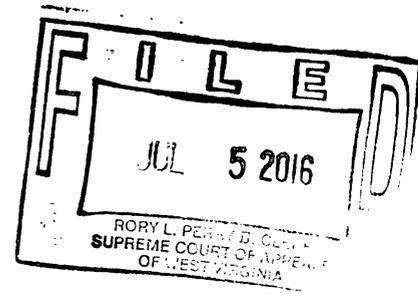


IN THE SUPREME COURT OF APPEALS OF  
WEST VIRGINIA



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No. 16-0325  
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WEST VIRGINIA DEPARTMENT OF TRANSPORTATION,  
DIVISION OF HIGHWAYS, a Public Corporation, and  
PAUL MATTOX, P.E. Secretary / Commissioner of Highways,

Petitioners Below, Petitioners

v.

MARGARET Z. NEWTON,

Respondent Below, Respondent.

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**PETITIONERS' BRIEF ON APPEAL**

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Respectfully submitted by  
Counsel for Petitioners,

A handwritten signature in black ink, appearing to read "Scott L. Summers", written over a horizontal line.

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## **PETITIONER'S BRIEF ON APPEAL**

Comes now, Petitioners, West Virginia Department of Transportation, Division of Highways and Paul Mattox, Secretary / Commissioner of Highways, by counsel, Scott L. Summers, Esquire, pursuant to the West Virginia Rules of Appellate Procedure and respectfully file Petitioners' Brief on Appeal.

### **ASSIGNMENTS OF ERROR**

Assignment of Error No. 1: The circuit court erred in awarding Attorney's Fees, Litigation Expenses and Expert Witness' Fees and Expenses to Respondent.

Assignment of Error No. 2: The circuit court erred in failing to make any meaningful review or analysis of the amounts sought to be recovered by Respondent.

### **STATEMENT OF CASE**

Petitioners' appeal is taken from the "Order Granting Respondent's Motion for Reimbursement of Attorney's Fees, Litigation Expenses and Expert Witness' Fees and Expenses" entered in the circuit court of Hardy County, West Virginia on March 2, 2016.

This case arises out of a condemnation action filed by the West Virginia Department of Transportation, Division of Highways to condemn certain property in relation to the construction of "Corridor H" through Hardy County.

The sole issue in this appeal is the propriety of the circuit court's award of attorney's fees, litigation expenses and expert witness' fees and expenses to Respondent.

After a trial held in this matter from April 7 through April 9, 2014, the circuit court of Hardy County entered a Judgment Order in favor of Margaret Newton and against the West Virginia Department of Transportation, Division of Highways, a public corporation, and Paul A. Mattox, Jr., P.E., Secretary/Commissioner of Highways. That Judgment Order was appealed to this Court on

May 15, 2015. This Court affirmed the Judgment Order and issued a written opinion. *See West Virginia Department of Transportation, Division of Highways v. Newton*, 235 W.Va. 267, 773 S.E.2d 371 (2015)

Upon the affirmation of the Judgment Order, the only issue remaining to be decided by the circuit court was Respondent's motion for reimbursement of attorney's fees, litigation expenses and expert witness' fees and expenses.

On March 2, 2016, the circuit court of Hardy County entered the "Order Granting Respondent's Motion for Reimbursement of Attorney's Fees, Litigation Expenses and Expert Witness' Fees and Expenses." In said Order, the circuit court awarded to Respondent a judgment in the amount of Thirty Two Thousand Five Hundred Ten Dollars and Five Cents (\$32,510.05) plus interest at seven percent (7%) per annum from the date of the judgment "for attorney's fees and costs in Case Number 10-C-42." Case Number 10-C-42 was the mandamus action filed by Ms. Newton. (Appendix at page 84.) (hereinafter "App. at pg. \_\_.")

Said Order also awarded to Respondent a judgment in the amount of Two Hundred Twenty Eight Thousand Nine Hundred Seventeen Dollars and Forty-Four Cents (\$228,917.44) plus interest at seven percent (7%) per annum from the date of the judgment "for attorney's fees and costs in Case Number 10-C-30." Case Number 10-C-30 is the condemnation action. (App. at pg. 84)

Petitioners are asking this Court to reverse the "Order Granting Respondent's Motion for Reimbursement of Attorney's Fees, Litigation Expenses and Expert Witness' Fees and Expenses" entered by the circuit court of Hardy County and remand the case back to the circuit court.

In reversing and remanding said Order, Petitioners are also requesting this Court to direct the circuit court of Hardy County to enter an Order denying the relief sought in Respondent's Motion for Reimbursement of Attorney's Fees, Litigation Expenses and Expert Witness' Fees and Expenses.

In the alternative, Petitioners request that this Court remand the case back to the circuit court of Hardy County with directions to conduct a full hearing on the propriety and reasonableness of the amounts requested by Respondent.

### SUMMARY OF ARGUMENT

The circuit court erred in awarding Attorney's Fees, Litigation Expenses and Expert Witness' Fees and Expenses to Respondent.

In determining whether an award of attorney's fees was appropriate in the mandamus action filed by the Respondent, the circuit court did not conduct the proper analysis required by this Court in Syllabus Point 4 of State ex re. W.Va. Highlands Conservancy, Inc. v. W.Va. Department of Environmental Protection, 193 W.Va. 650, 458 S.E. 88(1995). Specifically, the circuit court was required to:

[w]eigh the following factors to determine whether it would be fairer to leave the costs of litigation with the private litigant or impose them on the taxpayers: (a) the relative clarity by which the legal duty was established; (b) whether the ruling promoted the general public interest or merely protected the private interest of the petitioner or a small group of individuals; and (c) whether the petitioner has adequate financial resources such that petitioner can afford to protect his or her own interests in court and as between the government and petitioner.

By failing to conduct this analysis, the circuit court abused its discretion. As such, the circuit court's order awarding attorney's fees in the mandamus action filed by Respondent must be reversed.

The circuit court also abused its discretion in awarding attorney's fees in the condemnation action filed by the Petitioners.

In order to prevail on her motion for an award of attorney's fees and costs associated with the condemnation proceeding (11-C-30), Ms. Newton was required to prove that, (1) the State took and/or damaged her property for public use; (2) a reasonable amount of time passed after the completion of the project and the Department of Highways did not file a condemnation action; (3)

the Court granted her petition for Writ of Mandamus; and (4) the granting of the Writ of Mandamus resulted in Ms. Newton filing an inverse condemnation action. West Virginia Department of Transportation Division of Highways v. Dodson Mobile Homes Sales & Servs., Inc., 218 W. Va. 121, 125, 624 S.E.2d 468, 472 (2005).

The only one of the four elements identified above that Ms. Newman can satisfy is that the State took and/or damaged her property for public use.<sup>1</sup> She did not prove the other elements necessary in order for the circuit court to award attorney's fees and associated litigation costs. The Department of Highways did file a condemnation proceeding within a reasonable amount of time after the completion of the project. The Court did not grant Ms. Newton a Writ of Mandamus. Ms. Newton did not file an inverse condemnation proceeding.

The circuit court relied upon this Court's holding in Syllabus Point 3 of Sally-Mike Properties v. Yokum, 179 W.Va. 48, 365 S.E.2d 246 (1986). Which states: "[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."

The law of West Virginia is clear, "[i]n the absence of evidence to the contrary, the state road commissioner will be presumed to have performed properly and in good faith duties imposed upon him by law." Syllabus Point 3, of West Virginia Department of Transportation v. Contractor Enterprises, et al. 672 S.E.2d 234 (W.Va., 2008).

The circuit court relied upon stipulations improperly entered into by Petitioners' prior counsel at the trial of this matter to conclude that the West Virginia Division of Highways "did act in bad

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<sup>1</sup> This element is satisfied only because Petitioners' prior counsel improvidently stipulated that limestone is a mineral which is reserved under a general mineral reservation in a deed.

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." (App at pg. 82-83)

The circuit court abused its discretion in using a stipulation entered into by trial counsel (nearly nine years after the Respondent obtained a right to begin construction) in order to find that the West Virginia Division of Highways "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 ...."

Respondent is not entitled to an award of attorney's fees and associated litigation costs. The circuit court abused its discretion in making such an award to Respondent. Accordingly, the circuit court's Order in this regard must be reversed.

Assuming arguendo that Respondent was entitled to an award of attorney's fees, the circuit court erred in failing to make any meaningful review or analysis of the amounts sought to be recovered by Respondent.

Ms. Newton's attorney fee request includes time spent working on the issues of her former co-plaintiffs, Sherman and Garrett. Those two plaintiffs were dropped from the case and then had no connection to Ms. Newton's case. There were also other entries in the fee request which do not appear related to Ms. Newton's case.

Many of the receipts included in Respondent's counsel's affidavit appear to be for services rendered in other cases. Postage and copying services were also requested for apparently multiple clients. Many of the engineering bills submitted by Respondent were for multiple properties not at issue in the Newton case.

The attorney fees invoice contains many items that could be categorized and considered clerical or administrative in nature and did not require the skills or knowledge of an attorney to complete. Furthermore, multiple of Respondent's counsel's entries were block billing and did not provide a division of time between specific activities.

Finally, many entries in the attorney fee invoice for Ms. Newton's claim were ambiguous and gave little detail about what counsel was doing during the time.

These issues were raised by Petitioners. However, the circuit court's order contains no reference to an analysis of these specific issues. Instead, the circuit court has accepted Respondent's "Affidavit for Attorney Fees" in its entirety without question or analysis of the issues raised by Petitioners.

The Circuit Court erred in failing to conduct an analysis of the reasonableness of the costs and fees requested. If this Court determines that an award of attorney's fees and costs is appropriate in this matter, Petitioners respectfully request that this matter be remanded to the circuit court for a more in depth analysis to determine the reasonableness of Respondent's request for an award of costs and fees.

#### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

The issue before the Court in this appeal involves assignments of error in the application of settled law arising out of a narrow issue. Specifically, an award of costs and attorney's fees arising out of a mandamus action and a condemnation action.

However, due to the unique facts of this matter, a memorandum decision is not appropriate and oral argument under Rule 19 of the West Virginia Rules of Appellate Procedure is requested.

## STANDARD OF REVIEW

The circuit court was presented with a question of law with regard to the award of costs and attorney's fees arising from the mandamus action. The circuit court erred in the application of the law. As such, the standard of review is de novo.

The circuit court was presented with a question of law with regard to an award of attorney's fees in the condemnation action because the case was not an inverse condemnation action. The circuit court committed error in the application of the law. As such, the standard of review is de novo.

“Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a de novo standard of review.’ Syllabus Point 1, Chrystal R.M. v. Charlie A.L., 194 W.Va. 138, 459 S.E.2d 415 (1995).” Syllabus Point 1, West Virginia Department of Transportation, Division of Highways v. Dodson Mobile Homes, 218 W.Va. 121, 624 S.E.2d 468 (2005).

With regard to the circuit court's award of attorney's fees based upon its finding that the Petitioners acted in bad faith, and the circuit court's failure to conduct any meaningful review of the fees and costs sought to be recovered by Ms. Newton, the standard of review is abuse of discretion.

In Heldreth v. Rahimian, 637 S.E.2d 359 (W.Va., 2006) this Court stated:

Our review of the issue of a trial court's award of attorney's fees is to determine whether the lower court committed error in making the award. In Bond v. Bond, 144 W.Va. 478, 109 S.E.2d 16 (1959), we explained: “[T]he trial [court] . . . is vested with a wide discretion in determining the amount of . . . court costs and counsel fees; and the trial [court's] . . . determination of such matters will not be disturbed upon appeal to this Court unless it clearly appears that [it] has abused [its] discretion.” Id. at 478-79, 109 S.E.2d at 17, syl. pt. 3, in part.

## ARGUMENT

### 1. **The Circuit Court Erred When It Awarded Respondent Her Attorney's Fees.**

The circuit court granted an award of attorney's fees and costs in the mandamus action (10-C-42) and in the condemnation action (11-C-30)

#### A. **The Circuit Court Improperly Awarded Respondent Her Costs and Attorney's Fees Incurred in the Mandamus Action.**

In granting Respondent's request for an award of costs and attorney's fees, the circuit court found as follows:

6. At the trial of the matter, WVDOH and Respondents 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 limitations 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 instituted [sic] condemnation proceedings against the Respondent for the take of the minerals. A presumption therefore exists in favor of an award of attorney fees and costs and same are awarded as follows in case number 10-C-42 from the date of the 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 the 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 \$32,325.05.

(App. at page 81)

The circuit court relied upon this Court's decision in State ex re. W.Va. Highlands Conservancy, Inc. v. W.Va. Department of Environmental Protection, 193 W.Va. 650, 458 S.E. 88 (1995) in granting Ms. Newton attorney's fees in the mandamus action (10-C-42).

Specifically, the circuit court found and concluded that the West Virginia Division of Highways "did willfully, deliberately, and knowingly refuse to exercise its duty to instituted [sic] condemnation proceedings against the Respondent for the take of the minerals." Based upon that conclusion, and relying on Syllabus Point 3 of State ex re. W.Va. Highlands Conservancy, Inc. v. W.Va. Department of Environmental Protection,<sup>2</sup> the circuit court further concluded that, "[a] presumption therefore exists in favor of an award of attorney's fees and cost ...." (App. at pg. 81)

In order to make these findings, and reach this conclusion, the circuit court relied upon stipulations improvidently entered into by Petitioners' prior counsel in this matter on the eve of trial, via an Order entered on May 23, 2013. These stipulations were entered into nearly nine years after the West Virginia Division of Highways obtained rights to the property and construction on the project had begun.

The appropriate time frame for consideration as to whether the Division of Highways may have acted in bad faith with regard to the limestone ownership and/or value is when the Division of Highways acquired its rights in the property and began construction. The circuit court did not make any findings of fact, or conclusions of law concerning why the Division of Highways did not address

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2. Syllabus Point 3 of State ex re. W.Va. Highlands Conservancy, Inc. v. W.Va. Department of Environmental Protection states, "Where 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."

the limestone ownership and/or value at the time it acquired its rights in the property and began construction.

In reaching this conclusion, it was an abuse of discretion for the circuit court to rely on a decision made by counsel on the eve of trial nearly nine years after the property was acquired and construction on the project began.

The actions of the West Virginia Division of Highways with regard to the limestone at issue in this case was not the result of “a decision to knowingly disregard a legal command.” As such there is no legal presumption of an award of attorney’s fees.

Syllabus Point 4 of State ex re. W.Va. Highlands Conservancy, Inc. v. W.Va. Department of Environmental Protection provides:

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, there is no presumption in favor of an award of attorney's fees. Rather, the court will weigh the following factors to determine whether it would be fairer to leave the costs of litigation with the private litigant or impose them on the taxpayers: (a) the relative clarity by which the legal duty was established; (b) whether the ruling promoted the general public interest or merely protected the private interest of the petitioner or a small group of individuals; and (c) whether the petitioner has adequate financial resources such that petitioner can afford to protect his or her own interests in court and as between the government and petitioner.

The circuit court did not evaluate the factors set forth in the Highlands Conservancy case. The circuit court abused its discretion in awarding attorney’s fees and costs for the mandamus action. As such, the circuit court’s order should be reversed. In the alternative, this issue should be remanded to the circuit court with instructions to:

weigh the following factors to determine whether it would be fairer to leave the costs of litigation with the private litigant or impose them on the taxpayers: (a) the relative clarity by which the legal duty was established; (b) whether the ruling promoted the general public interest or merely protected the private interest of the petitioner or a small group of individuals; and (c) whether the petitioner has adequate financial

resources such that petitioner can afford to protect his or her own interests in court and as between the government and petitioner.

**B. Ms. Newton Did Not Institute Inverse Condemnation Proceedings. Therefore, She Cannot Be Awarded Attorney's Fees and Associated Litigation Costs.**

West Virginia follows the Federal Property Acquisition Act for its federally funded state roads and must comply with the act as a condition for receiving federal funds. West Virginia Department of Transportation Division of Highways v. Dodson Mobile Homes Sales & Servs., Inc., 218 W. Va. 121, 124-25, 624 S.E.2d 468, 471-72 (2005). The policy behind the act is “to encourage and expedite the acquisition of real property by agreements with owners, to avoid litigation and relieve congestion in the courts, to assure consistent treatment for owners in the many Federal programs, and to promote public confidence in Federal land acquisition practices....” Id. at 125, 472. The Act states that to acquire real property, federal agencies must go through “formal condemnation proceedings.” 42 U.S.C.A. § 4651 (West). The Act only permits recovery of reasonable litigation costs by the owner in three circumstances: (1) “[t]he final judgment of the court is that the Agency cannot acquire real property by condemnation;” (2) “[t]he condemnation proceeding is abandoned by the Agency other than under an agreed-upon settlement;” (3) “[t]he court having jurisdiction renders a judgment in favor of the owner in an inverse condemnation proceeding or the Agency effects a settlement of such proceeding.” Dodson Mobile Homes, 218 W. Va. 121, 125, 624 S.E.2d 468, 472.

Clearly, the Department of Highways was able to acquire the property at issue by condemnation and the Department of Highways did not abandon the proceeding. Therefore, the only consideration under Dodson Mobile Homes is whether this case was an inverse condemnation proceeding. It was not.

Respondent relied on Dodson in support of her motion for attorney's fees and associated litigation costs. However, unlike the case at bar, Dodson involved an actual inverse condemnation

action filed via a counterclaim. There is no such inverse condemnation action in the case at bar. This was a traditional condemnation proceeding.

Traditional condemnation is “an action brought by a condemning authority such as the Government in the exercise of its power of eminent domain.” United States v. Clarke, 445 U.S. 253, 255, 100 S. Ct. 1127, 1129, 63 L. Ed. 2d 373 (1980). This typically is done by the condemnor “taking and acquiring title.” Id. at 257, 1130, 373.

An inverse or reverse condemnation “is ‘*a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency.*’” Id. (quoting D. Hagman, *Urban Planning and Land Development Control Law* 328 (1971) (emphasis added)).

In short, a traditional condemnation case is filed by the State agency, an inverse condemnation case is filed by the property owner against the State Agency. In theory, the inquiry into whether Ms. Newton is entitled to an award of attorney’s fees and associated litigation costs should end with a simple review of the caption of this case. The caption reads: West Virginia Department of Highways v. Newton; not Newton v. West Virginia Department of Highways.

Rather than file an inverse condemnation action, Ms. Newton filed a Writ of Mandamus seeking to force the Department of Highways to file a condemnation action. Such a process was acknowledged by this Court in Orlandi v. Miller, 192 W. Va. 144, 451 S.E.2d 445 (1994) *citing* State ex rel. Rhodes v. West Virginia Department of Highways, 155 W.Va. 735, 187 S.E. 2d 218 (1972) and State ex rel. French v. State Road Commission, 147 W.Va. 619, 129 S.E. 2d 831 (1963).

In Orlandi, at 448 this Court held that when a writ of mandamus is filed, “an agency of the State of West Virginia may be required by mandamus to institute eminent domain proceedings in

order to ascertain just compensation for private land taken or damaged for State highway purposes.” In order to be granted a Writ of Mandamus, a petitioner must show (1) “a clear legal right...to the relief sought;” (2) “a legal duty on the part of [the] respondent to do the thing which the petitioner seeks to compel;” and (3) “the absence of another adequate remedy.” Shaffer v. W. Virginia Dep't of Transp., Div. of Highways, 208 W. Va. 673, 677-78, 542 S.E.2d 836, 840-41 (2000). However, this Writ may not be issued until a reasonable amount of time has passed after the completion of the work:

If a highway construction or improvement project results in probable damage to private property without an actual taking thereof and the owners in good faith claim damages, the West Virginia Commissioner of Highways has a statutory duty to institute proceedings in eminent domain *within a reasonable time after completion of the work* to ascertain the amount of damages, if any, *and, if he fails to do so, after reasonable time*, mandamus will lie to require the institution of such proceedings.

Shaffer v. W. Virginia Dep't of Transp., Div. of Highways, 208 W. Va. 673, 677, 542 S.E.2d 836, 840 (2000); Syl. pt. 1, State ex rel. Rhodes v. West Virginia Dep't of Highways, 155 W.Va. 735, 187 S.E.2d 218 (1972). *Accord* Syl. pt. 1, State ex rel. Phoenix Ins. Co. v. Ritchie, 154 W.Va. 306, 175 S.E.2d 428 (1970); Syllabus, State ex rel. Lynch v. State Road Comm'n, 151 W.Va. 858, 157 S.E.2d 329 (1967); Syl. pt. 1, State ex rel. Griggs v. Graney, 143 W.Va. 610, 103 S.E.2d 878 (1958) (emphasis added).

Only if the agency does not file the condemnation proceeding within a reasonable time after the completion of the work, should a Court grant a Writ of Mandamus.

Therefore, in order to prevail on her motion for an award of attorney's fees and costs associated with this litigation, Ms. Newton is required to prove that, (1) the State took and/or damaged her property for public use; (2) a reasonable amount of time passed after the completion of the project and the Department of Highways did not file a condemnation action; (3) The Court

granted her petition for Writ of Mandamus; and (4) the granting of the Writ of Mandamus resulted in Ms. Newton filing an inverse condemnation action.

The only one of the four elements identified above that Ms. Newman can satisfy is that the State took and/or damaged her property for public use.<sup>3</sup> She cannot prove the other elements necessary to receive an award of attorney's fees and associated litigation costs.

The Department of Highways did file a condemnation proceeding within a reasonable amount of time after the completion of the project. The Court did not grant Ms. Newton a Writ of Mandamus. Ms. Newton did not file an inverse condemnation proceeding.

There can be no doubt that, under the applicable law, Ms. Newton is not entitled to an award of attorney's fees and associated litigation costs. Therefore, the circuit court erred as a matter of law when it entered its "Order Granting Respondent's Motion for Reimbursement of Attorney's Fees, Litigation Expenses and Expert Witness' Fees and Expenses." As such, the Order of the circuit court should be reversed.

**C. The Court Erred in Finding That Petitioners Acted in Bad Faith and Thereby Awarding Attorney's Fees as "Costs."**

Perhaps realizing that an award of attorney's fees was not available to Ms. Newton because she did not file an "inverse condemnation" action, the circuit court relied upon this Court's holding in Syllabus Point 3 of Sally-Mike Properties v. Yokum, 179 W.Va. 48, 365 S.E.2d 246 (1986), which states: "[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." (App at pg. 82)

In that regard the circuit court then made the following findings of fact:

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3. Again, the only reason Ms. Newton can satisfy this element is because Petitioners' prior counsel

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 interests. Under the mandamus jurisprudence, her attorney fees and expenses were awarded for her successful mandamus action. However, the delay occasioned by the WVDOH's refusal coupled with the commencement of highway construction while the 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 interests. 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 the "costs" under W.Va. Code §54-2-16a can include attorney fees and expert witness expense and are appropriate to award to Respondent Newton in this case. Additionally, this Court finds that 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 Company v. Pitrolo, 176 W.Va. 190, 342S.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 upon 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) the time limitations imposed by the client or by 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.

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improvidently entered into a stipulation that was contrary to law.

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 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 fee against the Petitioner.

13. Therefore, this Court finds that claimed attorney's fees in the amount of \$129,425 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.

(App. at pg. 82-84)

As is discussed above, the Petitioners followed the condemnation procedure which has been acknowledge by this Court. A property owner who believes that his or her property has been taken or damaged by the West Virginia Division of Highways due to construction of a highway may file a petition in the circuit court seeking a writ of mandamus to initiate condemnation proceedings.

This Court has recognized that an agency of the State of West Virginia may be required by mandamus to institute eminent domain proceedings in order to ascertain just compensation for private land taken or damaged for State highway purposes. To be entitled to mandamus relief, the parties seeking such relief are not required to establish that they will ultimately recover damages in the requested condemnation proceeding. They must only show that they have suffered probable damage to their private property.

Orlandi v. Miller, 192 W.Va. 144,148 451 S.E.2d 445, 449 (W.Va., 1994) (Internal citations

omitted). Further:

If a highway construction or improvement project results in probable damage to private property without an actual taking thereof and the owners in good faith claim damages, the West Virginia Commissioner of Highways has a statutory duty to institute proceedings in eminent domain within a reasonable time after completion of the work to ascertain the amount of damages, if any, and, if he fails to do so, after reasonable time, mandamus will lie to require the institution of such proceedings.

Shaffer v. West Virginia Dept. of Transp., 542 S.E.2d 836, 208 W.Va. 673 (W.Va., 2000) *citing* Syl. pt. 1, State ex rel. Rhodes v. West Virginia Dep't of Highways, 155 W.Va. 735, 187 S.E.2d 218 (1972). Accord Syl. pt. 1, State ex rel. Phoenix Ins. Co. v. Ritchie, 154 W.Va. 306, 175 S.E.2d 428 (1970); Syllabus, State ex rel. Lynch v. State Road Comm'n, 151 W.Va. 858, 157 S.E.2d 329 (1967); Syl. pt. 1, State ex rel. Griggs v. Graney, 143 W.Va. 610, 103 S.E.2d 878 (1958).

“Thus, the proper course of action for an aggrieved property owner who believes his or her property has sustained damage as a result of highway construction or improvement by the DOH, after a reasonable time without appropriate action by the DOH, is to file a complaint in the circuit court seeking a writ of mandamus.” Id.

The circuit court relied upon stipulations improvidently entered into by Petitioners’ prior counsel on the eve of the trial of this matter to conclude that the West Virginia Division of Highways “did willfully, deliberately, and knowingly refuse to exercise its duty to instituted [sic] condemnation proceedings against the Respondent for the take of the minerals.” (App. at pg. 81)

Relying on that same stipulation, the circuit court concluded that the West Virginia Division of Highways “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.” (App at pg. 82-83)

This Court has defined trespass as “an entry on another man’s ground without lawful authority, and doing some damage, however inconsiderable, to his real property.” Hark v. Mountain Fork Lumber Co., 127 W.Va. 586, 591-592, 34 S.E.2d 348,352 (1945).

Pursuant to the authority granted under West Virginia Code §17-2A-8 to “[a]cquire, in name of the department, by lease, grant, right of eminent domain or other lawful means all lands and

interests and rights in lands necessary and required for roads, rights-of-way, cuts, fills, drains, storage for equipment and materials and road construction and maintenance in general,” the West Virginia Division of Highways, negotiated and reached a deal with the only party it believed had a recoverable interest in the property to be acquired. By deed dated October 7, 2004, the Petitioners obtained a “controlled access right of way and uneconomic remnant for public road purposes over, through, across and upon that certain tract or parcel of land situate in Moorefield District, Hardy County, West Virginia.” Upon obtaining said deed, the West Virginia Division of Highways commenced construction.

In Syllabus Point 3, of West Virginia Department of Transportation v. Contractor Enterprises, et al. 672 S.E.2d 234 (W.Va., 2008) this Court held that “In the absence of evidence to the contrary, the state road commissioner will be presumed to have performed properly and in good faith duties imposed upon him by law.” *citing* Syllabus Point 5, State by State Road Commission v. Professional Realty Company, 144 W.Va. 652, 110 S.E.2d 616 (1959).

This Court has clearly recognized that condemnation proceedings may be instituted “within a reasonable time after the completion.” That is what occurred in the case at bar.

The very case upon which the circuit court relied to support its award to Respondent, actually supports and permits the steps taken by the Petitioners in this case.

Syllabus Point 4 of Sally-Mike Properties v. Yokum, 179 W.Va. 48, 365 S.E.2d 246 (1986) states that “Bringing or defending an action to promote or protect one's economic or property interests does not per se constitute bad faith, vexatious, wanton or oppressive conduct within the meaning of the exceptional rule in equity authorizing an award to the prevailing litigant of his or her reasonable attorney's fees as "costs" of the action.”

Simply put, the West Virginia Division of Highways acted pursuant to its statutory authority and acquired the necessary property rights. Once Ms. Newton brought her claim to the attention of the Division through the filing of her mandamus action when the construction was nearly completed, the West Virginia Division of Highways, instituted a condemnation action within a reasonable time.

At the most, any trespass would have occurred through inadvertence, or mistake, or in good faith, under the “honest belief” that the West Virginia Division of Highways was acting within its legal rights.

Syllabus Point 4 of Reynolds v. Pardee & Curtin Lumber Co., 172 W.Va. 804, 310 S.E.2d 870 (1983) states, in pertinent part, “If the trespass be committed, not recklessly, but through inadvertence or mistake, or in good faith, under an honest belief that the trespasser was acting within his legal rights, it is an innocent trespass ....” *citing* Pan Coal Co. v. Garland Pocahontas Coal Co., 97 W.Va. 368, 125 S.E. 226 (1924). Therefore, assuming arguendo that the West Virginia Division of Highways did commit a trespass upon Ms. Newton’s property rights, it certainly wasn’t in bad faith, vexatiously, wantonly or for oppressive reasons as is required by Sally-Mike Properties v. Yokum in order to justify an award of attorney’s fees to Respondent.

The circuit court abused its discretion in using a stipulation improvidently entered into by Petitioners’ prior counsel on the eve of trial via an Order entered on May 23, 2013 (nearly nine years after the deed was acquired) to find that the West Virginia Division of Highways “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 ....”

As such, the Order of the circuit court should be reversed.

**2. If the Court Finds that Ms. Newton is Entitled to an Award of Attorney’s Fees and Associated Litigation Costs, The Circuit Court Erred in Failing to Undertake a Review of the Requested Fees and Costs.**

This Court held, in Syllabus Point 4 of Aetna Casualty & Surety Company v. Pitrolo, 176 W.Va. 190, 342S.E.2d 156 (1986), that:

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 upon 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) the time limitations imposed by the client or by 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.

*See also* Daily Gazette Company, Inc. v. The West Virginia Development Office, 206 W.Va. 51, 521 S.E.2d 543 (1999); Multiplex, Inc. v. Town of Clay, 231 W.Va. 728, 749 S.E.2d 621,632 (2013).

When awarding attorney’s fees, a court is required to conduct an analysis of the factors identified above. The circuit court’s order in this case contains no real analysis of these factors or any consideration of the issues raised by Petitioners in their brief in opposition to an award of attorney’s fees. As such, the circuit court abused its discretion in making this award of attorney’s fees and costs to Respondent.

Petitioners raised several issues with the circuit court concerning the fees and costs claimed by Respondent.

First, Ms. Newton’s attorney fee request appears to include time spent working on the issues of her former co-plaintiffs, Sherman and Garrett. Those two plaintiffs were dropped from the case and then had no connection to Ms. Newton’s case. Those time entries are:

8/5/10	Research issues – releases, etc.	1.0
8/9/10	Research law re: releases	1.5

(App. at pg. 6)

There are additional entries in the fee request which do not appear related to the Newton case.

These entries included:

7/6/10	Conference with Oscar Bean, re: expert	0.1
7/7/10	Receive and review expert info from Oscar Bean	0.2

(App. at pg. 6)

3/7/11	Review file of Renick Williams at Circuit Clerk’s Office	2.0
3/8/11	Conference w/Jeff Weatherholt; review Fort Pleasant file and copy	1.0
3/9/11	Conference with Oscar Bean; letter regarding documents	0.4
3/10/11	Conference with Renick Williams	0.2
3/11/11	Email from Oscar Bean – forward to Larry Rine	0.3

(App. at pg. 8)

In addition, many of the receipts included in Respondent’s counsel’s affidavit appear to be for services rendered in the Newton as well as other cases. The receipts do not proportion how much of the bill should be charged to each client and clearly say that the bills are for multiple cases. Postage and copying services were also requested for apparently multiple clients. However, there is no detail the amount to be charged to each client. (App. at pgs. 22-55)

In addition, many of the engineering bills were for multiple properties. These bills include, *inter alia*, Invoice Number 226861 by MSES Consultants, Inc. for the appraisal of the Garrett, Newton, Sherman, Veach, and Woerner properties (\$36,355.33) (App. at pg. 34); Invoice Number 1860 by L&W Enterprises, Inc. for the appraisal of the Veach and Newton properties (\$600.00)(App at pg. 39); Invoice Number 229451 by MSES Consultants, Inc. for the appraisal of the Veach and

Newton properties (\$1,708.87)(App. at pg. 42); Invoice Number 1883 by L&W Enterprises, Inc. for the appraisal of the Veach and Newton properties (\$2,070.00)(App. at pg. 44); and Invoice Number 230408 for the appraisal of the Veach and Newton properties (\$30,752.47)(App. at pg. 50).

Additionally, the attorney fees invoice contains many items that could be categorized and considered clerical or administrative in nature and did not require the skills or knowledge of an attorney to complete. Those entries include:

5/5/10	Filed petition - \$170 paid to circuit clerk	0.4
5/12/10	Conference with Clerk, reference status	0.2
5/20/10	Check status of service	0.1
(App. at pgs. 5-6)		
8/17/10	Copy deeds and prepare file	0.4
(App. at pg. 7)		
3/17/11	Organize file; copy and bind	3.0
(App. at pg. 8)		
12/3/11	Copy and mail; scan reports	0.5
9/26/12	Work on file; organize	1.0
9/27/12	Work on file, organize and review	1.0
(App. at pg. 12)		
10/26/12	Review file documents; copy and scan for experts & send regarding quality testing	2.0
(App. at pg. 13)		
4/23/13	Receive email/documents – mail overnight to MSES US Postal Service - \$22.95	0.4
(App. at pg. 14)		
4/30/13	File, copy, organize reports and exhibits; email to clients. Receive Order of 4/11/13	3.5

5/18/13	Organize file, exhibits; Motions	3.0
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(App. at pg. 15)

8/8/13	Receive transcripts; paid Maxim \$432.75	0.3
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8/9/13	Email with condensed Wilson transcript from Brian at Maxim – email response	0.2
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8/12/13	Review documents; copy exhibits and depositions	3.5
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9/18/13	Prepare for trial; copy exhibits	4.0
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(App. at pg. 17)

Furthermore, multiple of Respondent’s counsel’s entries were block billing and did not provide a division of time between specific activities. This “block billing” style prevents the court from an accurate analysis of the reasonableness of the requested attorney’s fees. These entries include:

8/5/10	Waiting; conference with client; hearing	1.3
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(App. at pg. 6)

3/18/11	Review all briefs and pleadings, note arguments; all circulars	5.0
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(App. at pg. 9)

5/13/11	Revise brief; conference w/Carol Moran; file brief and mail copy to CEM Martin, paid L&W \$3,123.25; paid USPS \$8.65 for mailing brief	3.0
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5/17/11	Review discovery documents from DOH; conference w/ Larry Rine and Kirk Wilson; copy all documents and CD’s – deliver copies to Curtis and L&W; conference w/ Shannon Lopp 4,300 copies	7.0
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5/18/11	Conference with WVGS in Kearneysville to request color geological map from 1926; review our map; conference with Shannon Lopp; review documents & email copies	2.0
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(App. at pg. 10)

8/15/11	Conference with Carol Moran	0.1
9/13/11	Received invoice for \$22,000 & conf w/Kirk Wilson; message to Larry Rine; received motion to strike from C. Martin/WVDOH; respond to motion; deliver payment of \$10,465.50 to L&W	3.0
11/30/11	Clarksburg & return; meeting with Larry Rine (1.5 hrs.) and travel (5.0 hrs.); copies & email to Larry, photos, and state law	7.0
(App. at pg. 11)		
12/2/11	Conference with Kirk Wilson – Petersburg & return; conference and pick up final drafts of report w/CD's	1.5
1/4/12	Set hearing – notice and email to CEM Martin, twice and received; conference with Circuit Clerk; review file	2.0
9/24/12	Copy Order & letter; conference w/Clerk; review Orders	1.5
(App. at pg. 12)		
12/12/12	Deposition of Margie & James Oliver – waiting	4.0
12/19/12	Review file – work on trial preparation; copies of docs	2.0
12/20/12	Review documents – trial preparation; prepare letter and pretrial instructions to Court; deliver to Court	2.5
12/31/12	Emails with Brian McDonald, regarding J. Oliver deposition; Conference with J. Oliver reference deposition	0.4
(App. at pg. 13)		
3/28/13	Receive Orders of 3/14 and 18, copy and letter to Margie paid invoice of Maxim Reporting \$231.50	0.4
4/25/13	Work on exhibits; summary for trial; Commissioner's Hearing, copy CV's	2.0
(App. at pg. 14)		

5/5/13	Work on exhibits; research; prepare for trial	2.0
5/6/13	Copy and mark exhibits; research & copy Rules, prepare for trial; paid L&W \$1,970.00	10.0
5/7/13	Prepare for hearing; hearing; conference with experts and prepare Order; organize files	3.0
5/20/13	Court – Waiting – hearing	1.4
5/21/13	Prepare Order; email; conference with Clerk (3 times); Emails to clients and experts	2.0
(App. at pg. 15)		
7/11/13	Conference with Larry Rine; print and file Supplemental Disclosure – use of stone, Forestry	0.4
8/6/13	Conference w/ Joyce Stewart – dates available; email from MSES and to J. Stewart, re: dates	0.3
(App. at pg. 16)		
8/14/13	Prepare for trial; review file documents and exhibits; and copy	6.0
8/22/13	Work on Commissioner’s Hearing info.; prepare statement; Email to client with letter; contact PVT A for bus 9/20	5.5
8/27/13	Prepare for trial; obtain bus	3.0
9/18/13	Prepare for trial; copy exhibits	4.0
(App. at pg. 17)		
9/30/13	Prepare Summaries for hearing	1.0
2/17/14	Review Witnesses; prepare subpoenas and pay for Services - \$150.00	1.0
(App. at pg. 18)		
4/5/14	Prepare for trial; organize exhibits	5.0

4/10/14 Prepare Order, closing and organizing files 3.0

(App. at pg. 19)

Finally, many entries in the attorney fee invoice for Ms. Newton's claim were ambiguous and gave little detail about what counsel was doing during the time. Without the details, the reasonableness of the billing cannot be determined. Those entries include:

5/2/10 Research law 1.5

(App. at pg. 5)

10/28/10 Review file; original pleadings and Orders 0.4

(App. at pg. 7)

4/22/11 Review file; work on brief for discovery; research law 6.0

4/26/11 Various emails w/ C. Martin 3.0

(App. at pg. 9)

4/27/11 Work on briefs; research 7.0

4/28/11 Research for brief 6.0

5/2/11 Work on briefs & answer 6.0

5/3/11 Work on briefs & answer 5.0

5/9/11 Work on brief; research law; work on answer 3.0

5/10/11 Work on brief 2.0

5/11/11 Work on brief, reference draft 2.0

5/12/11 Receive brief of C. Martin; conf. w/ Shannon, re: draft brief 3.0

5/23/11 Legal research; prepare brief on date of take & compensation, work and value 4.0

5/24/11 Review and revise brief 1.5

(App. at pg. 10)

8/20/12	Prepare Newton response	6.0
8/23/12	Work on Newton response	5.0
8/24/12	Work on response for Newton	3.0
8/25/12	Work on Newton response and exhibits	2.0
8/27/12	Work on Newton response and exhibits	1.5
8/28/12	Work on response, message to Margie	4.0
8/30/12	Review response	1.5
8/31/12	Prepare response to file, conference with Margie, copy	2.0
(App. at pg. 12)		
1/28/13	Review file	0.2
(App. at pg. 13)		
5/28/13	Review CD of 11/13/12	2.5
6/7/13	Finish reviewing CD	1.5
(App. at pg. 16)		
8/13/13	Review documents and reports; prepare for trial	5.0
8/19/13	Preparing for hearing exhibits	4.0
8/20/13	Work on hearing and trial	5.0
8/21/13	Work on trial	7.0
8/24/13	Work on Commissioner's Hearing; exhibits	4.0
8/26/13	Prepare for Hearing	7.0
9/19/13	Prepare for trial	3.0
(App. at pg. 17)		
3/24/14	Prepare for trial; exhibits	4.0
3/25/14	Prepare for trial; exhibits	4.0
3/26/14	Prepare for trial, exhibits; conference w/ witnesses	8.0

3/27/14	Prepare for trial, exhibits; conference with witnesses	8.0
3/28/14	Prepare for trial, organize exhibits; conf. w/ witnesses	8.0
(App. at pg. 18)		
3/31/14	Prepare for trial, exhibits; conference with witnesses	8.0
4/1/14	Prepare for trial, exhibits; conference with client/witnesses	8.0
4/2/14	Prepare for trial, exhibits; conference w/ witnesses	8.0
4/3/14	Prepare for trial, conference with witnesses	8.0
4/4/14	Prepare for trial, conference with Margie	8.0
4/5/14	Prepare for trial, organize exhibits	5.0
4/6/14	Prepare for trial	7.0

(App. at pg. 19)

Because many of the entries are unrelated to the case, the work was able to be done without the knowledge of an attorney, and/or lacking detail to enable an appropriate determination of reasonableness, the circuit court could not have properly reviewed and analyzed Respondent's request for an award of fees and costs.

In Multiplex, Inc. v. Town of Clay, 231 W.Va. 728, 749 S.E.2d 621,632 (2013) this Court has stated:

We have made clear that while a court is not required to make detailed findings on each and every element of the Pitrolo test, some being irrelevant in a given situation, the court must make findings sufficient to permit meaningful appellate review. See *Shafer v. Kings Tire Serv., Inc.*, 215 W.Va. 169, 177, 597 S.E.2d 302, 310 (2004) (“Because our abuse of discretion review is limited to analyzing whether the circuit court engaged in a proper balancing of applicable factors, we have found that a ‘circuit court is required to make findings of fact and conclusions of law on the issue of attorneys' fees.’ ”); *Heldreth v. Rahimian*, 219 W.Va. 462, 470, 637 S.E.2d 359, 367 (2006) (“While the trial court's findings relative to the fee award in this case amount to more than the summary conclusion of a specific fee award that this Court found deficient in [ *Shafer* ], the findings made in this case do not fully comport with what is required under both *Bishop Coal [Co. v. Salyers*, 181 W.Va. 71, 380 S.E.2d 238 (1989)] and *Pitrolo*.”); *Erwin v. Henson*, 202 W.Va. 137, 143, 502 S.E.2d 712, 718

(1998) (finding that circuit court's order reducing fee request failed to provide sufficient reasoning to permit parties to “respond meaningfully ... and ... submit additional supporting written documentation or explanation”).

With regard to the analysis required, the circuit court made one finding:

12. In determining the amount of attorney fees and costs, the Court considered the factors from Syllabus point 4 of Aetna Casualty & Surety Company v. Pitrolo, 176 W.Va. 190, 342S.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 upon 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) the time limitations imposed by the client or by 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 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 fee against the Petitioner.

The circuit court erred in failing to conduct an appropriate analysis and review of Respondent’s request for an award of fees and costs in light of the issue raised by Petitioners regarding the same. As such, the circuit court abused its discretion. Therefore, assuming arguendo that Respondent is entitled to an award of attorney’s fees and costs, this issue must be remanded to the circuit court with instructions to make a proper analysis of the Respondent’s request in accordance with this Court’s holdings as cited above.

## CONCLUSION

This case is not an inverse condemnation case and the Petitioners have not acted in bad faith. Therefore, Ms. Newton cannot recover attorney's fees and associated litigation costs.

However, if the Court should find that Ms. Newton is entitled to attorney's fees, she should not be paid the entire amount she has requested. Several entries on the attorney fee invoice appear to be related to other cases. In addition, several entries appear to be miscellaneous administrative or clerical tasks that do not require the skill and knowledge of an attorney. Finally, many of the entries are broadly worded or are otherwise ambiguous which make it impossible to determine their reasonableness.

WHEREFORE, based upon the foregoing, Petitioners, West Virginia Department of Transportation, Division of Highways and Paul Mattox, Secretary / Commissioner of Highways, respectfully pray that the Supreme Court of Appeals of West Virginia enter an order reversing the "Order Granting Respondent's Motion for Reimbursement of Attorney's Fees, Litigation Expenses and Expert Witness' Fees and Expenses" entered by the Circuit Court of Hardy County, West Virginia on March 2, 2016.

**RESPECTFULLY SUBMITTED**

**WEST VIRGINIA DEPARTMENT OF  
TRANSPORTATION, DIVISION OF  
HIGHWAYS, and PAUL MATTOX, P.E.,  
Secretary/ Commissioner of Highways,**

**By Counsel,**



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IN THE SUPREME COURT OF APPEALS OF  
WEST VIRGINIA

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No. 16-0325  
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WEST VIRGINIA DEPARTMENT OF TRANSPORTATION,  
DIVISION OF HIGHWAYS, a Public Corporation, and  
PAUL MATTOX, P.E. Secretary / Commissioner of Highways,

Petitioners Below, Petitioners

v.

MARGARET Z. NEWTON,

Respondent Below, Respondent.

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**CERTIFICATE OF SERVICE**

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I, Scott L. Summers, Esquire, counsel for Petitioners, West Virginia Department of Transportation, Division of Highways and Paul Mattox, Secretary / Commissioner of Highways, certify that I have served the foregoing, **“PETITIONERS’ BRIEF ON APPEAL”** on the following by depositing same into the United States Mail, First Class, postage pre-paid this **5th** day of **July, 2016**, addressed as follows:

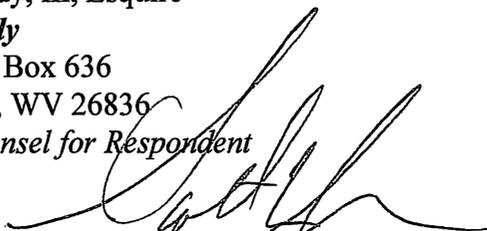
J. David Judy, III, Esquire

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