the party against whom the excluded witnesses would have testified;
- (2) the ability of that party to cure the prejudice;
- (3) the extent to which the waiver of the rule would disrupt the orderly and efficient trial of the case or of other cases in the court;
- (4) bad faith or willfulness in failing to comply with the court's order.

Syllabus Point 5 of Prager v. Meckling, 172 W.Va. 785, 790, 310 S.E.2d 852, 856 (1983); see also, Martin v. Smith, 190 W.Va. 286, 291, 438 S.E.2d 318, 323 (1993).

8. If a party believes that expert disclosures are incomplete, the proper procedure is to file a motion to compel more complete answers. Syl. Pt. 1, Nutter v. Maynard, 183 W.Va. 247, 395 S.E.2d 491 (1990); State Farm Fire & Casualty v. Madden, 192 W.Va. 155, 451 S.E.2d 721 (1994).

9. In determining who is an expert, a circuit court should conduct a two-step inquiry. First, a circuit court must determine whether the proposed expert: (1) Meets the minimal educational or experiential qualifications (2) in a field that is relevant to the subject matter under investigation (3) which will assist the trier of fact. Second, a circuit court must determine that the expert's area of expertise covers the particular opinion as to which the expert seeks to testify. Jones v. Patterson Contracting, Inc., 206 W.Va. 339, 524 S.E.2d 915 (1999); Syl. Pt. 5, Gentry v. Mangum, 195 W.Va. 512, 466 S.E.2d 171 (1995).

10. In determining whether an expert is qualified to give an opinion, generally, a trial judge should determine whether an expert's opinion has a reliable foundation and whether the expert's opinion is relevant to the issue before the court. W.Va. R. Evid. 702. See also, City of Wheeling v. Public Service Comm'n, 199 W.Va. 252, 483 S.E.2d 835 (1997).

11. While the determination of whether an expert is qualified to testify regarding a particular subject is normally within the discretion of the trial court, that

determination is reversible error if it is clearly wrong. W.Va. Div. of Highways v. Butler, 205 W.Va. 146, 516 S.E.2d 769 (1999).

V. DISCUSSION OF LAW

A. THE COURT ERRED BY GIVING THE DOH'S INSTRUCTION NO. 2.

The jury was first instructed correctly that the issue for them to decide was whether the Holiday Inn was entitled to fair market value damages by determining whether the change in access was "reasonable and adequate" and whether the Holiday Inn had been damaged as a result by a diminution in the fair market value of the property. As is set out below, West Virginia cases uniformly so hold.

However, the court also instructed the jury that:

The necessity for taking land for a state highway improvement project is a matter within the sound discretion of the West Virginia Division of Highways, and such discretion will not be interfered with unless, in the exercise of such discretion, it has acted capriciously, arbitrarily, fraudulently or in bad faith. In this case the landowner is not challenging the ability or authority of the West Virginia Division of Highways to construct Corridor D where it has been built.

Jury Charge at p. 8.

Therefore, the jury was already instructed that the DOH has essentially unbridled discretion to take and damage property. The DOH, however, offered the following instruction as the law of West Virginia:

The Respondents' right of access to public roads is not affected within the meaning of the guarantee against public encroachment so long as a convenient way of ingress and egress remains. The constitution does not undertake to guarantee a property owner the public maintenance of the most convenient route to his door. The law will not permit the Respondents to be cut off from the public thoroughfares, but

they must content themselves with such route for outlet as the West Virginia Division of Highways may deem most compatible with the public welfare. When the Respondents acquired property in the State of West Virginia, they did so in tacit recognition of these principles.

Jury Charge, DOH Instruction No. 2 at pp. 8-9. This instruction added several other key words besides "reasonable and adequate," which is the rule of law in West Virginia. Was the access "convenient?" Was it less or more than what was "most convenient?" Were the property owners "cut off?" Certainly, the Holiday Inn must "content [itself] with such route for outlet as the **West Virginia Division of Highways may deem most compatible with the public welfare.**" It should be noted that the trial court added the phrase "as long as access is reasonable and adequate" to the above sentence at the suggestion of the Holiday Inn. The Holiday Inn still objected to the instruction being given under any circumstance. (Trial Transcript dated February 13, 2007, Holiday Inn's objection to jury charge, at p. 3.)

Further, the instruction told the jury that the Holiday Inn bought the property with the "tacit recognition of these principles." This was not true and there was no evidence to even infer that the Holiday Inn knew any such thing. While an attorney and judge may understand the above statement, a jury would be absolutely confused by it.

Generally, a trial court's refusal to give or the actual giving of a certain instruction is reviewed under an abuse of discretion standard. State v. Guthrie, 194 W.Va. 657, 671 n. 12, 461 S.E.2d 163, 177 n. 12 (1995). "Where, however, the question is whether the jury instructions failed to state the proper legal standard, this Court's

review is plenary. 'Whether jury instructions were properly [legally] given is a question of law[.]'" *Id.*, citing U.S. v. Morrison, 991 F.2d 112, 116 (4th Cir. 1993).

"The purpose of instructing a jury is to focus its attention on the essential issues of a case and inform it of the permissible ways in which these issues may be resolved. If instructions are properly delivered they succinctly and clearly will inform the jury of the vital role it plays and the decisions it must make." State v. Guthrie, 194 W.Va. 657, 672, 461 S.E.2d 163, 178 (1995). "'Without [adequate] instructions, as to the law, the jury becomes mired in factual morass, unable to draw the appropriate legal conclusions based on the facts.'" *Id.*, citing State v. Miller, 194 W.Va. at 16, 459 S.E.2d at 127 (1995). "It is reversible error to give an instruction which tends to mislead and confuse the jury." Syllabus Point 19, Rodgers v. Rodgers, 184 W.Va. 82, 399 S.E.2d 664 (1990); Syllabus Point 2, Roberts v. Stevens Clinic Hospital, Inc., 176 W.Va. 492, 345 S.E.2d 791 (1986).

An instruction embodying an abstract proposition of law without in any way connecting it with the evidence should not be given. Matthews v. Cumberland & Allegheny Gas Co., 138 W.Va. 639, 77 S.E.2d 180 (1953); Mulroy v. Co-operative Transit Co., 142 W.Va. 165, 95 S.E.2d 63 (1956). Abstract propositions of law, which can readily be applied by a trained legal mind do not aid but frequently mystify the jury. McDonald v. Cole, 46 W.Va. 186, 32 S.E. 1033 (1899); Parker v. National Mut. Bldg. & Loan Ass'n, 55 W.Va. 134, 46 S.E. 811 (1904); Morrison v. Roush, 110 W.Va. 398, 158 S.E. 514 (1931).

An instruction should not be given which tends to confuse or mislead the jury.⁹ Nicholas v. Kershner, 20 W.Va. 251, 1882 WL 3513 (1882). See also, State v. Guthrie, *supra*; Toothman v. Brescoach, 195 W.Va. 409, 465 S.E.2d 866 (1995). Requests from jurors for clarification of confusion created by initial instructions may be considered by a reviewing court in determining whether error occurred. Ray v. American Nat'l Red Cross, 696 A.2d 399 (D.C. 1999). Instructions should not be inconsistent because it leaves the jury at liberty to decide according to an incorrect rule of law and renders it impossible for the Court to determine upon what legal principle the verdict was founded. Zinn v. Cabot, 88 W.Va. 118, 106 S.E. 427 (1921); Gordon v. Graham, 137 W.Va. 553, 73 S.E.2d 132 (1952); John D. Stump & Assoc., Inc. v. Cunningham Memorial Park, Inc., 187 W.Va. 438, 419 S.E.2d 699 (1992). See also, State v. Guthrie, *supra*; Toothman v. Brescoach, 195 W.Va. 409, 465 S.E.2d 866 (1995).

Adequate jury instructions are those that fairly and reasonably point up issues and provide correct principles of the law for a jury to apply to those issues. Dupuy v. Rodriguez, 620 So.2d 397 (La. 1993). If a trial court gives misleading or confusing jury instructions or omits an essential legal principle, jury instructions do not adequately set forth the law and may constitute reversible error. Id.

⁹ It should be noted that the jury seemed very confused during deliberations. They sent out four questions as follows:

- Question #1. "In question #1 are they talking about actual physical property being taken?"
- Question #2. "Are we able to see the depositions of Mr. Weigle, Mr. Horgan & Mr. Bailey?"
- Question #3. "If we answer yes to question #2 are we saying that the Department of Hi[gh]ways broke the law and did not provide reasonable access?"
- Question #4. Can we have access to other appraisals or any additional evidence if any?"

Instructions that assume facts not in evidence should not be given to the jury and constitute reversible error. State v. Lowe, 21 W.Va. 782, 1883 WL 3221 (1883); State v. Brooks, 214 W.Va. 562, 591 S.E.2d 120 (2003).

Argumentative instructions that are prejudicial should not be given and constitute reversible error. 89 C.J.S. Trial § 582; 75A Am.Jur.2d Trial § 964. "Argument must be left to counsel; it has no place in the court's instructions." 75 Am.Jur.2d § 1140. Where there are no model jury instructions on a subject, the jury instructions given "should be 'brief, impartial, and free from argument.'" Zieger v. Manhattan Coffee Co., 445 N.E.2d 844 (Ill. 1983); Saunders v. Schultz, 170 N.E.2d 163, 170 (Ill. 1960); Surestaff, Inc. v. Azteca Foods, Inc., 872 N.E.2d 428 (Ill. 2007)(Non-pattern jury instructions must be impartial statements of the law that are simple, brief and free from argument.).¹⁰

Instructions taken from the text of case authority may be properly refused if they are argumentative in form. Flemister v. Central Georgia Power, 79 S.E. 148 (Ga. 1913). "The fact that a statement of reasoning may be set forth in a judicial opinion does not mean that it is a proper jury instruction." Bankers Multiple Line Ins. Co. v. Farish, 464 So.2d 530, 533 n.3 (Fla. 1985). "Nor is every statement in an appellate opinion necessary or appropriate for inclusion in a jury instruction." Boyd v. Boyd, 680 S.W.2d 462, 466 (Tenn. 1984). See also, Gamble v. International Paper Realty Corp. of South Carolina, 474 S.E.2d 438 (S.C. 1996)(court's inclusion of language from an appellate decision in jury instruction which charged jury with argumentative language giving policy

¹⁰ See 75 Am.Jur.2d, Trial § 923, Instructing the Jury - Pattern Instructions.

arguments and rationale for the appellate decision was prejudicial and grounds for new trial.).

The West Virginia Supreme Court held in Matheny v. Fairmont General Hosp. Inc., 212 W.Va. 740, 575 S.E.2d 350 (2002), as follows:

'[a]n erroneous instruction is presumed to be prejudicial and warrants a new trial unless it appears that the complaining party was not prejudice[d] by such instruction.' Syllabus Point 2, Hollen v. Linger, 151 W.Va. 255, 151 S.E.2d 330 (1966). Syl. pt. 3, Honaker v. Mahon, 210 W.Va. 53, 552 S.E.2d 788 (2001).

Id. at 356.¹¹

In West Virginia, our Constitution requires the Supreme Court to write syllabus points and those are the holdings of the Court. West Virginia Constitution, Article VIII, § 4; Peel Splint Coal Co. v State, 36 W.Va. 802, 15 S.E. 1000 (1892). Therefore, in West Virginia, syllabus points of the Court are the controlling law. Koonce v. Doolittle, 48 W.Va. 592, 37 S.E. 644 (1900). Further, even the syllabus points must be read in light of the facts of the case and the opinion. Jones v. Jones, 133 W.Va. 306, 58 S.E.2d 857 (1949). Mere statements of a judge in explaining his reasoning are not holdings; they are at most dicta, and maybe not even that. "Dicta is language 'unnecessary to the decision in the case and therefore not precedential.'" State ex rel. Medical Assurance of West Virginia v. Recht, 213 W.Va. 457, 583 S.E.2d 80 (2003)(quoting Black's Law Dictionary 1100 (7th ed. 1999)).

¹¹ If a jury instruction is ambiguous, inconsistent, erroneous, confusing, one-sided, incomplete, or overly technical, a new trial will be awarded if prejudice has resulted to any party. Smith v. Midwood Realty Associates, 289 A.D.2d 391 (N.Y. 2001).

The DOH's Instruction No. 2, as modified, provided as follows:

The Respondents' right of access to public roads is not affected within the meaning of the guarantee against public encroachment so long as a convenient way of ingress and egress remains. The constitution does not undertake to guarantee a property owner the public maintenance of the most convenient route to his door. The law will not permit the Respondents to be cut off from the public thoroughfares, but they must content themselves with such route for outlet as the West Virginia Division of Highways may deem most compatible with the public welfare as long as access is reasonable and adequate. When the Respondents acquired property in the State of West Virginia, they did so in tacit recognition of these principles.

Jury Charge, DOH Instruction No. 2 at pp. 8-9. This instruction is not the law in West Virginia. It is a quote from the case of Woods v. State Road Commission of West Virginia, 148 W.Va. 555, 136 S.E.2d 314 (1964), which, in turn, cited Richmond v. City of Hinton, 117 W.Va. 223, 185 S.E. 411 (1936).

The instruction was written straight from nothing more than mere *obiter dictum*, which neither constitutes binding precedent nor law of the case. Frazier & Oxley, L.C. v. Cummings, 214 W.Va. 802, 591 S.E.2d 728, 734 n. 8 (2003) ("the implied conclusion must be 'necessary to a decision in the case' or it is dicta, which neither creates precedent . . . nor establishes law of the case. . . ." (citations omitted)); Ferrell v. Nationwide Mut. Ins. Co., 217 W.Va. 243, 617 S.E.2d 790, n. 5 (2005).

Because dicta neither constitutes the legal holding of a case nor creates precedent, the West Virginia Supreme Court of Appeals has rejected a jury instruction containing a new standard for the award of punitive damages which was based upon *dicta* in a prior decision of the Court. Coleman v. Sopher, 201 W.Va. 588, 603 & n. 21, 499 S.E.2d 592, 607 & n.21 (1997) ("Justice Cleckley's observations about those two cases are

dicta, and do not establish a new standard requiring clear and convincing evidence to support jury instructions on punitive damages.”).

The DOH’s argument at trial, that this was the law, misled the Court. Actually, the syllabus points from Woods applicable to this case are:

2. **“The right of access to and from a public highway is a property right of which the owner can not be deprived without just compensation.”** *State ex rel. Ashworth v. The State Road Commission et al.*, Point 1 Syllabus, W.Va., [128 S.E.2d 471.]

3. One whose land abuts on a public street or highway is not entitled, as against the public, to vehicular access at all points along the boundary between his property and the public street or highway. Such right of access may be regulated or curtailed reasonably in the public interest by public authorities. If the owner’s means of ingress to and egress from his property are not substantially or unreasonably interfered with in the public interest, he has no cause or basis of complaint.

5. If, in the construction, improvement or relocation of a public street or highway, the means of access of an abutting landowner has been impaired reasonably in the public interest, but the impairment has wrought no diminution of the true and actual value of the land when considered in its entirety, the landowner is not entitled to compensation.

Woods, supra, at Syl. Pts. 2, 3, and 5 (emphases added). It should be noted that Instruction No. 2 did not mention “diminution in value,” “abutting land,” or “substantially.”

The facts of both the Richmond and Woods cases are also considerably different from the case at bar. The Richmond case was one where property owners claimed damage because one end of a street was blocked off within the City of Hinton, and, in Woods the landowner was provided direct access after construction but it was limited to a 26 feet frontage on one street and access to two other streets were unaffected.

While the syllabus points in these cases correctly state the law, the damning language of Judge Maxwell written in 1936, has no place in an instruction to a jury. It may be good enough to provide a "convenient" way to a residence, but it may be unreasonable if to a commercial establishment.

The DOH's Instruction No. 2 is not only an incorrect statement of the law, but it is also argumentative, confusing, and misleading inasmuch as it fails to state objectively by what standard the jury is to measure liability. Saying on the one hand that a property owner is entitled to just compensation if his access is unreasonably affected and on the other hand saying, "they must content themselves with such route for outlet as the West Virginia Division of Highways may deem most compatible with the public welfare. . . ." and "[w]hen the Respondents acquired property in the State of West Virginia, they did so in tacit recognition of these principles, " is not only incorrect and argumentative, but is also confusing. Jury Charge, DOH Instruction No. 2 at pp. 8-9. While the Court modified this instruction as offered by petitioner by adding, "as long as access is reasonable and adequate" it did not cure the prejudice that this instruction injected into the trial. The instruction added absolutely nothing to clarify the standard with which the jury was to measure liability or damages. It actually misstates the law because the Constitution requires compensation if the property is "damaged."¹²

These statements say to the jury that the property owner bought the property with knowledge that someday the State could change his access and that he must

¹² Even if an instruction correctly states the law, it cannot be given if it might mislead the jury. 75A Am.Jur.2d Trial § 963, *citing* Oak Brook Park Dist. v. Oak Brook Development Co., 524 N.E.2d 213 (Ill. 1988).

merely content himself with whatever access is left to him by the state. This property owner did not purchase the property with that understanding.

Instructions should not assume facts. There was no evidence offered that the Holiday Inn, its management or owners, had a "tacit" understanding that the DOH could or would change the road as it did or, for that matter, in any way.

The instruction improperly diverted the jury's attention away from the correct legal standard to be applied in the case; it confused the standard; it conflicted with the standard; it assumed facts not in evidence; and it was argumentative. It was erroneous, and prejudicial to the Respondent, and warrants a new trial.

B. THE COURT ERRED BY PERMITTING RODNEY MEERS TO OFFER THE OPINION THAT THE DECREASE IN HOLIDAY INN REVENUE AND CUSTOMERS WAS CAUSED BY POOR MANAGEMENT DECISIONS WHEN MR. MEERS WAS NOT QUALIFIED TO GIVE ANY OPINIONS ON THE MANAGEMENT OF ANY HOTEL AND HAD NOT STUDIED THE ISSUE.

Rodney Meers was not only unqualified to answer any question about hotel management and whether it was wise to raise room rates, but he never even studied the issue to have a foundation to testify about it. Further, standards for real estate appraisers require them to assume proper management. Mr. Meers was a real estate appraiser. He had no basis for judging management of any hotel or motel. Here, when plaintiff objected to Mr. Meers' qualifications to testify about management issues, the trial court summarily overruled plaintiff.

As stated by Professor Wigmore, "the rules of evidence . . . must see to it that the testimonial statements offered as representing knowledge are not offered by persons

who are not fitted to acquire knowledge [on the subject at hand]." 2 *Wigmore on Evidence* §55, at 749. "Rule 702 of the West Virginia Rules of Evidence is the paramount authority for determining whether or not an expert is qualified to give an opinion."

Kiser v. Caudill, 210 W.Va. 191, 557 S.E.2d 245 (2001). Rule 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.
[Effective February 1, 1985.]

Pursuant to Rule 702 a witness must be qualified as an expert by knowledge, skill, experience, training, or education.

Before a witness can qualify to testify, it must appear that he or she has such knowledge and experience in reference to the subject matter under investigation as fits him or her to answer the question more accurately than a person who may not have been called upon to study the subject or to obtain or exercise any skill in it. 7B *Michie's Jurisprudence, Evidence* § 167; 31 *Am.Jur. 2d Expert and Opinion Evidence* §167; See also, State v. M.M., 163 W.Va. 235, 256 S.E.2d 549 (1979).

This Court has held:

In determining who is an expert, a circuit court should conduct a two-step inquiry. First, a circuit court **must determine whether the proposed expert (a) meets the minimal educational or experiential qualifications (b) in a field that is relevant to the subject under investigation (c) which will assist the trier of fact.** Second, a circuit court **must determine that the expert's area of expertise covers the particular opinion as to which the expert seeks to testify.**

Syl. Pt. 5, Gentry v. Mangum, 195 W.Va. 512, 466 S.E.2d 171 (1995); Syl. Pt. 6, Jones v.

Patterson Contracting, Inc., 206 W.Va. 399, 524 S.E.2d 915 (1999)(emphases added).

"The first and universal requirement for the admissibility of [expert] evidence is that the evidence must be both 'reliable' and 'relevant.'" Syl. Pt. 3, Gentry, *supra*.

In order for an expert witness to testify at trial not only must he/she be qualified to render his/her opinions but there must also be an adequate foundation for such opinions. Redman v. John D. Brush and Co., 111 F.3d 1174, 1179 (4th Cir. 1997); Jones v. Patterson Contracting, Inc., 206 W.Va. 399, 411, 524 S.E.2d 915, 927 (1999) (Davis, J., concurring, in part, and dissenting, in part) (affirmatively citing and discussing Redman and explaining: "The decision in Redman is important for several reasons. First, Redman recognized that merely because a person is an expert in metallurgy, does not immediately qualify that person to render an opinion on whether a metal safe was negligently designed. Second, Redman acknowledged that a person with general metallurgical knowledge could render such an opinion on whether a metal safe was negligently designed, if such person obtained adequate knowledge to formulate an opinion. Third, and most importantly, Redman held that for a person with only general metallurgical knowledge to testify as an expert on negligent design of a safe, the source of the person's knowledge must be reliable.").

Stated otherwise, while

[i]t is prejudicial error to exclude relevant and material expert evidence where a proper foundation for it has been laid, and the proffered testimony is within the proper scope of expert opinions. . . . Conversely, the courts have the obligation to contain expert testimony within the area of the professed expertise, and to require adequate foundation for the opinion.

Korsak v. Atlas Hotels, Inc., 2 Cal. App.4th 1516, 1523, 3 Cal. Rptr.2d 833, 837 (1992) (emphasis added). Accord Redevelopment Agency v. Mesdaq, 154 Cal. App.4th 1111, 65 Cal. Rptr.3d 372, 385 (2007) (same; also noting “To say that all objections to [an expert’s] reasons go to weight, not admissibility, is to minimize judicial responsibility for limiting the permissible arena in condemnation trials.” (citations omitted)).

A proper foundation must be laid for the testimony of the witness. “To qualify as an expert witness, his qualification must be demonstrated before the court. The qualification of an expert must affirmatively appear on the record. TRIAL HANDBOOK FOR WEST VIRGINIA LAWYERS § 25:4, citing Byrd v. Virginia R. Co., 123 W.Va. 47, 13 S.E.2d 273 (1941). In Hall v. Nello Teer Co., 157 W.Va. 582, 203 S.E.2d 145 (1974), this Court held that absent showing of a general contractor’s knowledge of geology, a proper foundation was not laid for his testimony, as an expert witness, as to why a 4,700 pound rock fell from a wall. In accord with Hall, questions should be directed to the witness regarding the witnesses’ qualifications and knowledge of the subject matter on which he proposes to testify. Id.

A court may exclude the testimony of an expert if his experience is too far removed from the subject of the proposed testimony. Gentry v. Mangum, at 525, 184. For example, in Ventura v. Winegardner, 178 W.Va. 82, 357 S.E.2d 764 (1987), the Court easily excluded an expert that intended to testify regarding a subject on which he had no specialized knowledge, training or experience beyond that of an average layperson. In Ventura, the Court ruled that a vocational counselor who admittedly knew very little about tennis and had no training or experience on the salaries of tennis professionals

was not qualified to give an opinion on the issue of lost earnings.¹³ Id., at 86, 768. While the witness was qualified as a vocational expert, no attempt was made to try to qualify the witness as an expert in tennis salaries, for which he was called to testify. He admitted he had little knowledge of tennis and the court found he was not qualified to give his opinion. Id., at 86-87, 768-769.

In Kiser v. Caudill, 210 W.Va. 191, 557 S.E.2d 245 (2001) (per curiam), this Court affirmed the trial court's decision to prohibit the plaintiff's medical expert from testifying on the standard of care required by a neurosurgeon. In doing so, this Court relied upon the following facts:

During his deposition [the expert] stated that he did not plan to testify about the standard of care required of a neurosurgeon in this case. He also stated that he was merely an expert in referring patients to neurosurgeons, but he did not hold himself out to be an expert in the field of neurosurgery. . . . In addition, at trial, during cross-examination by the [defendant] regarding his qualifications, [the expert] acknowledged that he was not qualified or trained in the field of neurosurgery and was not familiar with the manner in which neurosurgical procedures are performed. Given [the expert's] own admissions about his limited knowledge of neurosurgery, we do not find that the circuit court erred by limiting his testimony at trial to the field of neurology.

Kiser, 210 W.Va. at 196, 557 S.E.2d at 250. See also, Green v. Charleston Area Medical Center, Inc., 215 W.Va. 628, 600 S.E.2d 340 (2004).

¹³ See also, Fisher v. Flanagan Coal Co., 86 W.Va. 460, 103 S.E. 359 (1920)(holding erroneous the admission of an opinion of a witness examined as an expert upon a subject to which he disclaimed qualification to express an opinion).

Rodney Meers was not qualified to give any opinions on the management of any hotel. He admitted that, "[n]o, I am not qualified to give a categorical opinion as to the criteria for the Holiday Inn." (Rodney Meers Dep. Tr. at 53-54, cited in Holiday Inn's Motion for New Trial.) His qualifications concerning hotel management were derived solely from taking "just general economic courses." Id. at 45. He testified that the scope of his "impact study" was for "trying to determine the extent that location plays a part in the lodging industry in terms of where hotels locate and the impact that location has on operations." Id. at 5. He testified in deposition that "[t]he industry has determined that location is not as important to a property in terms of whether it can be successful or not." Id. at 6. All of the DOH appraisers then relied on Mr. Meers' "study." The bottom line is that a real estate appraiser who had absolutely nothing to do with the hotel/motel industry was hired to "study" the hotel/motel industry for this one case. He did not base his opinion on any information from the hotel industry. Id. at 6. Mr. Meers admitted that in his study he found no other hotels that were similarly impacted. Id. at 14. His opinions were based entirely upon his "observation" in traveling to interstate interchanges. The trial record is that appraisers always "assume" that a hotel is managed reasonably; therefore, being an appraiser does not qualify him. (Trial Transcript, Examination of Larry McDaniel, pp. 51 & 138.)

It was error to allow a witness, who did not know enough to even be cross-examined about the subject, to inject a red herring into the trial of the case to explain away the fact that a business, which had employed over 100 people for 23 years, was dying and going out of business. While the determination of whether a witness is

qualified to state an opinion typically rests with the trial court, an abuse of discretion warrants reversal. W.Va. Rules of Evid., Rule 702. See also, Jones v. Patterson Contracting, Inc., 206 W.Va. 399, 524 S.E.2d 915 (1999). The Holiday Inn is entitled to a new trial.

C. THE COURT ERRED BY SUSTAINING THE DOH'S OBJECTION TO TESTIMONY OF JIM COCHRANE, WHO WAS NOT A PAID EXPERT, BUT WHO HAD EXPERTISE IN HOTEL/MOTEL MANAGEMENT.

The Court sustained the DOH's objection to testimony of Jim Cochrane, who was not a paid expert, but who had expertise in hotel/motel management. The DOH's objection was not lack of qualification, but surprise. The DOH disingenuously claimed surprise at the trial. In this case, the scheduling order placed into effect on October 19, 2005, required the parties to supply to each other a list of witnesses and the purpose of the testimony 30 days in advance of trial, and, at that time, any party desiring to use an expert witness was to furnish opposing counsel with the specialty, copies of reports, or, if no report, a summary of the substance of contemplated testimony. The Holiday Inn first disclosed Jim Cochrane as a witness on January 5, 2006, and many times subsequently. He was deposed and was on the Holiday Inn's witness list and was identified to testify live or by deposition.

Mr. Cochrane's testimony was critical in that the Holiday Inn intended to proffer Mr. Cochrane to counter testimony by Rodney Meers. Mr. Meers was hired by the DOH to do a study of interstate interchanges throughout West Virginia and some surrounding states and to testify that location was not important to the success of a

motel. While Mr. Meers was an appraiser and was qualified as an appraiser and could testify about what he observed with respect to relevant issues, he was not qualified to give opinions about management of a hotel. Nevertheless, the DOH offered Mr. Meers' opinion that the cause of the Holiday Inn business drop off was because of poor management at the Holiday Inn.

Mr. Cochrane was identified to testify, and his opinion-testimony was elicited by DOH counsel by deposition. If the DOH had any objection it should have been made long before trial. The objection made was an opportunistic objection made on the eve of trial. The DOH had a right to discover Mr. Cochrane's opinions, and it did that contemporaneously with the depositions of their own experts. The DOH should not be permitted to depose the witnesses, glean the opinions, have the opinions and bases under oath and then claim surprise.

The prejudice to the Holiday Inn was multiplied by the Court allowing Messrs. Meers, Pope and Gordon to testify that the damages to the Holiday Inn was caused by management decision.

In Syllabus Point 5 of Prager v. Meckling, 172 W.Va. 785, 790, 310 S.E.2d 852, 856 (1983), the West Virginia Supreme Court of Appeals listed four factors a court must consider in determining whether the failure to supplement discovery requests under Rule 26(e) should require exclusion of evidence related to the supplementary material:

1. the prejudice or surprise in fact of the party against whom the excluded witnesses would have testified;
2. the ability of that party to cure the prejudice;
3. the extent to which the waiver of the rule would disrupt the orderly and efficient trial of the case or of other cases in the court;

4. bad faith or willfulness in failing to comply with the court's order.

See also, Martin v. Smith, 190 W.Va. 286, 291, 438 S.E.2d 318, 323 (1993). First, there was no surprise because the DOH took his deposition and filed a motion to exclude his opinions that it had for four months. Second, there being no prejudice or surprise, the ability to cure is moot. Nonetheless, the DOH had witnesses to rebut Mr. Cochrane. The DOH had four months to re-depose Mr. Cochrane or request additional information and never sought to do so. Third, Mr. Cochrane's testimony would not disrupt the trial because he had been listed as a witness for the Respondent for over a year before the trial. He had been deposed months prior to the trial and the DOH knew his opinions. The DOH knew he would be presented as a witness at trial and had multiple witnesses to rebut his testimony. Fourth, there was no bad faith or willfulness by the Holiday Inn and the DOH developed no facts and offered no arguments to show bad faith or willfulness. The Holiday Inn correctly believed that once the DOH had gone forward and deposed Mr. Cochrane on opinions and bases that that was sufficient notice as to what Mr. Cochrane's testimony was going to be.

West Virginia Rule of Civil Procedure 26(b)(4) provides in part that facts and opinions held by experts may be obtained only as follows:

(A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

(ii) A party may depose any person who has been identified as an expert whose opinions may be presented at trial. (Emphasis added.)

Here, the DOH undertook to exercise its right to depose Mr. Cochrane and obtained his opinions. It should not be allowed to claim surprise or prejudice unless the Holiday Inn was attempting to elicit other opinions that he did not disclose.

If the DOH believed that the Holiday Inn's disclosures were incomplete, the proper procedure was to file a motion to compel more complete answers. Syl. Pt. 1, Nutter v. Maynard, 183 W.Va. 247, 395 S.E.2d 491 (1990); State Farm Fire & Casualty v. Madden, 192 W.Va. 155, 451 S.E.2d 721 (1994). No such motion was ever filed by the DOH. Regardless, Mr. Cochrane's opinions were admissible under Rule 701 of the West Virginia Rules of Evidence. Rule 701 governs opinion testimony by lay witnesses.

This Rule provides:

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

Rule 701 is permissive in scope. See, Cleckley, Handbook on Evidence, §7-1 (3d ed. 1994).

"It is not really a rule against opinions, but rather 'a rule conditionally favoring them.' "

Id., quoting McCormick on Evidence § 11 (3d ed. 1984). Here, Mr. Cochrane was already familiar with the property and the effect of the roadway.

For a lay witness to give opinion testimony, (A) the witness must have personal knowledge or perception of the facts from which the opinion is derived; (B) there must be a rational connection between the opinion and the facts upon which it is based; and (C) the opinion must be helpful in understanding the testimony or determining a fact in issue. West Virginia Rules of Evidence, Rule 701; Hatcher v. McBride, 221 W.Va. 5, 650

S.E.2d 104 (2006); State v. Nichols, 208 W.Va. 432, 541 S.E.2d 310 (1999)(overruled on other grounds). A witness is not required to be qualified in the highest degree or in any particular degree to render his opinion admissible, and the opinion of a witness is admissible in evidence if he has some peculiar qualification and has more knowledge of the subject than jurors are ordinarily supposed to possess. State v. Jameson, 194 W.Va. 561, 461 S.E.2d 67 (1995)(fire department investigator and investigator from state fire marshal's office could testify as to their opinions regarding "pour patterns" they observed at the scene of fire; investigators were professional firefighters whose work focused on investigation of fires, and, although prosecution did not attempt to qualify them as experts, they were in position to have peculiar knowledge, which jurors would not ordinarily have, about "pour patterns.").

Indeed, "[i]t is firmly established in this state that the opinion of a witness who is not an expert may be given in evidence if he has some peculiar knowledge concerning the subject of the opinion[.]" Syl. Pt. 2, State v. Haller, 178 W.Va. 642, 363 S.E.2d 719 (1987)). *Accord*, Syl. Pt. 2, Cochran v. Appalachian Power Co., 162 W.Va. 86, 246 S.E.2d 624 (1978); Moore v. Shannondale, 152 W.Va. 549, 165 S.E.2d 113 (1968).

In Scott v. State, 222 S.W.3d 820 (Tex. 2007), the appellate court ruled that the witness was qualified to give expert testimony under Rule 702 and lay testimony under Rule 701. Scott, at 827. The court reasoned: "When a witness who is qualified as an expert testifies regarding events which he or she personally perceived the evidence may be admissible as both Rule 701 opinion testimony and Rule 702 expert testimony." Id., at 828.

The court in Scott further stated:

Moreover, a lay witness with sufficient personal experience and knowledge may be qualified to express an opinion on a matter outside the realm of common knowledge with respect to event not normally encountered by most people in everyday life. *Id.*

Scott, at 828 (emphasis added).

Further, the West Virginia Supreme Court of Appeals has specifically acknowledged that Rule 701 " 'specifically permits lay opinion testimony if those opinions are rationally based on the perception of the witness[.]' " State v. Nichols, 208 W.Va. 432, 541 S.E.2d 310 (1999)(overruled on other grounds)(citing Carter v. DecisionOne Corp., 122 F.3d 997, 1005 (11th Cir. 1997). The Court in Nichols also cited various other cases in support of its proposition that the rational connection requirement means that " 'the opinion must be one that a normal person would form from those perceptions.' " United States v. Riddle, 103 F.3d 423, 428 (5th Cir. 1997); United States v. Figueroa-Lopez, 125 F.3d 1241, 1244-1246 (9th Cir. 1997); Wactor v. Spartan Transp. Corp., 27 F.3d 347, 351 (8th Cir. 1994); United States v. Garcia, 994 F.2d 1499, 1506 (10th Cir. 1993); United States v. Fowler, 932 F.2d 306, 312 (4th Cir. 1991); Swajian v. General Motors Corp., 916 F.2d 31, 36 (1st Cir. 1990); Williams Enterprises v. Sherman R. Smoot Co., 938 F.2d 230, 233-234 (D.C. Cir. 1991). See also, King v. Rumsfield, 328 F.3d 145, 158 (4th Cir. 2003).

The helpfulness requirement is designed to provide " 'assurance against the admissions of opinions which would merely tell the jury what result to reach.' " State v. Nichols, 208 W.Va. 432, 541 S.E.2d 310 (1999)(overruled on other grounds)(citing United

States v. Rea, 958 F.2d 1206, 1215 (2d Cir. 1992)). Similarly, it is established law in West Virginia the helpfulness element of Rule 701 seeks to clarify a factual issue. Id.

Here, Mr. Cochrane was clearly an expert in commercial real estate development. But, he was also familiar with the subject property, both before and after the road was constructed. His unique situation made his testimony particularly helpful to the jury. Under the analysis of either Rule 702 or 701, his testimony was admissible. However, here, his testimony was excluded, not because it was not admissible under Rule 702 or 701, but supposedly because the DOH was surprised that he was going to testify as an "expert." The DOH was not so surprised that it did not depose him, get his opinions, and file a motion to exclude his testimony. The DOH had numerous witnesses whom Mr. Cochrane actually had to rebut. There is no way the DOH was surprised with three expert appraisers and a slew of in-house appraisers and engineers. It was error not to allow Mr. Cochrane to testify to what he had testified to in his deposition.

D. THE COURT ERRED BY SUSTAINING THE OBJECTIONS OF THE DOH TO THE OFFERING OF THE APPRAISAL OF RANDY REED AND TO THE OFFERING OF EVIDENCE AS TO THE AMOUNT FOR WHICH THOMAS MOTTA AND HARRY C. HARTLEBEN APPRAISED THE PROPERTY IN 1987 AND 1994.

The Court sustained the objections of the DOH to the offering of the appraisal of Randy Reed and to the offering of evidence as to the amount that Thomas Motta and Harry C. Hartleben appraised the property for in 1987 and 1994, after the Holiday Inn's appraiser was questioned about it in cross-examination by the DOH. These appraisals were completed in the regular course of business and not for litigation. (Trial

Transcript, Examination of Larry McDaniel at p. 21.) The Court erred in not allowing the Reed appraisal into evidence and in denying the Holiday Inn the evidence that, at least, in 1994 the property appraised for \$7.565 million after the DOH's counsel raised the issue in cross-examination. This evidence was relevant to prove that the Holiday Inn's fair market value had not deteriorated; that the management had properly maintained and improved the Holiday Inn; that all appraisers who had appraised the property when litigation was not at issue appraised it for at least \$7.5 million. It also was important to defuse the cross-examination, which had raised the issue but had not asked for the amount. The fair market value was one of two major issues with the DOH appraising it at \$5 million and claiming that the motel was out of date and obsolescent. West Virginia Rules of Evidence 401 and 402 provide that relevant evidence is admissible. There was nothing prejudicial about these appraisals. The appraisals were part of the Holiday Inn's business records.

“ ‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” W.Va. R. E. 401. The test used in Rule 401 to determine relevancy is one of probability: whether a reasonable person, with some experience in the everyday world, would believe that this piece of evidence might be helpful in determining the falsity or truth of any material fact. FRANKLIN D. CLECKLEY, HANDBOOK ON EVIDENCE FOR WEST VIRGINIA LAWYERS, § 4-1(C) (3d ed. 1994). See also, Young v. Salanda, 189 W.Va. 330, 431 S.E.2d 669 (1993).

A judge should consider not only whether the admission of evidence is likely to advance the cause, but also whether its absence might produce negative inferences that would unfairly hurt a party, i.e., the absence might be probative to the jury. FRANKLIN D. CLECKLEY, HANDBOOK ON EVIDENCE FOR WEST VIRGINIA LAWYERS, § 4-1(E)(2) (3d ed. 1994).

The relationship between the appraisals and the issues in this case is obvious. The appraisals establish that the value of the Holiday Inn's property had not declined over the years and that the hotel was not obsolete, as claimed by the DOH. The appraisals further discredit the DOH expert witness opinions regarding the value of the Holiday Inn's property prior to the change in access to the property.

Rule 402 of the West Virginia Rules of Evidence provides that relevant evidence is admissible unless it should be excluded by another rule of evidence. Rule 402 specifically provides: "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of West Virginia, these rules, or other rules adopted by the Supreme Court of Appeals. Evidence which is not relevant is not admissible."

West Virginia Rule of Evidence 403 provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

While a trial judge enjoys broad discretion in balancing relevant evidence against its possible unfair prejudice under Rule 403, it must be understood, however, that the

exclusion of purely relevant evidence is error and Rule 403 should not be used as an evidentiary bar where there has been a reasonable finding that the evidence is relevant and its probative value outweighs the dangers. See, Crawford v. Roeder, 169 W.Va. 158, 286 S.E.2d 273 (1982); State v. Dietz, 182 W.Va. 544, 390 S.E.2d 15 (1990).

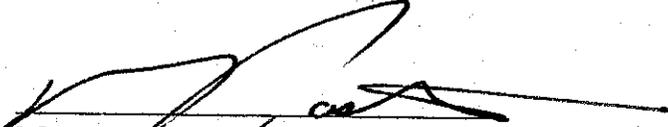
When a cross-examiner exceeds the proper scope of cross-examination, the cross-examiner makes the witness his own and the rules of direct examination apply. Hollen v. Crim, 62 W.Va. 451, 59 S.E. 172 (1907); State v. Bias, 156 W.Va. 569, 195 S.E.2d 626 (1973). Once a subject matter is "opened up" on direct, Rule 611(b) of the West Virginia Rules of Evidence permits the cross-examiner, or in this case the person conducting re-direct examination, to inquire into the details of the events testified to on direct, or in this case in cross-examination. W.Va.R.E. 611(b); FRANKLIN D. CLECKLEY, HANDBOOK ON EVIDENCE FOR WEST VIRGINIA LAWYERS, § 6-11(F)(4)(3d ed. 1994). Here, by opening the issue, it was error not to allow the Holiday Inn to clarify the appraisal value. It was error for the court not to admit the report of Mr. Reed and it was error for the court to sustain the objection to Mr. McDaniel testifying to the amount of the other appraisals after it was raised by the DOH on its cross-examination.

VI. RELIEF PRAYED FOR

The Petitioner, therefore, prays that this Honorable Court reverse the decision of the Circuit Court of Wood County in denying Holiday Inn's motion for a new trial and Order that the verdict of the jury be set aside and that the Holiday Inn be granted a new trial.

PARKERSBURG INN, INC., a West
Virginia corporation

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BEFORE THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 33882

WEST VIRGINIA DEPARTMENT OF
TRANSPORTATION, DIVISION OF
HIGHWAYS, et al.

Appellee,

v.

Civil Action No. 04-C-710
Honorable Jeffrey B. Reed

PARKERSBURG INN, INC.,

Appellant.

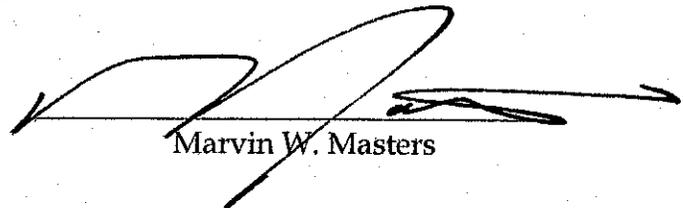
CERTIFICATE OF SERVICE

I, Marvin W. Masters, counsel for Appellant, Parkersburg Inn, Inc., do hereby certify that true and exact copies of the foregoing "Brief of Appellant, Parkersburg Inn, Inc." were served upon:

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in envelopes properly addressed, stamped and deposited in the regular course of the United States Mail, this 17th day of June, 2008.


Marvin W. Masters