

16-0325

IN THE CIRCUIT COURT OF HARDY COUNTY, WEST VIRGINIA

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION, DIVISION OF HIGHWAYS, a Public Corporation, and PAUL A. MATTOX, JR., P.E., SECRETARY/ COMMISSIONER OF HIGHWAYS, Petitioners,

FILED DATE 3-2-16 CLERK RS

v.

Case No. 11-C-30 DEPUTY Project No. X316-H-100.40, APD-0484(176) Parcel No. 3 (Mineral Rights) Judge Andrew N. Frye, Jr.

MARGARET Z. NEWTON Respondent.

ORDER GRANTING RESPONDENT'S MOTION FOR REIMBURSEMENT OF ATTORNEY'S FEES, LITIGATION EXPENSES AND EXPERT WITNESSES' FEES AND EXPENSES

Now comes this Court, the Honorable Andrew N. Frye, Jr. presiding, upon due consideration of the Respondent's Motion for Reimbursement of Attorney's Fees, Litigation Expenses and Expert Witnesses' Fees and Expenses, the Response thereto, and the arguments of counsel held thereon and hereby make the following FINDINGS OF FACT and CONCLUSIONS OF LAW:

1. This action was instituted by the filing of a Writ of Mandamus (Hardy County Circuit Court case number 10-C-42) by the Respondent wherein she alleged that her previously severed mineral rights were violated by the Petitioners through the removal of the limestone from their property in the path of the Corridor H roadway project without just compensation. By Agreed Order, WVDOH elected to file condemnation proceedings against the mineral rights of Ms. Newton. The issue of awarding attorney fees was reserved pending completion of the condemnation proceedings.

2. The matter was thoroughly litigated through several years of pretrial motions which ultimately resulted in a jury trial. The jury found that the Respondent was entitled to just

compensation for the take of her limestone. Petitioners appealed to the West Virginia Supreme Court of Appeals and the jury verdict was affirmed.

3. The remaining issue between the parties, therefore, is the matter of attorney fees and expenses requested by the Respondent. The Trial Court previously declined to decide the matter pending the appeal and the West Virginia Supreme Court of Appeals did not take up the matter inasmuch as it was left pending in the Hardy County Circuit Court.

4. Upon conclusion of the matter in the West Virginia Supreme Court of Appeals, Respondent renewed her Motion and submitted a *Final Revised Affidavit for Attorney Fees*. The Court has reviewed same and finds that attorney fees are warranted in this matter, keeping in mind that attorney fees have been requested in both Hardy County Circuit Court Case Number 10-C-42 (mandamus) and 11-C-30.

5. The West Virginia Supreme Court of Appeals has previously held, with regard to mandamus cases that “[c]osts and attorney’s fees may be awarded in mandamus proceedings involving public officials because citizens should not have to resort to lawsuits to force government officials to perform their legally prescribed nondiscretionary duties.” Syl. pt. 1, State ex rel. W.Va. Highlands Conservancy, Inc. v. W. Va. Department of Environmental Protection, 193 W.Va. 650, 458 S.E.2d 88 (1995). Further, the Court found that “[a]ttorney’s fees may be awarded to a prevailing petitioner in a mandamus action in two general contexts: (1) where a public official has deliberately and knowingly refused to exercise a clear legal duty, and (2) where a public official has failed to exercise a clear legal duty, although the failure was not the result of a decision to knowingly disregard a legal command. Syl. pt. 2, State ex rel. W.Va. Highlands Conservancy, Inc. v. W. Va. Department of Environmental Protection, 193 W.Va. 650, 458 S.E.2d 88 (1995). Finally, “[w]here a public official has deliberately and knowingly refused to exercise a clear legal duty, a presumption exists in favor of an award of attorney’s fees; unless

extraordinary circumstances indicate an award would be inappropriate, attorney's fees will be allowed." Syl. pt. 3, State ex rel. W.Va. Highlands Conservancy, Inc. v. W. Va. Department of Environmental Protection, 193 W.Va. 650, 458 S.E.2d 88 (1995).

6. At the trial of the matter, WVDOH and Respondent stipulated to the following facts: "1. Paul Williams and Margaret Z. Williams, now Newton, conveyed the surface only to James Parsons on June 4, 1980, reserving unto themselves fee simple ownership of all minerals underlying the Parsons real estate, without limitation or restriction, and which reservation and exception is free of ambiguity and clear in its intent. 2. The minerals reserved by Margaret Z. Newton include limestone and gravel as defined by the Court." West Virginia Dept. of Transp., Div. of Highways v. Newton, 235 W.Va. 267, ___, 773 S.E.2d 371, 382 (2015).

7. Accordingly, this Court specifically finds that WVDOH, by virtue of the reservation of minerals being made in the same deed from which WVDOH identified the surface owner and properly instituted condemnation proceedings against the surface, did willfully, deliberately, and knowingly refuse to exercise its duty to institute condemnation proceedings against the Respondent for the take of the minerals. A presumption therefore exists in favor of an award of attorney fees and cost and same are awarded as follows in case number 10-C-42 from the date of filing of the case on May 1, 2010 until the filing of the ordered petition in case number 11-C-30 on April 29, 2011. Inasmuch as Respondent Newton has fully prevailed in her mandamus action, full award of fees and costs are appropriate.

8. From a review of the affidavit, it would appear that Respondent Newton was billed 129.3 hours of attorney's fees at a rate of \$250.00 per hour for a total fee of \$32,325.00. Plus expenses of \$185.05 during this time frame for a total of \$32,510.05.

9. Respondent Newton has also requested attorney fees in the present civil action. W.Va. Code §54-2-16a provides that the "all costs of a condemnation proceeding in the trial

court shall be paid by the applicant.” The West Virginia Supreme Court of Appeals has held that “[t]here is authority in equity to award to the prevailing litigant his or her reasonable attorney's fees as ‘costs,’ without express statutory authorization, when the losing party has acted in bad faith, vexatiously, wantonly or for oppressive reasons.” Syl. pt. 3, Sally-Mike Properties v. Yokum, 179 W.Va. 48, 365 S.E.2d 246 (1986).

10. Under the facts of this case, Respondent Newton brought the mandamus action to force the WVDOH to file a condemnation suit against her mineral interest. Under the mandamus jurisprudence, her attorney fees and expenses were awarded for her successful mandamus action. However, the delay occasioned by WVDOH's refusal coupled with the commencement of highway construction while WVDOH was trespassing upon the mineral interests placed Respondent Newton at a distinct disadvantage in proving the volume and ultimately the value of her mineral interest. At the time the trial began, the minerals had been removed from her property and used in the Corridor H construction. Respondent Newton had to hire her own experts to reconstruct the topography of the property to estimate the volume of limestone which was removed by WVDOH contractors. WVDOH did not provide topography or volume information in discovery and placed the burden of production upon Respondent Newton to prove how much limestone was removed. This requirement greatly increased litigation costs and expenses.

11. In consideration of the Sally-Mike decision, this Court finds that “costs” under W.Va. Code §54-2-16a can include attorney fees and expert witness expenses and are appropriate to award to Respondent Newton in this case. Additionally, this Court finds that the WVDOH did act in bad faith through its actions in ignoring Respondent Newton's mineral interests at the time of the condemnation of the surface, through trespassing on Respondent Newton's minerals, and by failing to preserve and record volume information for the minerals

removed – making an award of attorney fees alternatively appropriate under Sally-Mike and in equity.

12. In determining the amount of attorney fees and costs, the Court considered the factors from syllabus point 4 of Aetna Casualty & Surety Co. v. Pitrolo, 176 W.Va. 190, 342 S.E.2d 156 (1986), in which the West Virginia Supreme Court of Appeals held:

Where attorney's fees are sought against a third party, the test of what should be considered a reasonable fee is determined not solely by the fee arrangement between the attorney and his client. The reasonableness of attorney's fees is generally based on broader factors such as: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

The Court finds that Respondent Newton entered into a Contract with her Counsel, J. David Judy, III, on April 30, 2010, whereby she was liable to pay all costs and expenses of the litigation and pay her counsel 33-1/3% of any award. The Court has reviewed the Affidavit provided by Mr. Judy and finds that the expenses claimed were reasonable and necessary for litigation of this type. The Court will not award the contingency fee amount specified in the Contract to the Respondent as attorney fees against the Petitioner.

13. Therefore, this Court finds that claimed attorney fees in the amount of \$129,425.00 are reasonable for case number 11-C-30. Additionally, Respondent Newton's costs in the amount of \$99,492.44 are also reasonable and appropriate and are hereby awarded.

ACCORDINGLY, it is hereby ORDERED:

1. Judgment is hereby entered in favor of Respondent Newton and against WVDOH in the amount of \$32,510.05, plus interest at 7% per annum from the date of the judgment, for attorney fees and costs in Case Number 10-C-42. This amount is not subject to any contingency fee offset under the Respondent's Contract with Mr. Judy inasmuch as the Court considers this award as a separate and distinct civil action from 11-C-30.

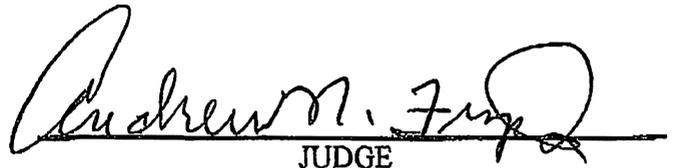
2. Judgment is hereby entered in favor of Respondent Newton and against WVDOH in the amount of \$228,917.44, plus interest at 7% per annum from the date of the judgment, for attorney fees and costs in Case Number 11-C-30.

3. Objections to any adverse rulings of the Court are hereby SAVED.

4. The Circuit Clerk shall provide a copy of this Order to all counsel of record.

5. Nothing remaining to be done in this matter, it shall be removed from the docket and placed among the actions ended.

ENTERED this 2nd day of March 2016.


JUDGE