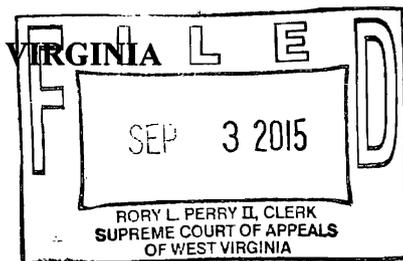


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



Loretta Lynn Gomez,
Respondent Below, Petitioner,

v.

Kanawha County Commission,
Petitioner Below, Respondent,

No. 15-0342
(Civil Action No. 13-P-327)

BRIEF OF RESPONDENT KANAWHA COUNTY COMMISSION

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I. INTRODUCTION OF THIS ACTION'S PURPOSE

This action involves condemnation of private property for a public purpose. For purposes of the Yeager Airport Runway 5 Approach Ground Obstruction and Removal Project (“Runway 5 Project”), it became necessary for the Petitioner Below / Respondent Kanawha County Commission (hereinafter “KCC”) in conjunction with the Central West Virginia Regional Airport Authority (hereinafter “CWVRAA”) to acquire necessary properties either through purchase or condemnation. *See* Appendix Vol. 2 No. 19 at p. 997-998. One of the main purposes of the Runway 5 Project was to enhance the necessary clearance for Yeager Airport’s Runway 5 in order to be FAA compliant and for operational use. *Id.* at p.998. This required 1.1 million cubic yards of soil to be eliminated from the mountain obstruction and placed at an economical alternative location. *Id.* at No. 20 p. 1014; 1022. Beginning in 2012, the CWVRAA purchased over 200 properties and condemned approximately twelve properties (most of which were unable to be purchased because of unknown heirs). *Id.* at p. 998, 1002, 1004. Honorable James C. Stucky presided over these cases. *Id.*

Thereafter, it became necessary for the KCC to acquire the property interest in certain property located in Kanawha County, West Virginia described as Lt 7 Tan Yard Br Les Fire Lt 7 Tan Yard Br Les 2 Fire Clay & Par Cont 40/100A Melton Est Charleston North Tax Map 46, Parcel 236, also referred to as the Nutter Farm (hereinafter “the subject property”) for use as a dump site. *See* Appendix Vol. 1 at No.1 p. 1. The entire subject property consisted of approximately ten acres that was completely surrounded by Northgate Business Park, much like a donut hole. *See* Appendix Vol. 2 at No. 20 p. 1011, 1020. Respondent Below / Petitioner Loretta Lynn Gomez (hereinafter “Gomez”) owned a 1/3 undivided interest of the subject property. *See* Appendix Vol. 1 at p. 3 ¶7; *see* Appendix Vol. 2 at p. 975 ¶3-5. When Petitioner Gomez refused to sell her 1/3 interest, it became necessary for KCC to file this condemnation action to acquire the subject property to complete the

Runway 5 Project to maintain, improve, and keep operational Yeager Airport. *Id.* at No. 20 p. 1022.

Gomez has asserted multiple assignments of error with regards to the Circuit Court of Kanawha County, West Virginia's ("Circuit Court") Orders; however, Gomez's assignments of errors are without merit. First and foremost, the taking was for public use. From the very beginning, the Circuit Court found the proposed taking was for a public purpose and continuously upheld its finding throughout its Orders in this action. Second, any evidence concerning or arising out of the Runway 5 Project would have been improper for establishing fair market value of the subject property under the law. Third, it was certainly appropriate for the Circuit Court to strike Gomez's pleadings and experts, and not permitting an inspection of the property after the expiration of the discovery deadline because Gomez failed to comply with the Circuit Court's Scheduling Order. Finally, the Circuit Court appropriately granted Summary Judgment because there was no genuine issue of material fact for the action to proceed to trial and Gomez failed to put forth any affirmative evidence to the Circuit Court to establish otherwise. Accordingly, KCC requests this Honorable Court to affirm the Circuit Court's Orders.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

On June 14, 2013, KCC filed its verified *Petition in Eminent Domain* with the Circuit Court. *See* Appendix Vol. 1 No. 1 at p. 1, generally. Pursuant to West Virginia Code §54-2-1 and §8-29-12, KCC filed its Petition because it was necessary for it to acquire a fee simple interest in the subject property. *Id.* at p. 1, ¶2. The entire subject property consisted of approximately ten acres which was initially owned by the late William McClellan Nutter. *See* Appendix Vol. 2 No. 14 at p. 975 ¶3-5. Upon Mr. Nutter's death, the subject property passed intestate to his three children, William Watson Nutter, Charles Curtis Nutter, and Petitioner Gomez. *See Id.* Gomez's brothers, William Watson Nutter and Charles Curtis Nutter, also possessed a 1/3 undivided interest each. *Id.* In November of

2013, H&L, LLC purchased 2/3 of the subject property, which was owned by the brothers for \$58,333.33 each 1/3 interest. *Id.* at No. 15 at p. 982-987. H&L, LLC and Corotoman were in agreement with the proposed use of the subject property, specifically improving, maintaining, and operating Yeager Airport in conjunction with the Runway 5 Approach Ground Obstruction and Removal Project, identified as Project #08-1800-0027. *See* Appendix Vol. 1 No. 1 at p. 2, ¶6. Because of the mountain obstruction, it was necessary to acquire a dump site for the removal of the 1.1 million cubic yards of soil. *See* Appendix Vol. 2 at No. 20 p. 1014, 1022. Since Petitioner Gomez was unwilling to sell her final 1/3 interest, it was necessary for Respondent to file its verified Petition. *See* Appendix Vol. 1 No. 1 at p. 1. Honorable James C. Stucky was assigned to this action as well. *Id.*

On August 15, 2013, the Circuit Court held a hearing on the Petition in which Petitioner Gomez and her counsel appeared and asserted “[t]o the extent that this a public project and is proper to eminent domain, we don’t contest that. The Airport Authority and the County Commission on behalf of the Airport Authority, I believe, have the power to exercise their right of eminent domain for this particular project.” *See* Appendix Vol. 2 No. 19 at p. 1000. At the end of counsel’s argument, he further asserted “[t]o the extent today that this is a proper eminent domain proceeding, we don’t object to that.” *Id.* at p. 1002. Thereafter at the hearing, an Order was presented to the Circuit Court, which Gomez’s counsel signed, and was entered by the Circuit Court via the Judge’s acceptance and signature. *Id.* at p. 1005. The Order stated, in pertinent part, that “[i]t appearing to the Court that this case is one in which the Petitioner has the lawful right to take private property for the public purposes stated in the petition, the same being for public purposes”. *See* Appendix Vol. 1 No.10 at p. 23, ¶11.

Pursuant to West Virginia Code § 54-2-8 and §54-2-9, KCC and Gomez were to appear at a

Commissioners' Hearing for the appointed Commissioners to ascertain a just compensation for the taking of the subject property for the public purpose asserted in the Petition. *See* Appendix Vol. 1 No. 6 at p. 14. However, Gomez requested a continuance to this Commissioners' Hearing on the basis that Gomez and her expert were not prepared. *Id.* Gomez then filed a Motion to Dismiss or to Join Indispensible Party, which the Circuit Court denied. *Id.* During a hearing on September 12, 2013, Gomez's counsel reiterated his understanding of the public purpose of the take. Specifically, Gomez's counsel stated "there's a contract that the Airport Authority has taken out - - gotten bids on - they haven't [accepted] a bid yet, but they've received bids - - haven't awarded the bid, rather - that calls for 1.23 million cubic yards of dirt to be moved and placed - whoever the contract is awarded to is going to have to place that dirt somewhere." Appendix Vol. 2 No. 20 at p. 1014. Accordingly, Gomez was fully aware of the purpose and had some degree of availability to information and documentation involving the Runway 5 Project because how else could her counsel make such representations to the Circuit Court. *See Id.* Further, the September 12, 2013 hearing transcript reflects that Gomez's counsel in fact received everything he requested. Gomez's counsel requested KCC's initial appraisal of the subject property, and he received it. *Id.* at p. 1022. Further, Gomez's counsel asked for the purpose for taking the property and how much fill was going to be placed upon it for which KCC's counsel represented that "[t]he one-third was [being taken] because she was not in agreement with selling her share or the proposed use, which is fill. The 1.1 million cubic yards of fill, which I provided in the bid tabs for when he asked for it, and it designated exactly how much fill was to be put on the plain." *Id.* Additionally, KCC's counsel represented to Gomez's counsel that the initial bids for the project had to be thrown out as it was substantially higher, which resulted in new bids based upon utilization of the subject property as fill. *Id.* at p. 1024. As such, KCC's counsel complied with Gomez's counsel's informal requests for information and

documentation. It cannot be disputed that Gomez, or at least her counsel, possessed the requisite knowledge of the Runway 5 Project and the purpose of the subject property prior to September 12, 2013, which makes Gomez's arguments to the contrary inaccurate.

Thereafter, on October 15, 2013, KCC and Gomez appeared at the Commissioners' Hearing. *See* Appendix Vol. 1 No. 8 at p. 17. Outside of the presence of the Commissioners, the Special Commissioner heard argument by the parties as to "the legality and relevancy of testimony and evidence concerning the potential future use of the subject property and the value of said property in relation to the anticipation of its immediate future use for fill purposes in furtherance of the runway project of the Central West Virginia Regional Airport Authority for which the property of the Respondent is being taken and condemned." *Id.* The Special Commissioner found that such evidence and testimony would be improper. *Id.* at p. 18.

It is undisputed that Gomez did not present any evidence or witnesses to the Commissioners for consideration at this hearing. *See* Appendix Vol. 2 No. 21 at p. 1131. In fact, Gomez did not even return to the hearing following the Commissioners' view of the subject property. *Id.* at p. 1096. Nonetheless, all parties were given ample opportunity to present evidence with respect to the subject real property and cross-examine all witnesses who testified. *Id.* KCC presented evidence through its expert appraiser Jay Goldman and his appraisal report. *Id.* at 1102-1120. KCC also presented evidence of the purchase option agreements of Gomez's two brothers receiving approximately fifty-eight thousand dollars each; the property's tax value; and the property's estate appraisal. *Id.* at 1105; 1110; 1114. After all the evidence was presented, the Commissioners determined that Thirty-Three Thousand Three Hundred and Thirty-Five Dollars and Zero Cents (\$33,335.00) would be just compensation for the subject real property. Appendix Vol. 1 No. 7 at p. 16.

Thereafter, Gomez requested a jury trial on the issues of whether the taking was for an

appropriate public purpose and the appropriate measure of damages. *See* Appendix Vol. 1. No. 9 at p.19. On November 15, 2013, KCC and Gomez came before the Circuit Court on a hearing upon Gomez's Request for a Jury Trial, as well as KCC's Motion to Pay Money Into the Court and for Immediate Possession. *See* Appendix Vol. 1. No. 12 at p. 32. In its Order entered on December 12, 2013, the Circuit Court again found that the KCC "had the lawful right to take the subject private property for the public purposes as stated in the petition, and has condemned Loretta Lynn Gomez's one-third share in the subject property, pursuant to W. Va. Code §54-2-1, et. seq". *Id.* at p. 34. Additionally, the Circuit Court granted KCC's Motion to Pay Money Into Court and for Immediate Possession on the specific condition that it obtain through purchase or otherwise the remaining two-thirds share of the subject property, and the Court granted in part Gomez's Request for a Jury Trial "on the issue of the fair market value of the subject real estate at the time of the taking as well as any rights of way taken by the Petitioner." *Id.* at p. 34-5.

KCC proceeded to purchase the remaining two-thirds share of the subject property for the same purchase price paid to each of Gomez's brothers. *See* Appendix Vol. 1. No. 13 at p. 36-7. As of March 12, 2014, absolute and fee simple title in the subject real property was vested in KCC. *Id.* Thereafter, KCC proceeded to pay Thirty-Three Thousand Three Hundred and Thirty-Five Dollars and Zero Cents (\$33,335.00) into the Circuit Court, and began placing removed soil from the mountain obstruction on the subject property as part of the Runway 5 Project.

Accordingly, this action proceeded on the issue of just compensation for the subject real property taken. On April 2, 2014, the Circuit Court entered a Scheduling Order. *See* Appendix Vol. 1. No. 4 at p. 10. According to the Scheduling Order, the discovery was to be completed on or before December 1, 2014, and expert witnesses were to be disclosed by KCC on June 16, 2014, and by Gomez on July 16, 2014. *Id.*

Despite these deadlines, Gomez did not complete any discovery within the deadline. Gomez had 9 months to complete discovery. *See Id.* Despite the fact that Gomez was aware of this action for over 8 months prior to the Scheduling Order even being entered and possessing full knowledge of the Runway 5 Project and its purpose prior to September 12, 2013, Gomez did not complete any discovery. *See* Appendix Vol. 1 No. 2 at p. 5-7; Appendix Vol. 2 No. 20 at p. 1014-24. Rather, Gomez sought to extend discovery and thereafter, seek to inspect the subject property and complete further discovery and expert disclosures. *See* Appendix Vol. 1. No. 38-39 at p. 218-226. As these actions were beyond the Circuit Court's discovery deadline, KCC filed its Motion to Quash. *See Id.* at No. 39 at p. 237-241.

Unlike Gomez, KCC sought discovery through requests and the depositions of Gomez and her expert Dean Dawson. *See Id.* at No. 31-32 at p. 134-141. However, Gomez did not appear for her deposition and did not timely disclose her expert's report. *See Id.* at No. 35 p. 153, generally. As a result of these failures, KCC filed its Motion to Quash. Thereafter, KCC filed its Motion for Summary Judgment because there was no genuine issue of material fact to permit Gomez's claims to survive summary judgment and she could not present any proof in support of her claims. *See* Appendix Vol. 2. No. 3 at p. 811, generally. The Circuit Court granted KCC's Motion to Quash and Motion to Strike and denied Gomez's Motion to Inspect Property, Motion to Extend Discovery, and Renewed Motion to Dismiss. *Id.* at No. 7 at p. 874-877.

At the Pre-Trial Conference, the Circuit Court granted Respondent's Motion for Summary Judgment. *See* Appendix Vol. 2. No. 12 at p. 968-70. The Circuit Court reiterated, in pertinent part, that "[KCC] had the lawful right to take the subject property for public purposes"; "that the only evidence of fair market value which would be permitted at trial would be the fair market value of the take at its highest and best use at the time of the take"; "[t]his Court, by Order dated January 9, 2015,

declined to permit Respondent to reopen discovery or name a new expert appraiser”; and “[t]he only evidence Respondent could have submitted at trial as to the value of the subject real property at the time of the take would have been the testimony of Ms. Gomez. However, since Ms. Gomez intentionally failed to appear for scheduled and noticed deposition, it is unknown whether her testimony, if any, would have been allowed.” *Id.* Gomez now appeals to this Court on multiple assignments of error which were extensively litigated before the Circuit Court. Based upon the following arguments and the numerous Orders, this Court should affirm the Circuit Court’s Orders.

III. SUMMARY OF ARGUMENT

Despite the various alleged assignments of errors, there are no errors in the Circuit Court’s findings, reasoning and rulings upon which it based its Orders in this action. Instead, many of the alleged assignments of errors are red herrings and are irrelevant to whether the taking was for a public purpose. Based upon the verified Petition and the representations of the parties, the Circuit Court correctly found that the taking was for the public purpose of improving, maintaining, and operating the Yeager Airport as the subject property would be utilized in conjunction with the Runway 5 Approach Ground Obstruction and Removal Project, identified as Project #08-1800-0027. Accordingly, the Circuit Court did not err in denying this issue to go to the jury as this is a question of law to be determined by the Court, not the jury.

Further, the Circuit Court correctly denied Gomez’s numerous attempts to introduce alleged evidence of the value of the subject property based upon the condemnation project and post take actions, or future use. As the Appendix before this Honorable Court reflects, numerous amounts of motion practice and hearings took place before the Circuit Court over this issue. Through its Orders, the Circuit Court continuously asserted “the only evidence of fair market value which would be permitted at trial would be the fair market value of the take at its highest and best use at the time of

the take.” *See Id.* at p. 969. Thus, the Circuit Court did not abuse its discretion in denying Gomez’s Rule 60(b) Motion that further attempted to reopen the issue of public purpose and value based upon the condemnation project.

Moreover, the Circuit Court did not err in striking Gomez’s pleadings; untimely Motion to Inspect; and her experts because Gomez failed to comply with discovery and the Circuit Court’s Scheduling Order by not appearing for her deposition and not disclosing her expert’s report within the discovery deadline. The record clearly establishes that Gomez did not undertake any discovery efforts within the deadline. Rather, Gomez waited until the deadline passed to attempt to start conducting discovery, even though this action had been pending since June 14, 2013. Further, her expert’s alleged reports would have attempted to put forth evidence of the condemnation project, post take actions, and future use, which the Circuit Court had continuously ruled was not permissible.

Finally, the Circuit Court did not err in granting KCC’s Motion for Summary Judgment as there is no genuine issue of material fact and Gomez failed to meet her burden to establish otherwise. Thus, KCC respectfully requests this Honorable Court to affirm the Circuit Court’s Orders in their entirety.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rule 18 of the *West Virginia Rules of Appellate Procedure*, oral argument is unnecessary as the Circuit Court’s Orders were based on well settled law. W. Va. R.A.P. 18(a)(3). Moreover, KCC asserts that the facts and legal arguments are adequately presented in its brief before this Court and the Appendix, and the decisional process would not be significantly aided by oral argument as this action does not present any new or novel issues. W. Va. R.A.P. 18(a)(4).

V. STANDARD OF REVIEW

The multiple assignments of errors asserted in this appeal require different standards of review to be applied by this Court. The granting of summary judgment in favor of KCC is a *de novo* review. See *Painter v. Peavy*, 451 S.E.2d 755, 758 (W. Va. 1994). This Court also reviews *de novo* the Circuit Court's determination on questions of law. Syl. Pt. 1, in part, *Public Citizens, Inc. v. First National Bank in Fairmont*, 480 S.E.2d 538 (W. Va. 1996).

Regarding the Circuit Court's rulings upon the evidentiary issues and Gomez's Rule 60(b) Motion, the review is based on an abuse of discretion standard. This Court recognizes that:

[t]he West Virginia Rules of Evidence and the West Virginia Rules of Civil Procedure allocate significant discretion to the trial court in making evidentiary and procedural rulings. Thus, rulings on the admissibility of evidence and the appropriateness of a particular sanction for discovery violations are committed to the discretion of the trial court. Absent a few exceptions, this Court will review evidentiary and procedural rulings of the circuit court under an abuse of discretion standard.

Brooks v. Galen of W. Va., Inc., 649 S.E.2d 272, 276 (W. Va. 2007); quoting, Syl. Pt. 1, *McDougal v. McCammon*, 455 S.E.2d 788 (W. Va. 1995). Similarly, this Court has ruled that “[a] motion to vacate a judgment made pursuant to Rule 60(b), W. Va. R.C.P., is addressed to the sound discretion of the court and the court's ruling on such motion will not be disturbed on appeal unless there is a showing of an abuse of such discretion.” Syl. Pt. 5, *Toler v. Shelton*, 204 S.E.2d 85, 87 (W. Va. 1974).

VI. ARGUMENT

I. **The Circuit Court did not abuse its discretion in denying Gomez's Rule 60(b) Motion renewing her Motion to Dismiss as it was nothing more than another attempt to put forth improper evidence of the condemnation project.**

Rule 60(b) of the *West Virginia Rules of Civil Procedure* provides, in pertinent part, that [o]n motion and upon such terms as are just, the court may relieve a party or a party's

legal representative from a final judgment, order, or proceeding for the following reasons: . . .(2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b) . . . The *motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.*

W. Va. R. Civ. P. 60(b)(emphasis added). In reviewing Rule 60(b) motions, “the appellant bears the burden of showing that there was error in the proceedings below resulting in the judgment of which he complains, all presumptions being in favor of the correctness of the proceedings and judgment in and of the trial court.” *Cales v. Wills*, 569 S.E.2d 479, 483 (W. Va. 2002); quoting, Syl. Pt. 2, *Perdue v. Coiner*, 194 S.E.2d 657 (W. Va. 1973).

Gomez filed her Rule 60(b) Motion renewing her Motion to Dismiss on December 15, 2014, and alleged that newly discovered evidence had been “obtained through an independent party who had been provided the maps and bidding documents by the Petitioner herein (Central West Virginia Regional Airport Authority).” Appendix Vol. 1 No. 42 at p. 273-74. Gomez requested the Circuit Court to “reverse its prior Order.” *Id.* at p. 278. Although it is not apparent from Gomez’s Motion which Order she requested the Circuit Court to reverse, it appears that Gomez was referring to the initial Order dated August 15, 2013 wherein the Circuit Court initially found the take was for purposes of a public use. Gomez’s Motion was approximately 4 months beyond the one year requirement of Rule 60(b). Even if Gomez was referring to the Order denying her original Motion to Dismiss, Gomez’s Motion still fails to meet the one year requirement of Rule 60(b) as this Order was entered by the Court on September 26, 2013, which causes her Rule 60(b) Motion to be untimely by approximately two and a half months. *See* Appendix Vol. 1 No. 6 at p. 14-5.

Further, the Circuit Court did not abuse its discretion in denying Gomez’s Rule 60(b) Motion because Gomez did not act with due diligence in bringing forth this alleged “newly discovered” evidence. “To come within the “newly discovered” evidence rule, the [party] at a minimum must

show that the evidence was discovered since the adverse ruling and that the [party] was diligent in ascertaining and securing this evidence.” *Powderidge Unit Owners Ass’n v. Highland Properties, Ltd.*, 474 S.E.2d 872, ft. nt. 25 (W. Va. 1996).

Gomez did not bring forth this alleged evidence to the Circuit Court until December 15, 2014. *See* Appendix Vol. 1 No. 42 at p. 273-74. The verified Petition filed on June 14, 2013 specifically set forth the purposes for acquiring the subject property for improving, maintaining, and operating the Yeager Airport as the subject property would be utilized in conjunction with the Runway 5 Approach Ground Obstruction and Removal Project, identified as Project #08-1800-0027. *See* Appendix Vol. 1 No. 1 at p. 1. The Circuit Court’s initial Order finding the take was for a public purpose was entered on August 15, 2013. *See* Appendix Vol. 2 No. 19 at p. 1005. Gomez’s original Motion to Dismiss was filed on September 4, 2013 and denied on September 26, 2013. *See* Appendix Vol. 1 No. 6 at p. 14-5. As such, Gomez was fully aware for over 3 months of the purposes of taking the subject property. During this time, Gomez did not object or seek any evidence to inquire as to the stated purpose.

Even after the Circuit Court entered a Scheduling Order on April 2, 2014 requiring that discovery be completed on December 1, 2014, Gomez still did not seek any information or evidence via discovery. Gomez first sought discovery after the discovery deadline expired when she filed her “Motion to Inspect Property” and “Respondent and Third-Party Petitioner’s First Set of Interrogatories and Requests for Production of Documents to Petitioner”. *See* Appendix Vol. 1. No. 38; No. 39 at p. 222-236. Gomez had approximately 18 months from the filing of the Petition and approximately 8 months from the entry of the Scheduling Order to seek information and documentation regarding the Runway 5 Project. However, Gomez failed to conduct any discovery and only obtained alleged newly discovered evidence one week prior to filing her Rule 60(b) Motion

on December 15, 2014. Appendix Vol. 1 No. 42 p. 273-74. This is not due diligence, but inexcusable neglect. Further, this alleged newly discovered evidence had been publically available because they were submitted with the bids for the project, which Gomez or at least her counsel possessed knowledge of prior to the hearing on September 12, 2013. Appendix Vol. 2 No. 20 at p. 1014.

Moreover, the alleged newly discovered evidence involved the necessary removal of soil for post take activities to be completed as a result of the Runway 5 Project. The United States Supreme Court has recognized that

[s]trict adherence to the criterion of market value may involve inclusion of elements which, though they affect such value, *must in fairness be eliminated in a condemnation case, as where the formula is attempted to be applied as between an owner who may not want to part with his land because of its special adaptability to his own use, and a taker who needs the land because of its peculiar fitness for the taker's purposes. These elements must be disregarded by the fact finding body in arriving at "fair" market value.*

United States v. Miller, 317 U.S. 369, 375 (1942). The United States Supreme Court has asserted that “[i]t is a well settled rule that while it is the owner’s loss, not the taker’s gain, which is the measure of compensation for the property taken.” *United States ex rel. Tennessee Valley Authority v. Powelson*, 319 U.S. 266, 281 (1943); *citing, United States v. Miller, supra; United States v. Chandler-Dunbar Co.*, 299 U.S. 53, 81 (1913); *Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 195 (1910). Therefore, “[s]ince the owner is to receive no more than indemnity for his loss, his award cannot be enhanced by any gain to the taker.” *United States v. Miller, supra*. Thus, the United States Supreme Court has recognized that “although the market value of the property is to be fixed with due consideration of all its available uses, its special value to the condemnor as distinguished from others who may or may not possess the power to condemn, must be excluded as an element of market value.” *Id.* Similarly, this Honorable Court has recognized the following:

[t]he Constitution does not define just compensation. Though it guarantees payment of just compensation to the owner for his property taken or damaged, it does not require that he shall receive equal benefits, or any benefits, which result to his land from a public improvement. The constitutional guarantee extends to the loss and the damage suffered by the owner of land, but not the benefits which accrue to his land.

Strouds Creek and Muddlety R.R. v. Herold, 45 S.E.2d 513, 520 (W. Va. 1947).

Here, Gomez's Rule 60(b) Motion involved initial bid documentation for the Runway 5 Project. Gomez's argument that the initial bid documentation negates the fact that the take was for a public purpose is completely erroneous. It is evident from the bid documentation that the subject property was going to be needed for the Runway 5 Project. Specifically, the Runway 5 Project was for the purpose of enhancing the necessary clearance for Yeager Airport's Runway 5 to permit it to be FAA compliant and operational for use, which required the removal of 1.1 million cubic yards of soil to be eliminated from the mountain obstruction. *See* Appendix Vol. 2 No. 20 p. 1014; 1022. As such, an economical location was needed for a dump site. There has never been any evidence to even suggest that the subject property would be used for anything other than in conjunction with the Runway 5 Project. As of today the subject property has a significant portion of the 1.1 million cubic yards of soil removed from the mountain obstruction on it.

Gomez's argument that "she just wanted to play the same \$3.50/yard game that they other private owner was allowed to play" is inaccurate and simply a red herring. Corotoman was paid a wheelage rate for crossing its property in order to dump onto the subject property. *See* Appendix Vol. 2 No. 22 at p. 1255. KCC purchased the 2/3 interests for the same purchase price paid to each of Gomez's brothers. *See* Appendix Vol. 1 No. 13 at p. 36-7. As of March 12, 2014, absolute and fee simple title in the subject real property was vested in KCC. *Id.* KCC has not received any benefit of the subject property other than being utilized for its public purpose as a dump site.

Moreover, Gomez is seeking the post take benefits of the property being filled, which would

not have occurred but for the Runway 5 Project. Based upon the law discussed above, this is inappropriate as Gomez is seeking the benefit accrued to the subject property from the public purpose of the take. *See Miller*, 317 U.S. at 375 (“[the subject property’s] special value to the condemnor as distinguished from others who may or may not possess the power to condemn, must be excluded as an element of market value.”). Therefore, it was certainly reasonable for the Circuit Court to deny Gomez’s Rule 60(b) Motion, and a far cry to now allege that the Circuit Court abused its discretion in doing so.

II. The Circuit Court did not err in finding the taking of the Subject Property was for an appropriate public use (i.e. the Runway 5 Project).

West Virginia Code § 8-29-12 provides, in pertinent part, that

[w]henver it shall be deemed necessary by an authority, in connection with the exercise of its powers herein conferred, to take or acquire any lands, structures or buildings or other rights, either in fee or as easements, for the purposes herein set forth, the authority may purchase the same directly or through its agents from the owner or owners thereof, or failing to agree with the owner or owners thereof, the authority may exercise the power of eminent domain in the manner provided for condemnation proceedings in chapter fifty-four of this code, and such purposes are hereby declared to be public uses for which private property may be taken or damaged.

W. Va. Code §8-29-12. Pursuant to West Virginia Code §8-29-8, each authority is given the plenary power and authority to

[t]o enter into contracts with any person, including both public and private corporations, or governmental department or agency, and generally to do any and all things necessary or convenient for the purpose of acquiring, establishing, constructing, equipping, improving, financing, maintaining and operating a public airport to best serve the region in which it is located, including the development of an industrial park in the same general area.

W. Va. Code §8-29-8. Further, West Virginia Code §54-2-1 provides, in pertinent part, that

[i]n any case in which property may lawfully be taken for public use, application may be made by petition to the circuit court or the judge thereof in vacation, of the county in which the estate is situated, to appoint commissioners to ascertain a just

compensation to the owners of the estate proposed to be taken.

W. Va. Code §54-2-1. West Virginia Code § 54-2-2 requires that

[t]he pleadings shall be in writing and shall be verified. The Petition shall describe with reasonable certainty the property proposed to be taken If an estate less than a fee is proposed to be taken, the petition shall describe with reasonable certainty the particular estate less than the fee which it is proposed to take, the name of the owner or owners thereof, the manner and extent of their respective interests. . . . The petition shall also state the use to which the estate sought to be taken is intended to be appropriated.

W. Va. Code § 54-2-2. This Court has long held that:

“Courts are limited in their inquiry to the question, whether the particular service provided for is a public service.” “When the court has determined that the use for which property is condemned is a public use, its judicial function is gone, and the legislative discretion is unrestrained. Whether the proposed plan will accomplish the end proposed, or to what extent it will be beneficial to the public, are not matters to be determined by the courts; these are matters belonging to the legislative discretion.” *Charleston Natural Gas Co., v. Lowe & Butler*, 44 S.E. 410, 411.

State by State Rd. Comm'n v. Professional Realty Co., 110 S.E.2d 616, 658 (W. Va. 1959).

Pursuant to the above Statutes, KCC filed its verified Petition with the Circuit Court. In accordance with West Virginia Code §54-2-2, the Petition was in writing and verified by the President of the Kanawha County Commission. *See* Appendix Vol. 1 No. 1 at p. 1. There was never a dispute as the subject property to be taken was for use as a dump site. The verified Petition described with reasonable certainty the subject property proposed to be taken as the “certain property located in Kanawha County, West Virginia described as Lt 7 Tan Yard Br Les Fire Lt 7 Tan Yard Br Les 2 Fire Clay & Par Cont 40/100A Melton Est Charleston North Tax Map 46, Parcel 236. *Id* at. p. 1. The verified Petition stated the use to which the estate sought to be taken was intended to be appropriated by declaring the purposes were for “improving, maintaining, and operating a regional airport known as Yeager Airport and located in Charleston, West Virginia.” *Id*. The verified Petition further specified that the subject property was to “be used in conjunction with the Runway 5

Approach Ground Obstruction and Removal Project, identified as Project #08-1800-0027.” *Id.* The verified Petition accurately identified Gomez as owner of the 1/3 share of the subject property. *Id.* at p. 2.

Accordingly, KCC had the authority and followed the proper statutory procedure to take the subject property by filing with the Circuit Court its verified Petition containing all requirements of West Virginia Code §54-2-2. “This Court has held that a petition is sufficient if it substantially conforms to the requirements of the statute.” *State by State Rd. Comm’n*, 110 S.E.2d at 622 (W. Va. 1959). Moreover, this Court has recognized that “[t]he necessity for taking is a matter left to the sound discretion of the agency exercising the power of eminent domain under legislative authority, and the decision by it that a necessity exists will not be interfered with by the courts, unless the agency exercising the right “has acted capriciously, fraudulently, or in bad faith.” *Id.* at 658-659; *citing, George v. City of Wellsburg*, 163 S.E. 431 (W. Va. 1932); *Huntington v. Frederick Holding Co.*, 101 S.E. 461 (W. Va. 1919); *Pittsburg Hydro-Electric Co., v. Liston*, 73 S.E. 86 (W. Va. 1911).

During the hearing upon the Petition, Gomez’s counsel did not object and specifically stated that “[t]o the extent that this a public project and is proper to eminent domain, we don’t contest that. The Airport Authority and the County Commission on behalf of the Airport Authority, I believe, have the power to exercise their right of eminent domain for this particular project.” *See Appendix Vol. 2 No. 19* at p. 1000. Thereafter, an Order Appointing Commissioners was presented to the Circuit Court, which Petitioner’s counsel signed, and was entered by the Circuit Court via the Judge’s acceptance and signature. *Id.* at p. 1005. The Circuit Court initially held that “[i]t appearing to the Court that this case is one in which the Petitioner has the lawful right to take private property for the public purposes stated in the petition, the same being for public purposes”. *See Appendix Vol. 1 No.10* at p. 23. The Circuit Court has repeatedly found that the taking was for a public

purpose. *See* Appendix Vol. 1. No. 12 at p. 32.

In its Order entered on December 12, 2013, the Circuit Court further reiterated, in pertinent part, that

The Petition filed in this matter was for the acquisition of Respondent's one third interest in the subject property for the purposes of improving, maintaining, and operating a regional airport known as Yeager Airport and located in Charleston, West Virginia, specifically for use in conjunction with the Runway 5 Approach Ground Obstruction and Removal Project, identified as Project #08-1800-0027.

Upon proper notice, on August 15, 2013, the parties appeared on the Petition for Eminent Domain. Defendant and her counsel, Shannon Bland, were given an opportunity to present any evidence or otherwise object to the Petition of Eminent Domain. Defendant's counsel stated while Respondent was present, "To the extent that this is a public project and is proper for eminent domain, we don't contest that. The Airport Authority and the County Commissioner on behalf of the Airport Authority I believe, have the power to exercise their right of eminent domain for this particular project." The parties, via their counsel, jointly signed and presented this Court a proposed Order appointing Commissioners stating "It appearing to the Court that this case is one in which the Petitioner has the lawful right to take private property for public purpose stated in the petition, the same being for public purposes." *See Order Appointing Commissioners*, entered August 15, 2013.

Id. at p. 32-33. After making these findings and others, the Circuit Court further found that

[t]he Kanawha County Commission had the lawful right to take the subject private property for the public purposes as stated in the petition, and has condemned Loretta Lynn Gomez's one-third share in the subject property, pursuant to W. Va. Code §54-2-1, et. seq".

Id. at p. 33.

The Circuit Court also found that Petitioner was taking the subject property in this matter for the purposes of improving, maintaining, and operating a regional airport known as Yeager Airport and located in Charleston, West Virginia, specifically for use in conjunction with the Runway 5 Approach Ground Obstruction and Removal Project, identified as Project #08-1800-0027. *See* Appendix Vol. 1. No. 12 at p. 33. The proposed purpose was repeatedly described as a dump site. There has been absolutely no evidence contrary to the Circuit Court's findings.

The Circuit Court granted Gomez's request for a jury trial as to just compensation for the subject real property at the time of the take, however, denied Gomez's request for a jury trial on the issue of whether the take was for public use. West Virginia Code §54-2-10 does not provide for the jury to decide the issue of public use. Specifically, West Virginia Code §54-2-10 provides, pertinent part, that "[w]ithin ten days after the report required by the provisions of section nine of this article is returned and filed, either party may file exceptions thereto, and *demand the question of the compensation, and any damages to be paid, be ascertained by a jury.*" *Id.* (emphasis added). As such, as a matter of law, the Circuit Court did not err in denying Gomez's request for a jury trial on the issue of whether the take was for public use.

III. The Condemnation Project, post take actions, and/or the value to the Condemnor cannot be considered in establishing the fair market value of the Subject Property. Accordingly, the Circuit Court did not err in denying Gomez's request to present improper evidence of alleged dump fees.

"In eminent domain proceedings, the date of take for the purpose of determining the fair market value of property for the fixing of compensation to be made to the condemnee is the date on which the property is lawfully taken by the commencement of appropriate legal proceedings pursuant to W. Va. Code, 54-2-14a, as amended." Syl. Pt. 2, *West Virginia Dep't of Transp. v. Roda*, 352 S.E.2d 134 (W. Va. 1986).

Here, the Petition was filed on June 14, 2013. Appendix Vol. 1 No. 1 at p. 1. Accordingly, the fair market value of the subject property must be determined as of June 14, 2013. However, Gomez cannot be permitted to put forth her alleged evidence 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." *See* "Petitioner's

Brief’ at p. 17. First, as stated above, this allegation is inaccurate as Corotoman was paid a wheelage rate for crossing its property in order to access the subject property. *See* Appendix Vol. 2 No. 22 at p. 1255.

Second, the condemnation project cannot be considered in the determination of the fair market value for the property taken. *See Miller*, 317 U.S. at 375 (1942). Gomez’s attempt to put forward this alleged highest and best use arises solely in conjunction of the purposes of the take. If not for the condemnation project, then the subject real property would not have been taken for use as a fill location for the soil required to be removed as part of the Runway 5 Project. A private sale between private individuals in an arm’s length transaction would have never brought forth the alleged evidence Gomez seeks to bring forth in this action. Simply without the public purposes for the take, Gomez would have never obtained an individual to pay her for the subject property for fill purposes or for the property’s post take condition. As KCC’s appraiser Jay Goldman testified at the Commissioners Hearing, the subject property is “zoned R-6 by the City of Charleston for up to four family – on four – family apartment.” *See* Appendix Vol. 2. No. 21 at p. 1100. Mr. Goldman testified that “[i]t’s highly unlikely [the subject property] could be [rezoned /] used – . . . if you go up Coal Branch Heights, were the quarry is, Mazzella Quarry on the right, there’s a sign there that says “no tractor-trailers beyond this location.” So, you’re very limited as to what size vehicle you can take up Coal Branch Heights.” *Id.* at p. 1107-1108. Further, Mr. Goldman described the property as having a one-lane narrow access road and public water, but no access to public sewer or electricity. *Id.* at p. 1108.

Therefore, “[s]ince the owner is to receive no more than indemnity for his loss, his award cannot be enhanced by any gain to the taker.” *United States v. Miller, supra*. Thus, the Circuit Court did not err in precluding Gomez from not “introduce[ing] evidence of the increased value of the

property as it relates to the purpose of the condemnation, i.e. the run way.” See Appendix Vol. 2. No. 12 at p. 968-70.

Moreover, the Circuit Court did not err because Gomez improperly attempts to establish fair market value by using alleged income derived from a business enterprise. “The measure of just compensation to be awarded to one whose interest in real estate is taken for a public use in a condemnation proceeding is the fair market value of the property at the time of the taking.” Syl. Pt. 1, *W. Va. DOT, Div. of Highway v. W. Pocahontas Props., L.P.*, 2015 W. Va. LEXIS 810 (W. Va. June 17, 2015); see also, *Guyandotte Valley Ry. v. Buskirk*, 57 W. Va. 417, 428, 50 S.E.2d 521, 525 (1905); *United States v. Miller*, 317 U.S. 369 (1943); *West Virginia Div. of Highways v. Butler*, 205 W. Va. 146, 516 S.E.2d 769 (1999). “The fair market value of the property taken has been defined as: “[T]he price for which the land could be sold in the market by a person desirous of selling to a person wishing to buy, both freely exercising prudence and intelligent judgment as to its value, and unaffected by compulsion of any kind.” *W. Pocahontas Props., L.P.*, 2015 W. Va. LEXIS 810 at 15; quoting, Syl. Pt.5, *Wheeling Elec. Co. v. Gist*, 173 S.E.2d 336 (W. Va. 1970). In determining this fair market value, this Court recognized that

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 reasonably expected to be immediately devoted, and the most advantageous uses to which it may so be applied.

W. Pocahontas Props., L.P., 2015 W. Va. LEXIS 810 at 20; citing, *W. Va. Dep’t of Highways v. Berwind Land Co.*, 280 S.E.2d 609, 614 (quoting, Syl. Pt. 7, in part, *Strouds Creek & Muddlety R.R. v. Herold*, 45 S.E.2d 513, 516 (W. Va. 1947).

However, this Court has further recognized that

“[w]hile it is proper to show how the property is used, as an element of value, it is incompetent to go into question of profits, derived from the business carried on upon it. The reason evidence of “[l]oss of profits to business” is generally inadmissible is because those profits are “too remote and speculative to be the subject of jury consideration.” “[T]he extent to which such income arises out of the property used is uncertain,” and is greatly affected by the “the capital invested, business conditions obtaining and the trading skill and business capacity of the owner, as well as the adaptability of the property to the business.”

Id. at 24; quoting, *Buckhannon & N. R.R. v. Great Scott Coal & Coke Co.*, 83 S.E. 1031, 1040 (1914); Syl. Pt. 1, in part, *Gauley & E. Ry. Co. v. Conley* 100 S.E. 290 (1919). Additionally, this Court has recognized that

“[i]n applying the income capitalization approach, appraisers must take care to consider only the income that the property itself will produce – not income produced from the business enterprise conducted on the property (i.e., the business of mining.”

W. Pocahontas Props., L.P., 2015 W. Va. LEXIS 810 at 44-45; quoting, *Uniform Appraisal Standards for Federal Land Acquisitions* at 97. Thus, “just compensation cannot be based upon the pure lost profits of a business because that approach disregards market realities.” *W. Pocahontas Props., L.P.*, 2015 W. Va. LEXIS 810 at 28.

Gomez is attempting to assert value for the subject real property based upon the condemnation project and business actions of Corotoman Inc. in obtaining a wheelage fee from the contractor to access the subject property. Again, fees paid, which were actually a wheelage rate for crossing Corotoman’s property, is directly associated with the condemnation project, not the value of the subject property at the time of the take. *See* Appendix Vol. 2 No. 22 at p. 1255. However, even if true, Gomez’s allegation of \$3.50 per cubic yard of material to be earned by the subject property would be improper evidence. *W. Pocahontas Props., L.P.*, 2015 W. Va. LEXIS 810 at 56 (“Fixing just compensation for land taken by multiplying the number of cubic feet or yards or tons by a given price per unit has met with almost uniform disapproval of the courts,” largely because “[n]o man of

business experience would buy property on that theory of value.”).

Furthermore, the Circuit Court did not err because Gomez is attempting to improperly establish value by using alleged speculative future use based off of the condemnation project. This Court has recognized that the “condemnee 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. *W. Va. Dep’t of Highways v. Berwind Land Co.*, 280 S.E.2d at 614. However, “[t]he inquiry as to value should be limited to the land as it exists at the time of the taking with due regard to the uses to which it is then applied or for which it may be suitable for any useful purposes reasonably to be expected immediately to occur. Values based on future or prospective uses to which the land may be applied and which are expected to bring or to produce estimated compensation or income, which are predicated on speculation or conjecture, are not to be considered.” *Strouds Creek and Muddlety Railroad Company v. Herold*, 45 S.E.2d 513, 523 (W. Va. 1947); *citing, Ry. Co.*, 52 S.E. 724 (W. Va. 1906).

Here, Gomez has not produced any evidence as to the subject real property’s suitable useful purpose reasonably to be expected to occur at the time of the take or prior to the take. Gomez is once again attempting to use the condemnation project to establish value based upon post take actions or future use. Just as a landowner cannot reap the future speculative benefit of a condemnation project establishing an interstate highway creating potential future commercial activity, Gomez cannot establish value based upon the potential future use of the project after the condemnation project’s benefit accrued to the subject property taken. Again, the fair market value cannot be determined by using the condemnation project, post take actions, or future use. Accordingly, the Circuit Court did not err in precluding Gomez from presenting such evidence.

IV. The Circuit Court properly struck Gomez's pleadings because she failed to comply with discovery and the Circuit Court's Scheduling Order.

Rule 37 of the *West Virginia Rules of Civil Procedure* provides for sanctions where parties fail to cooperate in discovery. *See* W.Va. R. Civ. P. 37. A party's failure to appear for his or her properly-noticed deposition is among the list of unacceptable and sanctionable conduct. *See* W.Va. R. Civ. P. 37(d)(1). Through Rule 37(d) of the *West Virginia Rules of Civil Procedure*, the Circuit Court is afforded the authority to impose dismissal or default judgment as a sanction for a party's failure to attend his or her own deposition. *See Id.*

Rule 37(d) of the *West Virginia Rules of Civil Procedure* provides, in pertinent part, that

[i]f a party . . . fails (1) to appear before the officer who is to take the deposition, after being served with a proper notice . . ., the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under subparagraphs (A), (B), and (C) or subdivision (b)(2) of this rule.

See Id. Rule 37(b)(2)(C) authorizes dismissal or default judgment, stating that the Court may dismiss the action or proceeding or any part thereof, or render a judgment by default against the disobedient party. *See* W.Va. R. Civ. P. 37(b)(2)(C). When issuing default as a sanction against a party for failure to appear for his or her own deposition, the court initially must find willfulness or bad faith. *Cattrell v. Carlton*, 614 S.E.2d 1, 14 (W. Va. 2005). Upon finding willfulness or bad faith, the court should then weigh the degree of prejudice to the moving party and the effectiveness of other sanctions in conjunction with any other indicative circumstances. *Id.*

Here, Gomez failed to appear for her properly-noticed deposition, which the date for said deposition was provided by and agreed upon by her own counsel. *See* Appendix Vol. 1 No. No. 35 p. 153. When Gomez did not appear for her noticed deposition on November 18, 2014, the parties' counsels made a record as to Gomez's failure to appear. *See Id.* at p. 165-169. Specifically, Gomez's

counsel stated the following:

Let me say that I met with Ms. Gomez yesterday evening to discuss the format and her deposition and so forth. And she was to meet me at nine o'clock this morning. When that didn't happen, we began calling. I thought we had gotten a hold of her. And she had said she was running late, but my office told me that they have tried and she must be running late. So we waited till now about – what is it – 20 after? And I've talked to Trig again and came down. My direction that I left was to call me if she showed up so that we wouldn't have to cancel for today. And as of this vouching of the record, I have not received a call that she has shown up at the office. So I do not know what the circumstances are surrounding her failure to appear today, but she is not here.

Id. at p. 167-168.

Gomez's counsel's statement on the record makes it apparent that Gomez was well aware of her deposition having discussed it with her the previous day. *Id.* Further, it is apparent that Gomez did not notify her counsel that she was not going to attend her deposition. *Id.* Rather, Gomez made the unilateral and unexplained decision to not appear and to not provide any prior notice even to her own counsel. At the time of filing the Motion to Strike with the Court on November 21, 2014 (3 days after the scheduled deposition), KCC's counsel still had not received any excuse or justification as to Gomez's failure to appear for her deposition. *Id.* at p. 155. Additionally, Gomez's counsel had not made any offers to pay for the Court reporter fee nor to reschedule. The only excuse that was ever received for Gomez's conduct was the unverified assertions that were made after the discovery deadline in her Response to the Motion to Strike, which was filed weeks after the discovery deadline on December 19, 2014.

Gomez's own conduct demonstrates a clear unwillingness to cooperate in discovery, and a willful disregard for KCC and bad faith. Besides wasted time and resources, Gomez's actions prejudiced impeded KCC's right to prosecute its claims and defend against Gomez's claims as the main purpose of the deposition was to discover the alleged factual basis for said claims prior to the

discovery deadline. Gomez's conduct foreclosed KCC's ability to determine her alleged testimony and evidence she would have possibly put forth at trial as to the value of the subject real property at the time of the take.

As such, Gomez's conduct constitutes willfulness and bad faith. Moreover, the Circuit Court was clearly justified in dismissing Gomez's claims based on her willful disregard, bad faith, and clear unwillingness to cooperate in discovery. Accordingly, the Circuit Court did not abuse its discretion.

V. The Circuit Court did not err in striking Gomez's untimely Motion to Inspect, experts, and the undisclosed final reports because these related solely to post take consideration of the condemnation project.

This Court has continuously recognized that

“one of the purposes of the discovery process under our Rules of Civil Procedure is to eliminate surprise. Trial by ambush is not contemplated by the Rules of Civil Procedure.” The discovery process is the manner in which each party in a dispute learns what evidence the opposing party is planning to present at trial. Each party has a duty to disclose its evidence upon proper inquiry. The discovery rules are based on the belief that each party is more likely to get a fair hearing when it knows beforehand what evidence the other party will present at trial. This allows for each party to respond to the other party's evidence, and it provides the jury with the best opportunity to hear and evaluate all of the relevant evidence, thus increasing the chances of a fair verdict.

State ex rel. Tallman v. Tucker, 769 S.E.2d 502, 509 (W. Va. 2015) (Concurring Opinion); *citing*, *Graham v. Wallace*, 588 S.E.2d 167, 173-74 (W. Va. 2003); *quoting*, *McDougal v. McCammon*, 455 S.E.2d 788, 795-96 (W. Va. 1995). Moreover, pursuant to Rule 16(f) of the *West Virginia Rules of Civil Procedure*, a party's failure to abide by the court's Scheduling Order may result in the court imposing certain sanctions against the disobedient party, as outlined under Rule 37 of the *West Virginia Rules of Civil Procedure*. See W.Va. R. Civ. P. 16(f). As for the appropriate sanctions, Rule 37(b)(2) of the *West Virginia Rules of Civil Procedure* provides, in pertinent part, that

if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just. . .

W.Va. R. Civ. P. 37(b)(2).

Here, the Circuit Court entered the Scheduling Order on April 2, 2014. *See* Appendix Vol. 1. No. 4 at p. 10. The Scheduling Order required discovery to be completed on or before December 1, 2014, and expert witnesses were to be disclosed by KCC on June 16, 2014, and by Gomez on July 16, 2014. *Id.* Despite this action being filed in June of 2013 and having over 7 months to conduct discovery, Gomez did not serve any discovery requests upon KCC or make a request to inspect the subject property prior to the deadline of December 1, 2014. Further, Gomez did not disclose her expert's alleged report within the discovery deadline. Moreover, Gomez was aware of this action for over 8 months prior to the Scheduling Order even being entered. *See* Appendix Vol. 1 No. 2 at p. 5-7. As stated above, Gomez possessed full knowledge of the Runway 5 Project and its stated purpose prior to September 12, 2013. Appendix Vol. 2 No. 20 at p. 1014-24. However, Gomez did not complete discovery or even attempt to subpoena any documents regarding the Runway 5 Project.

Rather, Gomez filed her "Motion to Extend Discovery Deadline" on December 1, 2014, which was the deadline. *See* Appendix Vol. 1. No. 36 at p. 218. Thereafter, on December 3, 2014, Gomez filed her "Motion to Inspect Property"; "Respondent and Third-Party Petitioner's First Set of Interrogatories and Requests for Production of Documents to Petitioner"; and "Respondent Loretta Lynn Gomez's Supplemental Response to Petitioner's First Set of Interrogatories and Requests for Production of Documents", which for the first time disclosed Petitioner's expert Dean Dawson's alleged expert report. *See* Appendix Vol. 1. No. 37; No. 38 at p. 222; 227. KCC proceeded to file its Motion to Quash. *See* Appendix Vol. 1. No. 39 at p. 237.

Gomez now contends that KCC "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.” *See* “Petitioner’s Brief” at p. 26. Although KCC’s position is that the condemnation project cannot be considered, it did not stonewall any request to inspect the property or discovery. If Gomez had a dire need to inspect the subject property post take, then one would think she would have filed a Motion to Inspect prior to the discovery deadline. Further, Gomez had an opportunity to inspect the subject property prior to the Commissioners Hearing in October of 2013 when the parties agreed for KCC’s expert Jay Goldman to inspect the subject property. *See* Appendix Vol. 2. No. 21 at p. 1103. However, Gomez nor her counsel attended this inspection. As such, the record below clearly shows Gomez did not make a timely Motion or seek discovery. Rather, after approximately 7 months of discovery, Gomez filed a Motion to Inspect after the discovery deadline expired that was clearly unwarranted as it would have only provided evidence of the condemnation project.

Moreover, this Honorable Court has recognized that

[t]he very basis of expert disclosure under Rule 26(b)(4) is so that a party does not have to go on a fishing expedition in trying to determine what opinions the expert will rely upon at trial.

State ex rel. Tallman, 769 S.E.2d at 507. Gomez waited approximately 4 months beyond the deadline to disclose experts to produce an untimely summary report of her Expert Dean Dawson’s preliminary findings. *See* Appendix Vol. 2 No. 5 at p. 841-849. The summary report revealed that the whole basis of the alleged future report was the condemnation project and future use. *Id.* Since the condemnation project absolutely cannot be used in determining the fair market value, KCC further moved to strike the expert and report.

Throughout this action, Gomez has controlled her actions in discovery, and KCC in no way impeded them. Gomez’s Motion to Inspect and undisclosed expert reports were untimely and in violation of this Court’s Orders. Moreover, the undisclosed expert reports would have been

improper. It is disingenuous for Gomez to now argue that KCC “stonewalled” her discovery efforts. Therefore, in accordance with the Court’s authority through Rule 37(b)(2) of the *West Virginia Rules of Civil Procedure*, the Circuit Court was correct in striking Gomez’s Motion to Inspect, her expert, and her expert reports.

VI. The Circuit Court did not err in taking Judicial Notice of the Commissioners’ Decision.

Rule 201 of the *West Virginia Rules of Evidence* provides, in pertinent part, that:

- (a) This rule governs only judicial notice of adjudicative facts.
- (b) 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 whose accuracy cannot reasonably be questioned.

W. Va. R. Evid. 201(a)-(b). This Honorable Court has recognized that judicial notice is permitted for adjudicative facts that cannot reasonably be questioned in consideration of the information provided by the party seeking the notice. *See Arnold Agency v. West Virginia Lottery Comm’n*, 526 S.E.2d 814, 827 (W. Va. 1999).

Pursuant to West Virginia Code § 54-2-8 and §54-2-9, KCC and Gomez appeared at the Commissioners’ Hearing on October 15, 2013. *See Appendix Vol. 1 No. 8 at p. 17.* Gomez did not present any evidence or witnesses at this hearing even though all parties were given the opportunity to do so. *See Appendix Vol. 2 No. 21 at p. 1096.* After all parties were given the opportunity to present evidence with respect to the subject real property and cross-examine all witnesses who testified, the Commissioners came to a decision as to what would be just compensation for the subject real property and its rights of way. *See Appendix Vol. 1 No. 7 at p. 16.* The Commissioners determined that Thirty-Three Thousand Three Hundred and Thirty-Five Dollars and Zero Cents (\$33,335.00) would be just compensation for the subject real property. *Id.*

The Commissioners determined this amount based upon the evidence presented at the

Commissioners' Hearing. KCC was the only party to introduce evidence at this Hearing even though all parties were given the opportunity to present evidence with respect to the subject real property. *See* Appendix Vol. 2 No. 21 at p. 1131. KCC presented the Commissioners with evidence from its expert Jay Goldman and his appraisal report. *Id.* at 1102-1120. KCC also presented evidence of the purchase option agreements of Gomez's two brothers receiving approximately fifty-eight thousand dollars apiece; the property's tax value; and the property's estate appraisal. *Id.* at 1105; 1110; 1114. Thus, the Commissioners had multiple sources of information to base their determination of value off for the subject real property.

The Commissioners' Decision is an adjudicative fact that cannot be disputed because it is the Commissioners' ultimate decision after considering all the evidence and testimony presented by the parties. *See Id.* The Commissioners entered this Decision under the oath to honestly, faithfully and impartially ascertain the just compensation for the subject real property. *See* Appendix Vol. 1 No. 41 at p. 263. Moreover, the Decision can accurately and readily be determined because it was filed with the Circuit Court. *See* Appendix Vol. 1 No. 7 at p. 16.

Therefore, it is apparent that the Commissioners' Decision is not subject to "reasonable dispute" and can be "accurately and readily determined." Thus, the Circuit Court did not err in taking judicial notice of the Decision.

VII. Gomez's failures to comply with discovery caused her to have no evidence or for there to be a genuine issue of material fact for this action to proceed to trial. Therefore, the Circuit Court did not err in granting KCC's Motion for Summary Judgment.

Summary judgment is a favored procedure that "plays an important role in litigation." *Williams v. Precision Coil, Inc.*, 459 S.E.2d 329, 335 (W. Va. 1995). "It is 'designed to effect a prompt disposition of controversies on their merits without resort to a lengthy trial,'" and "to isolate

and dispose of meritless litigation.” *Id.* (quoting, *Painter v. Peavy*, 451 S.E.2d 755, 758 n.5 (W. Va. 1994)). Summary judgment is proper “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.” *Stemple v. Dobson*, 400 S.E.2d 561, 564 (W. Va. 1990) (citation omitted); *see also* W. Va. R. Civ. P. 56, 50. The moving party initially bears the burden of showing that there is no genuine issue of fact, after which “the burden of productions shifts to the nonmoving party,” who must present evidence showing that there are material facts in dispute. *Williams*, 459 S.E.2d at 337.

Here, the only evidence that needed to be developed was evidence of highest and best use of the subject real property at the time of the taking. However, Gomez’s failures in complying with discovery and the Court’s Scheduling Order caused her to have no evidence to contest the Commissioner’s Decision.

Gomez’s conduct in not appearing for her deposition foreclosed KCC’s ability to determine her alleged testimony and evidence she would have possibly put forth at trial. Gomez’s failures resulted in her having no evidence to even attempt to present to a jury or evidence to contest the Commissioners’ Hearing Decision as to just compensation for the subject real property to create a genuine issue of material fact. The Circuit Court recognized that this was highly prejudicial to KCC. Accordingly, Gomez’s conduct resulted in one of the grounds in which the Circuit Court granted summary judgment. In its Order, the Circuit Court stated, in pertinent part, that:

[t]he only evidence Respondent could have submitted at trial as to the value of the subject real property at the time of the take would have been the testimony of Ms. Gomez. However, since Ms. Gomez intentionally failed to appear for scheduled and noticed deposition, it is unknown whether her testimony, if any, would have been allowed.

See Appendix Vol. 2. No. 12 at p. 969.

Further, Gomez simply failed to conduct any discovery prior to the expiration of the

discovery deadline. Gomez also failed to submit timely expert reports to assert opinion evidence of highest and best use of the subject real property at the time of the taking. Rather, Gomez produced an untimely summary report of her Expert Dean Dawson's preliminary findings, which reflected that an actual report would allegedly be disclosed at some undisclosed date. *See* Appendix Vol. 2 No. 5 at p. 841-849. The summary report alone was untimely due to being produced after the discovery deadline, which would make the alleged future report even more untimely. Moreover, the summary report still did not contain any opinion as to the fair market value of the subject real property's highest and best use at the time of the taking. Instead, the summary report reflected that the basis for the future report was the condemnation project. Specifically, the summary report states that "[t]he Yeager Airport expansion project for Runaway 5 created an immediate need for a site to be used as an earthen landfill." *Id.* at p. 845. It was undisputed that Dean Dawson's alleged future report in determining value was based on the condemnation project.

Through its Motion for Summary Judgment, KCC set forth the above positions as to why it should have been granted judgment as a matter of law to the Circuit Court. Gomez now contends in her Brief to this Court that "[t]here 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." *See* "Petitioner's Brief" at p. 29. However, Gomez did not present any such evidence to the Circuit Court. Gomez's Response to Respondent's Motion for Summary Judgment did not set forth any such record evidence to the Circuit Court to rebut KCC's arguments that no genuine issue of material fact exists. *See* Appendix Vol. 2 No. 4 at p. 815-816. Rather, Gomez's Response Brief only continued to argue future use and the alleged valuation based upon the alleged dump fees without any supportive facts or evidence cited within it. *Id.*

Although the facts and evidence are to be considered in the light most favorable to the nonmoving party, “the nonmoving party must nonetheless offer some ‘concrete evidence from which a reasonable . . . [finder of fact] could return a verdict in . . . [its] favor.’” *Williams*, 459 S.E.2d at 337,(alteration in original) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986)). Any such evidence may not consist of vague, unsupported assertions by counsel; rather, “the nonmovant must go beyond the pleadings and contradict the showing by pointing to specific facts demonstrating a single ‘trialworthy’ issue.” *Powderidge Unit Owners Ass’n v. Highland Props, Ltd.*, 474 S.E.2d 872, 977-80 (W. Va. 1996).

In this case, Gomez failed to meet her burden to survive summary judgment. Further, Gomez’s failure to comply with discovery caused her to have no evidence or ability to refute that there was no genuine issue of material fact. Accordingly, the Circuit Court did not err in granting KCC’s Motion for Summary Judgment.

V. CONCLUSION

Based upon the foregoing argument, law, and the Circuit Court’s Orders, Petitioner Below / Respondent Kanawha County Commission requests that this Honorable Court affirm the Circuit Court’s Orders granting it judgment as a matter of law, finding that the take was for a public purpose, finding that Gomez could not put forth evidence of the condemnation project and post take actions involving the subject property, finding judicial notice of the Commissioner’s Decision, and striking Gomez’s pleadings and experts; and granting Petitioner Below / Respondent Kanawha County Commission all other relief that this Honorable Court deems just and proper.

KANAWHA COUNTY COMMISSION,

By Counsel,



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Loretta Lynn Gomez, Respondent Below,

Petitioner,

v.

No. 15-0342
(Civil Action No. 13-P-327)

Kanawha County Commission, Petitioner Below

Respondent,

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of foregoing "BRIEF OF RESPONDENT KANAWHA COUNTY COMMISSION" was served upon the following parties by U.S. Mail and facsimile on this day, Thursday, September 3, 2015:

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