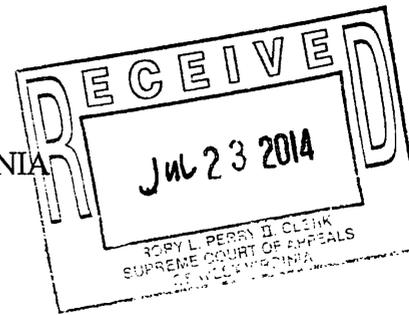


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



WEST VIRGINIA DEPARTMENT OF TRANSPORTATION,
DIVISION OF HIGHWAYS, a public corporation,
Appellant,

v.

NO. 14-0381

WESTERN POCAHONTAS PROPERTIES, LP,
A Delaware limited partnership,
WPP, LLC, a Delaware limited liability company, and
BEACON RESOURCES, INC., a West Virginia
corporation,

Appellees.

**BRIEF OF APPELLEES
WESTERN POCAHONTAS PROPERTIES, LP and
WPP, LLC**

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ASSIGNMENTS OF ERROR

1. The trial court properly refused appellant's requested jury instruction as it misstated the facts presented, the applicable law, and failed to recognize the valuable interest held by WPP and Beacon in the real estate which was subject to the take.

2. The testimony of Tom Gray was properly excluded as it did not satisfy the requirements of Rule 702.

STATEMENT OF THE CASE

Appellant, West Virginia Department of Transportation, Division of Highways, ("DOH") filed its petition for Right of Eminent Domain in the Circuit Court of Tucker County, West Virginia in or about April, 2012. The action was modified to include appellee Beacon Resources, Inc., ("Beacon") as an additional respondent, as the leaseholder of minerals interests, particularly coal. As a part of this modification, Parcel 1-5 was bifurcated from the remaining action, as the only parcel in the original petition in which Beacon had a lease interest.

On or about July 25, 2012, DOH was granted a Right of Entry, and deposited with the Clerk a sum it considered "just compensation" for the interests of Beacon and WPP. Appellees Western Pocahontas Properties, LP and WPP, LLC, (hereafter "WPP" collectively), accepted the "just compensation" represented by DOH as the surface owner of the property and the lessee of the mineral interest as the value of the surface portion being taken and its royalty interest in the leased coal. Beacon contested, asserting its leasehold interest was also valuable, and neither included in the just compensation nor adequate to compensate for its interest. On several occasions thereafter, WPP attempted to be dismissed from the litigation, however DOH continuously objected, on the basis that the just compensation was the entire amount owed for all interests being taken.

Trial occurred in the Circuit Court of Tucker County in late July, 2013. At trial, DOH and WPP stipulated as to the value of the surface of the real estate of \$750,000.00, and agreed

that the amount previously deposited for the surface interest had been received. Following trial, the jury rendered a verdict in favor of respondents in the total amount of \$24,000,000.00. There were no special interrogatories presented to the jury concerning the apportionment of the award between the respondents.¹

Beacon presented several witnesses for the purpose of valuing its leasehold interest. Its presentation began with the testimony Jason Svonavec the owner of Beacon, who testified regarding the value of coal produced from the mine, and the business model the mine used. Then Beacon presented Pat Gallagher for the purpose of quantifying the amount of harvestable coal reserves within the leased area (Tr. p. 203 lines 12-18). Next Aaron Teets testified regarding the remaining overburden on the lease and the economic feasibility of continuing to mine the leased area following the right of entry (Tr. p. 220 lines 4-10). The testimony of Doug Wise followed, for the purpose of valuing the remaining coal within the lease that was not harvestable due to the take. Using the Income Approach authorized by USPAP , Mr. Wise presented a value of the remaining lease (Tr. p. 250 line 21), by valuing the remaining coal and reducing that value for foreseeable loss of material (Tr. p. 247 line 5-20), deducting the cost of production, and profit from the operation (Tr. p.244 line 22 - p. 245 line 23) , an “entrepreneurial adjustment” (Tr. p. 247 line 24- p. 248 line 18), and present day value. Mr. Wise also testified regarding the royalty which would be lost to WPP as a result of the determination that the mining operation was no longer economically feasible (Tr. p. 255 line 6-11).

Alan Stagg testified on behalf of WPP, and indicated that the just compensation paid by DOH at the time the right of entry was granted was only the royalty interest for WPP from the take area, and did not include royalty for the remaining coal under lease (Tr. p. 276 line 5-24. P.

¹ Unknown to DOH, respondents had previously entered into an agreement concerning the distribution of any award received at trial. DOH did not request special interrogatories.

281 line 7-11). Mr. Stagg also offered his opinion as a certified mineral appraiser that the income approach is the appropriate and accepted method in the industry to value an operating mine (Tr. p. 279 lines 13-20; p. 286 lines 5-14), and the sales comparison approach is not appropriate as being too speculative and subject to many other factors (Tr. p. 279 line 24 - p. 280 line 11).

During petitioner's case in chief, DOH presented Tom Gray as an expert witness for the purpose of valuing the leasehold interest of Beacon. When DOH moved to have Gray recognized as an expert in the field of mineral evaluation and appraisal, Beacon's counsel objected, on the basis that: he was not qualified to do so; was not a certified appraiser in this State; and began to argue that the *Daubert* analysis would exclude his testimony (Tr. p. 290 line 14- p. 291 line 4). The Court interrupted Beacon's counsel and instructed her to address her objection on cross-examination. Later in Mr. Gray's testimony, he indicated that for the sales comparison approach he used to value Beacon's leasehold interest, he gathered information primarily from websites and newspaper articles. Once again, Beacon objected. The Court then inquired of the witness whether he had other sources for comparable sales. Upon learning that the only comparable sales used were derived from those sources, the Court excluded Mr. Gray's testimony (Tr. p.308 line 3- p. 309 line 19). DOH did not object, nor inquire further to rehabilitate the witness for the testimony it sought to introduce.

SUMMARY OF ARGUMENT

1. The trial court properly refused appellant's requested jury instruction as it misstated the testimony presented, the applicable law, and failed to recognize the valuable interest held by WPP and Beacon in the real estate which was subject to the take

Beacon Resources, Inc., had leased coal from WPP and had an exclusive right to mine coal from Parcel 1-5. This mining activity was terminated as a result of the take, and continued mining was not feasible after entry by DOH. Both WPP and Beacon had a continuing interest in

the mining operation that does not relate to “profit” but instead is a viable economic interest that was terminated as a result of road construction. The value awarded to Beacon and WPP represents the interest in real estate taken from them as recognized by this Court in *West Virginia Department of Highways v. Berwind Land Co.*, 280 S. E. 2d 609, 167 W. Va. 726 (1981).

2. The testimony of Tom Gray was properly excluded as it did not satisfy the requirements of Rule 702.

Mr. Gray’s use of website information and newspaper articles to support his sales comparison approach was determined by the trial court to be deficient. Rule 702 requires that such testimony, among other things, be of specialized knowledge, and helpful to the trier of fact. A review of the source of the testimony did not convince the Court that the proffered testimony met that standard.

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Rule 19, *W. Va. R. R. A. P.*, WPP believes this case represents an appeal of an issue involving assignments of error in the application of settled law. Further, WPP believes oral argument may assist this Court in its decision making process.

STANDARD OF REVIEW

As to Appellant’s argument regarding the refusal to give a particular jury instruction, the applicable standard of review is an abuse of discretion standard (*Reynolds v. City Hospital* 207 W. Va. 101, 529 S. E. 2d 341 (2000)). Regarding Appellant’s argument concerning the admissibility of comparable sales testimony is likewise an abuse of discretion standard, as such determination is within the sound discretion of the trial court (See *W. Va. Dept. Of Highways v. Brumsfield* 170 W. Va. 677, 295 S. E. 2d 917, (1982)). Finally, regarding Appellant’s request for a new trial, this Court has held that the denial of a Motion for a New Trial is reviewed under and

abuse of discretion standard (See *Burke-Parsons-Bowbly Corp. V. Rice* 230 W. Va. 105, 736 S. E. 2d 338 (2012)).

ARGUMENT

1. The trial court properly refused appellant's requested jury instruction as it misstated the testimony presented, the applicable law, and failed to recognize the valuable interest held by WPP and Beacon in the real estate which was subject to the take.

The argument advanced by DOH in its appeal erroneously attempts to characterize the jury award as "profits" or "business profits" which are not available in condemnation cases in West Virginia. This is clearly not the basis for the jury award. Instead, the award was properly based upon testimony regarding the valuable interest both WPP and Beacon had in the real estate in terms of the coal lease, as well as the loss of that interest as a result of the take and entry by DOH.

Both WPP and Beacon had interests in Parcel 1-5 separate and distinct from one another, and in one respect mutually reliant on each other's interest. WPP owned the surface and minerals, and Beacon leased the coal from WPP, and, at the time of the take, operated a mine. Beacon remitting to WPP royalties based upon the mine's production. The just compensation paid by DOH for its right of entry considered the surface value of the area within the take (Tr. p. 277 lines 16-20), and the royalty from coal within the take (Tr. p. 281 lines 4-11). It did not include the value of the coal that was "sterilized" by the take, nor the lost royalty to WPP as a result of Beacon's lost production of the coal outside the take area.

This Court has long recognized the multiple interests that exist in real estate. In *West Virginia Dept. of Highways v. Berwind Land Co.*, 280 S. E. 2d 609, 167 W. Va. 726 (1981), the Court permitted "the owner of fee property taken by eminent domain to prove the market value of the land by introducing evidence of the separate value of the elements present in or on the land..." *Berwind* at p.621. This opinion was based upon the Court finding that "consideration

should be given to every element of value which ordinarily arises in negotiations between private persons with respect to the voluntary sale and purchase of the land, the use made of the land at the time... it is taken, its suitability for other uses, its adaptability for every useful purpose to which it may be reasonably expected to be immediately devoted, and the most advantageous uses to which it may so be applied” *Berwind* at p. 614. Further, the Court found that “the condemnee is not limited to the use actually being made of the land at the time of the taking but is entitled to consideration of its value for any purpose for which it is then reasonably available in the immediate future” *Berwind* at p. 614, citing *State Road Commission v. Pennel Co.* 147 W. Va. 505, 129 S. E. 2d 133, (1963). Finally, the *Berwind* opinion recognizes that “...the property must be valued as land with consideration of the value of the components of the land limited to their existence, nature, and state of development to the extent that these components enhance the market value of the land as a whole” *supra* at p. 617.

From this ruling it is clear that WPP is entitled to compensation for its interest not only in the surface and minerals within the take area, but also in the royalty it lost from the active coal lease with Beacon. Likewise, Beacon is also entitled to compensation for its interest in the coal it could no longer mine, as it held an exclusive lease with WPP to harvest that coal. That opportunity was denied Beacon and WPP when DOH entered, preventing the harvesting of the mineral interest held by the appellees.

The evidence presented at trial specifically excluded a “profit” factor from the values presented to the jury. As Doug Wise indicated, his valuation was arrived at after adjusting for several factors, including a reduction for losses in the pit and after washing, the cost of production, the cost of development, the present day value, and entrepreneurial adjustment (Tr. p. 239 line 13- p. 249 line 15). Moreover, it is clear from DOH cross-examination of Mr. Wise that “profit” was removed from the value he testified to (Tr. p. 265 line12- p. 266 line 14). Further,

Mr. Wise confirmed that the value he ascribed to the leasehold interest was based upon what another coal company could be expected to pay Beacon for its leasehold interest (Tr. p. 265 line 12-15). Mr. Wise also testified that WPP had a separate interest in the coal reserves, that being the royalty it was entitled to from Beacon through the lease, which was also deducted from the final value ascribed to the leasehold interest held by Beacon (Tr. p. 253 10-24).

Appellant's proffered instruction would not address the testimony presented regarding the values presented at trial. Since Appellees did not introduce evidence of profits, and the Court in other instructions, (see for example Beacon's Instruction No. 10) targeted the jury's deliberations toward the net value of the lease interests, there was no need to exclude reference to profit. Indeed, giving such instruction would confuse the jury about their role in reaching a determination as to just compensation for the interests being taken by Appellant. Because there was no evidence presented regarding profit an instruction excluding profit from the jury's consideration would serve only to unnecessarily complicate the jury's deliberations.

The evidence presented to the jury complied with the opinion rendered in *Berwind*, that being "[W]e see no reason why evidence of the separate value of minerals underlying a fee estate taken by eminent domain should not be admissible to prove the market value of the land taken, *supra* at page 618. For Appellant to characterize this value as profit is inconsistent with this Court's previous opinions in regard to the same topic.

The lower Court's refusal to give the requested instruction was a correct interpretation of the law. The jury was otherwise properly instructed as to their duties in determining just compensation in this matter.

2. The testimony of Tom Gray was properly excluded as it did not satisfy the requirements of Rule 702.

The testimony of Tom Gray was properly excluded since he could not legitimately use

newspaper and internet articles to support the comparable sales approach valuation he advocated. Notwithstanding the prior testimony of Alan Stagg that the income approach was the industry's accepted method of valuation, Mr. Gray sought to use the comparable sales approach to value the interests in question, and support that opinion only with press releases he found while surfing the internet.

The process the Court went through to determine that Mr. Gray's testimony should be excluded started near the beginning of Mr. Gray's testimony when DOH offered him as an expert witness. Counsel for Beacon objected for several reasons, including, but not limited to, his methodology. Later, after Mr. Gray himself identified the nature of his source for the sales comparisons he used, Beacon's counsel again objected to his testimony in that regard. The Court, after inquiring about the methodology used by Mr. Gray, confirmed that this was not reliable and did not permit him to testify to the values he reached.

Appellant argues variously that Beacon's objection was not timely made, not properly stated, or not properly vetted per *Daubert/Wilt* by the Court. These arguments miss the mark. In terms of Mr. Gray being offered as an appraiser, his testimony was neither scientific nor technical. Contrary to Appellant's assertions, the admissibility of Mr. Gray's testimony is more properly determined under Rule 702 than through the context of a *Daubert/Wilt* "gatekeeper" analysis. (See *West Virginia Div. Of Highways v. Butler* 205 W. Va. 146, 516 S. E. 2d 769 (1999), "we hold that Rule 702 of the West Virginia Rules of Evidence is the paramount authority for determining whether an expert is qualified to give an opinion on the value of real estate in an eminent domain proceeding" *Butler* at p. 774). (See also *Watson v. Inco Alloys Intern. Inc.*, 209 W. Va. 234, 545 S. E. 2d 294 (W. Va. 2001).

In *Butler*, the landowner attempted to introduce an individual who had experience in buying commercial real estate to testify as to the value of the property. This court determined that

the trial court improperly excluded the testimony simply on the premise that the proffered witness was not a certified appraiser. Comparing that scenario to the instant case, DOH attempted to introduce an engineer whose appraisal whose methods were suspect and unaccepted in the field. This testimony was excluded not because he was not certified, but because his methodology did not meet the standard in the field (See Beacon's Emergency Motion to Exclude, and Memorandum of Law, Supplemental Appendix Record Vol II, p. 99).

Under the Rule 702 analysis, "expert" testimony sought to be introduced must be of a scientific, technical or specialized nature, *and* assist in an understanding of the evidence and in the determination of the fact in issue. Clearly in the instant case, the testimony of Mr. Gray, based solely upon the newspaper articles he found, would not meet any of these requirements.

It is required that an expert possess more knowledge than the jury regarding the subject about which he is to testify. In this case, the expert intended to rely only upon information that was general in scope and availability. He could not demonstrate that he; 1) had exercised the due diligence required of his specialty, nor 2) possessed knowledge that was superior to the jury. On that basis, the opinion that Mr. Gray reached would not be helpful to the jury in understanding the issue in question.

As this Court held in *Watson*, Rule 702 has three components. First, the witness must be an expert; second, the expert must testify to scientific, technical or specialized knowledge, and; third, the testimony must assist the trier of fact (*Watson* at p. 302, citing *Gentry v. Mangum* 195 W. Va. At 524, 466 S. E. 2d at 183). In the case at hand, the final two components of Rule 702 are not met. Mr. Gray's testimony is not specialized knowledge, given the nature of its source, [See *W. Va. Dept. Of Highways v. Bellomy*, 169 W. Va. 791, 289 S. E. 2d 511 (W. Va. 1982), expert testimony should not be supported by inadmissible facts], and therefore it would not assist the trier of fact to determine the value of the property. This the lower Court determined when it

inquired of Mr. Gray as to the source of his information relied upon to reach his conclusion.

Once that determination was made, a relevancy analysis would determine whether to allow the testimony, or to permit vigorous cross-examination as to its reliability. The lower Court correctly determined that Mr. Gray's testimony, as it was constructed, was not relevant, i.e., allowing it would not make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence, Rule 401 W. Va. Rules of Evidence. Once again, the question is not whether the testimony would be reliable, but whether it would accurately be considered specialized knowledge. Since the testimony is not of a quality to be acknowledged as "specialized" it would not be relevant, and its admission would only serve to confuse the jury about its ultimate objective, that being to determine the fair market value of condemnee's leasehold interests in the minerals.

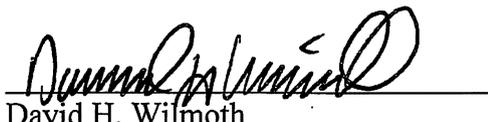
CONCLUSION

The refusal to instruct the jury regarding "profit" was correct, as Beacon did not seek recovery of "profit" but rather the value of its leasehold interest in Parcel 1-5. Further, the decision to exclude Mr. Gray's testimony was correct, as the testimony would not satisfy the requirements of Rule 702. The decision of the lower court should be affirmed and the appeal of this matter dismissed.

Respectfully submitted,

WESTERN POCAHONTAS PROPERTIES, LP
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CERTIFICATE OF SERVICE

I, David H. Wilmoth, counsel for Appellees, Western Pocahontas Properties, LC, do hereby certify that on this date I served a true copy of the foregoing **BRIEF OF APPELLEES**, upon the below, by depositing a true copy of same in the United States mail United States mail, postage prepaid, addressed to said counsel as follows:

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