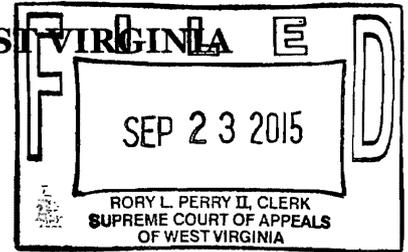


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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 REPLY BRIEF

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TABLE OF CONTENTS

	<u>PAGE</u>
ASSIGNMENTS OF ERROR	1
STATEMENT OF FACTS AND PROCEDURAL HISTORY	1-8
SUMMARY OF ARGUMENT	8
STATEMENT REGARDING ORAL ARGUMENT AND DECISION	9
ARGUMENT	9-15
A. THE CIRCUIT COURT’S DENIAL OF GOMEZ’S RULE 60b MOTION TO DISMISS	10-11
B. APPROPRIATE PUBLIC USE	11-12
C. CIRCUIT COURT’S DENIAL OF GOMEZ’S REQUEST TO PRESENT EVIDENCE OF DUMP FEES	12-13
D. STRIKING OF GOMEZ’S PLEADINGS	13
E. CIRCUIT COURT’S STRIKING OF EXPERTS AND DENIAL OF MOTION TO INSPECT	13-14
F. JUDICIAL NOTICE	14
G. SUMMARY JUDGEMENT	14-15
CONCLUSION	15

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>Bartles vs. Hinkle</u> 196 W.Va. 381, 472 S.E.2d 827 (1996).....	13
<u>Cattrell v. Carlton</u> 614S.E.2d.1, 14 (W.Va. 2005).....	12-13
<u>W. Va. Department of Highways v. Berwind Land Company,</u> W.Va. 726, 732, 280 S.E.2d 609, 613 (1981).....	4
<u>West Virginia Department of Transportation, Division of</u> <u>Highways vs. Western Pocahontas Properties, LP,</u> 2015 W. Va. LEXIS 810 (W.Va. June 17, 2015).....	12
<u>Rules and Regulations</u>	<u>Page</u>
Rule 60b of the W. V. Rules of Civil Procedure.....	6

PETITIONER'S REPLY TO RESPONDENT'S BRIEF

Now, comes the Petitioner, Loretta Lynn Gomez, by counsel of record, Shannon M. Bland, of Bland & Bland Attorneys at Law, L.C., and in reply to the Respondent's, Kanawha County Commission brief upon this appeal, hereby makes and filed his response thereto for this Honorable Court's consideration.

I. ASSIGNMENTS OF ERROR

The Petitioner has not restated his assignments of error in this portion of his reply brief, and the argument section of this reply will loosely track the Respondent's Brief.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

The facts are unrefuted in this case that the Kanawha County Commission chose to allow the private owner of an undivided two-thirds interest in the subject property to retain that ownership and pursue lucrative private uses for the subject property, which included the one-third interest of the Petitioner herein.

The statement in the Respondent's Brief on page 2, "KCC filed its petition because it was necessary for it to acquire fee simple interest in the subject property" is simply incorrect. If it were necessary, they would have condemned the whole parcel.

There is no evidence in this case that the Kanawha County Commission ever tried to purchase, through negotiation or written offer, the Petitioner's one-third interest. To the contrary the evidence is that the private owner of the other two-thirds undivided interest was attempting to purchase Petitioner's property through a private transaction and when she would not sell to him for \$58,333.33, the Kanawha County Commission sought to foreclose on her one-third interest and continued to allow the private owner to

negotiate private uses for the property. The Petitioner, however had been approached by contractors that had told her of the private use of the property and she believed it to be worth much more than the \$58,333.33 the other owner had offered.

The Kanawha County Commission did not move to purchase the other two-thirds interest until the Court in its December 12, 2013, Order found that they could not take the one-third interest unless they acquired the other two-thirds, not until this Order did the Kanawha County Commission move in any way to acquire the interest of the other two-thirds.

Once Mrs. Gomez became aware that in fact the property was to be used a dump site and that it was not part of the runway project, she agreed to the use and simply asked for the same value that the other two-thirds interest in the property was going to garner.

The Kanawha County Commission on several occasions in the status conference of August 12, 2013, (A. R. 1008 to 10043) says that if Mrs. Gomez is willing to allow dumping on her property then they do not need to condemn it (A.R. 1022, line 11-19; 1027, line 13-18; 1029, line 4-7 and 15-18; 1031, line 9-13; and 1034, line 5-8).

The Kanawha County Commission admits their lack of necessity to obtain fee simple interest in the property on a permanent basis by allowing the other two-thirds to initially remain in private ownership (A.R. 1027, line 14-17; 1036 and 1037, line 22-3; 1038, line 16-19; and 1081, line 8-17).

Further in arguing against the future use in the Commissioner's Hearing, counsel for the Kanawha County Commission says, "Wellford could do anything with that property, absent the Kanawha County Commission's condemnation suit in the future"

(A. R. 1082, line 15-17).

The Respondent's discuss the discovery requests in their brief and alledge that no discovery was conducted. All we wanted was the maps showing the take. In the September 12 hearing we asked for the maps (A.R. 1013, line 10-11; 1027, line 20-21; and 1035, line 4-5).

To which they respond that they have provided me with all those maps last week (A.R. 1026, line 15-16) and that "we'll give Shannon everything we can and possibly have to provide" (A.R. 1038, line 11-13).

We received copies of 3 topo maps (A. R. 970, 971, 972). None of which show the boundaries of the take.

The Maps (A. R. 292-334) were what they had to provide and did not.

Map number A-P12 (A. R. 310) clearly shows the "Edge of the runway 5 approach". The same map clearly shows the subject property is not within the take for the airport.

The Kanawha County Commission represents to the Court that the subject property is within the "trapezoid area" of the removal project (A.R. 1031, line 18-23). Map A-P12 (A.R. 310) shows that that statement is not accurate.

However, contrary to the Kanawha County Commission representations in open court, they d not provide the requested maps showing the take when clearly when clearly these maps were available from their client.

On October 15, 2013, the hearing before the land commissions was held. Mrs. Gomez renewed her objection to the appropriateness of the taking and that it was not for proper public use (A. R. 1049-1050). Both the hearing commissioner and counsel for

Kanawha County Commission opined that the appropriateness of the take should not be heard at that proceeding (A. R. 1065-1066).

The hearing then moved to the issue of the admissibility of evidence as to the future use of the subject property. The commissioner would not allow any evidence to be presented regarding the future use of the subject property (A. R. 1068).

We then argued that pursuant to the W. Va. Department of Highways vs. Berwind Land Company, 167 W.Va. 726, 732, 280 S.E.2d 609, 613 (1981), that evidence of future use in the immediate future of a non-speculative nature is appropriate and should be permitted (A. R. 1069).

Counsel for the Kanawha County Commission argued future prospective uses are speculative and they're not to be considered in determining what fair market value is at the time of the taking (A. R. 1069).

After much argument on the issue, the Commissioner ruled without hearing the evidence and that he would not allow evidence on the future use of the property (A. R. 1089 - 1091). The Commissioner found that the value of future use was too speculative and of a conjectural nature.

Because the Petitioner's basis for its valuation was primarily the future use, this ruling, which we believe is in direct conflict with the Berwind Land Company Decision, in essence precluded the Petitioner from presenting any of their evidence at the Commissioner's Hearing.

On November 15, 2013, there was a Status Conference to set trial date and Petitioner's (Kanawha County Commission) Motion to Pay Money into the Court and for Immediate Possession (A.R. 1235).

At this hearing, counsel for the Kanawha County Commission asserts that Mrs. Gomez's objection to the appropriateness of the taking was a new issue (A.R. 1236).

We have objected to the appropriateness of the take from the time that we were told this was going to be a dump site. At the first hearing, we acknowledged that the building of a run way for an airport was an appropriate public use, but that a dump site that the property owner agreed to was not an appropriate public use.

At this point, they say "if he wanted to make that argument it should have been done at the first hearing" (A.R. 1237). We have argued this point throughout the proceedings.

There is much back-and-forth in this transcript and, as noted by the court reporter, there were technical difficulties with the transcripts (A. R. 1234). However, the Court's ruling in this hearing is that the Kanawha County Commission could not condemn the undivided one-third interest of Mrs. Gomez unless they acquired the other two-thirds interest (A. R. 1258).

The Court also partially granted the Petitioner (Mrs. Gomez's) request for a Jury trial on the issue of damages (A. R. 34-35).

The next item raised by the Kanawha County Commission is the discovery where they alledge Mrs. Gomez did no discovery. At this point Gomez had heard and seen the testimony of the Kanawha County Commissioner's appraisers and had been told they had been provided all of the maps regarding the project.

The Commissioner had ruled that the future use evidence proposed by Mrs. Gomez was too speculative and was conjecture. Therefore, to be more specific in their expert reports, Mrs. Gomez sought to use final calculations from the completed project

with dates of start and finish to satisfy requirements by the Berwind Land Company decision with more specificity. Mrs. Gomez asked for additional time to complete final expert reports because they had not been notified that the project was completed (A. R. 1302 - 1303).

Mrs. Gomez had previously filed her Disclosure of Expert Witnesses (A. R. 48 - 50) on July 16, 2014, the day required by the Court's scheduling Order (A. R. 10).

The Kanawha County Commission scheduled two depositions, Mrs. Gomez (A. R. 134-137) and Mr. Dawson (A. R. 10.).

The Kanawha County Commission cancelled Mr. Dawson's deposition, since he had not been able to prepare his final report because the final calculations from the completed project had not yet been performed.

Mrs. Gomez could not appear for her deposition because of employment conflicts. The Kanawha County Commission did not ask to reschedule or for the court reporters appearance fee, but moved to strike her pleadings instead.

Therefore, on October 2, 2014, the Court held a hearing on several motions (A.R. 1294). The Court addressed the issue of future use evidence in this hearing and ruled the evidence allowed to be presented would be the highest and best use at the time of the taking (A. R. 1345, line 2-7), the Court then further ruled, not after the condemnation, future use is not relevant (A. R. 1346, line 18-21). A ruling the Petitioner considers to be a direct violation of the Berwind Land Company decision.

Thereafter, on December 22, 2014, the Court held a hearing on several motions A. R. 1350). Most of this hearing is about the Renewed Motion to Dismiss by Mrs. Gomez pursuant to Rule 60b of the W. V. Rules of Civil Procedure (A. R. 273-798). The

Kanawha County Commission, in their Respondent's Brief, raise objections to the timeliness of this motion for the first time. Those arguments were not made at the hearing on the motion (A. R. 1350-1423). The Court in this hearing finds that the date of the take in this case was May 12, 2014 (A. R. 1407). The Order actually entered on March 12, 2014 (A. R. 36-37) based on the Court's finding that the Petitioner could not take Mrs. Gomez's one-third interest unless they took, or otherwise acquired, the other two-thirds interest (A. R. 1251). The Kanawha County Commission did not satisfy this requirement that they obtain the other two-thirds interest until the March 12, 2013, Order.

Therefore, any evidence of use of the property, or proposed use of the property, between private individuals or businesses should be admissible, and not excluded as post take evidence.

Mrs. Gomez seeks to present evidence of pre-take use and marketing of the property by the private owner of the other two-thirds interest in the same property with independent private contractors (A. R. 387-457). These private negotiations are documents from July 19, 2013, through July 23, 2013, (A. R. 387-457).

Mrs. Gomez's argument is that these pre-take uses and negotiations involving the property that occurred between private parties is relevant and proper to the valuation of the property.

The evidence in this record is that the private contractors were required to obtain a dump site from a private land owner (A. R. 301).

The next motion was Kanawha County Commission's Motion to Strike Experts because final reports were not completed. Mrs. Gomez had told the Court and counsel

from the entry of the Scheduling Order to inspect the property after completion to more specifically present their theory of highest and best use (A. R. 1416 and 1401). The Court then granted the motion of Kanawha County Commission to not allow the inspection (A. R. 1415), which dovetailed in with the motion to exclude experts because final reports were not completed because the project was not finished so that they could be done. The Court then granted Kanawha County Commission's Motion to Strike Mrs. Gomez's experts (A. R. 1417) and her claims.

Though not discovered at length in the transcript, the Kanawha County Commission's Motion to Strike Mrs. Gomez's Pleadings (A. R. 152-217) and the response (A. R. 808-810) are based on Mrs. Gomez not being able to attend her deposition because of a last minute scheduling conflict at her employer Highland Hospital. Mrs. Gomez worked the night shifts and when the next shift was not able to get there on time, she could not leave the hospital and missed her deposition. As a result, her pleadings were struck (A. R. 1417).

The Court also granted the Kanawha County Commission's Motion to Take Judicial Notice of the Commissioner's Hearing. The Court also denied the Renewed Motion to Dismiss of Mrs. Gomez and the Kanawha County Commission's Motion for Summary Judgement.

On February 13, 2015, a Pre-trial Conference was held and the Court granted the Kanawha County Commission's Renewed Motion for Summary Judgement (A. R. 1424-1431).

III. SUMMARY OF ARGUMENT

A. The KCC in their decision to only condemn Mrs. Gomez's 1/3 interest and leave

the remaining 2/3 of this subject property in the private ownership, as well as the other side of the valley fill and haul road area in the same private ownership, created an unusual and unique factual scenario where both privately owned property, and property they sought to condemn, was being treated differently as a result of the same project. Thereby creating a situation where one side of the valley fill is precluded from receiving the same benefit from the other side of the valley fill. The term is now wheelage instead of fill, but its is the exact same terms as the original private negotiation. Mrs. Gomez should not be precluded from presenting this evidence to establish the value to her side of the valley fill.

B. The subject property is not within the project, tis use is temporary, and the parties agreed to its use as a dump site. Therefore, there is no need to condemn the property.

C. The Court abused its discretion in striking Mrs. Gomez's pleadings and striking her experts and denying her motion to expand the time for discovery.

D. There are genuine issues of material fact to be presented to a Jury as to the value of the subject property and as such the Court's granting of Summary Judgement was not appropriate.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner submits that oral argument is necessary upon this appeal under Rule 20 of the Revised Rules of Appellate Procedure, within the Court's discretion. Petitioner prays that this matter be scheduled for Rule 20 oral argument upon this appeal.

V. ARGUMENT

A. THE CIRCUIT COURT'S DENIAL OF GOMEZ'S RULE 60b MOTION TO DISMISS

As is set forth above, the Kanawha County Commission objects to the timeliness of this motion for the first time in its brief to this Court.

The basis for the motion is the newly discovered evidence (A. R. 273-798) including maps that clearly establish the subject property not being a part of the runway project. This evidence was never provided by the Kanawha County Commission despite their representations that they would provide everything they had to Mrs. Gomez (A.R. 1038, line 11-13). The evidence was discovered through a third-party who bid on the subject project and still had the documents. The motion was filed within one week of obtaining the evidence.

The evidence clearly established that this was a private dump site and private offers and negotiations were being conducted regarding the value and use of the subject property. These activities and evidence were pre-take and should be admissible to be considered by the Jury.

The Kanawha County Commission relies continually on the theory that the dump fee that is clearly established in the private negotiations was changed to a wheelage fee; however, they produce no evidence to support their assertion.

The bid for this project was awarded on July 25, 2013 (A. R. 460). On July 22, 2013, private parties were negotiating values and uses for this property (A. R. 450).

The Kanawha County Commission filed its Petition to Condemn Gomez's one-third interest on June 13, 2013 (A. R. 1-4).

The Kanawha County Commission by electing to condemn a one-third interest

and leave the other privately held two-thirds in the hands of a private owner created a unique set of circumstances that distinguish this case from every case cited as authority in this matter. Had they moved to condemn the dump site, the haul road, and the entire area from all owners, they may have created a factual scenario similar to every other condemnation case, public body taking private property for public use (public use issue discussed infra).

They however, and for unestablished reasons, elected to allow the private land owner of the two-thirds interest to continue to privately negotiate a use of the land, thereby creating a factual scenario that the other one-third owner should be allowed to present to the Jury.

B. APPROPRIATE PUBLIC USE

The petition does not say dump site, it says in conjunction with the Runway 5 project (A. R. 01-04). There is much discussion early on as to a statement made at the first hearing regarding the public use issue (A. R. 1000-1001). Our position was then, and remains, that if the property was part of the airport runway or the obstruction area, it is an appropriate public project. To the extent this property is not totally encompassed with in the run way project, I think there is an issue there (A. R. 1001).

However, evidence has been presented that clearly establishes that the property is not part of the runway or the obstruction area (A. R. 302 and 310).

Once the Kanawha County Commission said the property was only being taken as a dump site, Mrs. Gomez agreed to that use (A. R.). The Kanawha County Commission accepted the agreement from the other two-thirds owner to retain ownership because he agreed with the proposed use as a dump site (A. R. 1008-1043).

Further, the use by the Kanawha County Commission as a dump site outside the project area is a temporary use to which the property owners had agreed. There was no need to condemn this property and deprive the owners of its use in the future.

C. CIRCUIT COURT'S DENIAL OF GOMEZ'S REQUEST TO PRESENT EVIDENCE OF DUMP FEES

The date of the take as found by the Circuit Court was March 12, 2014 (A. R. 1407). The statement by the Kanawha County Commission that the other two-thirds owner as paid a "wheelage rate" as opposed to a dump fee and that was being negotiated in June of 2013 is incorrect. As discussed above, there were private negotiations being conducted on July 22, 2013 (A. R. 450). The "License Toll And Work Agreement" was not signed until March 5, 2014, after the Circuit Court had Ordered that the Kanawha County Commission had to acquire the other two-third interest.

Interestingly, the terms and values of this document are exactly the same as those negotiated by the other two-third owner for the dump fees (i.e. \$3.50 per yard and \$500,000 down payment), which were private negotiations between private parties in an arms length transaction.

*This document is not a part of the record in this case, but was produced in the companion case by Central Contracting Inc.

These facts are directly in line with the Court's findings in West Virginia Department of Transportation, Division of Highways vs. Western Pocahontas Properties, LP, 2015 W. Va. LEXIS 810 (W.Va June 17, 2015).

The income created by the private party negotiation of dump fees is income created by the property itself and not from a business being conducted on the property.

Again, the Kanawha County Commission by not condemning all the needed property and allowing private owners to make private deals with private contractors, created the factual scenario that is unique, and the one-third owner should be allowed to present those matters of value to a Jury.

D. STRIKING OF GOMEZ'S PLEADINGS

The Court struck Mrs. Gomez's pleadings in the hearing held on December 22, 2014 (A. R. 1417). As stated previously, Mrs. Gomez could not attend her deposition due to a work conflict that prevented her from leaving Highland Hospital after working the midnight shift.

The Court made no findings on the issue but simply states "I'm going to grant the request to strike the claims" (A. R. 1417, line 8-9). There was no finding of willfulness or bad faith, there was no weighing of the prejudice to Mrs. Gomez.

The prejudice to Mrs. Gomez's case resulting from their ruling is devastating. Her property has now been taken and she is precluded from testifying about it to the Jury. There was no bad faith or willfulness, the directives of *Cattrell v. Carlton* 614S.E.2d.1, 14 (W.Va. 2005) were not followed and the Circuit Court abused its discretion.

E. CIRCUIT COURT'S STRIKING OF EXPERTS AND DENIAL OF MOTION TO INSPECT

As cited above (A. R.) From the time of the Scheduling Conference, which was held in the secretaries office, off the record, Mrs. Gomez has made clear her theory of highest and best use of the subject property as a dump site, and has from the time of the scheduling conference maintained the need to inspect the property upon completion of

the project to perform calculations needed to prepare final reports.

The stated needs of the Kanawha County Commission to remove the obstruction to runway 5, had been met, the project was nearing completion. The motion of Mrs. Gomez to allow inspection of the project would cause no prejudice to the opposing party.

Again, the Circuit Court makes no findings to support the sanction, it simply says "I'm going to grant the request to strike the claims and the expert appraisers" (A. R. 1417, line 8-9).

The Court's failure to establish, on the record, a basis for the sanctions is inappropriate. *Bartles vs. Hinkle*, 196 W.Va. 381, 472 S.E.2d 827 (1996).

In syllabus point two of *Bartles*, the rule is established in part that, "The Court must explain its reasons clearly on the record if it decides a sanction is appropriate", clearly there was no explanation of reasons as to the sanctions.

There was insignificant impact on the case as the purpose of the Kanawha County Commission proceeding was to remove the obstruction that was being done, the request for additional time to allow discovery to be completed would in no way interfere with the project.

The Court's decision to strike the experts and denial of additional time to complete reports was an abuse of discretion.

F. JUDICIAL NOTICE

For the reasons and authority set forth in their Brief, the Petitioners herein assert that Courts taking Judicial Notice of the Commissioner's finding was improper

G. SUMMARY JUDGEMENT

As to the issue of value of the subject property, this is clearly a question of fact on

which there are differing opinions. There is the Kanawha County Commission version of their appraiser's testimony of \$100,000 valuation of the whole property which resulted in the Commissioner's Report of \$33,335.00 valuation to Mrs. Gomez. There is the amount paid to her two brothers for their interest in the property of \$58,333.33 (A. R. 982-923). Even with the Court's limitations of her case, Mrs. Gomez still had genuine issues of material fact to present to a Jury.

VI. CONCLUSION

WHEREFORE, for all the foregoing reasons stated herein and the reasons stated in the "Petitioner's Brief", the Petitioner prays that this Honorable Court will reverse this case for a full Jury trial where all the relevant evidence may be presented.

LORETTA LYNN GOMEZ,
By Counsel



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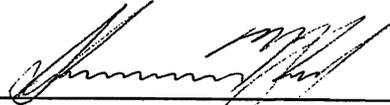
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(13-P-327)

KANAWHA COUNTY COMMISSION,
Respondent

CERTIFICATE OF SERVICE

I, Shannon M. Bland, counsel for the Petitioner, Loretta Lynn Gomez, hereby certify that a true and exact copy of the "**Petitioner's Reply Brief**" was duly served upon counsel of record for the Kanawha County Commission by depositing the same in the first class U.S. mail, postage prepaid on this the **23rd day of September, 2015**, addressed as follows:

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