

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 1998 Term

No. 24897

STATE OF WEST VIRGINIA ex rel.
MERVIN HENSON and KAREN HENSON,
Petitioners below, Appellants,

v.

WEST VIRGINIA DEPARTMENT OF
TRANSPORTATION, DIVISION OF HIGHWAYS,
Respondent below, Appellee.

Appeal from the Circuit Court of Kanawha County
Hon. Paul Zakaib, Jr., Judge
Case No. 96-MISC-400

AFFIRMED

Submitted: June 3, 1998

Filed: July 14, 1998

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The Opinion of the Court was delivered PER CURIAM.

JUSTICE STARCHER dissents and reserves the right to file a dissenting opinion.

SYLLABUS BY THE COURT

1. “A writ of mandamus will not issue unless three elements coexist--(1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy.” Syllabus Point 2, *State ex rel. Kucera v. City of Wheeling*, 153 W.Va. 538, 170 S.E.2d 367 (1969).

2. “Section 9, Article 3 of the Constitution which provides that “Private property shall not be taken or damaged for public use, without just compensation” requires action on the part of the state, its sub-divisions or instrumentalities, to ascertain damages and compensate owners of property for the taking thereof or damage thereto, incident to any public improvement for which such property may be appropriated.” Syllabus Point 1, *Hardy et al. v. Simpson*, 118 W.Va. 440, 190 S.E. 680 (1937).

3. “If a highway construction or improvement results in probable damage to private property without an actual taking thereof and the owners in good faith claim damages, the State Road Commissioner has the statutory duty to institute proceedings within a reasonable time after completion of the work to ascertain damages, if any, and, if he fails to do so, after reasonable time, mandamus will lie to require the institution of such proceedings.” Syllabus Point 1, *State ex rel. Griggs v. Graney*, 143 W.Va. 610, 103 S.E.2d 878 (1958).

Per Curiam:¹

The appellants, Mervin and Karen Henson, appeal a September 11, 1997 order of the Circuit Court of Kanawha County that dismissed the appellants' petition for a writ of mandamus to compel the appellee West Virginia Department of Transportation ("DOT") to institute eminent domain proceedings. The appellants argue that the circuit court erred in granting the appellee's motion to dismiss and erred in failing to issue the writ of mandamus. Following our review of the record in this case and the arguments of the parties, we affirm the circuit court.

I.

In 1993, appellants purchased a home in St. Albans, West Virginia. Approximately 2 years after purchasing their property, appellants' house and personal property were damaged due to flooding. Two months after the first flood, a second heavy rain occurred and appellants again experienced damage to both their house and personal property.

The appellants believed that the flooding was caused by water backing up in and discharging from the ditches, culverts and pipelines along State Route 35 and flowing onto the appellants' property and onto the property of the appellants' neighbors. According to the appellants' brief, the appellants and their neighbors contacted appellee DOT and requested that the DOT take action to remedy the flooding.

¹We point out that a *per curiam* opinion is not legal precedent. See *Lieving v. Hadley*, 188 W.Va. 197, 201 n.4, 423 S.E.2d 600, 604 n.4 (1992).

When no action was taken by the DOT, appellants filed a petition for a writ of mandamus in the Circuit Court of Kanawha County seeking to compel the appellee to institute eminent domain proceedings. Appellants argued that the damage done to their real and personal property constituted a taking by the appellee, and that appellants should be compensated for this taking of their property. The appellee filed a response to the petition and a motion to dismiss.

A hearing to show cause was held on April 8, 1997, at which the appellee argued that the petition should be dismissed because the appellee had done nothing to cause the flooding. The circuit court determined that the issue before the court was a question of law and did not require the presentation of evidence. The parties were instructed to submit briefs on appellee's motion to dismiss, and following the submission of briefs, the circuit court granted the appellee's motion by order dated September 11, 1997.

This appeal followed.

II.

Our standard of review is *de novo* in cases in which a motion to dismiss a petition for a writ of mandamus has been granted. *Ewing v. The Board of Education of the County of Summers*, ___ W.Va. ___, ___, ___ S.E.2d ___, slip. op. at 11 (No. 24902, June 12, 1998).

It is well settled law that "[a] writ of mandamus will not issue unless three elements coexist -- (1) a clear legal right in the petitioner to the relief sought; (2) a legal

duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy.” Syllabus Point 2, *State ex rel. Kucera v. City of Wheeling*, 153 W.Va. 538, 170 S.E.2d 367 (1969). *In accord*, Syllabus Point 1, *State ex rel. Billy Ray C. v. Skaff*, 190 W.Va. 504, 438 S.E.2d 847 (1993); Syllabus Point 1, *Smith v. West Virginia State Board of Education*, 170 W.Va. 593, 295 S.E.2d 680 (1982).

Our common law, our statutes² and our constitution guarantee that no person shall be deprived of his or her property without just compensation. This Court has said:

Section 9, Article 3 of the Constitution which provides that “Private property shall not be taken or damaged for public use, without just compensation” requires action on the part of the state, its sub-divisions or instrumentalities, to ascertain damages and compensate owners of property for the taking thereof or damage thereto, incident to any public improvement for which such property may be appropriated.

Syllabus Point 1, *Hardy et al. v. Simpson*, 118 W.Va. 440, 190 S.E. 680 (1937).

If a real property owner can prove that the state, acting through the DOT, has taken his or her property, then the property owner is entitled to just compensation for the property taken. Should the state fail to initiate eminent domain procedures to provide compensation for taken property, then the property owner may seek a writ of mandamus to compel the state to institute eminent domain proceedings. We have held:

²W.Va. Code, 54-1-1 to 54-2-20.

If a highway construction or improvement results in probable damage to private property without an actual taking thereof and the owners in good faith claim damages, the State Road Commissioner has the statutory duty to institute proceedings within a reasonable time after completion of the work to ascertain damages, if any, and, if he fails to do so, after reasonable time, mandamus will lie to require the institution of such proceedings.

Syllabus Point 1, *State ex rel. Griggs v. Graney*, 143 W.Va. 610, 103 S.E.2d 878 (1958).

Therefore, the appropriate remedy for a property owner whose property has been taken or damaged by the DOT when the department takes no action to compensate an injured property owner is to seek a writ of mandamus to compel the DOT to institute eminent domain proceedings. The appellants took such action in this case.

However, while the appellants may seek a writ of mandamus, they still must meet the three-pronged test set forth in *Kucera, supra*. In its findings of facts the circuit court found that the flooding did cause both permanent and temporary damage to appellants' property. The court further determined that the "Division of Highways" [DOT] had not made any substantial changes in the section of Route 35 which was adjacent to appellants' property. The appellants' complaint alleged that the damages first occurred approximately 2 years after they purchased their property. *Griggs, supra*, requires that any claim for damages must be made "within a reasonable time after completion of . . . work" done by the DOT.

The circuit court concluded as a matter of law that the appellants failed to prove any of the elements necessary to require the DOT to institute eminent domain

proceedings. Without addressing whether the appellants failed to meet all requirements to mandate the institution of proceedings by the DOT, we do agree with the trial court to the extent that “[t]here is no legal duty on the part of the Division of Highways [DOT] to condemn real property merely because that property is damaged by flooding which may occasionally occur.”

Appellants have failed to show that they have a “clear legal right” to the relief sought. *Kucera, supra*. To be entitled to the relief requested, property owners are required that show that the appellee has taken or damaged their property within a reasonable time after construction or improvements are made by the DOT. The record before this Court contains no showing that the appellee took any action which would have resulted in the damages to the appellants’ property.

Therefore, we find that the appellants failed to meet the requirements necessary for a writ of mandamus to be issued. We affirm the circuit court.

Affirmed.