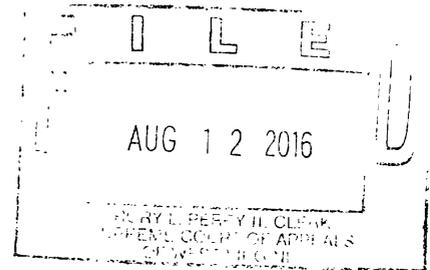


**IN THE SUPREME COURT OF APPEALS OF  
WEST VIRGINIA**

-----  
No. 16-0325  
-----



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,

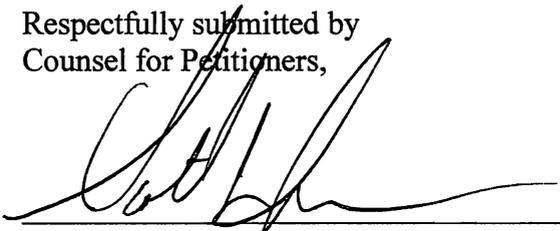
Respondent Below, Respondent.

---

**PETITIONERS' REPLY BRIEF AND  
RESPONSE TO RESPONDENT'S CROSS ASSIGNMENT OF ERROR**

---

Respectfully submitted by  
Counsel for Petitioners,



\_\_\_\_\_  
Scott L. Summers, Esquire (WV Bar No.:6963)  
**SUMMERS LAW OFFICE, PLLC**  
Post Office Box 6337  
Charleston, West Virginia 25362  
T: (304) 755-5922  
F: (304) 755-5949  
[scott@summerswvlaw.com](mailto:scott@summerswvlaw.com)

## TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	i
<b>I. RESPONSE TO RESPONDENT’S CROSS ASSIGNMENT OF ERROR .....</b>	<b>1</b>
STATEMENT REGARDING ORAL ARGUMENT AND DECISION .....	1
STANDARD OF REVIEW .....	1
ARGUMENT .....	2
<b>II. REPLY TO RESPONDENT’S RESPONSE TO PETITIONERS’ BRIEF ON     APPEAL.....</b>	<b>5</b>
1. Respondent’s Assertion that the Mandamus Action is an Inverse Condemnation Action is Incorrect.....	8
2. The Petitioners did not Act in Bad Faith .....	8
3. Neither the Respondent Nor the Circuit Court Have Ever Addressed the Issues Raised by Petitioners with Regard to Respondent’s Counsel’s Affidavit Concerning Attorney’s Fees.....	14
CONCLUSION .....	17
CERTIFICATE OF SERVICE .....	20

## TABLE OF AUTHORITIES

### *CASES*

<u>Aetna Cas. &amp; Sur. Co. v. Pitrolo,</u> 176 W.Va. 190, 342 S.E.2d 156 (1986).....	3, 15, 16
<u>Bishop Coal Co v. Salyers,</u> 181 W.Va. 71, 380 S.E.2d 238 (1989) .....	15
<u>Bond v. Bond,</u> 144 W.Va. 478, 109 S.E.2d 16 (1959), .....	1
<u>Daily Gazette Company, Inc. v. The West Virginia Development Office,</u> 206 W.Va. 51, 521 S.E.2d 543 (1999) .....	15, 16
<u>Dohany v. Rogers,</u> 281 U.S. 362, 50 S.Ct. 299, 74 L.Ed. 904 (1930).....	18
<u>Erwin v. Henson,</u> 202 W.Va. 137, 502 S.E.2d 712 (1998).....	15
<u>Heldreth v. Rahimian,</u> 637 S.E.2d 359 (W.Va., 2006).....	1, 3, 4, 5, 15
<u>Joslin Mfg. Co. v. Providence,</u> 262 U.S. 668, 43 S.Ct. 684, 67 L.Ed. 1167 (1923).....	18
<u>Mitchell v. United States,</u> 267 U.S. 341, 45 S.Ct. 293, 69 L.Ed. 644 (1925).....	18
<u>Monongahela Navigation Co. v. United States,</u> 148 U.S. 312, 326, 13 S.Ct. 622, 626, 37 L.Ed. 463 (1893).....	18
<u>Multiplex, Inc. v. Town of Clay,</u> 231 W.Va. 728, 749 S.E.2d 621 (2013) .....	15, 16
<u>Orlandi v. Miller,</u> 192 W.Va. 144, 451 S.E.2d 445 (1994) .....	11
<u>Sally-Mike Properties v. Yokum,</u> 179 W.Va. 48, 365 S.E.2d 246 (1986).....	10, 13
<u>Shafer v. Kings Tire Service, Inc.</u> 215 W.Va. 169, 597 S.E.2d 302 (2004) .....	15

<u>Shaffer v. W. Virginia Dep't of Transp., Div. of Highways,</u> 208 W.Va. 673, 542 S.E.2d 836 (2000) .....	11, 12
<u>State by State Road Commission v. Professional Realty Company,</u> 144 W.Va. 652, 110 S.E.2d 616 (1959).....	9
<u>State ex rel. Griggs v. Graney,</u> 143 W.Va. 610, 103 S.E.2d 878 (1958).....	11,12
<u>State ex rel. Lynch v. State Road Comm'n,</u> 151 W.Va. 858, 157 S.E.2d 329 (1967) .....	11, 12
<u>State ex rel. Phoenix Ins. Co. v. Ritchie,</u> 154 W.Va. 306, 175 S.E.2d 428 (1970).....	11, 12
<u>State ex rel. Rhodes v. West Virginia Department of Highways,</u> 155 W.Va. 735, 187 S.E. 2d 218 (1972) .....	11, 12
<u>State ex rel. W.Va. Highlands Conservancy, Inc. v. W.Va. Department of Environmental Protection,</u> 193 W.Va. 650, 458 S.E. 88(1995) .....	3, 10
<u>United States v. Bodcaw Co.,</u> 440 U.S. 202, 203, 99 S.Ct. 1066, 59 L.Ed.2d 257 (1979).....	18
<u>Venegas v. Mitchell,</u> 495 U.S. 82, 87, 110 S.Ct. 1679, 109 L.Ed.2d 74 (1990).....	4
<u>West Virginia Department of Transportation v. Contractor Enterprises, et al.</u> 672 S.E.2d 234 (W.Va., 2008) .....	9
<u>West Virginia Department of Highways v. Roda,</u> 177 W.Va. 383, 352 S.E.2d 134 (1986).....	18
<u>West Virginia Department of Transportation Division of Highways v. Dodson Mobile Homes Sales &amp; Servs., Inc.,</u> 218 W. Va. 121, 624 S.E.2d 468 (2005).....	3, 6,7, 8
<u>West Virginia Department of Transportation, Division of Highways v. Newton,</u> 235 W.Va. 267, 773 S.E.2d 371 (2015) .....	9

***OTHER SOURCES***

4A J. Sackman, Nichols' Law of Eminent Domain, ch. 14 (rev. 3d ed. 1977).....	18
---	----

**PETITIONERS' REPLY TO RESPONDENT'S RESPONSE BRIEF AND  
PETITIONERS' RESPONSE TO RESPONDENT'S CROSS ASSIGNMENT OF ERROR**

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 a Reply to Respondent's Response Brief as well as a Response to Respondent's Cross Assignment of Error.

**I. RESPONSE TO RESPONDENT'S CROSS ASSIGNMENT OF ERROR**

**STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

The issue before the Court in Respondent's Cross Assignment of Error 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 standard of review with regard to Respondent's Cross Assignment of Error is whether the circuit court abused its 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

Respondent asserts that the circuit court committed error when it denied Respondent a reimbursement of attorney's fees based upon a one-third contingency fee contract.

In its "Order Granting Respondent's Motion for reimbursement of Attorney's Fees, Litigation Expenses and Expert Witness Fees and Expenses" the circuit court relied upon the Affidavit submitted by Respondent's counsel and found and concluded as follows:

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 (App. at pg. 83)

Respondent's Cross Assignment of Error must fail for two reasons.

First and foremost, in her "Motion for Reimbursement of Attorney's Fees, Litigation Expenses and Expert Witness' Fees and Expenses" Respondent did not request an award of attorney's fees based upon a contingency fee contract. (See App. at pgs. 1-55)

With her motion, Respondent attached an "Affidavit of Attorney's Fees and litigation expenses incurred by and on behalf of the Respondent during the process of this litigation, all of which were responsible and necessary to bring this matter to a conclusion and to obtain an Order of Just Compensation to be paid to your Respondent." (App. at pgs. 1-2 paragraph 2).

Nowhere in that motion does Respondent request an award of a contingency fee.

Second, despite Respondent's unsupported assertion that "[t]he contingency fee agreement with reimbursement of expert witness fees and costs is reasonable and customary practice in representation of clients in condemnation proceedings," there is no authority for a court to grant a contingency fee attorney fee award.

In support of her Cross Assignment of Error with regard to an award of attorney's fees based upon a contingency fee contract, Respondent relies on State ex re. W.Va. Highlands Conservancy, Inc. v. W.Va. Department of Environmental Protection, 193 W.Va. 650, 458 S.E. 88 (1995); West Virginia Department of Transportation Division of Highways v. Dodson Mobile Homes Sales & Servs., Inc., 218 W. Va. 121, 624 S.E.2d 468 (2005). None of these cases reference an award of attorney's fees based upon a contingency fee contract. Further, as discussed in Petitioners' Brief on Appeal and herein, these cases do not support the award of attorney's fees actually granted to Respondent by the circuit court - much less a contingency fee award.

In syllabus Point 5 of Heldreth v. Rahimian, 637 S.E.2d 359 (W.Va., 2006) this Court reaffirmed 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 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. *citing* Syllabus Point 4 of Aetna Casualty & Surety Company v. Pitrolo, 176 W.Va. 190, 342S.E.2d 156 (1986).

Heldreth is an appeal of an attorney fee award arising out of the successful prosecution of a sexual harassment action pursuant to the fee shifting provisions in the West Virginia Civil Rights Act. (West Virginia Code § 5-11-13(c))

In Heldreth, Plaintiff did not prevail on all of the claims that were raised in her Complaint. Therefore, the circuit court reduced the total amount of requested attorney's fees by a percentage.

[w]hen Appellant's attorney submitted his request for attorney's fees and expenses, he submitted a bill for 246.09 hours of work at a rate of \$175 an hour for a total amount

of \$43,085. After holding a hearing on the issue of a statutory fee award, the trial court decided to apply a percentage basis and awarded Appellant's counsel 20% of his requested fees for a total amount of \$8,617. In its order authorizing the award, the trial court noted that this award of statutory fees was in addition to the 40% contingency fee counsel would receive from his client pursuant to their contractual fee arrangement. *Id.* at 363

In Syllabus Point 6 of Heldreth, this Court held that “[w]hile fee structures that involve a contingent-fee arrangement are clearly enforceable despite the existence of a fee-shifting statute, attorneys are not entitled to receive both the statutory fee award and the full amount of the contingent fee.”

In reversing and remanding the case to the circuit court, this Court permitted “the trial court to recalculate an award of reasonable attorney's fees. In arriving at that figure, the existence of a contingency fee agreement should not be relied upon to affect the amount of the award, as it clearly was when the trial court made its initial award of statutory fees. On remand, the trial court is to determine an award by applying the factors set forth in *Bishop Coal* and *Pitrolo*.” *Id.* at 367-8

Relying on the decision of the United States Supreme Court in Venegas v. Mitchell, 495 U.S. 82, 87, 110 S.Ct. 1679, 109 L.Ed.2d 74 (1990), this Court, in Heldreth, stated as follows:

In *Venegas*, the United States Supreme Court addressed how a plaintiff's freedom to contract with his or her attorney with regard to fee arrangements impacts on the recovery of fees where a fee-shifting statute is involved. According to the high Court, the intent of the fee-shifting mechanism incorporated into the federal civil rights act is to assist potential complainants in securing “reasonably competent lawyers” and to “avoid having their recovery reduced by contingent-fee agreements.” 495 U.S. at 86, 89, 110 S.Ct. 1679. The United States Supreme Court has made clear, however, that fee-shifting statutes cannot “protect[ ] plaintiffs from having to pay what they have contracted to pay, even though their contractual liability is greater than the statutory award that they may collect from losing opponents.” *Id.* at 89, 110 S.Ct. 1679. Thus, the enforceability of a contingent-fee contract is not affected by the presence of a fee-shifting statute that imposes responsibility on a third-party for attorney's fees and expenses. See *Venegas*, 495 U.S. at 87, 110 S.Ct. 1679 (observing that nothing “in the legislative history . . . persuades us that Congress intended [42 U.S.C.] § 1988 to limit civil rights plaintiffs' freedom to contract with their attorneys”)

While fee structures that involve a contingent-fee arrangement are clearly enforceable despite the existence of a fee-shifting statute, attorneys are not entitled to receive both the statutory fee award and the full amount of the contingent fee. Other courts have recognized that this would amount to either double recovery or a windfall, and we agree. See *State ex rel. Okla. Bar Ass'n v. Weeks*, 969 P.2d 347, 356 (Okla. 1998) (observing that “[t]hose federal courts which have considered the issue of an attorney’s recovery of both the court awarded statutory fee and the entirety of the contingent fee amount, have disallowed the arrangement as inappropriate and a windfall to the attorney”); *Venegas v. Skaggs*, 867 F.2d 527, 534 n. 7 (9th Cir.1989) (“Where the district court concludes that a contingent fee that exceeds the statutory award is reasonable, the plaintiff may be required to pay the difference between the [§] 1988 award paid by the defendant and the contingent fee. The plaintiff’s attorneys are not entitled to both the statutory award and the full amount of the contingent fee.”) (citation omitted), *aff’d. sub nom. Venegas v. Mitchell*, 495 U.S. 82, 110 S.Ct. 1679, 109 L.Ed.2d 74 (1990).

Therefore, Respondent was free to enter into a contingency fee contract with her counsel.

However, that contingency fee contract does not determine an amount of an attorney’s fee award, if any.

If Respondent’s contractual obligation under the contingency fee contract is greater than the award of attorney’s fees from the circuit court, then Respondent is required to pay the difference, not the Petitioners.

Wherefore, assuming *arguendo* that this Court upholds the circuit court’s award of attorney’s fees,<sup>1</sup> the circuit court did not commit error in failing to award Respondent attorney’s fees based upon the contingency fee contract entered into with her counsel.

## **II. REPLY TO RESPONDENT’S RESPONSE TO PETITIONERS’ BRIEF ON APPEAL.**

As is discussed in Petitioners’ previously filed Brief on Appeal, the circuit court erred in granting an award of attorney’s fees and costs.

---

<sup>1</sup> As is discussed in Petitioners’ initial brief, and herein, Petitioners assert that the circuit court erred in awarding Respondent any attorney’s fees.

**1. Respondent's Assertion that the Mandamus Action is an Inverse Condemnation Action is Incorrect.**

Respondent asserts that, because the Mandamus action she filed (10-C-42) includes the term "inverse condemnation" she is entitled to an award of attorney's fees.

As Respondent acknowledged on page 3 of her brief, "Civil Action No. 10-C-42 proceeded until the entry of an Agreed Order on March 31, 2011." Further, "By Order dated March 19, 2012, Civil Action No. 10-C-42 was ended by the Circuit Court and the file closed. (Respondent's brief at page 3) Therefore, assuming arguendo that Civil Action No. 10-C-42 was an inverse condemnation action, any attorney fee award arising out of that action should have ceased on or about March 31, 2011. Respondent's Mandamus action does not automatically convert the condemnation action (11-C-30), which was later filed by the Petitioners, into an inverse condemnation action.

Respondent relies upon this Court's opinion in West Virginia Department of Transportation Division of Highways v. Dodson Mobile Homes Sales & Servs., Inc., 218 W. Va. 121, 624 S.E.2d 468 (2005) in support of her request for an award of attorney's fees and expenses incurred in the condemnation action. As was pointed out in Petitioners' initial brief, Respondent's reliance upon the Dodson case is misplaced. Respondent asserts that she is entitled to an award of attorney's fees because she alleged an inverse condemnation proceeding in the Writ of Mandamus she filed. Respondent's interpretation of Dodson is not correct.

The factual background of Dodson is as follows:

The attorneys' fee issue surfaced in an eminent domain proceeding filed by the State on August 21, 1995, for the purpose of determining just compensation for the acquisition and/or damage to the residue of Appellant's property due to a highway improvement project involving the relocation of West Virginia Route 9 in Berkeley County, West Virginia. ... The improvements to Route 9 resulted in the construction of a road through the middle of what was originally one piece of land measuring 4.3 acres. Consequently, the single piece of property became two tracts of unequal size located on either side of the new highway. One tract was large enough to continue to

accommodate the furniture store and the mobile homes sales business and the remaining tract was a .73 acre triangle-shaped parcel located across the road from these establishments. Appellant maintains that no use could be made of the smaller tract in connection with the furniture and mobile homes businesses.

During the course of the eminent domain proceedings, *Appellant filed a motion seeking leave to file an amended answer so as to raise a counterclaim for inverse condemnation*. In the proposed amended answer, Appellant alleged that the .73 acre tract was an uneconomic remnant and sought a writ of mandamus to require the State to purchase the remnant. The court below permitted the requested amendment, and the case was tried to a jury in December 2003. The verdict form submitted to the jury contained special interrogatories, which the State did not challenge, about the .73 acre parcel. . . . As a direct result of these specific jury findings, the court below ordered the State to purchase the uneconomic remnant from Appellant for \$73,000. Subsequent to the verdict and entry of judgment, Appellant brought a motion seeking award of attorneys' fees as permitted by the federal regulations promulgated under authority of the Property Acquisition Act. The court below denied Appellant's motion by order dated April 15, 2004. In a further effort to obtain the award of attorneys' fees, Appellant filed a motion to alter or amend judgment pursuant to Rule 59 of the West Virginia Rules of Civil Procedure. This motion was likewise denied by order dated July 14, 2004. (emphasis supplied)  
Id. at 470-471

The difference between the case at bar and the Dodson case is that, after the Respondent in the case at bar filed her Mandamus action, the Petitioners instituted a condemnation action. In the Dodson case, the West Virginia Division of Highways did not institute condemnation proceedings against the .73 acre parcel and the landowner was required to pursue the claim against the Division of Highways. 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.

In footnote 2 of the Dodson Mobile Home case, this Court recognized that:

The United States Supreme Court drew the following distinction between “inverse condemnation” and condemnation proceedings in *U.S. v. Clarke*, 445 U.S. 253, 100 S.Ct. 1127, 63 L.Ed.2d 373 (1980). [A] landowner's action to recover just compensation for a taking by physical intrusion has come to be referred to as “inverse” or “reverse” condemnation. . . . [A] “condemnation” proceeding is commonly understood to be an action brought *by* a condemning authority such as

the Government in the exercise of its power of eminent domain. *Id.* at 255, 100 S.Ct. at 1129.

Further, in Dodson, this Court stated, “[w]e perceive the intent of Congress to be that a landowner not be required to pay fees for attorney services and other litigation expenses when the landowner, and not the government, has initiated a claim for just compensation and has successfully prosecuted that claim to judgment. That is what happened here.” *Id.* at 473

Again, in the case at bar, the condemnation action was instituted by the Department of Highways after the dismissal of the Respondent’s Mandamus action. Therefore, there is no “inverse condemnation” action in the case at bar under which an award of attorney’s fees may be made.

This Court, in Dodson Mobile Homes, 218 W. Va. 121, 125, 624 S.E.2d 468, 472, stated that,

The Act (Federal Property Acquisition 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.

The Department of Highways was able to acquire the property at issue by condemnation. 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. Despite Respondents assertion to the contrary, this case is not an inverse condemnation case.

As such, the circuit court erred in awarding Respondent her attorney’s fees.

## **2. The Petitioners did not act in Bad Faith.**

The circuit court committed error when it found, and the Respondent is incorrect when she alleges, that the Petitioners have acted in bad faith.

This analysis must begin with a legal presumption that Petitioners acted in good faith. “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.” Syllabus Point 3, of West Virginia Department of Transportation v. Contractor Enterprises, et al. 672 S.E.2d 234 (W.Va., 2008) *citing* Syllabus Point 5, State by State Road Commission v. Professional Realty Company, 144 W.Va. 652, 110 S.E.2d 616 (1959).

In concluding that the Petitioners acted in bad faith, the circuit court made the following findings:

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.

(App. at page 81)

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.

(App. at pgs. 82-84)

The circuit court also 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) to conclude that, “[a] presumption therefore exists in favor of an award of attorney’s fees and cost ....” (App. at pg. 81)

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 actions of the West Virginia Division of Highways with regard to the limestone at issue in this case were 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.

In fact, the Petitioners followed the condemnation procedure which has been acknowledged as appropriate 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 (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.

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).

The first time that the Petitioners received notice that the Respondent believed her mineral rights had been taken or damaged was when Petitioners were served with her Petition for Writ of Mandamus in May, 2010. This was nearly six (6) years after Petitioners acquired surface rights to the property.

The section of Corridor H at issue was completed on October 27, 2010, five (5) months after Respondent filed her Writ of Mandamus. On October 29, 2010, two days after completion of this section of Corridor H, Petitioners informed the circuit court of Hardy County that Condemnation proceedings would be initiated.

The timeline of events demonstrate that the West Virginia Division of Highways acted in good faith and complied with its obligation to “institute proceedings in eminent domain *within a reasonable time after completion of the work* to ascertain the amount of damages, if any...” as discussed above.

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 Department of Highways did file a condemnation proceeding within a reasonable amount of time after the completion of the project.

Petitioners have argued throughout the pendency of this case that Respondent was not entitled to compensation for the limestone at issue. The fact that Petitioners have made legal arguments against Respondent’s claim for compensation does not mean that Petitioners actions have been frivolous, or that they have acted in bad faith.

The very case upon which the circuit court relied to support its award to Respondent, actually supports Petitioners’ ability to make the arguments against Respondent’s position. 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.

The circuit court erred in relying upon stipulations improvidently entered into by Petitioners' prior counsel in this matter on the eve of trial. These stipulations were entered into nearly nine (9) years after the West Virginia Division of Highways obtained rights to the property and construction on the project had begun. The circuit court did not make any findings of fact, or conclusions of law concerning why the Division of Highways did not address the limestone ownership and/or value at the time it acquired its rights in the property and began construction.

The circuit court abused its discretion in using a stipulation improvidently entered into by Petitioners' prior counsel on the eve of trial 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.

**3. Neither the Respondent nor the Circuit Court Have Ever Addressed the Issues Raised by Petitioners with Regard to Respondent's Counsel's Affidavit Concerning Attorney's Fees.**

In their Response to Respondent's motion for an award of attorney's fees, Petitioners raised several issues with regard to the Affidavit of fees submitted by Respondent's counsel. Such as: the attorney fee request appears to include time spent working on issues related to Respondent's former co-plaintiffs; there are fees identified which do not appear related to the Newton case; many of the receipts included in Respondent's counsel's affidavit appear to be for services rendered in other cases; the receipts / invoices do not proportion how much should be charged to each client and clearly say that the receipts/ invoices are for multiple cases; Postage and copying services were requested for apparently multiple clients; many of the engineering bills were for multiple properties unrelated to the Respondent's property; many items in the Affidavit could be categorized and

considered clerical or administrative in nature and did not require the skills or knowledge of an attorney to complete; and multiple of Respondent's counsel's entries were block billing and did not provide a division of time between specific activities. (App. at pgs. 61-68)

Pursuant to Syllabus Point 4 of Aetna Casualty & Surety Company v. Pitrolo, 176 W.Va. 190, 342S.E.2d 156 (1986):

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).

Further, 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”).

The circuit court’s analysis of the request for an award of attorney’s fees and Petitioners’ objection to the same consisted of the following single 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 the analysis required by this Court in Aetna Casualty & Surety Company v. Pitrolo; Daily Gazette Company, Inc. v. The West Virginia Development Office; and Multiplex, Inc. v. Town of Clay.

In the “Brief of Respondent and Respondent’s Cross Assignment and Argument” Respondent’s counsel asserts that “In the event that an explanation is demanded for each of those

entries, it is impossible to respond within forty (40) Pages as allotted by this Court.” (Respondent’s Brief page 24) The Respondent then goes on to provide “an example of the entries in the Newton case which the Petitioners do not understand...” (Respondent’s Brief pgs. 24-26)

It is important to note that Respondent has made virtually no effort to address the issues raised on Petitioners’ response to the motion for attorney’s fees until the filing of her appellate brief. The appellate stage of this proceeding is not the point at which the Respondent should be introducing new evidence. Clearly, the explanation provided by Respondent’s counsel in Respondent’s appellate brief was not considered by the circuit court prior to the entry of its Order

Simply put, when considering an award of 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.

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, the circuit court erred in awarding Respondent attorney’s fees. Therefore, the circuit court may not add further elements of value to the judgment that has been rendered by the jury in this matter. Including, but not limited to, restitution to the Respondent in the form of attorney’s fees,

expenses, costs and witness fees.

The United States Supreme Court, in United States v. Bodcaw Co., 440 U.S. 202, 203, 99 S.Ct. 1066, 59 L.Ed.2d 257 (1979) stated:

This Court has often faced the problem of defining just compensation. One principle from which it has not deviated is that just compensation "is for the property, and not to the owner." *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 326, 13 S.Ct. 622, 626, 37 L.Ed. 463 (1893). As a result, indirect costs to the property owner caused by the taking of his land are generally not part of the just compensation to which he is constitutionally entitled. See, e. g., *Dohany v. Rogers*, 281 U.S. 362, 50 S.Ct. 299, 74 L.Ed. 904 (1930); *Mitchell v. United States*, 267 U.S. 341, 45 S.Ct. 293, 69 L.Ed. 644 (1925); *Joslin Mfg. Co. v. Providence*, 262 U.S. 668, 43 S.Ct. 684, 67 L.Ed. 1167 (1923). See generally 4A J. Sackman, *Nichols' Law of Eminent Domain*, ch. 14 (rev. 3d ed. 1977). Thus, [a]ttorneys' fees and expenses are not embraced within just compensation . . . ." *Dohany v. Rogers, supra*, 281 U.S. at 368, 50 S.Ct. at 302.

Also important to note is the fact that the circuit court has already sanctioned Petitioners for the circuit court's finding that Petitioners failed to contact the Respondent prior to commencement of construction. In its April 7, 2014 Order, at paragraph 2, the circuit court stated:

That the instant proceeding is a condemnation matter and not a trespass matter. While the WVDOH failed to contact the respondent prior to commencing construction on Corridor H, the WVDOH has already been penalized for its failure to contact the Respondent in advance of construction pursuant to this Court's prior ruling that the compensation for the underlying minerals is the fair market value of the limestone which was removed and used before April 29, 2011 in its present uncovered state ready for loading with no consideration of the production, mining or excavation costs pursuant to *West Virginia Department of Highways v. Roda*, 177 W.Va. 383, 352 S.E.2d 134 (1986)

Therefore, an award of attorney's fees to Respondent essentially amounts to a second sanction against Petitioners for the same conduct. As such an award of attorney's fees, costs and expenses against Petitioners is extremely harsh and inequitable

However, if this Court should determine that Respondent is entitled to an award of attorney's fees, the case should be remanded to the circuit court with direction to conduct the analysis required

as identified above.

WHEREFORE, based upon the foregoing, and the Petitioners' initial Brief on Appeal, 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,**



Scott L. Summers, Esquire (WV Bar No.: 6963)

**SUMMERS LAW OFFICE, PLLC**

Post Office Box 6337

Charleston, West Virginia 25362

T: (304) 755-5922

F: (304) 755-5949

[scott@summerswvlaw.com](mailto:scott@summerswvlaw.com)

**IN THE SUPREME COURT OF APPEALS OF  
WEST VIRGINIA**

-----  
No. 16-0325  
-----

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.

---

**CERTIFICATE OF SERVICE**

---

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’ REPLY BRIEF AND RESPONSE TO RESPONDENT’S CROSS ASSIGNMENT OF ERROR”** on the following by depositing same into the United States Mail, First Class, postage pre-paid this **12th** day of **August, 2016**, addressed as follows:

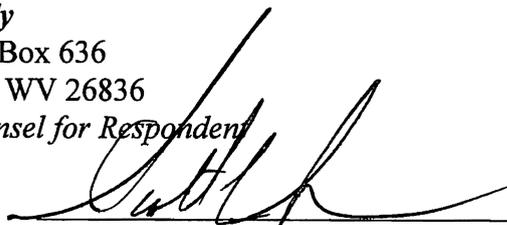
J. David Judy, III, Esquire

*Judy & Judy*

Post Office Box 636

Moorefield, WV 26836

*Counsel for Respondent*



Scott L. Summers, Esquire (WV Bar No.:6963)

**SUMMERS LAW OFFICE, PLLC**

Post Office Box 6337

Charleston, West Virginia 25362

T: (304) 755-5922

F: (304) 755-5949

[scott@summerswvlaw.com](mailto:scott@summerswvlaw.com)