No. 16-0326

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

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

vs. No. 16-0326

DOUGLAS R. VEACH, et al.,
Respondents Below, Respondents.

BRIEF OF RESPONDENTS
AND
RESPONDENTS' CROSS ASSIGNMENTS AND ARGUMENT

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BRIEF OF RESPONDENTS

III. RESPONSE TO ASSIGNMENTS OF ERROR

The limestone quarries throughout West Virginia will be surprised and concerned to learn that limestone is not subject to a mineral reservation or exception. Respondents have found a least nine (9) separate statutory provisions which define and/or refer to limestone as a "mineral" including the following: 22-4-3 (13); 22A-4-2; 11-4-17; 22-3-3(m); 11-1C-10(a)(2); 11-1A-11(5); 11-4-9; 11-13A-3; and 21-5-1(k). The West Virginia Supreme Court of Appeals has entered numerous decisions regarding limestone minerals, including but not limited to 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 at 605 (1994), which considered the definition of minerals to include limestone pursuant to 22A-4-2(e); West Virginia Department of Highways v. Farmer, 159 W.Va. 823, 226 S.E. 2d 717 (1976), which defined "minerals" in its ordinary and common meaning as a comprehensive term including every description of stone and rock deposit, whether containing metallic or non-metallic substances, previously defined in Waugh v. Thompson Land and Coal Co., 103 W.Va. 567, 137 S.E. 895 (1927); and most recently, Justice Ketchum wrote the opinion in Faith United Methodist Church and Cemetery of Terra Alta v. Morgan, 231 W.Va. 423, 745 S.E. 2d 461, (2013), which found that a fee simple owner of real estate may sever the land into separate surface and mineral estates, and which may, in fact, include limestone. Therefore, the Petitioners have completely misrepresented their claimed principal issue. It is not an issue of first impression; a fee simple owner of the surface and the minerals may sever limestone by severing "all minerals" by reservation

or exception; and once severed, as in the deed of Anna Veach, the mineral owner is the owner of the limestone. Tate v. United Fuel Gas Co., 137 W.Va. 272, 71 S.E. 2d 65 (1952). The Anna Veach deed of August 31, 1968, contained the following language: "The Grantor herein does hereby except and reserve in fee simple all minerals underlying the tracts of real estate herein conveyed." The experts of the WVDOH, Summit Engineering ,Inc., specifically found that the limestone mineral interests of Anna M. Veach were severed within that deed dated August 31, 1968, and that the Respondents named herein are the mineral owners of the Veach limestone. Summit Engineering, Inc., report filed 4/16/2012.

This matter originally came before the Circuit Court of Hardy County, West Virginia, as a Petition for Writ of Mandamus in underlying Civil Action No. 10-C-88, to which the West Virginia Department of Transportation, Division of Highways, hereinafter, WVDOH, made a Motion to Dismiss and therein specifically agreed that the mineral interests claimed within the Petition for Writ of Mandamus are the property of the Respondents, the same Respondents named within the Civil Action below,11-C-36, the condemnation action filed to determine the value of the limestone minerals taken, appropriated and used by the WVDOH in the Corridor H highway from the Veach limestone mineral reserves. The eminent domain action against the individual owners of the severed mineral rights was instituted pursuant to an Agreed Order entered by Judge Parsons, on March 31, 2011. Civil Action No. 10-C-88 below was dismissed by Order of Judge Parsons entered April 30, 2012, wherein the Circuit Court of Hardy County, West Virginia, found that the individual owners of the severed Veach mineral rights were named as Respondents within the pleadings filed in Civil Action No.

11-C-36. Insofar as Civil Action No. 10-C-88 has been dismissed, and insofar as the Department of Transportation, Division of Highways, failed to appeal the decisions of the Circuit from Civil Action No. 10-C-88, the Petitioners in this action are barred from claiming that the Respondents in 11-C-36 are not the limestone mineral owners of the Veach property, and that the limestone minerals could not be severed within the Deed from Anna Veach dated August 31, 1968.

Assignment of Error No. 1 of the Petitioners in this action claims that the Circuit Court erred in refusing to set aside stipulations which were improvidently entered into by prior counsel for the Petitioners below, and by thereafter using the stipulations to grant Summary Judgment in favor of the Respondents. The Petitioners are specifically referring to stipulations which stated that the Respondents below are the mineral owners from the Deed of Anna Veach of August 31, 1968, and that the minerals excepted to Anna Veach included limestone. In fact, these issues have already been litigated on a number of levels, including within the companion case of WVDOH v. Margaret Z. Newton, Hardy County Civil Action No. 11-C-30, which was considered and affirmed by this, the West Virginia Supreme Court of Appeals, in that decision filed May 13, 2015, Appellate Action No. 14-0428, 235 W.Va. 267, 773 S.E. 2d 371 (2015).

As noted within the Order of Judge Frye granting Summary Judgment, the Honorable Charles E. Parsons entered a number of Orders in Action No. 11-C-36 which made specific findings regarding the deed of Anna M. Veach of August 31, 1968, and that the mineral reservation included limestone. Respondents would specifically refer the Court to the Amended Order entered by Judge Parsons on December 6, 2012, from proceedings which took place on October 25, 2012, finding that the Deed of Anna

M. Veach was clear in its intent and free of ambiguity, and that minerals reserved by Anna M. Veach included the limestone deposits. Therefore, whether or not the Court allowed the Petitioners below to withdraw their "stipulations", the findings of fact and conclusions of law of Judge Parsons within both, the Veach case currently being considered by the Court, and the separate Newton case already affirmed by this Court, made identical findings based upon virtually identical deed language, all of which has been considered in separate Civil Actions No. 10-C-42 for Newton, and 10-C-88, for Veach, below, neither of which were appealed by the Petitioners of this action.

Assignment of Error No. 2 made by the Petitioners states that the Circuit Court erred in not granting the Petitioners' Motion for Summary Judgment below based upon the fact that the limestone for which they seek compensation is not owned by the Respondents. The Petitioners are barred from making such a claim based upon their own agreements within Civil Action No. 10-C-88, which has long ago ended, except for consideration of attorney's fees by the Respondents, and based upon the allegations made by the Petitioners within their Application for Condemnation filed on May 27, 2011, which specifically state that the Respondents are the owners of the mineral interests from the Anna M. Veach real estate. Pettry v. Hedrick, 123 W.Va.107, 135 S.E. 2d 401 (1941).

In response to Assignment of Error No. 3, the Petitioners claim that the Circuit Court erred in relying upon the stipulations made by the Petitioners below, and by applying the doctrine of Collateral Estoppel to grant Respondents' Motion for Summary Judgment. Your Respondents have already demonstrated that Assignment of Error No. 3 is without merit, and your Respondents will further demonstrate hereinafter that the

doctrine of Collateral Estoppel does, in fact, apply in this action. On 4/23/2014 the Petitioners filed a Motion to Stay Proceedings below to allow the Newton case to proceed through the West Virginia Supreme Court of Appeals. Petitioners claimed that the decision in Newton would settle most of the outstanding issues in Veach, and that judicial economy required that Veach be stayed to allow the completion of the Newton case through appeal in Appellate Action No. 14-0428 which was Affirmed by decision filed May 13, 2015.

Finally, the Petitioners claim that the Circuit Court erred in finding that the Petitioners acted in bad faith, and in awarding attorneys fees to the Respondents. In fact, the Petition for Writ of Mandamus served upon the Petitioners in Civil Action No. 10-C-88, specifically raised the issue of "inverse condemnation", and but for the Petition for Writ of Mandamus filed in Civil Action No. 10-C-88, the Petitioners herein, Respondents in Civil Action No. 10-C-88, the WVDOH, would have never filed a condemnation action for valuation of the severed limestone mineral rights excepted and reserved in the Anna Veach deed dated August 31, 1968. The various Orders of the Circuit Court below clearly demonstrate that the Petitioners failed to act in good faith, and that an award of attorney's fees is within the broad discretion of the Court below.

IV. STATEMENT OF CASE

The facts and procedure of this case are virtually identical to the facts and the procedure of WVDOH v. Newton, Appellate Case No. 14-0428, 235 W.Va. 267, 773 S.E. 2d 371 (decided May 13, 2015). By Deed dated August 31, 1968, Anna M. Veach conveyed to three (3) of her sons, Doug, Leo and Dalton Veach, two tracts of real estate containing a total of 405 acres, excepting to herself all minerals by using the

following language:

> The Grantor herein does hereby except and reserve in fee simple all minerals underlying the tracts of real estate herein conveyed.

The reservation in Newton contained the following language: "All mineral rights under this tract are hereby reserved by the Grantors."

A Geotechnical Report was presented to the WVDOH, dated March, 2002, by E.L. Robinson Engineering Co. of Charleston, West Virginia, which included laboratory testing of rock core samples from core borings demonstrating a very high rock quality designation and hardness of the limestone underlying the Veach property, all of which said information was available to the WVDOH, prior to contracts for construction being let, prior to excavation, and prior to crushing, appropriation and use of the limestone by the WVDOH in the Corridor H highway from the Veach reserves. L & W Enterprises' report, filed 4/30/2013.

Sometime during 2005 or 2006, contractors of the WVDOH began excavation of the right of way for the Corridor H limited access highway through the real estate previously owned by Anna M. Veach. On September 8, 2005, the WVDOH filed a condemnation proceeding against Douglas R. Veach, Dalton L. Veach, Mildred S. Veach (the widow of Leo Veach), and James Paul Geary, as Trustee for the Potomac Valley Bank in Hardy County Civil Actions No. 05-C-108 and 05-C-109. Within those civil actions, the WVDOH sought to condemn a right of way through the property owned by the Defendants named therein based upon the conveyance of the surface of the property within that Deed dated August 31, 1968, from Anna M. Veach. Anna M. Veach was still living at the time the civil actions were filed against the surface owners. Anna M. Veach died on July 25, 2006, retaining the fee simple ownership of all mineral rights

underlying the real estate conveyed within that Deed dated August 31, 1968.

During the late summer or early fall, 2010, information and knowledge came to the heirs of Anna M. Veach that their mineral rights excepted within the Anna M. Veach deed were impacted by the construction of Corridor H by the removal and use of significant quantities of valuable limestone minerals which were situate beneath the surface of the subject real estate. By then, that portion of the Corridor H highway was open and used by the public. Contractors for the WVDOH had excavated, removed, crushed and utilized millions of tons of valuable Veach limestone minerals in the construction of Corridor H, through the real estate of Veach, and on adjoining "reaches" or contracts let to various contractors in the construction of Corridor H. As a result thereof, a Petition for Writ of Mandamus was filed in the Circuit Court of Hardy County, West Virginia, on October 12, 2010, styled as Estate of Anna M. Veach, Doug R. Veach, executor, Petitioner vs. Department of Transportation, Division of Highways, Respondent, Civil Action No. 10-C-88, to which reference is hereby made for all purposes. A Motion to Dismiss was filed on behalf of the WVDOH in Civil Action No. 10-C-88 on November 15, 2010, together with a Memorandum of Law in support thereof. The WVDOH maintained that the mineral rights reserved by Anna M. Veach had passed directly to her heirs immediately upon her death by virtue of her Last Will and Testament. At footnote 1, page 6, of the Memorandum of Law supporting the Motion to Dismiss, the WVDOH acknowledged that it had failed to name Mrs. Veach, or following her death, her heirs, as parties to those condemnation Actions Number 05-C-108 and 05-C-109 as an "unintentional omission on the part of the WVDOH". The WVDOH further acknowledged within footnote 1, page 6, of the Memorandum of Law in

support of the Motion to Dismiss as follows:

> ... since the WVDOH reached an agreement with the surface owners of the subject property, it will be necessary to file a separate condemnation action against the heirs of Mrs. Veach to determine the amount of Just Compensation, if any, they are entitled to receive in light of their possession of the mineral rights beneath the subject property ... Id.

An Agreed Order was entered by the Hardy County Circuit Court, the Honorable Charles E. Parsons, on March 31, 2011, wherein the Court noted the following agreement entered into by the parties:

> Within sixty (60) days, Respondents will institute an eminent domain action against the individual owners of the severed mineral rights excepted and reserved on or under that certain tract or parcel of real estate containing 405 acres, more or less, situate in Moorefield District of Hardy County, West Virginia, and as more fully described within that Deed dated August 31, 1968, recorded in the Office of the County Commission of Hardy County, West Virginia, in Deed Book No. 120, at page 258, and in which said Deed, the surface of the real estate was conveyed to D. R. Veach, et al.

The Court withheld all other rulings before the Court within the mandamus action pending expert review of documents and an evaluation of the quantity, quality and value of the minerals or materials taken, removed, excavated or otherwise used from the property of the Petitioners.

Civil Action No. 10-C-88 was dismissed by Judge Parsons by that Order dated April 30, 2012, upon the WVDOH acknowledging to the Court that the WVDOH had commenced an eminent domain action, Civil Action No. 11-C-36, "against the individual owners of the severed mineral rights reserved by Anna Veach in that Deed dated August 31, 1968, recorded in Deed Book No. 120, at page 258 in the Hardy County Clerk's Office as required by that Order..." (of March 31, 2011). In the final Order of 10-C-88, dated April 30, 2012, the Court retained the issue of whether or not Petitioners in the underlying Civil Action No. 10-C-88, Defendants in Civil Action No.

11-C-36, are entitled to attorney's fees, expenses and court costs as requested in the Petition for Writ of Mandamus.

The Mandamus action of the Veach mineral heirs proceeded concurrently with the Mandamus action of Margaret Z. Newton pursuing their mineral rights against the WVDOH, and thereafter during the condemnation action upon which this Court affirmed the judgment of the Circuit Court of Hardy County, West Virginia, in WVDOH v. Newton decided May 13, 2015, supra. The WVDOH filed a Motion to Stay the Proceedings of the Condemnation action against the Veach minerals pending resolution and final affirmation of WVDOH v. Newton, supra. The Motion for Stay was filed in both, in the Circuit Court of Hardy County, West Virginia, on May 12, 2012, and within the West Virginia Supreme Court of Appeals, along that same time frame, after the filing of the appeal in Newton, supra. Within the Memorandum of Law of the WVDOH in support of the Motion for Continuance and Stay of the trial proceedings of Veach below, the WVDOH acknowledged at paragraph 3, page 4, the following:

> 3. Since the filing of the instant matter (Referring to the underlying Veach Condemnation Action No. 11-C-36) and the Newton matter, nearly every hearing concerning the evidentiary and legal standards to be applied at a trial of these matters have been conducted contemporaneously. In that regard, this Court's rulings as set forth in the various Orders entered in this matter are identical to those made in the Newton matter. Specifically, the Petitioners would direct this Court's attention to the hearings which occurred on May 10, 2012, October 25, 2012, November 13, 2012, May 20, 2013, July 30, 2013, and August 20, 2013, and the Orders entered by the Court following same.

The Memorandum of Law filed on behalf of the WVDOH filed April 24, 2014, in support of the Motion for Stay, at paragraph 8, page 6, stated the following:

> 8. As reflected by the foregoing, the decision of the Supreme Court in the Newton matter would serve to resolve the majority of the objections to

> certain evidentiary and legal rulings of this Court that the parties have previously asserted, and have preserved for subsequent appeal, in the instant matter. At a minimum, the Supreme Court's decision will provide direction and guidance for this Court on the applicable law and proper standards to be applied in this unique eminent domain proceeding, thereby serving to avoid a subsequent appeal on identical legal issues to the Supreme Court before it has had an opportunity to consider the appeal in the Newton matter.

Civil Action No. 10-C-88 was terminated by agreement of all parties. The rulings and agreements reached within Civil Action No. 10-C-88, were not appealed, and therefore, much of the relief requested within the present appeal before the West Virginia Supreme Court of Appeals in this action has been waived and is final and cannot be prosecuted in this appeal. The Attorneys for the WVDOH are correct in their position that the rulings in Newton, supra, are binding in this action, and given the identical facts and procedure in the underlying cases of Newton and Veach in the Circuit Court of Hardy County, West Virginia, collateral estoppel and *res judicata* found by the Circuit Court below was absolutely correct and within the jurisdiction, discretion and authority of the Circuit Court. The same can be said for the rulings contained within the various Orders of the Circuit Court hereinbefore considered as same pertain to attorneys fees granted by the Circuit Court to counsel for the Respondents. The Notice of Appeal and the Assignments of Error of the Petitioners in this appeal have ignored and waived the elements underlying the valuation and judgment stated within that Order entered by Judge Frye on March 2, 2016, whereby Judge Frye made various findings of fact, conclusions of law, and an Order granting Summary Judgment based upon proven quantity, quality and market value of the limestone minerals in question. Petitioners are therefore very limited in their Petition here before this Court and for issues which may be remanded for further consideration in the Circuit Court below.

V. SUMMARY OF ARGUMENT

The exception of mineral rights in the Anna M. Veach deed dated August 31, 1968, clearly excepted and reserved fee simple ownership of "all minerals" underlying the real estate conveyed by Anna M. Veach. Tate v. United Fuel Gas Co., supra. The exception within the Anna M. Veach deed is sufficient to sever all minerals, including limestone, from the surface. The argument by the Petitioners that limestone is somehow a part of the surface and non-severable as a mineral interest is not supported by substantive law in the State of West Virginia. Id. In essence, the claim of the WVDOH that limestone is not a mineral, and not subject to being severed, is not supported by any law whatsoever given the language contained within the Veach deed.

The "stipulations" that the Petitioners seek to have set aside were not only stipulations by the Petitioners below, but were also included within findings of fact and conclusions of law of the Court in the Orders from proceedings which took place on May 10, 2012, and October 25, 2012. The "stipulations" came later within the Order of May 20, 2013, entered May 23, 2013, in the face of a second Motion for Partial Summary Judgment filed on behalf of the Respondents below. The "stipulations" by the Petitioners, the WVDOH, in the Order of May 20, 2013, were superfluous given the previous findings and conclusions made by the Court, and given the factual bases before the Court upon which the Court had previously concluded that ownership of the limestone minerals was, in fact, in the named Respondents in Civil Action No. 11-C-36. The remainder of the arguments made by the Petitioners in support of their assignment regarding stipulations are completely without merit based upon the evidence presented in expert witness reports which have been filed with the Court, and upon which

judgment has previously been entered in the Newton case as affirmed by this Court on May 13, 2015.

The Amended Order of the Court entered December 6, 2012, for the proceedings which took place on October 25, 2012, included the findings and conclusions that the WVDOH acted in bad faith and in a willful trespass against the limestone mineral interests of the Veach heirs. This conclusion by the Court was the basis for the conclusion that the mineral valuation of the limestone taken from the Veach reserves fell under the auspices of and within the purview of WVDOH v. Roda , 177 W.Va. 383, 352 S.E. 2d 134 (1986). The Court therein referred back to its previous Order of May 10, 2012, and found ownership of the limestone minerals by the Veach heirs, as well as the trespass by the WVDOH in violation of Article 3, Section 9 of the West Virginia Constitution and the 5th Amendment of the United States Constitution by the actions of the WVDOH in unilaterally finding that the limestone minerals had no value, and upon the WVDOH proceeding to excavate and use the limestone minerals from the Veach reserves without permission or notice to the Veach heirs. Premised thereon, the Court was correct in awarding attorney's fees insofar as the Respondents below were forced to resort to a mandamus action to require the WVDOH to file a condemnation action to allow valuation of the limestone minerals taken, appropriated and used from the reserves of the heirs of Anna M. Veach.

VI. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

1. Oral Argument is not waived by the Respondents.
2. This response is not frivolous.
3. Respondents reserve the right to participate in oral argument.

VII. ARGUMENT

A. STANDARD OF REVIEW - SUMMARY JUDGMENT

Because the Summary Judgment standard requires the Circuit Court to make a legal determination rather than to engage in differential fact finding, appellate review is plenary. Gentry v. Mangum, 195 W.Va. 512, 466 S.E. 2d 171 (1995).

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

The standard of review is virtually the same be it an appeal from a judgment on the pleadings or an appeal of a Summary Judgment Order. That is the appropriate standard of review is de novo. When employing the de novo standard of review, the Court reviews anew the findings and conclusions of the Circuit Court, affording no deference to the lower court's ruling. West Virginia Div. Of Envtl. Protection v. Kingwood Coal Co., 200 W.Va. 734,745, 490 S.E. 2d 823, 834 (1997). De novo refers to a plenary form of review that affords no deference to the previous decision maker. Blake v. Charleston Area Medical Center, Inc., 201 W.Va.469, 498 S.E. 2d 41, at 47 (1997).

Rule 56 of the West Virginia Rules of Civil Procedure allows a Motion for Summary Judgment to be made with the Court after the expiration of thirty (30) days from the commencement of the action or after service of a Motion of Summary Judgment by the adverse party. Rule 56(c)provides, in pertinent part, as follows:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits , if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

The Circuit Court's function in consideration of Summary Judgment is not to weigh the evidence and determine the truth of the matter, but is to determine whether there is a genuine issue for trial. Syl pt. 3, Painter v. Peavy, 192 W.Va. 189, 451 S.E. 2d 755 (1994). In the event there is no genuine issue as to any material fact, Summary Judgment should be granted, but such judgment must be denied if there is a genuine issue as to a material fact. Kelley v. City of Williamson, 221 W.Va. 506, 655 S.E. 2d 528 (2007).

The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported Motion for Summary Judgment. The requirement is that there be no genuine issue of material fact. Reed v. Orme, 221 W. Va. 337, 655 S.E. 2d 83 (2007). A "material fact", for purposes of the rule governing Summary Judgment, is one that has the capacity to sway the outcome of the litigation under applicable law. Chafin v. Gibson, 213 W.Va. 167, 578 S.E. 2d 199 (2002); Hawkins v. U.S. Sports Association, Inc., 219 W.Va. 275, 633 S.E. 2d 31 (2006). Roughly stated, a "genuine issue" for Summary Judgment purposes, is simply one half of a trial worthy issue, and a genuine issue does not arise unless there is sufficient

evidence favoring the nonmoving party for a reasonable jury to return a verdict for that party. W.Va. R. Civ. P. 56(c);Stephens v. West Virginia Coll. of Graduate Studies, 506 S.E. 2d 336 (W.Va. 1998); Sheely v. Pinion, 490 S.E. 2d 291 (W.Va. 1997); Fayette County Nat. Bank v. Lilly, 484 S.E. 2d 232 (W.Va. 1997).

In assessing the record to determine whether there is a genuine issue as to any material facts, the Circuit Court is required to resolve all ambiguities and draw all factual inferences in favor of the party against whom Summary Judgment is sought. Hanlon v. Chambers, 464 S.E. 2d 741 (W.Va. 1995). Although the non-movant for Summary Judgment is entitled to the most favorable inferences that may reasonably be drawn from the evidence, it cannot create a genuine issue of material fact through mere speculation or the building of one inference upon another. Marcus v. Holley, 217 W. Va. 508, 618 S.E. 2d 517 (2005). Review is limited to issues noticed for appeal.

The Order of the Circuit Court granting Summary Judgment and awarding fees and costs to Respondents dated March 2, 2016, is incorporated herein by reference as if stated verbatim. The Final Order of Judge Frye granting Summary Judgment and awarding fees and costs to the Respondents dated March 2, 2016, is well written, factually and legally supported, and cannot be overcome by the Petitioners.

B. MINERAL EXCEPTION

The principal issue claimed by the Petitioners is whether or not the mineral exception in the Anna M. Veach deed is sufficient to sever limestone minerals from the surface estate, and whether or not limestone is owned by the surface owners or by the mineral interest owners. The deed of Anna M. Veach dated August 31, 1968, excepted and reserved in fee simple "all" minerals underlying the real estate conveyed. The

WVDOH seeks to have this Court conclude that limestone is not a mineral subject to exception. This position can not be supported factually or by law in the State of West Virginia. Tate v. United Fuel Gas Co., supra.

There is no question that the limestone minerals underlying the Veach real estate were valuable. Core borings were undertaken and a Geotechnical Report was issued based upon testing and the evaluation of the limestone minerals as noted in the revised report of L & W Enterprises filed 4/30/2013. The WVDOH prepared a power point presentation proclaiming the value of the limestone minerals taken and removed from the Veach reserves and used in the construction of Corridor H as was noted by Judge Frye in the Order of March 2, 2016. That power point presentation is a part of the Court record below which was anticipated to be used at trial, filed on 5/26/2015 as Exhibit 6, together with Respondents' Motion for Summary Judgment below. App. 212. There are expert reports which have been made a part of the evidence below which demonstrate the quantity, quality and value of the limestone minerals taken, excavated, appropriated and used from the Veach limestone reserves filed 4/30/2013. These reports include the attachments to the expert reports demonstrating the crushed limestone and testing processes undertaken by contractors on behalf of the WVDOH prior to use of the limestone in the Corridor H highway. Each of the Assignments of Error proferred by the Petitioners in this action come back to the claims that limestone is not a mineral; that limestone can not be conveyed within the deed of conveyance from Anna M. Veach; that the attorneys for the WVDOH made mistakes which rendered the Newton decision ineffective in this action; and that mineral exceptions ordinarily do not include limestone as a "mineral". None of these claims are viable. The mineral exception by Anna M.

Veach is clear and unambiguous, and not subject to interpretation. The term " all minerals" is sufficient to separate and sever the separate surface estate from the mineral estate below. Faith United Methodist Church and Cemetery of Terra Alta v. Morgan, supra. Tate v. United Fuel Gas Co., supra. Minerals have been defined in at least nine (9) separate statues enacted by the legislature of the State of West Virginia: 22-4-3 (13); 22A-4-2; 11-4-17; 22-3-3(m); 11-1C-10(a)(2); 11-1A-11(5); 11-4-9; 11-13A-1-3; and 21-5-1(k). This Court has taken judicial notice of the definitions of minerals to include limestone, including within Francis O. Day Co., Inc. v. Director, Division of Environmental Protection of the West Virginia Department of Commerce, Labor and Environmental Resources, supra, which not only defines minerals to include limestone, but also stood as authority that where language of the statute is clear, and when a word such as "all" is used, it is not susceptible to an ambiguous interpretation ..."all" means everything as opposed to nothing. Id. 443 S.E. 2d 602, at page 608. The term "minerals" in its ordinary and common meaning, has been held to be a comprehensive term which includes every description of stone and rock deposit, whether containing metallic or non-metallic substances. WDOH v. Farmer, supra; Waugh et al., v. Thompson Land and Coal Co.,et al. , supra. These citations, taken together with the Order of the Court of March 2, 2016, overcome virtually all of the claims by the WVDOH of error in this case. The narrow reading of Farmer by the WVDOH is completely without merit given the language of the mineral exception and reservation in the Anna M. Veach deed.

The reliance of the Petitioners on Phillips v. Fox, 193 W.Va. 657, 458 S.E. 2d 327 (1995) is misplaced. This Court in Phillips found reasonable rights of the surface owner

to protect himself from incompatible mining by a mineral owner. Phillips gives no rights to the WVDOH as a third-party interloper which acted criminally in removing limestone without permission, intentionally against the mineral owner, and without any ownership interest. The Petitioners have no standing whatsoever to rely upon Phillips v. Fox, supra. It is significant that the Petitioners removed the limestone minerals from the Veach real estate and reserves without notice, without right, as a third-party trespasser, and as the mining principal. At the time of the commencement of the underlying civil action, the limestone minerals had already been appropriated, excavated, crushed and used in the Corridor H highway without compensation to the Respondents. Whether or not the extraction of the limestone had any effect whatsoever on the surface is totally without merit with respect to the positions of the parties to this action. The WVDOH basically acted as a criminal stealing the limestone minerals without notice to the mineral owners, and without regard to the surface owners. The WVDOH had filed a condemnation action against the interests of the surface owners in 2005. Phillips v. Fox, supra, does not apply in any manner to protect the WVDOH. The WVDOH cannot hide behind claimed rights as a "surface owner".

C. MINERAL OWNERSHIP

It was the WVDOH who brought the condemnation action against the heirs of Anna M. Veach herein based upon an Order of the Court entered in a separate Civil Action No. 10-C-88 which ended on April 30, 2012, and which was not appealed. The WVDOH is conclusively bound by verified allegations in pleadings filed. Pettry v. Hedrick , supra. Gardner v. Gardner, 144 W.Va. 630, 110 S.E. 2d 495 (1959). The rights of the Respondents are protected by Chapter 54, Article 2, of the West Virginia

Code; Article 3, Section 9, of the Constitution of West Virginia; and the 5th Amendment of the Constitution of the United States of America.

D. STIPULATIONS

The claims of the Petitioners that the Court erred in relying upon stipulations of the WVDOH below and in applying the doctrine of Collateral Estoppel granting Respondents' Motion for Summary Judgment are equally without merit and without support in fact or law. As previously noted, the Circuit Court of Hardy County, West Virginia, entered numerous Orders bearing on the issue of ownership of limestone minerals by the Respondents herein. Respondents would point to the Order of May 10, 2012, entered June 5, 2012, and the Amended Order of the Court from proceedings which took place on October 25, 2012, entered by the Court on December 6, 2012. Neither of these two Orders were generated on the basis of any "stipulations". The Circuit Court found the mineral exception in the Anna M. Veach deed of August 31, 1968, free of ambiguity and clear in its intent, and therefore, controlling the intent of the parties. The underlying limestone minerals were conveyed within the deed; "minerals" include limestone; and the WVDOH was on notice of the limestone mineral reservation by virtue of the deed of Anna M. Veach having been recorded in the land records of Hardy County, West Virginia. The Court concluded that the WVDOH had acted in bad faith and in a willful trespass against the interest of the Veach heirs by removing, taking and using the limestone minerals from the Veach reserves without having noticed or made any communication or contact with Anna M. Veach or her heirs prior to entry onto the property. These are the exact same facts as occurred in Newton, supra. The application of the doctrine of Collateral Estoppel is based upon the acknowledgment of

the Petitioners, the WVDOH, that every hearing concerning evidentiary and legal standards had been conducted contemporaneously, and that the Circuit Court's rulings were identical in both Veach and Newton, including those cited hearings of May 10, 2012, October 25, 2012, November 13, 2012, May 20, 2013, July 30, 2013, and August 20, 2013. The Orders entered by the Circuit Court on March 31, 2011, in Veach and Newton, Civil Actions No. 10-C-42 and 10-C-88, respectively, are identical whereby the WVDOH was ordered to institute eminent domain proceedings against the owners of the severed mineral rights, in the Newton case, against Margaret Z. Newton, and in the Veach matter, against the individual Respondents named herein. Based thereon, the WVDOH filed eminent domain proceedings against the named Respondents herein as the owners of the limestone mineral rights pursuant to the deed of Anna M. Veach of August 31, 1968, and upon the mineral reservation stated therein. The Petitioners cannot now claim that sworn pleadings were in error in an effort to recommence this entire lawsuit against some other entity based upon the warped interpretation of West Virginia law by the attorneys for the WVDOH. Timberlake v. Heflin, 180 W.Va. 644, 379 S.E. 2d 149 (1989); Aluise v. Nationwide Mut. Fire Ins. Co., 218 W.Va. 498, 625 S.E. 2d 260 (2005); W.Va. Dept. of Health and Human Resources ex rel. Wright v. Brenda C., 197 W.Va. 468, 475 S.E. 2d 560 (1996). Pettry v. Hedrick, supra.

E. COLLATERAL ESTOPPEL

"Collateral Estoppel" is an aspect of *res judicata* which prevents re-litigation of issues actually decided in a prior case. Moore v. Sun Lumber Co., 166 W.Va. 735, 276 S.E. 2d 797 (1981). Collateral Estoppel is applicable to matters which have actually been litigated in an earlier suit, even if it was on a separate cause of action. Christian v.

Sizemore, 185 W.Va. 409, 407 S.E. 2d 715 (1991); Jordache Enterprises, Inc. v. National Union Fire Ins. Co. of Pittsburgh, PA., 204 W. Va. 465, 513 S.E. 2d 692 (1998); Conley v. Spillers, 171 W.Va. 584, 301 S.E. 2d 216 (1983). Conley changed the conditions required for Collateral Estoppel in the decision in 1983, making mutuality of parties no longer necessary to enforce a judgment against a party or his privy with a party to a prior action. This is a change from the prior case law which required the very same parties to be involved on both sides in the previous litigation. Whether a stranger to the first action can assert Collateral Estoppel in the second action depends on inquiries set forth within Walden v. Hoke, 189 W.Va. 222, 429 S.E. 2d 504 (1993): (1) whether the issues presented in the present case are the same as presented in the earlier case; (2) whether the controlling facts or legal principles have changed substantially since the earlier case; and (3) whether there are special circumstances that would warrant the conclusion that enforcement of the judgment is unfair. The central inquiry on Collateral Estoppel following Conley v. Spillers, supra, is whether an issue has been actually litigated by the parties in the earlier suit, and that 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 Min., Inc., 224 W.Va. 160, 680 S.E. 2d 791 (2009). Zakaib and Peters each stand for the doctrine that Collateral Estoppel will bar a claim if (1) the issue previously decided is identical to the one presented in the action in question; (2) there is a final adjudication on the merits of the prior action; (3) the party against whom the doctrine is invoked was a party or in privity with a party to a prior

action and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issues in the prior action. State ex rel. Federal Kemper Ins. Co. v. Zakaib, supra; Peters v. Rivers Edge Min., Inc., supra. Collateral Estoppel requires identical issues raised in successive proceedings and requires determination of issues by valid judgment to which such determination was essential to the judgment. State v. Miller, 194 W.Va. 3, 459 S. E. 2d 114 (1995). Limestone was found a mineral reserved by Anna Veach. The WVDOH "took" the limestone. The issues are: quantity stipulated; quality, proven; market, proven; and market value or price, proven.

The issues of collateral estoppel and *res judicata*, as same pertain to the Assignments of Error raised by the Petitioners, could primarily be said to arise from the failure of the Petitioners to have appealed the rulings of the Circuit Court in Civil Action No. 10-C-88, especially regarding the issues of severing limestone and the ownership of the limestone by the Respondents named in this action. Collateral estoppel does apply from WVDOH v. Newton, supra, as same pertains to the primary issues of judgment rendered by the Circuit Court in the Summary Judgment Order in 11-C-36, especially as same pertain to the quantity, quality, and market value or price of the limestone minerals taken from the Veach reserves. These issues were not noticed for appeal. In fact, each of the issues raised by the Petitioners in their Assignments of Error were considered by Judge Parsons in the underlying actions of 11-C-42, the Mandamus action in Newton; 11-C-88, the Mandamus action in Veach; 11-C-30, the underlying action which was affirmed by the West Virginia Supreme Court in Newton; and 11-C-36, the underlying Circuit Court action which gives rise to the current appeal by the WVDOH in this action. The WVDOH has failed to notice in this appeal of the issues of quantity, quality, market value and market price. Therefore, once the Court has determined that limestone is a

mineral and that the Veach heirs are the owners of the limestone minerals in question, this appeal is decided. Collateral Estoppel is designed to foreclose litigation of issues in a second suit which have actually been litigated in the earlier suit even though there may be a difference in the cause of action between the parties of the first and second suit. Holloman v. Nationwide Mut. Ins. Co., 217 W.Va. 269, 617 S.E. 2d 816 (2005). Collateral Estoppel is not automatic, and rests in the sound discretion of the trial court. Holloman v. Nationwide Mut. Ins. Co., supra. Offensive use of Collateral Estoppel is not precluded, and trial courts have broad discretion to determine when Collateral Estoppel should be applied. Conley v. Spillers, supra.

This discussion regarding Collateral Estoppel is based primarily upon the opinion of the Supreme Court of Appeals of West Virginia in West Virginia Department of Transportation, Division of Highways v. Newton, 235 W.Va. 267, 773 S.E. 2d 371 (2015), filed on May 13, 2015, and Civil Action No. 10-C-88, the Mandamus action below. The facts and circumstances of Newton are virtually identical to facts and circumstances of this case which involve underground limestone interests owned by the heirs of Anna M. Veach.

F. BAD FAITH AND WILLFUL TRESPASS

The Circuit Court was correct in its findings of fact and conclusions of law within those two (2) Orders dated 5/10/2012 and 10/25/2012 of bad faith and willful trespass by the WVDOH. Documented evidence before the Court demonstrated that the WVDOH had actual knowledge that Anna M. Veach had excepted "all minerals" within the 8/31/1968 deed. The WVDOH knowingly and intentionally entered, removed, appropriated and used limestone minerals from the reserves of the Respondents without

notice to the Respondents, without permission, in violation of statutory law, and as a willful trespass against the ownership rights of the Respondents. The Court was also correct in applying the valuation standards set forth within West Virginia Department of Highways vs. Roda, 177 W.Va. 383, 352 S.E. 2d 134 (1986). The WVDOH had actual knowledge that the surface owners had no ownership right to convey the limestone minerals underlying the surface. The WVDOH had actual knowledge of the existence of the significant quantity and quality of the limestone lying beneath the surface of the Veach property, and the WVDOH had present intent to mine, appropriate and use Veach limestone in the construction of Corridor H as an aggregate base material rather than purchasing the limestone from a commercial source at the time the WVDOH and its contractors commenced construction through the Veach property. The evidence before the Court clearly demonstrates that the WVDOH mined, removed, appropriated, and used the limestone from the reserves of the Respondents "in bad faith" and as a "trespass". Had the contractors and WVDOH employees been acting as private citizens, they would have been charged criminally as felons. Evidence, in part, included core borings prior to construction, the appraisal of Kent Kessecker, crushing and sizing the limestone minerals from the reserves of the Respondents, and use of the limestone aggregate in the construction of the highway as a base layer under the pavement rather than purchasing limestone from a commercial source as would otherwise have been required to meet the rigid standards for state and federal highway construction.

But for the failure of the WVDOH to follow clear statutory and Constitutional law, we would not be here arguing these issues. Many landowners may not know the value of their timber, their buildings or their real estate, and many landowners may have no

present intent to exploit the potential value of their ownership interests, however, private property is protected by our Constitutions, and before the WVDOH can enter onto private property to use, appropriate or consume the property, Just Compensation must be deposited with the Court or paid to the owners. 54-2-14, 54-2-14a. The value, quantity, quality and use of the limestone were all factual issues before the Court and the jury in Newton. The Circuit Court below directed the law to be applied to the facts for consideration of "Just Compensation" given the conduct of the WVDOH. The WVDOH avoided purchase of commercial limestone by paying their contractors to excavate, crush, stockpile, use and distribute the limestone from the Veach mineral estate within various "reaches" in the construction of Corridor H with no notice to the legal owners and no application filed with the Court for valuation in condemnation. "Date of Take" is established from these facts and West Virginia law. Valuation is set on the "date of take". The issues herein were settled as a matter of law by collateral estoppel from Newton, supra.

The WVDOH, failed to comply with its statutory duty and with the constitutional rights of the Respondents by refusing to value and pay "Just Compensation" for the limestone minerals taken from the Veach reserves. The WVDOH did not voluntarily file condemnation proceedings. It was not until the Respondents filed a Petition for Writ of Mandamus and until the Court entered an Order from proceedings which took place on 3/28/2011, in Civil Action No. 10-C-88 that the WVDOH finally was forced to file a condemnation action against the Veach limestone reserves. The WVDOH is and was under statutory and constitutional obligation to pay for the Veach limestone taken and used in the construction of Corridor H, yet the WVDOH never intended to value or pay

for the limestone taken from the Veach heirs. This factual and legal situation is identical to Newton, supra.

G. ATTORNEY FEES

Within Civil Action No. 10-C-88, the Veach heirs specifically alleged that the Petition for Writ of Mandamus was brought as an inverse condemnation proceeding, and therein demanded attorney's fees and expenses based upon West Virginia Law. West Virginia Department of Transportation, Division of Highways vs. Dodson Mobile Home Sales and Services, Inc., 218 W.Va. 121, 624 S.E.2nd, 468 (2005); Shaffer v.West Virginia Department of Transportation, Division of Highways, 208 W.Va. 673,542 S.E. 2d, 836 (2000); and State ex rel. Henson v. West Virginia Department of Transportation, Division of Highways, 203 W.Va. 229, S.E. 2d, 825 (1998).

By Order entered March 31, 2011, in Civil Action No. 10-C-88 the WVDOH was ordered to institute an eminent domain action against the individual Veach heirs concerning the severed mineral rights within sixty (60) days thereof. The final Order of April 30, 2012, in Civil Action No. 10-C-88 deferred attorney fees, expenses and court costs for further consideration in Civil Action No. 11-C-36.

The Circuit Court has granted Summary Judgment to Respondents, Veach, as a final Order of Judgment in this action, and therein considered the pending motion by the Respondents for attorney fees and expenses in this action. As a general rule, each litigant pays his or her own attorney's fees absent a contrary rule of court or express statutory or contractual authority for reimbursement. Syl. pt. 2, Sally-Mike Properties v. Yokum, 179 W.Va. 48, 365 S.E.2d 246 (1986). This principle has long been characterized as the "American" rule, distinguishing it from the rule in England which

allows attorney's fees to be recovered from the losing party. Id. 179 W.Va. at 52, 365 S.E.2d at 250. Attorney's fees may be awarded by agreement of the parties. Nelson v. W. Va. Public Employees Ins. Bd., 171 W.Va. 445, 456, 300 S.E.2d 86, 97-98 (1982). There is no such agreement in this matter.

In W.Va. Dept. of Transportation v. Dodson Mobile Homes Sales and Services, 218 W. Va. 121, 624 S.E.2d 468 (2005), Syl. Pt. 5, the Court stated:

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

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

In W. Va. Dept. of Highways v. Roda, 177 W.Va. 383, 352 S.E.2d 134 (1986), the Court stated that "Clearly, there is a strong public policy in this State which requires that condemnors strictly adhere to prescribed statutory procedures

before appropriating private property for public use." Roda at 139. In Gainer v. Walker, 226 W.Va. 434, 701 S.E.2d 837 (2009), the Court has explained that:

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

By State and Federal Law, 42 U.S.C. § 4651; and W. Va. Code §§ 54-2-9, 54-3-3 and 17-2A-20, the Respondents were entitled to bring the Petition against the WVDOH for a Writ of Mandamus as an inverse condemnation proceeding, requiring and compelling the WVDOH to comply with State and Federal law. Pursuant thereto, and upon judgment entered, the Respondents are entitled to recover all of their attorney's fees, expenses and costs generated in the eminent domain proceedings. Dodson, supra; Shaffer, supra; and Henson, supra. The agreed Order entered by the Court on March 31, 2011, in Civil Action No. 10-C-88 required the WVDOH to institute an eminent domain action against the Veach heirs concerning the severed mineral rights reserved by Anna M. Veach which are the subject of this action. The agreed Order deferred the issue of attorney's fees to be considered in this action, and the Court found, as a conclusion of law, that but for the filing of the Petition for Writ of Mandamus as an inverse condemnation proceeding, the WVDOH would have continued to claim that the limestone owned by the Respondents had no value whatsoever, and there would have been no compensation made to the Respondents, Veach, as ordered in the Order of this Court granting Summary Judgment to the Respondents Veach as a final Order. The

Mandamus action, 10-C-88, was filed October 12, 2010. Reimbursement of attorneys fees, costs and expenses, and prejudgment interest begin October 12, 2010.

In Aetna Cas. & Sur. Co. v. Pitrolo, 176 W.Va. 190, 342 S.E.2d 156 (1986), Syl. Pt. 4, the Court stated that:

> Where attorney's fees are sought against a third party, the test of what should be considered a reasonable fee is determined not solely by the fee arrangement between the attorney and his client. The reasonableness of attorney's fees is generally based on broader factors such as: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

The Petition for Writ of Mandamus raised inverse condemnation pursuant to 42 USC, § 4651, 54-2-9, 54-3-3, and 17-2A-20 upon the failure of the WVDOH to file condemnation proceedings in accordance with West Virginia law, 54-2-13, 54-2-14, and 54-2-14a. The Respondents and their counsel have been required to invest an extraordinary amount of time, effort and expense into this action to force the WVDOH to acknowledge the existence of ownership interests of the Respondents in and to limestone minerals owned by the Respondents. Respondents have filed in this matter an Affidavit of Attorney's Fees and litigation expenses incurred by and on behalf of the Respondents during the processes of this litigation, which formed the basis of claims for reimbursement of the contingency fees contracted. The Respondents have been required to undertake significant litigation to enforce their constitutional rights to compensation, and they

have prevailed, at great expense as shown on the affidavits filed by counsel for Respondents. The legal issues, litigation processes and development of factual and expert evidence in this action required advanced litigation experience and significant expenses advanced by counsel for the Respondents without guarantee of repayment other than by the contingency fee contract.

In the Order entered by the Court on June 5, 2012, the eighth Finding of Fact and Conclusion of Law was "[t]hat the WVDOH contends that the mineral rights are subservient to the surface, but the Petitioner's unilateral assessment of the underlying minerals as having no value, and subsequent excavation, without permission the owner of the mineral rights, may be tantamount to trespass and a violation of the Respondents' constitutional right[s]. WVDOH v. Roda, supra." By Order entered December 6, 2012, the Circuit Court found that the Petitioners acted in "bad faith and willful trespass against the interests of the Veach heirs." Thus, Attorney fees, expert witness fees, and litigation expenses should be granted to the Respondents as sought within the Petition for Writ of Mandamus and which continued through this action.

The Petitioners are statutorily required to pay Just Compensation before entry onto the property pursuant to 54-2-13, 54-2-14, and 54-2-14a, of the West Virginia Code, as well as pursuant to Article III, Section 9, of the West Virginia Constitution and the Fifth Amendment of the United States Constitution. The WVDOH has thereby deliberately and knowingly refused to exercise a clear legal duty, and a presumption exists in favor of an award of attorney's fees in a mandamus proceeding unless extraordinary circumstances indicate that an award of attorney's fees would be inappropriate. Trozzi v. Board of Review of West

Virginia Bureau of Employment Programs, 214 W.Va. 604, 591 S.E. 2d 162 (2003); West Virginia Education Association v. Consolidated Public Retirement Board, 194 W.Va. 501, 460 S.E. 2d 747 (1995); Hechler v. Casey,175 W.Va. 434, 333 S.E. 2d 799 at 815 (1985). The West Virginia Supreme Court of Appeals has held that when a losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons, attorney's fees should be awarded. Corporation of Harper's Ferry v. Taylor, 227 W.Va. 501, 711 S.E. 2d 521 (2011); Hicks v. Bailey , 227 W.Va. 448, 711 S.E. 2d 270 (2011); Hechler v. Casey, supra. When the bad faith of the West Virginia Department of Highways is taken together with the deliberate refusal to exercise a clear legal duty and a constitutional mandate, attorney's fees are presumed to be proper. West Virginia Education Association v. Consolidated Public Retirement Board, supra.

The reasonable and customary contract of representation by attorneys in condemnation cases in the Hardy and Grant County area is by a contingency fee agreement. There has been significant risk to Respondents' counsel in taking this case on a contingent fee basis and the likelihood that the Respondents would not or could not have afforded the lengthy and arduous Court proceedings but for counsel's willingness to accept the case on a contingent fee basis. The contingency fee agreement contracted between the Respondents and their attorney is fair and reasonable given the services rendered; the risk involved in this action; the expenses generated in proving the case on behalf of the Respondents; and the expertise and efforts required by counsel representing the Respondents. Respondents actually paid attorneys fees and expenses based on the 1/3 contingent fee contract.

Respondents are entitled to reimbursement and recovery of all attorney's fees, litigation expenses, expert witness fees and expenses actually paid, as well as all other costs generated during these condemnation proceedings and from the original petition for Writ of Mandamus underlying this current action in accordance with WVDOH v. Dodson Mobile Home Sales and Services, Inc., 218 W.Va. 121, 624 S.E.2nd, 468 (2005); Shaffer v. WVDOH, 208 W.Va. 673, 542 S.E.2nd, 836 (2000); and State ex rel. Henson v. WVDOH, 203 W.Va. 229, 506 S.E.2nd, 825 (1998); based upon the contingent fee agreement with the Respondents of one-third (⅓) of the total judgment of the Court, plus expert fees, plus all expenses and costs of this litigation as set forth in the Counter Petition. Prejudgment interest starts on October 12, 2010.

IX. CONCLUSION

WHEREFORE, the judgment of Judge Frye granting Summary Judgment and Attorney's Fees to the Respondents should be affirmed by this Court, and the relief requested by the Petitioners should be denied.

The facts of this case represent again the lack of responsibility and accountability of government. The violations of the Veach and Newton property rights by the WVDOH epitomize the overreaching of government out of control. When we call for accountability, the entire hierarchy resort to a concerted effort to beat down the rights of citizens. The WVDOH has tampered with evidence, denied the existence of documents known to exist, hired purported experts who clearly lack all moral integrity, and engaged lawyers who attack every conceivable angle of defense, no matter how outrageous.

It is not the place of government to seek to redefine limestone as something other than a mineral or to overturn precedent of descent and distribution and property transferred in deeds during a contested action of taking. The WVDOH is relying on the perceived premise that government will protect government against the interests and claims of citizens' rights. At some point, the wrongs committed by the government must be checked. Now is the time.

Respondents should be awarded reasonable attorney's fees, expert witness fees and expenses and costs in this action as was found by the Court, however, the Attorney's Fees should be based upon the contingency fee contract entered into by the Respondents below and counsel based upon those factors argued within Respondents' Brief and as more particularly set forth in the Cross Assignments of Error filed on behalf of Respondents hereinafter. Prejudgment interest should begin as of October 12, 2010.

RESPONDENTS' CROSS ASSIGNMENTS AND ARGUMENT

III. CROSS ASSIGNMENTS OF ERROR

1. CONTINGENT FEES OF 1/3

The Circuit Court abused its discretion when it granted the motion of Respondents for Reimbursement of Attorney Fees but denied reimbursement pursuant to the contingent fee contract entered into between these parties against the third party, WVDOH. The contingency fee agreement with reimbursement of expert witness fees and costs is the reasonable and customary practice in representation of clients in condemnation proceedings. Attorney's fees actually

paid were pursuant to the contingent fee agreement. Direction is necessary from this Court to require reimbursement by the WVDOH of Attorney's fees, costs, expenses and expert witness fees to comply with Article III, Section 9, of the Constitution of the State of West Virginia; 54-2-14;54-2-14a and West Virginia Department of Transportation, Division of Highways v. Dodson Mobile Homes Sales and Service, Inc., supra. Attorney's fees in this action are based upon a one third (1/3) contingent contract plus expenses.

2. DATE OF COMMENCEMENT OF INTEREST

The Circuit Court erred and abused its discretion in setting the commencement of interest at the rate of ten percent (10%) per annum on May 27, 2011, rather than October 12, 2010, the date of filing of the Petition for Writ of Mandamus in Civil Action No. 10-C-88, which precipitated enforcement of statutory law forcing the filing of the eminent domain proceeding against the mineral interests of the heirs of Anna M. Veach.

IV. STATEMENT OF CASE

Respondents/Cross Appellants would hereby reiterate the Arguments made within the body of the Respondents' Brief. In addition thereto, Respondents would say as follows:

The legislature requires interest to be paid to a land owner in a condemnation action as set forth within 54-2-13 of the West Virginia Code. Specifically, the legislature has stated that the WVDOH is required to pay interest upon the value of the property subject to the take "from the date of the filing of the Petition until payment". 54-2-13 The record in this case demonstrates that the WVDOH intentionally and in bad faith failed to acknowledge the mineral rights of

the Respondents; the WVDOH refused to value and pay for the mineral property taken from the reserves of the Respondents; and but for the filing of the Petition for Writ of Mandamus on October 12, 2010, the WVDOH would have **never** paid for the mineral interests absent the Order of the Court below of March 31, 2011. Therefore, the right of action in this condemnation proceeding arose as of the filing of the Petition for Writ of Mandamus on October 12, 2010, for purposes of 54-2-13 and the commencement of the accrual of interest at the rate of ten percent (10%) per annum. Attorneys fees also commence to accrue as of October 10, 2010, in the preparation of the Petition for Writ of Mandamus filed in Civil Action No. 10-C-88, and continuing through this appeal and any other proceedings necessary to enforce the judgment against the WVDOH.

The Respondents are entitled to reimbursement of attorneys fees based upon the one-third (1/3) contingency fee agreement upon which actual attorneys fees will be paid upon enforcement of the judgment against the Petitioners, plus the expenses of litigation and the expert witness fees and expenses.

V. SUMMARY OF ARGUMENT

The attorneys fees granted by the Circuit Court are presumptively mandated by existing law in the State of West Virginia. The question presented is whether or not the mandated attorneys fees are required to be paid in accordance with the standard and customary practice of a one-third (1/3) contingency fee agreement which is the contracted means of payment by the Respondents to their counsel given the time and labor required to prosecute this action on behalf of the Respondents; the novelty and difficulty of the questions raised and prosecuted; the skill required to perform the services; and other factors

hereinbefore considered within the argument made in Respondents' Brief.

The second issue of the interpretation of 54-2-13 in determining the "date of the filing of the Petition" is a matter of first impression insofar as this Court has not heretofore determined whether or not the filing of the Petition for Writ of Mandamus against the WVDOH begins the running of the time for purposes of payment of prejudgment interest. Prejudgment interest is mandated by 54-2-13, at the statutory rate of ten percent (10%) per annum. Prejudgment interest is also mandated by 56-6-31 of the West Virginia Code. There is significant law in the State of West Virginia which finds that prejudgment interest is a form of compensatory damages intended to make an injured Plaintiff whole as far as loss of use of the funds denied are concerned. Bruce v. Steele, 215 W.Va. 460, 599 S.E.2d 883 (2004). Equity requires that the commencement of statutory interest and attorneys fees in this matter begins on the date of the filing of the Petition for Writ of Mandamus, October 12, 2010.

VI. STATEMENT REGARDING ORAL ARGUMENT

Given the equity interests and the matter of first impression raised within these Cross Assignments, oral argument is necessary pursuant to Rule 20 of the Rules of Appellate Procedure.

VII. ARGUMENT

1. STANDARD OF REVIEW

Respondents incorporate herein the standard of review set forth within the argument in the responsive brief of Respondents. In addition thereto, Respondents would note that issues regarding attorneys fees and prejudgment

interest are generally considered by an Appellant Court under an abuse of discretion standard.

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

This Court has also found that when considering issues arising from the Circuit Court under abuse of discretion, the Court will accord to the Circuit Court a significant degree of deference depending upon the ruling being made. Stephen L.H. v. Sherry LH., 195 W. Va. 384, 465 S.E. 2d 841 (1995). The trial court has wide discretion in determining and assessing court costs and counsel fees. Hollen v. Hathaway Electric, Inc., 213 W.Va. 667, 584 S.E. 2d 523 (2003). On appeal, the trial court determination of the assessment and granting of attorneys fees, litigation expenses and expert witness fees and expenses should not be disturbed unless it appears that the trial court abused its discretion. Id. The Respondents herein have filed these Cross Assignments upon the Circuit Court having abused its discretion when it denied the Motion of the Respondents for reimbursement of attorneys fees based upon the one-third (1/3) contingency

contract entered into between the parties and the erroneous date for commencement of prejudgment interest..

2. ATTORNEY FEES, CONTINGENCY FEE AGREEMENT

Once the Circuit Court rendered judgment in favor of your Respondents in the underlying action, from the preliminary action of 10-C-88, the Respondents are entitled to costs and litigation expenses including reasonable attorney's fees. WVDOH v. Dodson Mobile Home Sales and Service, Inc., 218 W.Va. 121, 624 S.E. 2d 468 (2005). The contingency fee agreement must be reimbursed as actually paid. Respondents re-state all arguments of the underlying Brief of Respondents filed herein as if set forth verbatim.

3. PREJUDGMENT INTEREST

Respondents are entitled to prejudgment interest at 10% from October 12, 2010, the date of filing of the Petition for Writ of Mandamus in Civil Action No. 10-C-88.

Prejudgment interest is mandated in Chapter 54, Article 2, Section 13, of the West Virginia Code by the legislature of the State of West Virginia to be paid at the rate of ten percent (10%) per annum from the date of the filing of a Petition. 54-2-13. This action was commenced by the filing of a Petition for Writ of Mandamus on October 12, 2010 , therein claiming inverse condemnation in Civil Action No. 10-C-88. By agreed Order entered by the Circuit Court on March 31, 2011, the Petitioners were given sixty (60) days to file an eminent domain action against the individual owners of the severed mineral rights of Anna M. Veach. On May 27, 2011, the Petitioners filed an eminent domain action against the mineral interests of the heirs of Anna M. Veach to determine Just Compensation of the

limestone mineral interests of the heirs of Anna M. Veach which were taken by the Petitioners in the construction of the Corridor H highway. A reasonable and practical reading of Chapter 54, Article 2, Section 13, of the West Virginia Code demonstrates the intent of the legislature to commence prejudgment interest on the date that the action accrued for valuation of the mineral interests of the Respondents, Veach. That is, October 12, 2010, upon the filing of the Petition for Writ of Mandamus which precipitated the condemnation proceedings, and upon which the Petitioners were required, by Court order, to proceed with valuation and Just Compensation of the mineral interests of the Respondents. Prejudgment interest is a form of compensatory damages intended to make an injured Plaintiff whole in consideration of the loss of use of funds the subject of the action. Bruce v. Steele, supra. Your Respondents are entitled to consideration of prejudgment interest as of the date of the filing of the original Petition for Writ of Mandamus on October 12, 2010, in Civil Action No. 10-C-88 in the Circuit Court of Hardy County, West Virginia.

VIII. CONCLUSION

Respondents are entitled to reimbursement of Attorney's fees, litigation expenses, expert witness fees, costs, and reasonable attorneys fees based upon the one-third (⅓) contingent fee contract entered into between these parties and which is a part of the record in this action as referred to within the Final Order of the Circuit Court below.

Respondents are also entitled to prejudgment interest at the rate of ten percent (10%) per annum from the date of the filing of the original Petition for Writ of Mandamus in the Circuit Court of Hardy County, West Virginia, in Civil Action

No. 10-C-88, on October 12, 2010, until the judgment found by the Circuit Court of Hardy County, West Virginia, is paid in full.

Douglas R. Veach, et al.
Respondents - By Counsel

JUDY & JUDY
Attorneys at Law

By: _____
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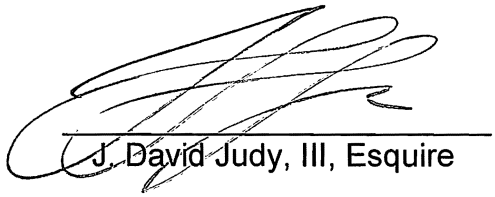
P. O. Box 636
Moorefield, West Virginia 26836
304-538-7777
West Virginia State Bar No. 1939
Counsel for Veach heirs,
Respondents below

CERTIFICATE OF SERVICE

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



J. David Judy, III, Esquire