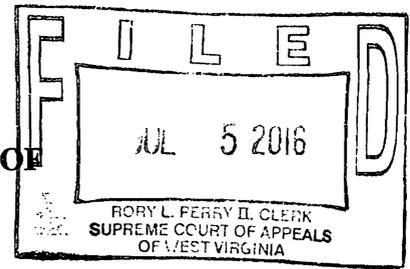


IN THE SUPREME COURT OF APPEALS OF
WEST VIRGINIA



No. 16-0326

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

Petitioners Below, Petitioners,

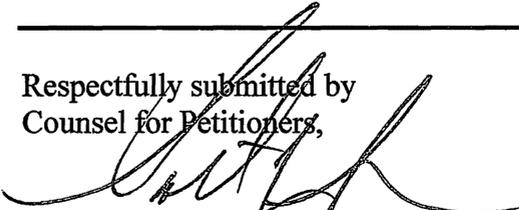
v.

DOUGLAS R. VEACH, CATHERINE D. VEACH,
ARVELLA PIERCY, ARETTA TURNER,
ROSELLA A. VEACH, DOROTHY VEACH,
DEBORAH E. VEACH, SHEILA KAY VEACH,
SHERWOOD S. VEACH, SHARON A MEHOK,
F. CRAIG VEACH, L. COLEMAN VEACH,
REGINALD K. VEACH, JEFFREY T. VEACH,
ERIC C. VEACH, CHRISTOPHER K. VEACH,
ST. MARY'S CATHOLIC CHURCH AND EPIPHANY
OF THE LORD CEMETERY, AND THE ROMAN
CATHOLIC WHEELING-CHARLESTON,

Respondents Below, Respondents.

PETITIONERS' BRIEF ON APPEAL

Respectfully submitted by
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PETITIONER'S BRIEF ON APPEAL

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

ASSIGNMENTS OF ERROR

Assignment of Error No. 1: The circuit court erred in refusing to set aside stipulations which were contrary to law and were improvidently entered into by Petitioners' prior counsel.

Assignment of Error No. 2: The circuit court erred in denying Petitioners' motion for summary judgment based upon the fact that Respondents do not own the limestone for which they seek compensation.

Assignment of Error No.3: The circuit court erred granting Respondents' motion for summary judgment based upon the doctrine of collateral estoppel and based upon stipulations which were contrary to law and improvidently entered into by Petitioners' prior counsel.

Assignment of Error No. 4: The circuit court erred in finding that the Petitioners acted in bad faith and therefore awarding attorney's fees and costs to Respondents.

STATEMENT OF CASE

Petitioners' appeal is taken from the "Order Granting Summary Judgment and Awarding Fees and Costs to Respondents, and Order Denying Petitioner's Motion for Summary Judgment; Petitioner's Motion to Set Aside and Rescind Stipulation; and Petitioner's Motion to Certify a Question" entered by the circuit court of Hardy County, West Virginia on March 2, 2016.

This case arises out of a condemnation action filed by the West Virginia Department of Transportation, Division of Highways (hereinafter sometimes “WVDOH”) to condemn certain property in relation to the construction of “Corridor H” through Hardy County.

The principal issue in this appeal is an issue of first impression for this Court. Specifically: Is a general mineral reservation contained in a deed sufficient to sever limestone from the surface estate? Simply put, is limestone owned by the surface owner, or is it owned by the mineral interest owner?

On August 31, 1968, Anna M. Veach conveyed approximately 405 acres of real estate located in Hardy County, West Virginia to D.R. Veach, (Douglas R. Veach), L.C. Veach (Leo C. Veach) and Dalton L. Veach, (“Veach Surface Owners”) by deed, of record in the Hardy County Clerk’s office in Deed Book 120, at page 258, (hereinafter sometimes referred to as the “subject property”). This deed contained a general, non-specific, mineral rights reservation which stated that “[t]he Grantor herein does hereby except and reserve in fee simple all minerals underlying the tracts of real estate herein conveyed.” (Appendix at pages. 24-25) (hereinafter “App. at pg. __”) Respondents are the successors in title to that general, non-specific mineral reservation. (App. at pgs. 81-82, 92)

Portions of this property were the subject of the condemnation proceeding for construction of a section of the “Corridor H” highway in Hardy County.

Construction began on September 1, 2005, and the road was opened to the public on October 27, 2010. Anna M. Veach died on July 25, 2006. From September 1, 2005 until July 25, 2006, neither Anna M. Veach, nor anyone acting on her behalf, attempted to contact the WVDOH or intervene in the condemnation proceeding related to the surface estate in order to make any allegations related to taking of minerals from beneath the surface of the subject property.

The condemnation proceedings for the surface estate were still pending when Anna M. Veach died. According to her Last Will and Testament, Mrs. Veach bequeathed the subject property to Dalton Veach, Arvella Percy, Aretha Turner, Leo Veach, Farland Veach, Ernest Veach, Douglas Veach, Rosella Anne Veach, St. Mary's Catholic Church Petersburg, West Virginia, and St. Mary's Cemetery (collectively sometimes referred to as the "Veach Heirs" or "Respondents.") At no time during the construction of Corridor H, or during the pendency of the condemnation proceedings for the surface estate, did the Veach Heirs, or their issue, contact the WVDOH concerning an alleged take or damages to mineral interests as a result of the highway project or seek to intervene in the condemnation proceedings for the surface estate. It is important to note that three of the residual heirs, Douglas Veach, Dalton L. Veach (now his heirs) and Mildred S. Veach were defendants in the condemnation proceedings for the surface estate and had knowledge of the take of the surface rights and had advice of counsel relating thereto.

On October 12, 2010, the Estate of Anna M. Veach filed a Petition for Writ of Mandamus against the WVDOH alleging that significant minerals, primarily limestone, were disturbed or otherwise utilized by the WVDOH from the property and that they were entitled to just compensation for loss of the same. The mandamus proceeding was dismissed by agreement of the parties. On May 27, 2011 an eminent domain proceeding was filed by the WVDOH against the Respondents. (*See* App. at pgs. 48-51)

Respondents believe that they are entitled to be compensated for limestone underling the subject property. Petitioners assert that Respondents are not the owners of said limestone.

It is Petitioners' position that the general mineral reservation in this case does not include the limestone. Therefore, Respondents are not the owners of the limestone at issue.

In relation to these mineral interests, Petitioner's previous counsel improvidently entered into stipulations that were contrary to the law. Specifically:

1. That Anna M. Veach conveyed the surface only to three (3) of her sons on August 31, 1968, reserving unto herself fee simple ownership of all minerals underlying the Veach real estate, without limitation or restriction, and which reservation and exception is free of ambiguity and clear in its intent.

2. That the minerals reserved by Anna M. Veach include limestone and gravel as defined by the Court. (App. at pg. 3)

Petitioners, through new counsel, filed "Petitioners' Motion to Rescind and Set Aside Stipulation." Petitioners' new counsel also filed "Petitioners' Motion to Certify a Question to the West Virginia Supreme Court of Appeals" asking the Court to determine "If limestone is not specifically identified in a generic non-specific severance of the mineral interests from the surface estate, does the limestone remain a part of the surface estate?" Petitioners' new counsel also filed "Petitioners' Motion for Summary Judgment" which demonstrated that Respondents did not own the limestone at issue in this case.

Respondents filed "Respondents' Specific and Comprehensive Motion for Summary Judgment Against Petitioners" wherein they asserted the doctrine of collateral estoppel based upon findings and the verdict rendered in the case of "West Virginia Department of Transportation, Division of Highways, a public corporation, and Paul A. Mattox, Jr., P.E., Secretary/Commissioner of Highways v. Margaret Newton," Circuit Court of Hardy County, West Virginia, Civil Action No.: 11-C-30, as well as the opinion from this Court in the appeal of the verdict in Newton. West Virginia Department of Transportation Division of Highways v. Newton, 235 W.Va. 267, 773 S.E.2d 371 (2015) as well as the improper stipulations discussed above.

The circuit court granted Respondents' motion for summary judgment and denied all of Petitioners' motions. In its Order, the circuit court found as follows:

18. Accordingly, this court FINDS that there exists no question of material fact between the parties; but the Respondents Veach are owners of a limestone/gravel mineral interest on parcels 5-1 and 5-2; that the issue of limestone valuation has already been decided by a Hardy County jury with regard to Ms. Newton's property which has limestone of identical character; that the present case and the Newton case were combined for all pre-trial hearings and had identical pre-trial rulings as entered by this Court; that the application of collateral estoppel is appropriate in this matter, that the parties experts have previously agreed that the total volume of limestone removed is four million, eight hundred thirteen thousand, seven hundred and forty (4,813,740) tons, that the limestone remaining under the Corridor H highway is five million, two hundred eighty five thousand and seventy nine (5,285,279) tons, and that Respondents Veach have made an offer of settlement in the matter at the rates set by the Newton jury of \$3.79 per ton of limestone removed and \$0.25 per ton of limestone remaining in the ground. Therefore, this court finds that just compensation for the limestone removed by WVDOH from the Respondents' property on the date of take is \$18,244,074.00 and for the residue left in place as of the date of take is \$1,321,319.70. For a total award of just compensation in the amount of \$19,565,393.00. Summary judgment is appropriate. (App. at pgs. 349-350)

Petitioners have filed the instant appeal asking this Court to reverse the "Order Granting Summary Judgment and Awarding Costs to Respondents, and Order Denying Petitioners' Motion for Summary Judgment; Petitioners' Motion to Set Aside and Rescind Stipulation; and Petitioners' Motion to Certify Question" entered by the circuit court of Hardy County.

SUMMARY OF ARGUMENT

The circuit court erred in refusing to set aside stipulations which were contrary to law and improvidently entered into by prior counsel for the Petitioners.

Petitioner's previous counsel improvidently stipulated that the Respondents were the owners of the limestone at issue in this case by virtue of a prior general mineral reservation deed. As is

discussed in detail below, these stipulations are contrary to law. Respondents do not own the limestone at issue in this case.

This Court has long recognized that “[a] stipulation of counsel may be set aside, upon the request of one of the parties, on the ground of improvidence provided both parties can be restored to the same condition as when the agreement was made.” Syllabus Point, Cole v. State Comp. Commissioner, 114 W.Va. 584, 173 S.E. 263 (1934). Further, “[w]hen a party who has entered a stipulation can show that they acted mistakenly, or if the agreement to enter into the stipulation was improvident, the party may be relieved from the stipulation.” Gilkerson v. Baltimore, 132 W.Va. 133, 51 S.E.2d 767 (1948) (internal citations omitted)

As such, the circuit court erred in denying Petitioners’ Motion to Rescind and Set Aside Stipulation and then relying on said stipulations, in part, to grant summary judgment in favor of Respondents. This error has resulted in the entry of a Judgment against the Petitioners in excess of Nineteen Million Dollars (\$19,000,000.00). If the ruling of the circuit court is not reversed and remanded, Petitioners and the citizens of West Virginia will suffer a substantial and manifest injustice.

The circuit court also erred in denying Petitioners’ Motion for Summary Judgment.

As discussed above, Respondents are not the owners of the limestone at issue in this case. A litigant must have some legal right, or authority, in order to seek compensation for an alleged wrongdoing. “Every action shall be prosecuted in the name of the real party in interest.” Rule 17(a) of the West Virginia Rules of Civil Procedure; Housing Auth. v. E.T. Boggess, Architect, Inc., 233 S.E.2d 740 (W.Va. 1977) The purpose of Rule 17(a) of the West Virginia Rules of Civil Procedure, according to this Court in Keesecker v. Bird, 490 S.E.2d 754 (W.Va. 1997), “is not simply to identify

a party by the correct title, but also to ensure that the party who makes a claim possesses, under substantive law, the right sought to be enforced.”

Respondents do not have standing to assert the claim they are asserting. As a result, this Court should remand this matter back to the circuit court with direction to enter judgment in favor of Petitioners.

The circuit court also erred in relying on allegations contained in the original petition in the condemnation action, the above referenced stipulations, and in applying the doctrine of collateral estoppel in order to grant Respondents’ motion for summary judgment.

Respondents’ motion for summary judgment, and the circuit court in the order which is the subject of this appeal, relied on rulings, stipulations, findings and the verdict rendered in the case of *West Virginia Department of Transportation, Division of Highways, a public corporation, and Paul A. Mattox, Jr., P.E., Secretary/Commissioner of Highways v. Margaret Newton*, in the circuit court of Hardy County, West Virginia, Civil Action No.: 11-C-30, as well as the opinion from this Court in the appeal of the judgment entered in that case. (West Virginia Department of Transportation Division of Highways v. Newton, 235 W.Va. 267, 773 S.E.2d 371 (2015)).

Application of the doctrine of collateral estoppel is not appropriate in the case at bar. “[T]he offensive use of collateral estoppel is generally disfavored in this jurisdiction.” Holloman v. Nationwide Mut. Ins. Co., 617 S.E.2d 816, 822 (W.Va. 2005)

One of the key inquiries when considering an application of collateral estoppel is whether the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue or issues in the prior action. State ex rel. Federal Kemper Ins.Co. v. Zakaib, 506 S.E.2d 350 (W.Va.1998); Peters v. Rivers Edge Mining, Inc., 680 S.E.2d 791 (W.Va. 2009). Further, collateral estoppel may not

be applied if “there are special circumstances that would warrant the conclusion that enforcement of the judgment would be unfair.” Syllabus point 6, Conley v. Spillers, 171 W.Va. 584, 301 S.E.2d 216 (1983).

Due to errors made during the trial in the Newton case, there was no full and fair opportunity to litigate the issues. Further, due to the failure of Petitioners’ prior counsel to file certain key motions in the Newton case, which this Court acknowledged in its opinion, Petitioners were denied a meaningful review of those errors on appeal.

The circuit court erred in using the doctrine of collateral estoppel offensively in this case in granting Respondents’ motion for summary judgment. As such, the ruling of the circuit court in this regard must be reversed.

The circuit court erred awarding attorney’s fees to Respondents by finding that the Petitioners acted in bad faith and trespassed upon Respondents’ mineral rights.

The WVDOH acted pursuant to its statutory authority and acquired the necessary property rights. Once Respondents brought their claim to the attention of the WVDOH, within a reasonable time, it instituted a condemnation action.

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

Under law, Respondents are not entitled to an award of attorney’s fees and associated litigation costs. Therefore, the ruling of the circuit court in this regard must be reversed.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This appeal presents a case of first impression for this Court. Specifically: is limestone a mineral which is reserved under a general reservation of mineral interests?

As such, a memorandum decision is not appropriate and oral argument under Rule 20 of the West Virginia Rules of Appellate Procedure is necessary.

STANDARD OF REVIEW

With regard to the circuit court's entry of summary judgment in favor of Respondents, the standard of review is de novo. "A circuit court's entry of summary judgment is reviewed de novo." Syllabus Point 1, Calhoun v. Traylor, 624 S.E.2d 501 (W.Va. 2005) *citing* Syllabus Point 1, Painter v. Peavy, 192 W.Va. 189, 451 S.E.2d 755 (1994).

The circuit court was presented with questions of law with regard to setting aside the stipulations entered into by Petitioners' prior counsel, the award of costs and attorney's fees arising from the mandamus action, and the award of attorney's fees in the condemnation action. The circuit court committed error in the application of the law. As such, the standard of review is de novo.

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

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

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

Our review of the issue of a trial court's award of attorney's fees is to determine whether the lower court committed error in making the award. In Bond v. Bond, 144 W.Va. 478, 109 S.E.2d 16 (1959), we explained: "[T]he trial [court] . . . is vested with a wide discretion in determining the amount of . . . court costs and counsel fees;

and the trial [court's] . . . determination of such matters will not be disturbed upon appeal to this Court unless it clearly appears that [it] has abused [its] discretion.” Id. at 478-79, 109 S.E.2d at 17, syl. pt. 3, in part.

ARGUMENT

1. The Circuit Court Erred in Refusing to Set Aside Stipulations Which Were Improvidently Entered into by Prior Counsel for the Petitioners.

A seminal issue in this case has never been proven. Specifically, are the Respondents the owners of the limestone for which they seek to be compensated?

In an Order entered by the circuit court on May 23, 2013, the circuit court stated:

The Court directed the attention of the parties to the Second Motion for Partial Summary Judgment filed by the Respondents regarding potential stipulations of fact numbered 1 through 7. In accordance therewith, the parties stipulate to the following:

1. That Anna M. Veach conveyed the surface only to three (3) of her sons on August 31, 1968, reserving unto herself fee simple ownership of all minerals underlying the Veach real estate, without limitation or restriction, and which reservation and exception is free of ambiguity and clear in its intent.

2. That the minerals reserved by Anna M. Veach include limestone and gravel as defined by the Court.
(App. at pg. 3)

The mineral reservation at issue in this case is a general non-specific reservation. “The Grantor herein does hereby except and reserve in fee simple all minerals underlying the tracts of real estate herein conveyed.” (Anna M. Veach Deed dated August 31, 1968.) (App. at pgs.24-25)

The reservation at issue in this case is not “free of ambiguity” and is not “clear in its intent.” Further, limestone is not a mineral which is severed from the surface estate in a general, non-specific mineral reservation. It remains a part of the surface estate. As such, under the law, the stipulations are incorrect.

A. A Stipulation May Be Rescinded and Set Aside if the Stipulation was Entered into Improvidently, or if the Stipulation is Contrary to the Law.

It has long been recognized by this Court that “[a] stipulation of counsel may be set aside, upon the request of one of the parties, on the ground of improvidence provided both parties can be restored to the same condition as when the agreement was made.” Syllabus Point, Cole v. State Comp. Commissioner, 114 W.Va. 633, 173 S.E. 263 (1934).

Further, as this Court stated in State ex rel. Crafton v. Burnside, 207 W. Va. 74, 78, 528 S.E.2d 768, 772 (2000):

It has been said that agreements of counsel made during the progress of a cause have never been treated as binding contracts to be absolutely enforced, but as mere stipulations which may be set aside in the sound discretion of the court when such action may be taken without prejudice to either party. See, e.g., Porter v. Holt, 73 Tex. 447, 11 S.W. 494 (1889). A stipulation of counsel originally designed to expedite trial should not be rigidly adhered to when it becomes apparent that it may inflict a manifest injustice on one of the contracting parties. Maryland Cas. Co. v. Rickenbaker, 146 F.2d 751, 753 (4th Cir.1944). See also Brast v. Winding Gulf Colliery Co., 94 F.2d 179, 181 (4th Cir.1938). A stipulation of counsel may be set aside on the request of a party on the ground of improvidence, if both parties can be restored to the same condition as when the agreement was made. Syllabus, Cole v. State Compensation Comm'r, 114 W.Va. 633, 173 S.E. 263 (1934).

In addition, in Gilkerson v. Baltimore, 132 W.Va. 133,140, 51 S.E.2d 767 (1948), this Court has stated:

Trial courts look favorably upon stipulations the effect of which is generally to simplify litigation. For this reason they are not generally construed rigidly but are looked upon in order to carry out their actual purpose. For this reason where a stipulation appears to have been inadvertently or under a misapprehension entered into courts occasionally relieve the parties concerned from their effect. Cole v. State Compensation Commissioner, 114 W.Va. 633, 173 S. E. 263. See also 50 Am. Jur. 609, 612, 613, and Ann. Cas. 1912 C 769

Other jurisdictions have also held that parties are not bound by a stipulation as to a matter of law which is contrary to the controlling law on the subject. State v. Bodtmann, 239 N.J. Super. 33,

570 A.2d 1003 (App. Div. 1990); 161 A.L.R. 1161. Therefore, the court has power to relieve parties of a stipulation entered into under a misunderstanding of the applicable law. Boston Edison Co. v. Campanella & Cardi Const. Co., 272 F.2d 430 (1st Cir. 1959).

Therefore, when a party who has entered a stipulation can show that they acted mistakenly, or if the agreement to enter into the stipulation was improvident, or if the stipulation is contrary to the law, the party may be relieved from the stipulation.

The stipulations at issues are contrary to the law and Petitioners' prior counsel was improvident in entering into the stipulations. Further, Respondents' would not be prejudiced if the stipulations were rescinded. They would simply be tasked to prove that they are the owners of the property for which they seek compensation.

i. It was Improvident for Petitioners' Prior Counsel to Enter into the Stipulations at Issue.¹

It was improvident for Petitioners' prior counsel to stipulate that ownership of the limestone was severed from the surface estate as part of a general, non-specific mineral reservation. Essentially, Petitioners' prior counsel relieved Respondents from the initial and primary burden of proof in any litigation. That is, do the Respondents have a right to bring the claim for the compensation they seek? As will be discussed below, the answer to what should have been the initial inquiry in this case is a resounding – No, they do not.

A fundamental principle in the law is that a litigant must have some legal right, or authority, in order to seek compensation for an alleged wrongdoing. Rule 17(a) of the West Virginia Rules of

¹ In addition to the issue addressed herein, the improvidence of Petitioners' previous counsel was highlighted by this Court numerous times in its May 23, 2015 opinion in West Virginia Department of Highways v. Newton 235 W.Va. 267, 773 S.E.2d 371 (2015). Due to Petitioners' previous counsel's improvidence in not filing an appropriate dispositive motion or post-trial motions, this Court was prevented from any meaningful review of the issues raised in Petitioners' appeal.

Civil Procedure provides, in pertinent part, that “Every action shall be prosecuted in the name of the real party in interest.” Interpreting this rule, this Court in Housing Auth. v. E.T. Boggess, Architect, Inc., 160 W.Va. 303, 233 S.E.2d 740 (1977) stated that “every action shall be prosecuted in the name of a real party in interest.” The purpose of Rule 17(a) of the West Virginia Rules of Civil Procedure, according to this Court in Keesecker v. Bird, 200 W.Va. 667, 490 S.E.2d 754 (1997), “is not simply to identify a party by the correct title, but also to ensure that the party who makes a claim possesses, under substantive law, the right sought to be enforced.” Due to these stipulations, Respondents were completely relieved of this basic proof obligation.

It was improvident for Petitioners’ prior counsel to enter into these stipulations. By entering into these stipulations, Petitioners’ prior counsel gave Respondents standing to make a claim for damage which Respondents would not otherwise be permitted to make under the law.

ii. The Stipulations at Issue Are Clearly Contrary to Well Established Law.

Under the law, Respondents do not own the limestone for which they seek to be compensated.

As is common knowledge, all matter is classified as either being an animal, vegetable, or mineral. Therefore, one would assume that limestone is a mineral which would be severed from the surface estate in a reservation of mineral interests. However, “the mere fact that a substance is inorganic does not bring it within the category of a mineral *as that term is used in a deed or lease.*” Little v. Carter, 408 S.W.2d 207, 208 (Ky. 1966) (*referencing Hudson & Collins v. McGuire*, 188 Ky. 712, 223.). (emphasis added).²

2. Petitioners acknowledge the case of Sult v. A. Hochstetter Oil Co., 63 W.Va. 317, 61 S.E. 307, 310 (1908) which held that “‘mineral’ will prima facie include every substance which can be got from underneath the surface of the earth for the purpose of profit.” However, subsequent decisions from this Court, as discussed herein, indicate that limestone does not fit within that prima facie assumption.

Although this Court has never addressed the issue of whether limestone is a mineral that is severed from the surface by virtue of a general mineral reservation in a deed, this Court has ruled on a similar question with a very similar factual basis. In West Virginia Department of Highways v. Farmer, 159 W.Va. 823, 226 S.E.2d 717 (1976), this Court held that sand and gravel were not part of a broad mineral reservation.

In Farmer, the WVDOH bought the surface rights from the surface owner in order to quarry sand and gravel needed for the construction of roadways. *Id.* at 719. The mineral rights owners filed suit claiming they owned 9/10 of the mineral rights. They argued that they were entitled to 9/10 of the eminent domain proceeding payout for the sand and gravel. *Id.*

The Court looked to the intent of the parties when the mineral reservation was created and found “oil, gas and other minerals” were all reserved. *Id.* at 720. The Court found ambiguity within the four corners of the contract, so it applied the principle of *ejusdem generis*³ to discern intent. *Id.* The Court held that, when oil and gas were reserved, the phrase “other minerals” was limited to petroleum-based minerals. *Id.* This Court concluded that the conveyance to the surface owners would be completely useless if sand and gravel were to be reserved to the mineral owners. *Id.* If the mineral owners could rightfully take all the sand and gravel, the surface owners would be deprived entirely of the use of the surface they rightfully own. *Id.*

Like sand and gravel, to give a mineral reservation owner the legal right to quarry limestone is to give him the right to destroy the surface owner’s property and to render the conveyance of the

³ “In order to resolve this ambiguity, accepted rules of construction must be employed. One such rule of construction *ejusdem generis*, has been so used. *Ejusdem generis* means of the same kind, class or nature. Under that rule, where general words follow an enumeration of persons or things, such general words are not to be construed in their widest extent but are to be held as applying only to persons or things of the same kind, class or nature as those specifically mentioned. Black’s Law Dictionary 608 (4th ed. 1951). See 10 M.J. Interpretation and Construction, § 13.” Farmer at 719

surface useless. The process of quarrying limestone necessarily destroys the surface. The quarrying process is analogous to the practice of strip (or surface) mining coal.

There is a “fundamental principle that a right to surface use will not be implied where it is totally incompatible with the rights of the surface owner.” Phillips v. Fox, 193 W.Va. 657, 458 S.E.2d 327, 335 (W. Va. 1995)

Citing Buffalo Mining Co. v. Martin, 165 W. Va. 18, 267 S.E.2d 72 (1980), the Court in Phillips at 334. reaffirmed that “our past cases have demonstrated that any use of the surface by virtue of the rights granted by a mining deed must be exercised reasonably so as not to unduly burden the surface owner’s use.” The Court, in Phillips, ultimately held that “The right to surface mine will only be implied if it is demonstrated that it may be exercised without any substantial burden to the surface owner.” *Id.* at 335.

Therefore, a mineral interest owner is never given the implied right to surface mine because the surface mining would unduly burden the surface estate and is wholly incompatible with the rights of the surface owner. Limestone can only be mined by surface mining.

Further, “a grant of the surface necessarily includes sufficient subjacent sandstone or other strata to support the soil.” Drummond v. White Oak Fuel Co., 104 W.Va. 368 140 S.E.2d. 57, 59 (1927). (emphasis supplied) “The rule of support for surface in its natural state is so well settled that ... it has become axiomatic.” *Id.* See also Winnings v. Wilpen Coal Co., 134 W. Va. 387, 59 S.E.2d 655 (1950).

In Syllabus Point 2 of Faith United Methodist Church & Cemetery of Terra Alta v. Morgan, 231 W.Va. 423, 745 S.E.2d 461 (2013) this Court held that:

The word “surface,” when used in an instrument of conveyance, generally means the exposed area of land, improvements on the land, ***and any part of the underground***

actually used by a surface owner as an adjunct to surface use (for example, medium for the roots of growing plants, groundwater, water wells, *roads*, basements, or construction footings). (emphasis supplied)

Clearly an “adjunct to surface use” is “sandstone or other strata to support the soil.” In the case at bar, the other strata happens to be limestone. If the limestone is removed, the soil no longer has any support and the surface is no longer in its natural state.

Many other jurisdictions that have considered the issue have found that limestone is not a mineral that is reserved under a general mineral reservation. This will be discussed in detail in section 2. B. below.⁴

It is clear by the discussion of the law herein that limestone is not to be included in a general, non-specific mineral reservation. Therefore, to enter into a stipulation that assumes limestone is included in a general mineral reservation is not only improvident, it is also contrary to law.

By entering into the stipulations at issue, Petitioners’ prior counsel gave Respondents standing to make a claim for damage which Respondents would not otherwise be permitted to make under the law. The result of this stipulation was a grant of summary judgment in favor of the Respondents and entry of a judgment against the Petitioners in the amount of Nineteen Million Five Hundred Sixty Five Thousand Three Hundred and Ninety Three Dollar (\$19,565,393.00) and for an award of attorney’s fees costs and litigation expenses in the amount of One Hundred Ninety Nine Thousand Two Hundred Forty Three Dollars and Nine Cents (\$199,243.09). (App. at pg. 355) As a

4. Heinatz v. Allen, 217 S.W.2d 994 (Tex. 1949); Campbell v. Tennessee Coal, Iron & R. Co., 265 S.W. 674, 678 (Tenn. 1924); Beury v. Shelton, 144 S.E. 629 (Va. 1928); Rudd v. Hayden, 97 S.W.2d 35. 36-37 (Ky. 1936); Little v. Carter, 408 S.W.2d 207, 209 (Ky. 1966); Florman v. MEBCO Ltd. P'ship, 207 S.W.3d 593, 603 (Ky. Ct. App. 2006); Southern Title Ins. Co. v. Oller, 595 S.W.2d 681, 682-83) (emphasis added); W.S. Newell, Inc. v. Randall, 373 So. 2d 1068 (Ala. 1979); Save Our Little Vermillion Environment, Inc. [“SOLVE”] v. Illinois. Cement Co., 725 N.E.2d 386, 390 (Ill. 2000); Holland v. Dolese Co., 540 P.2d 549 (Ok. 1975); Griffith v. Cloud, 1988 OK 113, ¶ 4, 764 P.2d 163 (1988); Atwood v. Rodman, 355 S.W.2d 206, 215 (Tex. Civ. App. 1962); Holland v. Dolese Co., 1975 OK 98, 540 P.2d 549

result of these stipulations, Petitioners and the citizens of West Virginia have suffered a substantial injustice.

The circuit court erred in failing to set aside a stipulation that was contrary to the law and entered into improvidently. As such, this matter must be remanded to the circuit court with instructions to set aside and rescind these stipulations.

2. The Circuit Court Erred in Not Granting Petitioners' Motion for Summary Judgment Based Upon the Fact That Respondents Do Not Own the Limestone for Which They Seek Compensation.

The mineral reservation at issue in this case is a general non-specific reservation. The reservation states as follows: “[t]he Grantor herein does hereby except and reserve in fee simple all minerals underlying the tracts of real estate herein conveyed.” (Anna M. Veach Deed dated August 31, 1968.) (App. at pgs. 24-25)

The issue presented herein is whether the Respondents own the limestone for which they seek to be compensated. This literally is a multi-million dollar issue. The circuit court entered judgment for Respondents in the amount of Nineteen Million Five Hundred Sixty Five Thousand Three Hundred Ninety Four Dollars and Thirty Five Cents (\$19,565,394.35) (App. at pg. 355)

As discussed herein, limestone is not a mineral which is severed from the surface estate in a general, non-specific mineral severance. Respondents have no legal right to the compensation they sought. The circuit court erred in denying Petitioners' Motion for Summary Judgment.

A. Respondents Have No Legal Right or Authority to Make the Claim they are Asserting.

As is discussed in section 1. A. i. above, a litigant must have some legal right, or authority, in order to seek compensation for an alleged wrongdoing. Rule 17(a) of the West Virginia Rules of

Civil Procedure; Housing Auth. v. E.T. Boggess, Architect, Inc., 160 W.Va. 303, 233 S.E.2d 740 (1977); Keesecker v. Bird, 200 W.Va. 667, 490 S.E.2d 754 (1997).

Respondents do not own the limestone for which they are seeking compensation. As a result, Respondents do not have standing to assert the claim they are asserting.

B. As a Matter of Law, Respondents Do Not Own the Mineral Interest for Which They Seek to be Compensated.

Under the law, Respondents do not own the limestone for which they seek to be compensated.

At first blush, it appears common sense that limestone would be a “mineral” included in a reservation mineral interests in a deed. However, “the mere fact that a substance is inorganic does not bring it within the category of a mineral as that term is used in a deed or lease.” Little v. Carter, 408 S.W.2d 207, 208 (Ky. 1966) (citing Hudson & Collins v. McGuire, 188 Ky. 712, 223.).

As discussed above, this Court in West Virginia Department of Highways v. Farmer, 159 W.Va. 823, 226 S.E.2d 717 (1976), held that sand and gravel were not included as part of a broad mineral reservation. Further, when oil and gas were reserved, the phrase “other minerals” was limited to petroleum-based minerals. *Id.* The Court then considered how minerals had previously been used on the land and found that the owners of the minerals had never attempted to hold dominion over the sand or gravel.

Further, this Court, in Farmer, looked to the purposes for which the surface owners used the land and found it was used primarily for farming. *Id.* This Court concluded that the conveyance to the surface owners would be completely useless if sand and gravel were to be reserved to the mineral owners. *Id.* If the mineral owners could rightfully take all the sand and gravel, the surface owners would be deprived entirely of the use of the surface they rightfully own. *Id.*

In applying the factors used in the Farmer case to the case at bar, we are driven to the same conclusion. The limestone was not reserved in the general mineral reservation in the 1968 Deed.

Respondent Douglas Veach's deposition testimony fully supports the position of the Petitioners when analyzed in the context of the Farmer opinion. Prior to, and after the mineral severance, the property at issue had only been used for timbering, cattle grazing and recreation. Mr. Veach believes that there might have been a gas lease on the property at the time they purchased it. At no time was the property ever used for mining of any type, including quarrying for limestone. (App. at pgs. 83, 85-97)

In Farmer the Court also considered the implications of giving sand and gravel rights to a mineral owner. It held that to give sand and gravel rights to the mineral owner is to give that owner the power to destroy the surface owner's property and "the surface owners could be deprived entirely of the use of such surface." "The conveyance to the Farmers would be useless."⁵ *Id.* at 720.

To give the mineral reservation owner the legal right to quarry limestone is to give him the right to destroy the surface owner's property and to render the conveyance of the surface useless. The process of quarrying limestone necessarily destroys the surface. The quarrying process is analogous to the practice of strip (or surface) mining coal.

In West Virginia, even when it comes to coal mining, the right to destroy the surface estate by strip mining will never be presumed. There is a "fundamental principle that a right to surface use will

5 Interestingly, the Court in Farmers at 720 also stated: "In other jurisdictions such reservations have been held to exclude sand and gravel from the term 'other minerals'. In State ex rel. State Highway Commission v. Trujillo, 82 N.M. 694, 487 P.2d 122 (1971), rock, taken in exposed state from the landowner's property by the Highway Commission, which had no rare character or value and was useful only in road building, was not intended to be reserved as 'coal and other minerals' and the court held that the land owner was entitled to be compensated for such material. See Dawson v. Meike (Wyo.) 508 P.2d 15 (1973); Elkhorn City Land Company v. Elkhorn City (Ky.) 459 S.W.2d 762 (1970), and Harper v. Talledega County, 279 Ala. 365, 185 So.2d 388 (1966)."

not be implied where it is totally incompatible with the rights of the surface owner.” Phillips v. Fox, 458 S.E.2d 327, 335 (W. Va. 1995) *citing* Buffalo Mining Co. v. Martin, 165 W. Va. 18, 267 S.E.2d 72 (1980) *citing* West Virginia-Pittsburgh Coal Co. v. Strong, 129 W. Va. 832, 42 S.E.2d 46 (1947). Continuing to cite Buffalo Mining, the Court in Phillips at 334. reaffirmed that “our past cases have demonstrated that any use of the surface by virtue of the rights granted by a mining deed must be exercised reasonably so as not to unduly burden the surface owner’s use.” The Court, in Phillips, ultimately held that “The right to surface mine will only be implied if it is demonstrated that it may be exercised without any substantial burden to the surface owner.” *Id.* at 335.

Therefore, a mineral interest owner is never given the implied right to surface mine because the surface mining would unduly burden the surface estate and is wholly incompatible with the rights of the surface owner. Limestone can only be mined by surface mining.

In Syllabus Point 2 of Faith United Methodist Church & Cemetery of Terra Alta v. Morgan, 231 W.Va. 423, 745 S.E.2d 461 (2013) this Court held that:

The word “surface,” when used in an instrument of conveyance, generally means the exposed area of land, improvements on the land, and any part of the underground actually used by a surface owner as an adjunct to surface use (for example, medium for the roots of growing plants, groundwater, water wells, *roads*, basements, or construction footings).

Further, “a grant of the surface necessarily includes sufficient subjacent sandstone or other strata to support the soil.” Drummond. v. White Oak Fuel Co., 104 W.Va. 368 140 S.E.2d. 57, 59 (1927). “The rule of support for surface in its natural state is so well settled that ... it has become axiomatic.” *Id.* *See also* Winnings v. Wilpen Coal Co., 134 W. Va. 387, 59 S.E.2d 655 (1950). Clearly an “adjunct to surface use” is “sandstone or other strata to support the soil.” In the case at bar, the other strata happens to be limestone.

Even though this Court has not specifically addressed whether limestone is included in a general mineral reservation, many other jurisdictions have held that the term “minerals,” when used in a broad mineral reservation, does not include limestone.⁶

In an often quoted decision, the Texas Supreme Court held in Heinatz v. Allen, 217 S.W.2d 994 (Tex. 1949), that limestone is not considered a mineral under a general mineral reservation. This case arose over a dispute as to who owned the limestone rights to a 400-acre piece of property devised by Mrs. Emilie Heinatz. *Id.* at 995. In the devise, Mrs. Heinatz left her daughter all the surface rights exclusive of the mineral rights. *Id.* In deciding whether limestone was included in the mineral reservation, the court looked to the nature of the limestone, its relation to the surface of the land, its use and value, and the method and effect of its removal. *Id.* at 995-96. The land in question was rough land with ravines and canyons. *Id.* at 996. Only a small portion of the land was useful for logging or agricultural purposes. *Id.* Limestone was found from outcroppings on the surface to as far down as 8 feet under the surface. *Id.*

The Heinatz court found that operating a limestone quarry on the property at issue would not likely be profitable. Therefore, destruction of the land to quarry limestone would not be the highest and best use of the property. *Id.* Further, it found that this limestone had no value other than for building and roadmaking purposes. As such, it is not to be considered a mineral under a general mineral reservation. *Id.* at 997. Lastly, the court reasoned that limestone is reasonably to be considered part of the surface rather than part of the mineral estate because quarrying limestone

6. Although the vast majority of jurisdictions which have considered the issue have ruled that limestone is not a mineral which is reserved under a general mineral reservation, counsel’s research revealed that some jurisdictions have found the limestone is a reserved mineral. *See Millsap v. Andrus*, 717 F.2d 1326 (10th Cir. 1983) and Coastal Petroleum Co. v. Sec’y of Army, 315 F. Supp. 845 (S.D. Fla. 1970). These cases are factually distinguishable from the case at bar.

would result in the utter destruction of the surface. *Id.* at 1000. Therefore, the court held that limestone is not part of a broad mineral reservation unless specifically stated. *Id.* See also Atwood v. Rodman, 355 S.W.2d 206, 215 (Tex. Civ. App. 1962) (“Sand, gravel and limestone are not minerals ... unless they are rare and exceptional in character or possess a peculiar property giving them special value [S]uch substances, when useful only for building and road-making purposes, are not regarded as minerals”)

In Campbell v. Tennessee Coal, Iron & R. Co., 265 S.W. 674 (Tenn. 1924) the Tennessee Supreme Court considered the implications of classifying limestone as a mineral reserved to the mineral rights owner and not the surface owner. The court succinctly stated, “If this reservation be construed to include limestone, it destroys the conveyance, for by quarrying the limestone the entire surface would be made way with.” Therefore, the court held that the limestone belonged to the surface owner and was not a mineral reserved in the mineral reservation. *Id.* at 678.

The question before the New York Court in Brady v. Smith, 73 N.E. 963 (N.Y. 1905) was whether the mineral reservation in question was broad enough to include a bed of limestone and the open quarrying of it. The court found it “apparent that each case must be decided upon the language of the grant or reservation, the surrounding circumstances and the intention of the grantor if it can be ascertained.” The court looked to three English cases⁷ for guidance and held that the reservation did not intend to reserve the limestone.

⁷ *Darvill v. Roper*, 3 Drewry, 294 (Stating that if scientific definition of the word “minerals” was applied it would mean every portion of the soil, not merely the limestone, but also the gravel, the pebbles, even the very substance of the loam which forms the soil); *Countess of Listowel v. Gibbings*, 9 IR. C. L. Repts. 223 (Holding that limestone is not included under a reservation of “all mines and minerals”); *Brown v. Chadwick*, 7 Ir. C. L. Repts. 101 (Holding that minerals mean substances of a mineral character, which can be worked only by the means of a mine).

The Virginia Supreme Court of Appeals, in Beury v. Shelton, 144 S.E. 629 (Va. 1928) held that limestone was not included in the reservation of the metals and minerals. The court found it highly pertinent that all parties to the deed knew the deed was to operate in the heart of “limestone country.” *Id.* at 633. Limestone was everywhere on the land in question. Therefore, the court reasoned that to reserve the limestone with the right to remove it “would reserve practically everything and grant nothing.” *Id.* The court held that in an area rich with limestone deposits the language of a reservation should be very clear and specific to justify a construction that allows the reservation to take or destroy land that was granted to the surface owner. *Id.*

In his deposition, Douglas Veach made it clear that it was well known that there was limestone on his property. He testified that he contacted his nephew (who owned a quarry in Pennsylvania) to inquire as to the possibility of the quarrying of limestone. This occurred several years prior to the Petitioners’ take. (App. at pgs. 89-91) It is important to note that, although Douglas Veach is only a nominal fractional interest owner under the mineral reservation, he owns two-thirds (2/3) of the surface estate. (App. at pg. 80)

In Rudd v. Hayden, 265 Ky. 495, 97 S.W.2d 35 (1936). The Kentucky Court of Appeals noted that “the use of the term ‘minerals,’ without more, would not show an intention to include limestone within the grant of the deed before us.” *Id.* at 36-37. “The authorities agree that the word “minerals,” as used in a deed, does not ordinarily include limestone. *Campbell v. Tennessee Coal, Iron & R. Co.*, 150 Tenn. 423, 265 S.W. 674; *Brady v. Smith*, 181 N.Y. 178, 73 N.E. 963, 106 Am. St. Rep. 531, 2 Ann. Cas. 636; *Beury v. Shelton*, 151 Va. 28, 144 S.E. 629, 632.” *Id.* 265 Ky. at 498,.

In the case of Little v. Carter, 408 S.W.2d 207(Ky. 1966) the court held, “We conclude that under the plain language of Rudd v. Hayden, the use of the term ‘minerals’ without more, would not

show an intention to include limestone within the reservation under construction.” *Id.* at 209. The court further acknowledged that as,

was pointed out in a Texas case, *Atwood v. Rodman*, Tex.Civ.App., 355 S.W.2d 206, that limestone is not legally cognizable as a mineral, because it is usually found in “a natural surface situation that warrants its consideration as a part of the surface rather than as a part of the mineral estate.” In another Texas case, *Heinatz v. Allen*, 147 Tex. 512, 217 S.W.2d 994, it was held: “In our opinion substances such as sand, gravel and limestone are not minerals within the ordinary and natural meaning of the word unless they are rare and exceptional in character or possess a peculiar property giving them special value, as for example sand that is valuable for making glass and limestone of such quality that it may profitably be manufactured into cement. Such substances, when they are useful only for building and road-making purposes, are not regarded as minerals in the ordinary and generally accepted meaning of the word. Such substances [like limestone], when they are useful only for building and road-making purposes, are not regarded as minerals in the ordinary and generally accepted meaning of the word. *Id.* at 209

The Alabama Supreme Court in *Payne v. Hoover, Inc.*, 486 So. 2d 426 (Ala. 1986) held that the grantors’ reservation of “all mineral rights” did not include limestone that was quarried by strip-mining, where some of the uses of the limestone included construction of waterways and parkways. The court acknowledged that many courts from other jurisdictions have considered this question and “have followed the general rule that a reservation of mineral rights does not include limestone.” *Id.* at 428 (citing *Southern Title Ins. Co. v. Oller*, 595 S.W.2d 681, 682-83). The court also acknowledged the in situ of limestone is problematic because when limestone is quarried it destroys the surface and its soil for agricultural or grazing purposes. *Id.* See also *W.S. Newell, Inc. v. Randall*, 373 So. 2d 1068 (Ala. 1979). The court considered the weight of authority and concluded the reservation of “all mineral rights” did not include the limestone in question.

In *Save Our Little Vermillion Environment, Inc. [“SOLVE”] v. Illinois. Cement Co.*, 725 N.E.2d 386, 390 (Ill. 2000) the Appellate Court of Illinois, Third District stated:

decisions of other jurisdictions that have considered the question have held that a grant or reservation of "minerals" does not include limestone. See, e.g., Holland v. Dolese Co., 540 P.2d 549 (Okla.1975); Little v. Carter, 408 S.W.2d 207 (Ky.1966); see also Downstate Stone Co. v. United States, 712 F.2d 1215 (7th Cir.1983) (reservation of "all minerals" did not include limestone); 58 C.J.S. Mines and Minerals § 175, at 161 (1998) (limestone is not ordinarily included in a grant or reservation of minerals; language of reservation should be clear and specific to justify inclusion of limestone). Indeed, SOLVE has not cited, nor has our research disclosed, a single case from any jurisdiction construing the term "minerals" as including limestone.

In Holland v. Dolese Co., 1975 OK 98, 540 P.2d 549 (Ok. 1975) The Supreme Court of Oklahoma held that limestone was not included in a mineral reservation when the limestone was not rare and exceptional in character, was part of the general soil and subsoil, and would destroy the surface for its normal uses when extracted. This case arose when a half-interest mineral rights owner filed suit against the owner of the surface and the other half of the mineral estate for an accounting and reimbursement for 50% of all limestone quarried and sold off of the land in question. *Id.* at 550. The surface owner argued that, as the owner of the surface, the limestone was legally his. The sole issue before the court was whether limestone was considered a mineral under a general mineral reservation.

First, the court looked to the quality of the limestone and found it was not exceptional in character. Due to its ordinary character, the court held that the limestone should remain part of the surface estate. *Id.* at 552. The limestone was primarily used as an aggregate in concrete, a surface material on secondary roads without other additives, and as a general construction material. At no point had the limestone been used in the manufacturing of cement. *Id.* at 550. The court found it would be illogical and against public policy to give the limestone to the mineral owner; because, if the mineral owner were to extract the limestone, it would destroy a large majority of the surface

owner's property. *See also* Griffith v. Cloud, 1988 OK 113, 764 P.2d 163 (1988) (Holding the phrase “oil, gas, and other minerals” in Oklahoma does not include limestone.)

In Southern Title Insurance Company v. Oller, 595 S.W.2d 681 (Ark. 1980), the Supreme Court of Arkansas adhered to what it called the “general rule” amongst other jurisdictions and held that the broad reservation of mineral rights in a deed does not ordinarily include limestone. In this case, a party purchased 400 acres of property along with title insurance for said property. The title insurance policy contained an exclusionary clause: “subject to mineral interest leased or reserved.” Id. at 682. At the time the title insurance was purchased, the 400 acres were subject to a reservation which reserved one-half of “chalk deposits.” (It was uncontested that limestone is a form of chalk deposit.) Id. The purchaser of the land claimed the insurance company was liable under the policy for a defective title due to the reservation in the deed. The title insurance company claimed “chalk deposits” are considered minerals in a mineral reservation, and as such, are included under the exclusionary clause in the policy. Id. at 684. The insurance company argued that limestone's profitability should be the controlling factor when considering limestone's classification. The court disagreed and determined that profitability is only one factor in the analysis as to whether or not limestone is a mineral. Id. at 683-84. The court found that the “predominate, if not controlling factor, is that the mining of limestone destroys the surface of the property for farming or any legitimate purpose” Id. at 684. It was undisputed that quarrying limestone would cause significant surface damage. Therefore, the court concluded limestone was not to be considered a mineral under the exclusionary clause in the title insurance policy.

The Supreme Court of Kansas in Wulf v. Shultz, 508 P.2d 896 (KAN 1973) addressed the quarrying of limestone in the context of an oil and gas lease. The lessor argued that it did not intend

to give the lessee the legal right to quarry limestone and other similar minerals on the leased land. The lessees argued that the use of “other mineral substances” in the lease showed they were entitled to the limestone. The record showed the strata of limestone on this tract of land was 30-35 feet thick and was located three feet below the surface. *Id.* at 899. Further, the record revealed that the limestone would be easy to quarry and was of considerable value in the manufacture of cement. *Id.* at 900. The Supreme Court of Kansas held that an “Oil and Gas” lease that authorized the lessee “to dig, drill, operate for and procure natural gas, petroleum and other mineral substances” restricted the scope of the lease to related minerals. *Id.* at 896. The court, applying the rule of *ejusdem generis*, found that limestone was not similar-in-kind to the minerals specifically listed in the lessee’s lease. As such, the right to the limestone remained with the lessor. *Id.* The court, at 900, held that:

[t]he quarrying of limestone, for which the appellant seeks the right under the terms of this lease, was not within the contemplation of the original parties to this lease. The presence of limestone near the surface was known to the parties, and would have to be mined by the open pit or strip-mining method, such operations necessarily destroying the surface for agricultural or grazing purposes. It is apparent from the whole lease the parties, in using the words, 'natural gas, petroleum and other mineral substances' did not intend that the mineral estate should be allowed to destroy the surface estate. Had they so intended provision would have been made in the lease.

A Florida District Court of Appeals in Florida Audubon Soc. v. Ratner, 497 So. 2d 672 (Fla. Dist. Ct. App. 1986) held that limestone was not included in a general mineral reservation. A mineral rights owner in the Everglades attempted to quarry limestone on a tract of land where the surface rights were owned by the Florida Flood Control District. *Id.* at 674. The District sought to enjoin the mineral rights owner from quarrying limestone. *Id.* at 676. The District contended that limestone was not intended to be a mineral reserved in the reservation, and even if it was, the quarrying of limestone would destroy the environment which goes against the express language of the reservation. The court, in order to determine the parties’ intent, looked to the original deed that split the estate

into separate surface and mineral estates. It found the language of the reservation clearly excluded destructive quarrying as the deed explicitly stated, “[the mineral rights owner can] make such further use [of minerals] as will not conflict with the purposes for which this grant is given.” *Id.* at 676. Undisputed evidence from trial showed quarrying limestone would affect aquatic plant growth, the natural cleansing processes of the water, and the evapotranspiration and seepage rates of the water. *Id.* Therefore, the court held limestone was not intended to be included in this general mineral reservation. *Id.* at 677.

It is clear by the discussion above that, as a matter of law, limestone is not to be included in a general mineral reservation. Therefore, Respondents do not own the limestone for which they are seeking to be compensated. As a result, the circuit court erred in not granting Petitioners’ Motion for Summary Judgment.

3. The Circuit Court Erred in Relying on Stipulations and Applying the Doctrine of Collateral Estoppel and Granting Respondents’ Motion for Summary Judgment.

The circuit court relied the doctrine of collateral estoppel offensively in order grant summary judgment to Respondents (App at pgs. 342-345).

This Court has stated: “we note that the offensive use of collateral estoppel is generally disfavored in this jurisdiction.” Holloman v. Nationwide Mut. Ins. Co., 217 W.Va. 269, 617 S.E.2d 816, 822 (2005) *citing*, Tri-State Asphalt Products, Inc. v. Dravo Corporation, 186 W.Va. 227, 230-31, 412 S.E.2d 225, 228-29 (1991). “Further, the right to offensively invoke collateral estoppel is not automatic.” *Id.* *citing* Conley v. Spillers, 171 W.Va. at 592, 301 S.E.2d at 224; Laney v. State Farm Mut. Ins. Co., 198 W.Va. 241, 246, 479 S.E.2d 902, 907 (1996).

One of the key inquiries when considering an application of collateral estoppel is whether the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue or issues

in the prior action. State ex rel. Federal Kemper Ins.Co. v. Zakaib, 203 W.Va. 95, 506 S.E.2d 350 (1998); Peters v. Rivers Edge Mining, Inc., 224 W.Va. 160, 680 S.E.2d 791 (2009). As discussed below, due to errors made during the trial in the Newton case, which were prejudicial to Petitioners, there was no full and fair opportunity to litigate the issues. Further, as is also discussed below, due to the failure of Petitioners' prior counsel to file certain key motions, Petitioners were denied a meaningful review of those errors on appeal to the West Virginia Supreme Court.

Further, collateral estoppel is not appropriate because "there are special circumstances that would warrant the conclusion that enforcement of the judgment would be unfair." Syllabus point 6, Conley v. Spillers, 171 W.Va. 584, 301 S.E.2d 216 (1983). *See also* Walden v. Hoke, 189 W.Va. 222, 429 S.E.2d 504 (1993)

The circuit court accepted Respondents' use the doctrine of collateral estoppel as an offensive tool. Such use is disfavored by this Court. Petitioners have not had a full and fair opportunity to litigate the issues presented in this case. There are special circumstances which would make application of anything that happened in the context of the Newton case unfair and inequitable if applied to the case at bar.

Specifically, as is evident from opinion issued by this Court in West Virginia Department of Transportation Division of Highways v. Newton, 235 W.Va. 267, 773 S.E.2d 371 (2015) Petitioners' previous counsel argued that the proceedings in the Newton case were fraught with error. "In seeking a new trial, DOH has set out nine assignments of error." *Id.* at 374.

However, as a result of Petitioners' prior counsel's failure to file necessary motions, the Court was foreclosed from any meaningful review of the issues in the Newton case.

To properly raise the issue below, DOH had to at least file a motion for judgment on the pleadings or for summary judgment, because a resolution of the issue in DOH's

favor would result in a dismissal of the case. ... Without such a motion and a definitive ruling on the issue appearing in the record, the first assignment of error was not properly preserved for this Court to rule upon as an exception to the waiver provision of Rule 59(f). Id. at 377

If the DOH wanted the trial court to make a ruling on a dispositive issue set out in the condemnation Petition, it had to file a dispositive motion, e.g., a motion for summary judgment. Trial courts are not obligated to rule upon matters set out in a petition or complaint without a motion being filed asking the court to rule on the matter. Id. at 378

DOH has set out arguments based on evidence actually presented at trial and jury instructions given during the trial in order to show that the eighteen-month timeframe for showing marketability was an abuse of discretion and prejudicial. The problem with DOH's reliance on evidence and jury instructions submitted at trial is that we are constrained from reviewing such matters. This appeal is limited to reviewing the pretrial rulings, not evidence or jury instructions actually introduced or given at trial. It was incumbent upon DOH to file a post-trial motion for new trial in order for this court to assess the prejudicial impact of the pretrial ruling on evidence introduced during the trial, as well as jury instructions. To do otherwise would make the general waiver under rule 59 (F) meaningless. Id. at 380-381.

DOH's objections to this pretrial ruling are not reviewable in this appeal, because they would involve an examination of trial testimony and other evidence. For example, in order to determine whether the evidence was irrelevant, we would have to review it in the context of actual evidence introduced during the trial – not in the hypothetical abstract. As stated earlier, DOH has locked itself out of a full review because it chose not to file a post - trial motion for new trial. Id. at 381

DOH contends that the limiting instruction did not cure the problem associated with the evidence. According to DOH, the evidence was irrelevant, immaterial, and unfairly prejudicial. As with the previous assignment of error, we cannot reach the merits of DOH's argument because to do so requires this court to review the objected to evidence in the context of all evidence admitted at trial. ... In other words, even if we assume the trial court should have granted DOH's pretrial motion to exclude the evidence, we still would have to assess the prejudicial impact of that evidence. Determining prejudicial impact cannot be divorced from a review of the trial testimony and other evidence. DOH has chosen to limit our ability to review the trial record because it failed to file a motion for new trial. Id. at 382.

DOH argues that it was prejudiced by instructions 3, 4, and 5 and that those instructions were in conflict with other instructions given to the jury. Assuming that it was error to give these instructions, as previously stated, we cannot determine the prejudicial effect the instructions had on the outcome of the case without reviewing the trial evidence. We are precluded from reviewing such evidence. Thus, this assignment of error is not grounds for a new trial. Id. at 383-384.

In the instant case, DOH argues that Ms. Newton's evidence was insufficient with respect to showing marketability of the limestone; therefore, DOH claims, it was entitled to judgment as a matter of law. Under our holding, we cannot reach the issue of the sufficiency of the evidence because DOH failed to file a post-verdict motion for judgment as a matter of law as required under rule 50(b). *Id.* at 386

This Court was clearly foreclosed from any meaningful review of the issues raised in the Newton case. As such the Newton case should not be used as a guidepost for applying the doctrine of collateral estoppel and granting summary judgment in favor of the Respondents.

By relying on the doctrine of collateral estoppel, the circuit court did not consider the questions of fact raised by Petitioners' in "Petitioners' Response to Respondents' specific and Comprehensive Motion for Summary Judgment Against Petitioners."

The property at issue in this case is not the same property at issue in the Newton case. Therefore, there remain factual questions. The feasibility of quarrying the limestone, the value of the limestone, and the marketability of the limestone. (See "Petitioners' Response to Respondents' specific and Comprehensive Motion for Summary Judgment Against Petitioners" App. at pgs. 286-307)

4. The Circuit Court Erred in Granting Respondents an Award of Attorney's Fees and Costs.

A. The Circuit Court Improperly Awarded Respondents Their Costs and Attorney's Fees Incurred in the Mandamus Action.

In granting Respondent's request for an award of costs and attorney's fees, the circuit court found that the WVDOH admitted in its Petition that the Veach Respondents owned the mineral interests and identified the mineral interests as limestone. Later in the litigation, WVDOH stipulated "[t]hat Anna M. Veach conveyed the surface only to three (3) of her sons on August 31, 1968, reserving unto herself fee simple ownership of all minerals underlying the Veach real estate, without limitation or restriction, and which reservation and exception is free of ambiguity and clear in its

intent, and that the minerals reserved by Anna M. Veach include limestone and gravel as defined by the Court.” (App. at pgs. 351-352)

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

The circuit court further found that:

WVDOH did willfully, deliberately, and knowingly refuse to exercise its duty to institute condemnation proceedings against the Respondents when it had a duty to do so, and, nevertheless, trespassed upon the Respondents’ mineral rights and removed same without providing notice or compensation to the Respondent. A presumption therefore exists in favor of an award of attorney’s fees and costs and the same are awarded as follows in case number 10-C-88 from the date of filing of the case on October 12, 2010 until the filing of the ordered petition in case number 11-C-36 on May 27, 2011. Inasmuch as Respondents Veach have fully prevailed in the mandamus action, full award of fees and costs are appropriate.

The circuit court then found that the fee award for the mandamus action would be \$13,051.01. (App. at pg. 352)

In order to make these findings, and reach this conclusion, the circuit court relied upon allegations contained in the original petition filed by the Division of Highways and upon stipulations improvidently entered into by Petitioners’ prior counsel in this matter.

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

In reaching this conclusion, it was an abuse of discretion for the circuit court to rely on a decision made by counsel in filing the action or in agreeing to stipulations years later.

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

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

Where a public official has failed to exercise a clear legal duty, although the failure was not the result of a decision to knowingly disregard a legal command, there is no presumption in favor of an award of attorney's fees. Rather, the court will weigh the following factors to determine whether it would be fairer to leave the costs of litigation with the private litigant or impose them on the taxpayers: (a) the relative clarity by which the legal duty was established; (b) whether the ruling promoted the general public interest or merely protected the private interest of the petitioner or a small group of individuals; and (c) whether the petitioner has adequate financial resources such that petitioner can afford to protect his or her own interests in court and as between the government and petitioner.

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

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

B. The Circuit Court Erred in Finding That the Petitioners Acted in Bad Faith and Therefore Awarding Attorney’s Fees to Respondents with Regard to The Condemnation Action.

The circuit court relied upon this Court’s holding in Syllabus Point 3 of Sally-Mike Properties v. Yokum, 179 W.Va. 48, 365 S.E.2d 246 (1986), which states: “[t]here is authority in equity to award to the prevailing litigant his or her reasonable attorney’s fees as ‘costs,’ without express statutory authorization, when the losing party has acted in bad faith, vexatiously, wantonly or for oppressive reasons.” (App. at pgs. 352-353)

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

28. Under the facts of this case, Respondents Veach brought the mandamus action to force the WVDOH to file a condemnation suit against their mineral interests. Under the mandamus jurisprudence, her attorney fees and expenses were awarded for their 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 Respondents Veach at a distinct disadvantage in proving the volume and ultimately the value of their mineral interests. At the time the case began, the minerals had been removed from her property and used in the Corridor H construction. Respondents Veach had to hire their 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 Veach to prove how much limestone was removed. This requirement greatly increased litigation costs and expenses.

29. 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 Respondents Veach in this case. Additionally, this Court finds that WVDOH did act in bad faith through its actions in ignoring Respondents’ mineral interests at the time of the condemnation of the surface, through trespassing on Respondents’ 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.

30. 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 Respondents Veach entered into a Contract with their counsel, J. David Judy, III, on October 12, 2010, whereby they were liable to pay all costs and expenses of the litigation and pay counsel 33-1/3% of any award. The Court has reviewed the Affidavit provided by Mr. Judy and finds that the expenses claimed were reasonable and necessary for litigation of this type. The Court will not award the contingency fee amount specified in the Contract to the Respondent as attorney fee against the Petitioner.

13. Therefore, this Court finds that claims attorney's fees in the amount of \$131,775.00 are reasonable for case number 11-C-36. Additionally, Respondents' costs in the amount of \$67,468.09 are also reasonable and appropriate and are hereby awarded.

(App. at pg. 354)

The Petitioners did not act in bad faith and the circuit court erred in reaching that conclusion. The Petitioners followed the condemnation procedure which has been acknowledge by this Court. A property owner who believes that his or her property has been taken or damaged by the West Virginia Division of Highways due to construction of a highway may file a petition in the circuit court seeking a writ of mandamus to initiate condemnation proceedings.

This Court has recognized that an agency of the State of West Virginia may be required by mandamus to institute eminent domain proceedings in order to ascertain just compensation for private land taken or damaged for State highway purposes. To

be entitled to mandamus relief, the parties seeking such relief are not required to establish that they will ultimately recover damages in the requested condemnation proceeding. They must only show that they have suffered probable damage to their private property.

Orlandi v. Miller, 192 W.Va. 144,148 451 S.E.2d 445, 449 (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 (2000)

“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 at 840.

Relying on allegations contained in the original petition filed by the Division of Highways and upon stipulations improvidently entered into by Petitioners’ prior counsel in this matter, the circuit court concluded that the West Virginia Division of Highways “did act in bad faith through its actions in ignoring Respondents’ mineral interests at the time of the condemnation of the surface, through trespassing on Respondents’ minerals, and by failing to preserve and record volume information for the minerals removed.” (App at pg. 353)

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

Pursuant to the authority granted under West Virginia Code §17-2A-8 to “[a]cquire, in name of the department, by lease, grant, right of eminent domain or other lawful means all lands and interests and rights in lands necessary and required for roads, rights-of-way, cuts, fills, drains, storage for equipment and materials and road construction and maintenance in general,” the West Virginia Division of Highways, began condemnation proceedings against the parties it believed had a recoverable interest in the property to be acquired. Upon obtaining the necessary property rights, the West Virginia Division of Highways commenced construction.

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

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

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

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

Simply put, the West Virginia Division of Highways acted pursuant to its statutory authority and acquired the necessary property rights. Once Respondents brought their claim to the attention of the Division of Highways, the Division of Highways, within a reasonable time, instituted a condemnation action.

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

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

The circuit court abused its discretion in finding that the West Virginia Division of Highways “did act in bad faith through its actions in ignoring Respondents’ mineral interests at the time of the condemnation of the surface, through trespassing on Respondents’ minerals, and by failing to preserve and record volume information for the minerals removed.”

Further, the circuit court granted Respondents’ motion for attorney’s fees, costs and expenses without conducting any meaningful review of the same and without permitting Petitioners’ counsel an opportunity to be heard in opposition thereto. This Court has made it clear in Multiplex, Inc. v.

Town of Clay, 231 W.Va. 728, 749 S.E.2d 621, 632 (2013) that the circuit court must provide a party an opportunity to be heard in opposition to a request for attorney's fees.

The determination of whether fees are reasonable “is simply a fact driven question that must be assessed under the Pitrolo factors.” Id. at 466, 665 S.E.2d at 300 (Davis, J., concurring). In order for a circuit court to determine those facts, it must allow the parties to present evidence on their own behalf and to test their opponents' evidence by cross-examination, “ ‘the greatest legal engine ever invented for the discovery of truth [.]’ ” *California v. Green*, 399 U.S. 149, 158, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970) (citing 5 *Wigmore* § 1367). See *Paugh v. Linger*, 228 W.Va. 194, 201, 718 S.E.2d 793, 800 (2011) (ordering, in reliance on Pitrolo, that “[t]he issue is remanded to the circuit court with directions to remand to the family court for entry of an order making findings of fact which would allow a court to engage in meaningful review of the award of 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) (“We have 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.”); (*Statler v. Dodson*, 195 W.Va. 646, 653–55, 656, 466 S.E.2d 497, 504–06, 507 (1995) (remanding for a hearing on several issues including, “if appropriate, the reasonableness of the requested attorney's fees followed by the preparation of findings of fact and conclusions of law as predicates to the ultimate decision as to the amount of fees to be paid.”)); *Daily Gazette Co. v. Canady*, 175 W.Va. 249, 251, 332 S.E.2d 262, 264 (1985) (“ ‘Like other sanctions, attorney's fees certainly should not be assessed lightly or without fair notice and an opportunity for a hearing on the record.’ ”) (citing *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 766–67, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980)).

As such, the Order of the circuit court in this regard must, at a minimum, be reversed and remanded with directions to conduct a hearing on Respondents' request for an award of fees and costs.

CONCLUSION

The circuit court erred in failing to set aside improvidently entered into stipulations. Under the law, Respondents are not the owners of the mineral interest for which they seek compensation. Therefore, Petitioners were entitled to a grant of summary judgment. As such, the circuit court erred in granting Respondents' motion for summary judgment and awarding attorney's fees and costs to

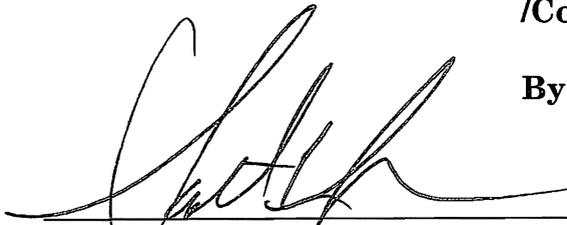
Respondents.

WHEREFORE, based upon the foregoing, Petitioners, West Virginia Department of Transportation, Division of Highways and Paul Mattox, Secretary / Commissioner of Highways, respectfully pray that the Supreme Court of Appeals of West Virginia enter an order reversing the “Order Granting Summary Judgment and Awarding Fees and Costs to Respondents, and Order Denying Petitioner’s Motion for Summary Judgment; Petitioner’s Motion to Set Aside and Rescind Stipulation; and Petitioner’s Motion to Certify a Question” entered the circuit court of Hardy County, West Virginia on March 2, 2016.

RESPECTFULLY SUBMITTED

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

By Counsel,



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

No. 16-0326

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

Petitioners Below, Petitioners,

v.

DOUGLAS R. VEACH, CATHERINE D. VEACH, ARVELLA PIERCY,
ARETTA TURNER, ROSELLA A. VEACH, DOROTHY VEACH,
DEBORAH E. VEACH, SHEILA KAY VEACH, SHERWOOD S. VEACH, SHARON A
MEHOK, F. CRAIG VEACH, L. COLEMAN VEACH, REGINALD K. VEACH, JEFFREY T.
VEACH, ERIC C. VEACH, CHRISTOPHER K. VEACH, ST. MARY'S CATHOLIC
CHURCH AND EPIPHANY OF THE LORD CEMETERY, AND THE ROMAN
CATHOLIC WHEELING-CHARLESTON,

Respondents Below, Respondents.

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' BRIEF ON APPEAL**" on the following by depositing same into the United States Mail, First Class, postage pre-paid this **5th** day of **July, 2016**, addressed as follows:

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