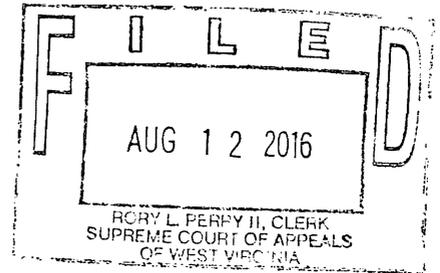


**IN THE SUPREME COURT OF APPEALS OF
WEST VIRGINIA**

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,

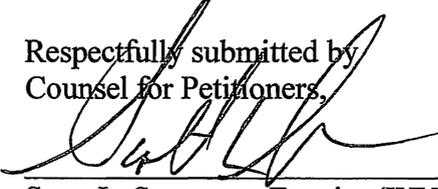
v.

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

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

Comes now, Petitioners, West Virginia Department of Transportation, Division of Highways and Paul Mattox, Secretary / Commissioner of Highways, by counsel, Scott L. Summers, Esquire, pursuant to the West Virginia Rules of Appellate Procedure and respectfully file a Reply to Respondents' Response Brief as well as a Response to Respondents' Cross Assignment of Error.

I. RESPONSE TO RESPONDENTS' CROSS ASSIGNMENT OF ERROR

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

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

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

STANDARD OF REVIEW

The standard of review with regard to Respondents' Cross Assignment of Error is whether the circuit court abused its discretion. In Heldreth v. Rahimian, 637 S.E.2d 359 (W.Va., 2006) this Court stated:

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

ARGUMENT

1. **The Circuit Court Did Not Commit Error When It Refused to Grant Respondents' Counsel an Award of Attorney's Fees Based Upon a One-Third Contingency Fee Contract.**

Petitioners assert that the circuit court committed error in awarding Respondents any attorney's fees. Respondents assert that the circuit court committed error when it denied Respondents a reimbursement of attorney's fees based upon a one-third contingency fee contract.

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

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 fees against the Petitioner (App. at pg. 354)

Respondents' Cross Assignment of Error must fail.

First and foremost, 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.

In their brief, Respondents assert that "[a] hearing was properly noticed and held in this matter on the issue of attorney's fees on August 4, 2015 [sic]." (Respondents' brief at page 27) A review of the Docket Sheet for this matter reveals that Respondents' "Motion for Reimbursement of Attorney's Fees, Litigation Expenses and Expert Witness Fees and Expenses" was not filed until September 8, 2015. (App. at pg. 361) Further, a review of the transcript from the August 25, 2015

hearing on the various motions pending in this matter reveal that there was absolutely no discussion of a motion for attorney's fees. (App. at pgs. 315-336).¹ In fact, it is quite nonsensical that Respondents would argue a motion for attorneys' fees and expenses at an August 25, 2015 hearing, when their Motion for Summary Judgment was not granted until nearly seven months after the August 25, 2015 hearing.

The simple fact is that Petitioners were never given an opportunity to be heard in opposition to Respondents' request for attorney's fees and expenses. As such the circuit court committed error.

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

¹ Respondents' brief asserts that a hearing was held in this matter on August 4, 2015. The hearing on the pending motions was actually held on August 25, 2015.

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.

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

In support of their Cross Assignment of Error with regard to an award of attorney’s fees based upon a contingency fee contract, Respondents rely on *State ex re. W.Va. Highlands Conservancy, Inc. v. W.Va. Department of Environmental Protection*, 193 W.Va. 650, 458 S.E. 88 (1995) and *West Virginia Department of Transportation Division of Highways v. Dodson Mobile Homes Sales & Servs., Inc.*, 218 W. Va. 121, 624 S.E.2d 468 (2005). Neither of these cases reference an award of attorney’s fees based upon a contingency fee contract. Further, as discussed in Petitioners’ initial Brief on Appeal and herein, these cases do not support the award of attorney’s fees actually granted to Respondents by the circuit court - much less a contingency fee award.

In syllabus Point 5 of *Heldreth v. Rahimian*, 637 S.E.2d 359 (W.Va., 2006) this Court reaffirmed that,

Where attorney's fees are sought against a third party, the test of what should be considered a reasonable fee is determined not solely by the fee arrangement between the attorney and his client. The reasonableness of attorney's fees is generally based on broader factors such as: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations

imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *citing* Syllabus Point 4 of Aetna Casualty & Surety Company v. Pitrolo, 176 W.Va. 190, 342S.E.2d 156 (1986).

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

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

[w]hen Appellant's attorney submitted his request for attorney's fees and expenses, he submitted a bill for 246.09 hours of work at a rate of \$175 an hour for a total amount of \$43,085. After holding a hearing on the issue of a statutory fee award, the trial court decided to apply a percentage basis and awarded Appellant's counsel 20% of his requested fees for a total amount of \$8,617. In its order authorizing the award, the trial court noted that this award of statutory fees was in addition to the 40% contingency fee counsel would receive from his client pursuant to their contractual fee arrangement. Id. at 363

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

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

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

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

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

Therefore, Respondents were free to enter into a contingency fee contract with their counsel.

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

If Respondents' contractual obligation under the contingency fee contract is greater than the award of attorney's fees from the circuit court, then Respondents are required to pay the difference, not the Petitioners.²

Wherefore, assuming arguendo that this Court upholds the circuit court's award of attorney's fees, the circuit court did not commit error in failing to award Respondents attorney's fees based upon the contingency fee contract entered into with their counsel.

2. The Circuit Court did not Err in Determining the Date in Which Prejudgment Interest Would Begin.

The Respondents' Cross Assignment of Error with regard to prejudgment interest is not supported by law and is without merit. As the Respondents point out in their brief, West Virginia Code §54-2-13 provides for payment of ten percent (10%) interest from the date of the filing of the Petition.

In this case, the filing of the Petition for condemnation was May 27, 2011. If the circuit court was correct in awarding prejudgment interest in the first place, the circuit court was bound by statute in setting the date such prejudgment interest would begin.

Therefore, assuming arguendo that an award of prejudgment interest was appropriate, the circuit court did not commit error in setting the commencement date as May 27, 2011.

II. REPLY TO RESPONDENTS' RESPONSE TO PETITIONERS' BRIEF ON APPEAL.

Petitioners are asking this Court to reverse the Order of the circuit court which granted

2. In their brief, Respondents assert that "Respondents actually paid attorneys fees and expenses based on the 1/3 contingency fee contract." And "Attorney's fees actually paid were pursuant to the contingency fee agreement." (emphasis supplied) (Respondents' brief at pgs. 31, 33-34.) In granting summary judgment, the circuit court awarded Respondents a judgment in the amount of \$19,565,393. This judgment has not been paid by Petitioners. Therefore, Respondents are asserting that they have been required to pay their counsel an attorney fee of approximately \$6,521,797.67 without have been paid anything themselves from this case.

summary judgment to Respondents and to remand this case back to the circuit court for entry of an Order granting Petitioners' motion for summary judgment. Or in the alternative, reverse the Order of the circuit court with directions to permit the parties to litigate a seminal issue in this case. Specifically, was limestone severed from the surface estate by virtue of a general reservation of minerals.³

1. Limestone is not a Mineral Reserved Under a General Mineral Reservation in a Deed.

Respondents use a considerable amount of space in their brief arguing that limestone is a mineral. Respondents appear to miss the focus of Petitioners' argument.

Petitioners' do not dispute that limestone is technically a mineral. It is certainly not a plant or animal. The question before the Court is not whether limestone is a mineral. The question before the Court is whether limestone is a mineral which is reserved under a general mineral reservation in a Deed.

Respondents assert that at least nine (9) statutory provisions define and/or refer to limestone as a "mineral" and that these statutes are somehow controlling or informative to the issues raised in this appeal. However, Respondents do not provide any quotations from these statutes or otherwise provide any detail as to how these statutes support Respondents' position. (See pages 1 and 9 of Respondents' Brief) Perhaps it is because none of the statutes cited by Respondents have any bearing whatsoever on this case. For example:

West Virginia Code § 22-4-3(13). Quarry Reclamation Act – Definitions:

3. Respondents' assertion, and the circuit court's finding, that Petitioners are barred from asserting that Respondents are not the owners of the limestone because Petitioners did not file an appeal in the Mandamus action filed by the Respondents (10-C-88) is without merit. The Mandamus action was dismissed by agreement of the parties with the understanding that Petitioners would file the civil action which underlies this appeal. Therefore, an appeal from the Mandamus case was not necessary.

“Minerals” means natural deposits of commercial value found on or in the earth, whether consolidated or loose, including clay, flagstone, gravel, sand, limestone, sandstone, shale, chert, flint, dolomite, manganese, slate, iron ore and any other metal or metallurgical ore. The term does not include coal or topsoil.

West Virginia Code § 22A-4-2 *Applicability of Mining Laws:*

All provisions of the mining laws of this state intended for the protection of the health and safety of persons employed within or at any coal mine and for the protection of any coal mining property extend to all open-pit mines and any property used in connection therewith for the mining of underground limestone and sandstone mines, insofar as such laws are applicable thereto.

West Virginia Code § 11-4-17 *Assessment of Real Property – Consolidation of Contiguous*

Tracts or Mineral or Timber Interests:

Any owner of two or more contiguous tracts of land, or the surface of land, or of any estate in the coal, oil, gas, ore, limestone, fireclay, or other minerals or mineral substances, in and under the same, or of the timber thereon, situated in whole or in part in the same tax district of any county, may upon application to the county court of such county and duly showing the relative location of such tracts, their ownership and present description on the land book, have the same, by order of such court, consolidated with other like tracts or parts of tracts, and charged by aggregating the quantities thereof, so far as lying in the same tax district, as one tract upon the landbook of such county for the succeeding year and thereafter: Provided, That for the purpose of consolidation of lands or the surface of lands or any estate in the coal, oil, gas, ore, limestone, fireclay, or other minerals or mineral substances in and under the same, or of the timber thereon, on the landbooks, any tract heretofore charged separately thereon, whether as fee (by which is meant not only the estate of the owner therein, but also the entire body of the land), or as one or more mineral interests, or other interests herein specified, or surface, or timber only, may be divided, and the divisions thereof be charged separately or be consolidated with other like tracts or parts of tracts. In every case of consolidation the order directing the consolidation to be made shall so describe the several properties consolidated as to enable the same to be therein identified as separate parcels or to be so identified by reference therein made to a recorded instrument, or recorded instruments, or both by description and reference to such instrument or instruments. The officer whose duty it is to make out the landbooks, upon presentation to him of a certified copy of such order showing the consolidation or designation of such several tracts or parts of tracts of land, surface or timber, or estates in the coal, oil, gas, ore, limestone, fireclay, or other minerals or mineral substances herein mentioned, shall enter the same as one upon the landbook for the year next ensuing, and make a proper note opposite the last entry of each of such several tracts so consolidated or designated in whole or in part, referring to such

order, and a like note opposite the entry of the tract so consolidated or designated. He shall value such tract at its proper value according to the rule prescribed in this chapter. Any such officer, failing to comply promptly with any of the several duties imposed by this section, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than twenty-five nor more than fifty dollars: Provided, however, That this section shall not apply to any undivided interest in any estate in any land, coal, oil, gas, ore, limestone, fireclay, or other mineral substances in or under lands or of the timber on land.

West Virginia Code § 22-3-3(m) Surface Coal Mining and Reclamation Act – Definitions:

“Minerals” means clay, coal, flagstone, gravel, limestone, manganese, sand, sandstone, shale, iron ore and any other metal or metallurgical ore.

West Virginia Code § 11-1C-10(a)(2) Fair and Equitable Property Valuation - Valuation

of Industrial Property and Natural Resources Property by Tax Commissioner; Penalties:

Methods; Values Sent to Assessors:

“Natural resources property” means coal, oil, natural gas, limestone, fireclay, dolomite, sandstone, shale, sand and gravel, salt, lead, zinc, manganese, iron ore, radioactive minerals, oil shale, managed timberland as defined in section two of this article, and other minerals.

West Virginia Code § 11-1A-11(5) Appraisal of Property - Valuation of certain classes

or species of property; reserve coal properties; oil producing properties; gas producing properties; timberland; active mining mineral interest; commercial real property and industrial land; commercial and industrial furniture, fixtures, machinery and equipment; intangible personal property; public utility property; vehicles, watercraft and aircraft:

Active mining mineral interests including limestone, fireclay, dolomite, sandstone and other actively mined minerals.

West Virginia Code § 11-4-9 Assessment of Real Property – Assessment of Different

Estates; Undivided Interest:

... When any person or persons are, or become, the owner or owners of any undivided interest or interests in land, or in the surface, coal, oil, gas, ore, limestone, fireclay,

timber or other estate or estates therein, the owner or owners of such undivided interest or interests shall have their land, or estate or interest or undivided interest in such land, or in such estate in land, entered on the landbooks of the county in which it or a part of it is situated, and cause himself to be charged with taxes legally levied on such interest or undivided interest, but may on request of such owner to the assessor, and without consent or acquiescence of the other joint owner or owners of the other undivided interest or interests have such undivided interest or interests assessed to him or them separately and independently of the other undivided interest or interests therein; and all such assessments of undivided interests heretofore entered on the assessment books are hereby validated insofar as the same are now in, or liable to vest in the state....

West Virginia Code § 11-13A-3 *Imposition of tax or privilege of severing coal, limestone or sandstone, or furnishing certain health care services, effective dates therefor; reduction of severance rate for coal mined by underground methods based on seam thickness:*

(a) *Imposition of tax.* -- Upon every person exercising the privilege of engaging or continuing within this state in the business of severing, extracting, reducing to possession and producing for sale, profit or commercial use coal, limestone or sandstone, or in the business of furnishing certain health care services, there is hereby levied and shall be collected from every person exercising such privilege an annual privilege tax.

West Virginia Code § 21-5-1(k) *Wage Payment and Collection - Definitions:*

The term "minerals" means clay, coal, flagstone, gravel, limestone, manganese, sand, sandstone, shale, iron ore and any other metallurgical ore."

Although these statutes have no bearing on the issues presented in this appeal, perhaps Respondents believe that, since some of the statutes include the term limestone in a mineral definition, they are dispositive of the issue in this appeal. This is not correct.

It is important to note that the statutes which include limestone in the definition of a mineral also define gravel and sand as "minerals."

Despite the inclusion of sand and gravel as a defined mineral in some of these statutes, as will be discussed below, this Court in, West Virginia Department of Highways v. Farmer, 159 W.Va.

823, 226 S.E.2d 717 (1976) has specifically held that sand and gravel are not “minerals” which are reserved under a general mineral reservation.

Respondents are also relying on this Court’s opinions in Francis O. Day Co., Inc. v. Director, Division of Environmental Protection of West Virginia, Department of Commerce, Labor and Environmental Resources, 191 W.Va. 134, 443 S.E.2d 602 (1994) and Tate v. United Fuel Gas Co. et al. 137 W.Va. 272, 71 S.E.2d 65 (1952). Neither of these cases provide any support of Respondents’ position.

The Francis O. Day Co., Inc. case involved the refusal of the West Virginia Department of Environmental Protection to grant a limestone, sandstone or sand surface mining permit. It merely recites the definition of mineral as contained in West Virginia Code § 22A-4-2(e). It does not stand for the proposition that limestone is a mineral that is included in a general mineral reservation in a deed.

Likewise, Respondents’ reliance on Tate v. United Fuel Gas Co. et al. 137 W.Va. 272, 71 S.E.2d 65 (1952) is misplaced. The case at bar involves a general reservation contained in a deed. Specifically, “The Grantor herein does hereby except and reserve in fee simple all minerals underlying the tracts of real estate herein conveyed.” (App. at pages. 24-25)

The reservation in the Tate case was very specific:

The oil, gas and brine and all minerals, except coal, underlying the surface of the land hereby conveyed are expressly excepted and reserved from the operation of this deed, together with the exclusive right to drill and mine thereon for the production and removal of the oil and gas and other minerals hereby excepted and reserved and rights of way over and across said premises to the place or places of drilling and mining and the right to use necessary water from and lay pipe lines across said premises or construct drips, build tanks and stations and houses for gates, meters, regulators and all other appliances necessary for such purpose; but such operations shall be carried on in such manner as not to unreasonably destroy or injure the soil or surface of said land or the improvements thereon or remove the subjacent

support from said land, or unreasonably or unnecessarily interfere with the use thereof for agricultural purposes or the removal of coal therefrom, it being understood that the term 'mineral' as used herein does not include clay, sand, stone or surface minerals except such as may be necessary for the operation for the oil and gas and other minerals reserved and excepted herein.

Id. at 67-68. The Court, in Tate, acknowledged that “In the case at bar the term ‘mineral’ is limited by the words of the instrument which separated the minerals from the other estate in the land. We are here dealing with an exception qualifying and limiting the meaning of the term ‘minerals.’” Id. at 72

The Tate case also cites to the cases of Williams v. South Penn Oil Co., 52 W.Va. 181, 43 S.E. 214 (1903) and Drummond v. White Oak Fuel Co., 104 W.Va. 368, 140 S.E. 57 (1927).

As was discussed in Petitioners’ initial Brief on Appeal, Drummond is supportive of Petitioners’ position. In Drummond, at 59, this Court held:

A grant of the surface necessarily includes sufficient subjacent sandstone or other strata to support the soil. It is not requisite here that we say just what thickness of strata is included in this grant, as defendant's mining has not disturbed the strata immediately supporting the soil. It may be admitted, for the sake of argument, that the sandstone penetrated by the well is necessary for the support of the soil, and is consequently a part of the plaintiff's estate; but that admission would not warrant a recovery under the rule of absolute support. That rule applies only to the surface as it was "in its natural state"; i. e., in its condition when severance occurred. At that time the well was not in existence. Support of the surface, so as to conserve the waters of a well to be drilled nearly 30 years later, and drilled after all the coal had been removed, was assuredly not within the contemplation of the parties to the severance. Such support is a maintenance the grantor did not undertake, and is an additional servitude on the grantor's estate.

The plaintiff cannot, by his own act, enlarge the liability of the servient estate. The integrity of plaintiff's surface as it was at the date of severance has been preserved. That is the whole extent of his right to subjacent support. ***The rule of support for surface in its natural state is so well settled that Snyder, supra, § 1021, says it has become axiomatic. "Whenever there has been a separation in ownership of the mines beneath the surface from the surface, the owner of the latter, in the absence of an agreement to the contrary, has an absolute right to have the surface supported precisely as it was in its natural state."*** (emphasis supplied)

In West Virginia Department of Highways v. Farmer, 159 W.Va. 823, 226 S.E.2d 717 (1976) this Court also considered the implications to the surface estate if sand and gravel rights were given to a mineral interest owner. This Court 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." *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 Respondents' reliance on the above discussed statutes and case law is misplaced.

As discussed above, the statutes cited by Respondents add nothing to the discussion which is relevant to this case. Limestone is a mineral. However, it is not a mineral reserved under a general mineral reservation in a Deed.

The cases relied upon by Respondents, which actually speak to mineral reservations, have been modified by subsequent decisions of this Court. Such modifications, support Petitioners' position in this case.

This Court's decision in the case of West Virginia Department of Highways v. Farmer, 159 W.Va. 823, 226 S.E.2d 717 (1976) is very instructive for the issues raised in the case at bar.

The factual background of Farmer is as follows:

The West Virginia Department of Highways, needing sand and gravel for its road building program, instituted an action in eminent domain against the Farmers for the purpose of obtaining sand and gravel from their land. A trial of that action resulted in a jury verdict in the approximate amount of \$33,000.00, which represented the value of the property taken and damages to the residue.

Subsequent to the jury verdict, but prior to the disbursement of the funds, the owners of the greater portion of the mineral interests in such land sought the [159 W. Va. 825] right and were permitted to intervene. It was their contention that, being the owners of nine-tenths of the oil and gas and other minerals in and under the Farmer land, nine-tenths of the award should be paid to them.

Id. at 719. The reservation at issue in Farmer did not specifically reserve sand and gravel. The reservation only reserved “the oil, gas and other minerals in and under said land.” Id.

With regard to the issue to be decided in Farmer, this Court stated:

The sole question presented on this appeal is whether, in the circumstances revealed by the record, the sand and gravel situate on the land of Claude Farmer and Virginia H. Farmer, his wife, owners of the surface of the subject real estate, is included in a reservation of the 'oil, gas and other minerals'. The trial court found that sand and gravel are not included in such reservation and awarded the proceeds for the sale thereof to the Farmers. We affirm that ruling.

Id.

The mineral interest owners in Farmer took the same position that Respondents are taking in the case at bar. In Farmer, “The intervenors charge that since sand and gravel are minerals and since they own nine-tenths of the mineral, they are entitled to that proportionate share of the award. It is the further position of the intervenors that the language is clear and unambiguous and that there is therefore no need for construction of such language.” Id.

In addition, in Farmer, it was “conceded by all parties that sand and gravel are normally included in the term ‘minerals’” Id.

This Court found that the reservation in the deed was ambiguous and applied the principle of *ejusdem generis* to discern intent. *Id.*

In looking to the intent of the parties to the deeds in the Farmer case, this Court stated:

The record reveals that from February 2, 1911, the date of the original deed in this case, sand and gravel were not sold from the Farmer land until this eminent domain proceeding. The predecessor in title to Mr. Farmer testified that he was unaware of

any sale of sand in this area; that he was aware of the existence of sand when he purchased the land; and that he purchased and used the land strictly for farming. In these circumstances it seems remote that a reference to 'minerals' in a reservation was intended to include sand and gravel.

In the case at bar, 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. At no time was the property ever used for mining of any type, including quarrying for limestone. (App. at pgs. 83, 85-97) Like Farmer, "in these circumstances it seems remote that a reference to 'minerals' in a reservation was intended to include" limestone.

This Court, in Farmer, also relied upon the rule of construction wherein, when an ambiguity exists, the language will be construed against the grantor. In Farmer this Court recognized that "Restrictive covenants are to be strictly construed against the person seeking to enforce them, and all doubts must be resolved in favor of the natural rights and a free use of property, and against restrictions." *citing* syllabus point 2 of Neekamp v. Huntington Chamber of Commerce, 99 W.Va. 388, 129 S.E. 314 (1925). Id. at 720.

In Farmer, this Court acknowledged that other jurisdictions have held that sand and gravel were excluded from the term "other minerals' in a mineral reservation. (citing State ex rel. State Highway Commission v. Trujillo, 82 N.M. 694, 487 P. 2d 122 (1971); Dawson v. Meike, 508 P.2d 15 (Wyo 1973); Elkhorn City Land Company v. Elkhorn City, 459 S.W. 2d 762 (Ky. 1970); Harper v. Talledega County, 279 Ala. 365, 185 So. 2d 388 (1966) Id.

Petitioners herein are asking this Court to also acknowledge that nearly every other jurisdiction that has considered the issue has held that limestone is not a mineral which is reserved

under a general mineral reservation in a deed.⁴ Petitioners are also asking this Court to take the same step it took in Farmer, and make this the law in West Virginia.

Like the intervenors in Farmers, the Respondents herein are not correct in their assertions and their arguments must fail. The circuit court's order is clearly a result of error and must be reversed and the case remanded back to the circuit court with instructions to enter an Order granting Petitioners' motion for summary judgment.

2. The Circuit Court Erred in Not Setting Aside and Rescinding the Stipulations Entered into by Petitioners' Prior Counsel.

As is discussed herein, and in Petitioners' initial Brief on Appeal, limestone is not a mineral which is reserved under a general mineral reservation. As such, the stipulations and Orders of the circuit court are contrary to law. Respondents do not own the limestone at issue and they are not entitled to the compensation they seek.

It was a mistake and was improvident for the Petitioners' prior counsel to enter into stipulations, and make allegations in pleadings, that Respondents were the owners of the limestone at issue in this case.

These stipulations and assertions resulted in the circuit court entering summary judgment in favor of the Respondents.

These stipulations and assertions resulted in the circuit court finding that Petitioners acted in bad faith.

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 (Ky. 1936); Little v. Carter, 408 S.W.2d 207 (Ky. 1966); Florman v. MEBCO Ltd. P'ship, 207 S.W.3d 593 (Ky. Ct. App. 2006); Southern Title Ins. Co. v. Oller, 595 S.W.2d 681 (Ark. 1980); 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 (Ill. 2000); Holland v. Dolese Co., 540 P.2d 549 (Ok. 1975); Griffith v. Cloud, 764 P.2d 163 (OK 1988); Atwood v. Rodman, 355 S.W.2d 206 (Tex. Civ. App. 1962).

These stipulations and assertions resulted in a significant award of attorney's fees and expenses against Petitioners.

Despite the improper stipulations, and assertions made by Petitioners' prior counsel, the mineral 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, the circuit court erred when it did not permit Petitioners to rescind the stipulations and allow the parties to litigate a threshold issue in this case.

This Court made a clear pronouncement regarding rescinding stipulations in Cole v. State Comp. Commissioner, 114 W.Va. 633, 173 S.E. 263 (1934). "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."

As discussed in Petitioners' briefing, the stipulations were unquestionably improvident and contrary to law.

Further, if the stipulations are set aside, the parties will be restored to the same condition as before the stipulations were entered into. The only difference is that the Respondents will be required to meet a basic burden of proof. Specifically, that they own the limestone and are entitled to the compensation they seek.

Counsel understands that setting aside these stipulations may extend the time it would take for this case to ultimately go to trial. However, there is an important issue to be decided which will have an impact on future condemnation / imminent domain actions. In addition, there is a considerable amount of money at stake in this case and, potentially, in future cases.

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.

As such, the circuit court committed error when it did not permit the stipulations to be rescinded and permit the parties to litigate the threshold issues.

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

The offensive use of collateral estoppel is generally disfavored in West Virginia 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, collateral estoppel is not appropriate when "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's reliance on the result of the proceedings in the Newton case was not appropriate and did not provide the Petitioners with a full and fair opportunity to litigate the issues in the case at bar.

This Court's acknowledgement of the failings of Petitioners' prior counsel in this Court's opinion in West Virginia Department of Transportation Division of Highways v. Newton, 235 W.Va. 267, 773 S.E.2d 371 (2015) clearly illustrates why the offensive use of collateral estoppel should not be permitted in this case. As discussed in detail in Petitioners' initial Brief on Appeal, as a result of the failure of Petitioners' prior counsel to file certain key motions, Petitioners were denied a

meaningful review of errors made during the trial in the Newton case. As such, there was no full and fair opportunity to litigate the issues.

Due to the errors committed in the Newton case, which this Court was foreclosed from reviewing, the circuit court's application of anything that happened in the context of the Newton case creates "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 offensive use of the doctrine of collateral estoppel in this case, permitted the circuit court to avoid consideration of the questions of fact raised by Petitioners in their Response to Respondents' Motion for Summary Judgment. For instance, 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)

The circuit court erred in its offensive use of the doctrine of collateral estoppel to grant Respondents' Motion for Summary Judgment. As such, the circuit court's Order should be reversed.

4. The Circuit Court Erred in Finding that Petitioners Acted in Bad Faith and in Awarding Attorney's Fees as a Result.

The circuit court committed error when it found, and the Respondents are incorrect when they allege, that the Petitioners have acted in bad faith.

This analysis must begin with a legal presumption that Petitioners acted in good faith. "In the absence of evidence to the contrary, the state road commissioner will be presumed to have performed properly and in good faith duties imposed upon him by law." Syllabus Point 3, of West Virginia Department of Transportation v. Contractor Enterprises, et al. 672 S.E.2d 234 (W.Va., 2008) *citing*

Syllabus Point 5, State by State Road Commission v. Professional Realty Company, 144 W.Va. 652, 110 S.E.2d 616 (1959).

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

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 Respondents 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.

The circuit court also relied upon this Court's decision in State ex re. W.Va. Highlands Conservancy, Inc. v. W.Va. Department of Environmental Protection, 193 W.Va. 650, 458 S.E. 88 (1995) to conclude that, "[a] presumption therefore exists in favor of an award of attorney's fees and cost" (App. at pg. 81)

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

Environmental Protection provides:

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

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

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

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

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

“Thus, the proper course of action for an aggrieved property owner who believes his or her property has sustained damage as a result of highway construction or improvement by the DOH, after

a reasonable time without appropriate action by the DOH, is to file a complaint in the circuit court seeking a writ of mandamus.” Id.

However, this Writ may not be issued until a reasonable amount of time has passed after the completion of the work:

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

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

This Court has clearly recognized that condemnation proceedings may be instituted “within a reasonable time after the completion.” That is what occurred in the case at bar. The Department of Highways did file a condemnation proceeding within a reasonable amount of time after the completion of the project.

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

The very case upon which the circuit court relied to support its award to Respondents, actually supports Petitioners' ability to make the arguments against Respondents' position. Syllabus Point 4 of Sally-Mike Properties v. Yokum, 179 W.Va. 48, 365 S.E.2d 246 (1986) states that "Bringing or defending an action to promote or protect one's economic or property interests does not per se constitute bad faith, vexatious, wanton or oppressive conduct within the meaning of the exceptional rule in equity authorizing an award to the prevailing litigant of his or her reasonable attorney's fees as "costs" of the action."

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

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.

The circuit court erred in finding that the Petitioners acted in bad faith when Petitioners did exactly what they were permitted to do under the law.

In order to make these findings, and reach the conclusion that the Petitioners acted in bad faith, 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 were not the result of “a decision to knowingly disregard a legal command.” As such there is no legal presumption of an award of attorney’s fees.

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.

Assuming arguendo that this Court determines that Respondents are entitled to compensation for the limestone at issue in this case. The Respondents are not entitled to an award of attorney's fees. This case was not an inverse condemnation case and the Petitioners did not act in bad faith.

The circuit court may not add further elements of value to the judgment that has been rendered via summary judgment in this matter. Including, but not limited to, restitution to the Respondents in the form of attorney's fees, expenses, costs and witness fees.

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

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

Assuming arguendo that Respondents are the owners of the limestone at issue in this case, the circuit erred in awarding attorney's fees to the Respondents. Therefore, the Order of the circuit court must be reversed.

If this Court determines that an award of attorney's fees is appropriate, the circuit court erred in failing to give the Petitioners an opportunity to be heard in opposition to Respondents' request for attorney's fees. Therefore, the Order of the circuit court must be reversed with instructions to provide Petitioners an opportunity to be heard in opposition.

CONCLUSION

The circuit court erred in failing to set aside improvidently entered into stipulations and in granting Respondents' motion for summary judgment.

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.

The circuit court erred in finding that the Petitioners acted in bad faith. Petitioners acted in accordance with their statutory obligations. As such, the circuit court erred in awarding attorney's fees and costs to Respondents.

WHEREFORE, based upon the foregoing, and the Petitioners' initial Brief on Appeal, Petitioners, West Virginia Department of Transportation, Division of Highways and Paul Mattox, Secretary / Commissioner of Highways, respectfully pray that the Supreme Court of Appeals of West Virginia enter an order reversing the "Order Granting 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 and directing the circuit court to

enter an Order granting Petitioners' motion for summary judgment.

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

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