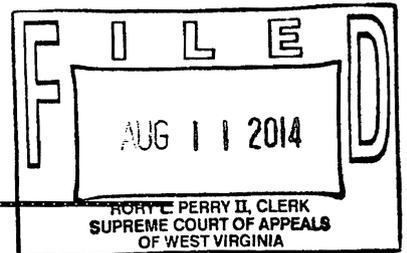


No. 14-0381



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION,
DIVISION OF HIGHWAYS, a public corporation, Petitioner below

Petitioner

vs.

WESTERN POCAHONTAS PROPERTIES, L.P., a Delaware Limited
Partnership; WPP, LLC, a Delaware Limited Liability Company; BEACON
RESOURCES, INC., Respondents below

Respondents

From the Circuit Court of
Tucker County, West Virginia
Civil Action No. 12-C-46

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	3
I. ASSIGNMENTS OF ERROR	4
II. ARGUMENT	
A. The Circuit Court erred in its refusal to give Petitioner’s proposed jury instruction no. 8, which necessarily allowed the jury to consider profit as a basis for just compensation	4
B. The Circuit Court erred in its exclusion of the testimony of Petitioner’s expert witness, Tom Gray, regarding his valuation of Beacon Resources, Inc.’s leasehold interest	8
III. CONCLUSION	10
CERTIFICATE OF SERVICE	12

TABLE OF AUTHORITIES

	Page
West Virginia Code sections	
WV Code 37-6-29	5
West Virginia Rules	
WVRE 702	8, 9
Federal cases	
<u>Arcoren v. United States</u> , 929 F.2d 1235 (8th Cir. 1991)	9
<u>United States vs. Alderson</u> , 49 F.Supp. 673 (S.D.W.Va. 1943)	5
<u>Weisgram v. Marley Co.</u> , 169 F.3d 514 (8th Cir. 1999)	9
West Virginia cases	
<u>Gentry v. Mangum</u> , 195 W.Va. 512, 466 S.E.2d 171 (1995)	9
<u>Harris vs. CSX Transp., Inc.</u> , Case No. 12-1135 (W.Va. 2013)	8
<u>In re Flood Litig. Coal River Watershed</u> , 222 W. Va. 574, 668 S.E.2d 203 (2008)	9
<u>Miller vs. Triplett</u> , 507 S.E.2d 714, 203 W.Va. 351 (1998)	10
<u>W.Va. Department of Highways vs. Berwind Land Co.</u> , 167 W.Va. 726, 280 S.E.2d 609 (1981)	8
Secondary sources	
Franklin D. Cleckley, Handbook on Evidence for West Virginia Lawyers (3rd ed. 1994)	9, 10

I. ASSIGNMENTS OF ERROR

- A. The Circuit Court erred in its refusal to give Petitioner's proposed jury instruction no. 8, which necessarily allowed the jury to consider profit as a basis for just compensation.**
- B. The Circuit Court erred in its exclusion of the testimony of Petitioner's expert witness, Tom Gray, regarding his valuation of Beacon Resources, Inc.'s leasehold interest.**

II. ARGUMENT

Assignments of Error

A. The Circuit Court erred in its refusal to give Petitioner's proposed jury instruction no. 8, which necessarily allowed the jury to consider profit as a basis for just compensation.

Western Pocahontas and WPP LLC acknowledge that profit is non-compensable under West Virginia eminent domain law. (Brief of Western Pocahontas and WPP, pg. 8) Beacon acknowledges that "the general rule [is that] courts should not look to business profits as an indicator of the value of land". (Brief of Beacon, pg. 14)

The expert witnesses presented by the respective parties used markedly different methods to value the coal present on the date of take and the value of the leasehold interest held by Beacon. For instance, DOH witness Phil Lucas found that Beacon's lease required a royalty payment to WPP of seven and one-half percent (7-1/2 %). Mr. Lucas found the standard coal royalty in the Tucker County, West Virginia market to be eight percent (8%) on the date of take, which meant that the lease had a market value of one-half percent (.5%) royalty on the coal, or \$137,434. Mr. Lucas testified that the coal still in place still belonged to

WPP (incorrectly referred to in his testimony as Western Pocahontas) until it was mined out. Mr. Lucas analyzed the residue of the property under Beacon's permit, found the coal was still economically feasible to mine, and assigned \$191,200 as the cost of modifying the permit and other features necessary to continue mining. Trial Tr. 340:15-344:7. While Mr. Lucas did indeed use the income approach to calculate just compensation due the collective property owners, his calculations discounted the income stream from an 8% royalty over the 4-year remaining term of the permit to represent the value of the coal. Trial Tr. 339:14-340:2.

The method of valuing Beacon's leasehold used by DOH expert Phil Lucas conforms to the method set forth in United States vs. Alderson, 49 F.Supp. 673 (S.D.W.Va. 1943) and cited by Beacon in its brief. The case explains West Virginia's approach for valuing a lease [under what is now WV Code 37-6-29] as follows: *"[t]he lessee is compensated for the market value of the unexpired term [of the lease], less the value of the rent reserved. The lessor receives the value of the rents plus the value of the reservation; or the value of the fee less the award to the lessee. If the land were renting for more than the value of the use, the landlord should not get the full value of the rents to become due, as this would result in the paying of more than the value of the property taken."* Id. at 675. This methodology is precisely that used by Phil Lucas, except that he found the royalty (e.g., rent) paid by Beacon (to-wit, 7.5%) to be lower than the eight percent (8%) the market would bear. This concept recognizes a "submarket lease" having value in the open market for sublet at a higher rate. West Virginia

law clearly allows profit to play no role in the valuation of a leasehold in an eminent domain proceeding, and the jury should have been so instructed.

The trial transcript flatly contradicts Beacon's claim that their evidence did not ask for profit. Jason Svanovec, President of Beacon Resources, Inc. applied his "profit margin" of \$65/ton to the entirety of the area under permit at a 78-80% mining recovery rate. Trial Tr. 162:21-175:22. As noted in the statement of facts in Petitioner's Brief, Beacon expert witnesses Pat Gallagher, P.E., Aaron J. Teets, P.E. and Douglas C. Wise, Certified General Real Estate Appraiser testified to the gross profit to Beacon, or words of similar effect, on the mining operation. They applied their profit figures not just to the area of take and the 100-foot buffer zone around public road rights of way, but to the entirety of the area under permit. DOH acknowledges that its counsel elicited from at least one of these witnesses that the "just compensation" to which the witness testified was, in fact, profit. DOH's counsel correctly insured that the record clearly reflected Beacon's evidence as a gambit to acquire four years of anticipated profit on a going concern.

Beacon's claim that its appraiser, Douglas Wise, excluded profit is unsupported (Beacon's brief, pg. 16). On the contrary, a review of Mr. Wise's testimony demonstrates that his opinion of just compensation to the leaseholder was \$64.80 gross profit per ton to the leaseholder, or \$48 million, which represented "what a willing buyer might pay a willing seller for this lease." Trial Tr. 265:12-266:2. Mr. Wise's numbers essentially parroted those offered by Jason Svanovec, that being \$120 per ton gross sales price, with an 80%

recovery rate, resulting in Beacon “making [\$64.80] on a per ton coal basis on the 120 less his expenses.” This sum, multiplied by the tonnage found in Summit Engineering’s (Phil Lucas’s) report, resulted in a value of nearly \$84 million. The “profit” Mr. Wise claims to have excluded was at 14% “entrepreneurial adjustment” of nearly \$12 million, bringing the value down to \$72 million.¹ Trial Tr. 247:5-248:18. Mr. Wise then discounted the \$72 million over eight years at ten percent (10%) to arrive at his final value of the leasehold of \$48,088,000 for the entirety of the 187 acres under lease. Trial Tr. 248:19-249:8.

Beacon’s argument presupposes that its witnesses’ approaches represented the only accurate methodology for valuing Beacon’s leasehold interest. However, the trial court admitted the expert opinions of Mr. Gray and Mr. Lucas, whose methods differed substantially from Beacon’s when valuing Beacon’s interest in the subject property. The tremendous disparity in the experts’ methodology, coupled with repeated references to “profit” in the testimony, underscores the necessity for a jury instruction excluding profit from consideration. The jury instructions absolutely failed to advise the jury that lost profit is not compensable in the State of West Virginia. Without direction from the Court, it is not surprising that the jury returned a verdict far in excess of DOH’s estimate of just compensation.

The cases cited by the Respondents in support of their claim that no profit instruction was warranted do not apply to a condemnation effected by the State

¹ Mr. Wise later clarified that “entrepreneurial profit” represented the \$11 million (previously rounded to \$12 million) “someone could make if they invested the \$48 million to get their money over that period of time.” Trial Tr. 265:22-266:1.

of West Virginia. Neither by statute or in case law has the State of West Virginia ever included in just compensation the profit earned by a mining operator leasing mineral interests which have been severed from the surface. To the extent that Beacon suggests that W.Va. Department of Highways vs. Berwind Land Co., 167 W.Va. 726, 280 S.E.2d 609 (1981), approves Jason Svonavec's blatant request for the profits the mining operation, the holding in Berwind was limited to cases in which the mineral estate had not yet been severed from the remainder of the fee estate, and to valuation of minerals in place. Id. at 613. Read in its entirety, Berwind clearly stands more for the proposition that competing highest and best uses cannot be used to "stack" multiple claims for just compensation which then exceed the fair market value of the entirety of the property taken and damages to the residue.

The evidence establishes a blatant pattern of Beacon witnesses testifying to profit as part of the alleged just compensation due the Respondents. Absent an instruction on the non-compensability of profit, DOH's right to defend against the Respondents' claims was grossly prejudiced and warrants a new trial.

B. The Circuit Court erred in excluding the testimony of Petitioner's expert witness, Tom Gray, regarding his valuation of Beacon's leasehold interest.

Western Pocahontas Properties and WPP contend that Rule 702 controls the question of Mr. Gray's testimony. However, the recent case of Harris vs. CSX Transp., Inc., Case No. 12-1135 (W.Va. 2013), notes that Rule 702

operates as a rule of *inclusion*, rather than *exclusion* regarding the testimony of expert witnesses, to-wit:

“Rule 702 reflects an attempt to liberalize the rules governing the admissibility of expert testimony.” Weisgram v. Marley Co., 169 F. 3d 514, 523 (8th Cir. 1999). What this means is that “[t]he rule ‘is one of admissibility rather than exclusion.’” In re Flood Litig. Coal River Watershed, 222 W. Va. 574, 581, 668 S.E.2d 203, 210 (2008) (quoting Arcoren v. United States, 929 F.2d 1235, 1239 (8th Cir. 1991)). “Disputes as to the strength of an expert’s credentials, mere differences in the methodology, or lack of textual authority for the opinion go to weight and not to the admissibility of their [sic] testimony.” Gentry v. Mangum, 195 W. Va. 512, 527, 466 S.E.2d 171, 186 (1995) (citation omitted) Id. at pg. 6.

The broader perspective on why experts are permitted to offer opinions based on otherwise inadmissible evidence is discussed succinctly by Professor Cleckley:

“The rationale for permitting an expert to base an opinion on facts that have not been introduced into evidence is one of common sense because every expert relies upon many sources of information in forming opinions about specific data. Many professionals, such as physicians, geologists, and appraisers, necessarily rely upon hearsay daily. Physicians, for example, base their diagnoses not only upon the objective findings and tests performed on a given patient but also upon their medical studies, personal experiences in other cases, medical treatises, discussion with their peer, findings and tests compiled by other medical personnel, and the statements made by the patient. The physician herself is unlikely to be able to disentangle the part each piece of information played in the formation of the ultimate opinion.” 2 Franklin D. Cleckley, Handbook on Evidence for West Virginia Lawyers, §7-3(B)(2) at 51 (3rd Ed. 1994).

Likewise, Beacons’ complaint that “*the information upon which Mr. Gray based his valuation opinion could have been obtained by anyone with a computer and a motivation to conduct an internet based search using an online search engine*” (Beacon’s Brief, pg. 8) is a red herring. The same may be said of

any person searching for comparable sales of real estate in the local county clerk's office or in a county clerk's online searchable database. This does not minimize or even relate to the reliability of the information. The information upon which an expert bases his opinion need not be secret or even confidential. The key to the expert's opinion, as implied in Prof. Cleckley's discussion above, is the method by which the information is actually incorporated by the expert in his ultimate opinion, according to his experience and training. The record amply demonstrates Mr. Gray's experience, training and overall ability to offer a jury useful insight on the value of the coal and Beacon's leasehold, as noted when Mr. Gray was determined to be qualified to testify as an expert in mineral appraisal and mineral valuation over Beacon's objection. (Tr. Trans., pp. 288-290)

Beacon's brief, footnote 7, incorrectly suggests that arguments excluded from DOH's post-trial motions may not be raised on appeal. This Court has expressly recognized that *"not every trial error has to be specifically set forth in the motion for a new trial in order to raise that error on appeal. Rather, as long as a motion for new trial is timely filed, all errors occurring during the trial which were objected to at the trial are properly preserved even though not specifically identified in the motion for a new trial."* Miller vs. Triplett, 507 S.E.2d 714, 718, 203 W.Va. 351 (1998)

The Circuit Court's exclusion of Tom Gray's testimony represents reversible error which entitles the Petitioner to a new trial.

III. CONCLUSION

The Circuit Court's failure to properly instruct the jury on how it should weigh the substantial evidence presented by Beacon on profits lost by Beacon incident to the subject condemnation requires that the Amended Judgment Order be set aside and the Order Denying Petitioner's Motion for New Trial and Respondent's Motion to Enforce Judgment be reversed, and that DOH be awarded a new trial. Further, the Circuit Court's exclusion of Tom Gray's critical expert opinions offered by the Petitioner constitutes reversible error. These issues, operating jointly and separately, entitle DOH to a new trial.

Respectfully submitted,
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CERTIFICATE OF SERVICE

The undersigned counsel for the Petitioner hereby certifies that she did serve a true copy of the attached Petitioner's Reply Brief and Certification for Second Supplemental Appendix Record (Vol. II) on this the 11th day of August, 2014 by U.S. Mail, to all parties at the following addresses:

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AMENDED CERTIFICATE OF SERVICE

The undersigned counsel for the Petitioner hereby certifies that she did serve a true copy of the attached Petitioner's Reply Brief and Certification for Second Supplemental Appendix Record (Vol.11) on this the 11th day of August, 2014 by U.S. Mail, to all parties at the following addresses:

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