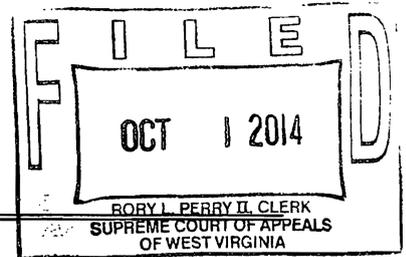


No. 14-0428



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

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

v.

MARGARET Z. NEWTON, Respondent Below,
Respondent.

**BRIEF OF RESPONDENT
AND
CROSS PETITION**

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BRIEF OF RESPONDENT

III. OBJECTION

Respondent restates her objection to the Scheduling Order and to consideration of this Petition for Appeal, including the Assignments of Error set forth on behalf of the Petitioners within the Notice of Appeal and the Brief of the Petitioners as more fully stated within the objection heretofore filed in this action with this Honorable Supreme Court of Appeals of West Virginia by Certificate dated 5/9/2014. In addition thereto, Respondent would note that the Petitioners failed to properly preserve error and objections prior to and during the trial from which the Petitioners filed this appeal. Order for rulings on 11/13/2012, filed 1/4/2013; App., p. 36; Order for rulings on 3/31/2014, filed 4/17/2014, App., p. 130; tr. trans. While numerous briefs and motions were filed and ruled upon by the Court prior to trial in the Circuit Court, the Petitioners failed to preserve their objections to the instructions and the law given to the jury for its consideration during the trial; Petitioners failed to preserve their Rule 50 motions; and the Petitioners failed to allow the Court to consider a Motion for New Trial or other required post-trial motions as a jurisdictional and mandatory precedent to the filing of the appeal with this Court. Without waiving the objection of the Respondent, the Respondent would file this brief in response to the Appeal Brief of the Petitioners .

IV. RESPONSE TO ASSIGNMENTS OF ERROR

The Assignments of Error stated by the Petitioners are primarily fact driven, and the issues complained of were discretionary by the Court based upon what were mostly undisputed or indisputable facts. Error No. 1 disputes that there was an actual "take" of

limestone from the mineral interests reserved by Deed to the Respondent; Error No. 2 claims error as to whether or not the WVDOH appropriated and used limestone from the reserves of the Respondent in wilful trespass or in bad faith and disputes whether or not the facts and circumstances of the case dictate valuation under West Virginia Department of Highways v. Roda, 177 W. Va. 383, 352 S.E. 2d 134 (1986); Error No. 3 claims valuation under the standards of West Virginia Department of Highways vs. Berwind Land Co., 167 W.Va. 726, 280 S.E. 2d 609 (1981), which again hinges upon the facts; Error No. 4 disputes whether or not the Court should have allowed the Respondent a reasonable market time frame window to establish the element of “marketability” for the hundreds of thousands of tons of limestone “taken” from the reserves of the Respondent; Error No. 5 and Error No. 6 are interrelated in claims that the Circuit Court abused its discretion in allowing certain evidence to be introduced at trial subject to a Limiting Instruction, all of which said evidence was used to prove knowledge of the WVDOH and quality of the limestone taken by the WVDOH; Error No. 7 claims that the Court abused its discretion in reading to the jury facts considered by the Court in Partial Summary Judgment prior to trial which were undisputed and which could not be disputed by the WVDOH; Error No. 8 relates to the mining yield recovery of the limestone which has no relevance given the facts and applicable law of this case; and Error No. 9 claims failure of the Court to grant judgment as a matter of law or directed verdict pursuant to 50(b) which was not properly preserved nor appropriate given the testimony and evidence presented.

V. STATEMENT OF THE CASE

By Deed dated, 6 /4/1980, Paul V. Williams and Margaret Z. Williams, his wife, now Margaret Z. Newton, conveyed 37.2424 acres of real estate located in Hardy

County, West Virginia, to James S. Parsons, reserving unto themselves “all minerals” lying beneath the surface. During March, 2003, engineers and contractors of the West Virginia Department of Transportation, Division of Highways, hereinafter WVDOH, entered onto the Parsons real estate and drilled into the sub-surface to catalog and map the underlying strata from which core boring charts were created as a part of a Geotechnical Report prepared for the benefit of the WVDOH dated September, 2003, by Michael Baker, Jr., Inc., engineers for the WVDOH. The core borings confirmed significant underground strata of limestone minerals situate under the Parsons real estate as was already known to the WVDOH from Geological Survey Maps. L & W report, App., pp. 2308-2322. On 10/7/2004, James S. Parsons conveyed a right of way to the WVDOH through the 37.2424 acres for the construction of the Corridor H highway based upon an appraisal report of Kent Kessecker, a general appraiser, who identified the reservation and ownership of the underlying minerals by Margaret Z. Newton in the Parsons deed, which said appraisal report was prepared at the direction of and for the benefit of the WVDOH. Kent Kessecker appraisal report, App., p. 4417.

The testimony at trial demonstrated that during 2006 through 2009, actual construction of the Corridor H highway took place through the Parsons real estate. As a part of that construction of the Corridor H highway, contractors of the WVDOH were paid to blast, excavate, and crush and stockpile limestone minerals from the Margaret Newton mineral reserves underlying the James S. Parsons real estate for use in the construction of the Corridor H highway. Respondent’s Exhibit No. 24, App., pp. 2700-2702; tr. trans. 4/7/2014, pp. 74-75. The contractors of the WVDOH were paid for the stockpiled aggregate by the WVDOH as an alternative to purchasing limestone

aggregate and gravel from commercial quarries. The WVDOH thereby saved millions of dollars in purchase and transport costs of commercial limestone aggregate. MSES report, App., pp. 2644-2699.

The WVDOH had no contact with Margaret Z. Newton prior to entry onto the Parsons property and prior to the excavation, removal, appropriation and use of the limestone minerals from the Newton limestone mineral reserves. Appeal Brief of Petitioners, Summary of Argument, pp. 7-8.

The action below was precipitated by the filing of a Petition for Writ of Mandamus with the Circuit Court of Hardy County, West Virginia, on behalf of the Respondent below during May, 2010, in Civil Action No. 10-C-42 against the WVDOH. The Petition for Writ of Mandamus sets forth the factual and legal bases of the claims of the Respondent below, together with supporting law and attachments. App., pp. 134-146. During the mandamus proceedings before the Circuit Court, substantial discovery was undertaken together with numerous briefs and filings on behalf of each party which resulted in an Agreed Order entered 3/31/2011, whereby the WVDOH was ordered to institute an eminent domain action against the limestone interests of Margaret Z. Newton, the Respondent herein. App., p 8. Civil Action No. 10-C-42 remains an open case file in the Hardy County Circuit Court for consideration of the demand by the Respondent for attorney's fees. As a result of the Agreed Order entered by the Circuit Court below on 3/31/2011, in Civil Action No. 10-C-42, the WVDOH filed a condemnation action on 4/29/2011, to determine Just Compensation for the mineral interests of Margaret Z. Newton in Civil Action No. 11-C-30 in the Circuit Court of Hardy County, West Virginia, the trial from which this Appeal is taken. Petitioners have acknowledged within their brief at page 7 that they never had any intention of evaluating

value or filing condemnation proceedings for the Newton limestone mineral interests absent the Court Order of 3/31/2011. Appeal Brief of Petitioners, p.7.

Numerous pleadings and briefs were filed in the action below, Civil Action No. 11-C-30, all of which are a part of the Court record. There were findings and conclusions made by the Court of undisputed facts as Partial Summary Judgment and for judicial economy which were instructed to the jury as "Additional Instructions" prior to the commencement of presentation of evidence at the trial below. Second Motion for Partial Summary Judgment by Respondent, App., p. 902; Order of 5/20/2013, App., p. 67; Order of 7/30/2013, App., p. 71; tr. trans. 4/7/2014, pp. 51-52. There was no objection at trial by the WVDOH to giving the "Additional Instructions" prior to the commencement of evidence as undisputed and proven facts, and in any event, Petitioners' own evidence proves these facts. A jury trial was undertaken on 4/7, 4/8 and 4/9/2014, in the Circuit Court of Hardy County, West Virginia, on the condemnation issues of the limestone minerals taken from the Newton reserves. Experts of both parties agreed that 236,187 tons of limestone were removed from the Newton reserves and used in the construction of Corridor H. Order of 5/20/2013, App., p. 67; Reports of MSES, App., p. 2644 and Summit Engineering, App., p. 4364. The instructions of law were read to the jury at trial without objection in the form prepared by the Court, and the jury returned a verdict in favor of the Respondent, Newton, stating a quantity of limestone excavated and removed of 236,187 tons, as agreed upon by the experts of each party, and the jury found a value of \$3.79 per ton. The jury also found that there remained alienated under the Corridor H right of way 318,623 tons of limestone having a value of \$0.25¢ per ton. The form of the verdict was accepted by the Court and by the parties as received from

the jury, and an Order of Judgment was entered by the Court on 4/16/2014, App., p. 1. There were no timely post-trial motions filed with the Circuit Court by the Petitioners. Petitioners, WVDOH, failed to renew 50(b) motions made regarding the issue of Helderberg limestone at the final conclusion of presentation of evidence at trial and after return of the verdict of the jury. The Petitioners have appealed directly from the Order of Judgment entered 4/16/2014, based upon the verdict of the jury of 4/9/2014. The issue of attorney's fees below remains unresolved.

VI. SUMMARY OF ARGUMENT

It is undisputed that Margaret Newton, your Respondent herein, was the title owner of all minerals in the Newton mineral estate as of the date of the execution of the Right of Way Deed to the WVDOH by Parsons on 10/7/2004. Although the WVDOH had actual knowledge of the severance of the Williams/Newton minerals, the WVDOH did not include Margaret Newton as a party to any Deed or condemnation action. The WVDOH made no effort to value the limestone taken from the Newton mineral estate within any Statement of Just Compensation or appraisal prepared on behalf of the WVDOH, and no payment was made into the Court or to Newton for any valuation of limestone minerals. Petitioners' Appeal Brief p. 7. The WVDOH entered onto the Parsons real estate and removed 236,187 tons of limestone through its contractors without permission of Margaret Newton and without making any communication or contact with Margaret Newton prior to entering onto the property or prior to appropriating the limestone minerals from the Newton reserves. The WVDOH used the Newton limestone in the construction of Corridor H. tr. trans. 4/8/2014, p.115. It cannot be disputed that by the failure of the WVDOH to communicate with the Respondent, the

Respondent had no opportunity to assess the value of the limestone minerals intended to be removed by the WVDOH prior to excavation, appropriation and use of the limestone minerals by the WVDOH.

The language of the Deed from Williams to Parsons dated 5/4/1980, was found by the Court as clear and unambiguous, therein reserving "all minerals". Where there is no ambiguity, there is no need for construction, and it is the duty of the Court to give every word its usual meaning. WVDOH v. Farmer, 159 W.Va. 823, 226 S.E. 2d 717 (1996). There are no words of limitation as to the minerals reserved within the Parsons deed, and this Court has held in Horse Creek Land & Min. Co. v. Midkiff, 81 W.Va. 616, 95 S.E. 26 (1918) as follows:

The term "mineral", when employed in conveyancing in this State, is understood to include every inorganic substance which can be extracted from the earth for profit, whether it be solid, as stone, fire clay, the various metals and coal, or liquid, as, for example, salt and other mineral waters and petroleum oil, or gaseous, unless there are words qualifying or limiting its meaning, or unless from the deed, read and construed as a whole, it appears that the intention was to give the word a more limited application. Horse Creek Land & Min. Co. 95 S.E. 26 at page 27.

At trial, Respondents placed into evidence a copy of a deed, one of many filed in this State which specifically sells limestone mineral reserves, in place, and for future development. App., p. 2783. Limestone reserves are acquired, and maintained by commercial limestone companies in the Hardy, Grant and Pendleton county area for future development. The limestone, including the mineral reserves of Newton, is of high quality, valuable, and is used in virtually all areas of construction. tr. trans, 4 /7/2014, pp.104 and 107; MSES report, App., p. 2644.

Margaret Newton filed her Petition for Writ of Mandamus in the Hardy County Circuit Court as allowed by law upon the WVDOH having failed or refused to place any

value whatsoever on the hundreds of thousands of tons of limestone intentionally taken, appropriated and used in highway construction and alienated within the Newton reserves. 54-2-14; French v. State Road Commission, 147 W.Va. 619, 129 S.E 2d 831 (1963); W.Va. Constitution, Article III, § 9. The issue of attorney's fees from the Petition for Writ of Mandamus in Civil Action No. 10-C-42 remains an active issue from the Order of 3/31/2011, as requiring "inverse condemnation". W.Va. Department of Transportation v. Dodson Mobile Home Sales and Service, Inc., 218 W.Va. 121, 624 SE 2d 468 (2005).

The WVDOH filed its Application for Condemnation solely to avoid a further ruling by the Court in the Mandamus proceedings which was not "voluntary", but was forced by the Petition itself and Ordered by the Court. Order of 3/28/2011, App., p. 8. The WVDOH has claimed that it asked for a determination as to legal issues from the Court, however, upon receiving rulings in the Order of the Court of 5/10/2012, and upon finding the rulings by the Court not to their liking, the WVDOH filed a motion with the Circuit Court to stay proceedings to allow the filing of a Petition for Writ of Prohibition with the Supreme Court of Appeals of West Virginia. Your Respondent hereby refers to that previous Petition for Writ of Prohibition and the Response filed on behalf of the Respondent therein in Appellate Action No. 12-0928 from which an Order was entered dated 9/20/2012, refusing to award an opinion thereon. App., pp. 532-664.

The use of the Newton limestone by the WVDOH proves quality. tr. trans. 4/7/2014, p. 78; 4/8/2014, pp. 21 and 95. The WVDOH had actual knowledge of the limestone deposits under the Parsons real estate prior to the right of way deed and prior to construction and excavation of the highway. tr. trans. 4/7/2014, pp.122-127. The construction contracts of Corridor H required development and stockpiling of the Newton

limestone minerals for use in construction of the highway and for distribution to other “reaches” including different contractors of the WVDOH. Respondent’s Exhibit 24, 24A, App., pp. 2700-2704. The WVDOH actually did testing and required quantification of the limestone used for payment to its contractors. L&W Enterprises Report, trial exhibit 21, App., pp. 2284-2643; tr. trans. 4/7/2014 p. 78. The original Corridor H construction plans by the WVDOH are incomprehensible to all but expert engineers or contractors who are used to dealing with such plans. It would have been difficult at best for Respondent to have independently learned that the WVDOH intended to remove limestone minerals without disclosure by the WVDOH. The limestone taken from the Newton mineral estate was blasted, transported, sorted, crushed, stockpiled and used in lieu of purchasing commercially quarried limestone, including in the crushed aggregate base course of the Corridor H highway directly under the pavement of the highway. tr. trans. 4/7/2014, pp. 74-76. Witnesses and experts of the Respondent testified that the crushed limestone aggregate removed from the Newton’s reserves required testing to meet the rigid standards of the Federal and State Highway Departments for use in the highway. Id. pp. 78,104, 107, 149; tr. trans. 4/8/2014, pp. 14-15, 17-22. Documents from the WVDOH involving the limestone used from Newton’s reserves are very limited, with no daily logs of inspectors, no test results, no stockpile records, and only a single letter dated 11/3/2008, from Kanawha Stone Company included in Respondent’s exhibits at trial as Exhibit 24A. The WVDOH paid contractors to excavate and stockpile the limestone with payment based on stockpiled cubic yardage. L&W Enterprises Report, trial exhibit 21, Inspector’s Daily Reports, App., pp. 2402-2638; and pp. 2639-2640. The WVDOH and contractors for the WVDOH apparently minimized the amount

of documentation and evidence of the intended use of the limestone minerals from the Newton mineral estate in the construction of Corridor H. Lawrence Rine, expert mineral appraiser and engineer for the Respondent, testified that the records of the WVDOH appeared "sanitized". tr. trans. 4/8/2014, p. 91. Kirk Wilson, engineer for the Respondent, testified that the WVDOH had "deleted" elevation information from digital plans provided during discovery for purposes of assessing the volume of limestone removed from the Newton reserves. tr. trans.,4/7/2014, p. 157. The only actual record received from the WVDOH referencing crushed aggregate removed from the Newton reserves was that letter of Kanawha Stone dated 11/3/2008, Trial exhibit No. 24, App., p.2700, referred to above. The only other records of the limestone crushed and stockpiled from the Newton reserves known to exist were the photographs taken by Jim Oliver, a landowner living adjacent to Corridor H, filed as trial exhibits 1,2 and 3. App., pp. 2232-2234. It was necessary to use exhibits from the J.F. Allen reach and the "Veach cut" in an adjoining "reach" of Corridor H to demonstrate the requirement of Inspector's Daily Reports, sieve analysis of aggregate, and cross-section measurements of stockpiled stone to demonstrate necessary records and the methodology of payment by the WVDOH to its contractors during excavation and crushing and stockpiling the limestone. L&W Enterprises Report, trial exhibit 21. The "Limiting Instruction" given by the Court was sufficient to cure any prejudice to the Petitioners by instructing the jury that the evidence from the J.F. Allen Co. reach was presented solely to demonstrate documentation of process procedures and methodology of the WVDOH. Use of information of other owners, Garrett and Sherman, in the Newton cut was solely to demonstrate completeness in calculations of volume of material removed. Required

records for the Newton/Kanawha Stone reach were simply not provided by the WVDOH.

The Court was correct in using the valuation standards set forth in West Virginia Department of Highways v. Roda, 177 W.Va. 383, 352 S.E. 2d 134 (1986). Based on Roda, the only factors which the Respondent should have been required to prove as elements of valuation and use of the limestone was quantity, quality and a market price.

The Court needs to consider that this matter was originally filed as a Petition for Writ of Mandamus, on 5/4/2010, in a prior Civil Action No. 10-C-42. Petition for Writ of Mandamus App., p. 135. An Agreed Order was entered in Civil Action No. 10-C-42 by Judge Parsons on 3/31/2011, directing the WVDOH to institute condemnation proceedings against the mineral interests of Margaret Z. Newton which gave rise to the subsequent Civil Action No. 11-C-30, which ultimately resulted in the Order of Judgment entered by the Court on 4/16/2014, from which this Appeal has been made. App., p. 1. During the processes of the original Civil Action No. 10-C-42, from the inception of the original Petition of Writ of Mandamus, numerous briefs were filed for the benefit of the Court in an effort to provide as much information and legal precedent as possible for the benefit of the Circuit Court. The record in both of the underlying civil actions demonstrate the laborious efforts of the Respondent to meet the tedious demands of the WVDOH through the legal processes below. There is no possible way to include within this brief all of the legal precedent provided to the Court in the legal briefs provided to the Circuit Court below given the restrictions of pages for this brief. Therefore, Respondent specifically designates the following briefs and legal precedent designated within filings of the Court below which must be considered by the West Virginia Supreme Court of Appeals in reaching any decision in this action:

1. Order of Judgment, 11-C-30, entered 4/16/2014, App., p 1;
2. Agreed Order, Action No. 10-C-42, entered 3/31/2011, App., p 8;
3. Order of 5/10/2012, 11-C-30, entered 5/30/2012, App., p. 23;
4. Order of 10/11/2012, 11-C-30, entered 10/18/2012, App., p. 29;
5. Order of 10/25/2012, 11-C-30, entered 11 /8/2012, App., p. 31;
6. Order of 5/20/2013, 11-C-30, entered 5/23/2013, App., p.67;
7. Order of 7 /30/2013, 11-C-30, entered 8/29/2013, App., p. 71;
8. Order of 3/6/2014, 11-C-30, entered 3 /12/2014, App., p. 126;
9. Order of 3/31/2014, 11-C-30, entered 4/7/2014, App., p.130;
10. Petition for Writ of Mandamus, 10-C-42, filed 5 /4/2010, App., p.134;
11. Affirmative Defenses and Response of Respondent, 11-C-30, filed 5/12/2011, App., p. 186;
12. Respondents' Amended Brief Date of "Take" ..., filed 3/30/2012, 11-C-30, App., p.232;
13. Respondent's Reply Brief: "Date of Take" ..., filed 5/4/2012, 11-C-30, App., p. 448;
14. Newton's Response to Petition for Writ of Prohibition and attached Exhibits, App., pp. 580-664;
15. Brief of Respondent, Taking of Minerals ..., filed 10/22/2012, 11-C-30, App., p.665;
16. Second Motion for Partial Summary Judgment by Respondent, filed 5/8/2013, 11-C-30, App., p. 902;
17. Respondents Second Motion in Limine (percentage recovery yields of limestone), filed 5/13/2013, 11-C-30, App., p. 965.

Each of the documents referred to above demonstrate information considered by the Circuit Court in making rulings prior to trial and at trial. Perhaps the most significant brief filed by the Respondents is the Amended Brief for Date of “Take” and Calculation of the Value of Minerals “Taken” or Appropriated, App., p. 232. Respondent attempted to give an overview of the relationship of Roda and Berwind. The documents noted above are not listed as limiting importance of the others filed below.

There should not have been any requirement to demonstrate marketability of the limestone excavated in any commercial market insofar as there is a known and easily identified commercial price per ton value for the limestone taken, used and stockpiled from Newton by the WVDOT for use in the highway. MSES Consultants, Inc., Report, trial exhibit 22, App., p. 2644. The evidence of the Respondent was fully supported by documents and by testimony of experts, which included the reports of the experts as to quantity and an appraised value, all of which are included as exhibits at trial, and specifically the L&W Enterprises, Inc., report at Exhibit 21, App., p. 2284, and the MSES Consultants, Inc, report at Exhibit 22, App., p.2644, both with all attachments. The reports of the experts of Respondent demonstrate that in addition to 236,187 tons of limestone actually removed and used from Newton, which have a value of \$10.99 per ton, there remain 318,623 tons of limestone minerals alienated below road grade on the Newton tract through which the Corridor H highway was constructed which have a value of \$0.25¢ per ton “in place”. Given the rulings of the Court, a “market window” was necessary for valuation much the same as is allowed, and in fact, required, in real estate appraisals for valuation. Uniform Standards of Professional Appraisal Practice. The jury apparently compromised on the value per ton of the limestone to reach a verdict.

There was no objection at trial to the Court reading the “Additional Instructions” to the jury prior to submission of evidence. In fact, there was no objection at trial by the Petitioners to any of the Instructions read to the jury. The Petitioners failed to renew their Motion for Directed Verdict or Judgment as a Matter of Law pursuant to Rule 50 at the end of the presentation of evidence at trial and after the return of the jury verdict at trial, and the Petitioners failed to file any post-trial motions required by the Rules of Civil Procedure.

VII. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

1. Oral argument is not waived by the Respondent.
2. This Response is not frivolous.
3. It is unclear to your Respondent whether or not all errors claimed have been decided authoritatively, however, it is necessary to determine.
4. Your Respondent is not able to say that the decisional process would not be significantly aided by oral argument, and your Respondent is unable to state affirmatively that the facts and legal arguments in this matter are adequately presented in briefs and in the record on Appeal.

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

VIII. ARGUMENT

A. OVERVIEW OF LAW

The WVDOH appropriated and used limestone minerals from the Newton mineral reserves in violation of constitutional and statutory law requiring either direct payment or the filing of an application for eminent domain as a legal “take” to determine the damage suffered as a result of the appropriation, use and consumption of limestone minerals

from her property pursuant to Article III, Section 9 of the West Virginia Constitution; Amendment 5, United States Constitution; 54-2-14 and 54-2-14a of the West Virginia Code. Reservation of the Newton minerals was part of the appraisal report of Kent Kessecker as an attachment and specifically referenced within the appraisal for the WVDOH. App., p. 4417.

Your Respondent filed with the Circuit Court below an Amended Brief Date of "Take" and Calculation of Value of Minerals "Taken" or Appropriated by Certificate of Service dated 3/30/2012, App., p. 232, which provides an extensive overview of the law governing the "take" and valuation of minerals "taken" by the WVDOH in this matter.

The documents currently before the Court demonstrate that the WVDOH placed no value on the minerals underlying the property of your Respondent although the WVDOH removed from your Respondent's property 236,187 tons of limestone for use in the construction of the Corridor H highway, and there are 318,623 tons of limestone remaining below the roadbed as a result of the actions of the WVDOH, none of which were valued, quantified nor "taken" until this action was commenced in the Hardy County Circuit Court. Petitioners have admitted that they never intended to pay for the appropriated limestone of Respondent at page 7 of their Appeal Brief.

B. STANDARD OF REVIEW

Respondent acknowledges that the standards of review recited within the Appeal Brief of the Petitioners demonstrate the multiple standards which are required to be considered by the West Virginia Supreme Court of Appeals in reviewing the Assignments of Error from below. Respondent further acknowledges that the Assignments of Error of the Petitioners are primarily fact driven, and based on the facts presented to the Circuit Court below. The Circuit Court applied West Virginia Law as

noted within the various Orders of the Circuit Court below. Respondent would further note that the apparent primary dispute of the Petitioners with the rulings of the Circuit Court below involved whether or not the Court should have relied upon the precedent set in WVDOH v. Roda, supra, or WVDOH v. Berwind, supra. Those issues are considered within the Respondents' Amended Brief which considers the date "take" and calculation of value of minerals "taken" or appropriated which begins at p. 232 of the Appendix filed with this Court. Respondent opposes each of the errors claimed by Petitioners.

C. SPECIFIC RESPONSES TO ASSIGNMENTS OF ERROR

1. The Circuit Court was correct that the Respondent did suffer an actual take of limestone having a commercial value as was found by the jury at trial.

The "Date of Take" is 4/29/2011. Roda, supra. The Circuit Court correctly found that a jury issue existed as to whether or not the Respondent had suffered an actual take of limestone which had a compensable value. The Respondent and her husband had reserved ownership of "all minerals" within the deed of transfer to Parsons in 1980, and therefore, the surface owner had no right to convey underlying mineral interests of limestone to the WVDOH. The Circuit Court correctly determined that limestone is a mineral, and that the stone and gravel removed from the reserves of the Respondent required jury consideration for compensation based upon the removal, appropriation and use of the limestone from the reserves of the Respondent by the WVDOH. The contractors of the WVDOH actually blasted the limestone from the reserves of the Respondent in a manner suitable to crush the limestone into a gravel form by use of a commercial crusher, and then the contractors of the WVDOH sized the limestone and stockpiled gravel for use in the construction of Corridor H as a crushed aggregate base under the pavement of the highway. Testimony at trial demonstrated that Federal and

State regulations required the limestone used in the highway to be tested to meet the rigid standards of State and Federal highway projects. tr. trans. 4/7/2024, p. 78; 4/8/2014, pp.15, 17-18. The crushed and sized limestone was used by the WVDOH from the reserves of the Respondent rather than purchasing the same type of limestone gravel from a commercial source. Rine testimony, trans., 4/8/2014, p. 22. Producing limestone gravel from the reserves of the Respondent saved the contractors of the Petitioners millions of dollars. MSES report, App., p. 2644. The Respondent proved the quantity, quality, marketability and market value of the limestone as demonstrated by the verdict of the jury. The Court's findings and conclusions within its Orders of 5/10/2012, and 10/25/2012, were correct as stated therein with the exception of requiring proof of "marketability" for a commercial sale.

While the Petitioners cite numerous decisions from outside the State of West Virginia regarding what constitutes "minerals", the West Virginia Supreme Court of Appeals has defined "mineral" in West Virginia Department of Highways v. Farmer, 159 W.Va. 823, 226 S.E. 2d 717 (1976), as noted by the Petitioners within their Brief at the top of page 12. The WVDOH simply cannot avoid the fact that limestone is a "mineral", valuable in construction purposes, and that very high quality limestone was retained by the Respondent, Newton, in her deed of ownership. The Petitioners have also ignored Respondent's Trial Exhibit No. 26, the Deed from Allegheny Investments included in the App., p. 2783. Limestone is a valuable mineral which is exchanged, traded and sold as such. Value is based on density, hardness and other physical factors, not the name of the limestone. tr. trans. 4/7/2014, pp. 78, 104, and 107; 4/8/2014, pp. 40,47,56, and 73. The Court made the proper findings in reliance upon Roda, supra, and the jury at trial disagreed with the contentions of the WVDOH that the limestone taken by the WVDOH

from the Newton reserves had no value. Roda, supra, is directly on point. The WVDOH had a statutory and constitutional duty to pay for the limestone taken.

2. The Circuit Court was correct in establishing the valuation standard for the Newton limestone in accordance with West Virginia Department of Highways v. Roda, 177 W.Va. 383, 352 S.E. 2d 134 (1986).

As the Respondent has previously noted, Respondent's Amend Brief for Date of "Take" and Calculation of Values of Minerals "Taken" or Appropriated by the WVDOH sets forth the bases for the reasoning of the Circuit Court below which define the actions of the WVDOH as acting in bad faith and in a willful trespass against the interests of the Respondent. The Petitioners have admitted that their appraiser, Kent Kessecker, informed them of the reservation of minerals by Newton when the appraisal was done for the Parsons property. The geotechnical reports prepared for the Department of Highways included core borings which are filed together with the L&W Enterprises report demonstrating the limestone known to exist under the surface of the Parsons property prior to the WVDOH entering onto the Parsons property and excavating the Newton limestone reserves. And, at page 7 of the Appeal Brief of the Petitioners, the WVDOH, acknowledges that it never contemplated condemning the limestone interests of Newton. The Court was correct in finding as an undisputed fact that the WVDOH entered onto the Parsons' property without notice to Newton and excavated her limestone reserves without permission with the intent to use the limestone reserves in the construction of Corridor H. This taking and appropriation by the WVDOH clearly is included in the definition of "trespass". In fact, if a private company had undertaken the same actions of appropriating the property of someone else without permission, intending to permanently deprive the owner of their property, a private company may well have been charged with a felony. The claims of the WVDOH that they did not receive notice from

Newton when the limestone was being appropriated by the WVDOH is much akin to a homeowner not giving notice to a burglar that the property within the homeowners home was protected by law. Evidence demonstrates that the WVDOH had a present intent to appropriate and use Newton limestone from the outset. Respondent's Trial Exhibit 24, App., p. 2700.

The Circuit Court was correct in making its findings of fact, 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 the Respondent and her husband had reserved "all minerals" within the 6/4/1980 deed when the Parsons property, was sold. The WVDOH knowingly and intentionally entered, removed, appropriated and used limestone minerals from the reserves of the Respondent without notice to the Respondent, without permission, and as a willful trespass against the ownership rights of the Respondent. 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 owner, Parsons, had no right or ownership interests 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 Parsons property, and the WVDOH had an actual present intent to mine the limestone, appropriate the limestone and use the Newton 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 property. The evidence presented at trial and to the Court prior to trial clearly demonstrated that the

WVDOH mined, removed, appropriated, and used the limestone from the reserves of the Respondent “in bad faith” and as a “trespass”. 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 Respondent; 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 highway construction.

The excuses given to the Court for failing and refusing to file eminent domain proceedings against the mineral owner by the WVDOH are factual in nature, and but for the failure of the WVDOH to follow clear statutory and Constitutional law, we would not be arguing the legal ramifications of the WVDOH having failed to file condemnation proceedings prior to appropriating and using the Newton limestone minerals, much the same as Roda. Many landowners may not know the value of their timber, their buildings or their real estate, and many landowners may have no intent to presently 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 are all factual issues before the Court and the jury. 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 Newton mineral estate within various “reaches” in the construction of Corridor H with no notice to the legal owner and no application filed with

the Court for valuation in condemnation. This Court established the valuation process in Roda for these specific facts. "Date of Take" is established also from these facts and West Virginia law.

The WVDOH, failed to comply with its statutory duty and with the constitutional rights of the Respondent by refusing to value and pay "Just Compensation" for the limestone minerals taken from the Newton reserves. The WVDOH did not voluntarily file condemnation proceedings. It was not until the Respondent 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-42 that the WVDOH finally was forced to file a condemnation action against the Newton limestone reserves. App., p. 8 . The WVDOH is and was under statutory and constitutional obligation to pay for the Newton limestone taken and used in the construction of Corridor H, yet the WVDOH never intended to value or pay for the limestone taken from Newton. Petitioner's Appeal Brief at p. 7.

3. The Circuit Court was correct when it determined that West Virginia Department of Highways v. Roda, supra, applies to the issues of the Newton limestone appropriation by the WVDOH, and that WVDOH v. Berwind Land Co. , 167 W.Va. 726, 280 S.E. 2d 609 (1981), does not apply to valuation of the Newton limestone reserves taken by the WVDOH.

The Circuit Court was correct in using the valuation standards and directions of this Court set forth in West Virginia Department of Highways v. Roda, 177 W.Va. 383, 352 S.E. 2d 134 (1986). The determination by the Circuit Court that West Virginia Department of Highways vs. Berwind Land Co., 167 W.Va. 726, 280 S.E. 2d 609 (1981), did not apply for valuation of the Newton limestone is correct given the facts and circumstances presented to the Court and to the jury. The valuation processes set forth in Roda, based upon the actions of the WVDOH against the limestone interests of your Respondent, cancel the claims of the Petitioners to value the Newton limestone under valuation standards of Berwind. Ownership interests of the limestone mineral reserves

had been severed from the surface, and the WVDOH and its contractors entered onto the property and excavated, stockpiled and used the limestone minerals as aggregate gravel and stone within the Corridor H roadway intentionally and knowingly in violation of the ownership interest of the Respondent.

The burden of notice and the payment of Just Compensation for the limestone mineral interests taken from Margaret Newton is upon the WVDOH, and not upon the unsuspecting owner of the property. 54-2-14; 54-2-14a; Article III, Section 9, West Virginia Constitution; 5th Amendment U.S. Constitution. Contrary to the arguments of the WVDOH, Judge Parsons reviewed and considered all of the evidence submitted to him in determining that Roda applies. The WVDOH simply ignored the West Virginia Constitution, the United States Constitution, statutory law, and prior cases where the WVDOH has been found to have appropriated property without payment. When the WVDOH did not agree with the findings and rulings of the Court as to the rights of the Respondents below, the WVDOH filed a Petition for Writ of Prohibition seeking a second opinion. The Circuit Court followed the law of the State of West Virginia in its Orders of 5/10/2012, and 10/25/2012, and in the instructions to the jury by applying Roda.

Respondent would again refer the Court to Respondent's Amended Brief of "Take" and Calculation of Value of Minerals "Taken" or Appropriated filed March 30, 2012, and made a part of the record in the App., p. 232.

4. The Circuit Court was correct when it ruled that the Respondent would be allowed a market time frame window from 4/29/2011, to 10/29/ 2012, for the limestone taken, appropriated and removed from the Newton reserves by the WVDOH.

The "market time period" window allowed by the Court for the Respondent to demonstrate an ability to establish a "market" for purposes of "marketability" was correct,

given the rulings of the Court that “marketability” is required under Roda.

As stated within the cross-assignment of error hereinafter the Respondent should not have been required to demonstrate separate commercial “marketability” of the limestone excavated, removed, appropriated and used by the WVDOH. Constitutional property rights of your Respondent in the State of West Virginia and the United States Constitutions require compensation for property taken by the government, including the limestone reserves of the Respondent taken by the WVDOH. Therefore, because the WVDOH intentionally removed, appropriated and used limestone reserves owned by your Respondent, the WVDOH must be required to compensate the market value of the property removed, in this case, the limestone excavated by the WVDOH, to be calculated under the standards of Roda, supra, without regard to any other commercial “marketability” of the limestone. Without waiving this position of the Respondent, and given the rulings of the Circuit Court with which the Respondent was required to prove just compensation to be paid by the WVDOH, the Circuit Court was correct in allowing a market time frame window of eighteen (18) months to establish a market or marketability. In fact, given the non-perishable nature of limestone gravel, the market time frame window should have been at least the same time frame necessary for construction of the highway, a period of years, since the limestone gravel created by the WVDOH and contractors does not degrade. Stockpiled limestone gravel and other limestone used by the WVDOH in the construction of Corridor H remains in its aggregate form, crushed and sized, indefinitely and therefore, the Respondent should have been given an indefinite time frame to create a “market” to “sell” and value the limestone gravel stockpiled by the WVDOH to demonstrate “marketability” for the limestone reserves of your Respondent. The Court should recognize that real estate appraisals always give a “market window”. Uniform Standards of Professional Appraisal Practice.

The Newton limestone had been converted to personalty by the contractors of the WVDOH in its removal, crushing, sizing, stockpiling and use of the limestone reserves as aggregate, stone and gravel in the construction of Corridor H, thereby meeting the standards and the requirements of Roda, supra. The actual market price was established by expert testimony as of the "Date of Take", 4/29/2011, as directed by the Court which is the date the WVDOH finally commenced condemnation proceedings.

There are a number of cases directly on point in the State of West Virginia finding that once minerals have been appropriated and removed from real estate, the minerals removed and "severed" are considered personalty rather than real estate. Williamson v. Jones, 39 W. Va. 231, 19 S.E. 436 (1894); Rymer v. South Pin Oil Co., 54 W.Va. 530, 46 S.E. 595 (1904); Harvey Coal & Coke Co. vs Dillon, 59 W. Va. 605, 53 S.E. 928 (1905); McGraw Oil & Gas Co.v. Kennedy, 65 W. Va. 595, 64 S.E. 1027 (1909); Pittsburgh & West Virginia Gas Co. v. Pentress Gas Co., 84 W. Va. 449, 100 S.E. 2d 296 (1919); WVDOH v. Roda, 177 W.Va. 383, 352 S.E. 2d 134 (1986).

Limestone is sold and consumed for all manner of uses, everywhere, including in Hardy County, for public roads, private roads, building foundations, concrete, bridges and bridge approaches, erosion control on streams and rivers, parking lots, driveways, asphalt paving, home and basement fill, sub-grade for concrete and asphalt, recreational parks, walking paths, as well as numerous other uses. The average market rate for limestone aggregate sold in Grant, Hardy and Pendleton counties as of 4/29/2011, is \$10.99 per ton at the quarry and without regard to any Corridor H construction. The WVDOH is fully aware of the cost of limestone aggregate, as well as the cost of commercial hauling limestone aggregate (gravel or larger stone) which may equal or exceed the per ton cost at the quarry. The value of aggregate was undisputed by the WVDOH. That is why the WVDOH paid their contractors \$8.00 per cubic yard

for the limestone crushed and stockpiled for use in the Corridor H project. It was considerably cheaper than the purchase and delivery of limestone from a commercial quarry which would have cost three to five times as much as the cost of the stone appropriated from the Respondent below. MSES Consultants, Inc., report App., p. 2644.

The Uniform Standards of Professional Appraisal Practice establish a “reasonable exposure time” as a requirement of any appraisal performed for real estate. There can be no difference in establishing a time frame for “marketability” of the 236,187 tons of limestone removed and processed from the Newton reserves. When the issue was raised to the Circuit Court, the Circuit Judge acknowledged that it would be virtually impossible to sell over two hundred thousand tons of limestone in a single day, although the price was established as of the “Date of Take”, 4/29/2011.

Contrary to the claims of the Petitioners, the valuation set for the limestone was the “date of take” which was the date that the WVDOH finally filed condemnation proceedings in the Circuit Court of Hardy County, West Virginia, 4/29/2011. That is the “date of take”, and that is the date of valuation of the limestone. In fact, the “market time period” complained of by the Petitioners would not have been necessary had the Court followed the strict guidelines of Roda which did not require any determination of “marketability” other than the determination of a value of the limestone minerals on the “date of take”. The valuation is clearly available from the quarries in the area of Hardy County as found by the MSES report which was filed as an exhibit at trial, Exhibit 22, and included within the App., p. 2644. The MSES report and the testimony of Lawrence Rine at trial demonstrated clearly the available markets for the limestone during the 18 month window. Therefore, the claims of the Petitioners of “speculation or conjecture” are misplaced, as are the claims of “contradictory and competing legal standards”. There were no inconsistent jury instructions. There was simply a “market window”

granted to the Respondents given the quantity of limestone appropriated by the WVDOH during the time that they excavated limestone from the Newton property; during the time that they crushed and stockpiled the limestone for use in the roadway; and during the time construction of the highway took place.

5. The Circuit Court was correct in allowing the Respondent and her experts to introduce evidence of the use of the limestone by the WVDOH in the construction of the Corridor H highway, as well as the necessary testing procedures and processes for the limestone to demonstrate quality.

The Circuit Court was correct in allowing testimony and evidence to be introduced at trial concerning the use of the excavated limestone from the reserves of the Respondent by the WVDOH in the construction of the Corridor H highway to prove quality. Expert testimony and documentation at trial demonstrated that the limestone aggregate removed from the reserves of the Respondent required testing and quality control to meet the rigid standards for use in the construction of a Federal highway project at both the State and Federal level the same as commercial grade limestone which would otherwise have been required to be purchased. MSES mineral appraisal, App., p. 2644; tr. trans. 4/7/2014, p. 78. The evidence at trial also demonstrated that the WVDOH failed and refused to provide full and complete records of testing and quality control which was known to exist to meet the Federal and State standards in such a construction project. tr. trans. 4/8/2014, p. 91.

US v. Whitehurst, 337 F. 2d 765, (4th Cir. 1964) and other U.S. cases cited by the Petitioners do not apply in the valuation requirements of Roda, supra. In Whitehurst, the Navy filed for a fee taking of a tract of real estate designated as a farm which required a finding of “highest and best use”. The issues in this case are distinct in the separate estate of limestone mineral ownership appropriated for use in a public highway. West Virginia law allows “title to a right of way only” to pass to the WVDOH, and requires Just

Compensation to be paid separately for the limestone minerals taken and used. 54-2-12; 54-2-14a; Article III, Section 9, Constitution of West Virginia; Amendment 5 U.S. Constitution.

The Court should not have required the Respondent to prove “marketability” through some commercial or public market. Just Compensation must be based solely upon the quality of the limestone, the quantity of the limestone actually appropriated and used, and the value of the limestone on the date the Application for Condemnation of the limestone mineral reserves of Newton was filed, in this case, 4/29/2011, in the circumstances that the limestone existed at that time, or in its present uncovered state, ready for loading, with no consideration of the costs of production, mining or excavation. WVDOH v. Roda, supra. The WVDOH appropriated private property, and therefore are obligated by law to pay for it. This should be clarified by this Court as prevailing Law.

Witnesses testified at trial that the hardness, density and composition of the Newton limestone made it suitable for use in road construction as construction aggregate, and that required testing by the WVDOH standards would have demonstrated required quality. tr. trans. 4/7/2014, pp. 78,104 and 107; tr. trans., 4/8/2014, pp. 40,47,56,73.

6. The Circuit Court was correct in allowing the Respondent to introduce evidence consisting of photographs, expert opinions, expert fact witness testimony and construction documents related to limestone excavated by the WVDOH from related properties.

There was no abuse of discretion by the Circuit Court in permitting the parties to introduce evidence consisting of photographs, expert opinions and documentation related to limestone excavated by the WVDOH and its contractors from properties other than the Respondent with the Limiting Instruction given by the Court to the jury. Given the limited documentation available from the two separate projects,

Newton and Veach, certain documentation existed for one project yet not the other, while the same documentation was required for both. Therefore, to disallow use of the available documentation from both, Veach and Newton, would have been highly prejudicial to the Respondent, and in fact, had the Court not allowed documentation from both projects, the WVDON may have succeeded in its efforts to avoid providing crucial documentation necessary in proof for the case of the Respondent. The actions of the WVDON in refusing to provide documentation known to exist and in deleting information from these projects were tantamount to fraud. tr. trans. 4/7/2014, pp. 148, 149, 155-157; 4/8/2014, p 91. Reports of Respondent's experts included related properties solely to demonstrate methodology and processes in calculations, measurement accuracy, and completeness.

Respondent demanded access to the files of the WVDON as a part of discovery in the underlying action. Experts of the Respondent reviewed boxes of documents at the Burlington District 5 Office of the WVDON during April, 2011. Lawrence Rine, professional civil engineer and expert mineral appraiser, testified at trial that the documents reviewed at the District 5 Burlington Headquarters of the WVDON appeared to have been "sanitized". tr. trans. 4/8/2014 p. 91. Kirk Wilson, professional civil engineer, testified at trial that the elevations on the digital contour maps provided from the WVDON had been deleted from the CD's provided through discovery from the WVDON. tr. trans. 4/7/2014, pp. 148, 149, 155-157. Based upon the extremely limited documentation received from the WVDON in discovery regarding limestone removed from the Newton property, the Respondent was required to determine, through experts, what processes were required, and what documentation would have been generated by the WVDON in record keeping of excavation, manufacturing and use of the limestone from the Newton reserves. Fortunately, the experts of the Respondent had the

opportunity to review documentation from the J.F. Allen “reach” of the construction of the Corridor H highway through the Veach tract, also in Hardy County, and also before the Circuit Court of Hardy County, West Virginia, in Civil Action No. 11-C-36. The Veach documents demonstrated a number of different record keeping processes and documentation provided in discovery which were not included within the discovery documentation from the Kanawha Stone “reach” through the Parsons/Newton property.

There were no cross section stockpile records provided from the WVDOH from the Kanawha Stone project or for the gravel stockpile made from the Newton limestone reserves, even though payment was made based upon the cubic yards of aggregate actually crushed, sized and stockpiled. tr. trans., 4/7/2014, p. 75. There was only one cross-section record provided from the J.F. Allen Company project, and it was incomplete. There were no Daily Inspector’s Reports demonstrating any excavation, crushing or screening of limestone from the Newton project, however, there are numerous Daily Inspector’s Reports from the J.F. Allen Company project of the crushing, screening and stockpiling of limestone in J.F. Allen project from the Veach limestone reserves. The lack of records even go to the geotechnical reports by the engineering firms provided during discovery as preliminary to the construction of Corridor H. The Michael Baker, Jr., engineering geotechnical report from the Kanawha Stone project through the Newton property is significantly deficient when compared to the geotechnical report E.L. Robinson, Inc., for the J.F. Allen project through the Veach property. Cross references of those geotechnical reports are very necessary for the benefit of the jury to understand the knowledge and the testing processes undertaken by the WVDOH for the limestone minerals and aggregate removed from the Newton reserves. Therefore, the error claimed by the WVDOH in cross referencing documentation from the various “reaches” or other properties through which the Corridor H highway was constructed is

simply an effort to conceal documentation and prevent information from coming to the jury which was otherwise deleted or “sanitized” from the records of the WVDOH.

The claims of the Petitioners that documentation and testimony regarding the J. F. Allen reach and the Veach cut was “misleading” or in violation of the Rules of Evidence, 401, 402 and 403, are simply wrong. The WVDOH has made consistent efforts to hide information and documentation, and to exclude information which would allow the jury to determine quality or quantity of the limestone appropriated from the Veach reserves. As noted at page 7 of the Appeal Brief of the Petitioners, the WVDOH never had any intention to value the limestone appropriated from the Newton reserves. In fact, during discovery, the WVDOH consistently claimed in its responses to Interrogatories that it kept no documentation demonstrating quantities or use of the limestone minerals taken from the Newton reserves. This was confirmed at trial by Darby Clayton, tr. trans., 4/8/2014, pp. 128, 133, 134, 137,140, 141, 143,147, 150 and 152-156. The testimony of Darby Clayton also confirms the testimony of Lawrence Rine and Kirk Wilson that the records of the DOH lacked completeness.

The “Limiting Instructions” submitted to the Court for consideration together with the testimony and evidence regarding information from other properties was prepared by the Respondent and approved by the Court. The Court had requested each of the parties to prepare a “Limiting Instruction” and provide same to the Court. At the hearing on 8/20/2013, the Petitioners refused to submit a proposed Limiting Instruction as requested by the Court, preferring only to then object to the ruling of the Court granting a Limiting Instruction. Order of 8/20/ 2013, App., p. 115. No objection was made at the trial, and the limiting instruction protected the interests of the WVDOH before the jury.

7. The Circuit Court was correct in allowing the “Additional Instructions” for judicial economy in establishing undisputed facts which had

been considered in accordance with Respondent's Second Motion for Pretrial Summary Judgment, and at a hearing to establish those undisputed facts.

To the knowledge of your Respondent, there was no objection at trial from the Petitioners to the reading of the "Additional Instructions" to the jury prior to submission of evidence as complained by the WVDOH in Error No. 7. As with most of the errors claimed by the Petitioners within its Notice of Appeal, the errors were waived by the failure of the WVDOH to object. Respondent would further say that the "Additional Instructions" were allowed for judicial economy to avoid additional unnecessary witnesses. Had the court not allowed the "Additional Instructions", your Respondent would have presented testimony as to each of the factors set forth within the "Additional Instructions", together with additional factors which would have been undisputed and even more damaging to the WVDOH at trial in demonstrating the intentional trespass and criminal conduct of the WVDOH and its contractors in removing and using limestone minerals which were clearly the property of your Respondent, without notice, without permission, without payment, and in violation of the statutory and constitutional rights of your Respondent. The Petitioners cannot dispute these facts. The WVDOH stole the Respondent's limestone.

Respondent suggests that the Court review the specific "Additional Instructions" set forth in the App., p. 112 . The lead-in paragraph of the Petitioners "Statement of the Case" at page 1 establishes paragraph number one as fact. The Court ruled as a matter of law in its Orders of 5/20/2012 and 10/25/2012, that the minerals reserved by Newton include limestone and gravel by definition. App., pp.31 and 67. The Court considered the Respondent's Second Motion for Partial Summary Judgment in making findings stated at ¶ 3, 4 and 5 of the Additional Instructions, at ¶ 3 that the WVDOH entered onto the Parsons real estate and excavated and appropriated the limestone minerals of

Newton without permission; at ¶ 4 that the WVDOH made no communication or contact with Margaret Newton prior to entering onto the property and appropriating the limestone minerals; and at ¶ 5 that the failure of the WVDOH to communicate with the Respondent precluded any opportunity to assess the value of the limestone minerals prior to appropriation. Order of the Court of 7/30/2013, App., p. 73 It is unclear how the WVDOH believes that it can contradict these facts as found and as stated within the “Additional Instructions” when the WVDOH has admitted that they refused to contemplate condemnation of the limestone interests of Newton at p. 7 of their Appeal Brief under “Summary of Argument”. Those five (5) facts have never been contested by the WVDOH by any witness or by any evidence presented by the WVDOH during either of the underlying civil actions, either 10-C-42 or 11-C-30, or at trial. It is clear that this argument by the Petitioners is a “red herring” without any basis in fact. The Court simply granted a Partial Summary Judgment on those facts in favor of judicial economy to avoid the necessity of presenting testimony and evidence on those clearly uncontested facts. There was no prejudice or error in the reading of these undisputed facts to the jury.

8. The Circuit Court was correct when it precluded the WVDOH from introducing any evidence concerning percentage of recovery yields of limestone an issue.

The Court was correct in refusing evidence concerning “percentage of recovery yields of limestone” from the limestone reserves of the Respondent. The WVDOH agreed down to the ton of limestone removed from the reserves of the Respondent, 236,187 tons. The valuation standards set forth in Roda , supra, preclude introduction of percentage of recovery yields because of the circumstances of the limestone on the date the Application for Condemnation was filed. The limestone from Newton had been converted to personalty and at that time. The limestone had been

removed and had gone through a manufacturing process of crushing, screening, grading and testing to meet the rigid federal standards for construction material in a Federal highway project. Evidence concerning percentage of recovery yields would have been confusing to the jury, and would have “muddied the water” in violation of West Virginia Law. The WVDOH is trying to force the Respondent to prove she could have mined the limestone. Mining processes have no relevance given the facts of this case.

Respondent would again refer the Court to Respondent’s Amended Brief Date of “Take” and Calculation of Value of Minerals “Taken” or Appropriated. App., p. 232. Once the determination is made that valuation is pursuant to the standards set forth in Roda, supra, cost of production and percentage of yield issues are completely irrelevant. As in Roda, the WVDOH failed and refused to pay Just Compensation or undertake condemnation proceedings against the limestone interests of Newton prior to entering onto the property and appropriating her limestone minerals. In accordance therewith, the Court found properly that valuation would consider the limestone minerals “in circumstances of the limestone as it existed on that date” (4/29/2011), and for the “limestone excavated and removed, in its present uncovered state, ready for loading, with no consideration of the production, mining or excavation costs, consistent with the prior Order of this Court” entered 5/30/2012. Order of 5/10/2012, App., p. 23; Order of 10/25/2012, App., pp. 31- 34. It is interesting that the WVDOH now claims that the stockpile demonstrated in the photograph taken by James Oliver was not limestone when, in fact, the WVDOH failed to present any testimony or evidence to demonstrate the makeup of the stockpile. The WVDOH has consistently denied having any information or documentation whatsoever as to the makeup of the stockpile. It was the testimony of the witnesses at trial and the experts of both, the Petitioners and the

Respondent, that agreed that 236,187 tons of limestone from the Newton reserves had been excavated, used and/or stockpiled for use in the roadway. Various witnesses testified that the material in the Newton stockpile was limestone. tr. trans. 4/7/2014, pp. 54,67,75 and 78. It appears the attorneys for the WVDOH have now determined the composition of the stockpile in the Jim Oliver photographs when none of their experts or their witnesses were able to make that determination, nor was there any document in the possession of the WVDOH to demonstrate that composition or lack of composition.

9. The Circuit Court was correct in denying the Motion for Directed Verdict or Motion for Judgment as a Matter of Law requested by the Petitioners under Rule 50 of the West Virginia Rules of Civil Procedure.

The evidence presented at trial was clearly sufficient to allow the jury to consider the quantity and value of the limestone minerals taken from the Newton reserves. The ruling complained of by the WVDOH was required to give every favorable inference to the evidence of the Respondent. The Respondent makes this argument without waiving Respondent's objection to this claim of error by the Petitioners. A review of the tr. trans. 4/9/2014, demonstrates on p. 65 that the Petitioners failed to renew the Rule 50 Motion at the conclusion of evidence and before the case was sent to the jury. Page 139 of that same transcript, 4/9/2014, again demonstrates that the Petitioners failed to renew their Rule 50 Motion after the verdict was returned and after the Court and the parties had accepted the verdict of the jury. The Petitioners failed to preserve error in their Motions for Directed Verdict or Motion for Judgment as a Matter of Law during the trial and Petitioners failed to file any post trial motions.

Without waiving Respondent's objection, the evidence at trial demonstrated clearly that Helderberg limestone is quarried, marketed and sold from various other quarries and that the claims of the WVDOH that the Helderberg formation of limestone is

somehow inferior as a limestone aggregate was disproved by documented evidence and expert testimony . The jury had the opportunity to hear and consider the conflicting testimony at trial, and a verdict was returned in the Respondent's favor.

IX. CONCLUSION

In this action, the WVDOH has refused to step up to the plate and admit that it has violated the statutory and constitutional rights of the Respondent below. The State of West Virginia and the WVDOH have unlimited financial resources allowing the WVDOH to overrun the ability of landowners to defend themselves, and to overwhelm landowners who may elect to fight against the WVDOH by the State hiring expensive attorneys and by keeping experts in their pockets who undervalue real estate interests thereby forcing landowners or mineral owners to either accept the cut rate value set by the experts of the WVDOH or alternatively, a landowner must hire lawyers and experts in the face of an onslaught of motions, petitions, depositions and other Court processes by lawyers for the WVDOH which generally make resistance by a landowner cost prohibitive and the WVDOH wins by default. Relief requested by the Petitioners should be denied.

Respondent should be awarded reasonable attorney's fees and costs in this action. As the Circuit Court noted to counsel for the WVDOH on 5/10/2012, if the WVDOH had acted as it was constitutionally and statutorily required, to file the Application for Condemnation before appropriating the limestone, we would not be in this present argument before the Court. Hearing transcript of 5/10/2012, pp. 26 and 29; App., pp. 4618 and 4621. The rulings of the Court below are fully supported by the documents contained within the Court file, evidence presented at trial, and by the law of the State of West Virginia. The WVDOH has demonstrated a pattern and practice of ignoring the requirements of constitutional and statutory rights of landowners, including

the rights of Margaret Newton in the appropriation of limestone minerals from her property. The constitutional law, statutory law, and the case law of the State of West Virginia are absolutely clear in the application of WVDOH v. Roda, supra, as the appropriate law upon which recovery by Margaret Newton should be premised given the separate and distinct title to the minerals held by the surface owner, Parsons, and the mineral owner, Newton, and the intentional misconduct of the WVDOH. The verdict of the jury below and the Order of Judgment of the Court should be affirmed, and directions should be given on the issues of “marketability” and reimbursement of reasonable attorney’s fees.

RESPONDENT’S CROSS PETITION

III. ASSIGNMENTS OF ERROR

1. The Circuit Court was clearly wrong when it overruled Respondent’s motion to delete the element of “marketability” from the Instructions to the Commissioners and to the jury. West Virginia Department of Highways vs. Roda, 177 W. Va. 383, 352 S.E. 2d 134 (1986), does not require an element of “marketability” for proof of valuation of limestone minerals in this action. By the ruling of the Court, “marketability” required the Respondent to prove, as an element of valuation, that a separate commercial market existed during a specified and limited time frame for sale of the limestone and limestone aggregate excavated, removed, appropriated and used by the WVDOH from the limestone reserves of the Respondent. This ruling is in violation of Article III, Section 9 of the Constitution of West Virginia; the 5th Amendment of the U.S. Constitution; 54-2-13, 54-2-14, and 52-4-14a of the West Virginia Code; and the rulings of this Court stated in West Virginia Department of Highways vs. Roda, 177 W. Va. 383, 352 S.E. 2d 134 (1986). The elements for valuation under Roda do not require proving

“marketability”, for sale of the limestone in a commercial market during a limited specified time other than the use made of the material in the highway, to determine Just Compensation. The argument by the WVDOH that U.S. v. Whitehurst, 337F. 2d 765 (1964) applies is without merit.

2. The Circuit Court of Hardy County, West Virginia, has failed to consider the Motion of the Respondent for reimbursement of costs, expenses, expert witness fees and attorney’s fees. Failure to consider the Motion constitutes denial. Direction is necessary from this Court to require payment of attorney’s fees, costs, expenses and expert witness fees to comply with Article III, Section 9 of the Constitution of West Virginia; 54-2-14; 54-2-14a; West Virginia Department of Transportation, Division of Highways v. Dodson Mobile Home Sales and Service, Inc. 218 W.Va. 121, 624 S.E. 2d 468 (2005). Attorney’s fees are based on 1/3 contingent.

IV. ARGUMENT

ELEMENT OF “MARKETABILITY”

Within the Order of the Court of October 25, 2012, the Court accurately found and concluded that the valuation of the limestone minerals appropriated and removed from the property of the Respondent are under the purview of WVDOH v. Roda, 177 W.Va.383, 352 S.E.2d, 134 (1986), upon those findings made within the said Order. Roda is directly on point for valuation of the limestone mineral interests of the Respondents. At headnote 4 of Roda, and as found by the Court under number 4 of Roda, 352 S.E. 2d, 134 at page 140; “Where a trespass is willful, the trespasser shall pay the full value of the mineral at the time he sells or uses it.” There is absolutely no requirement within the opinion of Roda to support the conclusion by the Court requiring the element of marketability or to require the Respondent to prove whether or not there is a an established market for the limestone independent of the Corridor H highway in

which the minerals were used during a specified and limited time frame. Simply stated, this is a non-existent element within Roda. Limestone is non-perishable and the State used the property of the Respondent to construct a public road.

ATTORNEY'S FEES

Private property shall not be taken or damaged for public use without Just Compensation. Article III, Section 9, West Virginia Constitution. Before entry, taking possession, appropriation, or use of private property, the WVDOH is required to pay Just Compensation either to the owner or into the registry of the Court. 54-2-14; 54-2-14a. Mandamus is the appropriate remedy to require the WVDOH to comply with statutory requirements of eminent domain. Shaffer v. WVDOH, 208 W.Va. 673, 542 S.E. 2d 836 (2000); State ex rel. Henson v. WVDOH, 203 W.Va. 229, 506 S.E. 2d 825 (1998); Orlandi v. Miller, 192 W. Va. 144, 451 S.E. 2d 445 (1994). This Court has recognized the remedy of Mandamus to require "inverse condemnation". Orlandi, supra; State ex rel. McCormick v. Miller, 171 W.Va. 42, 297 S.E. 2d 448 (1982). Once the Circuit Court rendered judgment in favor of your Respondent in the underlying action, from the preliminary action of 10-C-42, the Respondent was entitled to litigation expenses including reasonable attorney's fees. WVDOH v. Dodson Mobile Home Sales and Service, Inc., 218 W.Va. 121, 624 S.E. 2d 468 (2005). This Court has found that citizens should not be required to resort to lawsuits to force government officials to perform their legally prescribed nondiscretionary duties. West Virginia Law mandates costs, expenses and attorney's fees for litigation resulting from a public officials' disregard for mandatory provisions of the State Code. State ex rel West Virginia Highlands Conservancy, Inc. v. West Virginia Division of Environmental Protection, 193 W.Va. 650, 458 S.E. 2d 88 (1995); Trozzi v. Board of Review of West Virginia Bureau of Employment Programs, 214 W.Va. 604, 591 S.E. 2d 162 (2003).

V. CONCLUSION

In the event the Court accepts Petitioners' Petition for Appeal, Respondent respectfully presents "marketability" as an issue which need to be addressed by the Court. "Marketability" during a specified time frame as a separate element and as proof of value in condemnation under Roda is not required under existing law, and the Circuit Court was in error to require proof of "marketability" of sale to other potential purchasers during a time frame window.

Respondent is entitled to reimbursement of litigation expenses, costs, expert witness fees and reasonable attorney's fees. It is necessary that this Court give direction to the Circuit Court to Order reimbursement of those fees.

Margaret Z. Newton
Respondent - By Counsel

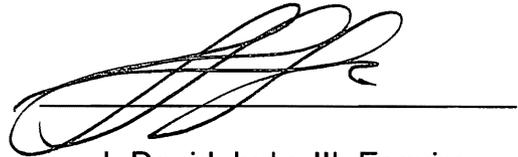
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CERTIFICATE OF SERVICE

I, J. David Judy, III, Counsel for the Respondent do hereby certify that I served a true copy of the foregoing, *BRIEF OF RESPONDENT AND CROSS PETITION*, upon Counsels for Petitioners, Clarence E. Martin, III, and Susan R. Snowden of Martin & Seibert, LC, at their address of P.O. Box 1286, Martinsburg, WV 25402-1286, via U.S. Mail, postage prepaid, on this the 29 day of September, 2014.

A handwritten signature in black ink, consisting of stylized, overlapping loops and flourishes, positioned above a horizontal line.

J. David Judy, III, Esquire