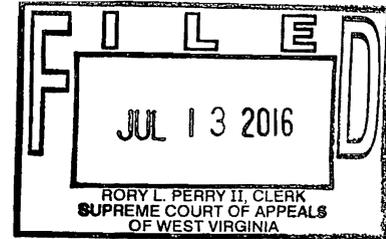


No. 16-0325



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

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

v.

MARGARET Z. NEWTON, Respondent Below,  
Respondent.

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**BRIEF OF RESPONDENT  
AND  
RESPONDENT'S CROSS ASSIGNMENT AND ARGUMENT**

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## BRIEF OF RESPONDENT

### III. RESPONSE TO ASSIGNMENTS OF ERROR

The Notice of Appeal and the Assignments of Error filed by the Petitioners in this action represent that the sole issue on appeal from the Circuit Court of Hardy County, West Virginia, is the propriety of the award of Attorney's fees, litigation expenses and expert witness fees and expenses to the Respondent. This matter was previously before the West Virginia Supreme Court of Appeals in West Virginia Department of Transportation, Division of Highways v. Newton, 235 W.Va. 267, 773 S.E. 2d 371 (2015). This Court noted at footnote 1 and footnote 4 of the Newton opinion that the issue of Attorney's fees arising from the Mandamus proceeding in the Circuit Court of Hardy County, West Virginia, remained pending in the Circuit Court, and therefore, was not considered in the original appeal and opinion of this Court decided May 13, 2015. Newton, supra. Your Respondent would refer to the opinion of the Court and the record filed in Appellate Action No. 14-0428 decided May 13, 2015, for purposes of this appeal. The Appellant appears to limit the Appendix.

The Circuit Court of Hardy County, West Virginia, was absolutely correct in awarding attorney's fees based upon the rulings of the Court during pretrial litigation processes of 10-C-42 and 11-C-30 below, and upon the law of the State of West Virginia cited within the Order of the Circuit Court entered March 2, 2016. The Respondent does take issue with the Circuit Court as to the nature of the Attorney's fees granted. The Respondent has a one-third (1/3) contingent fee contract with counsel upon which representation was based against the Petitioners. Counsel kept a log of hours and expenses generated during the course of representation of the

Respondent below and through the appeal in this action. The log of hours and expenses contained within the Affidavit filed by counsel was in support of the contingent fee agreement between counsel and the Respondent. The affidavit demonstrates the significant efforts of counsel, the novelty of the issues argued and briefed, the expense of the proceedings below, and the egregious conduct of the WVDOH against the constitutional rights and interests of the Respondent. The Respondent is entitled to reimbursement of the one-third (1/3) contingent fee actually paid by contract which is the usual and customary arrangement of counsel in actions of condemnation in Hardy County, West Virginia.

#### **IV. STATEMENT OF CASE**

The proceedings below began as a Petition for Writ of Mandamus filed in the Circuit Court of Hardy County, West Virginia, on May 5, 2010, in Civil Action No. 10-C-42. Your Respondent, Margaret Z. Newton, therein represented that she was the owner of the mineral rights reserved within a deed dated June 4, 1980, between her deceased husband and herself to James S. Parsons as recorded in the Office of the County Commission of Hardy County, West Virginia, in Deed Book No. 162, at page 59, and therein specifically alleged that the surface was conveyed to James S. Parsons, excepting all mineral rights. The Petition for Writ of Mandamus stated at paragraph 6 that the action was filed in order to compel the Commissioner of the West Virginia Department of Transportation, Division of Highways (hereinafter WVDOH), to file eminent domain proceedings against the property interests of the Petitioner therein and to pay her Just Compensation for damages. The Petition for Writ of Mandamus cited State and Federal law, 42 USC §4651; West Virginia Code: 54-2-9, 54-3-3, 17-2A-20,

54-2-1, et seq., 54-2-14; and Article 3, Section 9 of the Constitution of the State of West Virginia, the 5<sup>th</sup> Amendment of the U.S. Constitution, as well as various applicable case law, noting that the Petition for Writ of Mandamus was brought as an inverse condemnation proceeding to require and compel the WVDOH to comply with State and Federal law, and therein stating that the Petitioner in the Petition for Writ of Mandamus is entitled to recovery of all attorney's fees, expenses and costs generated in the Mandamus action and the eminent domain proceeding.

The action below clearly began as inverse condemnation in Civil Action No. 10-C-42. Civil Action No. 10-C-42 proceeded until the entry of an Agreed Order by the Circuit Court on March 31, 2011. The Circuit Court of Hardy County, West Virginia, ordered the WVDOH to institute an eminent domain action against Margaret Z. Newton concerning the severed mineral rights reserved in her deed recorded in Deed Book 162, at page 59 in the Office of the Clerk of the County Commission of Hardy County, West Virginia. The condemnation action ordered required consideration of whether or not Margaret Newton is entitled to receive compensation and/or damages as a result of the taking of limestone minerals for use in the construction of the Corridor H highway through the property of James S. Parsons, and valuation of those damages and/or compensation. The condemnation action was required to be filed within 45 days of the Order of March 31, 2011. Issues of attorney's fees and costs were deferred within the Order of the Court of March 31, 2011, from the Petition for Writ of Mandamus into the condemnation action. By Order dated March 19, 2012, Civil Action No. 10-C-42 was ended by the Circuit Court and the file closed. The Petitioner herein filed no appeal from Civil Action No. 10-C-42.

The Petitioners herein, the WVDOH, filed the condemnation action below, Civil Action No. 11-C-30, against the mineral interests of Margaret Z. Newton, on April 29, 2011. Exhaustive discovery was undertaken, originally commenced during Civil Action No. 10-C-42, and collaterally with a companion case involving the heirs of Anna M. Veach which has been appealed to this Court, the Veach case also having been commenced as a Petition for Writ of Mandamus in Civil Action No. 10-C-88, and continuing thereafter with the same procedure outlined above as 11-C-36. The issues of the Veach action have been fully briefed within the Brief of Respondents in Appellate Action No. 16-0326. As noted within the pleadings and exhibits filed in Appellate Action No. 14-0428, WVDOH v. Newton, supra, the Newton and Veach cases proceeded contemporaneously, basically as consolidated actions through discovery and pretrial proceedings.

The underlying action, WVDOH v. Newton, Civil Action No. 11-C-30, ended below with the Order of Judgment by the Circuit Court on April 16, 2014, after a 3-day jury trial. The Order of Judgment was appealed to the West Virginia Supreme Court of Appeals in Appellate Action No. 14-0428, and was affirmed in WVDOH v. Newton, 235 W. Va. 267, 773 S.E.2d 371 (2015), decided May 13, 2015, which said decision is incorporated herein by reference. The Circuit Court of Hardy County, West Virginia, thereafter conducted a hearing on August 4, 2015, to consider the issues related to the request for Attorney's fees, litigation expenses and expert witness fees and expenses by the Respondent below. The Court entered an Order granting Respondent's Motion for Reimbursement of Attorney's Fees, Litigation Expenses and Expert Witness Fees and Expenses on March 2, 2016, from which the Petitioners appealed.

Rather than setting forth an extensive factual recitation in this brief, Respondent would refer the Court to the factual statement contained in the previous Newton appeal and the decision of the Court in WVDOH v. Newton, supra.

## **V. SUMMARY OF ARGUMENT**

The Petition for Writ of Mandamus filed in the Circuit Court of Hardy County, West Virginia, on behalf of Margaret Z. Newton, the Respondent herein, and others, Civil Action No. 10-C-42, is the underlying basis for all Court proceedings in the Circuit Court of Hardy County, West Virginia, and through the appeal by the WVDOH in the underlying case of WVDOH v. Newton, supra. The Petition for Writ of Mandamus filed May 5, 2010, in the Circuit Court of Hardy County, West Virginia, as Civil Action No. 10-C-42, is incorporated herein by reference as if stated fully verbatim. The Petition for Writ of Mandamus sets forth the claims made on behalf of Margaret Z. Newton concerning the mineral rights reserved within her deed dated June 4, 1980, and as recorded in the land records of Hardy County, West Virginia. There can be no denial by the WVDOH that the Petition for Writ of Mandamus was filed in order to compel the Commissioner of the West Virginia Department of Transportation, Division of Highways, to implement eminent domain proceedings against the mineral interests of Margaret Z. Newton. The factual basis for the Petition for Writ of Mandamus is fully stated therein, together with the applicable law upon which the Petition for Writ of Mandamus was filed. Your Respondent, Newton, specifically alleged within the Petition for Writ of Mandamus that action No. 10-C-42, in the Circuit Court of Hardy County, West Virginia, was brought as an inverse condemnation proceeding against the WVDOH to require and compel the WVDOH to file eminent domain proceedings against the mineral

interests of Margaret Z. Newton and to pay Just Compensation therefore. The pleadings and litigation record below clearly show that had the Petition for Writ of Mandamus not been filed, the WVDOH would have never filed any eminent domain proceeding against the mineral interests owned by Margaret Z. Newton. This is clear from the Answer filed by the WVDOH to the Petition for Writ of Mandamus in Civil Action No. 10-C-42. Your Respondent obtained judgment against the Petitioners for damages, and your Respondent is entitled to reimbursement of all attorney's fees, litigation expenses, expert witness fees and expert expenses actually paid.

The Agreed Order entered by the Circuit Court of Hardy County, West Virginia, on March 31, 2011, in Civil Action No. 10-C-42 ordered and directed the WVDOH to institute an eminent domain action against the mineral interests severed and reserved within the deed of Margaret Newton as recorded in the land records of Hardy County, West Virginia. The WVDOH filed no appeal from the Order of March 31, 2011. A virtually identical Order was entered in the separate Civil Action No. 10-C-88, the heirs of Anna M. Veach versus the WVDOH, also in the Circuit Court of Hardy County, West Virginia. As in Newton, the WVDOH filed Civil Action No. 11-C-36, an eminent domain action against the heirs of Anna M. Veach, as a direct and proximate result of the Order of the Court entered in Civil Action No. 10-C-88, on March 31, 2011. Again, the Veach and Newton actions continued in tandem, contemporaneously, and virtually as consolidated actions until the trial of the Margaret Newton action which resulted in the appeal and decision in WVDOH v. Newton, supra.

The eminent domain statutes of the State of West Virginia arise from Article III, Section 9, of the Constitution of the State of West Virginia. Our Constitution states

“private property shall not be taken or damaged for public use without just compensation”. Chapter 54, Article 2, Section 14, of the West Virginia Code states as follows:

Before entry, taking possession, appropriation, or use, the applicant shall pay into the Court such sum as it shall estimate to be the fair value of property, or estate, right, or interest therein, sought to be condemned, including, where applicable, the damages, if any, to the residue beyond the benefits, if any, to such residue, by reason of the taking. 54-2-14; 54-2-14a.

The underlying actions in the Circuit Court of Hardy County, West Virginia, arose as a result of the construction of the Corridor H highway through Hardy County, West Virginia, by the WVDOH in conjunction with the Federal Highway Administration. Corridor H is a limited access dual lane expressway which is currently in existence from Washington, D.C. to Strasburg, Virginia; from Wardensville, West Virginia, to Davis, West Virginia; and from Elkins, West Virginia, to Weston, West Virginia. Certain sections of the Corridor H highway are currently under construction. The section of Corridor H through Hardy County, West Virginia, was completed in 2010. The Respondent’s limestone was removed in or about 2006.

In addition to the Petition for Writ of Mandamus filed in the Circuit Court of Hardy County, West Virginia, in Civil Action No. 10-C-42, the Respondent also filed with the Circuit Court Motions for Attorney’s Fees, together with legal citations in support of reimbursement of attorney’s fees, litigation expenses and expert witness fees. Citations for the requests are contained within the Petition for Writ of Mandamus in Civil Action No. 10-C-42, and within the Motion for Attorney’s Fees in Civil Action No. 11-C-30. Part of the basis for the demand for attorney’s fees by the Respondent below arises from 42 U.S.C. § 4651 and 4654, as well as 49 C.F.R. § 24.107(c), each of which have been

considered by this Court in West Virginia Department of Transportation, Division of Highways v. Dodson Mobile Home Sales and Service, Inc., 218 W.Va. 121, 624 SE 2d 468 (2005). In Dodson, this Court has held as follows:

The intent of Congress in enacting attorney fee provision of Uniform Location Assistance and Real Property Acquisition Policies Act is that a landowner should not be required to pay fees for attorney services and other litigation expenses where the landowner, and not the government, has initiated a claim for just compensation and has successfully prosecuted that claim to judgment. Uniform Location Assistance and Real Property Acquisition Policies Act of 1970, Section 304, 42 USC § 4654.

42 USC §4654 states that the owner of real property shall be reimbursed reasonable expenses, including reasonable attorney's fees, appraisals and engineering fees which the owner actually incurs because of a condemnation proceeding if the Court having jurisdiction renders a judgment in favor of the owner as a result of an inverse condemnation proceeding or the agency effects a settlement of such proceeding.

49CFR, §24.107. Clearly, the Respondent herein, Margaret Z. Newton, prevailed from the Petition for Writ of Mandamus and in subsequent Civil Action No. 11-C-30, which was considered by the West Virginia Supreme Court of Appeals in WVDOH v. Newton, supra, decided May 13, 2015. It is absolutely clear that had Margaret Z. Newton not filed a Petition for Writ of Mandamus, the Petitioners herein would have never filed an eminent domain action against her mineral interests, and she would have never received any compensation for the limestone minerals which the WVDOH took, appropriated, excavated, and used in the Corridor H highway as found in WVDOH v. Newton, supra, and within the underlying Order of Judgment of the Circuit Court of Hardy County, West Virginia, entered in Civil Action No. 11-C-30 on April 16, 2014. Therefore, the Respondent, Newton, is entitled to recover, as a matter of right, under

State and Federal law, all of her court costs, reasonable attorney's fees, reasonable expenses, and including all litigation expenses and expert witness fees and expenses **actually incurred.** 42 USC §4654; 49 CFR §24.107; WVDOH v. Dodson Mobile Homes Sales and Services, Inc., supra.

As an additional basis for the Attorney's fees, litigation expenses and expert witness fees claimed by your Respondent, the Court should consider West Virginia Highlands Conservancy, Inc. v. West Virginia Division of Environmental Protection, 193 W.Va. 650, 458 S.E. 2d 88 (1995). This Court has held that costs and attorney's fees may be awarded in a mandamus proceeding involving public officials insofar as citizens should not be required to resort to lawsuits to force government officials to perform their legally prescribed and non-discretionary duties. West Virginia Highlands Conservancy, Inc. v. West Virginia Division of Environmental Protection, supra. The Respondent herein entered into a contract of employment with counsel below and through this proceeding as a one-third (1/3) contingency fee agreement. The underlying Civil Actions No. 10-C-42 and 11-C-30 required a monumental effort to overcome the defenses of the West Virginia Department of Transportation, Division of Highways, mounted against the rights of Margaret Z. Newton in seeking Just Compensation for the limestone minerals taken in violation of her constitutional and statutory rights. The expenses in the underlying action totaled nearly two hundred thousand dollars (\$200,000.00) in considering both, the Newton and Veach cases which were undertaken simultaneously, and which included contemporaneous and reciprocal expert consultations, inspections, calculations, processes and evaluations. The fees and expenses of counsel were prorated between Veach and Newton. Therefore, while

the Respondent has no quarrel with the Circuit Court in granting attorney's fees and litigation expenses in this action, the Attorney's fees granted to the Respondent should have been based on the actual required payment of the one-third (1/3) contingency fee. The hours and the efforts demonstrated within the Affidavits for Attorney's Fees filed with the Circuit Court of Hardy County, West Virginia, were solely to demonstrate the effort required from counsel for the Respondent during the litigation processes from the inception of Civil Action No. 10-C-42, through the condemnation proceedings in 11-C-30, and through the Supreme Court of Appeals in Appellate Action No. 14-0428. Respondent has filed herein her Cross Assignment to require the Petitioners, the WVDOH, to compensate fully the fees and the expenses under the contingency fee agreement upon which attorney's fees were actually paid. Significantly, the customary counsel fees paid in condemnation actions is by contingency fee agreement.

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

1. Oral Argument is not waived by the Respondent.
2. This response is not frivolous.
3. It is necessary to determine whether or not the Petitioners have noticed valid errors, and it is necessary to allow the Respondent an opportunity to oppose any arguments or presentation made by the Petitioners before this Court.
4. Your Respondent is not able to say that the decisional processes would not be significantly aided by oral argument, and your Respondent is unable to state affirmatively that the facts and legal arguments in this matter are adequately presented in briefs and in the record on Appeal.

Upon the foregoing, Respondent reserves the right to participate in oral argument if allowed by the Court per WVRAP 20.

## **VII. ARGUMENT**

### **A. STANDARD OF REVIEW**

Generally, when determining the propriety of a Circuit Court's ruling, the Court employs a multifaceted standard of review. This Court reviews the Circuit Court's Final Order and ultimate disposition under an abuse of discretion standard. The Court reviews challenges to findings of fact under a clearly erroneous standard; conclusions of law are reviewed de novo. Syl. pt. 4, Burgess v. Porterfield, 196 W.Va. 178, 469 S.E. 2d 114 (1996); Syl. pt. 1, State ex rel. Hechler v. Christian Action Network, 201 W.Va. 71, 491 S.E. 2d 618 (1997); Clark v. Kawasaki Motors Corp., U.S.A., 200 W.Va. 763, 766, 490 S.E. 2d 852, 855 (1997); Syl. pt. 2, Walker v. West Virginia Ethics Comm'n, 201 W.Va. 108, 492 S.E. 2d 167 (1997); and Blake v. Charleston Area Medical Center, Inc., 201 W.Va. 469, 498 S.E. 2d 41 (1997).

The distinction between "clearly erroneous" and "abuse of discretion" has been compared and contrasted in previous rulings of this Court, and specifically, in Stephen L. H. v. Sherry L. H., 195 W.Va. 384, 465 S.E. 2d 841 (1995) noting that Judge Henry H. Friendly has suggested "that a discretionary ruling may not be set aside by an appellate court unless it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of relevant factors." Stephen L.H., 465 S.E. 841 at page 862. This is a significant difference from the "clearly erroneous" standard. The "abuse of discretion" standard seems to be something of a sliding scale which requires a specific degree of deference

to be accorded to the rulings of the circuit court depending upon the nature of the ruling being reviewed. *Id.*

The Order of Judge Frye of March 2, 2016, involves solely the issue of reimbursement of attorney's fees, litigation expenses and expert witness fees and expenses. The trial court has wide discretion in determining and assessing court costs and counsel fees. Hollen v. Hathaway Electric, Inc., 213 W.Va. 667, 584 S.E. 2d 523 (2003). On appeal, the trial court determination of the assessment and granting of attorney's fees, litigation expenses and expert witness fees and expenses should not be disturbed unless it appears that the trial court abused its discretion. *Id.* The Petitioner has stated that 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 the Respondent. The assignments of error by the Petitioners are two-fold:

1. The Circuit Court erred in awarding attorney's fees, litigation expenses, and expert witnesses' fees and expenses to Respondents; and
2. The Circuit Court erred in failing to make any meaningful review or analysis of the amounts sought to be recovered by the Respondent, claiming that the itemized attorney's fees were not properly analyzed, and were ambiguous, giving little detail.

The Respondent herein has filed a Cross Assignment of Error claiming that the Circuit abused its discretion when it denied the Motion of the Respondents for reimbursement of attorney's fees **actually paid** based upon the one-third (1/3) contingency contract entered into between the parties rather than based upon the Affidavit of Attorney's Fees generated in support of the motion made for reimbursement of attorney's fees, litigation expenses and expert witness fees and expenses in the action below. Each of these issues fall under an abuse of discretion standard as noted above.

## **B. ATTORNEY FEES AND EXPENSES**

### **1. Mandamus Action is Inverse Condemnation**

Within Civil Action No. 10-C-42, Respondent, Newton, specifically alleged that the Petition for Writ of Mandamus was brought as an inverse condemnation proceeding, and therein demanded attorney's fees and expenses based upon West Virginia Law. West Virginia Department of Transportation, Division of Highways vs. Dodson Mobile Home Sales and Services, Inc., 218 W.Va. 121, 624 S.E.2nd, 468 (2005); Shaffer v. West Virginia Department of Transportation, Division of Highways, 208 W.Va. 673, 542 S.E. 2d, 836 (2000); and State ex rel. Henson v. West Virginia Department of Transportation, Division of Highways, 203 W.Va. 229, S.E. 2d, 825 (1998).

By Order entered March 31, 2011, in Civil Action No. 10-C-42, the Department of Transportation, Division of Highways, of the State of West Virginia, hereinafter "WVDOH", was ordered to institute an eminent domain action against Margaret Z. Newton concerning the severed mineral rights complained of within the Petition of Writ of Mandamus in Civil Action No. 10-C-42 within forty-five (45) days thereof, and the said Order therein deferred attorney's fees and expenses claimed by the Petitioner through the Petition for Writ of Mandamus for further consideration in Civil Action No. 11-C-30.

A final Order of Judgment has been entered in this action, this Court affirmed the judgment, and there remains the pending motion by the Respondent for attorney's fees and expenses in this action. As a general rule, each litigant pays his or her own attorney's fees absent a contrary rule of court or express statutory or contractual authority for reimbursement. Syl. pt. 2, Sally-Mike Properties v. Yokum, 179 W.Va. 48,

365 S.E.2d 246 (1986). This principle has long been characterized as the “American” rule, distinguishing it from the rule in England which allows attorney’s fees to be recovered from the losing party. Id. 179 W.Va. at 52, 365 S.E.2d at 250. Attorney’s fees may be awarded by agreement of the parties. Nelson v. W. Va. Public Employees Ins. Bd., 171 W.Va. 445, 456, 300 S.E.2d 86, 97-98 (1982). There is no such agreement in this matter. In W.Va. Dept. of Transportation v. Dodson Mobile Homes Sales and Services, 218 W. Va. 121, 624 S.E.2d 468 (2005), Syl. Pt. 5, the Court stated:

Pursuant to the provisions of the Uniform Relocation Assistance and Real Property Acquisition Policies for Federal and Federally Assisted Programs Property Acquisition Act, 42 U.S.C. §§ 4601—4655 (2000), the event triggering the award of attorneys’ fees in a proceeding involving inverse condemnation, as set forth in Title 49, Section 24.107 of the Code of Federal Regulations, is when “[t]he court having jurisdiction renders a judgment in favor of the owner.”

However “ attorney’s fees certainly should not be assessed lightly or without fair notice and an opportunity for a hearing on the record.” Daily Gazette Co., Inc. v. Canady, 175 W.Va. 249, 251, 332 S.E.2d 262, 264 (1985) [quoting Roadway Express, Inc. v. Piper, 447 U.S. 752, 766-67, 100 S. Ct. 2455, 2464, 65 L.E.2d 488, 501-02 (1980)]. Consequently, the West Virginia Supreme Court of Appeals has previously determined, on numerous occasions, that a circuit court has erred by failing to afford a party notice and the opportunity to be heard prior to awarding attorney’s fees. Kanawha Valley Radiologists, Inc. v. One Valley Bank, N.A., 210 W.Va. 223, 229, 557 S.E.2d 277, 283 (2001). A hearing was properly noticed and held in this matter on the issue of attorney’s fees on August 4, 2015.

## 2. WVDOH Acted in Bad Faith.

The WVDOH had actual knowledge that all minerals had been severed and excepted by the Respondent in the Deed of Conveyance to the surface owner, James S. Parsons, from the Respondent and her husband in that deed dated June 4, 1980, recorded in Deed Book 162 at page 59, of the land records in Hardy County, West Virginia. Kent Kesecker, the appraiser for the WVDOH, noted that the mineral rights were retained by the Respondent at page 2 of the official appraisal report filed with and received by the WVDOH by stamp dated June 17, 2004, a copy of which is included in the record below, and noted as Appendix page 4417 in Appellate Action No. 14-0428. The WVDOH ignored information provided by their appraiser and by their attorneys in the title opinions provided to them that the minerals underlying the Parsons real estate were severed and excepted by the Grantor, your Respondent herein, and not included in the surface right of way take. The WVDOH now asks this Court to change clear existing law and the West Virginia Constitution rather than to protect the rights of property owners, essentially, to ask for forgiveness rather than permission.

In W. Va. Dept. of Highways v. Roda, 177 W.Va. 383, 352 S.E.2d 134 (1986), the Court stated that "Clearly, there is a strong public policy in this State which requires that condemnors strictly adhere to prescribed statutory procedures before appropriating private property for public use." Roda at 139. In Gainer v. Walker, 226 W.Va. 434, 701 S.E.2d 837 (2009), the Court has explained that:

[I]litigants are normally responsible for paying their own attorney's fees unless court rule, statute or express contract provision provides otherwise." Syllabus Point 2, Sally-Mike Properties v. Yokum, 179 W.Va. 48, 365 S.E.2d 246 (1986). However, we have further held that, "[t]here is authority in equity to award to the prevailing litigant his or her reasonable attorney's fees; without express statutory authorization, when the losing party has acted in bad faith, vexatiously, wantonly or for oppressive reasons." Syllabus Point 3, Sally-Mike Properties v. Yokum, 179 W.Va. 48, 365 S.E.2d 246 (1986).

By State and Federal Law, 42 U.S.C., Section 4651; and W. Va. Code §§ 54-2-9, 54-3-3 and 17-2A-20, the Respondent was entitled to bring the Petition against the WVDOH for a Writ of Mandamus as an inverse condemnation proceeding, requiring and compelling the WVDOH to comply with State and Federal law. Pursuant thereto, and upon judgment entered, the Respondent is entitled to recover all of her attorney's fees, expenses and costs actually incurred throughout the eminent domain proceedings, beginning in the original action commenced as a Petition for Writ of Mandamus, C.A. # 10-C-42. WVDOH v. Dodson Mobile Home Sales and Services, Inc. 218 WV 121, 624 S.E.2d 468 (2005); Shaffer v. WVDOH, 208 WV 673, 542 S.E.2d 836 (2000); and State, ex rel Henson v. WVDOH, 203 WV 229, 506 S.E.2d 825 (1998). The agreed Order entered by the Court on March 31, 2011, in Civil Action No. 10-C-42 required the WVDOH to institute an eminent domain action against the Respondent concerning the severed mineral rights excepted by Margaret Newton which are the subject of this action. The agreed Order deferred the issue of attorney's fees to be considered in this action, and the Court found, in its Order of March 2, 2016, as a conclusion of law, that the WVDOH refused to exercise its statutory duty, the WVDOH would have continued to claim that the limestone owned by the Respondent has no

value whatsoever, and there would have been no compensation made to the Respondent, Newton.

In Aetna Cas. & Sur. Co. v. Pitrolo, 176 W.Va. 190, 342 S.E.2d156 (1986), Syl.

Pt. 4, the Court stated 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.

This matter came before the Court in the underlying action, 10-C-42, upon a Petition for Writ of Mandamus and as an inverse condemnation proceeding filed originally pursuant to 42 USC, section 4651, 54-2-9, 54-3-3, and 17-2A-20 upon the failure of the WVDON to file condemnation proceedings in accordance with West Virginia law, and specifically 54-2-13, 54-2-14, and 54-2-14a. The Respondent and her counsel have been required to invest an extraordinary amount of time, effort and expense into this action to force the WVDON to acknowledge the existence of ownership interests of the Respondent in and to limestone minerals reserved by the Respondent. Respondent has filed in this matter an Affidavit of Attorney's Fees and litigation expenses demonstrating actual time and expenses required by counsel on behalf of the Respondent during the processes of this litigation, all of which were reasonable and necessary to bring this matter to a conclusion and to obtain an Order of

Just Compensation to be paid to the Respondent. The Respondent has been required to undertake significant litigation to enforce her constitutional rights to compensation, and she has prevailed at great expense as shown on the invoices and expenses filed by counsel for Respondent.

Affidavits of Attorney's Fees and Expenses filed on behalf of the Respondent demonstrate significant efforts by counsel in prosecuting the claims and in litigating valuation of the limestone minerals underlying the Newton real estate surface. The legal issues, litigation processes and development of factual and expert evidence in this action required advanced litigation experience by the attorney for the Respondent. The contingent fee agreement attached to the Affidavit for Attorney's Fees demonstrates that counsel for the Respondent fronted all of the expenses without guarantee of repayment unless the Respondent prevailed and obtained a judgment sufficient to repay expenses of litigation.

Counsel has undertaken significant efforts for Respondent to bring this matter through the litigation processes required by the oppositional efforts of the WVDOH and its counsel. In the Order entered by the Court from the proceedings of May 10, 2012, entered on May 30, 2012, at page 3, paragraph 6, the Court found:

"That the WVDOH contends that the mineral rights are subservient to the surface, but the Petitioner's unilateral assessment of the underlying minerals as having no value, and subsequent excavation, without permission the owner of the mineral rights, may be tantamount to trespass and a violation of the Respondents' constitutional right[s]. WVDOH v. Roda, supra.", page 3 Order of May 10, 2012.

The Circuit Court found, by Order entered November 13, 2012, page 3, paragraph 8, that the Petitioners "acted in bad faith and willful trespass against the interests of Newton." Thus, Attorney's fees, expert witness fees, and litigation

expenses should be granted to the Respondents as sought within the Petition for Writ of Mandamus and through this action.

The Petitioners are statutorily required to pay Just Compensation before entry onto the property pursuant to 54-2-13, 54-2-14, and 54-2-14a, of the West Virginia Code, as well as pursuant to Article III, Section 9, of the West Virginia Constitution and the Fifth Amendment of the United States Constitution. The WVDOH has deliberately and knowingly refused to exercise a clear legal duty, and a presumption exists in favor of an award of attorney's fees and expenses actually incurred in this proceeding unless extraordinary circumstances indicate that an award of attorney's fees would be inappropriate. Trozzi v. Board of Review of West Virginia Bureau of Employment Programs, 214 W.Va. 604, 591 S.E. 2d 162 (2003); West Virginia Education Association v. Consolidated Public Retirement Board, 194 W.Va. 501, 460 S.E. 2d 747 (1995); Hechler v. Casey, 175 W.Va. 434, 333 S.E. 2d 799 at 815 (1985). The West Virginia Supreme Court of Appeals has held that when a losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons, attorney's fees should be awarded. Corporation of Harper's Ferry v. Taylor, 227 W.Va. 501, 711 S.E. 2d 52 (2011); Hicks v. Bailey, 227 W.Va. 448, 711 S.E. 2d 270 (2011); Hechler v. Casey, supra. When the bad faith of the West Virginia Department of Highways is taken together with the deliberate refusal to exercise a clear legal duty and a constitutional mandate, attorney's fees are presumed to be proper. West Virginia Education Association v. Consolidated Public Retirement Board, supra.

### **3. Analysis of Attorney's Fees Requested.**

The Final Revised Affidavit for Attorney's Fees filed by counsel on September 8, 2015, demonstrates the actual hours and expenses of counsel **which support** the

claims of the Respondent for reimbursement of attorney's fees and litigation expenses pursuant to the contract of employment attached to the Affidavit demonstrating a one-third (1/3) contingent fee, plus expenses. The reasonable and customary contract of representation by attorneys in condemnation cases in the Hardy and Grant County area is by a contingency fee agreement. There has been significant risk to Respondent's counsel in taking this case on a contingent fee basis and the likelihood that the Respondent and others similarly situated would not or could not have afforded the lengthy and arduous Court proceedings but for counsel's willingness to accept the case on a contingent fee basis. The contingency fee agreement contracted between the Respondent and her attorney is fair and reasonable given the services rendered; the risk involved in this action; the expenses generated in proving the case on behalf of the Respondent; and the expertise and efforts required by counsel representing the Respondent. The WVDOH should not benefit at the expense of the Respondent. Respondent is entitled to reimbursement and recovery of attorney's fees, litigation expenses, expert witness fees and expenses, and all other costs actually expended as a result of these condemnation proceedings and from the original Petition for Writ of Mandamus underlying this current action in accordance with WVDOH v. Dodson Mobile Home Sales and Services, Inc., 218 W.Va. 121, 624 S.E.2nd, 468 (2005); Shaffer v. WVDOH, 208 W.Va. 673, 542 S.E.2nd, 836 (2000); and State ex rel. Henson v. WVDOH, 203 W.Va. 229, 506 S.E.2nd, 825 (1998); based upon the contingent fee agreement with the Respondent of one-third (1/3) of the total judgment of the Court, and expert fees, and all expenses and costs of this litigation as set forth in the Cross Assignment of Error, and as actually paid by Respondent.

At the outset of the underlying action, when the original Petition for Writ of Mandamus was filed, the Respondent and counsel were aware that substantial effort and expense would be required to prevail against the West Virginia Department of Transportation. The Respondent and counsel were also aware that experts would be required to be retained; that the WVDOH and their attorneys had a reputation and history of significant litigation and contrary tactics when facing opposition by a landowner; and that the inverse condemnation Petition for Writ of Mandamus in Civil Action No., 10-C-42, and the following condemnation action would require significant expert evaluation and opinions, and significant legal battles, likely through the West Virginia Supreme Court of Appeals. Based thereon, both, the Respondent and counsel recognized and realized that the appropriate and customary one-third (1/3) contingency contract for attorney's fees and expenses was the only reasonable and fair method of protecting both, the Respondent and counsel through the litigation process against the WVDOH. The WVDOH and their attorneys have exhausted virtually every avenue of defense under any theory that could possibly be conceptualized, including the appeal which now continues in the Veach case in Appellate Action No. 16-0326.

The West Virginia Supreme Court of Appeals will recall that the Petitioners below, the WVDOH, filed a Petition for Writ of Prohibition against Judge Parsons in Appellate Action No. 12-0928, and the WVDOH, through counsel, requested and obtained a stay of the Veach proceedings until the appeal of WVDOH v. Newton, supra, could be completed. Therefore, it is clearly an abuse of discretion to modify the

attorney - client relationship between the Respondent and counsel which is the customary one-third (1/3) contingency fee contract, plus expenses, entered into between the Respondent and counsel. As is clearly evident to the Court, most landowners either cannot afford to gamble several hundred thousand dollars, or they would not be willing to litigate against the WVDOH without the assistance of an attorney who is willing to accept employment based on a contingency fee agreement.

This Court has acknowledged that it has consistently upheld contingency fee agreements which are not excessive, over-reaching, and which do not take inequitable advantage of a client. Lawyer Disciplinary Board v. Morton, 212 W.Va 165, 569 S.E. 2d 412 (2002). A contingency fee agreement would be excessive only if the skill and labor required of the lawyer is grossly disproportionate to the fee being charged. Committee on Legal Ethics of West Virginia State Bar v. Gallagher, 180 W.Va. 332, 376 S.E. 2d 346 (1988). This Court has also held in Bishop Coal Co. v. Salyers, 181 W.Va. 71, 380 S.E. 2d 238 (1989) that when significant monetary damages are at issue, it is perfectly appropriate for a lawyer and a client to enter into a standard contingency contract. This Court has recognized that a reasonable contingent fee agreement is two-thirds (2/3) to the Plaintiff and one-third (1/3) to counsel. *Id.* Therefore, there is no basis to modify the contractual agreement between counsel and the Respondent and there is no reasonable basis for reduction of the actual fees paid from the contingency contract to an hourly fee in the Order of the Circuit Court of March 2, 2016. The Affidavit for Attorney's Fees submitted to the Circuit Court together with the Motion for Attorney's Fees was solely to demonstrate the number of hours, efforts and the expense undertaken by counsel to form a basis of approving the

contingency fee agreement and to require the Petitioners to reimburse the entirety of the contingency fee contract as paid.

The Petitioners certainly should be required to reimburse all of the attorney's fees paid under the contingency fee agreement, as well as all litigation and expert witness fees and expenses based upon the clear findings of the Circuit Court below in the Orders of May 10, 2012, and October 25, 2012, which formed the basis of utilizing the valuation pursuant to Roda, upon the intentional lack of good faith of the WVDH in its treatment of the Respondent below.

**C. CONTINGENCY CONTRACT OF 1/3 VERSUS HOURLY AFFIDAVIT**

The error claimed by the WVDH as to the hours and the time spent by counsel on the case of the Respondent and as recorded is completely without merit. While the Petitioners may disagree with the form and itemization of the attorney's fees and the work recorded as a record of attorney's fees spent on the Newton litigation, the Affidavit is clear that the attorney's fees are pro-rated between Veach and Newton as the cases progressed contemporaneously. In any event the Affidavit of Attorney's Fees demonstrates the actual hours spent working on the Newton litigation against the WVDH in protecting the real estate rights and constitutional rights of Newton which were breached by the Petitioners. Notations such as "copy" merely demonstrate that someone was provided a copy, which is a record to counsel for future reference. The Petitioners are being antagonistic and mean-natured as they have been throughout this litigation. There is nothing ambiguous about the one-third (1/3) contingent contract between counsel and the Respondent. Respondent respectfully requests this Court to Order the Petitioners to reimburse attorney's fees and all expenses consistent with to

contingency fee agreement which represents the true and actual attorney's fees paid in this matter.

The Petitioners have cited numerous entries in their Brief from the Affidavit of Attorneys Fees demonstrating the hours spent by counsel on the Newton case from the time of the original Petition for Writ of Mandamus through the appeal of this Court. 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. The hours and the expenses noted within the Affidavit for Attorneys Fees in both, the Newton case and the Veach case, were prepared as a record for counsel, and to demonstrate the requirements of the action litigated on behalf of the Respondent against the efforts of the WVDOH. Each of the entries can be explained fully, however, it would be necessary to demonstrate the entire thought process and strategy undertaken by the Respondent against the efforts of the WVDOH in the action below and proceedings through this Court in the appeal of Newton, supra.

Just as an example of the entries in the Newton case which the Petitioners do not understand, an explanation would go as follows:

1. Oscar Bean has great experience in prosecuting eminent domain actions on behalf of landowners. He has undertaken numerous eminent domain actions for landowners in the area of Hardy County for the past forty (40) years. Your undersigned counsel was relatively inexperienced with eminent domain actions prior to undertaking these proceedings on behalf of Newton and Veach. Therefore, counsel sought out Oscar Bean as a resource.

2. The WVDOH had filed an eminent domain action against the shale interests of Fort Pleasant Farms in the Circuit Court of Hardy County, West Virginia. Renick Williams owns Fort Pleasant Farms. The Fort Pleasant/ WVDOH file in the Circuit Clerk's Office of Hardy County presented a great deal of underlying information as to the methodology of the WVDOH in filing and prosecuting proceedings against landowners.

Petitioners, in their Brief, also claim that many items were categorized as clerical or administrative. Your undersigned attorney does not have a paralegal or a subservient intern or young attorney upon which to rely in preparing for trial. That may be why your undersigned has a greater knowledge and understanding of the processes of eminent domain than the "hired guns" of the WVDOH such as Martin & Seibert who brought with them secretaries, paralegals, and technical support at every hearing and throughout the trial. Your undersigned attorney undertakes preparation and research which includes copying deeds, organizing a file, reading and scanning reports and reviewing documents in preparation of depositions. In fact, those very efforts may be, to a large extent, why the attorneys in large firms loose. They have no "hands on" understanding of their file or their case.

The Petitioners also complained of "blocked billing" or "ambiguous entries" within the Affidavit for Attorneys Fees filed with the Court below. Significantly, the Affidavit filed with the Court is a sworn document by an officer of the Court, that is, your undersigned. The record kept of time undertaken in services on behalf of the Respondent below was intended as support for a contingency fee contract, and not as

a record for payment from a client such as an insurance company. Mrs. Newton was fully aware of the efforts being undertaken by counsel on her behalf. She was kept up-dated on a regular basis as to experts, depositions, and processes involved in preparation for litigation and appeal. The affidavit demonstrating the hours spent in support of litigation processes for Newton is a record of counsel to demonstrate the hours undertaken, and not to satisfy the curiosity of the Petitioners.

## **VII. CONCLUSION**

WHEREFORE, the Circuit Court of Hardy County, West Virginia, made no error in the propriety of granting attorney's fees, litigation expenses and expert witness fees and expenses to the Respondent. Respondent should be awarded reasonable attorney's fees, expert witness fees and expenses, as well as the costs of this action and all litigation expenses as found by the Court, however, the Attorney's fees should be based upon the contingency fee contract entered into by and between the Respondent below and counsel based upon those factors argued within Respondent's Brief and as set forth in the Cross Assignment of Error and Argument filed hereinafter on behalf of the Respondent.

### **RESPONDENT'S CROSS ASSIGNMENT AND ARGUMENT**

## **III. ASSIGNMENT OF ERROR**

The Circuit Court was clearly wrong when it denied the Motion of Respondents for Reimbursement of Attorney's Fees based upon the contingency contract entered into with Respondent. The contingency fee agreement with reimbursement of expert witness fees and costs is the reasonable and customary practice in representation of clients in condemnation proceedings. The payment of one-third (1/3) of the judgment represents the actual attorney's fees paid. Direction is necessary from this Court to

require payment of attorney's fees, costs, expenses and expert witness fees actually paid to comply with Article III, Section 9, of the Constitution of the State of West Virginia; 54-2-14;54-2-14a and West Virginia Department of Transportation, Division of Highways v. Dodson Mobile Homes Sales and Service, Inc., 218 W.Va. 121, 624 S.E. 2d 468 (2005). Attorney's fees in this action are based upon a one-third (1/3) fee contract of the total judgment paid with interest.

#### **IV. ARGUMENT**

Private property shall not be taken or damaged for public use without Just Compensation. Article III, Section 9, West Virginia Constitution; 5<sup>th</sup> Amendment, U.S. Constitution. Before entry, taking possession, appropriation, or use of private property, the WVDOH is required to pay Just Compensation either to the owner or into the registry of the Court. 54-2-14; 54-2-14a. Mandamus is the appropriate remedy to require the WVDOH to comply with statutory requirements of eminent domain. Shaffer v. WVDOH, 208 W.Va. 673, 542 S.E. 2d 836 (2000); State ex rel. Henson v. WVDOH 203 W.Va. 229, 506 S.E. 2d 825 (1998); Orlandi v. Miller, 192 W. Va. 144, 451 S.E. 2d 445 (1994). This Court has recognized the remedy of Mandamus to require "inverse condemnation". Orlandi, supra; State ex rel. McCormick v. Miller, 171 W.Va. 42, 297 S.E. 2d 448 (1982). Once the Circuit Court rendered judgment in favor of your Respondent in the underlying action, from the preliminary action of 10-C-42, the Respondent was entitled to litigation expenses including reasonable attorney's fees. WVDOH v. Dodson Mobile Home Sales and Service, Inc., 218 W.Va. 121, 624 S.E. 2d 468 (2005). This Court has found that citizens should not be required to resort to lawsuits to force government officials to perform their legally prescribed

nondiscretionary duties. West Virginia Law mandates costs, expenses and attorney's fees for litigation resulting from a public officials' disregard for mandatory provisions of the State Code. State ex rel West Virginia Highlands Conservancy, Inc. v. West Virginia Division of Environmental Protection, 193 W.Va. 650, 458 S.E. 2d 88 (1995); Trozzi v. Board of Review of West Virginia Bureau of Employment Programs, 214 W.Va. 604, 591 S.E. 2d 162 (2003).

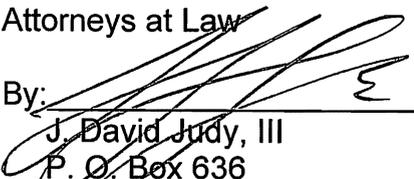
Respondent re-states all arguments of the underlying Brief of Respondent filed herein as if set forth verbatim.

## V. CONCLUSION

Respondent is entitled to reimbursement of attorney's fees, litigation expenses, expert witness fees, costs, and reasonable attorney's fees actually paid based upon the one-third (1/3) contingent fee contract entered into between these parties and which is a part of the record in this action as referred to within the Final Order of the Circuit Court below.

Margaret Z. Newton  
Respondent - By Counsel

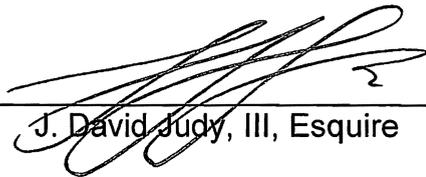
JUDY & JUDY  
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Counsel for Margaret Newton  
Respondent below

**CERTIFICATE OF SERVICE**

I. J. David Judy, III, Counsel for the Respondents do hereby certify that I served a true copy of the, *BRIEF OF RESPONDENTS and RESPONDENTS' CROSS ASSIGNMENT AND ARGUMENT*, upon Scott L. Summers, Summers Law Office, PLLC, at his address of P.O. Box 6337, Charleston, West Virginia 25362, via U.S. Mail, postage prepaid, on this the 8 day of July, 2016.

  
\_\_\_\_\_  
J. David Judy, III, Esquire