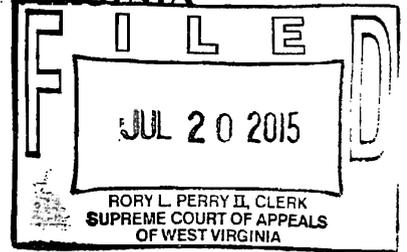


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 15-0342



LORETTA LYNN GOMEZ,
Petitioner,

v.

KANAWHA COUNTY COMMISSION,
Respondent

Appeal from a final order of
The Circuit Court of Kanawha County
(13-P-327)

PETITIONER'S BRIEF

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ASSIGNMENTS OF ERROR

- I. THE CIRCUIT COURT ERRED IN THE DENYING RESPONDENT'S RENEWED MOTION TO DISMISS BECAUSE THERE IS NO EVIDENCE OF PUBLIC USE.
- II. THE CIRCUIT COURT ERRED IN FINDING THE PROPOSED TAKING TO BE AN APPROPRIATE PUBLIC USE.
- III. THE CIRCUIT COURT ERRED IN DENYING RESPONDENT'S REQUEST TO PRESENT EVIDENCE ON THE DUMP FEES GARNERED BY THE OTHER 2/3 OF THE SUBJECT PROPERTY IN ESTABLISHING FAIR MARKET VALUE.
- IV. THE CIRCUIT COURT ERRED BY STRIKING THE RESPONDENT'S PLEADINGS BECAUSE OF HER INABILITY TO ATTEND HER DEPOSITION.
- V. THE CIRCUIT COURT ERRED BY REFUSING TO ALLOW RESPONDENT'S EXPERT SURVEYOR AND APPRAISER ACCESS TO THE COMPLETED PROJECT SO THEY COULD PREPARE FINAL REPORTS AND THEN STRIKING THEIR TESTIMONY BECAUSE THEY COULD NOT SUBMIT FINAL REPORTS.
- VI. THE CIRCUIT COURT ERRED IN TAKING JUDICIAL NOTICE OF THE LAND COMMISSIONER'S DECISION.
- VII. THE CIRCUIT COURT ERRED IN GRANTING PETITIONER'S MOTION FOR SUMMARY JUDGMENT.

STATEMENT OF THE CASE

This is a condemnation action by the Kanawha County Commission on behalf of the Central West Virginia Regional Airport Authority.

The Airport Authority (henceforth referred to as Yeager) was required by the F.A.A. to remove a section of hill top in the Coal Branch Twilight Drive area of the City of Charleston so that planes could take off from run way five (5) of Yeager and not have to navigate the hill top. The project is referred to as the "Runway Five Obstruction Removal Project."

The property sought to be condemned by the County is NOT part of the project, nor is the property within the Edge of the Runway 5 approach line (A.R. 302 & 310).

The history of the subject property is as follows, Mr. William McClellan Nutter and his wife acquired the property in 1985. They lived on the property at the end of Twilight Drive and raised their children there. Mr. Nutter died on March 25, 2009, intestate, leaving the property to three (3) of his children William Watson Nutter, Charles Curtis Nutter, and Loretta Lynn Gomez. Mr. Nutter is buried in the family cemetery located on the property.

During the years of the Nutter's residence on the farm, the neighboring property was developed into a business park known as NORTHGATE. The developers of NORTHGATE were interested in purchasing the Nutter farm but it was Mr. Nutter's home and he was not interested in selling. Upon Mr. Nutter's passing, the developers of NORTHGATE contacted the Nutter children and offered to purchase their interest in the farm. Option agreements were offered to each of the Nutter children and on November 13, 2012, the two Nutter sons William Watson Nutter and Charles Curtis Nutter agreed

to sell their interest to COROTOMAN, INC., a company owned by JOHN WELLFORD, the developer of Northgate. Mrs. Gomez however, did not agree to the option offered for her interest in the farm from COROTOMAN, INC.

MR. WELLFORD owned most of the property surrounding the Nutter farm though access was still available through Twilight Drive to the Nutter farm and the family cemetery. Now in control of 2/3 of the Nutter farm, Mr. Wellford, in the name of the brothers, files a partition suit to partition the undivided 1/3 interests of the Nutter children (A.R. 974-995). Meanwhile, the project for the Runway 5 Obstruction Removal is moving forward. The project will involve the removal of 1,123 million cubic yards of dirt and rock from the hill top.

In June of 2013 L. R. KIMBALL, the architect and engineer for the project, issues the bid package and mapping requirements to interested contractors to bid on the project (A. R. 299-334). On Map AP-03 titled "IMPORTANT CONTRACTOR NOTES" (A. R. 301) it is required that: "The contractor is responsible to waste the earth material and to work out any agreement with a property owner to allow for the receipt of the waste material."

In the Pre-Bid Meeting minutes from July 3, 2013, (A. R. 335-353) there is a requirement that the waste site be "designated and developed by the contractor." In the "Permitting Issues" section of the document, it is noted that, "the site is permitted for earth work only and not for fill placement. Once the waste site is identified and designated by the contractor (hired engineer) to accept fill, the parcel can be added to the airport's permit" (A. R. 346).

In the question and answer section of the Pre-bid meeting held on July 3, 2013,

there is further discussion of the waste area as follows:

“Question 24: Can we modify the existing NPDES Permit to include the Army Corps Permit? Can we get core approval with NPDES Permit?”

Response 24: All questions involving the Army Corp Permit with the Wellford Property Waste Area is the Contractor’s responsibility to find the answer since this is dependent on which area the contractor chooses to use as a waste area.

Mr. John Wellford was in attendance at the meeting and provided an update on his property being used as a waste area. However, since the waste area is the contractor’s responsibility, we did not include any information on their discussion.” (A. R. 352)

On July 16, 2013, “Addendum No. 2” e-mail from Frank Dilareto to all bidders, in the Plan holder’s Questions section:

“Q7. We have not received any waste area information from Mr. John Wellford. Can his contact information be provided?”

A7. A representative of Mr. John Wellford sent an e-mail to all attendees of the Pre-Bid meeting on July 10, 2013, of the waste area.

Q12. The Wellford Property US Army Corps of Engineers (Corps) permit was discussed at the pre-bid meeting. Sheet AP-17 Note #11 indicates construction contract time will not begin until the NPDES modification is obtained. Will this apply or does this apply to the Wellford property corps permit?

A12. Yes, contract time will not be started until the Contractor provides all the necessary permits for his/her selected waste site.

Q15. Will the Contractor be required to pay prevailing wage while working on the Wellford waste area?

A15. First of all, Mr. Wellford’s property is a potential waste area, only. We are reviewing this matter. An answer will be provided under a future addendum.” (A. R. 358-359)

On July 19, 2013, Mr. Wellford supplies information to the bidders regarding the waste area which includes the Nutter farm. In the “Contractor’s Questions and Responses #1” from John Wellford:

Q10. What if any are the fees to be paid for the placement of fill in the waste areas? Yes, there will be a fee for placement of the fill. You will

receive the details of it before noon on Monday. (A. R. 388)

In a later e-mail from Christine Gutzweller, John Wellford's assistant, dated July 19, 2013 at 3:36 she writes to all bidders:

"I have attached the specs for the Fill Site and Access Road for the Yeager Airport Ridge Removal Project. The plan drawings will follow shortly." (A. R. 395)

Then there is forty-six (46) pages of specifications for the Access Road and Fill Area from Mr. Wellford to the bidders of this project. (A. R. 396-441)

On July 22, 2013, Mrs. Gutzweller sends the following e-mails to all bidders of the project:

At 11:33 a.m. "3.50/yard will be charged for fills." (A. R. 446)

At 11:35 a question is sent:

"Is this based on the cubic yardage paid by the Airport Authority or Cross Sections taken of the waste area?"

Answer: "It will be paid based on the cubic yardage paid by the Airport Authority." (A. R. 447)

At 2:05 p.m. the 3rd set of Contractor Questions and Responses:

Q: Does the contractor relocate only the portion of the structure that is log, or will contractor be required to move other structure?

A: Only the log portion of the structure has to be preserved and relocated.

Q: Is this based on cubic yardage paid by the Airport Authority or Cross Sections taken of waste area?

A: \$3.50/yard will be charged for fill. It will be paid on the cubic yardage paid by the Airport Authority.

Q: Will this be paid as we place the fill or all at a portion paid up front?

A: Deposit of \$500,00 is required. (A. R. 450)

The log structure refers to a log cabin that was located on the Nutter farm that in

Mrs. Gomez discussing the possible sale of her property as its use as a dump site she had request that structures be moved and preserved.

The cubic yardage for this job paid by the Airport Authority is 1,123,00 cubic yards as listed in item P.152-1A of the bid tabulations. (A. R. 461)

Therefore, the receipts for the dump fees at \$3.50/yard X 1,123,000 cubic yards would be \$3,930,500.88.

On the map dated 5-21-2013 by Heritage Technical Associates (A. R. 295) the “Permanent Storage Area” clearly includes a portion of the Nutter farm as being the property where the fill was to be placed.

On July 25, 2013, at 2:55 p.m. the Contract for the job was awarded to Central Contracting, their bid was \$13,245,310.00.

So what does all this contractor bidding information have to do with this Condemnation proceeding?

The petition in this matter was filed on June 14, 2013. The “take” Order was entered on March 12, 2014. (A.R 1, 36-37)

It is abundantly clear from the bidding documents and communication between John Wellford and the contractors that the dump site was a private transaction and that the successful bidder had to “work out any agreement with a property owner to allow for receipt of the waste material.” (A. R. 301)

There is never a mention in the bidding documents or maps (A. R. 286-798) that the Kanawha County Commission, Airport Authority, or any other governmental body is going to provide a dump site through eminent domain, to the contrary these documents clearly establish that there is nearly a private, 4 million dollar fee connected

to the dumping of the material.

The respondents were never provided the maps or bidding documents, (A. R. 335, 798), by the Petitioner. Not until December of 2014 did counsel obtain these documents through an un-involved third-party contractor that had received the documents but did not bid on the project. This was the basis for Respondent's Renewed Motion to Dismiss (A. R. 273-798).

This, despite Respondent's open court request in the September 12, 2013, Status Conference before the Court (Transcript of A. R. 1008-1043).

In open Court, on the record, a request was made by Respondent's Counsel for a map showing the take (Page 28 lines 4-5) (A. R. 1008-1043).

In response to this request, there was an assurance, "-and we'll give Shannon everything we can and possible have to provide." (Transcript Page 31 Lines 11-12) (A. R. 1008-1043).

The Respondents were then provided four (4) 8 1/2 X 11 copies of topographical maps (A. R. 288-291) that show the airport/coal branch area of the City of Charleston with absolutely no representation or connection to the subject property.

We now know that the bidding information and all the maps (A. R. 292-334) were available in June of 2013, and existed of more than forty (40) 24"X36" engineering maps. These were never provided by the Petitioner.

Perhaps because they clearly show the waste site for this project was a private matter, and was not being condemned and offered to the contractors.

Further, Mrs. Gomez at the Status Conference offered her 1/3 interest in the subject property to be used as a dump site (Transcript Page 28 lines 15-16) (A. R. 1008-

1043).

The County would not allow Mrs. Gomez to participate as a 1/3 owner in the negotiations with the contractors and John Wellford to dump on the Nutter farm.

At all times throughout these proceedings, she was willing to offer her undivided 1/3 interest to be dumped on, she only wanted to have the same treatment as the other undivided 2/3 interest in the property was receiving.

The County sought to condemn only Mrs. Gomez's 1/3 interest and chose to leave Mr. Wellford's 2/3 interest alone. Not until the Petitioner's objection in the November 13, 2013, hearing (A.R. 1234-1293). To the taking of only 1/3 interest did the Court require the County to purchase the other 2/3.

The Court's Order of December 12, 2013 (A.R. 32-35) requires the County to obtain the other 2/3 interest before taking Mrs. Gomez's 1/3.

The Court also found at the hearing that the taking of this property for the temporary use as a fill site was for an appropriate public use, even though the owner had agreed to letting it be used as a fill site and that there was no evidence beyond the representation of counsel (A.R. 1258).

On November 15, 2013, H&L, LLC (a company owned by Mr. Wellford) acquired the 2/3 interest of the two Nutter brothers, and paid \$58,333.33 to each brother (A.R. 982-987).

Thereafter, on January 28, 2014, H&L, LLC transferred the property to Corotoman, Inc. (a company owned by John Wellford).

Thereafter, on February 26, 2014, Corotoman Inc. transferred the subject property to THE COUNTY OF KANAWHA, WEST VIRGINIA.

The Respondent Mrs. Gomez sought to establish through her appraisal a value of the property which included utilizing the income capitalization approach of appraising real estate. As such the respondent appraiser wanted to obtain the final yardage amounts, prior to authoring a final report, to avoid any question of speculation.

The Respondent asked for an extension of the discovery cut-off and to inspect the property after completion of the project to perform surveying calculations (A.R. 218-221 and 222-226). The Court denied these motions and struck Respondents experts. The Court then struck Mrs. Gomez's pleadings because she could not attend her deposition. The Court then took judicial notice of the Land Commissioner's decision (A.R. 874-879).

The Respondent also filed a Renewed Motion to Dismiss based on newly obtained evidence that the Petitioner had not discovered despite their assertions "they would give Respondent everything they possibly had" (A.R. 273-798). The Court denied this motion along with the above-noted rulings in its Order entered January 9, 2015 (A.R. 874-877).

Thereafter, at a pre-trial conference held on February 13, 2015, the Court granted the Petitioner's Motion for Summary Judgment (A.R. 1424-1431) by Order entered March 12, 2015 (A.R. 968-970).

Now with the benefit of hind sight, we know the project is complete, the planes are flying out of Yeager Airport, the Nutter farm has been torn down and filled in, there is no public use of the property being made, and there is no access to the family cemetery.

Mrs. Gomez has been offered \$33,335.00 for her undivided 1/3 interest and not been able to present evidence of the nearly four (4) million dollars the other 2/3 interest

has garnered.

It is from these rulings that Mrs. Gomez brings this appeal.

SUMMARY OF ARGUMENT

- I. The Nutter farm condemnation was not for an appropriate public use. There is no evidence presented by the Petitioners to establish the property as being a part of a public project. The only direct evidence is that the property is not within the boundary of the public project and the property was offered by private owner to private contractors in a private transaction to be used as a dump site and now that the dumping is completed, there is no public use,
- II. The question of whether or not a proposed take is for an appropriate public use should be presented to a jury for a factual determination,
- III. The Respondent should be allowed to present evidence of the highest and best use of a property, not limited historical use, but in accordance with future use principles established in the Berwind Land Co. decision and the ability to use to income capitalization approach in their appraisals,
- IV. It is an abuse of discretion for a Circuit Court to strike the pleadings of a Respondent in a condemnation proceeding because of the Respondent's inability to attend a deposition when good cause has been shown as to why the Respondent was not able to attend, and
- V. It is an abuse of discretion for a Circuit Court to deny Respondents expert surveyor and appraiser access to the completed project so they can establish data to complete their final reports and then to strike the experts testimony because they were not able to submit final reports.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Because of the Constitutional issues presented in the government's taking of private property and the requirements of public use associated with their powers, the Respondent below Petitioner herein believes this case is an appropriate case for a Rule 20 Oral Argument.

ARGUMENT

I. THE CIRCUIT COURT ERRED IN THE DENYING RESPONDENT'S RENEWED MOTION TO DISMISS BECAUSE THERE IS NO EVIDENCE OF PUBLIC USE.

The Petition in this case states in paragraph 1 "1. The Kanawha County Commission is authorized to exercise the power of eminent domain for improvements for public use. (emphasis added) See W.V. Code § 54-2-1 (Appendix 01).

In paragraph 9 of the Petition, it states, "9. The purpose of this suit is to acquire fee simple in Respondent Loretta Lynn Gomez's 1/3 undivided interest in the subject property for the public purpose of improving, maintain, and operating Yeager Airport, a regional airport located in Charleston, West Virginia, specifically in conjunction with the above mentioned Runway 5 Approach Ground Obstruction and Removal Project.(A.R. 2-3).

Paragraph 11 alleges that the County had attempted in good faith to purchase the property from Mrs. Gomez (A.R. 03). The County never attempted to purchase the property, John Wellford, a private individual and the owner of Northgate Business Park had tried to purchase the property from Mrs. Gomez and when she wouldn't sell to him the Petition was filed.

This petition was to take an undivided 1/3 interest and the county sought to allow the other undivided 2/3 interest to remain privately held. Not until after the Court in its Order of December 12, 2013, Ordered the County to acquire the other undivided 2/3 interest before they could condemn Mrs. Gomez's undivided 1/3 interest did they attempt to take the privately held 2/3 that Mr. Wellford acquired from Mrs. Gomez's

brothers.

The County in open Court on the record in a status conference held on September 12, 2013, stated “He can provide any objection he wants to on the legal taking or whatever, and it can go before this Court, once that’s a full hearing”. (Transcript Page 25 lines 21-24) (A.R. 1032).

“The issue he raised should be preserved in that hearing and the Court can rule at the appropriate time”. (Transcript Page 26 lines 18-20) (A.R. 1008-1043).

“... John Wellford fully understands in him closing his purchase option agreements from the two thirds, that Kanawha County Commission is the other 1/3 undivided interest”. (Transcript Page 23 lines 17-21) (A.R. 1030).

“They do plan to use it to fill”. (Transcript Page 24 line 9) (A.R. 1031).

“Wellford has this option on this two thirds, and Wellford said, “Fill on whatever or whatever you want to do. But you know if Mrs. Gomez feels that she would like to be a part of that or if we do that, there may be no need to condemn her property.” (Transcript Page 27 lines 2-8) (A.R. 1034).

To which the Respondent below replied “well if they just want it to dump she’ll let them dump. Its not a take”. (Transcript Page 28 lines 15-16) (A.R. 1035).

To which the county responded “Johnny Wellford permitted the fill on his two thirds and he exercised the option. The fact that Johnny Wellford was negotiating an arms length negotiation with her two brothers, which she refused to participate in, and Johnny Wellford got the two-thirds and was willing to do what we want to do is not my problem. Your client’s problem is that she in my opinion, she had not wanted to play”. (Transcript Page 30-31 lines 20-5) (A.R. 1037 - 1038).

So we now know on September 12, 2013, that the property is to be used as a dump site and that Mrs. Gomez has agreed to allowed her property to be used as a dump site along with the other 2/3. So two private parties agreeing to allow their property to be used in the way the County needs it to be used. Where's the need for the taking of Mrs. Gomez's 1/3 interest for the dump site?

Now we know that the public project at issue, the Runway 5 Obstruction Removal project specifically required the successful bidder to "work out any agreement with a property owner to allow for receipt of the waste material." (A.R. 03).

There is no evidence of public use in this case, to the contrary the assertion that the property will be taken to be used as a dump site is in direct contradiction with the contract.

What does it mean that Mrs. Gomez "didn't want to play"? Taken in the context of the statement that Mr. Wellford was buying the brothers 2/3 interest but that she [Mrs. Gomez] refused to participate in. Does "play" mean sell to Wellford or the County will take it?

Well Mrs. Gomez offered her property to be dumped on she was willing to "play" she just wanted to play the same \$3.50/yard game that they other private owner was allowed to play.

Both the Fifth Amendment to the United States Constitution and Article III Section 9 of the West Virginia Constitution require that the element of public use be established as a pre-requisite to the governments use of its eminent domain power.

The facts of this case as established by the maps and the construction requirements clearly establish the waste site for this project to be "worked out" between

private parties and no where is there a mention of a government provided waste site.

The Circuit Court therefore Erred in denying the Petitioner/Respondent below's Renewed Motion to Dismiss.

II. THE CIRCUIT COURT ERRED IN FINDING THE PROPOSED TAKING TO BE AN APPROPRIATE PUBLIC USE.

Mrs. Gomez timely filed her request for a jury trial on the issues of whether the attempted taking herein is for an appropriate public purpose or to benefit a private entity and the appropriate measure of damages incurred by the Respondent if the take is appropriate (A.R. 19).

The Circuit Court in its Order of December 12, 2013, Granted the Request for jury trial in part to the extent the Court will schedule a jury trial on the subject fair market value of the subject real estate at the time of taking as well as any rights of way taken by the Petitioner.

The Court found on the issue of appropriate public use that the purpose stated in the petition was an appropriate public use (A.R. 32-35).

There is no evidence in the record, no one ever took the stand, no exhibit was ever offered by the Petitioner to establish that the taking of Mrs. Gomez's 1/3 undivided interest would satisfy any appropriate public use.

The County in open Court on the record in a status conference held on September 12, 2013, stated "He can provide any objection he wants to on the legal taking or whatever, and it can go before this Court, once that's a full hearing". (Transcript Page 25 lines 21-24) (A.R. 1032).

"The issue he raised should be preserved in that hearing and the Court can rule at

the appropriate time”. (Transcript Page 26 lines 18-20) (A.R. 1033).

The Court Erred in making this factual finding with no evidence to support the allegation that the dump site was for public use and in fact there was evidence to the contrary that the contract for the project required private parties to “work out” the dump site arrangements.

III. THE CIRCUIT COURT ERRED IN DENYING RESPONDENT’S REQUEST TO PRESENT EVIDENCE ON THE DUMP FEES GARNERED BY THE OTHER 2/3 OF THE SUBJECT PROPERTY IN ESTABLISHING FAIR MARKET VALUE.

The unrefuted evidence in this case is that prior to the filing of the Petition, June 14, 2013 (A.R. 01), the owner of the other 2/3 undivided interest was negotiating for the subject property to be used as a dump site and in June of 2013 established the price of \$3.50 per cubic yard of material that would be earned by the property for the material to be placed on it.

The Court entered its Order allowing the County to take the fee simple interest in the subject property on March 12, 2014 (A.R. 36-37).

On November 25, 2014, the Circuit Court ruled on the Petitioner’s Motion in Limine to limit the evidence that could be presented as to the future use of the property, and held “... the evidence of fair market value which will be permitted at trial is evidence of highest and best use at the time of the taking”, however future use evidence may not be offered to the jury. The Respondent will not be permitted to introduce evidence of increased value of the property as it relates to the purpose of the condemnation, i.e. the run way” (A.R. 38-41).

This ruling is in direct contradiction to this Court's ruling in West Virginia Department of Highways vs. Berwind Land Co., 167 W.Va. 726, 280 S.E. 2d 609 (1981).

The Court in Berwind Land Co. found that a condemnee is entitled to have his property valued at the highest and best use to which it can be put, and further held that, "The land owner is not limited to the use actually being made of the land at the time of the taking but is entitled to consideration of its value for any purpose for which it is then reasonably available in the immediate future. Id at 744.

The Berwind Court further noted that, "for purposes of determining the market value of property taken by eminent domain,

[a] consideration should be given to every element of value which ordinarily arises in negotiations between private persons with respect to the voluntary sale and purchase of land, the use made of the land at the time it is taken, its suitability for other uses, its adaptability for every useful purpose to which it may be devoted and the most advantageous uses to which it may be applied, citing Strouds Creek and Muddlety R. R. Co. v. Lee Harold 45 W.Va. 131, 45 S.E. 2d 719 (1947).

The subject property was "reasonably available", "in the immediate future" from the time of the taking to be used as a dump site and receive material at a rate of \$3.50 per cubic yard.

This evidence is a real use of the subject property for which private individuals in an arms length transaction negotiated the use for the land and the price to be paid for such use prior to its being taken..

The Court has recently addressed the issue of establishing damages in condemnation cases in the matter of West Virginia Department of Transportation,

Division of Highways vs. Western Pocahontas Properties, LP, et al., No. 14-0381 Filed June 17, 2015.

The Court in this case, citing Norfolk & W Ry Co vs Devis 58 W.Va. 620, 52 S.E. 724 (1906), noted “Every element of value which would be taken into consideration between private parties in a sale of property should be considered in arriving at a just compensation for land proposed to be taken” Id.

“When the tract of real estate itself generates income such as through the rental of land, rental of buildings upon the land, or the extraction of crops, timber or minerals that income may be considered in a condemnation action through an appraisers use of the income capitalization approach to valuing real estate”, Western Pocahontas at page 20.

“Income from the real estate itself (emphasis added) derives from qualities inherent only to that tract of real estate...” Id at page 20.

“An appraiser may, in part rely upon future (emphasis added) income stream from the real estate to calculate a fair market value through use of the “income capitalization approach” Id at page 20.

“The income approach is typically used where the condemned real estate itself (emphasis added) generates future income, ‘which can be capitalized to give some fair indication of what an investor would pay for the privilege of receiving that income over some foreseeable period of time’”. Id at page 23.

Based on these principles of valuation Mrs. Gomez should not be limited in her ability to present evidence on the revenue that the real property itself (emphasis added) could have created.

IV. THE CIRCUIT COURT ERRED BY STRIKING THE RESPONDENT'S PLEADINGS BECAUSE OF HER INABILITY TO ATTEND HER DEPOSITION.

The Petitioner filed a Motion to Strike Loretta Lynn Gomez's Claims (A.R. 152-217). A hearing was held on December 22, 2014, the transcript of that hearing is at A.R. 1350-1423.

On page 1359 and 1360 the issue regarding Mrs. Gomez deposition is discussed. Our response to the Motion is at A.R. 808 and 809.

Mrs. Gomez had to work over at Highland Hospital on the midnight shift before her deposition and missed the scheduled time for her deposition as a result of this unforeseen conflict. I was not able to contact Mrs. Gomez at the time to determine why she couldn't be at the deposition. Counsel did appear at the deposition and did express to opposing counsel his willingness to reschedule the deposition and to pay for the court reporter's appearance fee.

There were no findings of fact made, there was no motion to compel or assessment of the deposition costs.

The Court simply says, "I'm going to grant the request to strike the claims". (Transcript Page 67 Line 8) (A.R. 1417)

This Court has addressed the issue of a party not attending a noticed deposition in the case of CATTRELL COMPANIES, INC. VS. CARLTON INC., 217 W.Va. 1, 614 S.E.2d 1 (2005).

In CATTRELL this Court established the application of Rule 37(d) sanctions for

failure to attend a deposition, and held that before a circuit court may impose the sanction of dismissal or default judgment under Rule 37 (d) of the West Virginia Rules of Civil Procedure for a party's failure to attend a deposition, the Court must first make a finding that party's failure was due to willfulness or bad faith. Thereafter, the Court must weigh the following factors to determine if default judgment or dismissal is an appropriate sanction; (1) the degree of actual prejudice to the other party (2) the effectiveness of less drastic sanctions and (3) any other factor that is relevant under the circumstances presented. *Id* at 14 W.Va.

In the present case Mrs. Gomez met with counsel the evening before her deposition was scheduled and had every intention of being present the next morning. Due to no fault of her own, she was not able to leave the hospital where she worked in time to attend. Counsel did attend and offer to re-schedule and pay the Court reporter's fee.

There is no willfulness or bad faith on the part of Mrs. Gomez, there is less than desirable communication by her of the unexpected events she encountered, but not willfulness or bad faith.

Her failure to attend did not prejudice the County's case, her property had been taken and the subject project was nearly complete at the time the deposition was scheduled. Counsel offered to re-schedule the deposition, there was no attempt to re-schedule just a motion to strike her pleadings.

Based on the foregoing Mrs. Gomez believes the Court abused its discretion in striking her pleadings in this case.

V. THE CIRCUIT COURT ERRED BY REFUSING TO ALLOW

RESPONDENT'S EXPERT SURVEYOR AND APPRAISER ACCESS TO THE COMPLETED PROJECT SO THEY COULD PREPARE FINAL REPORTS AND THEN STRIKING THEIR TESTIMONY BECAUSE THEY COULD NOT SUBMIT FINAL REPORTS.

The Respondent hired Converse Surveying to prepare a survey of the Nutter Farm. The Respondent also hired Dean Dawson, a certified real estate appraiser to prepare an appraisal of the Nutter Farm. Each of these experts has completed their preliminary work and were ready to prepare their final reports. Mr. Dawson's appraisal was to be based in part on the income capitalization approach, which included the property's earning power as a dump site.

To prepare his final report it was necessary to have Mr. Converse perform cross section surveys to determine the number of cubic yards of material that had been placed on the property. It was most accurate to perform this survey after the completion of the placement of the dirt, this also would minimize any speculation in the report.

Mrs. Gomez requested that discovery cut offs set forth in the Court's Scheduling Order be extended so that the above experts could do the calculations necessary to prepare their final reports (A.R. 218-221).

Mrs. Gomez filed a Motion to allow the above named experts to Inspect the subject property (A.R. 222-226).

The Kanawha County Commission filed a Motion to quash the discovery request and Motion to Inspect Property (A.R. 237-241) , a Motion in Opposition to extend Discovery (A.R. 242-246) and a Motion to Strike Mrs. Gomez's experts (A.R. 152-217).

Mrs. Gomez filed her response to Motion to Quash and to Inspect Property (A.R.

802-804) and to the Motion to Strike Experts (A.R. 805-807).

These Motions from the Respondent and the Motions to Strike Mrs. Gomez's experts are not the result of intentional non-compliance with the Court's Scheduling Order, to the contrary under the theory of damages and valuation of the subject real estate, the Respondent's experts in order to give more definite numbers that were factually supported felt it necessary to obtain final cross section surveys.

The request to inspect the property was denied, there was no finding as to why it was denied, the only explanation from the Court was, "I understand its post take and I am going to deny that request [to inspect the property]. I am going to grant the request to strike the claims and the expert appraiser (A.R. 1417, line 6-9).

Because the Court and the Petitioner's refusal to allow any evidence of the income capitalization approach earning power of the property itself, in what we believe is in opposition to the Berwind Land Co. And Western Pocahontas Properties decisions of this Court (discussed infra in Assignment of Error III).

The only basis for the Court's denial of Respondents Motion to Extend discovery and Motion to Inspect Property, and the granting of the Petitioner's Motion to Strike the Expert Appraiser, was that the evidence sought to be discover was post take (A.R. 1417, line 6-9).

When the scheduling Order was entered Respondent's Counsel informed the Court and opposing Counsel that under Respondent's theory of damages (an appraisal that includes the income capitalization approach), final reports from our appraisal expert could not be provided until the surveying was completed (A.R. 1416, line 17-20).

Mrs. Gomez did provide the preliminary reports of Mr. Dawson (A.R. 158).

However a final report could not be done without the final site visit and survey.

The Court's granting of the sanction of striking our appraisal expert in a case where one of the primary issues is to determine a value for the property being taken was a significant blow to the Respondent's case.

This based solely on the fact that the Respondent's appraiser was attempting to use all 3 of the general approaches to establishing a fair market value for the subject real estate, including the Income Capitalization Approach. West Virginia Department of Transportation, Division of Highways vs. Western Pochahontas Properties, LP, et al, No. 14-0381 Filed June 17, 2015 (at page 21).

"The income approach provides an indication of current value, "by converting the future (emphasis added) cash flow to a single current capital value". Id at 42.

"And the income approach is typically used where the condemned real estate itself (emphasis added) generates future income, "which can be capitalized to give some fair indication of what an investor would pay for the privilege of receiving that income over some period of time". Id at page 23.

"In the appraisal of complex property consisting of different qualities of land and numerous improvements all three [approaches] can be used simultaneously as cross checks upon the other". Id at 23, citing W.Va. Department of Highways vs. Sickles, 161 W.Va. 411, 242 S.E. 2d 568 (1978).

The Respondent should have been allowed to present the evidence of all three (3) appraisal approaches.

The Petitioner's Motion is brought pursuant to Rule 16-F for Sanctions.

The Court in addressing the awarding of sanctions pursuant to Rule 16-F applies

an abuse of discretion standard. Sheely vs. Pinion, 200 W.Va. 472 (1997).

The Circuit Court gave no prior warning of the sanction of striking Mrs. Gomez's experts even with Counsel's notice at the scheduling conference that Mrs. Gomez would need to have the final survey in order to have the final appraisal report.

"The absence of a prior warning that the trial court was considering sanctions may be a pertinent factor in evaluating a sanction, especially if the conduct in question did not violate a clearly pre-existing requirement", Bartles vs. Hinkle 196 W.Va. at 393, 472 S.E.2d 839 (1996).

"In all most any conceivable set of circumstances a Circuit Court's failure to... warn of an impending ultimate sanction.... would amount to reversible error" Sheely vs. Pinion, 200 W.Va. 472, 490 S.E.2d 291 (1997).

Once a non-compliance with a discovery Order is established the burden shifts to the non-compliant party to demonstrate that either that it was unable to comply or that special circumstances exist which make the imposition of sanctions unjust. Bartles vs. Hinkle 196 W.Va. 393 at 390, 472 S.E.2d 827 (1996).

"The due process clause of Section 10 of Article III of the West Virginia Constitution requires that there exist a relationship between the sanctioned parties misconduct and the matters in controversy such that the transgression threatens to interfere with the rightful decision of the case," Id at 391.

The Respondent's at the scheduling conference (held in the Court's secretary's office and not on the record) informed the Court and opposing counsel of the need to perform final survey work in Order to have the final appraisal report. The Petitioner's never told the Respondent the project was completed (A.R. 1416, line 21-24).

The Respondent's asked for an extension of the deadline until work was completed and the final surveys could be performed. Motion to Extend Discovery Cut off (A.R. 218-221); Motion to Inspect Property (A.R. 222-226).

The Respondent has asked for the right to perform final survey analysis of the property throughout the proceedings (A.R. 802)

The Respondent, as the "non-compliant" party to this motion has completely demonstrated that they could not comply with the production of a final appraisal report because the Petitioner's have stonewalled the request to inspect and have never complied with that request simply because they do not agree that any "post-use" evidence of the property can be considered, the Court has agreed with that position and because of that imposed the sanction of excluding Respondent's experts even though the existence of circumstances beyond Respondent's control have clearly been shown to be the cause for their inability to comply with the expert report requirement.

Respondent asserts that the Circuit Court abused its discretion in granting the sanction of excluding their expert appraiser.

VI. THE CIRCUIT COURT ERRED IN TAKING JUDICIAL NOTICE OF THE COMMISSIONER'S DECISION

The Petitioner filed a Motion to Seek Judicial Notice of Commissioner's Decision (A.R. 258-272). The Respondent filed there response to said motion (A.R. 799-801).

The Court ruled, "O.K., I will take judicial notice fo the commissioner's decision", (A.R. 1420, page 15-16).

The Commissioner's hearing is comprised of the same disagreements that followed this case back to Circuit Court and now to this Court, whether Mrs. Gomez is

allowed to present or rely upon any post take evidence in her utilization of the income capitalization approach of arriving at a value for the subject property. At the Petitioner's request, the Commissioner would not allow Respondent to present said testimony.

"Well I'm of the opinion that future value [use] is not the value of the property that the Land Commissioner's are going to be able to hear evidence on (Commissioner Shephard, A.R. 1063).

"Well, again, if she would have accepted our offers, we wouldn't have this conversation. She won't accept the offers, because Mr. Bland and she believe they can convince someone down the line that she's entitled to future-use money. This is what it's all about. We offered her more than the appraised value of - -" (A.R. 1083).

"And that any testimony with regard to the future value of the property will not be proper" (A.R. 1091, page 13-15).

This Court has addressed the preliminary nature of a Commissioner's Report in Eminent Domain proceedings, "the appointment and rendition of a report of the commissioner's in a proceeding in eminent domain is preliminary in character and is subject to correcting upon exceptions to such report and the demand of a trial by jury of freeholders as required by Article III, Section 9 of the Constitution of this State. Cross vs. Watkins, 90 S.E.2d 193 (1955).

Rule 201 of the West Virginia Rules of Evidence govern the issue of Judicial Notice of Adjudicative Facts. "201 (b) Kinds of Facts That May Be Judicially Noticed. The Court may judicially notice a fact that is not subject to reasonable dispute because it:

- (1) is generally known within the trial court's territorial jurisdiction or;

(2) can be accurately and readily determined from sources who's accuracy cannot reasonably be questioned.

The decision of the land commissioner doesn't fit any of the requirements of Rule 201 (b) as the value of this land is not generally known, and the accuracy of the report as to value can be reasonably questioned.

Thus the right to a jury trial pursuant to West Virginia Code § 54-2-10.

Respondent's believe the Circuit Court erred in taking judicial notice of the Commissioner's decision.

VII. THE CIRCUIT COURT ERRED IN GRANTING PETITIONER'S MOTION FOR SUMMARY JUDGMENT

The Petitioner filed a Motion for Summary Judgment (A.R. 811-813), with Memorandum in Support thereof (A.R. 818-851). Respondent filed a Response to the Motion (A.R. 815-816).

The issues for the jury are, whether there is a legitimate public use to justify the taking of this property and if so what the value of the property taken is.

The evidence on these issues at the Summary Judgement stage should be viewed in the light most favorable to the non-moving party Honlon vs. Chambers, 195, W.Va. 99, 464 S.E.2d 741 (1995).

A Motion for Summary Judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law Aetra Casualty & Security Co. vs. Federal Insurance Co. Of New York, 148 W.Va. 160, 133 S.E. 2d 770 (1963).

The Petitioner's evidence of value is the Commissioner's award of \$33,335.00.

There are other pieces of evidence in the record of the case that establish other values for the property that Mrs. Gomez could have testified to at the trial of this matter based upon her own personal knowledge of offers made to her to purchase the property.

Further, the land owner who's property is taken by eminent domain may give their opinion as to the value of the property taken from them. She also could have testified to her personal knowledge as to the amount of payment made to her brothers.

This testimony alone, without consideration of the testimony of dump fees and the expert appraisal opinion, which was discussed above, would create a genuine issue of material fact for a jury to consider as to the value of the real estate taken.

When the testimony and facts set forth herein are applied to the Rule 56 standard and considered in the light most favorable to the Petitioner there are genuine issues of material fact raised as to the value of the property taken and therefore the Petitioners herein believes the Circuit Court erred in granting the Defendants Motion for Summary Judgement.

CONCLUSION

Based on the foregoing argument and legal authority the Petitioner herein believes her property was improperly taken and that her ability to show her evidence of the resulting damages was virtually eliminated by the Circuit Court rulings and therefore, asks this Honorable Court to Reverse this case for a full jury trial where all the relevant evidence may be presented.

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of July, 2015, true and accurate copies of the foregoing **Petitioner's Brief** were delivered via hand-delivery to counsel for all other parties to this appeal as follows:

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