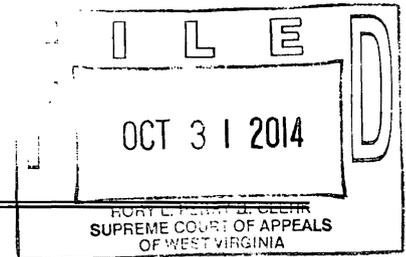


No. 14-0428



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

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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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**PETITIONERS' REPLY TO BRIEF OF RESPONDENT AND CROSS PETITION**

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## I. INTRODUCTION

The Petitioners, West Virginia Department of Transportation, Division of Highways, and Paul A. Mattox, Jr., P.E., Secretary/Commissioner of Highways (hereinafter collectively referred to as the “WVDOH”), respectfully submit this Brief as their Reply to the arguments raised by the Respondent, Margaret Z. Newton, (hereinafter referred to as “Newton”), in the Brief of Respondent and Cross Petition (“Response Brief”). As fully addressed below, Newton’s Response Brief fails to provide a justifiable basis for this Court to refuse to reverse the judgment order below, remand the case and order a new trial. Newton’s Response Brief presents a series of skeletal arguments and suggests that there is “no possible way to include within this brief all of the legal precedent provided to the Court in the legal briefs provided to the Circuit Court below given the restrictions of pages for this brief.” Response Brief, p. 11. Rather than fully brief the issues for the benefit of the Court, Newton has suggested that this Court should and “must” review and consider the various memoranda she previously submitted to the Circuit Court “in reaching any decision.” Response Brief, pp. 11-13, 15 and 18-19.<sup>1</sup> Such an action is the equivalent of “incorporating by reference” all documents filed by Newton.

Despite Newton’s approach towards this appeal, this Court has before it several assignments of error that involve matters of first impression. As set forth in the WVDOH’s Petition for Appeal, the Circuit Court made several pretrial rulings which erroneously departed from eminent domain standards that have been the law of this state for decades. The Circuit Court did so under the premise that this Court would eventually consider the issues. These pretrial rulings allowed Newton to present a case to a jury, and receive a favorable verdict, 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. Such reasoning is contrary to West Virginia law and is “unjust to the public.” *Bauman v. Ross*, 167 U.S. 548, 574 (1897).

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<sup>1</sup> The West Virginia Rules of Appellate Procedure (“W.Va.R.App.P.”) and this Court’s Administrative Order dated December 10, 2012 require parties to fully brief the issues and not simply (a) cut and paste from prior submissions, or (b) refer this Court to other legal filings. If additional pages were necessary to formulate a response, Newton could have requested leave from this Court to file a response in excess of the page limitation.

Newton's Response Brief repeatedly suggests that the WVDOH concocted a scheme to "steal" limestone that was necessary for the construction of Corridor H and that it had an "intent to appropriate and use Newton limestone from the outset." Response Brief, pp. 19 and 31. In addition, Newton argues that "if the WVDOH had acted as it was constitutionally and statutorily required, to file the Application for Condemnation before appropriating the limestone, we would not be in this present argument before the Court." Response Brief, p. 35. However, these accusations are without merit and not supported by the record. While the WVDOH admits that it did not contact Newton after it obtained a right-of-way for highway construction purposes through the property possessed by James S. Parsons, ("Parsons"), such actions were not an attempt to violate Newton's constitutional rights, "steal" limestone and save money.<sup>2</sup> It is clear in the record that the WVDOH never sought to purposefully condemn any "minerals", it simply acquired from Parsons a right-of-way "over, through, across and upon" the subject property "in connection with the construction, maintenance and use of a controlled access facility." App., pp. 279 and 282.

Contrary to Newton's representations, the parties are not before this Court because the WVDOH violated Newton's constitutional and statutory rights. As the record reflects, the WVDOH complied with its statutory obligations by instituting the instant matter within a reasonable time after it received notification of Newton's claim and upon completion of construction. *Shaffer v. West Virginia Department of Transportation, Div. of Highways*, 208 W.Va. 673, 677, 542 S.E.2d 836, 840 (2000). Even if eminent domain proceedings had been initiated prior to commencement of construction, Newton's evidentiary burden would not have changed. Newton would still have the burden of proving that she is entitled to recover just compensation for a property right that was not legally actionable. By virtue of this appeal, the WVDOH is not trying to evade statutory responsibility, it is requesting that this Court reverse the judgment order below and order a new trial.

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<sup>2</sup> On June 4, 1980, Newton and her husband at the time, Paul V. Williams conveyed a parcel of real estate to Parsons, consisting of approximately 37.2424 acres located in Hardy County, West Virginia by deed, of record in the Office of the Clerk of the County Commission of Hardy County, West Virginia in Deed Book 162, at page 59, hereinafter referred to as the "subject property". App., pp. 0203-0207.

## II. RESPONDENT'S PRELIMINARY OBJECTIONS

On May 12, 2014, Newton filed an Objection to Appellant Scheduling Order and Petition for Appeal (“Respondent’s Objection”) arguing that the WVDOH’s Petition for Appeal was improper and that this Court exceeded its own jurisdiction by accepting the Appeal and entering a Scheduling Order. On May 20, 2014, the WVDOH filed a response to the Respondent’s Objection. Upon consideration of the Respondent’s Objection, this Court deemed the same to be a motion to dismiss and entered an order on June 10, 2014, stating that “the Court is of the opinion to and does hereby refuse the motion to dismiss.” *See*, June 10, 2014 Order.

In her Response Brief, Newton renews her argument that since the WVDOH did not file a motion for a new trial with the Circuit Court prior to the filing of its Notice of Appeal pursuant to Rule 59(f) of the West Virginia Rules of Civil Procedure (“W.Va.R.Civ.P.”), the WVDOH waived any errors that may have been committed. As previously noted by the WVDOH, the requirements of W.Va.R.Civ.P. 59(f) with respect to the filing of a motion for new trial following entry of a final judgment is not applicable in this matter as eight of the assigned errors of law cited by the WVDOH occurred **prior** to the trial in question and not during the trial. Additionally, the ninth assignment of error relating to the denial of the WVDOH’s motion for judgment as a matter of law is specifically exempt from the requirements of W.Va.R.Civ.P. 59(f). *Taylor v. Miller*, 162 W.Va. 265, 249 S.E.2d 191 (1978), ) and *Miller v. Triplett*, 203 W.Va. 351, 507 S.E.2d 714 (1998)

Although not raised in the Respondent’s Objection, Newton now maintains that the WVDOH failed to properly preserve its objections **prior** to the trial, citing as authority two orders entered by the Circuit Court. Contrary to these assertions, the record reflects that the WVDOH did preserve its objections to each of the rulings of the Circuit Court which serve as a basis for this appeal. Specifically, the WVDOH would refer this Court to the following orders and transcripts in the record:

1. In its May 30, 2012 Order, the Circuit Court stated that the “Court notes the objection of counsel for the respective parties to any adverse ruling.” App. p. 27.

2. In its November 8, 2012 Order, concerning rulings made during the October 25, 2012, hearing, the Circuit Court stated that the “Court notes the objections of counsel to any adverse rulings.” App., p. 35.
3. In its January 2, 2013, Order, concerning rulings made during the November 13, 2012, hearing, the Circuit Court stated “[o]bjection and exception is saved to the respective parties for any rulings stated within this Order adverse to their interests.” App., p. 39.
4. In its August 29, 2013 Order, concerning rulings made during the July 30, 2013 hearing, the Circuit Court stated “all of the matters set forth herein, including the findings and directions stated herein are the order of this Court as if fully stated herein verbatim. Objection and exception is saved to each party for any adverse rulings made herein.” App., p. 79.
5. In its August 29, 2013 Order, concerning rulings made during the August 20, 2013 hearing, the Circuit Court stated “the Petitioners object to the Court's ruling and maintain that redaction of the reports is necessary for a variety of reasons. The Court indicated that the Petitioners' objections to its ruling were noted and that it was well aware of the basis for the same since such have been fully briefed and argued.” App., p. 116.

The Circuit Court recognized that its decisions concerning the legal and evidentiary standards to be applied at trial were creating new law which would ultimately be reviewed by this Court. The Circuit Court also observed that it would be necessary to preserve each party's objections to all of its pretrial rulings that were contrary to their respective interests. The following acknowledgements were made by the Circuit Court during the hearings on these pretrial issues:

“we might make some law for the West Virginia Supreme Court; I don't know . . .”  
App., p. 4596, ll. 13-14.

“We might make some law here, which is okay with me. I don't know if - - if anybody's every [sic] decided a case exactly like this; I don't see any. There's combinations of cases, but there's not one exactly like that.” App., p. 4674, ll. 6-9.

“I know you all wanna preserve a right to appeal and all this - -” App., p., p. 4692, ll. 10-12

“I know we're gonna be in one of those Southeastern Reporters - -” App., p. 4799, ll. 10-11

“because we're probably make new law here. . .” App., p. 4799, ll. 16-18

“Well, I'm gonna find that the reasonable period of time to sell and liquidate the limestone would be 18 months from the date of the take. I'm gonna let Supreme Court argue that.” App., p. 4852, ll. 17-19.

“I note your objection. We're making new law here about every minute, it looks to me like.” App., p. 4852, ll. 22-23.

As reflected by the foregoing, and the pretrial record as a whole, the Circuit Court painstakingly preserved the objections of the parties to its legal and evidentiary rulings for appeal.

With respect to the WVDOH's assignment of error associated with the Circuit Court's denial of its motion for judgment as a matter of law pursuant to W.Va.R.Civ.P. 50(b), Newton is also asserting that the WVDOH failed to properly preserve its objections its objections in the following manner:

The Respondent makes this argument without waiving Respondent's objection to this claim of error by the Petitioners. A review of the tr. trans. 4/9/2014, demonstrates on p. 65 that the Petitioners failed to renew the Rule 50 Motion at the conclusion of evidence and before the case was sent to the jury. Page 139 of that same transcript, 4/9/2014, again demonstrates that the Petitioners failed to renew their Rule 50 Motion after the verdict was returned and after the Court and the parties had accepted the verdict of the jury.

Response Brief, p. 34.

The record plainly demonstrates that the WVDOH moved for judgment as a matter of law pursuant to W.Va.R.Civ.P. 50(a) immediately after Newton's case-in-chief, and renewed that motion after completion of the WVDOH's case-in-chief. App., pp. 5137-5139 and 5292. In addition, the Order of Judgment specifically provides that the WVDOH properly preserved its objections:

The Petitioners moved the Court for a directed verdict as more fully stated on the record, which said motion was denied based upon findings made by the Court, on the record, objection saved.

...

The Petitioners then renewed their motion for directed verdict, which said motion was again as previously stated, objection saved. The Court then read the Charge and Limiting Instruction to the jury.

App., p. 3. Thus, the WVDOH *did* properly preserve its objections to the Circuit Court's denial of its motion for judgment as a matter of law.

As reflected by the foregoing, the objections which serve as a basis for the assignments of error presently before this Court were properly preserved and noted by the Circuit Court. Therefore, this Court has, and should continue to exercise, jurisdiction over this matter.

### III. STATEMENT OF THE CASE

In the “Statement of the Case” section of its Petition for Appeal, the WVDOH provided a detailed summary of the instant action, the claims at issue and the proceedings and rulings below. Newton’s “Statement of the Case” contains several inaccurate statements which are restated throughout her argument. In that regard, and to the extent necessary, the WVDOH will address these issues below.

### IV. REPLY ARGUMENT TO RESPONDENT’S RESPONSE TO PETITION FOR APPEAL

**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.**

As set forth in the Petition for Appeal, the WVDOH maintains that it did not take or damage any actionable property right possessed by Newton when it began construction on Corridor H through the subject property. The WVDOH avers that the Circuit Court should have declared that Newton (1) is not entitled to just compensation and/or damages with respect to the mineral rights associated with the subject property; and (2) has not suffered any compensable damages as a result of the construction of the highway. App., p. 0183 ¶¶ 2 and 3. Newton’s Response Brief ignores the crux of the WVDOH’s argument and provides absolutely no response to the same. Newton argues that limestone is a mineral and that limestone from the subject property was used in the construction of Corridor H. Neither of these arguments is persuasive, or supported by West Virginia law.

It is important to note that the WVDOH does not dispute that limestone is a mineral within the general scientific or geological sense as set forth in *West Virginia Dept. of Highways v. Farmer, et al.*, 159 W.Va. 823, 825, 226 S.E.2d 717, 719 (1976). However, Newton fails to acknowledge that the ruling of the *Farmer* Court is adverse to her position. In *Farmer*, the mineral rights had been severed from the property. However, condemnation proceedings were only brought against the surface owners, the Farmers, with respect to sand and gravel that was taken for a highway project. At trial the jury awarded the Farmers thirty-three thousand dollars (\$33,000) for the value of the property taken and damages to the residue. After the jury verdict, the mineral owners intervened and requested that the trial court disburse

the jury award to them, which was denied. On appeal, this Court found that the mineral owners were not entitled to any part of the just compensation awarded by the jury finding that it was “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. In reaching this conclusion, the *Farmer* Court was persuaded, in part, by the fact that no mining or plan to mine had existed with respect to the subject property, and that quarrying the sand and gravel would have a detrimental effect upon the surface, essentially rendering it useless. *Farmer*, 159 W.Va. at 827-828, 226 S.E.2d at 720-721. The *Farmer* Court ultimately concluded that the mineral owners did not have an actionable interest in the sand and gravel, **even when the same were the subject of condemnation proceedings.**

In the instant matter, the WVDOH **did not** acquire a portion of the subject property in order to obtain limestone, sandstone or any other mineral. The same principles relied upon by this Court in *Farmer* are applicable to this case. The WVDOH has plainly demonstrated and the record reflects that (1) Newton did not have an exercisable right to mine limestone since she did not have an agreement in place with Parsons; and (2) the mining of the limestone would deplete or “swallow” the surface. App., pp. 0298, ¶¶ 6, 8; 0323 ¶ 9; 393, 396 and 4945. It is undisputed that the limestone at issue in this case constituted a part of the surface of the subject property, which includes the subjacent and lateral support supplied by same. App., pp. 0393 and 0435. Even though Newton did reserve an interest in the minerals underlying the subject property in 1980, this did not include a right to exploit the land for limestone or any other mineral where its recovery would destroy the surface of the land which had been conveyed to Parsons for residential purposes. Under these circumstances, when the WVDOH acquired a right-of-way for highway construction purposes through the subject property, and later when construction commenced, Newton did not possess an actionable interest in the limestone. Since Newton’s interests in the limestone were non-compensable, no property right was taken from her or otherwise affected.

Despite the foregoing, Newton argues in her Response Brief that she is entitled to compensation because “her” limestone was purposefully mined, crushed, sized and stockpiled for use in the construction of the highway. The WVDOH’s construction processes and its use of the subject property was irrelevant

with respect to determining just compensation and should not have been admissible. *See, United States v. Whitehurst*, 337 F.2d 765, 772, (4th Cir. Va. 1964); *United States v. Weyerhaeuser Co.*, 538 F.2d 1363, 1367 (9th Cir. Or. 1976); and *U.S. v. Cors*, 337 US 325 (1949). Newton's arguments that her limestone was essential to the WVDOH's project is not supported by the record. As noted in its Petition for Appeal, the WVDOH builds roads with whatever materials are encountered during the process. The limestone at issue was not mined for a specific use in order to save millions of dollars. After excavation, the limestone and other materials had to be further crushed in order to be appropriately placed in fill areas for purposes of compaction, and for subgrade. App., p. 5144, l. 18 to 5155, l. 21 and 5145, ll. 6-16.

The WVDOH's contractor did not institute a quarry operation for the purpose of mining limestone in order to avoid purchasing limestone for use in construction of the highway. The record shows that tons of limestone were purchased where specifications required commercial grade limestone to be used, such as for concrete and asphalt. App., pp. 5149-4141. The WVDOH's contractor was simply performing roadway excavation on the subject property. Concerning these operations, the WVDOH's Construction Manual, adopted in 2002, states as follows:

Section 207.1.1 "The construction of a graded roadbed, upon which the base and wearing courses will be placed, is generally referred to as earthwork. **Excavation refers to that part of earthwork that is excavated, hauled, and placed to form the embankment. Roadway excavation material is soil, solid rock, loose rock, or any combination of these materials obtained from within the right-of-way.**" App., p. 3219. (Emphasis added).

Section 207.3.1. "**Excavation involves the loosening, digging, loading, hauling, and disposal of materials obtained from roadway cuts, channel changes, ditches, fill bench excavation, grading transitions, undercuts, and borrow pits.** The Contractor will dispose of the material by either incorporation in embankments, flattening side slopes, or wasting. Roadway excavation includes constructing, shaping, and finishing all earthwork within the construction limits for the entire length of the roadway, including approaches, to conform with the required lines, grades, typical sections, and the contract specifications. **Unclassified excavation includes all materials encountered within the construction limits regardless of nature or manner of removal.**" App., p. 3224. (Emphasis added.)

In the record below it is clear that the core borings, sandstone, limestone and other materials were encountered in the cut through the subject property. The WVDOH did not crush and sort the material into piles of sandstone or limestone. It crushed the excavated material in order to "break the material down

into usable pieces” for use in fill and subgrade areas, and to comply with compaction standards. App., pp. 5144, l. 18 to 5155, l. 21 and 5145, ll. 6-16. The mere use of sandstone and limestone in this capacity does not mean that the materials were commercially valuable. These materials were merely found within the right-of-way during the construction process. App. p. 5145-5145 and 5149-5151.

The foregoing was substantiated below by Newton’s own experts, L&W Enterprises, Inc. (“L&W”) and MSES Consultants, Inc. (“MSES”). L&W calculated that the WVDOH removed 236,187 tons of limestone and 454,585 tons of sandstone. App., pp. 2286, 2290-2292. The WVDOH excavated nearly twice as much sandstone as limestone. As further noted by L&W, the “final design used the sandstone and limestone from the cut in the area of interest because it met Division of Highway standards for Usable Excavation and Select Embankment.” App., p. 2303. However, MSES maintained that only Newton’s limestone had an economic value. More specifically, MSES stated:

**Sandstone** and shale are quarried in Hardy, Grant, and surrounding counties. Based on the geological evaluation, these minerals would not be of sufficient economic value to quarry. **Therefore, the sandstone and shale would have no economic value and are not part of this Appraisal Report.**

App., p. 2662. (Emphasis added.)

Even though it concluded that (a) sandstone is quarried in the region, as is limestone; and (b) the WVDOH’s contractors used sandstone during construction, testing it in the same fashion as limestone, MSES determined that it had “no economic value.” App., pp. 2303 and 2662. Thus, MSES admitted that the mere use by the WVDOH of a certain mineral that passes basic construction standards does not automatically deem it to be commercially valuable. App., p. 2662. Despite reaching this conclusion, MSES, contradicted itself and opined that Newton’s limestone was valuable solely because the limestone was used in the construction of the highway and satisfied “very rigid” federal and state “highway aggregate specifications and standards”. App., pp. 2303 and 2664. MSES conducted no independent testing of the limestone and simply opined that its use in construction deemed the same to be of high quality. App., pp. 2664-2665, 5047-5048 and 5081. Evidence in the record below was that the sandstone encountered also passed the same roadway specifications but was deemed worthless by MSES.

Likewise, the mere use of limestone from the subject property for construction purposes does not automatically mean that it has an independent commercial value. App., pp. 2303 and 2664.

In light of the foregoing, the Circuit Court should have found that (a) Newton was not entitled to just compensation and/or damages with respect to the mineral rights associated with the subject property since they were not actionable and the limestone at issue had “no economic value”; and (b) that this Court’s holding in *West Virginia Dept. of Highways v. Roda*, 177 W.Va. 383, 352 S.E.2d 134 (1986) was not applicable. To not rule in accordance with settled West Virginia law was error by the Circuit Court.

**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.**

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

W.Va.R.App.P. 10(d) provides that a response brief “must specifically respond to each assignment of error, to the fullest extent possible.” Rule 10(d) further provides that “if the respondent’s brief fails to respond to an assignment of error, the Court will assume that the respondent agrees with the petitioner’s view of the issue.” The Response Brief, fails to address a response to the WVDOH’s argument that it complied with its statutory duties by filing the instant matter within a reasonable time (a) after receipt of a claim; and (b) upon completion of construction. In that regard, this Court may, during its consideration of this matter, conclude that Newton agrees, or otherwise has no credible response to this aspect of the assignment of error at issue. W.Va.R.App.P. 10(d).

This Court has previously opined in *Shaffer*, 208 W.Va. at 677, 542 S.E.2d at 840, that if a highway construction project results in “probable damage” or a taking and the “owners in good faith claim damages” the WVDOH “*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*”. (Emphasis

added.)<sup>3</sup> See also, *State ex rel. Rhodes v. West Va. Dep't of Highways*, 155 W. Va. 735, 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).

In the instant matter, the first notice that the WVDOH received concerning a potential claim for damages with respect to Newton's mineral interests was when she filed a mandamus proceeding on May 4, 2010, **five months before** construction was completed on the section of Corridor H at issue (October 27, 2010). App., pp. 0134-0146, 0182, 0539, 4565 and 4578. On October 29, 2012, just two days after completion of construction, the WVDOH informed the Circuit Court that it would voluntarily institute eminent domain proceedings against Newton concerning her limestone claims. On April 29, 2011, the WVDOH filed an eminent domain proceeding against Newton providing her with an opportunity to prove that she is entitled to just compensation for a loss or damage to her property. App., pp. 0179-0185. Since the WVDOH complied with its statutory duty to institute proceedings in eminent domain within a reasonable time after completion of construction, there was no conspiracy, trespass or bad faith associated with Newton's claims. *Shaffer*, 208 W.Va. at 677, 542 S.E.2d at 840.

In light of the foregoing, this Court's holding in *Roda, supra*, was not applicable to the facts at issue in the proceedings below. The WVDOH is requesting that this Court reverse the judgment order below and award a new trial and allow a trial without the unwarranted evidentiary sanctions that were imposed by the Circuit Court against the WVDOH.

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

In the Response Brief, Newton did not address the WVDOH's argument that it did not commit a willful trespass in bad faith. The Response Brief fails to address the two classes of trespass and the legal standard applicable to a trial court's determination that a trespass has occurred. The Response Brief

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<sup>3</sup> While Newton does cite *Shaffer, supra*, at page 38, of the Response Brief, she only does so in support of her claim for attorney fees, as addressed in further detail below.

presents a series of argumentative statements which suggest that the record before this Court demonstrates that the Circuit Court was clearly right. However, Newton does not reference any specific portions of the record in support of the same. Newton directs this Court to review its prior briefs “which define the actions of the WVDOH as acting in bad faith and in a willful trespass against the interests of the Respondent.” Response Brief, p. 18. No specific finding of fact in the record is cited. Based upon the foregoing, the WVDOH would suggest that Newton has no meaningful response to this aspect of the assignment of error at issue. W.Va.R.App.P. 10(d).

Notwithstanding the foregoing, Newton asserts that the Circuit Court’s findings that the WVDOH acted in bad faith and committed a willful trespass against Newton were correct because (a) the WVDOH began excavation despite having acquired knowledge that the minerals had been previously severed; and (b) the presence of limestone was revealed prior to construction. Response Brief, pp. 18-19. Newton cites no legal authority in support of this position, nor does she demonstrate how the WVDOH’s actions were committed intentionally and recklessly in order to take advantage of her. *Reynolds v. Pardee & Curtin Lumber Co.*, 172 W. Va. 804, 310 S.E.2d 870 (1983) and *Pan Coal Co. v. Garland Pocahontas Coal Co.*, 97 W. Va. 368, 125 S.E. 226 (1924). Furthermore, Newton has failed to explain why the legal presumption that the WVDOH performed properly and in good faith those duties which are imposed upon it by law, does not apply. 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 record reflects that when highway construction began on the subject property, the WVDOH had already acquired a right-of-way from Parsons 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 and its contractors did have a legal right to enter upon the subject property and excavate for purposes of constructing Corridor H. App. pp. 0209-0213. Under these circumstances, the WVDOH commenced

construction through the subject property believing that it was acting within its legal rights. *See, Contractor Enters., supra*, and *Professional Realty, supra*.

Newton maintains that the WVDOH's actions were in bad faith because it (a) was aware that limestone was present beneath the subject property; and (b) fully intended to appropriate and use the same from the very outset to avoid purchasing limestone from commercial sources. Response Brief, p. 19-20. However, there is no evidence in the record to support this allegation. The record reflects that the presence of limestone had no bearing on the WVDOH's acquisition of the right-of-way through the subject property. App., pp. 3219, 3324, 5144, ll. 13-16; 5145, ll. 19-24; 5146, ll. 1-11; 5160, ll. 13-16; and 5181, ll. 5-24. There was no hidden agenda on the part of the WVDOH, it acquired an interest in Parson's property because the route selected for Corridor H crossed the property. App., pp. 4414-4416 and 4453. *See also*, <http://www.wvcorridorh.com/route/timeline.html>.

In advance of construction, the WVDOH did receive core borings for the area from various properties, including the subject property, which depicted the nature and thickness of the underlying soil and rock. However, these core borings were not intended to be an exploration for limestone, or any other mineral. App., p. 0388. The record reflects that the presence of limestone in this area of Hardy County has been known since at least 1927, as acknowledged by Newton's own expert witnesses. App., pp. 2287, 2292, 2295-2302, 2389, 2663 and 4369. Limestone is a relatively common mineral and is quite prevalent in Hardy County. App., p. 0393. As specifically noted by Bruce Rogers during trial, limestone is the "most common rock in America." App., p. 5203, ll. 5-7.

The purpose for acquiring core borings prior to construction was to provide potential contractors with data for the region so that they can develop a bid for construction services. The contractors use the core borings, along with other information, to estimate the extent of excavation, drilling and blasting that may be necessary for the project. App., pp. 542. The core borings at issue revealed the existence of multiple types of earthen materials, including soil, shale, sandstone and limestone of varying degrees of thickness and hardness in the area which would furnish "unclassified excavation" or "usable material" for use in the project. App., pp. 2303, 2308-2323, 2387, 3224, 4393-4411 and 4415-4416. These core

borings were conducted by the engineering firm of Michael Baker, Jr., Inc. App., pp. 2288 and 2308-2323. The Final Roadway Geotechnical Report did not include a separate section discussing the various characteristics of the minerals found, nor are recommendations made concerning the use of limestone or any other specific mineral. App., pp. 2250, 2288, 2303, 2308-2323, 4367, 4998-4999 and 5053-5054. This is not necessary or important because, as noted by the WVDOH's construction manual, unclassified excavation for use in road building is "all materials encountered within the construction limits regardless of nature or manner of removal." App., p. 3224. Thus, the actual classification of the materials revealed in the core borings was irrelevant since the WVDOH builds roads with whatever material it encounters, with most material being used simply as road base, i.e. fill material. App., pp. 5144, ll. 13-16; 5145, ll. 19-24; 5146, ll. 1-11; 5160, ll. 13-16; and 5181, ll. 5-24.

While Newton would have this Court believe that the WVDOH exploited the landowner by finding a reserve of limestone which allowed it to 'avoid purchase of commercial limestone', such is simply not true. Response Brief, pp. 20-21. Aggregate commercial limestone produced by quarries is not purchased by the WVDOH for use in building a road base, i.e. fill and subgrade. The WVDOH uses whatever material is found during construction and excavation to accomplish this purpose. App. p. 5145-5145, 5149-5151. However, in areas where "approved source material" is required (such as commercial grade aggregate), the contractor purchases this directly from the quarry. For this section of Corridor H, approved source material was purchased from Fairfax Materials, Inc. App., pp. 5149-5151.

Since the WVDOH **DID NOT** seek to condemn an actionable mineral right, and was otherwise not concerned with the classification of rock contained beneath the subject property, it did not contact Newton and believed that it was acting in good faith when construction began on the subject property. The WVDOH did not act with "reckless intent". *Reynolds*, 172 W. Va. at 809-810, 310 S.E.2d at 876. The WVDOH's actions do not constitute a willful trespass. This is further substantiated when the legal presumption that the WVDOH, as a governmental entity, has performed its duties properly and in good faith is applied. *See, Contractor Enters., supra*, and *Professional Realty, supra*. In order to overcome this presumption, the burden was on Newton to prove that the WVDOH "acted capriciously, arbitrarily,

fraudulently or in bad faith”. *Contractor Enters.*, 223 W. Va. at 102, 672 S.E.2d at 238. Newton did not satisfy this burden below and her Response Brief fails to address this issue for the benefit of this Court.

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

With respect to the error raised by the WVDOH concerning the Circuit Court’s determination of the date of take, Newton’s response argument consists of one sentence “The Date of Take is 4/29/2011. *Roda*, supra.” However, as noted above and in the WVDOH’s Petition for Appeal, *Roda* is distinguishable from the facts at hand. By way of further example, the WVDOH would note the following distinctions:

1. Coal is not at issue in this matter. It is also important to recognize that coal is treated under a completely different standard in West Virginia in light of its intrinsic nature and value. This is substantiated by the very definition of minerals in West Virginia as found in the Quarry Reclamation Act, W.Va. Code § 22-4-3 (13). Specifically, the term “minerals” is deemed to “not include coal.”
2. As fully discussed in the WVDOH’s Petition for Appeal, and reiterated above, the limestone found on the subject property constituted a part of the surface which includes the subjacent and lateral support supplied by the same. App., pp. 0393 and 0435.
3. In *Roda* the mineral rights had not been severed. In the instant matter, Newton only possesses mineral rights and she did not have any agreements in place with Parsons to mine the property. Thus, Newton did not, and does not currently, have an absolute right to exercise her rights to the minerals. App., pp. 0290, ¶¶ 6, 8; 0298, ¶¶ 6, 8; 0308-0320, ¶ 9; 0323 ¶ 9; 0390; 0392; 0435; and 4945.
4. The WVDOH obtained title to the rights-of-way at issue by virtue of a deed from Parsons which conveyed all rights and easements necessary and useful for the WVDOH to construct and maintain a public road. App., pp. 279-283.
5. In compliance with West Virginia law, the WVDOH reached an agreement with Parsons for the value of the property to be taken and acquired a right-of-way “over, through, across and upon” the subject property “in connection with the construction, maintenance and use of a controlled access facility”. App., pp. 279 and 282.
6. Since the WVDOH had legal title to the rights-of-way over, upon, through, across or under the subject property, the WVDOH and/or its contractors were not trespassing when construction began on the project. App., pp. 279-283.
7. Materials, including but not limited to, limestone, excavated by the WVDOH’s contractors from the property acquired from Parsons were **NOT** sold. The contractors were paid for excavation and roadwork, nothing more. As indicated above, the WVDOH uses whatever materials are encountered to build the road base, in this case shale,

sandstone and limestone. App., pp. 3224, 5144, ll. 13-16; 5145, ll. 19-24; 5146, ll. 1-11; 5160, ll. 13-16; and 5181, ll. 5-24.

8. There is no evidence of bad faith on the part of the WVDOH in these proceedings.

The controlling factors for this Court's decision in *Roda* were that (1) the WVDOH willfully trespassed on the property in question; (2) the property owners asked for permission to remove the coal themselves after it was uncovered but their request was rejected; and (3) the WVDOH's contractor actually sold the coal that was removed and pocketed the money. In the instant matter, none of these factors were present. In light of the foregoing, Newton's reliance upon *Roda, supra* is misplaced, as it is distinguishable from the matter at hand, and therefore, inapplicable.

**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.**

In her Response Brief, Newton chose not to structure an argument that applied applicable law in support of her position to this assignment of error. Instead, she argues that (a) the Circuit Court was correct; (b) the "actions of the WVDOH against the limestone interests of your Respondent, cancel the claims of the Petitioners to value the Newton limestone under the valuation standards of Berwind"; and (c) prior memoranda of law that she filed with the Circuit Court on the issue "**must be considered**" by this Court in consideration of this issue. Response Brief, pp. 11-12 and 21-22. (Emphasis added.)

As this Court is aware, its holding in *West Virginia Dept. of Highways v. Berwind Land Co.*, 167 W.Va. 726, 280 S.E.2d 609 (1981), established a hybrid valuation rule that must be satisfied before a property owner can recover an enhanced market value because of the presence of minerals. Pursuant to *Berwind*, in order to recover just compensation for minerals 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*, 167 W.Va. at 743-746, 280 S.E.2d at 619-621.

The Circuit Court erred, when by applying *Roda, supra*, the Circuit Court concluded that issues associated with highest and best use, marketing and production were irrelevant because it (a) found a willful trespass had taken place; and (b) the property interests had been severed. As discussed hereinabove, and in the WVDOH's Petition for Appeal, the record does not reflect that a willful trespass occurred and the WVDOH enjoys a presumption that it has performed its statutory duties in good faith. *Contractor Enters., supra* and *Professional Realty, supra*. The fact that the minerals had previously been severed is inconsequential. To find otherwise undermines this Court's decision in *Berwind*, and gives *carte blanche* to mineral owners, like Newton, to value their mineral interests "as a natural warehouse for minerals as personal property" even if they do not possess a legally actionable interest in the same. *State by Dept. of Natural Resources v. Cooper*, 152 W.Va. 309, 315-316, 162 S.E.2d 281, 285 (1968).

By ignoring the principles of *Berwind* and implementing its own hybrid rule, the Circuit Court exceeded its authority. As this Court succinctly noted with respect to a landowners' right to just compensation, "[n]ot every damage to real estate is compensable." *Gardner v. Bailey*, 128 W. Va. 331, 337, 36 S.E.2d 215, 218 (1945). The record demonstrates that if *Roda, supra*, does not apply, and *Berwind* is fully applied, then Newton is not entitled to any just compensation. By way of example, the WVDOH would emphasize the following facts which the Circuit Court precluded the WVDOH from presenting at trial:

1. No mining or quarrying had ever taken place on the subject property from June 4, 1980 to October 7, 2004 and Newton did not have any plans to mine limestone from the property. App., pp. 0289-0293, ¶¶ 2, 4, 5, 12-16 and 20; 0297-0300, ¶¶ 2, 4, 5, 12-16 and 20; 0308-0314, ¶¶ 2, 3, 4, 5-6, 9-10, 13-16 and 23-26; and 0322-0327, ¶¶ 2-6, 9-10, 13-16 and 23-26.
2. Newton and Parsons did not have an agreement in place which would have allowed for surface mining. App., pp. 0290, ¶¶ 6, 8; 0298, ¶¶ 6, 8; 0308-0320, ¶ 9; 0323 ¶ 9; 0390; 0392; 0435; and 4945.
3. No mining or quarrying permits had ever been issued with respect to the subject property from June 4, 1980 to October 7, 2004. App., pp. 0314, ¶¶ 27-29; 327, ¶¶ 27-29; 0397; 0424, 0435 and 4384.
4. A mining feasibility study was never obtained by Newton at any time from June 4, 1980 to October 7, 2004. App., pp. 0312-0313, ¶¶ 20-21; 0326, ¶¶ 20-21; and 0401.

5. Newton never had any geological testing performed with respect to potential minerals lying beneath the surface of the subject property from June 4, 1980 to October 7, 2004. App., pp. 0289-0292, ¶¶ 2, 12-14; 0297-0299, ¶¶ 2, 12-14; 0308-0314 ¶¶ 2-4, 9, 13-16, 25-26; and 0322-0327, ¶¶ 2-4, 9, 13-16, 25-26; and 0407.
6. As of October 7, 2004, the highest and best use for the subject property was for residential/woodland/pasture. App., pp. 0343, 0345, 0435; 4419, 4421 and 5371, l. 22 to 5372, l. 19.
7. Underground mining for limestone is not a viable option on the subject property due to the relatively small distance between the limestone strata and the surface in the area. App., p. 0393.
8. Underground mining is not a viable option beneath the right-of-way taken by the WVDOH from the subject property. App., p. 0396
9. Start up and development costs (including capital, labor and equipment costs) for a limestone quarry on the subject property would be cost prohibitive for a private owner such as Newton. App., pp. 0389 and 0392.
10. As of October 4, 2004, quarrying limestone was not a feasible use of the subject property and therefore it contained no economically recoverable limestone reserves. App., pp. 0394, 0407, 0433 and 0435.
11. The naturally occurring subsoil and bedrock along the right-of-way on the subject property are not unique. The material would not be considered a mineral reserve, but is likely a part of the surface. App., p. 435.
12. The limited acreage associated with the subject property excludes it from being a stand-alone mineral reserve property. App., pp. 0392 and 0435.
13. The only available use for limestone contained on the subject property as of October 4, 2004, was for basic road building purposes, it had no viable economic use. App., pp. 4367, 4373, 4377, 4379 and 4385-4387.

The mere fact that the mineral rights were severed in 1980 does not qualify as an exception to the factors set forth in *Berwind*, especially where the evidence demonstrates that (a) Newton could not have legally quarried the property for limestone as of October 4, 2004; and (b) quarrying is completely inconsistent with the subject property's overall highest and best use. These factors are indisputable, and were essentially ignored by Newton and her experts. App., pp. 1070-1088, 1090-1100, 1102-1461, 1832-1888 and 1890-1959. Newton never had a mining feasibility study prepared with respect to the subject property, nor did she introduce any evidence to suggest that the subject property's highest and best use would be for a limestone quarry. In addition, Newton presented no evidence to dispute that the highest

and best use for the subject property was, and remains, residential/woodland/pasture. App., pp. 0343, 0345, 0435; 4419, 4421 and 5371, l. 22 to 5372, l. 19. The WVDOH would posit that no reputable appraiser or mining engineer would conclude that mining/quarrying would be consistent with the overall highest and best use of a 37.2424 acre parcel of real estate being utilized for residential purposes, complete with a home and outbuildings, along with limited utility. App., pp. 0297, ¶ 3; 0345, 4421 and 4945. See, *Berwind*, 167 W. Va. at 733, 280 S.E.2d at 614.

In this matter, the Circuit Court refused to consider the element of highest and best use for the subject property or to recognize that mining on the subject property as of October 4, 2004, was not a viable or permitted use. App., pp. 0023-0027, 0029-0030 and 0031-0035. As a result, Newton was allowed to separately value limestone without any due consideration to the fact that the presence of limestone had no bearing whatsoever on the market value of the subject property as a whole. App., pp. 0031-0035. As noted by this Court in *Berwind, supra*, minerals are only **a factor** to be considered in determining the total market value of the property. Therefore, the WVDOH respectfully states that the Circuit Court committed reversible error by failing to properly apply the factors enumerated by this Court in *Berwind*.

**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.**

With respect to the market time frame window, Newton argues in her Response Brief that the Circuit Court did not commit reversible error. She further states that the window provided should have been larger.<sup>4</sup> Newton's argument on this issue recites several purported statements of fact which are largely unrelated to this issue. The primary basis for her position is that (a) the limestone was converted to personality; and (b) prevailing appraisal standards provide for a market window.

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<sup>4</sup> Newton has also filed a cross-petition for appeal concerning this issue.

A close examination of the statutes governing condemnation in West Virginia reflects that they focus solely upon the taking of real property, as opposed to personal property. W.Va. Code § 54-2-1, *et seq.* As noted by this Court in *State ex rel. Firestone Tire & Rubber Co. v. Ritchie*, 153 W. Va. 132, 168 S.E.2d 287 (1969), there is actually no procedure to recover compensation for, or damages, to personal property in eminent domain proceedings. In this regard, the *Firestone Tire* Court stated:

The general law with regard to the procedure for compensation in eminent domain proceedings is found in Chapter 54 of the Code of West Virginia. When the state institutes condemnation proceedings under the general law dealing with eminent domain, the only procedure set out therein for compensation is for land or real estate taken or for the interest therein if less than a fee, and for damages to the residue of the tract adjacent thereto. Code, 54-1-1 *et seq.*, as amended, and in particular Code, 54-2-9, as amended. There is no procedure prescribed by general law for compensation for personal property or leaseholds damaged . . .

*Firestone Tire*, 153 W. Va. at 138, 168 S.E.2d at 290. See also, *State ex rel. Phoenix Ins. Co. v. Ritchie*, 154 W. Va. 306, 175 S.E.2d 428 (1970) and *Mr. Klean Car Wash v. Ritchie*, 161 W. Va. 615, 244 S.E.2d 553 (1978).

This issue was subsequently addressed by this Court in *G.M. McCrossin, Inc. v. West Va. Bd. of Regents*, 177 W. Va. 539, 355 S.E.2d 32 (1987). The *G.M. McCrossin, Inc.* Court observed that there was a conflict as to whether the eminent domain procedure set forth in W.Va. Code 54-1-1 *et seq.*, may be utilized in seeking recovery for property interests other than realty, referencing its prior holdings in *State ex rel. Point Towing Co. v. McDonough*, 150 W. Va. 724, 149 S.E.2d 302 (1966) and *Firestone Tire*. *G.M. McCrossin, Inc.* 177 W.Va. at 544-545, 244 S.E.2d at 37-38. Although the *G.M. McCrossin, Inc.* Court stated that it thought “the statutory eminent domain procedure can, in the appropriate case, be utilized to set compensation for personal property”, it did not identify what type of cases would be appropriate and the procedure that should be followed with respect to the same. In a footnote, the Court indicated that the “Legislature, of course, may choose to alter or add to the eminent domain procedure currently detailed in Chapter 54 of the West Virginia Code so that compensation for property other than realty may be more efficiently determined.” *G.M. McCrossin, Inc.* 177 W.Va. at 544-545, 244 S.E.2d at 37-38.

It is important to recognize that the West Virginia Legislature has not amended W.Va. Code § 54-2-1, *et. seq.* to include parameters for taking personal property. Therefore, eminent domain statutes are to be strictly construed. *State of West Virginia by the State Road Commission v. Bouchelle*, 137 W.Va. 572, 73 S.E.2d 432 (1952). Thus, when eminent domain proceedings are instituted, the only procedure established “for compensation is for land or real estate taken or for the interest therein if less than a fee, and for damages to the residue of the tract adjacent thereto.” *Firestone Tire*, 153 W. Va. at 138, 168 S.E.2d at 290.

As further noted by the *Firestone Tire* Court “the general rule is that damages resulting from negligence, nuisance and trespass are not recoverable in eminent domain proceedings but are subject to independent actions for damages.” *Firestone Tire*, 153 W. Va. at 140, 168 S.E.2d at 291. Newton had an opportunity to file an independent action in the Court of Claims against the WVDOH to assert claims of trespass and/or fraud, but did not do so. W.Va. Code § 14-2-1. As noted by this Court in *Foster Found. v. Gainer*, 228 W. Va. 99, 105, 717 S.E.2d 883, 889 (2011) “[t]he court of claims was established by the Legislature ‘to provide a simple and expeditious method for the consideration of claims against the State’ which cannot be decided within the normal judicial system.” *See also, G.M. McCrossin, Inc., supra*, 177 W. Va. at 540 n.2, 355 S.E.2d at 33 n.2. Rather than file a claim with the Court of Claims, Newton opted to file a mandamus proceeding “seeking writ of mandamus to compel the Department of Transportation, Division of Highways, to institute eminent domain proceedings for purposes of ascertaining damages” to her property. App., p. 0136 ¶ 7.

The laws governing eminent domain are applicable in this matter which means that (a) minerals are an element of value that may or may not enhance the overall market value of the property; and (b) the universal rule for determining just compensation is the market value at the time of taking. W.Va. Code § 54-2-1, *et. seq.*, *Guyandotte Valley Ry. v. Buskirk*, 57 W. Va. 417, 424, 50 S.E. 521, 523 (1905), *Strouds Creek & Muddlety R.R. v. Herold*, 131 W.Va. 45, 61, 45 S.E.2d 513, 523 (1947), *State by State Rd. Comm'n v. Snider*, 131 W. Va. 650, 656-657, 49 S.E.2d 853, 857 (1948) and *Berwind, supra*. Moreover, the case law cited by Newton with respect to the consideration of minerals as personalty are inapposite

since they did not arise from eminent domain proceedings. While Newton also cites *Roda, supra*, it, as noted above, is distinguishable from the matter *sub judice*.

In further support of her position, Newton maintains that the *Uniform Standards of Professional Appraisal Practice*, always provide for a “market window” and establish a “reasonable exposure time” as a requirement of any appraisal performed for real estate. However, Newton does not identify what version of the *Uniform Standards of Professional Appraisal Practice* she is relying upon, or any page numbers for her citations to the same. For the purposes of this Reply, the WVDOH will assume that Newton intended to make reference to the *Uniform Standards of Professional Appraisal Practice*, 2014 Edition (“*USPAP*”).<sup>5</sup>

At the outset, it is important to recognize that the WVDOH has adopted the requirements of 49 C.F.R. § 24 which refers to nationally recognized standards such as *USPAP*. However, there are a number of instances where the “Jurisdictional Exception Rule” has been invoked by the WVDOH. *USPAP*, p. 15. The jurisdictional exception has been invoked with respect to the definition of “fair market value” because West Virginia law provides for a definition different from that set forth in *USPAP*.<sup>6</sup> However, since Newton has failed to identify the sections of *USPAP* she deems supportive of her position, the WVDOH is unable to state whether a particular jurisdictional exception would apply.

Notwithstanding the applicability of any jurisdictional exception, *USPAP* does not support Newton’s arguments. Contrary to the argument made by Newton in her Response Brief, the phrases “market window” or “market time frame window” are not used in any capacity in *USPAP*. Moreover, her reliance upon “reasonable exposure time” actually undermines her position. In *USPAP*, p. 2, “exposure time” is defined as “the estimated length of time that the property interest being appraised would have

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<sup>5</sup> While *USPAP* standards were referenced in the Appraisal prepared by Kent Kesecker on behalf of the WVDOH, the actual standards were not part of the record. App., pp. 0342-0343, 0368, 4418-4419 and 4444. Additionally, the applicability of *USPAP* with respect to the Circuit Court’s decision to require Newton to demonstrate marketability of limestone within an eighteen month market window was not raised by Newton during any of the pretrial hearings or at trial.

<sup>6</sup> See, *USPAP*, p. 3 and *West Va. Dep’t of Highways v. Brumfield*, 170 W. Va. 677, 295 S.E.2d 917 (1982), *Wheeling Electric Company v. Gist*, 154 W. Va. 69, 173 S.E.2d 336 (1970), *Guyandotte Valley, supra*; and *Mills v. Van Kirk*, 192 W. Va. 695, 702, 453 S.E.2d 678, 685 (1994).

been offered on the market prior to the hypothetical consummation of a sale at market value on the effective date of the appraisal.” Further explaining this definition, *USPAP* provides that “[r]easonable exposure time is one of a series of conditions in most market value definitions. **Exposure time is always presumed to precede the effective date of the appraisal.**” *USPAP*, pp. 79-80, Statement No. 6.

(Emphasis added.) See also, *USPAP* Advisory Opinions 2014-2015 Edition, pp. 13, Advisory Opinion 7.

Commenting further on this issue, *USPAP* states as follows:

The fact that exposure time **is always presumed to occur prior to the effective date of the appraisal** is substantiated by related facts in the appraisal process: supply/demand conditions as of the effective date of the appraisal; the use of current cost information; the analysis of historical sales information (sold after exposure and after completion of negotiations between the seller and buyer); and the analysis of future income expectancy projected from the effective date of the appraisal.

*USPAP*, p. 79. (Emphasis added.) To the extent that *USPAP* is deemed to apply, any reasonable exposure time would be presumed to occur prior to the effective date of take. Therefore, the Circuit Court’s implementation of a market time frame window of April 29, 2011 to October 29, 2012, is also erroneous because it violates relevant *USPAP* valuation standards.

**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.**

Throughout these proceedings it has been the position of Newton that the limestone found on her property was of high quality because it was used in the construction of Corridor H. She has not offered any independent evidence concerning the quality of limestone present on the subject property. The record contains no such evidence.

Newton’s evidence contradicts her position. As stated above, the WVDOH excavated nearly twice as much sandstone as limestone. This excavated sandstone was also used in the same capacity as the limestone, as basic road building materials. The sandstone and the limestone met the WVDOH’s requirements for this limited purpose as admitted to by Newton’s expert L&W. App., p. 2303. Despite this common usage, MSES opined that only the limestone was economically valuable, and declared that **“sandstone and shale would have no economic value and are not part of this Appraisal Report.”**

App., p. 2662. (Emphasis added.) MSES reached this conclusion despite the fact that the (a) sandstone is quarried in the region, as is limestone; and (b) the WVDOH's contractors used sandstone during construction, testing it in the same manner as limestone. App., pp. 2303 and 2662.

According to the opinions of Newton's own experts, mere use by the WVDOH does not mean that Newton possessed commercially valuable limestone. On this basis, the admissibility of the WVDOH's usage and testing procedures to demonstrate quality was not only factually erroneous, it invited the jury to presume that usage equals high quality. The admissibility of this information served to create a "trial within a trial" in contravention of the West Virginia Rules of Evidence ("W.Va.R.Evid."), specifically W.Va.R.Evid. 403. This is substantiated by the fact that a large portion of the trial concentrated on construction processes of the WVDOH, including testing procedures, crushing and stockpiling of material and general road building, all of which distracted the jury from the very narrow purpose for these proceedings, whether or not Newton was entitled to any just compensation. Rather than assisting the trier of fact, the admissibility of such evidence only served to confuse the jury; and prejudice the WVDOH.

Newton also maintains that *Whitehurst, supra*, *Weyerhaeuser Co., supra*, and *Cors, supra* are not applicable because the taking by the WVDOH in this matter consisted only of a right-of-way for public road purposes, and not a full fee simple taking. The foregoing cases stand for the principle that the condemnee's actual use must be excluded from consideration at trial because such evidence is prejudicial, and serves to encourage the jury to inflate values for just compensation when there is no basis for the same. As seen in the record, that is exactly what occurred in the present matter. App., pp. 2303-2307, 2648, 2664-2666, 5009-5010, 5017-5018, 5111, 5048-5049, 5051-52 and 5055-5057. As specifically noted by the Fourth Circuit, "mere physical adaptability to a use does not establish a market." *Whitehurst*, 337 F.2d at 772.

Applying this same principle to the determination of a land's highest and best use, which necessarily includes elements of quality when discussing minerals, the Tenth Circuit concluded that the highest and best use of condemned land was not as a quarry because there was no market for stone apart

from the government project. In reaching this conclusion, the Tenth Circuit held that “values in a market created solely by the need of the taker for the property taken are not fair market values to measure constitutionally guaranteed just compensation.” *J.A. Tobin Const. Co. v. United States*, 343 F.2d 422, 424-25 (10th Cir. 1965), cert. denied, 382 U.S. 830, 15 L. Ed. 2d 74, 86 S. Ct. 70 (1965). In light of the foregoing, the mere fact that limestone was utilized during the construction process does not give rise to any value associated with the mineral for which Newton should be compensated by the WVDOH. Thus, this evidence was not only irrelevant but inadmissible and the Circuit Court committed reversible error by allowing the same to be introduced as trial.

**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.**

Newton’s sole argument in support of the Circuit Court’s finding that evidence related to limestone excavated from other properties and for separate projects was admissible is that the WVDOH allegedly “made consistent efforts to hide information and documentation, and to exclude information which would allow the jury to determine quality or quantity of the limestone appropriated from the Veach [sic] reserves.” Response Brief, p. 30. Throughout her Response Brief, Newton alleges that records concerning limestone were non-existent, limited, sanitized, wrongfully withheld or otherwise not provided, pp. 9-11

First, the presence of limestone along the path of Corridor H was inconsequential because 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. This combined with the fact that the WVDOH and its contractors had to cut through a mountainside to construct the roadway and fill in adjacent valleys, undermines Newton’s argument that this route, and “her” limestone “saved millions of dollars” for the WVDOH. Response Brief, p. 4.

Again, the Final Roadway Geotechnical Report indicated that the entire cut, including the portion through the subject property, would furnish unclassified excavation for use on the project. App., pp.

2303, 100649. This Report did not suggest that extremely valuable limestone was present; nor did it recommend potential uses for the same that would save money for the WVDOH. In fact, there was not any discussion with respect to limestone because this factor is entirely irrelevant since the WVDOH builds roads with whatever material it encounters, “regardless of nature or manner of removal.” App., p. 3224. *See also*, App., pp. 5144, ll. 13-16; 5145, ll. 19-24; 5146, ll. 1-11; 5160, ll. 13-16; and 5181, ll. 5-24.

Since the WVDOH only concerns itself with materials excavated, and not the scientific classification of the material, it only requires its contractors to maintain daily logs of material excavated, and periodic compaction tests. App., pp. 4338-4339, 5144-5146 and 5167-5171, 5473 and 5181. This is why there were no specific records among the 30,000 pages of construction documents made available for inspection to Newton concerning the excavation and use of specific materials, whether it be limestone, shale, sandstone or siltstone. Thus, there is no merit to the accusations of Newton, and her expert witnesses, that the WVDOH sanitized or intentionally withheld limestone records. There were no records concerning limestone and the WVDOH was not required to maintain such records by the state of West Virginia or the Federal Highways Administration. Moreover, since none of Newton’s experts were experts in the field of public highway construction and engineering they are not qualified to even render an opinion as to what is, and what is not, required to be maintained during construction of a highway. App., pp. 2642-2643 and 2692-2699. Such accusations and arguments have been made throughout these proceedings and have been simply utilized as a smoke screen to divert attention away from the actual legal issues and portray the WVDOH in a negative manner.

**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.**

This assignment of error is related to the Circuit Court’s Additional Instructions that were read prior to opening statements concerning its findings related to bad faith and a willful trespass, and its

decision to also allow the introduction of evidence related to the same.<sup>7</sup> In her Response Brief, Newton maintains that the WVDOH (a) failed to preserve its objection to this issue; and (b) is disputing relevant findings of fact made by the Circuit Court.

Newton claims that the WVDOH failed to properly preserve its objections are without merit. The record reflects that the WVDOH properly and with specificity preserved its objections to these Additional Instructions. This issue was addressed by the Circuit Court during hearings which occurred on May 20, 2013 and July 30, 2013. As noted during the May 20, 2013 hearing, the WVDOH objected to three of the additional instructions on the basis that they were “irrelevant to the matters of the condemnation hearing.” App., p. 4790-4791. These objections were also preserved in the Circuit Court’s May 23, 2013 Order. App., p. 69. This issue was raised again during the July 30, 2013 hearing and once again objected to by the WVDOH, and further preserved in its August 29, 2013 Order, wherein the Circuit Court stated that “**all of the matters set forth herein**, including the findings and directions stated herein are the order of this Court as if fully stated herein verbatim. Objection and exception is saved to each party for any adverse rulings made herein.” App., pp. 79 and 4815-4817. (Emphasis added.) Thus, Newton’s argument that the WVDOH failed to preserve its objections to this assignment of error is without merit. *See also*, Section II above.

In further response, Newton maintains that the additional instructions correctly recite the facts and rulings of the Circuit Court and the WVDOH’s assignment of error is simply a “red herring”. Response Brief, p. 32. However, Newton misconstrues the WVDOH’s argument. This assignment of error by the WVDOH is not a *per se* factual dispute, but instead relates to the misleading nature of the statements of fact read to the jury as instructions of law. As specifically provided by W.Va.R.Evid. 403, relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . .” The pre-condemnation actions of the WVDOH were irrelevant to the jury’s consideration of just compensation. The Circuit Court not only

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<sup>7</sup> The WVDOH had presented its objections and was not allowed at trial to argue these issues. App., pp. 69, 79, 4790-4791 and 4815-4817.

allowed Newton to present evidence concerning the same, but converted a series of findings of fact from its prior rulings into jury instructions which were read at the beginning of the case. App., pp. 0079, 4925-4926 and 5346. In addition, the Circuit Court determined that the WVDOH would be precluded from introducing any evidence concerning these issues in order to provide an explanation for the same. App., pp. 0002-0003 and 4814-4817. As noted above, and not disputed by Newton in her Response Brief, the WVDOH complied with its statutory duty to institute proceedings in eminent domain within a reasonable time after receipt of a claim and completion of construction, however, the Circuit Court did not inform the jury of this fact, nor did it allow evidence to be presented concerning same. *Shaffer*, 208 W.Va. at 677, 542 S.E.2d at 840.

More specifically, the Circuit Court informed the jury by virtue of “Additional Instructions” 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. By reading these findings of fact as instructions to the jury before any evidence was presented, the jury was invited to accept as fact that the WVDOH wrongfully trespassed on Newton’s property which caused her harm. Notwithstanding the prejudicial nature of these instructions, such information was not necessary nor relevant to the only issue to be addressed by the jury, the amount of just compensation, if any, that Newton was entitled to receive. W.Va. Code § 54-1-2, *et. seq.* and W.Va. Code § 17-2A-17. These instructions were therefore improper and the Circuit Court committed reversible error when it (a) presented these additional instructions before any evidence was even presented to the jury, and (b) allowed Newton to present evidence related 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.**

Prior to trial, the Circuit Court determined that the WVDOH would be precluded from introducing evidence concerning the recovery yields of limestone from the subject property. In response,

Newton maintains that such information was irrelevant because it relates to mining processes and is therefore irrelevant in light of the Circuit Court's application of *Roda, supra*. Response Brief, pp. 32-33.

Regardless of whether *Roda* is deemed to apply in this matter, evidence related to yield and recovery rates were material and pertinent to demonstrate that the quality of the limestone that was excavated and removed was no different from any of the other materials that were used in the highway. To reiterate, Newton's only evidence concerning quality was that limestone was used in the highway. App., pp. 2664-2665, 5047-5048 and 5081. In that regard, and as reflected in the record and in her Response Brief, the Circuit Court allowed Newton to present a litany of evidence and testimony at trial concerning the WVDOH's construction processes, including excavation, crushing, stockpiling and use of limestone in the highway. Conversely, the Circuit Court precluded the WVDOH from discussing the recovery yields of the limestone in comparison with other materials that were used in the highway, even though Newton's own experts admit that twice as much sandstone was removed and used in the highway which they deemed economically worthless. App., pp. 2286, 2290-2292 and 2662. Nor was the WVDOH allowed to discuss the tons of overburden, other minerals and materials that also had to be processed along with the limestone which increased time and expense, even though Newton argued that the WVDOH was saving thousands of dollars because limestone was on her property. A discussion of recovery yields and how that factors into the construction process would have undermined Newton's arguments in this respect.

While Newton takes issue with the arguments in the WVDOH's Petition for Appeal that the stockpiles did not consist entirely of limestone, her own experts agreed that the recovery yields for sandstone were far greater than limestone. App., pp. 2286, 2290-2292. Since the WVDOH admitted that excavated material was not sorted by type, but simply processed and used to the extent practical in basic road building, the stockpiles referenced in the proceedings below were an amalgam shale, sandstone and limestone, and not solely limestone as argued by Newton. App., pp. 5144, l. 18 to 5155, l. 21 and 5145, ll. 6-16. This was further substantiated by the core borings from the subject property. App., pp. 2303, 2308-2323, 2387, 3224, 4393-4411 and 4415-4416. By refusing to allow the WVDOH to introduce

evidence concerning recovery yields for the subject property, the WVDOH was prevented from fully countering Newton's misstatement of the facts concerning the stockpiles.

It is also important to recognize that the Circuit Court implemented two evidentiary standards with respect to the limestone removed, and the limestone remaining beneath the highway. App., pp. 0031-0035. Even if recovery yields were deemed to be inapplicable because of the application of *Roda* to the limestone removed, evidence concerning recovery yields remained relevant with respect to the limestone beneath the highway in which the Circuit Court determined would be valued "in place" with consideration given to the prospective costs for the production, excavation and marketing. With respect to the limestone beneath the highway, if recovery rates are estimated to be low, it affects quality and marketability, thereby diminishing its value. This is relevant information pursuant to W.Va.R.Evid. 401, 402 and 403.

It is apparent that evidence related to recovery yields of material from the project was pertinent to the jury's consideration of quality and satisfied the relevancy standards of the Rules of Evidence. W.Va.R.Evid. 401, 402 and 403. The Circuit Court failed to properly consider these factors, and therefore, it committed reversible error.

**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.**

In its Petition for Appeal, the WVDOH argued that the Circuit Court committed reversible error when it denied the WVDOH's motion for a judgment as a matter of law on the basis that Newton had failed to produce any evidence with respect to the marketability of limestone derived solely from the Helderberg formation. Excluding her arguments that this issue was waived by the WVDOH which is not supported by the record (Section II hereinabove), Newton's argument in response consists of one sentence, "the evidence at trial demonstrated clearly that Helderberg limestone is quarried, marketed and sold from various other quarries and that the claims of the WVDOH that the Helderberg formation of limestone is somehow inferior as a limestone aggregate was disproved by documented evidence and

expert testimony.” However, Newton did not provide this Court with any specific reference to the record with respect to documentary evidence or testimony in support her position.

Newton’s response to this assignment of error is consistent with her overall approach to this matter; limestone is a mineral which in and of itself means that it is commercially valuable. That is a conclusory statement which is not true. Limestone, like any other mineral, has different types, each of which have varying qualities and characteristics. Pursuant to the standards set forth by the Circuit Court, Newton was required to prove marketability of limestone in her possession. The burden was on Newton to demonstrate that Helderberg limestone had a specific market, otherwise she was not entitled to just compensation. This is consistent with this Court’s opinion in *Roda* upon which Newton has placed her reliance in these proceedings.

In *Roda*, this Court observed that the coal in question was derived from two seams and that the record “established that the market conditions for both the Pittsburgh and Redstone seams were excellent” at the time of the take. *Roda*, 177 W. Va. at 385, 352 S.E.2d at 137. In the present matter there is no evidence in the record to suggest that there was a market at all for Helderberg limestone at the date of take. App., pp. 4367-4368, 4371-4374, 4377-4379, 4383-4387, 5210, 5230 and 5265. Newton’s experts attempted to establish a market by referencing twenty quarries in the vicinity. However, Newton’s experts testified that only three were mining Helderberg, the Cabins, Scherr and Ours quarries. App., pp. 5067, ll. 1-10; and 5121, ll. 3-24. However, Cabins must also be excluded because it was closed at the time of the take and had been closed for a number of years. App., pp, 2272 and 5220, l. 20 to 5221, l. 18.<sup>8</sup> Nonetheless, no evidence was introduced to demonstrate that Helderberg was actually being commercially mined, much less marketed at the Scherr or Ours quarries. This was a fatal factor to Newton’s claims. There is a difference between commercially mining an element, and excavating

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<sup>8</sup> Of the eighteen purported limestone quarries identified by Newton, three were not limestone mines at all (U.S. Silica, Continental Brick and Petersburg Block), four were closed or inactive at the time of take (Allegheny Investments, Cabins, Pond Lick and Southern WV-Bowden), and six did not even have the Helderberg seam on their property (Mashey Gap, Kelly Mtn., Greer, Meadows Stone, Inwood and Millville.) App., pp. 2251, 2254, 2272 and 2691.

overburden on waste material in order to get to the more valuable seams. Newton failed to address this issue. App., p. 5115, ll. 16-20 and 5120-5122. Thus, the lack of evidence in the record makes it clear that Newton failed to establish a market for the limestone at issue and the Circuit Court should have entered judgment as a matter of law in favor of the WVDOH.

## **V. ARGUMENT IN RESPONSE TO RESPONDENT'S CROSS PETITION FOR APPEAL**

### **A. Element of Marketability**

In her Cross Petition for Appeal, Newton maintains that when the standards of valuation set forth under *Roda, supra*, are applied, marketability is not required to be established by the landowner. On this basis, Newton maintains that the Circuit Court was “clearly wrong” when it denied her pretrial motion to delete the element of marketability from the instructions given to the jury. Without any explanation, Newton maintains that the Circuit Court’s ruling is in violation of the United States Constitution, West Virginia Constitution, and West Virginia law. U.S. Const. Amend. 5. W.Va. Const. Art. III, § 9, W.Va. Code §§ 54-2-13, 54-2-14 and 52-4-14a and *Roda, supra*.

To the extent that this Court deems that *Roda, supra* is applicable to this matter, and all of its assignments of error concerning this issue are rejected, the Circuit Court’s rulings concerning marketability should be affirmed. There is simply no basis for this Court to find that the Circuit Court erred by finding that marketability was a requisite factor that must be proven by Newton in order to recover just compensation.

In its November 8, 2012 Order, the Circuit Court concluded that in order for Newton to recover for limestone (1) that has been excavated and removed from the 6.714 acres at issue; and/or (2) limestone remaining beneath the 6.714 acres where the Corridor H right-of-way is not located, she must successfully demonstrate by a preponderance of evidence each of the foregoing factors: (a) the quantity of the limestone at issue; (b) the quality of the limestone at issue; (c) the marketability of the limestone at issue, independent of any use for Corridor H; and (d) the market value of the limestone at issue. App., pp. 31-35.

The only legal argument presented by Newton in support of her position is that this Court's decision in *Roda, supra*, does not include a requirement that the landowner must prove marketability. However, an examination of *Roda* does not support Newton's conclusion. As noted above, the mineral at issue in *Roda* was coal. As part of its analysis, the *Roda* Court noted that 4.8 acres of the Redstone coal and 2.9 acres of Pittsburgh coal had been removed by the contractor. With respect to market and the evidence presented during the trial, the Court observed that it "was established that the market conditions for both the Pittsburgh and Redstone seams were excellent on August 1, 1974." *Roda*, 177 W. Va. at 385, 352 S.E.2d at 136-137. (Emphasis added.) In addition, this Court further stated that "on the lawful date of take, according to the testimony, an excellent market existed for both the unearthed coal and the coal in place" and therefore marketing costs should be offset from the fair market value of the coal because testimony at trial established that there was an excellent market." *Roda*, 177 W. Va. at 389, 352 S.E.2d at 141. (Emphasis added.) As the foregoing plainly establishes, a determining factor in the *Roda* Court's decision was that the record reflected that there was an "excellent market" for the coal. Thus, it is clear that marketability was a factor in *Roda*, and likewise it is an important factor in this matter, as observed by the Circuit Court in its November 8, 2012 Order. App., pp. 31-35.

Although the Circuit Court concluded that the measure of compensation should be determined within the parameters of *Roda, supra*, and *Berwind, supra*, marketability remains an important factor in determining whether or not just compensation should be awarded. As noted by the Eleventh Circuit:

'just compensation' is wedded to the morals of the market place under which it is bound to pay only for that which it takes and severance damages for that which remains. It is not bound to pay for that which it injures or even destroys as a consequence of the taking. In short, it is not bound to pay 'consequential damages'.

*J. A. Tobin Constr. Co.*, 343 F.2d at 425. It is axiomatic that for property to have a market value, there must be a market. To find otherwise would completely undermine the fair market value standard for just compensation that has been implemented for condemnation matters in West Virginia. *Guyandotte Valley Ry., supra*, *Strouds Creek, supra*, *Snider, supra*, and *Berwind, supra*. Therefore, it is apparent that the

Circuit Court appropriately determined that marketability is a requisite factor that must be proven by Newton in order to recover just compensation in this proceeding.

**B. Attorney's Fees**

**1. The Issue of Attorney's Fees is not Properly Before This Court.**

Contrary to the representations of Newton, the Circuit Court did not deny her request for attorney fees on the basis that it refused to consider the same during the stay of these proceedings pending consideration by this Court of the WVDOH's Petition for Appeal. On April 25, 2014, the WVDOH filed a Notice of Appeal with this Court. Subsequently, on May 1, 2014, Newton filed her Motion for Reimbursement of Attorney's Fees, Litigation Expenses and Expert Witness Fees and Expenses ("Motion for Reimbursement") and scheduled the same for a hearing before the Circuit Court on May 28, 2014. App., pp. 4498-4552. On May 7, 2014, this Court entered a Scheduling Order noting that the Notice had been timely filed in accord with W.Va.R.App.P. 5(b). Upon receipt of this Court's Scheduling Order, counsel for the WVDOH wrote the Circuit Court to determine if it intended to go forward with the hearing. App., p. 4553-4554. On May 15, 2014, Newton filed an Objection to Correspondence from Petitioners to the Court and Response to Letter of May 13, 2014, arguing that the Supreme Court of Appeals of West Virginia did not have jurisdiction and that counsel for the WVDOH had in some fashion violated the Rules of Professional Conduct. App., pp. 4555-4563. Out of an abundance of caution, the WVDOH filed a Response to Newton's Motion for Reimbursement on May 22, 2014. App., pp. 4564-4593. On May 27, 2014, counsel for the WVDOH received notice from the Circuit Court that the May 28, 2014, hearing had been cancelled and was informed that an Order had been entered by the Circuit Court concerning same.

It is well accepted law that once jurisdiction was accepted by this Court that the Circuit Court is precluded from any further action. This would include presiding over a hearing related to Newton's request for attorney fees. *Fenton v. Miller*, 182 W. Va. 731, 735, 391 S.E.2d 744, 748 (1990). Once jurisdiction is transferred to this Court, the Circuit Court does not possess any authority to render any further decision affecting the parties in the cause until the matter is remanded. *Pure Oil Co. v. O'Brien*,

106 W. Va. 10, 12, 144 S.E. 564, 565 (1928). Aware of these basic principles, the Circuit Court refused to preside over any further hearings despite Newton's demands for same. Since the Circuit Court was without authority or jurisdiction to consider Newton's Motion for Reimbursement, it did not deny same, and therefore did not commit any error with respect to that issue. Therefore, this issue is not properly before this Court on appeal.

**2. Newton is not Entitled to a Recovery of Attorney Fees.**

Assuming *arguendo*, that this Court accepts and considers the issue of attorney fees, the WVDOH would proffer that in reliance upon this Court's decision 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), Newton claims that she is entitled to reimbursement of all of her fees and expenses. However, Newton's reliance upon this decision is misplaced.

In *Dodson*, this Court concluded that an inverse condemnation would also include a counterclaim filed by a landowner which seeks to have the condemnor purchase an uneconomic remnant that was not originally taken by the WVDOH. Determining that federal law applied in that situation, this Court concluded that pursuant to 49 C.F.R. § 24.107, a landowner is entitled to the reimbursement of reasonable expenses, including reasonable attorney, appraisal, and engineering fees, which the owner actually incurred because of a condemnation proceeding, if "[t]he court having jurisdiction renders a judgment in favor of the owner *in an inverse condemnation proceeding or the Agency effects a settlement of such proceeding.*" *Dodson*, 218 W. Va. at 125, 624 S.E.2d at 472 (Emphasis added).

The present matter is distinguishable from *Dodson*. In compliance with West Virginia law, the WVDOH initiated condemnation proceedings against Newton on April 29, 2011. *Shaffer, supra*. All of the pertinent issues related to any alleged taking and damage to Newton's property were raised by the WVDOH in its condemnation Petition which was filed shortly after construction was completed on the sections at issue. App., pp. 0009-0012 and 0179-0185. Although Newton filed a Petition for Writ of Mandamus against the WVDOH, her relief requested that the WVDOH be compelled to file a

condemnation proceeding. App., pp. 0134-0146. At no time did Newton file an action for inverse condemnation, nor did she plead the same in her Answer to the Petition. App., pp. 0186-0198.

As the record reflects, the first time the WVDOH received notice that Newton believed her mineral rights had been taken or damaged, was when it was served with a copy of her Petition for Writ of Mandamus in May of 2010. App., pp. 0134-0146. Construction on the section of Corridor H at issue was completed five months later on October 27, 2010. Since construction was not complete, and she had never even submitted a claim to the WVDOH, Newton's Petition of Writ of Mandamus was premature. Nonetheless, 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 related to her mineral claims. Six months later, on April 29, 2011, the WVDOH filed a Petition which initiated the instant matter. App., pp. 0009-0012 and 0179-0185.

It is also important to recognize that the Circuit Court did not determine that a writ of mandamus should issue against the WVDOH in favor of Newton. Again, the WVDOH, immediately after construction was complete, agreed to initiate eminent domain proceedings against Newton with respect to her mineral claims. Subsequently, the Circuit Court "ratified, approved and confirmed" this agreement by virtue of its March 31, 2011 Order in Civil Action No. 10-C-42. App., pp. 0008-0012. The record plainly reflects that the WVDOH complied with its statutory duties by filing the instant matter within a reasonable time (a) after receipt of a claim; and (b) upon completion of construction. *Shaffer*, 208 W.Va. at 677, 542 S.E.2d at 840. This Court has never found that a landowner is entitled to an award of fees and expenses simply because he or she initiated a mandamus action against the WVDOH to compel it to institute an eminent domain proceeding. *See Shaffer, supra* and *State ex rel. Henson v. West Virginia DOT, Div. of Highways*, 203 W.Va. 229, 506 S.E.2d 825 (1998). Under these circumstances, *Dodson* is not applicable and there is no statutory basis to award reasonable fees, including attorney fees to Newton.

In the absence of statutory authority upon which to base an award of attorney fees, this Court in *Nelson v. West Virginia Public Employees Ins. Bd.*, 171 W. Va. 445, 451, 300 S.E.2d 86, 92 (1982) held that "[a] court may order payment by an attorney to a prevailing party reasonable attorney fees and costs

incurred as the result of his or her vexatious, wanton, or oppressive assertion of a claim or defense that cannot be supported by a good faith argument for the application, extension, modification, or reversal of existing law.” See also, *Gainer v. Walker*, 226 W.Va. 434, 701 S.E.2d 837 (2009) and *Martin v. West Virginia Div. of Labor Contractor Licensing Bd.*, 199 W. Va. 613, 486 S.E.2d 782 (1997). However, the timeline of events in this matter reflects that the WVDOH acted in good faith and complied with its statutory duties. While the WVDOH has consistently argued that Newton was not entitled to any compensation for the limestone at issue, this position and the WVDOH’s arguments in support of the same are not frivolous, nor have they been proffered in bad faith.

It is also important to recognize that attorney fees are not a compensable element of damage in condemnation proceedings. Concerning this issue of just compensation, the U.S. Supreme Court has stated:

This Court has often faced the problem of defining just compensation. One principle from which it has not deviated is that just compensation “is for the property, and not to the owner.” *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 326 (1893). As a result, indirect costs to the property owner caused by the taking of his land are generally not part of the just compensation to which he is constitutionally entitled. See, e. g., *Dohany v. Rogers*, 281 U.S. 362 (1930); *Mitchell v. United States*, 267 U.S. 341 (1925); *Joslin Mfg. Co. v. Providence*, 262 U.S. 668 (1923). See generally 4A J. Sackman, Nichols’ Law of Eminent Domain, ch. 14 (rev. 3d ed. 1977). Thus, “[attorneys’] fees and expenses are not embraced within just compensation . . . .” *Dohany v. Rogers*, supra, at 368.

*United States v. Bodcaw Co.*, 440 U.S. 202, 203 (1979).

In adherence to the foregoing principles outlined by the United States Supreme Court, West Virginia law specifically limits the issues to be determined at trial in condemnation matters. The only area of recovery to be determined at trial by a jury of twelve (12) freeholders is the just compensation for the property taken, and the damage, if any, to the residue. As noted by this Court in *Snider*, supra:

[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.

*Snider*, 131 W.Va. at 656, 49 S.E.2d at 857.

It is also important to note, as the Circuit Court recognized in its final hearing preceding trial, that the WVDOH had already been sanctioned for failing to contact Newton prior to commencement of construction. As specifically noted by the Circuit Court:

That the instant proceeding is a condemnation matter and not a trespass matter. While the WVDOH failed to contact the Respondent prior to commencing construction on Corridor H, **the WVDOH has already been penalized for its failure to contact the Respondent in advance of construction pursuant to this Court's prior ruling that the compensation for the underlying minerals is the fair market value of the limestone which was removed and used before April 29, 2011, in its present uncovered state ready for loading, with no consideration of the production, mining or excavation costs**, pursuant to *West Virginia Dept. of Highways v. Roda*, 177 W.Va. 383, 352 S.E.2d 134 (1986).

App., pp. 0130-0133 ¶ 2 (emphasis added). It is the WVDOH's position that an additional award of fees and expenses to Newton would in fact be penalizing the WVDOH a second time. In light of the severity of the Circuit Court's sanctions already issued under *Roda*, and assuming the same are upheld by this Court, a further award of attorney fees would be extremely harsh and inequitable.

For the foregoing reasons, the WVDOH asks that this Court refuse to depart from what has been characterized as the "American Rule", where each litigant pays his or her own fees. *Sally-Mike Properties v. Yokum*, 179 W.Va. 48, 365 S.E.2d 246 (1986), *Nelson, supra*.

## VI. CONCLUSION

The Circuit Court committed reversible error when it concluded that the standards set forth in *Roda, supra*, were applicable to this matter. In her Response Brief, Newton has failed to submit a meaningful argument to demonstrate why a new trial should not be awarded. Based upon the record before the Court, and the arguments presented by the WVDOH, it is clear that multiple assignments of error were committed by the Circuit Court and the WVDOH is entitled to a new trial.

With respect to the Cross Petition filed by Newton, and to the extent that this Court deems that *Roda, supra* is applicable to this matter, and all of the WVDOH's assignments of error concerning this issue are rejected, the Circuit Court's rulings concerning marketability should be affirmed. In addition, Newton's Cross Petition concerning attorney fees should be denied as premature since this issue is currently stayed and the Circuit Court could not, and did not, render a decision concerning the same.

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

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



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**CERTIFICATE OF SERVICE**

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I, Susan R. Snowden, 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 **30<sup>th</sup> day of October, 2014:**

J. David Judy, III, Esq.  
JUDY & JUDY  
P.O. Box 636  
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and Respondents in Veach Matter*

  
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Susan R. Snowden, Esquire