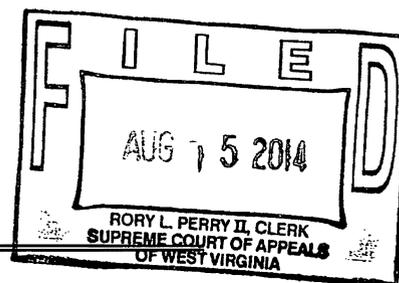


No. 14-0428



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

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

v.

MARGARET Z. NEWTON, Respondent Below
Respondent.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES..... iv

I. ASSIGNMENTS OF ERROR..... 1

II. STATEMENT OF THE CASE..... 1

A. Underlying Facts and Background of Instant Matter 1

B. Summary of the Instant Matter 4

C. Proceedings and Rulings Below..... 5

III. SUMMARY OF ARGUMENT 7

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION..... 8

V. ARGUMENT..... 9

A. The Standard of Review...... 9

B. The Circuit Court’s finding that the Respondent had suffered an actual take of limestone having a commercial value which necessitated a trial by twelve freeholders to determine the just compensation owed for the same was erroneous and constitutes reversible error...... 10

C. The Circuit Court abused its discretion and committed reversible error when it found that the WVDOH acted in bad faith and in a willful trespass against the interests of the Respondent, sanctioning the WVDOH by establishing April 29, 2011 as the date of take; and applying the limited and narrow valuation standard originally set forth by the Court in *West Virginia Dept. of Highways v. Roda*, 177 W.Va. 383, 352 S.E.2d 134 (1986) to limestone that had been excavated and removed as part of the construction of Corridor H. 14

 1. **The WVDOH complied with its statutory duty to institute eminent domain proceedings within a reasonable time upon completion of construction.**..... 14

 2. **The WVDOH did not act in trespass and commit a willful trespass against Newton when it commenced construction of Corridor H.**..... 15

 3. **The Circuit Court abused its discretion by ruling that the date of take for these proceedings was April 29, 2011**..... 19

D. The Circuit Court abused its discretion and committed reversible error when it determined that *West Virginia Dept. of Highways v. Berwind Land Co.*, 167 W.Va. 726, 280 S.E.2d 609 (1981) does not apply in the absence of a unified fee simple estate...... 21

E. The Circuit Court abused its discretion and committed reversible error when it ruled that the Respondent should be allowed a market time frame window from April 29, 2011 to October 29, 2012, for the limestone taken, appropriated and removed from the property for purposes of establishing a market or marketability for the same. 23

F. The Circuit Court abused its discretion and committed reversible error when it permitted the Respondent to introduce evidence at trial concerning the WVDOH’s use of limestone excavated from the property in the construction of the Corridor H highway to prove quality.... 28

G. The Circuit Court abused its discretion and committed reversible error pursuant to Rules 401, 402 and 403 of the West Virginia Rules of Evidence when it permitted the Respondent to introduce evidence consisting of photographs, expert opinions, expert and fact witness testimony and construction documents related to limestone excavated by the WVDOH from other properties and for separate projects...... 31

H. The Circuit Court abused its discretion and committed reversible error when it read “Additional Instructions” to the jury prior to the submission of evidence related to the WVDOH’s failure to contact the Respondent prior to commencement of construction and allowed the presentation of evidence with respect to the same..... 35

I. The Circuit Court abused its discretion and committed reversible error when it found that the WVDOH was precluded from introducing any evidence concerning the percentage of recovery yields of the limestone at issue. 37

J. The Circuit Court abused its discretion and committed reversible error when it failed to grant the WVDOH’s Motion for Judgment as a Matter of Law pursuant to Rule 50 of the West Virginia Rules of Civil Procedure. 39

VI. CONCLUSION 40

CERTIFICATE OF SERVICE 41

APPENDIX-A 42

TABLE OF AUTHORITIES

Cases

<i>Acker v. Guinn</i> , 464 S.W.2d 348, 352 (Tex 1971).....	13
<i>AIG Domestic Claims, Inc. v. Hess Oil Co.</i> , ___ W.Va. ___, 751 S.E.2d 31 (2013).....	27, 37
<i>Atwood v. Rodman</i> , 355 S.W.2d 206 (1962 Tex App).....	13
<i>Bauman v. Ross</i> , 167 U.S. 548, 574 (1897)	8
<i>Beury v. Shelton</i> , 144 S.E. 629 (Va 1928)	13
<i>Burdette v. Maust Coal & Coke Corp.</i> , 159 W.Va. 335, 222 S.E.2d 293 (1976).....	27, 37
<i>Campbell v. Tenn. Coal, Iron & R. Co.</i> , 265 S.W. 674 (Tenn. 1921).....	13
<i>Chrystal R.M. v. Charlie A.L.</i> , 194 W.Va. 138, 459 S.E.2d 415 (1995).....	9
<i>City of Sioux Falls v. Kelley</i> , 513 N.W.2d 97 (S.D.,1994)	36
<i>Eldridge v. Edmondson</i> , 252 S.W. 2d 605 (Tex. App. 1952)	13
<i>Elkhorn City Land Co. v. Elkhorn City</i> , 459 S.W.2d 762, 765, (Ky. 1970).....	13
<i>Faith United Methodist Church v. Morgan</i> , 231 W. Va. 423,745 S.E.2d 461 (2013).....	10
<i>Fredeking v. Tyler</i> , 224 W. Va. 1, 680 S.E.2d 16 (2009)	10, 39
<i>Guyandotte Valley Ry. v. Buskirk</i> , 57 W. Va. 417, 50 S.E. 521 (1905).....	24
<i>Hardy v. Simpson</i> , 118 W.Va. 440, 190 S.E. 680 (1937)	15
<i>Hark v. Mountain Fork Lumber Co.</i> , 127 W. Va. 586, 34 S.E.2d 348 (1945).....	15
<i>Heinatz v. Allen</i> , 217 S.W.2d 994 (Tex 1949).....	13, 14
<i>Heineman v. Terra Enters.</i> , 817 F.Supp.2d 1049 (E.D. Tenn. 2011)	13
<i>Henry v. Jefferson County Planning Comm'n</i> , 34 Fed. Appx. 92 (4th Cir. 2002)	14
<i>Holland v. Dolese Co., Okl.</i> , 540 P.2d 549 (1975)	13
<i>Jackson v. State Farm Mut. Auto. Ins. Co.</i> , 215 W. Va. 634, 600 S.E.2d 346 (2004).....	12, 35
<i>Johnson v. City of Parkersburg</i> , 16 W.Va. 402 (1880).....	15
<i>Kanawha, Glen Jean & E. R.R. v. Glen Jean, Lower Loup</i> , 45 W. Va. 119, 30 S.E. 86 (1898).....	19
<i>Keith v. Kinney</i> , 140 P.3d 141 (Colo. Ct. App. 2005).....	11
<i>Little v. Carter</i> , 408 S.W.2d 207 (Ky. 1966)	13
<i>Manor Care, Inc. v. Douglas</i> , 2014 W. Va. LEXIS 786, 13, 2014 WL 2835831 (June 18, 2014).....	10, 39
<i>Matsuda, LLC v. Duff (In re Brooks Sand & Gravel)</i> , 355 B.R. 1 (Bankr. W.D. Ky. 2006	13
<i>McCormick v. Allstate Ins. Co.</i> , 197 W. Va. 415, 475 S.E.2d 507 (1996).....	9
<i>McDougal v. McCammon</i> , 193 W. Va. 229, 455 S.E.2d 788 (1995).....	10, 38, 39
<i>Mullins v. Clinchfield Coal Corp.</i> , 227 F.2d 881 (4th Cir. 1955).....	16
<i>Phillips v. Fox</i> , 193 W. Va. 657, 458 S.E.2d 327 (1995).....	11, 12
<i>Quintain Dev. v. Columbia Natural Res.</i> , 210 W. Va. 128, 556 S.E.2d 95 (2001).....	11
<i>Reynolds v. Pardee & Curtin Lumber Co.</i> , 172 W. Va. 804, 310 S.E.2d 870 (1983)	16, 17, 19
<i>Rock House Fork Land Co. v. Raleigh Brick & Tile Co.</i> , 83 W.Va. 20, 97 S.E. 684 (1918.)	11, 12
<i>Shaffer v. West Va. Dep't of Highways</i> , 208 W. Va. 673, 542 S.E.2d 836 (2000)	4, 15
<i>Skaggs v. Elk Run Coal Co., Inc.</i> , 198 W. Va. 51, 479 S.E.2d 561 (1996).....	9
<i>Southern Electric Generating Co. v. Leibacher</i> , 110 So.2d 308 (Ala.1959)	36
<i>Squires v. Lafferty</i> , 95 W. Va. 307, 121 S.E. 90 (1924)	11
<i>St. Genevieve Gas Co. v. TVA</i> , 747 F.2d 1411 (11 th Cir. 1984).....	29
<i>State by Dept. of Natural Resources v. Cooper</i> , 152 W.Va. 309, 162 S.E.2d 281 (1968).....	5, 20, 22, 23
<i>State by State Rd. Comm'n v. Snider</i> , 131 W. Va. 650, 49 S.E.2d 853 (1948)	24
<i>State ex rel. French v. State Road Commission</i> , 147 W.Va. 619, 129 S.E.2d 831 (1963)	15
<i>State ex rel. Rhodes v. West Va. Dep't of Highways</i> , 155 W. Va. 735, 187 S.E.2d 218 (1972)	15
<i>State Road Commission v. Darrah</i> , 151 W.Va. 509, 153 S.E.2d 408 (1967).....	27, 37
<i>State Road Commission v. Ferguson</i> , 148 W.Va. 742, 137 S.E.2d 206 (1964).....	26
<i>State Road Commission v. Penn del Co.</i> , 147 W.Va. 505, 129 S.E.2d 133 (1963)	26

<i>State Road Commission v. Professional Realty Company</i> , 144 W.Va. 652, 110 S.E.2d 616 (1959)	18
<i>State v. Derr</i> , 192 W. Va. 165, 451 S.E.2d 731 (1994)	38
<i>State v. McFarland</i> , 228 W. Va. 492, 721 S.E.2d 62, (2011)	33
<i>State v. McGinnis</i> , 193 W. Va. 147, 455 S.E.2d 516 (1994)	33
<i>State v. Roussidakis</i> , 204 W.Va. 58, 511 S.E.2d 469 (1998)	9
<i>State v. Taylor</i> , 215 W. Va. 74, 593 S.E.2d 645 (2004).....	34
<i>Strouds Creek & Muddlety R.R. v. Herold</i> , 131 W.Va. 45,45 S.E.2d 513 (1947)	24, 25, 26
<i>Tennant v. Marion Health Care Found, Inc.</i> , 194 W. Va. 97, 459 S.E.2d 374 (1995).....	9
<i>Tracy v. Cottrell</i> , 206 W. Va. 363, 524 S.E.2d 879 (1999)	9
<i>U.S. v. Cors</i> , 337 US 325 (1949)	30
<i>United States v. Weyerhaeuser Co.</i> , 538 F.2d 1363 (9th Cir. Or. 1976).....	29
<i>United States v. Whitehurst</i> , 337 F.2d 765 (4th Cir. Va. 1964)	29
<i>W. Va. DOT v. Parkersburg Inn, Inc.</i> , 222 W. Va. 688, 671 S.E.2d 693, (2008).....	9, 10, 32
<i>W. Va. DOT, Div. of Highways v. Contractor Enters.</i> , 223 W. Va. 98, 672 S.E.2d 234 (2008).....	18
<i>W. Va. DOT, Div. of Highways v. Dodson Mobile Homes</i> , 218 W. Va. 121, 624 S.E.2d 468, (2005).....	9
<i>West Virginia Dept. of Highways v. Berwind Land Co.</i> , 167 W.Va. 726, 280 S.E.2d 609 (1981)	passim
<i>West Virginia Dept. of Highways v. Farmer, et al.</i> , 159 W.Va. 823, 226 S.E.2d 717 (1976) ..	12, 13, 21, 23
<i>West Virginia Dept. of Highways v. Roda</i> , 177 W.Va. 383, 352 S.E.2d 134 (1986).....	passim
<i>West Virginia Div. of Highways v. Butler</i> , 205 W. Va. 146, 516 S.E.2d 769 (1999)	25
<i>Young v. Saldanha</i> , 189 W. Va. 330, 431 S.E.2d 669 (1993).....	38
Statutes	
U.S. Const. Amend. 5	8
W. Va. Code, § 54-2-14a	19
W.Va. Code § 17-2A-17	20, 36
W.Va. Code § 17-2A-8(6)	18, 19
W.Va. Code § 54-1-2	36
W.Va. Code § 54-2-12	20
W.Va. Code § 54-2-14	4
W.Va. Const. Art. III, § 9	8
Rules	
W.Va.R.App.P. 18(a)	8
W.Va.R.App.P. 19	8
W.Va.R.App.P. 20	9
W.Va.R.Civ.P. 50	1, 5, 39
W.Va.R.Evid. 401	passim
W.Va.R.Evid. 402	passim
W.Va.R.Evid. 403	passim

I. ASSIGNMENTS OF ERROR

A. The Circuit Court's finding that the Respondent had suffered an actual take of limestone having a commercial value which necessitated a trial by twelve freeholders to determine the just compensation owed for the same was erroneous and constitutes reversible error.

B. The Circuit Court abused its discretion and committed reversible error when it found that the WVDOH acted in bad faith and in a willful trespass against the interests of the Respondent, sanctioning the WVDOH by establishing April 29, 2011 as the date of take; and applying the limited and narrow valuation standard originally set forth by the Court in *West Virginia Dept. of Highways v. Roda*, 177 W.Va. 383, 352 S.E.2d 134 (1986) to limestone that had been excavated and removed as part of the construction of Corridor H.

C. The Circuit Court abused its discretion and committed reversible error when it determined that *West Virginia Dept. of Highways v. Berwind Land Co.*, 167 W.Va. 726, 280 S.E.2d 609 (1981) does not apply in the absence of a unified fee simple estate.

D. The Circuit Court abused its discretion and committed reversible error when it ruled that the Respondent should be allowed a market time frame window from April 29, 2011 to October 29, 2012, for the limestone taken, appropriated and removed from the property for purposes of establishing a market or marketability for the same.

E. The Circuit Court abused its discretion and committed reversible error when it permitted the Respondent to introduce evidence at trial concerning the WVDOH's use of limestone excavated from the property in the construction of the Corridor H highway to prove quality.

F. The Circuit Court abused its discretion and committed reversible error pursuant to Rules 401, 402 and 403 of the West Virginia Rules of Evidence when it permitted the Respondent to introduce evidence consisting of photographs, expert opinions, expert and fact witness testimony and construction documents related to limestone excavated by the WVDOH from other properties and for separate projects.

G. The Circuit Court abused its discretion and committed reversible error when it read "Additional Instructions" to the jury prior to the submission of evidence related to the WVDOH's failure to contact the Respondent prior to commencement of construction and allowed the presentation of evidence with respect to the same.

H. The Circuit Court abused its discretion and committed reversible error when it found that the WVDOH was precluded from introducing any evidence concerning the percentage of recovery yields of the limestone at issue.

I. The Circuit Court abused its discretion and committed reversible error when it failed to grant the WVDOH's Motion for Judgment as a Matter of Law pursuant to Rule 50 of the West Virginia Rules of Civil Procedure.

II. STATEMENT OF THE CASE

A. Underlying Facts and Background of Instant Matter

On June 4, 1980, the Respondent, Margaret Z. Newton ("Newton") and her husband at the time, Paul V. Williams, conveyed approximately 37.2424 acres of real estate located in Hardy County, West Virginia to James S. Parsons, ("Parsons") by deed, of record in the Office of the Clerk of the County Commission of Hardy County, West Virginia ("Hardy County Clerk") in Deed Book 162, at page 59, hereinafter referred to as the "subject property". Joint Appendix ("App."), pp. 0203-0207. This deed

contained a broadly worded and undefined mineral rights reservation which stated that “All Mineral rights under this tract are hereby reserved by Grantors.” App., p. 0203. The sale did not give permission to Newton to conduct surface mining. App., pp. 0297-0298, ¶ 3-4.¹ On March 9, 1993, Mr. Williams died and the aforesaid mineral rights passed directly to his wife Newton. App., pp. 0180, ¶ 6 and 192, ¶ 6.

In 2004, the subject property consisted of two pastures separated by a steep woodland area, also known as Timber Ridge, with elevations ranging from 980 to 1,340 feet above sea level. App., pp. 0344, 4420. In 1981, Parsons constructed a cabin on the property without any objections from Newton or Mr. Williams. App., pp. 0297, ¶ 3, 0345, 4421 and 4945. Since 1981, this cabin has served as Parson’s primary residence. However, the steep wooded section of the subject property remained undeveloped. App., pp. 0345 and 4421.

Although the mineral estate was severed from the subject property approximately thirty-two years ago, Newton never conducted any testing, analysis or exploration for minerals on the property. In fact, she was not even aware of any limestone beneath the subject property.² As of 2004, no mining, quarrying or drilling had ever occurred on the subject property,³ nor were there any plans to do so.⁴ Parsons and Newton each agree that they never had any discussions concerning minerals beneath the subject property and Newton had no desire to extract the same. As of 2004, Newton did not have an agreement with Parsons which would have permitted her to disturb the surface in order to quarry limestone, or any other mineral, beneath the subject property.⁵ This would have served as an impediment to any quarrying operations by Newton since underground/deep mining was not a viable option. App., pp. 0393 and 0396.

Portions of the subject property were located within the alignment selected for Corridor H, specifically Project No. X316-H-100.40, APD-0484(176), by the West Virginia Department of Transportation, Division of Highways (“WVDOH”) and approved by the Federal Highway

¹ In responding to discovery requests, Newton did not restate the interrogatory or request in her response. The actual interrogatories and the requests are in the Joint Appendix at pages 0284-0296 and 0306-0321.

² App., pp. 0297-0300, ¶¶ 2, 4, 5, 12, 13, 14, 15, 16 and 20; and 0322-0327, ¶¶ 2, 3, 4, 5-6, 9, 10, 13-1, 23-26.

³ App., pp. 0228-0329, ¶¶ 39, 40.

⁴ App., pp. 0298, ¶ 7, 0300 ¶ 18) and 0323, 0326--0328 ¶¶ 8, 20-23, 27-29, 33-37.

⁵ App., pp. 0298, ¶¶ 6, 8; 0323 ¶ 9; and 4945.

Administration. The WVDOH designated the areas to be affected on the subject property as Parcel No. 3, which consisted of three tracts: Tract 1, a controlled access right-of-way consisting of 3.24 acres; Tract 2, a controlled access right-of-way consisting of 3.47 acres; and Tract 3, an uneconomic remnant consisting of 0.004 acres, for a total take of 6.714 acres. App., pp. 0174-0178. This alignment was publically announced and the plans associated with the same were recorded at the Hardy County Clerk's office for public review and analysis prior to the commencement of (a) negotiations with any property owners; and (b) construction. App., p. 0180 ¶ 3. These right-of-way of plans also included a depiction of the take from the subject property.

The subject property was appraised on behalf of the WVDOH by Kent Kesecker ("Kesecker"). That appraisal was completed June 10, 2004. App., pp. 0341-0380, 4417-4494. Kesecker concluded that the cabin and outbuildings were not affected by the take and that the highest and best use of the subject property if it were (a) vacant, would be residential/pasture/woodland; or (b) improved, would be as a single family residence. App., pp. 0345, 0368, 4421, 4444 and 5370-5371. Kesecker was aware that the mineral rights had been severed. App., p. 4419. Based upon his experience, research and inspection of the subject property, Kesecker determined that mining was not consistent with the subject property's overall highest and best use. App., p. 5372. This determination is consistent with the subsequent finding by Summit Engineering, Inc. ("Summit") rendered in 2012 that mining of the subject property was not feasible as of 2004. App., pp. 0435-0436.⁶ Kesecker concluded that the value of the take, including damages to the residue, was \$33,400 or approximately \$4,700/acre. App., pp. 0371-0373 and 4449-4451.

In the fall of 2004, the WVDOH entered into negotiations with Parsons. The parties eventually reached an agreement whereby Parsons, in exchange for the sum of \$33,500.00, would convey indefeasible title to Tracts 1, 2 and 3 to the WVDOH for "public road purposes over, through, across and upon" the subject property. This agreement was consummated by deed dated October 7, 2004, of record in the Hardy County Clerk's office, in Deed Book 282, page 70. As specified in the deed, the rights being

⁶ For the purposes of this Petition, Summit is deemed to collectively include the WVDOH's witnesses, Geologist Bruce Rogers and Professional Mining Engineer Phil Lucas.

conveyed were “in connection with the construction, maintenance and use of a controlled access facility (freeway).” App., pp. 0209-0213.

Even though construction on this portion of Corridor H began shortly after Parsons conveyed the aforementioned rights-of-way, Newton never contacted the WVDOH to express any objections or concerns about the take from the subject property. From October 7, 2004 until May 4, 2010, neither Newton, nor anyone acting on her behalf, attempted to contact the WVDOH concerning damage to her property interests. App., p. 0323 ¶ 7. On May 4, 2010, without providing any advance notice to the WVDOH, Newton, along with two neighboring property owners, filed a petition for writ of mandamus against the WVDOH in the Hardy County Circuit Court, styled *Theodore E. Garrett, Edward Sherman and Margaret Z. Newton v. Department of Transportation, Division of Highways, Civil Action No. 10-C-42*. App., pp. 0134-0146. In this action, Newton and her co-petitioners alleged that significant minerals, primarily limestone, were taken from their respective properties by the WVDOH and therefore condemnation proceedings should be initiated. App., p. 0138 ¶ 12.

On October 27, 2010, the section of Corridor H at issue was opened to the public. The WVDOH fulfilling its statutory obligations upon receipt of a “good faith claim for damages”, filed the instant proceedings on April 29, 2011, and did so within a reasonable time upon completion of construction. App., pp. 0009-0012 and 0179-0185. See also, W.Va. Code § 54-2-14 and *Shaffer v. West Virginia Department of Transportation, Div. of Highways*, 208 W. Va. 673, 667-678, 542 S.E.2d 836, 840-841 (2000). As a result, the claims of Newton in Civil Action No. 10-C-42 were dismissed.⁷

B. Summary of the Instant Matter

The WVDOH instituted this action seeking a judicial determination of a disputed claim for damages as contemplated under *Shaffer, supra*. App., pp. 0179-0185. As outlined in its Petition, the

⁷ The remaining two claims for minerals in Civil Action No. 10-C-42 [Garrett and Sherman] were subsequently dismissed with prejudice by the Circuit Court. Since Garrett and Sherman had previously reached agreements with the WVDOH, the Circuit Court determined that a Petition for Writ of Mandamus, as contemplated by *Shaffer, supra*, “was not intended to provide a condemnee with an additional opportunity to seek compensation and/or damages after reaching a prior agreement with the condemnor simply because the condemnee is now dissatisfied with the settlement amount that was originally accepted.”

WVDOH requested that the Circuit Court determine that (1) the WVDOH filed the action within a reasonable time after completion of construction; (2) Newton is not entitled to just compensation and/or damages with respect to the mineral rights associated with the subject property; and (3) Newton has not suffered any compensable damages as a result of the construction of the highway. App., p. 0183 ¶¶ 1, 2 and 3. Newton in her Affirmative Defenses and Response, requested that the Circuit Court determine that (1) the actions of the WVDOH constituted a taking of minerals from the subject property without just compensation in violation of West Virginia law; and (2) the taking of Newton's property by the WVDOH, did not occur until the filing of the civil action. App., pp. 0195-0196 ¶¶ 1, 2, 3 and 10.

C. Proceedings and Rulings Below

The assignments of error at issue in this matter are primarily the result of a series of hearings in which the Circuit Court made rulings concerning (a) the applicable legal standard to be applied with respect to the calculation of just compensation; and (b) the relevance and admissibility of evidence. The lone assignment of error resulting from the trial itself pertains to the Circuit Court's refusal to grant the WVDOH's Motion for Judgment pursuant to Rule 50 of the West Virginia Rules of Civil Procedure. ("W.Va.R.Civ.P.") The WVDOH would direct this Court's attention to the following hearings and rulings made by the Circuit Court:⁸

May 10, 2012 Hearing. On May 30, 2012, the Circuit Court entered an Order outlining multiple findings and conclusions concerning legal and evidentiary standards that would apply at trial, which had been argued on May 10, 2012. The Circuit Court ruled:

- a. That the mineral rights reservation created two separate estates and compensation for the same should be determined in accord with the interest of the parties, pursuant to *State by Dept. of Natural Resources v. Cooper*, 152 W.Va. 309, 162 S.E.2d 281 (1968).
- b. That April 29, 2011 would be the date of take pursuant to *West Virginia Dept. of Highways v. Roda*, 177 W.Va. 383, 352 S.E.2d 134 (1986).
- c. That the WVDOH's failure to contact Newton before construction denied her the opportunity to determine the highest and best use of the limestone and the just

⁸ The majority of the hearings in this matter were consolidated with another proceeding, *WVDOH, et al., Petitioners, vs. Douglas R. Veach, et al., Respondents, Hardy County Circuit Court, Civil Action No. 11-C-36*, ("Veach Matter"), even though the two cases were never consolidated. The Orders from the Veach Matter have also been included with the record. App., pp. 5408-5473. For this summary, the WVDOH will also provide references to the Circuit Court's decisions in the Veach Matter.

- compensation she was entitled to receive.
- d. That the compensation for the limestone that was removed is the fair market value as of the date of take, uncovered and ready for loading, with no consideration of the production, mining or excavation costs, pursuant to *Roda, supra*.
 - e. That the hybrid valuation rule for minerals adopted in *West Virginia Dept. of Highways v. Berwind Land Co.*, 167 W.Va. 726, 280 S.E.2d 609 (1981), did not apply because there is separate ownership.

App., pp. 0023-0027, 4594-4643 and 05408-5412.⁹

October 25, 2012 Hearing. Following a request by the WVDOH for clarification of its prior rulings, a hearing was held on October 25, 2012. On November 8, 2012, the Circuit Court entered an order expanding and clarifying certain findings as contained in its May 30, 2012 Order. Specifically, the Circuit Court held:

- a. That the WVDOH entered onto Newton's property and appropriated limestone without her permission and by so doing, acted in bad faith and in a willful trespass against her.
- b. That the valuation standard set forth in *Roda, supra*, was applicable to the facts at hand.
- c. That the standards set forth in *Roda, supra*, and *Berwind, supra*, would be applied.

App., pp. 0031-0035, 4644-4683 and 5413-5418.

November 13, 2012 Hearing. On November 13, 2012, a hearing was held concerning the adoption of a jury charge, jury instructions and jury verdict form. Relying upon its prior rulings, the Circuit Court entered an Order on January 2, 2013, adopting a jury charge, instructions and a verdict form which embodied its prior rulings. App., pp. 0036-0062 and 4684-4774.

July 30, 2013 Pretrial Hearing. At the Pretrial Hearing on July 30, 2013, the Circuit Court heard oral argument with respect to various motions for summary judgment and motions *in limine*. After consideration of the same, the Circuit Court entered an Order on August 29, 2013, ruling as follows:

- a. That evidence that the WVDOH (a) entered onto her property without permission; (b) did not contact her; and (c) prevented Newton from assessing the value of the limestone prior to excavation, was relevant and admissible.
- b. That recovery yields for limestone from the subject property as discussed by Summit were irrelevant and inadmissible, pursuant to *Roda, supra*. App., p. 0880.
- c. That Newton could introduce evidence related to the WVDOH's use of the limestone in construction of Corridor H to establish the quality of the same.

⁹ The WVDOH filed a Petition for Writ of Prohibition in the instant matter and the Veach Matter with respect to these rulings. In both cases, this Court found that the relief requested by the WVDOH should be refused as premature, without prejudice, to raise the issues on appeal from a final judgment. App., p. 0028.

- d. That because of the quantity of limestone at issue, Newton would be given an 18-month market window from the date of take to establish marketability.

App., pp. 0071-1114 and 4775-4800. As a result of these rulings, the Circuit Court also modified and revised its previously adopted jury charge and jury instructions. App., p. 4782.

August 20, 2013 Hearing. On August 20, 2013, a hearing was held to finalize several issues regarding the WVDOH's motion to preclude Newton from presenting evidence related to properties and materials not at issue. The Circuit Court denied the motion, finding that a limited instruction cautioning the jury would suffice. App., pp. 1115-1118 and 4859-4874.

March 31, 2014 Hearing. The Circuit Court scheduled a hearing on March 31, 2014, in order to "finalize all outstanding matters and alleviate any unnecessary conflict." At the hearing, the Circuit Court reminded the parties that its previous rulings concerning the legal and evidentiary standards would apply at trial, and its jury charge and instructions were final and *no further argument would be heard* concerning the same, with the Circuit Court noting that all objections had already been noted *multiple times* on the record. App., pp. 0130-0133.

Trial – April 7-9, 2014. As reflected by the above, the Circuit Court made nearly all of its rulings concerning the applicable standards for determining just compensation, along with evidentiary rulings related to the same, well in advance of trial with the objections of the parties noted for the record on multiple occasions. As a result, the trial was rather uneventful other than the Circuit Court's refusal to grant the WVDOH's motion for judgment as a matter of law.

III. SUMMARY OF ARGUMENT

The WVDOH does not dispute that after reaching a settlement with Parsons with respect to a take from the subject property that it commenced construction without contacting Newton. However, the WVDOH's actions were not an attempt to violate Newton's constitutional rights and covertly take limestone without paying her just compensation. At no time did the WVDOH ever contemplate condemning the subject property or any of the adjacent properties for the sole purpose of appropriating limestone. Upon execution of the deed by Parsons on October 7, 2004, the WVDOH acquired rights-of-

way for “public road purposes over, through, across and upon” his property and the rights conveyed were “in connection with the construction, maintenance and use of a controlled access facility (freeway).” App., pp. 0209 and 0212. Therefore, the WVDOH entered onto the subject property and constructed the highway in the same fashion that it has constructed roads for decades, using whatever earthen materials that it encountered. The presence of limestone was non-consequential as the WVDOH constructs roads with any material that is available if (a) the inorganic content is low and (b) compaction tests are satisfied. App., pp. 4338-4339, 5145-5146 and 5160.

The WVDOH is aware of the constitutional protection afforded citizens of the United States of America and West Virginia that private property will not be taken or damaged for public use without “just compensation”. U.S. Const. Amend. 5 and W.Va. Const. Art. III, § 9. However, it is important to note that these constitutional rights were also implemented to provide protection *for* the public. This principle was specifically highlighted by the United States Supreme Court (“U.S. Supreme Court”) in, *Bauman v. Ross*, 167 U.S. 548, 574 (1897), when it stated that a landowner is only entitled to receive the value of what he has been deprived of and “to award him more would be unjust to the public.” It is therefore axiomatic in any condemnation proceeding that the condemnee must first sufficiently demonstrate a viable ownership interest in the property taken or damaged **before** just compensation can be considered. In this matter, Newton, as evidenced by the jury verdict, has received a windfall for a property right that she could not have exercised and which had no independent value as of October 7, 2004, simply because the WVDOH constructed a road.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The WVDOH maintains that oral argument is necessary pursuant to the criteria outlined under Rule 18(a) of the West Virginia Rules of Appellate Procedure (“W.Va.R.App.P.”) because (a) the parties have not agreed to waive oral argument; (b) the petition is not frivolous; (c) the dispositive issues have not previously been authoritatively decided by this Court and the decisional process would be significantly aided by oral argument. The WVDOH further states that this case is suitable for oral argument pursuant to W.Va.R.App.P. 19 because it involves: (1) assignments of error in the application

of settled law; and (2) the unsustainable exercise of discretion where the law governing that discretion is settled. This case is further suitable for argument under W.Va.R.App.P. 20 because it potentially involves issues of first impression and issues of fundamental public importance.

V. ARGUMENT

A. The Standard of Review.

Of the nine assignments of error, eight are directly related to the Circuit Court's pretrial rulings concerning the application of West Virginia law to the facts of this case. When this Court reviews challenges to the findings and conclusions of a trial court, a two-prong deferential standard of review is applied. As stated by this Court in *McCormick v. Allstate Ins. Co.*, 197 W. Va. 415, 421, 475 S.E.2d 507, 513 (1996) "[w]e review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard." More specifically, as noted by this Court in *W. Va. DOT, Div. of Highways v. Dodson Mobile Homes Sales & Servs.*, 218 W. Va. 121, 124, 624 S.E.2d 468, 471, (2005) where the issue is "clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review". See also, Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995). Included in this *de novo* standard are matters related to whether the jury was properly instructed under the law and/or given a correct statement of the law. *W. Va. DOT v. Parkersburg Inn, Inc.*, 222 W. Va. 688, 693, 671 S.E.2d 693, 698, (2008) and *Skaggs v. Elk Run Coal Co., Inc.*, 198 W. Va. 51, 63, 479 S.E.2d 561, 573 (1996). However, a trial court's giving of an instruction is reviewed under an abuse of discretion standard. *Tracy v. Cottrell*, 206 W. Va. 363, 370, 524 S.E.2d 879 (1999), *Tennant v. Marion Health Care Found, Inc.*, 194 W. Va. 97, 459 S.E.2d 374 (1995).

With respect to a trial court's rulings concerning the admission of evidence, this Court has stated that "[a] trial court's evidentiary rulings . . . are subject to review under an abuse of discretion standard." Syl. Pt. 4, in part, *State v. Roussadakis*, 204 W.Va. 58, 61, 511 S.E.2d 469, 472 (1998). Moreover, a trial court's evidentiary rulings, as well as its application of the West Virginia Rules of Evidence ('W.Va.R.Evid.'), are subject to review under an abuse of discretion standard. Syl. pt. 1, *McDougal v.*

McCannon, 193 W. Va. 229, 455 S.E.2d 788 (1995), and *Parkersburg Inn, Inc.*, 222 W. Va. at 693-694, 671 S.E.2d at 698-699.

Finally, the appellate standard of review for an order granting or denying a renewed motion for a judgment as a matter of law after trial pursuant to Rule 50(b) of the West Virginia Rules of Civil Procedure [1998] is *de novo*." Syl. pt. 1, *Fredeking v. Tyler*, 224 W. Va. 1, 680 S.E.2d 16 (2009) and *Manor Care, Inc. v. Douglas*, 2014 W. Va. LEXIS 786, 13, 2014 WL 2835831 (W. Va. June 18, 2014).

B. The Circuit Court's finding that the Respondent had suffered an actual take of limestone having a commercial value which necessitated a trial by twelve freeholders to determine the just compensation owed for the same was erroneous and constitutes reversible error.

The WVDOH specifically requested that the Circuit Court determine whether Newton had suffered any compensable damage to a viable property right that she possessed as of October 7, 2004. App., p. 0184. Newton maintained that reservation of minerals in her deed to Parsons entitled her to compensation regardless of whether she had an actionable interest. However, a distinction must be drawn between the possession of mineral rights and the right to exercise those rights, an important distinction which was ignored by the Circuit Court.¹⁰ In that regard, the record reflects the following critical and uncontroverted facts as of October 7, 2004:

1. Parsons was utilizing the property for residential purposes, complete with a home and outbuildings. App., pp. 0297, ¶ 3, 0345, 4421 and 4945.
2. The subject property was not being mined, and had never been mined previously. App., pp. 0297-0300, ¶¶ 2, 4, 5, 12, 13, 14, 15, 16 and 20; and 0322-0327, ¶¶ 2, 3, 4, 5-6, 9, 10, 13-1, 23-26.
3. Newton did not have an agreement in place to surface mine limestone from the subject property, and, in fact, she had never discussed mining with Parsons. App., pp. 0298, ¶¶ 6, 8; 0323 ¶ 9; and 4945.
4. The only viable method to remove limestone from the subject property was surface

¹⁰ The WVDOH is aware of this Court's decision in *Faith United Methodist Church v. Morgan*, 231 W. Va. 423, 745 S.E.2d 461 (2013) concerning the definition of surface when used in a deed of conveyance and the interplay of the same with a reservation of mineral rights. However, the WVDOH maintains that this Court's decision in *Faith United* is distinguishable from this eminent domain proceeding. The issues before the Court in the instant matter are whether (a) in 2004 Newton had an actionable interest in limestone beneath the surface of the subject property; and (b) her interests were affected by the construction of the highway. As demonstrated herein, Newton did not have an actionable interest in the limestone in 2004, or at any time, because the limestone could only be removed by virtue of surface mining which would destroy the surface. In fact, the definition of "surface" as crafted by this Court would still be deemed to include subjacent and lateral support which Parsons by law is entitled to maintain.

- mining, which would have required depletion and destruction of the surface rendering the same useless for Parsons. App., pp. 0393 and 0396.
5. The subject property was not conducive for mining. App., pp. 0435-0436.
 6. Mining was not consistent with the highest and best for property. App., pp. 0345 and 4421.

The fact that the limestone at issue was an inseparable part of the surface and that mining was legally impossible in 2004 is a determinative factor that cannot be ignored and should not have been ignored by the Circuit Court. It is a fundamental tenet of real estate law that the mineral estate has a duty to support the surface. To find otherwise would render any conveyance of the surface useless since the indiscriminate removal of any and all minerals would serve to “swallow up the surface grant.” *Keith v. Kinney*, 140 P.3d 141, 147 (Colo. Ct. App. 2005). Addressing this issue, this Court in *Phillips v. Fox*, 193 W. Va. 657, 664, 458 S.E.2d 327, 334 (1995), noted “our past cases have demonstrated that any use of the surface by virtue of rights granted by a mining deed must be exercised reasonably so as not to unduly burden the surface owner's use.” See also, *Squires v. Lafferty*, 95 W. Va. 307, 121 S.E. 90 (1924). More specifically, this Court in *Phillips* concluded, as supported by its later decision in *Quintain Dev. v. Columbia Natural Res.*, 210 W. Va. 128, 133, 556 S.E.2d 95, 100 (2001), that:

The right to surface mine will only be implied if it is demonstrated that, at the time the deed was executed, surface mining was a known and accepted common practice in the locality where the land is located; that it is reasonably necessary for the extraction of the mineral; and that it may be exercised without any substantial burden to the surface owner.

See also, *Rock House Fork Land Co. v. Raleigh Brick & Tile Co.*, 83 W.Va. 20, 24-25, 97 S.E. 684, 686 (1918.) As an attorney and land developer, Mr. Williams would have been well aware of these limitations on the mineral rights reserved by him and Newton in the June 4, 1980, deed. App., p. 0297.

In light of the foregoing, it is apparent that the mere reservation of mineral rights in a deed does not mean that the owner of mineral rights possesses an unrestricted right to mine, quarry or otherwise remove any element that is deemed to be a “mineral.” It is also noteworthy that this Court has previously found that unless a mineral, such as limestone, is exceptional in character, it is actually considered to be a part of the surface, particularly when its removal would involve surface mining, which would deplete or otherwise “swallow” the surface. See generally *West Virginia Dept. of Highways v. Farmer, et al.*, 159

W.Va. 823, 825, 226 S.E.2d 717, 719 (1976), *Rock House Fork, supra*, and *Phillips, supra*.

This Court's decision in *Farmer, supra*, is applicable to this matter. While acknowledging that the term "mineral" in its ordinary and common meaning was a comprehensive term that included all stone and rock deposits, this Court ultimately concluded that the use of the term "minerals" to reserve mineral interests in a deed of conveyance was not intended to be all encompassing in the geological sense. On this basis, this Court held that a straight mineral reservation does not ordinarily include sand and gravel. *Farmer*, 159 W.Va. at 825-828, 226 S.E.2d at 719-720.

The Farmers were the owners of a tract of real estate in Jackson County, West Virginia. The Farmers **did not** have full fee simple title to the property. A prior deed in the chain of title reserved had "the oil, gas and other minerals in and under said land." However, the evidence reflected that no sand or gravel was ever sold from the property and that the Farmers purchased and used the property strictly for farming. *Farmer*, 159 W.Va. at 825-826, 226 S.E.2d at 719. On this basis, the WVDOH filed condemnation proceedings solely against the Farmers in order to obtain sand and gravel for its road building program. At no time prior to trial did the holders of the mineral rights seek to intervene, nor did they institute an independent action. At trial the jury awarded \$33,000 as just compensation for sand and gravel. Following the verdict, the majority owners of the mineral rights sought to intervene, claiming an interest in the amount awarded by the jury. The trial court found that the sand and gravel taken by the WVDOH were not included in the reservation at issue and awarded the full jury award to the Farmers and the mineral owners appealed the decision.

Upon consideration of the matter, this Court in *Farmer, supra*, held that it seemed "remote that a reference to 'minerals' in a reservation was intended to include sand and gravel." *Farmer*, 159 W.Va. at 826, 226 S.E.2d at 719. More specifically, this Court concluded:

Based upon evidence that (a) the property was purchased by the surface owner for farming; (b) the land had always been used for that purpose; and (c) no owner of the minerals in the past had ever sought to exercise control whatsoever over the sand and gravel, "it is readily discernable that the reservation of the minerals created in 1911, did not intend to include sand and gravel. Were it otherwise, the sand and gravel which lay principally on the surface, could be taken by the owners of the minerals and the surface owners could be deprived entirely of the use of such surface. The conveyance to the

Farmers would be useless.”

Farmer, 159 W.Va. at 827-828, 226 S.E.2d at 720-721.

In reaching the foregoing conclusions, this Court cited with approval the opinion of the Texas Supreme Court in *Acker v. Guinn*, 464 S.W.2d 348, 352 (Tex 1971) which held that a mineral reservation “should not be construed to include a substance that must be removed by methods that will, in effect, consume or deplete the surface estate. While the Texas Supreme Court in *Acker, supra*, was addressing rights associated with iron ore, the same principles would apply to that of limestone. The Texas Supreme Court in *Acker* noted “that a devise of ‘mineral rights’ did not include commercial limestone and building stone, we emphasized that these substances are not minerals in the ordinary and natural meaning of the term and that their production by the open-pit method would destroy the surface for agricultural and grazing purposes.” *Acker*, 464 S.W.2d at 351. Citing *Heinatz v. Allen*, 217 S.W.2d 994 (Tex 1949), emphasis added.

It is also noteworthy that this Court in *Farmer, supra*, favorably cited the decision of the Kentucky Court of Appeals in *Elkhorn City Land Co. v. Elkhorn City*, 459 S.W.2d 762, 765, (Ky. 1970), which held that unless limestone is rare and exceptional in character or possesses a peculiar property giving it special value, then it is **not** legally cognizable as a mineral because it is usually found in a natural surface situation that warrants its consideration as a part of the surface.¹¹ Commenting further on this issue, the Texas Supreme Court in *Heinatz, supra*, specifically stated:

Such substances [sand, gravel and limestone], when they are useful only for building and road-making purposes, are not regarded as minerals in the ordinary and generally accepted meaning of the word. The limestone on the land involved herein, **having value only for building purposes**, underlying most if not all of the land at varying and usually shallow depths, outcropping in all the ravines, sometimes found on the top of the surface and removed by quarrying after scraping off the overlying calichie or other top soil, is **so closely related to the soil, so nearly a part of the very surface, the soil itself, that it is reasonably and ordinarily considered a part of the soil and as belonging to the surface**

¹¹ Multiple jurisdictions have held that limestone which is not exceptional or unique in character would not be classified as a mineral in a deed where blanket “mineral rights” were reserved. See, *Campbell v. Tenn. Coal, Iron & R. Co.*, 265 S.W. 674 (Tenn. 1921); *Beury v. Shelton*, 144 S.E. 629 (Va 1928), *Eldridge v. Edmondson*, 252 S.W. 2d 605 (Tex. App. 1952); *Atwood v. Rodman*, 355 S.W.2d 206 (1962 Tex App); *Little v. Carter*, 408 S.W.2d 207, 209 (Ky. 1966), *Holland v. Dolese Co., Okl.*, 540 P.2d 549 (1975); *Matsuda, LLC v. Duff (In re Brooks Sand & Gravel)*, 355 B.R. 1 (Bankr. W.D. Ky. 2006); and *Heineman v. Terra Enters.*, 817 F.Supp.2d 1049 (E.D. Tenn. 2011).

estate rather than as a part of the minerals or mineral rights.

Heinatz, 217 S.W.2d at 997-998. (Emphasis added.)

Since (1) Newton did not have an exercisable right to mine limestone; (2) the limestone was not exceptional in nature nor did it possess any peculiar properties; (3) the limestone would only be useful for building/road-making purposes; and (4) the mining of the limestone would deplete or “swallow” the surface, it is abundantly clear that the WVDOH did not take or damage any actionable property right possessed by Newton. To hold otherwise would constitute a windfall to Newton, allowing her to recover compensation for a property right that possessed no value simply because a highway was built. This concept is contrary to the basic principles of condemnation. In that regard, the Circuit Court abused its discretion by (1) relying upon *Roda, supra*, which clearly does not apply under these circumstances; and (2) concluding, without any corroborative evidence, that a property right vested in Newton was taken or damaged, even though such was not actionable as of October 7, 2004.

C. The Circuit Court abused its discretion and committed reversible error when it found that the WVDOH acted in bad faith and in a willful trespass against the interests of the Respondent, sanctioning the WVDOH by establishing April 29, 2011 as the date of take; and applying the limited and narrow valuation standard originally set forth by the Court in *West Virginia Dept. of Highways v. Roda*, 177 W.Va. 383, 352 S.E.2d 134 (1986) to limestone that had been excavated and removed as part of the construction of Corridor H.

1. The WVDOH complied with its statutory duty to institute eminent domain proceedings within a reasonable time upon completion of construction.

As noted by the Fourth Circuit in *Henry v. Jefferson County Planning Comm'n*, 34 Fed. Appx. 92, 96 (4th Cir. 2002), West Virginia does not have a statutory inverse condemnation procedure. However, a property owner who believes that his or her property has been taken or damaged by the WVDOH due to highway construction may file a petition in the circuit court seeking a writ of mandamus to initiate condemnation proceedings, as outlined previously by this Court. In *Shaffer, supra*, this Court specifically stated:

If a highway construction or improvement project results in probable damage to private property without an actual taking thereof and the owners in good faith claim damages, the West Virginia Commissioner of Highways *has a statutory duty to institute proceedings in eminent domain within a reasonable time after completion of the work* to ascertain the amount of damages, if any, and, if he fails to do so, after reasonable time, mandamus

will lie to require the institution of such proceedings. Thus, the proper course of action for an aggrieved property owner who believes his or her property has sustained damage as a result of highway construction or improvement by the DOH, *after a reasonable time without appropriate action by the DOH*, is to file a complaint in the circuit court seeking a writ of mandamus.

Shaffer, 208 W.Va. at 677, 542 S.E.2d at 840. (Internal citations omitted and emphasis added). It is noteworthy that in these situations, the rules governing condemnation are applied and the WVDOH is not otherwise sanctioned or penalized.¹²

As evidenced in the record, the WVDOH did not receive any notice that Newton believed her mineral rights had been taken or damaged until it was served with a copy of her Petition for Writ of Mandamus in May of 2010. App., p. 0134-0146. Construction on the section of Corridor H at issue was completed five months later on October 27, 2010. The WVDOH maintains that Newton's Petition was premature. Two days after completion of construction, on October 29, 2010, the WVDOH notified the Circuit Court that it intended to voluntarily initiate eminent domain proceedings against Newton with respect to her alleged mineral claims. On April 29, 2011, the WVDOH filed the Petition. Therefore, the WVDOH complied with its statutory duty to institute proceedings in eminent domain within a reasonable time after completion of construction. *Shaffer*, 208 W.Va. at 677, 542 S.E.2d at 840. There was no factual basis for the Circuit Court to deviate from the standard legal and evidentiary rules that apply in eminent domain proceedings and apply the evidentiary sanctions outlined in *Roda, supra*. In essence, the Circuit Court sanctioned the WVDOH despite its compliance with its statutory obligations as noted above.

2. The WVDOH did not act in trespass and commit a willful trespass against Newton when it commenced construction of Corridor H.

Under West Virginia law, the tort of trespass is defined as “an entry on another man's ground without lawful authority, and doing some damage, however inconsiderable, to his real property.” *Hark v. Mountain Fork Lumber Co.*, 127 W. Va. 586, 591-592, 34 S.E.2d 348, 352, (1945). Applying this tort to

¹² Under West Virginia law it makes no difference if the property is alleged to have been either taken or damaged. The same procedure applies. See, *State ex rel. Rhodes v. West Va. Dep't of Highways*, 155 W. Va. 735, 738, 187 S.E.2d 218 (1972); *State ex rel. French v. State Road Commission*, 147 W.Va. 619, 129 S.E.2d 831 (1963); *Hardy v. Simpson*, 118 W.Va. 440, 190 S.E. 680 (1937); and *Johnson v. City of Parkersburg*, 16 W.Va. 402 (1880).

the taking of coal, this Court in *Reynolds v. Pardee & Curtin Lumber Co.*, 172 W. Va. 804, 310 S.E.2d 870 (1983), concluded that there are two classes of trespass, innocent and bad faith. The *Reynolds* Court stated that a “trespasser who does so intentionally or recklessly with intent to ‘take an unconscientious advantage of his victim’ commits a willful or bad faith trespass and is liable for damages in a greater amount than an innocent trespasser.” *Reynolds*, 172 W. Va. at 809-810, 310 S.E.2d at 876, citing *Pan Coal Co. v. Garland Pocahontas Coal Co.*, 97 W. Va. 368, 125 S.E. 226 (1924). Applying these principles to a trespass involving coal, this Court held as follows:

[i]f the trespass be committed, not recklessly, but through inadvertence or mistake, or in good faith, under an honest belief that the trespasser was acting within his legal rights, it is an innocent trespass, and the measure of damages for the coal mined and carried away is the value of the coal in place, usually to be ascertained by finding its value at the pit-mouth or loading tipple and deducting therefrom the expense of mining and carrying it to the pit-mouth or tipple. But if the trespass be willful, in an action for the value of the coal so mined, the measure of damages is its value at the pit-mouth or loading tipple, without deduction for mining and carrying it to the place of conversion.

Reynolds, 172 W. Va. at 809-810, 310 S.E.2d at 876 (1983). (Internal citations omitted.) Similarly, the Fourth Circuit in *Mullins v. Clinchfield Coal Corp.*, 227 F.2d 881, 885-886 (4th Cir. 1955), stated that it “is established law in Virginia and elsewhere [i.e. West Virginia] that where the removal or displacement of the coal is done innocently and in good faith, compensatory damages only can be recovered, and that such damages should be based on the value of the coal in place, in other words, its royalty value. It is only where the trespass is willful that a higher measure of damages may be allowed.” (Internal citations omitted.)

In light of the foregoing holdings, this Court in *Roda, supra*, concluded that the case before it was not a prototypical eminent domain proceeding but was instead “similar to an action in willful trespass.” *Roda*, 177 W. Va. at 388, 352 S.E.2d at 140. In *Roda*, the WVDOH sought to condemn property for the construction of Interstate 79 and the relocation of U.S. Route 50 from Louis and Mary Roda (“Rodas”). It was alleged that the WVDOH had examined the title to the property, was aware of the existence of coal thereunder, appraised the interests at issue and communicated its intention to acquire those interests prior to the beginning of construction. However, prior to initiating condemnation, contractors for the WVDOH

began excavation which included the removal and sale of the coal for proceeds in excess of \$1,000,000. Although the Rodas requested permission to remove the coal after it was uncovered, their request was denied by the WVDOH. *Roda*, 177 W. Va. at 389-391, 352 S.E.2d at 141-142. The WVDOH initiated condemnation proceedings, however it did not place any value on the coal. During pretrial proceedings the trial court ruled that the WVDOH could not present evidence of the coal prior to the date of the take because it began construction and began selling the coal before obtaining a right of entry. In addition, the trial court determined that the landowners could present testimony concerning the value of the coal at the time of the take, completely uncovered and ready for sale, thereby applying the same measure of damages involving willful/bad faith trespass, as set forth in *Reynolds*, *supra* and *Pan Coal Co.*, *supra*. The jury returned a verdict in favor of the Rodas and the WVDOH appealed.

Upon consideration of the record, this Court in *Roda* determined that “the rules ordinarily applicable in condemnation proceedings” did not apply since the “Department of Highways, through its contractor, willfully encroached on the landowners’ property, mining and removing coal in bad faith.” *Roda*, 177 W. Va. at 388, 352 S.E.2d at 140. Because of the intentional conduct, this Court affirmed the trial court’s ruling and concluded that “[w]here a trespass is willful, the trespasser shall pay the full value of the mineral at the time he sells or uses it”. *Roda*, 177 W. Va. at 388, 352 S.E.2d at 140.

Since this Court in *Roda* concluded that the WVDOH had committed a willful trespass, there was no discussion of the factors associated with an innocent trespass. In the instant matter, the Circuit Court gave no consideration to the two classes of trespass. Instead, the Circuit Court, applying this Court’s prior decision in *Roda*, held that the WVDOH had acted in bad faith and in a willful trespass against the interests of Newton because the WVDOH (1) had actual knowledge that Newton possessed the mineral rights under the subject property; (2) failed to communicate with Newton prior to entry upon the property; and (3) precluded Newton from assessing the value of limestone prior to appropriation of same. Doc. p. 33, ¶8. The WVDOH maintains that a determination that a willful trespass has been committed is not clear, particularly when a public entity is involved.

The WVDOH, as previously recognized by this Court, enjoys a legal presumption that it acted

properly under the law and that in the absence of evidence to the contrary, it is presumed to have performed properly and in good faith those duties which are imposed upon it by law. See, *W. Va. DOT, Div. of Highways v. Contractor Enters.*, 223 W. Va. 98, 102, 672 S.E.2d 234, 238 (2008) and *State Road Commission v. Professional Realty Company*, 144 W.Va. 652, 662-663, 110 S.E.2d 616, 623 (1959). The Circuit Court did not give any deference to the foregoing legal presumption.

It is undisputed that the mineral rights had been severed from the subject property and that the WVDOH did not contact Newton prior to construction. However, the WVDOH negotiated and reached an agreement with the only party *it* believed had a *recoverable interest* in the property to be acquired. As reflected by the October 7, 2004, deed from Parsons, indefeasible title to certain rights-of-way over, upon, through, across and under the subject property passed to the WVDOH on that date, in exchange for \$33,500. Based on this transaction, the WVDOH commenced construction believing that the property acquired included the rights “necessary and required for roads, rights-of-way, cuts, fills, drains storage for equipment and materials and road construction and maintenance in general.” W.Va. Code § 17-2A-8(6).

The presence of limestone had no bearing on the taking and was not important to the WVDOH, as the road would have been built in the same fashion if the subject property only consisted of shale or clay. In addition, quasi-mining operations were not established on the highway project for the sole purpose of extracting limestone as alleged by Newton. Because of the terrain of the area, it was necessary for the WVDOH to blast and crush material that was encountered. There is a distinct difference between road building materials and commercially valuable minerals. While limestone was present, it was used in the same fashion as other materials encountered during construction. It was tested for compaction, and placed into the road bed. All materials were utilized in some capacity in the construction of the roadway or otherwise disposed of as waste materials in accordance with W.Va. Code § 17-2A-8(6). The contractors were paid for excavation and construction performed on the project, nothing more. Thus, one of the determining factors relied upon by this Court in *Roda* by finding that the WVDOH had committed a willful trespass, i.e, the contractor’s sale of coal for profit *is not present* in this matter.

When highway construction began on the subject property, the WVDOH had already acquired a

right of entry from Parsons, and therefore, neither the WVDOH nor its contractors were trespassing. Assuming *arguendo* that the WVDOH did trespass upon Newton's property interests, such trespass occurred through inadvertence or mistake, or in good faith, under the "honest belief" that the WVDOH was acting within its legal rights. Therefore any trespass that occurred would be at most an innocent trespass. *Reynolds*, 172 W. Va. at 809-810, 310 S.E.2d at 876 (1983). In light of these circumstances, the Circuit Court abused its discretion and committed reversible error which it found that the WVDOH "acted in bad faith and in a willful trespass" against Newton.

3. The Circuit Court abused its discretion by ruling that the date of take for these proceedings was April 29, 2011

In *Roda, supra*, this Court held that in eminent domain proceedings the date of take 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." *Roda*, 177 W. Va. at 387, 352 S.E.2d at 139. In reliance upon this holding, the Circuit Court determined that the date of take for the instant proceeding was April 29, 2011, the date that the WVDOH filed its Petition. App., p. 0024 ¶¶ 3 and 4.

The WVDOH does not dispute that the date of take in a typical condemnation is the date on which the proceeding is initiated. However, the instant matter is not a typical condemnation proceeding. As noted previously, the WVDOH negotiated and reached an agreement with the only party it believed had actionable interest in the property to be acquired, Parsons. By virtue of the deed executed by Parsons on October 7, 2004, the WVDOH lawfully obtained a right-of-way for public highway purposes through the subject property. App., pp. 0174-0178. The WVDOH did not institute a condemnation proceeding because Parsons voluntarily conveyed all "rights in lands necessary and required for roads, rights-of-way, cuts, fills, drains storage for equipment and materials and road construction and maintenance in general." W.Va. Code § 17-2A-8(6).

It is important to recognize that eminent domain proceedings by their very nature are *in rem* proceedings against the land itself. As recognized by this Court over a century ago in *Kanawha, Glen Jean & E. R.R. v. Glen Jean, Lower Loup & Deep Water R.R.*, 45 W. Va. 119, 122, 30 S.E. 86, 87 (1898),

“the proceeding, so far as taking the land is concerned, being in the nature of a proceeding in rem while the assessment of damages is a proceeding in personam.” Thus, the date of take from the subject property was October 7, 2004 and any further damage to the same would relate back to October 7, 2004.

Despite the foregoing, the Circuit Court concluded that a separate date of take was necessary for the limestone claims of Newton because the reservation of the mineral rights from the subject property in 1981 created two separate and distinct estates which required compensation to be determined and apportioned as the interest of the parties may appear. *Cooper, supra*. While the WVDOH does not dispute that the severance of minerals from a property creates two estates, the Circuit Court’s application of *Cooper* and *Roda* to the facts at hand, was erroneous. The instant matter is distinguishable from *Cooper*. In *Cooper*, this Court determined that the owners of oil and gas rights underlying a parcel of land were necessary parties in an action since fee simple title was being acquired. *Cooper*, 152 W. Va. at 311-314, 162 S.E.2d at 283-284. In the present matter, the WVDOH did not obtain fee simple title to the subject property from Parsons, but rights of way for public road purposes over, through, across, under and upon the subject property. App., pp. 0209-0213. The WVDOH is precluded by statute from obtaining fee simply interest and may only acquire a “right-of-way.”¹³

Although the severance of minerals from a property creates two estates, this does not mean that the holder of the mineral rights is entitled to a separate date of take and compensation when property is taken or acquired by virtue of eminent domain. While there may be two estates, just compensation is calculated for the property as a whole, typically in one proceeding, as acknowledged by this Court in *Cooper, supra*. More specifically, this Court observed:

Where there are different estates in the property, the proper course is to ascertain compensation as though the property belonged to one person, and then apportion this sum among the different parties according to their respective rights, * * * So, where the mineral interest and the surface interest are owned by different persons, the mineral interest may be valued separately, but it must be valued as a segregated part of real property and not as a natural warehouse for minerals as personal property.

Cooper, 152 W.Va. at 315-316, 162 S.E.2d at 285. (Internal citations omitted.) This conclusion is further

¹³ See W.Va. Code § 17-2A-17 and W.Va. Code § 54-2-12

consistent with this Court's subsequent decision in *Berwind, supra*, where it held that "the value of elements such as minerals, timber and the like, in place on condemned land is admissible to show the market value of the land so long as they are in harmony with the other factors that are utilized in arriving at the market value at the time of the take." *Berwind*, 167 W.Va. at 743, 280 S.E.2d at 619. See also, *Farmer, supra*. In order to apply these standards appropriately, there can be only one date of take, which for this matter is October 7, 2004. App., pp. 0174-0178. To the extent there was any further legally compensable damage to the property that occurred as a result of this take, which the WVDOH denied, these damages would relate back to October 7, 2004. Therefore, the Circuit Court abused its discretion when it determined that April 29, 2011 was the date of take.

D. The Circuit Court abused its discretion and committed reversible error when it determined that *West Virginia Dept. of Highways v. Berwind Land Co.*, 167 W.Va. 726, 280 S.E.2d 609 (1981) does not apply in the absence of a unified fee simple estate.

In its May 30, 2012 Order, the Circuit Court concluded that this Court's decision in *Berwind, supra*, did not apply to the matter at hand. The Circuit Court concluded that (a) in the absence of a unified fee simple estate the hybrid rule for assessing market value does not apply; and (b) Newton's mineral rights are entitled to an independent evaluation for value as of April 29, 2011. App., p. 0026, ¶¶ 10-11.¹⁴ The Circuit Court further held that the measure of compensation for this matter "should be determined within the parameters of *WVDOH v. Roda, supra*; and *WVDOH v. Berwind Land Co., supra*." App., p. 0026.

Upon further review, the Circuit Court clarified and confirmed its prior rulings by virtue of its November 8, 2012 Order where it held that (a) "the criteria for the determination of take and value is set forth within *Roda* and *Berwind*"; and (b) "quantity, quality, marketability, and market value of the limestone minerals taken and appropriated by the WVDOH from the Newton reserves are issues for the consideration of the jury under *Roda* and *Berwind*". App., pp. 0033-0034 ¶¶ 7 and 9. The Circuit Court created its own hybrid rule which was contrary to West Virginia law. The Circuit Court determined that

¹⁴ Despite these findings, the Court also ordered that the measure of compensation should be determined within the parameters of *Roda, supra*, and *Berwind, supra*, without any explanation. App., p. 0026.

issues related to highest and best use were immaterial. Second, it found that it was proper to have a separate value assigned solely to the minerals, thereby valuing Newton's mineral interests as a natural warehouse. *Cooper*, 152 W.Va. at 315-316, 162 S.E.2d at 285.

This Court in *Berwind* did not carve out an exception for circumstances where minerals had been severed from the property. In *Berwind*, this Court adopted a hybrid of the unit rule for circumstances in which the condemned property contains minerals that enhance the market value of the land regardless of the number of estates at issue. Clarifying its decision, the Court stated:

We do not suggest, nor do we hold, however, that in all cases the value of an element determined by such a method may be added together with the value of the surface of the land to arrive at the market value of the property for purposes of determining the amount of just compensation to be awarded to the landowner for the taking of the condemned property. We hold only that evidence of the value of elements such as minerals, timber and the like, in place on condemned land is admissible to show the market value of the land so long as they are in harmony with the other factors that are utilized in arriving at the market value at the time of the take.

Berwind, *supra*, 167 W.Va. at 743, 280 S.E.2d at 619.

While this Court in *Berwind* provided an avenue for the *consideration* of minerals in determining just compensation, more is involved than a landowner simply asserting that his land contains minerals. In this regard, the *Berwind* Court delineated four (4) factors that must be proven before a landowner can *introduce* evidence of the separate value of elements present in or on his land. Specifically, the landowner must successfully demonstrate (1) the mineral's existence and quantity; (2) that the expense of production and marketing were considered in arriving at any value; (3) that its value is significant; and (4) mining the mineral from the property is consistent with its overall highest and best use. *Berwind*, *supra*, 167 W.Va. at 743-746, 280 S.E.2d at 619-621.

Although *Berwind* did not involve a severed mineral estate, the same principles would apply as eminent domain proceedings are *in rem* proceedings against the land itself. Acknowledging this factor, this Court in *Cooper*, *supra*, stated that “[w]here there are different estates in the property, the proper course is to ascertain compensation as though the property belonged to one person, and then apportion this sum among the different parties according to their respective rights.” This Court further stated

“where the mineral interest and the surface interest are owned by different persons, the mineral interest may be valued separately, but it must be valued as a segregated part of real property and not as a natural warehouse for minerals as personal property.” *Cooper*, 152 W. Va. at 315-316, 162 S.E.2d at 285. Thus, West Virginia law provides that property to be taken is valued as if owned by a single person, regardless of separate ownership interests and the sum of the separate values of the divided interests may not exceed the value of the whole. This is consistent with this Court’s subsequent decision in *Farmer, supra*, as discussed above.

By not applying the rationale set forth in *Berwind*, the Circuit Court permitted Newton to (1) seek recovery for limestone even though mining was inconsistent with the highest and best use of the subject property; and (2) introduce evidence of value for limestone excavated and removed without any consideration to the production and marketing of the same. The Circuit Court allowed Newton to seek recovery for a property interest that was not actionable and therefore had no value as of October 7, 2004. In light of the foregoing, it is apparent that the Circuit Court abused its discretion when it found that the hybrid rule established in *Berwind, supra*, did not apply in this matter.

E. The Circuit Court abused its discretion and committed reversible error when it ruled that the Respondent should be allowed a market time frame window from April 29, 2011 to October 29, 2012, for the limestone taken, appropriated and removed from the property for purposes of establishing a market or marketability for the same.

During the hearing held on November 13, 2012, the Circuit Court adopted a series of instructions that would be used during the Commissioners’ Hearing and trial. Concerning fair market value, these instructions stated that “the fair market value is established, determined and set at the time of the taking.” App., pp. 0048, 0051 and 0054. Newton did not lodge any objections to these specific instructions. In reliance upon the foregoing instructions, the WVDOH included among its Motions in *Limine*, a motion to preclude Newton from introducing any evidence or otherwise referencing any future/projected demand for limestone in the future. App., pp. 1062-1065.

During the pretrial hearing, the Circuit Court found that Newton “shall not be allowed to present evidence concerning projected uses for the limestone in the future as a prospective use or in the

frustration of plans the Respondent [Newton] may have had for the limestone minerals which they possessed on the subject property.” App., p. 0078. However, without reference to any legal authority, the Circuit Court also ruled that Newton would be given “a market time frame window for the limestone minerals taken, appropriated and used by the WVDOH from the interests of the Respondent to extend eighteen months from the date of take as fixed on April 29, 2011, which shall include the time frame through October 29, 2012.” App., pp. 0078-0079. In addition, the Circuit Court, over the WVDOH’s objections, amended the jury instructions to conform with its ruling. App., pp. 0088-0089.

There is no legal basis for the Circuit Court’s provision of a “market time period” window to Newton. In fact, the Circuit Court’s ruling is contrary to well accepted eminent domain law in West Virginia. As this Court first observed 109 years ago in *Guyandotte Valley Ry. v. Buskirk*, 57 W. Va. 417, 424, 50 S.E. 521, 523 (1905), “the universal rule” for determining just compensation is “the market value at time of taking thereof.” Moreover, in *Strouds Creek & Muddlety R.R. v. Herold*, 131 W.Va. 45,45 S.E.2d 513 (1947) this Court also noted:

The landowner is entitled to consideration of all the advantages which the land possesses, but the only proper inquiry is that which concerns the value of the land at the time of the taking. He may not realize on possibilities of increased value of the land except to the extent that they affect its then existing value. Compensation for land should be ascertained and determined on the basis of its value at the time it is taken or damaged.

Strouds Creek, 131 W. Va. at 61,45 S.E.2d at 523.(Internal citations omitted and emphasis added).

Commenting further on this rule, and citing its prior decisions in *Strouds Creek* and *Guyandot Valley*, this Court stated in *State by State Rd. Comm'n v. Snider*, 131 W. Va. 650, 656-657, 49 S.E.2d 853, 857 (1948) that “[t]he rule is that the measure of recovery is the fair market value of the land actually taken at the time it was appropriated, plus the difference between the fair market value of the residue of the land immediately before and immediately after the taking, beyond all benefits which may accrue to the residue from the construction of the improvement for which the land is taken and damaged. The foregoing is the dominant and controlling principle elsewhere.” (Internal citations omitted.) This “controlling principle” or “universal rule” remains valid and is consistently applied in eminent domain

proceedings in West Virginia.¹⁵

In light of the foregoing, any determination of just compensation must be based solely upon the fair market value for the property at the time it was taken. There are no exceptions to the rule and reliance upon any information beyond the date of take in calculating just compensation would serve to invalidate same. More specifically, and as explained by this Court in *Strouds Creek* any “inquiry as to value should be limited to the land as it exists at the time of the taking.” This universal principle would apply to any property taken by virtue of eminent domain, even if the property in question was land containing thousands of acres or thousands of tons of commercially valuable minerals. The date of take must serve as the basis for determining value.

Despite existing law, the Circuit Court permitted Newton to establish a market for, and uses of, limestone, during an 18-month window. This market window served as the basis for the opinions of Newton’s expert, MSES Consultants, Inc. (“MSES”) that the limestone (a) excavated was worth \$10.99/ton; and (b) alienated beneath the road was worth \$0.25/ton.¹⁶ MSES did not proffer any opinion as to the value and consumption of the limestone solely as of the date of take. Thus, the jury heard testimony from MSES and reviewed documentary evidence concerning limestone demand and uses associated with time periods well after the date of take. While MSES telephoned select quarries on November 18, 2011, and determined that the average price per ton for “cleaned at plant limestone” as of April 29, 2011 was \$10.99, it made no inquiries concerning the price per ton if 236,187 tons were purchased or the average number of tons that were sold per day. Likewise for the limestone allegedly alienated beneath the highway. App., pp. 2667 and 2669. MSES’s entire opinion as to fair market value for the limestone at issue was contingent upon an 18-month consumption rate. By way of example, the WVDOH would refer the Court to the following:

1. MSES relied upon annual production rates for multiple quarries in West Virginia for 2011, 2012 and beyond. See App., pp. 2270 and 2663-2664.

¹⁵ See, *Roda*, 177 W. Va. at 386, 352 S.E.2d at 137-138, *Berwind*, 167 W. Va. at 743, 280 S.E.2d at 619 and *West Virginia Div. of Highways v. Butler*, 205 W. Va. 146, 148, 516 S.E.2d 769, 771 (1999).

¹⁶ For the purposes of this Petition, MSES is deemed to collectively include Newton’s witnesses, Lawrence M. Rine and Nick Ferdorko.

2. MSES determined that there was an “emerging market” within the marcellus-shale gas industry for the limestone, in reliance upon mining figures from 2004 to 2012. MSES noted that this industry was “expected to continue to increase substantially in the future, and projected to grow to about nine hundred (900) wells per year by 2020.” MSES further suggested that said growth was expected to progress toward the Eastern panhandle of West Virginia.

During the hearing on July 30, 2013, the Circuit Court concluded that the opinions of MSES concerning market and “potential” uses were separate and distinct from its determination of the actual market value of the limestone. However, a closer examination of MSES’ report, and the testimony of its representatives at trial reflects that its entire opinion concerning the fair market value for the limestone was completely conditioned upon market conditions that existed eighteen months after the date of taking (April 29, 2011) and the complete consumption of the same during this period.

MSES’ inquiry as to the fair market value of the limestone was not limited to the limestone as it existed at the time of the taking. *Strouds Creek*, 131 W. Va. at 61, 45 S.E.2d at 523. By providing Newton with an 18-month market/use window, the Circuit Court gave Newton *carte blanche* to introduce evidence of value based upon future or prospective uses of limestone which were entirely based upon speculation or conjecture. As noted above, such evidence is plainly impermissible under West Virginia law. App., p. 2665. See, *State Road Commission v. Ferguson*, 148 W.Va. 742, 748-749, 137 S.E.2d 206,210-211 (1964), *State Road Commission v. Penndel Co.*, 147 W.Va. 505, 511, 129 S.E.2d 133, 137 (1963) and *Strouds Creek*, 131 W.Va. at 61,45 S.E.2d at 523. The Circuit Court, by creating an 18-month market window, instituted a new standard for determining fair market value, and in so doing, abused its discretion and committed reversible error.

Notwithstanding the foregoing, the instructions approved by the Circuit Court concerning the 18-month market/use window constituted additional error because the jury was presented with contradictory and competing legal standards. On one hand, the jury was repeatedly instructed that just compensation for the fair market value for the limestone, if any, must be established, determined and set as of the date of take or April 29, 2011. Yet, the Court also instructed the jury that it could consider uses and markets for the limestone over an 18-month period, which without question would condition just compensation on

events that existed after the date of taking. See, App., pp. 5331, ll. 7-9; 5333, ll. 3-5; 5333, ll. 19-25; 5334, ll. 1-11; 5334, ll. 20-24; 5335, ll. 12-23.

As recently acknowledged by this Court in *AIG Domestic Claims, Inc. v. Hess Oil Co.*, ___ W.Va. ___, 751 S.E.2d 31 (2013), the harm that results from instructing a jury in an inconsistent fashion has long been recognized. Citing with approval its prior decisions in *State Road Commission v. Darrah*, 151 W.Va. 509, 513, 153 S.E.2d 408, 411 (1967) and *Burdette v. Maust Coal & Coke Corp.*, 159 W.Va. 335, 343, 222 S.E.2d 293, 298 (1976), this Court noted that “[i]t is error to give inconsistent instructions, even if one of them states the law correctly, inasmuch as the jury, in such circumstances, is confronted with the task of determining which principle of law to follow, and inasmuch as it is impossible for a court later to determine upon what legal principle the verdict is founded. As we explained in *Darrah*, reversal is required in these instances because inconsistent instructions create ‘a distinct tendency to confuse rather than to instruct or enlighten the jury.’” *AIG Domestic Claims, Inc.*, 751 S.E.2d at 42, (Internal citations omitted.)

It is noteworthy that *Darrah* involved an eminent domain proceeding in which this Court awarded a new trial to the WVDOH because the trial court presented instructions to the jury that contained competing definitions for the term “just compensation.” In *Darrah*, only two instructions were read to the jury, one submitted by the WVDOH and one by the landowner. The WVDOH instruction stated that “just compensation means a fair and reasonable cash market value of said land actually taken”. The landowner’s instruction stated that “[j]ust compensation means a fair and full equivalent for the loss sustained by the landowner.” Upon consideration of the instructions, this Court found that the landowner’s definition for just compensation “had a distinct tendency to confuse rather than to instruct or to enlighten the jury” and to the extent that it defined a different measure of compensation from the WVDOH instruction, it “caused an inconsistency between the two instructions.” This Court awarded a new trial noting that there is “a presumption that the complaining party has been prejudiced by the giving of an erroneous instruction over his objection and the judgment in question must be reversed on this ground, unless it clearly appears from the record that such party could not have been prejudiced by the

giving of the instruction.” *Darrah*, 151 W. Va. at 515, 153 S.E.2d at 412.

In the instant matter, the Circuit Court’s instructions with respect to the provision of an 18-month market window contradicted the instructions that informed the jury that just compensation must be established as of the date of take. As a result, the jury was given conflicting methods by which to determine just compensation and whether to do so (1) as of the date of take; or (2) within the proscribed 18-month market window. These competing instructions created an inconsistency which served to confuse and mislead the jury. It is impossible for this Court to ascertain upon what legal principle the verdict was founded. Based upon the foregoing, not only did the Circuit Court commit reversible error by implementing a new standard for determining fair market value under West Virginia law, but the Court’s instructions to the jury concerning this standard were inconsistent with several other instructions. Based upon the foregoing, the judgment order below should be reversed, and the matter remanded for a new trial.

F. The Circuit Court abused its discretion and committed reversible error when it permitted the Respondent to introduce evidence at trial concerning the WVDOH’s use of limestone excavated from the property in the construction of the Corridor H highway to prove quality.

Upon consideration of the Petitioners’ Motion *in Limine* “H”, the Circuit Court determined that Newton would not be allowed to utilize the WVDOH’s use of materials in the construction of the highway as a basis for establishing a market. App., p. 0077, ¶ H. This decision was in conformance with the Circuit Court’s prior rulings concerning marketability of limestone whereby it found that in order to recover just compensation, Newton must establish a market for limestone independent of the highway project. App., pp. 0034, ¶ 4 and 0107. However, during the pretrial, Newton argued that it was necessary for her to present evidence of the WVDOH’s use of limestone, and testing of the same, to prove that the limestone was of commercial quality. Upon consideration of the same, and despite the WVDOH’s objections, the Circuit Court determined that Newton could “demonstrate the use of the limestone excavated from the subject property to provide quality, including the requirements of testing parameters established by the limestone industry and the American Association of State Highway and Transportation

Officials (AASHTO) which require limestone products to meet the standard specifications criteria of governmental departments in charge of the regulatory oversight of construction projects such as Corridor H, a federally funded highway.” App., p. 0077, ¶ H. This decision (a) undermined the Circuit Court’s other rulings concerning market; (b) created confusing and inconsistent instructions; and (c) permitted Newton to present evidence which was immaterial and irrelevant to the issues of just compensation to be decided by the jury.

At trial the only evidence related to quality of limestone introduced by Newton through her experts was that the WVDOH used the limestone in the highway and therefore it was good quality. More specifically, MSES testified as follows:

The way we determined the quality of the limestone was by reference and by reference is that we had documentation that the limestone was crushed. In fact, there's documents that showed that the Department of Highways did a change order with the contractor and the contractor on Newton section to establish a portable crusher and to crush and use the stone. And the reference part is that knowing that it was used in a federally funded and state funded highway the stone had to meet a certain quality standard and the West Virginia Department of Highway's standard is a very high standard to meet. So that material gave us the quality of the stone since it was used in the construction of the roadway.

App. pp. 5051-5042. As this testimony plainly demonstrates, Newton did not present any independent testimony concerning the quality of the limestone issue; all her evidence was tied to the highway.¹⁷

MSES’ opinions are erroneous as there are no standards associated with basic road building other than compaction. App., pp. 5144 and 5146. Nonetheless, the requirements of the WVDOH for the highway should have been excluded. As noted by the Fourth Circuit in *United States v. Whitehurst*, 337 F.2d 765, 772, (4th Cir. Va. 1964) “[i]n ascertaining the demand, **the requirements** of the Government for the project for which the land is taken **must be totally excluded.**” (Emphasis added.) See also, *St. Genevieve Gas Co. v. TVA*, 747 F.2d 1411, 1413 n. 3 (11th Cir. 1984). The exclusion of the WVDOH’s “requirements” would necessarily include any evidence or testimony related to its removal, any tests performed or not performed, and how the same was actual used in the highway. See, *United States v. Weyerhaeuser Co.*, 538 F.2d 1363, 1367 (9th Cir. Or. 1976).

The inadmissibility of evidence concerning mineral values that are tied to the government's demand is based upon the U.S. Supreme Court's holding in *U.S. v. Cors*, 337 US 325 (1949). In *Cors*, the U.S. Supreme Court stated:

It is not fair that the government be required to pay the enhanced price which its demand alone has created. That enhancement reflects elements of the value that was created by the urgency of its need for the article. It does not reflect what "a willing buyer would pay in cash to a willing seller," in a fair market. It represents what can be exacted from the government whose demands in the emergency have created a sellers' market. . . That is a hold-up value, not a fair market value. . .

Cors, 337 US at 333-334. (Internal citations omitted.)

Newton's evidence concerning the quality of the limestone based upon the use of the same by the WVDOH was a thinly veiled backdoor attempt to establish and enhance market value by using the highway, evidence which was prejudicial to the WVDOH. The Circuit Court established four factors that Newton was required to satisfy in order to recover just compensation: quantity, quality, marketability and market value. While the elements of proof necessary for each specific factor were slightly different, all four were inextricably intertwined with the establishment of fair market value/just compensation. Thus, any reference to the construction processes of the WVDOH and its material requirements, including limestone, introduced the highway into the fair market value equation for the jury's consideration. At a minimum, the introduction of such evidence (a) undermined the jury instruction which provided that Newton must establish a market for limestone independent of the highway project; (b) confused the jury; and (c) prejudiced the WVDOH. As a result, the jury either directly or indirectly determined that the limestone was of commercial quality because it was utilized in some fashion in the highway, which resulted in an enhanced market value. On this basis, the Circuit Court abused its discretion and committed reversible error.

¹⁷ See, App., pp. 2664, 5009-5010, 5017-5018, 5111, 5048-5049, 5051-52 and 5055-5057.

G. The Circuit Court abused its discretion and committed reversible error pursuant to Rules 401, 402 and 403 of the West Virginia Rules of Evidence when it permitted the Respondent to introduce evidence consisting of photographs, expert opinions, expert and fact witness testimony and construction documents related to limestone excavated by the WVDOH from other properties and for separate projects.

Prior to trial, the WVDOH requested *in limine* that the Circuit Court preclude Newton from introducing evidence/or testimony related to (1) limestone excavated by the WVDOH from other properties; (2) construction and excavation on other highway projects; (3) other minerals not at issue; and (4) legal conclusions rendered by Newton's experts. With respect to other properties, the report of L&W, Enterprises, Inc. ("L&W") which was introduced at trial by Newton included volume calculations for limestone and other minerals spanning two Corridor H projects.¹⁸ These properties were identified as "Garrett", "Sherman" and "McNeill" for Section 6 (the project at issue) and "Veach", "Woerner", "Weese,", and "Williams" for Section 7 all of which were several miles away from the subject property.¹⁹

The report prepared by L&W included data and analysis for seven (7) properties concerning materials excavated during construction. Similarly, the report prepared by MSES provided discussion and analysis with respect to limestone formations encountered during construction on Section 6 and 7, and the value of limestone removed for a completely separate property, Veach. Rather than exclude the reports in their entirety, the WVDOH suggested that the reports be redacted to remove this irrelevant information, since it bore no relevance to the just compensation, if any, that Newton was entitled to receive. Newton argued that the information was relevant because it (1) was necessary that her experts consider volumes of limestone and other minerals that were removed from other properties and projects in order to accurately ascertain the volume of limestone on the subject property that existed and was taken; and (2) provided a comparison of the construction processes of the WVDOH with respect to the removal of limestone.

After oral argument on the issue, the Circuit Court through its law clerk contacted counsel for the

¹⁸ In this Petition, L&W is deemed to collectively include Newton's witnesses, Kirk Wilson and Curtis Keplinger.

¹⁹ It should be noted that the properties denoted as "Veach", "Woerner", "Garrett", and "Sherman" were parties to separate litigation with respect to the alleged taking of valuable minerals from their respective properties. These actions were all filed in the Circuit Court of Hardy County West Virginia.

parties and indicated that it was not inclined to grant the motion *in limine* in its entirety and directed the parties to submit a proposed “limiting” instruction to address the issue. App., p. 0116. At a hearing on August 20, 2013, the Circuit Court reiterated that it had decided to grant the WVDOH’s motion *in limine* in part, by submission of a limiting instruction to the jury. The Circuit Court refused to redact, in any manner, the reports of the experts, or to otherwise strike their testimony. Thus, the Circuit Court, without any further discussion of the same on the record, concluded that the evidence and testimony at issue was relevant, yet posed some undefined danger which necessitated a cautionary instruction.

The WVDOH lodged an objection to the Circuit Court’s ruling and reiterated that redaction of the reports was necessary. The Circuit Court noted the WVDOH’s objections and indicated that it was “well aware of the basis for the same since such have been fully briefed and argued.” The WVDOH was given the opportunity to submit proposed limiting instructions or submit comments concerning the instruction proffered by Newton. App., p. 0116. By correspondence dated August 26, 2013, to the Court, counsel for the WVDOH reiterated its objections to the ruling stating that “the introduction of evidence related to limestone removed from other properties is (1) immaterial; (2) irrelevant; and will serve to unfairly prejudice the Petitioners in accord with Rules 401, 402 and 403 of the West Virginia Rules of Evidence.” In light of these objections, the WVDOH did not submit a proposed instruction, and Newton’s proposed instruction was adopted. App., pp. 2032-2034.

Newton was permitted to introduce *in toto*, all of the evidence objected to in the WVDOH’s Motion *in Limine*. App., pp. 1047-1055. At trial, the Circuit Court included with its charge an instruction which noted that the jury was “to consider matters of limestone and procedures by the WVDOH on properties other than the Respondent solely for the purposes of demonstrating documentation, processes and procedures by the WVDOH and for purposes of demonstrating methodology and accuracy of calculations made by the experts who have generated reports and provided testimony before you.” App., pp. 2032 and 5336, ln. 23 to 5337, ll. 1-4.

As observed by this Court in *W. Va. DOT v. Parkersburg Inn, Inc.*, 222 W. Va. at 700, 671 S.E.2d at 705, “the role of the trial court is to keep from the jury’s eyes or ears evidence that may be

misleading.” With respect to this role, W.Va.R.Evid. 401, 402 and 403 provide guidance. W.Va.R.Evid. 401 provides that relevant evidence “means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable than it would be without the evidence.” Further, W.Va.R.Evid. 402 provides that “[e]vidence which is not relevant is not admissible.” Finally, even when evidence is deemed to be relevant, W.Va.R.Evid. 403 provides that it may still be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion, misleading the jury and other issues.

In the instant matter, it is important to recognize that the Circuit Court reached its conclusions without demonstrating on the record the actual balancing done by it with respect to the evidence identified by the WVDOH, pursuant to W.Va.R.Evid. 403. As unequivocally stated by this Court in *State v. McGinnis*, 193 W. Va. 147, 156, 455 S.E.2d 516, 525, (1994), “[t]he balancing necessary under Rule 403 must affirmatively appear on the record.” Further elaborating on this requirement, this Court stated in *State v. McFarland*, 228 W. Va. 492, 503, 721 S.E.2d 62, 73, (2011), “[w]e previously have made clear that ‘[t]he balancing necessary under Rule 403 must affirmatively appear on the record.’ If the factors used by the circuit court in conducting the Rule 403 balancing test do not appear on the record, this Court is unable to effectively review the circuit court's decision to admit the evidence in question. Therefore, this Court concludes that the circuit court's failure to conduct the balancing test required by Rule 403 on the record also constitutes error.” (Internal citations omitted.) The failure of the Circuit Court to properly conduct this balancing test on the record constitutes reversible error.

Notwithstanding the Circuit Court’s failure concerning the balancing test under W.Va.R.Evid. 403, it is clear that evidence related to limestone or other minerals located on adjoining or neighboring properties was not probative of any issue in this matter. In fact, consideration of the same was inconsistent with the court’s instruction to the jury “to only to consider the limestone in the area of the take”. App., pp. 0105 and 5332, ln. 24. Nonetheless, the jury was presented with a litany of information concerning limestone from other properties and other minerals. This provided the jury with huge volume figures for materials removed as a result of two highway projects which had absolutely no relationship

with the just compensation, if any, Newton was entitled to receive.

Furthermore, the introduction of evidence concerning limestone and minerals removed from other properties was not necessary because the Circuit Court had already ruled that it would instruct the jury that “236,187 tons of limestone were excavated and removed from the construction area”. App., pp. 0105 and 5333, In. 16. Thus, such information constituted the needless presentation of cumulative evidence, contrary to W.Va.R.Evid. 403. In addition, this “needless” evidence undoubtedly served to (a) unnecessarily confuse and complicate the deliberations of the jury; and (b) prejudice the jury by permitting them to insinuate or infer that there were multiple takes of limestone and other minerals, when in fact, the WVDOH was simply building a highway. Even if evidence related to limestone and other minerals or properties was deemed to have some slight probative value, this information was incredibly confusing and prejudicial to the WVDOH because it invited the jury to make general comparisons, assumptions and insinuations about the entire area, instead of focusing solely on Newton’s mineral interests. The Circuit Court’s limited instruction did nothing to prevent the foregoing, and in fact, it only contributed to the confusion since it was inconsistent with the instructions as a whole. As noted by this Court in *State v. Taylor*, 215 W. Va. 74, 80, 593 S.E.2d 645, 651 (2004) “[i]t is well recognized that in some cases a limiting instruction will be insufficient, and proffered evidence must be all together excluded under Rule 403.” Moreover, a limiting instruction is not a mechanism by which the Rules of Evidence can be circumvented. If the evidence is irrelevant, it is not admissible. W.Va.R.Evid. 402.

Since the jury was charged with the obligation of determining the just compensation, if any, Newton was entitled to receive, the introduction of the taking of non-limestone materials from the subject property; and/or limestone/minerals from other properties and their values would only serve to confuse and complicate their deliberations. Further, any potential relevance concerning non-limestone materials from the subject property and limestone/minerals located on properties that were not at issue was highly prejudicial to the WVDOH and invited the jury to reach unfair comparisons and assumptions. On this basis, such evidence should have been excluded.

In addition, a limited instruction is not intended to permit the introduction of evidence, under the

guise of expert testimony, which editorializes with respect to a trial court findings and rulings, and renders a legal conclusion. By way of example, L&W stated “[t]he Court Order ruled that only limestone taken as a result of the construction could be considered for compensation regardless of the quality of the sandstone or siltstone” and therefore “[t]he valuable sandstone and siltstone that the Division of Highways had crushed and stockpiled and subsequently used in the construction and/or transported off site will be taken without consideration.” App., p. 2307. Despite the highly prejudicial nature of this statement, the Circuit Court refused to order the same to be redacted and this information was provided to the jury. This alone was an abuse of discretion. As observed by this Court in *Jackson v. State Farm Mut. Auto. Ins. Co.*, 215 W. Va. 634, 643, 600 S.E.2d 346, 355, (2004) an expert is not permitted to give an opinion on a question of law or matters which involve a question of law, or instruct the jury concerning the same. Despite the WVDOH’s objections concerning, the record reflects that the Circuit Court failed to consider this aspect of L&W’s report. Moreover, the limiting instruction failed to even address this issue. In light of the foregoing, the Circuit Court’s failure to grant the WVDOH’s *Motion in Limine* in its entirety pursuant to W.Va.R.Evid. 401, 402 and/or 403 constituted reversible error.

H. The Circuit Court abused its discretion and committed reversible error when it read “Additional Instructions” to the jury prior to the submission of evidence related to the WVDOH’s failure to contact the Respondent prior to commencement of construction and allowed the presentation of evidence with respect to the same.

In its November 8, 2012 Order, the Circuit Court found that in order to recover for limestone (1) excavated and removed from the 6.714 acres at issue; and/or (2) remaining beneath the 6.714 acres where the highway is now located, Newton must demonstrate by a preponderance of evidence (a) the quantity; (b) the quality; (c) the marketability, independent of any use for Corridor H; and (d) the market value. App., p. 34, ¶ 4. These rulings were incorporated into the Circuit Court’s jury charge where the jury was also instructed that if Newton was unable to successfully satisfy all four of these elements of proof then she was not entitled to a recovery of just compensation. App., pp. 0107 and 5335 ll. 12-19. In addition, the Circuit Court ruled at Pre-trial that Newton was “prohibited from arguing to the jury or presenting evidence to the jury the Pre-trial rulings of the Court finding that the Petitioners acted in bad faith or as a

wilful trespass against the limestone interests of the Respondent.” App., pp. 0073 and 0077.

Despite the clarity of the foregoing rulings and instructions, the Circuit Court read to the jury a series of legal findings entitled “Additional Instructions” after opening statements which were directly related to its rulings that the WVDOH acted in bad faith or as a wilful trespass against Newton. More specifically, the Circuit Court, over objection, informed the jury that the WVDOH (1) entered onto the surface of the subject property without Newton’s permission; (2) made no communication or contact with Newton prior to entering onto the property and excavating materials; and (3) that the failure of the WVDOH to communicate with Newton precluded her from an opportunity to assess the value of the limestone before excavation of the same. App., pp. 0002-0003. In addition, the Circuit Court also precluded the WVDOH from introducing any evidence concerning these issues, thereby preventing it from providing an explanation. Further exacerbating the issue, the Circuit Court equated these “instructions” as “stipulations”, insinuating that the parties had agreed to these “facts”. App., p. 4925, ll. 10-11.²⁰

The Circuit Court’s Additional Instructions were in direct conflict with the jury charge read to the jury prior to the parties’ closing arguments. As noted by the Circuit Court in its jury charge, “in a condemnation case the burden of proof is on the landowner to establish by a preponderance of the evidence the Just Compensation to which the landowner is entitled.” App., pp. 0103 and 5331, ll. 10-12.²¹ This determination of just compensation is a very narrow issue and should not be broadened by the interjection of any immaterial matters, especially matters calculated to be prejudicial. *City of Sioux Falls v. Kelley*, 513 N.W.2d 97 (S.D.,1994), and *Southern Electric Generating Co. v. Leibacher*, 110 So.2d 308 (Ala.1959). The Additional Instructions did not provide any guidance with respect to the jury’s determination of just compensation, instead they injected background information which insinuated that the WVDOH’s actions were unlawful, or otherwise improper, thereby prejudicing the WVDOH from the

²⁰ While the April 16, 2014 Judgment Order that these “Additional Instructions” were read by agreement, the WVDOH only stipulated to item nos. 1 and 2. The record clearly demonstrates that the WVDOH objected to the submission of any additional instructions which related directly or indirectly to alleged bad faith or acts of trespass.

²¹ See also, W.Va. Code § 54-1-2, *et. seq.* and W.Va. Code § 17-2A-17.

very outset of the trial.

By Orders dated May 30, 2012 and November 8, 2012, the Circuit Court reached a determination on the legal standard by which the jury would determine just compensation. The specific findings which led to the Circuit Court's rulings were irrelevant to the sole issue before jury, the just compensation, if any, Newton was entitled to receive. To not only allow Newton to make reference to the Court's findings related to bad faith and a willful trespass, but to also read instructions prior to the introduction of evidence related to the same, improperly confused and/or prejudiced the jury. In essence, the Circuit Court indirectly instructed the jury that it had already ruled and determined that Newton was entitled to an award of just compensation and that the jury's only obligation was to calculate just how much she should be awarded. The reading of the additional instructions served to undermine the Circuit Court's instructions concerning Newton's burden of proof. Unquestionably, these "Additional Instructions" were inconsistent and were in direct conflict with the jury charge. As noted above, "[i]t is error to give inconsistent instructions", since it is impossible to determine what legal principles were followed by the jury. *AIG Domestic Claims, Inc., supra. Darrah, supra, and Burdette, supra.* In addition, these instructions was prejudicial to the WVDOH as they not only confused the jury, but invited them to punish the WVDOH before the first witness was even introduced. Therefore, the Circuit Court abused its discretion and committed reversible error when it read "Additional Instructions" to the jury prior to the submission of evidence and allowed the presentation of evidence with respect to the same.

I. The Circuit Court abused its discretion and committed reversible error when it found that the WVDOH was precluded from introducing any evidence concerning the percentage of recovery yields of the limestone at issue.

Prior to trial, Newton requested *in limine* that the Circuit Court preclude the WVDOH from introducing expert evidence or testimony concerning yield and recovery rates for the limestone excavated from the subject property, arguing that it was "completely" irrelevant, misleading, prejudicial, and was intended to demonstrate some form of "mineability". App., pp. 0965-0967. More specifically, Newton objected to Summit's findings that limestone recovery yields from the subject property were "34.2% recovery. This is well below the typical recovery rate of a commercial quarry. The Fairfax quarry has

about 80% recovery.” App., p. 0880. The WVDOH maintains that this information was relevant and material to the quality of the limestone at issue, and therefore admissible pursuant to W.Va.R.Evid. 402. App., p. 1015-1029.

At the pretrial hearing on July 30, 2013, the Circuit Court determined that information concerning recovery yields of limestone, including evidence concerning overburden and other materials, was not at issue in this matter in light of its prior application of *Roda, supra*. App., p. 0075. The Circuit Court further indicated on the record that the presentation of such would be confusing. App., p. 4829, ll. 8-9. On this basis, the Circuit Court granted Newton’s Motion and as a result the WVDOH was prevented from presenting any testimony or evidence concerning recovery yields at trial.

Notwithstanding that the Circuit Court’s application of *Roda, supra*, is misplaced as stated above, evidence concerning recovery yields was indeed relevant and the WVDOH was prejudiced by its inability to discuss the same. Again, W.Va.R.Evid. 401 defines relevancy in a very broad manner stating that “relevant evidence means evidence having **any tendency** to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Under West Virginia law, evidence having any probative value whatsoever would be deemed “relevant evidence” and W.Va.R.Evid. 401 and 402 strongly encourage the admission of as much evidence as possible. *State v. Derr*, 192 W. Va. 165, 178, 451 S.E.2d 731, 744, (1994). Elaborating on this further, this Court stated in *McDougal v. McCammon*, 193 W. Va. 229, 236, 455 S.E.2d 788, 795, (1995) that “[u]nder Rule 401, evidence having any probative value whatsoever can satisfy the relevancy definition. Obviously, this is a liberal standard favoring a broad policy of admissibility. For example, the offered evidence does not have to make the existence of a fact to be proved more probable than not or provide a sufficient basis for sending the issue to the jury.”

The proper inquiry with respect to relevance is whether a reasonable person, with some experience in the everyday world, would believe that the evidence might be helpful in determining the falsity or truth of any fact of consequence. *Young v. Saldanha*, 189 W. Va. 330, 336, 431 S.E.2d 669, 675 (1993) and *Derr, supra*. Evidence concerning yield and recovery rates is directly related to the quality of

the limestone at issue and was clearly relevant to the jury's consideration of the same. Regardless of the Circuit Court's ruling with respect to the application of *Roda*, the materials removed from the subject property were not 100% limestone, nor were the stockpiles referenced numerous times by Newton in her case-in-chief. To the extent that Newton disagreed, she could have presented testimony from her experts on the issue, and the jury could have decided what, if any merit, the same had on the quality of the limestone at issue. However, the Circuit Court, presupposing that limestone had been separated at some point or that a mixture of different minerals would not affect value, took this ability away from the jury and excluded all of this evidence despite the liberal standards in West Virginia with respect to admissibility. Clearly this evidence had a probative value. *McDougal, supra*.

The August 29, 2013 Order is silent, as is the record, with respect to the Circuit Court's consideration of whether yield and recovery rates for the limestone that lies beneath the highway was relevant. Pursuant to its earlier rulings, the *Roda* evidentiary standards were not invoked with respect to this limestone and as such, this evidence was relevant. App., p. 0105.

In light of the foregoing, the Circuit Court's failure to permit the WVDOH to introduce evidence concerning the recovery yield percentages and apply such evidence to the limestone (1) excavated; and/or (2) remaining beneath the highway, was an abuse of discretion and constituted reversible error.

J. The Circuit Court abused its discretion and committed reversible error when it failed to grant the WVDOH's Motion for Judgment as a Matter of Law pursuant to Rule 50 of the West Virginia Rules of Civil Procedure.

At the conclusion of Newton's case-in-chief, and again at the conclusion of the WVDOH's case-in-chief, the WVDOH requested that the Court grant a directed verdict in its behalf arguing that Newton had specifically failed to produce any evidence with respect to the marketability of limestone derived solely the Helderberg formation. These motions were summarily denied by the Circuit Court.

Citing *Fredeking v. Tyler*, 224 W. Va. 1, 680 S.E.2d 16 (2009), this Court in *Manor Care, Inc., supra*, recently held that its review of a trial court's order denying a motion for judgment pursuant to W.Va.R.Civ.P. 50(b), "its task is to determine whether the evidence was such that a reasonable trier of fact might have reached the decision below." Although Newton introduced evidence concerning

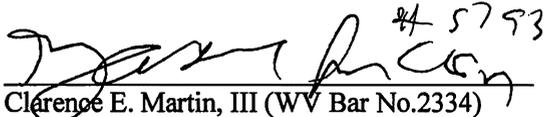
limestone production from over twenty quarries, she did not introduce any evidence to demonstrate that the same limestone present on her property was actually being marketed by these other quarries. To establish marketability, it was not enough for Newton to simply introduce evidence concerning uses of limestone in general because not all limestone is valuable. App., pp. 4367-4368, 4371-4374, 4377-4379, 4383-4387, 5210, 5230 and 5265. By way of analogy, red delicious apples have a market, but crab apples do not, the latter being extremely sour and for all intents and purposes not palatable. Limestone is similar, and the mere fact that limestone is possessed does not in itself mean that the same is valuable. As reflected by the record, there was no evidence introduced which demonstrated that there was a market for Helderberg limestone as of the date of the take. Newton failed to establish a market for the limestone at issue and the Court should have entered judgment as a matter of law in favor of the WVDOH.

VI. CONCLUSION

The Circuit Court's initial rulings as set forth in its May 30, 2012 and November 8, 2012 Orders had a snowball effect on all future proceedings since jury instructions, the admissibility of evidence and other evidentiary rulings were all based upon its misplaced reliance upon *Roda, supra*, and the new measure of damages it determined to implement in these proceedings. As a result, multiple assignments of error were committed and the WVDOH is entitled to a new trial.

WHEREFORE, the WVDOH respectfully moves this Court to reverse the judgment order below, remand the case and order a new trial.

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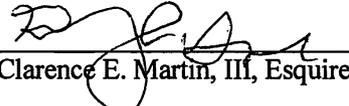
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CERTIFICATE OF SERVICE

I, Clarence E. Martin, III, Counsel for Petitioners hereby certify that I served a true copy of the foregoing upon the following individuals, via U.S. Mail, postage prepaid, on this the **15th day of August,**

2014:

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