IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 19-1065

Orange Scherich, Margaret Scherich, Thomas Scherich, and Bertha Scherich,
Defendants Below, Petitioners,

V.)

Wheeling Creek Watershed Protection and Flood Prevention Commission, a public corporation,
Plaintiff Below, Respondent.

Appeal from a final order of the Circuit Court of Marshall County (90-C-229M)

Petitioners' Brief

Counsel for Petitioners

Webster J. Arceneaux, III (W. Va. Bar No. 155)
James C. Stebbins (W. Va. Bar No. 6674)
Ramonda C. Marling (W. Va. Bar No. 6927)
Lewis Glasser PLLC
300 Summers Street, Suite 700
Charleston, West Virginia 25301
Phone: 304.345.2000
Fax: 304.343.7999
wjarcenaux@lewisglasser.com
jstebbins@lewisglasser.com
rmarling@lewisglasser.com

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II. STATEMENT OF THE CASE

This case involves a condemnation matter that was filed in 1990 by the Wheeling Creek Watershed Protection and Flood Prevention Commission ("Wheeling Creek" or "Respondent") against Petitioners who were the owners of valuable real property taken by Wheeling Creek for flood control purposes. Wheeling Creek took the initial steps required under W.Va. Code § 54-2-14a to obtain immediate title to and possession of the property, but then failed to prosecute the action in any way for approximately twenty seven (27) years, and the case remained on the docket of the Circuit Court. Petitioners then filed a Motion for Further Proceedings in an attempt to move the case forward, and the Circuit Court decided instead to dismiss the action even though neither party had made a motion to dismiss. The Circuit Court's October 22, 2019 Order dismissed the

action *sua sponte*. The Order was entered after the Circuit Court made a bench ruling dismissing the action at a "Status Hearing" without any prior notice being given that the court intended to dismiss the action, and the dismissal was based upon legal theories never raised by any of the parties.

The past procedural history of this matter is not complicated because not very much happened after filing. On June 1, 1990, Wheeling Creek filed this condemnation action under W.Va. Code § 54-2-14a seeking to aquire two parcels owned by Petitioners including "all of the oil and gas appurtenant thereto." J.A. 000006. At the time that the Petition was filed, the title to the property being condemned was vested 50% in Thomas E. Scherich and Bertha Scherich, husband and wife (with survivorship) and 50% in Thomas' parents, Orange E. Scherich and Margaret Scherich, husband and wife (with survivorship). J.A. 000045. Unfortunately, Orange Scherich, Margaret Scherich, and Thomas Scherich all passed away during the pendency of this action, but the style of the case was never changed. Petitioner Bertha Scherich is still living and continues to be a true party in interest. J.A. 000046. The other true party in interest is Eugene Sherich, the son of Thomas and Bertha Scherich, who obtained some rights to the property as an heir and additional rights via a tax sale.[1]

The property condemned consists of two parcels: Parcel 16 - containing 220 ½ acres; and Parcel 45 - containing 15 acres. J.A. 000017-18. The action was filed under the "quick take" provisions of W.Va. Code § 54-2-14a which allows a condemning authority to "estimate" the value of the property, pay the amount of the estimate into the court, and to take immediate possession

[1] While Eugene Scherich was never added to the style of the case, he is represented by the undersigned and is actively assisting in this appeal. The proper procedure when a party dies is for any party to suggest their death under Rule 25 of the West Virginia Rules of Civil Procedure and then a motion for substitution must be filed within 90 days and the Court can then substitute in the correct parties. Petitioners intend to invoke this procedure if this case is reversed and remanded.

and title to the condemned property. *Id.* Under the statutory scheme, the property owner is entitled to petition the court to release the deposit to him, but by accepting the deposit, the landowner is not in any way limited in "the amount to be allowed" for just compensation which is to be actually determined by additional proceedings as described below. *Id.*

As indicated above, under the "quick take" provisions, the condemning authority takes immediate title to the property. However, that title is merely "defeasible" until "the compensation and any damages are determined in the condemnation proceedings and the applicant has paid any excess into court." *Id.* Moreover, a condemning authority that chooses to utilize the "quick take" option:

> shall not be entitled, without the consent of the defendant, to abandon the proceeding for the condemnation thereof, but such proceeding shall proceed to final award or judgment, and the amount of compensation and any damages as finally determined in such proceeding shall be paid in the manner provided by this section.

Id.

If the property owner does not consent to the amount of the estimate as just compensation, the procedure allows for a condemnation commissioners' hearing, and if either party is dissatisfied with the results thereof, a jury trial by 12 freeholders decides the amount of just compensation. *Id.* If it turns out that the condemning authority underestimated the value of the just compensation, it must then pay the difference between the estimate and the award, plus statutory interest. *Id.*

In this case, only a small part of the above procedure designed to ensure just compensation actually occurred. Wheeling Creek filed its petition on June 1, 1990 (J.A. 000003-10) and indicated that its estimate of the value of the property condemned was $97,000. (J.A. 000006). It is not clear why Wheeling Creek only used the figure of $97,000 as its "good faith" estimate of just compensation because it had previously offered Petitioners $97,000 for just one of the two

parcels and an additional $5,100 for the second, smaller parcel. J.A. 000092-96. Wheeling Creek paid its estimated deposit of $97,000 into the court on June 15, 1990. J.A. 000016. The same day, the court entered an order granting Wheeling Creek immediate title and access to the property. J.A. 000027-29.

On June 19, 1990, Petitioners filed their Answer to Petition taking the position that $97,000 was an "inadequate sum to pay for the land and oil and gas appurtenant thereto." J.A. 000022. Petitioners also asserted in their Answer that they believed that Wheeling Creek was taking "excessive land beyond the needs for construction access" and further that "it is not necessary [for Wheeling Creek] to aquire the oil and gas interest in the subject property." J.A. 000021-22. The Answer included a request to release the amount of the estimated deposit of $97,000 to petitioners. J.A. 000023. By Order entered on May 30, 1991, the $97,000 deposit was released to Petitioners.

Wheeling Creek did nothing thereafter to prosecute the case for 27 years. The case was never dismissed during that time frame and remained on the docket of the Circuit Court. Neither the issue of the excessive take or just compensation were ever resolved by the Circuit Court.

On October 3, 2018, Petitioners filed a Motion for Further Proceedings to Determine Just Compensation since they had never had the benefit of either a commissioners' hearing or a jury trial to determine whether there had been an excessive take or just compensation and because they had only recovered the amount of the deposit which they believed to be insufficient. J.A. 000044-49.

On June 14, 2019, the Circuit Court entered an Order indicating that it was refusing to "address" the Motion for Further Proceedings but indicating that it would nonetheless hold a

"Status Hearing" on July 3, 2019 "as a result of but not to address the Motion for Further Proceedings." J.A. 000050-51.

The Circuit Court in fact held a hearing on July 3, 2019, and all parties appeared for the hearing. *See* Hearing Transcript at J.A. 000068-000091. The court noted at the outset that it was simply a "Status Hearing" as previously noticed by the court. J.A. 000070. The court then immediately made the incorrect assertion that the matter had previously "concluded" in 1991, and the court suggested to Petitioners' counsel that he was trying to "reopen this file." J.A. 000072. Petitioners' counsel respectfully corrected the court and indicated that the matter had never "concluded" because additional proceedings beyond the intial entry order had not taken place and because the case had never proceeded to a jury trial of "twelve freeholders." *Id.* The Court then proceeded *sua sponte* to dismiss the action even though it had provided no prior notice to the parties that it was even considering a dismissal. Thus, the Circuit Court reasoned:

> I think there's accord and satisfaction. I think there's estoppel. I think there's latches [sic]....Well, at no point, for the last thirty years, has Mr. Berry or Mr. Hook's firms, or the plaintiffs [sic] themselves, said anything to the contrary after being paid the ninety-seven thousand dollars, plus interest, that they didn't further challenge that as being the fair value of the property that was ultimately ordered taken....I think latches [sic] applies. Estoppel applies. If there was Statute of Repose, it's applicable. Even the Statute of Limitations. I understand the Statute of Limitations wouldn't be tolled or would be tolled, but a Statute of Repose is so we have ultimately finality, and while I don't think there is a general Statute of Repose, thirty years would certainly be a reasonable cut-off, if not twenty years, for a --- such thing to be final....Motion denied. Objections and exceptions duly noted, preserved, and overruled as wrong. I look forward to the appeal so that we can have something from Charleston that tells us what to do.

J.A. 000075, 000083-84. Thereafter, the Circuit Court entered its Final Order on October 22, 2019 dismissing the action consistent with the above ruling and finding that the "matter was concluded as of the last activity on record: May 30, 1991." J.A. 000052-54.

III. SUMMARY OF ARGUMENT

The Circuit Court erred in its October 22, 2019 Order by *sua sponte* dismissing the action at a "Status Hearing" without prior notice that it was even considering dismissal. Involuntary dismissal under Rule 41(b) was not appropriate because there had been a "proceeding" by virtue of the filing of the Motion for Further Proceedings within the prior year and because the dismissal occurred without the Circuit Court providing any prior notice to the parties of its intent to dismiss. By law, the Circuit Court was required to give written notice under Rule 41(b) to Petitioners of its intent to dismiss and allow 15 days for the filing of a motion alleging "good cause" why the case should not be dismissed. Had the Circuit Court followed the law, Petitioners would have filed a motion asking the Circuit Court not to dismiss the action for "good cause" for the reasons stated herein.

Good cause existed not to dismiss the action because Wheeling Creek had an affirmative duty to prosecute the action. Under W.Va. Code § 54-2-14a, Wheeling Creek was not entitled to abandon the proceedings without the consent of Petitioners. The Circuit Court's October 22, 2019 Order unfairly punished Petitioners and rewarded Wheeling Creek for its failure to prosecute this matter and deprived Petitioners of due process and just compensation.

The Circuit Court erred by applying the doctrines of waiver, estoppel, and laches because Wheeling Creek never asserted those theories, the Circuit Court gave no prior notice it intended to rely upon a theory or theories not raised by any party to dismiss the case, and because the law does not support application of those doctrines to the facts of this case. Moreover, Wheeling Creek could not have raised those legal theories because under W.Va. Code § 54-2-14a required it to proceed to final judgment absent Petitioners' consent to abandon the proceeding.

The Circuit Court erred by suggesting this matter should be dismissed pursuant to statutes of limitation and/or repose. The Circuit Court failed to identify or analyze any statute of limitation or repose and even if it had, any such statute of limitation or repose would have been tolled by the filing and pendency of the underlying action under W.Va. Code § 55-2-1.

The Circuit Court erred by applying the doctrine of "accord and satisfaction" insofar as there was never an accord and satisfaction and insofar as Petitioners' acceptance of the deposit, which is permitted by law, does not limit them from challenging the amount of just compensation, and no evidence of the deposit is admissible during the proceedings under W.Va. Code § 54-2-14a.

The Circuit Court should not have dismissed the action because Wheeling Creek only has "defeasible" title which is insufficient for property held in trust for the public. Under W.Va. Code § 54-2-14a, the only way for Wheeling Creek to obtain indefeasible title is to determine just compensation either by agreement of the parties or by following all necessary procedures to obtain a final judgment order including a jury trial with 12 freeholders.

The Circuit Court's October 22, 2019 Order denied Petitioners their Constitutional rights to be free from excessive and unnecessary takings and to receive just compensation for proper takings, as ultimately determined by 12 freeholders.

In the alternative, if this Honorable Court determines that dismissal was appropriate, because Wheeling Creek had the duty to prosecute the action it filed, upon involuntary dismissal, the court should have returned title and possession of the property to Petitioners to restore the status quo prior to suit being filed.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

If the appeal is decided based exclusively upon Rule 41(b) of the West Virginia Rules of Civil Procedure and the fact that there had been a "proceeding" within the year prior and/or the fact that the Circuit Court failed to give the parties prior notice of its intent to dismiss, Petitioners submit that oral argument is not necessary as the law regarding notice and Rule 41(b) is well-established, and the underlying facts and procedural history are undisputed.

However, to the extent that this Honorable Court wishes to consider any additional substantive issues raised by Petitioners herein, Petitioners respectfully request an oral argument under Rule 20 of the Rules of Appellate Procedure because the additional issues raised are believed to be largely issues of first impression and of fundamental public importance.

V. ARGUMENT

A. Standard of Review.

The standard of review for this Court under Rule 41(b) of the West Virginia Rules of Civil Procedure is to determine whether the ruling of the Circuit Court constituted an abuse of discretion. *Tolliver v. Maxey*, 218 W.Va. 419, 624 S.E.2d 856.

This appeal also involves questions of law and statutory interpretation both of which involve application of a "de novo standard of review." Syl. pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995).

B. The Circuit Court erred by in effect dismissing the action *sua sponte* under Rule 41(b) at a "Status Hearing" because there was a "proceeding" within the prior year and because the Circuit Court failed to give the parties prior notice of its intent to dismiss and a fair opportunity to be heard.

As indicated above, this matter was the subject of a "Status Hearing" that occurred on July 3, 2019. The Circuit Court gave no prior notice that it was considering a dismissal of the action, and the hearing came about as a result of the Court's June 14, 2019 Order which simply indicated

that there would be a "Status Hearing" that was scheduled "as a result of but ***not to address*** the Motion for Further Proceedings to Determine Just Compensation." J.A. 000050 (emphasis in original). At the hearing, despite emphasizing in its prior Order that it would not "address" Petitioners' motion, the Court denied it. The Circuit Court also *sua sponte* dismissed the action based upon numerous legal theories as described herein.

Rule 41(b) of the West Virginia Rules of Civil Procedure governs the involuntary dismissal of actions *sua sponte* by a circuit court. That Rule provides in part that:

> [a]ny court in which is pending an action wherein for more than one year there has been no order or proceeding, or wherein the plaintiff is delinquent in the payment of accrued court costs, may, in its discretion, order such action to be struck from its docket; and it shall thereby be discontinued.

Id. There is no allegation that the Plaintiff below (Wheeling Creek) was somehow delinquent in paying court costs. Accordingly, for the Court to dismiss the action under Rule 41(b), there must have been no "order or proceeding" for more than one year. *Id.*

That is simply not the case. The Circuit Court dismissed this case *sua sponte* at a Status Hearing on July 3, 2019. However, on October 5, 2018, which was less than one year prior, Petitioners filed a Motion for Further Proceedings to Determine Just Compensation and sought a hearing date from the Court. J.A. 000045-49. The word "proceeding" has been "broadly construed" by this Honorable Court to mean "any step or measure taken either the prosecution or the defense of the action, except a continuance." *State ex rel. Moore v. Canterbury*, 181 W.Va. 389, 382 S.E.2d 583 (1989). Clearly, the filing of a Motion for Further Proceedings and efforts made to get the motion promptly heard meets this broad definition. Accordingly, the Circuit Court did not have discretion to dismiss the action under Rule 41(b) because it had not been "more than one year" since any "proceeding" had occurred in the matter.

Moreover, Rule 41(b) further provides that "[b]efore a court may dismiss an action under Rule 41(b), notice and an opportunity to be heard must be given to all parties of record." *Id.* In Syl. Pt. 3 of *Dimon v. Mansy*, 198 W.Va. 40, 479 S.E.2d 339 (1996), this Honorable Court gave the following clear guidance to Circuit Courts considering dismissal under Rule 41(b):

> [i]n carrying out the notice and opportunity to be heard requirements, before a case may be dismissed under Rule 41(b), the following guidelines should be followed: First, when a circuit court is contemplating dismissing an action under Rule 41(b), the court must first send a notice of its intent to do so to all counsel of record and to any parties who have appeared and do not have counsel of record. The notice shall inform that unless the plaintiff shall file and duly serve a motion within fifteen days of the date of the notice, alleging good cause why the action should not be dismissed....

Id.

In *Covington v. Smith*, 213 W.Va. 309, 582 S.E.2d 756 (2003), this Court further discussed involuntary dismissals under Rule 41(b). After noting that circuit courts are generally vested with wide latitude to control their dockets and to dispose of inactive cases, this Court also noted that:

> [d]espite this latitude accorded to circuit court judges, the parties affected by this method of case management are also afforded certain procedural protections to ensure that inactive cases are not perfunctorily dismissed when there exists good cause for such dilatoriness. Before a court may dismiss an action under Rule 41(b), notice and an opportunity to be heard must be given to all parties of record.

Id.

In the instant case, the Circuit Court simply failed to provide any prior notice of its intent to dismiss the action and a reasonable opportunity to be heard in violation of Rule 41(b). As the above law makes clear, the Circuit Court was required to give the parties specific notice of its intent to dismiss and to allow the parties at least 15 days to file a motion to establish "good cause"

why the case should remain on the docket.[2] Had the Circuit Court provided this prior notice as required by law, Petitioners would have been able to establish good cause based upon the remainder of the arguments set forth in this memorandum.

Based upon the above, the Circuit Court did not follow the notice requirements of Rule 41(b) of the West Virginia Rules of Civil Procedure, and this Court should reverse the Circuit Court's October 22, 2019 Order and remand this case for further proceedings as discussed herein.

C. The Circuit Court erred by dismissing the action without Petitioners' consent based upon Respondent's failure to prosecute which is in direct violation of W.Va. Code § 54-2-14a.

As indicated above, under the "quick take" provisions of W.Va. Code § 54-2-14a, the benefit to the condemning party is that it may take immediate title and possession of the property so long as it in good faith estimates the value of the property taken and pays a deposit into court equal to the amount of the estimate. *Id.*[3] However, the former property owner is not required to accept the condemning party's estimate of just compensation and unless they agree, just compensation must be determined at a commissioners' hearing and, if necessary, at a jury trial by twelve freeholders. *Id.*

W.Va. Code § 54-2-14a also specifically provides that once the "quick take" procedure is invoked by a condemning authority:

> [i]f the applicant shall enter upon or take possession of the property, under the authority of this section, and shall injure the property, ***the applicant shall not be entitled, without the consent of the defendant, to abandon the proceeding for the condemnation***

[2] The case law from this Court interpreting Rule 41(b) generally contemplates a "plaintiff" filing such a motion. *See, e.g., Dimon, supra.* However, there is no reason that the rules stated should not also apply with equal force to a "defendant" if they have some interest in further proceedings and can establish "good cause."

[3] The "quick take" procedure under W.Va. Code § 54-2-12a is an "alternative" method for condemnation first adopted in 1963. The more traditional method is found in W.Va. Code § 54-2-1 et seq. and under that more traditional procedure, the condemning authority does not take title to the property until after just compensation is determined. Under a "quick take," the condemning authority takes title immediately.

> ***thereof,*** but such proceeding shall proceed to final award or judgment, and the amount of compensation and damages as finally determined in such proceeding shall be paid in the manner provided by this section.

Id. (emphasis added).

In this case, the dismissal by the Circuit Court in effect allowed Wheeling Creek to "abandon the proceeding" without the consent of Petitioners. While this Court has never had the opportunity to equate an involuntary dismissal with abandonment, this ruling would be consistent with the law in other jurisdictions. *See, e.g.,* Nichols on Eminent Domain §26D.01 fn 1 (noting that under Oregon Rev. Stat. § 35.335 "[a]n action is considered abandoned if, at any time after filing a complaint, the case is dismissed or terminated"). Because Petitioners never gave their consent for Wheeling Creek to abandon the proceedings, the statute is mandatory that the case "***shall*** proceed to final award or judgment" including an appropriate determination as to "the amount of compensation and damages."

Based upon the above, the Circuit Court erred as a matter of law in concluding that this case was ripe for dismissal. This Court should review the Circuit Court's October 22, 2019 Order and conclude the matter should be remanded to the Circuit Court for further proceedings.

D. The Circuit Court erred by dismissing the action because Respondent, as the Plaintiff below, had the obligation to prosecute the condemnation matter, not the Petitioners, and it is not appropriate to punish the Petitioners for Respondent's failure to prosecute.

Wheeling Creek was the plaintiff below in this condemnation matter, and as such, it had the burden to prosecute the case and "to take necessary steps under our condemnation statutes to ascertain damages to the owners of private property." *State ex rel. Phoenix Ins. Co. v. Ritchie*, 154 W.Va. 360, 175 S.E.2d 428 (1970). Conversely, Petitioners, as defendants below, had no duty to prosecute the case at all. *See, e.g.,* syl. *Chenowith v. Keenan*, 61 W.Va. 108, 55 S.E. 991 (1906)

(holding that "the defendant is under no duty to prosecute the case"); and syl. *Pickenpaugh v. Keenan*, 63 W.Va. 304, 60 S.E. 137 (1908) (also holding that "the defendant is under no duty to prosecute the case").

While this Court has never had the opportunity to specifically analyze in depth the duty to prosecute under the "quick take" provisions of W.Va. Code § 54-2-14a, this Court should take guidance from the Court of Appeal of Florida in a very similar case, *Manhattan Properties, Ltd. v. Div. of Admin., State, Dep't of Transp.*, 541 So.2d 655, 1989 Fla. App. LEXIS 1236 (Fla. 1989). In that case, the Florida Transportation Department utilized Florida's "quick take" procedures to condemn property owned by the appellant after paying a good faith estimated deposit into court. The landowner was allowed to withdraw the deposit and then the case sat idle for approximately three years when it was dismissed by the lower court based upon a failure to prosecute. The Court of Appeal of Florida reversed the dismissal after reasoning that "the condemning authority cannot sidestep its burden to prove to a jury whether its good faith deposit constitutes the constitutionally mandated full compensation for the taking by sitting back and doing nothing so that the court can dismiss for lack of prosecution at a later time." *Id.* at 656.

The *Manhattan Properties* Court based its reasoning in part upon another Florida Court of Appeal decision in *Div. of Admin., State of Florida, Dep't of Transportation v. Grossman*, 536 So. 2d 1181, 1989 Fla. Appl. LEXIS 66 (Fla. 1989). In that case, the court determined that eminent domain is "one of the most harsh proceedings known to the law" and that "a condemnor cannot sit idly by and avoid record activity hoping that the court will dismiss the cause for lack of prosecution." *Id.* at 1183. The *Grossman* Court further noted that the burden to proceed in eminent domain "is not upon the landowner; that burden rests squarely upon the shoulders of the governmental entity which seeks to invoke the harsh procedures." *Id.*

Other Courts have similarly found that the burden to prosecute is on the condemning authority that files suit. *See, e.g., Dep't of Conservation ex rel. People v. Cox*, 95 Ill. App. 3d 1126, 420 N.E.2d 1061 (1981) (holding that "when a condemning authority institutes a condemnation proceeding it should prosecute the suit with diligence, and it is liable to the landowner for damages occasioned by a wrongful delay"); *Amason v. Natural Gas Pipeline Co.*, 682 S.W. 2d 240 (Tex. 1984) (holding that "the condemnor as plaintiff has the burden of proving all the essentials necessary to show a right to condemnation, and has the burden of going forward to trial"); and *Alta Bates Hosp. v. Mertle*, 31 Cal App. 3d 349 (1973) (holding that "having filed a condemnation action, a condemnor is under the duty, insofar as it may voluntarily do so, of prosecuting the suit to its conclusion").

In this case, Wheeling Creek did nothing to prosecute the case and determine just compensation after filing suit and paying its estimated deposit into Court. The October 22, 2019 Order of the Circuit Court dismissing the action should be reversed insofar as it rewards Wheeling Creek for failing to prosecute the action. Respondent must not be permitted to sidestep its burden to prove to a jury that its good faith deposit constitutes full compensation, nor should it be permitted to sit back and do nothing while waiting for the Circuit Court to dismiss for lack of prosecution. This Court should remand this action for further proceedings under W.Va. Code § 54-2-14a.

E. The Circuit Court erred by *sua sponte* dismissing the action based upon the doctrine of "waiver."

One of the grounds asserted by the Circuit Court in its October 22, 2019 Order dismissing the case was that "any claims of deficiency in the due process afforded the Defendant landowners were waived by Defendants." J.A. 000053. First of all, no party requested a dismissal, and this ground for dismissal was obviously a new legal theory raised for the first time by the Court *sua*

sponte at a "Status Hearing," which is not appropriate. The Circuit Court's ruling in this regard was similar to what occurred in *Loudin v. National Liability & Fire Ins. Co.*, 228 W.Va. 34, 716 S.E.2d 696 (2011) in which the Circuit Court of Upshur County granted summary judgment to the insurer defendant on a ground raised for the first time *sua sponte* by the court at the summary judgment hearing. This Court reversed and remanded after reasoning in syllabus point 4 as follows:

> [a]s a general rule, a trial court may not grant summary judgment *sua sponte* on grounds not requested by the moving party. An exception to this general rule exists when a trial court provides the adverse party reasonable notice and an opportunity to address the grounds for which the court is *sua sponte* considering granting summary judgment.

Id. This Court cited with approval a similar federal case, *Lozano v. Ocwen Fed. Bank*, 489 F. 3d 636 (5th Cir. 2007), in which it was discussed that a party is entitled to "ten days notice" before the court can grant summary judgment based upon a ground "not urged in the pending motion." *Id.*

If the above sound reasoning is applied here, it was clearly inappropriate for the Circuit Court to dismiss the action with no pending motion based upon a ground not raised by any party especially when the Circuit Court failed to provide the Petitioners with adequate notice and a fair opportunity to be heard.

Moreover, it is clear that waiver does not apply even if that legal theory had been properly raised by either the Circuit Court or Respondent below. In *Bruce McDonald Holding Co. v. Addington, Inc.*, 241 W.Va. 451, 825 S.E.2d 779 (2019), this Court noted at Syl. Pt. 3 that: "[t]he common-law doctrine of waiver focuses on the conduct of the party against whom waiver is sought, and requires that party to have intentionally relinquished a known right. A waiver may be express or may be inferred from actions or conduct, but all of the attendant facts, taken together, must amount to an intentional relinquishment of a known right." *Id.* As this Court aptly noted in

Norfolk and Western Railway v. Sharp, 183 W.Va. 283, 395 S.E. 2d 527 (1990), with respect to condemnation proceedings and the right to a jury trial, "as with all basic constitutional rights, any waiver must be based on an informed and knowing decision." *Id.* (citing W.Va. Const. Art. III, § 10).

Under Article III, § 9 of the Constitution of West Virginia, not only are Petitioners entitled to "just compensation," they have a specific constitutional right to have "such compensation...ascertained by an impartial jury of twelve freeholders." *Id.* In the instant case, there is no evidence that Petitioners ever made an "informed and knowing" decision to waive their constitutional right to a jury trial.

In fact, due to the lack of prosecution by Wheeling Creek, this case never got to the point where a jury trial could be either demanded or waived. Under W.Va. Code § 54-2-10, a jury trial demand is only required to be made within 10 days after a Report of Commissioners is "returned and filed" under W.Va. Code § 54-2-9. In this case, there never was a commissioners' hearing, and hence, no Report of Commissioners was ever "returned and filed." While this Court has found that a landowner can waive a jury trial by failing to comply with the 10 day demand rule contained in W.Va. Code § 54-2-10 (*see, e.g., State Rd. Comm'n v. Boggess*, 147 W.Va. 98, 126 S.E.2d 26 (1962)), this Court has never found that a party can waive a jury trial before a Report of Commissioners is even issued since that is the very thing which triggers the start of the 10 day jury demand period.

Based upon the above, the Petitioners did not fail to act as a matter of law, and it can obviously not be said that Petitioners voluntarily relinquished any known right. This Court should conclude that it was clearly in error for the Circuit Court's October 22, 2019 Order to dismiss this case based upon the doctrine of waiver.

F. The Circuit Court erred by dismissing the action *sua sponte* based upon the doctrine of "estoppel."

The Circuit Court also asserted "estoppel" as one of the grounds for dismissal of the action. J.A. 000053. Like waiver, estoppel was never asserted by Wheeling Creek, and Wheeling Creek never even asked for the case to be dismissed. Once again, it was is improper for the Circuit Court to raise a new legal theory *sua sponte* especially when it did not give the parties prior notice and a fair opportunity to be heard. *See* discussion regarding *Loudin, supra, Part E.*

Moreover, it is clear that estoppel would not apply even if it had been properly asserted by Wheeling Creek. As this Court has previously noted: "[e]stoppel applies when a party is induced to act or to refrain from acting to her detriment because of her reasonable reliance on another party's misrepresentation or concealment of a material fact." Syl. Pt. 2, *Ara v. Erie Ins. Co.*, 182 W. Va. 266, 387 S.E.2d 320 (1989). The Circuit Court did not assert that Petitioners made a "misrepresentation" of any kind or that they somehow concealed a "material fact" let alone that Wheeling Creek somehow relied upon it. Simply allowing time to pass is not fairly characterized as a "misrepresentation" or "concealment" of fact. Moreover, Wheeling Creek was the one with the burden to prosecute its case.

Based upon the above, the Petitioners did not misrepresent or conceal any legal facts as a matter of law. This Court should conclude that the Petitioners are not estopped and reverse the Circuit Court's October 22, 2019 Order.

G. The Circuit Court erred by dismissing the action *sua sponte* based upon the doctrine of "laches."

In addition to waiver and estoppel, the Circuit Court's October 22, 2019 Order also asserted "laches" as one of the grounds for dismissal of the action. J.A. 000053. Laches is another legal theory that was never asserted by Wheeling Creek and which was raised by the Circuit Court *sua*

sponte with no prior notice to the parties. Once again, it was improper for the Circuit Court to raise a new legal theory *sua sponte*, especially when it did not give the parties prior notice and a fair opportunity to be heard. *See* discussion regarding *Loudin, supra, Part E.*

Even if it had properly been raised as a theory, laches is clearly inapplicable. As this Court has noted: "[t]he elements of laches consist of (1) unreasonable delay and (2) prejudice." *Province v. Province*, 196 W. Va. 473, 483, 473 S.E.2d 894, 904 (1996).

In this case, there is no evidence that Petitioners did anything to unreasonably delay this matter. As indicated above, as the plaintiff below, Wheeling Creek is the party that had the duty to prosecute this case, and Petitioners as defendants below had no duty to prosecute. *See* discussion regarding *Chenowith, supra, Part D.*

Moreover, there is no evidence that Wheeling Creek was somehow prejudiced by any delay in this matter. As this Court has previously noted, after suit is brought, the defense of laches is "generally defensive, and it is for a defendant to show prejudice of some kind, as loss of evidence or other injuries sustained." *Hough v. Watson*, 91 W.Va. 161, 112 S.E. 303 (1922). In this case, Respondent never asked for a dismissal and never argued or offered evidence of any prejudice to it whatsoever.

The Circuit Court decision appears to be based only upon the mere passage of time. However, as this Court has previously noted: "a mere lapse of time will not result in the bar of laches." *Carlone v. United Mine Workers Welfare & Retirement Fund*, 161 W. Va. 351, 242 S.E.2d 454 (1978) (*citing State ex rel. Board of Education v. Dyer*, 154 W.Va. 840, 179 S.E.2d 577 (1971); *Stuart v. Lake Washington Realty Corp.*, 141 W.Va. 627, 92 S.E.2d 891 (1956); *Acker v. Martin*, 136 W.Va. 503, 68 S.E.2d 721 (1951); and *Pownall v. Cearfoss*, 129 W.Va. 487, 40 S.E.2d 886 (1946)).

Finally, as noted by this Court in *Province, supra,* even if Wheeling Creek had tried to rely upon the equitable doctrine of laches, a party that seeks a remedy in equity must come with "clean hands." *Id.* In this case, Wheeling Creek does not come with "clean hands" because, as described above, it alone had the duty to prosecute the case, and it was not permitted under W.Va. Code § 54-2-14a to abandon the proceedings it started without Petitioners' consent.

Based upon the above, the Circuit Court erred in its October 22, 2019 Order as a matter of law in concluding that laches could apply. This Court should reverse this ruling and remand this case for further proceedings.

H. The Circuit Court erred by *sua sponte* dismissing the action based upon "potential" application of an unspecified statute of limitations or a statute of repose.

In addition to the other theories described above, the Circuit Court's October 22, 2019 Order also dismissed the action based upon a holding that the claims are barred "potentially by any statutes of limitation or repose." J.A. 000053. However, the Circuit Court failed to identify any specific statute of limitation or statute of repose in its Final Order. The Circuit Court also failed to explain what claim(s) of Petitioners, who were defendants below, are supposedly time-barred.

Another fundamental error in this part of the Circuit Court's October 22, 2019 Order is the fact that it ignores W. Va. Code § 55-2-1 which specifically tolls all statutes of limitation "on claims assertible in civil actions when actions commence." *Id.* The statute is specific that the tolling lasts "for so long as the action tolling the statute of limitations is pending." *Id.*

In other words, when this action was first filed by Wheeling Creek, any and all statutes of limitation (or repose) were tolled. Because the case was never dismissed until the October 22, 2019 Order, all statutes of limitation (or repose) remained tolled during the entire pendency of the

suit and could not have formed a proper basis for a dismissal simply because additional time passed while the case was pending.

Based upon the above, the Circuit Court erred in its October 22, 2019 Order as a matter of law in concluding that an unidentified statute of limitations or repose should apply. This Court should reverse this ruling and remand this case for further proceedings.

I. The Circuit Court erred by finding that withdrawal of the estimate was sufficient proof of "accord and satisfaction."

The final basis given by the Circuit Court for the dismissal of this action in its October 22, 2019 Order was a finding that:

> the acceptance of the deposited funds, as evidenced by the last order entered in this matter on May 30, 1991 disbursing such funds to defendants, without further proceedings until now, is sufficient proof of accord and satisfaction such that defendants have no further right or claim in this matter.

J.A. 000053. Thus, the Circuit Court appears to be saying that the withdrawal of the good faith estimated deposit along with the passage of time were enough to establish "accord and satisfaction." This reasoning is clearly flawed.

This Court has previously held that an accord and satisfaction is:

> [a] method of discharging a claim whereby the parties agree to give and accept something in settlement of the claim and perform the agreement, the 'accord' being the agreement and the 'satisfaction' its execution or performance, and it is a new contract substituted for an old contract which is thereby discharged, or for an obligation or cause of action which is settled, and must have all of the elements of a valid contract.

Berry v. Nationwide, 181 W.Va. 168, 381 S.E.2d 367 (1989) (citing *Black's Law Dictionary* 16 (5th ed. 1979). In the instant case, there was no "settlement" of the claim as there was no offer and acceptance to resolve the issue of just compensation. To the contrary, Wheeling Park and Petitioners could not agree on the amount of just compensation and that is why suit was filed.

In addition, the Circuit Court's ruling is directly contrary to W.Va. Code § 54-2-14a which provides in pertinent part that any person entitled thereto:

> may be paid his pro rata share of the money paid into court, or a portion thereof, as ordered by the court or judge, ***but the acceptance of such payment shall not limit the amount to be allowed by the report of the condemnation commissioners, or the verdict of the jury, if there be one.***

Id. (emphasis added). In fact, the statute goes on to provide that:

> no party to the condemnation proceeding shall be permitted to introduce evidence of such payment or of the amount so paid into court, or of any amount which has been accepted by any party, nor shall any reference be made thereto during the course of the trial.

Id.

Based upon the above, it was clearly inappropriate for the Circuit Court to conclude in its October 22, 2019 Order that by exercising their legal right to withdraw the deposit, Petitioners were somehow subject to a claim of "accord and satisfaction" or that they are somehow not permitted to seek funds over and above the estimate of just compensation This Court should reverse this ruling and remand the case for further proceedings.

J. The Circuit Court erred by dismissing the action because the Respondent only holds "defeasible" title, which is insufficient for property held in trust for the public. Under W. Va. Code § 54-2-14a, the only way to obtain indefeasible title is to complete the proceedings by determining just compensation, pay any excess into the court, and obtain a final judgment order.

As indicated above, under the "quick take" procedures of W. Va. Code 54-2-14a, once the condemning authority pays its estimate of just compensation into court, it is entitled to take immediate possession and title to the property. However, the statute provides that "[t]he title in the applicant shall be defeasible until the compensation and any damages are determined in the condemnation proceedings and the applicant has paid any excess amount into court." *Id.* For the condemning authority to obtain indefeasible title, the statute provides as follows:

> [w]hen the report of the condemnation commissioners, or the verdict of a jury, if there be one, has been confirmed and ordered to be recorded, and the excess amount, if any, has been paid into court as provided herein, the title to the property, or interest or right therein, so paid for shall be absolutely and indefeasibly vested in the applicant in fee simple or to the extent described in the petition.

Id.

In the instant case, there was never a report of condemnation commissioners or a verdict of a jury and, therefore, there has never been a final order vesting indefeasible title in Respondent. Instead the title is "defeasible" which means "[s]ubject to be defeated, annulled, revoked, or undone upon the happening of a future event or the performance of a condition subsequent, or by a conditional limitation. An estate which is not absolute." *Black's Law Dictionary*, 6th Ed. (1990) at p. 418.

Petitioners respectfully submit that on public policy grounds, defeasible title is insufficient for property held in trust for the public. The only way to resolve the issue and to have indefeasible title vested in Wheeling Creek is to fully follow all of the procedures set forth in W.Va. Code § 54-2-14a and to proceed to a commissioners' hearing and, if necessary, a jury trial. The Circuit Court erred in its October 22, 2019 Order by dismissing the case before following all of these procedures and ensuring that indefeasible title is held by Respondent. This Court should now reverse and remand with instructions to carry out the remainder of the required proceedings.

K. The Circuit Court erred by dismissing the action which denied Petitioners their West Virginia and United States Constitutional rights to be free from excessive and unnecessary takings and to receive just compensation for proper takings, as ultimately determined by 12 freeholders.

The Fifth Amendment to the United States Constitution states in pertinent part that "[n]o person shall be...deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." *Id.* This Court has further noted

that "[j]ust compensation under the Fifth Amendment is synonymous with due process of law under the Fourteenth Amendment as far as eminent domain proceedings are concerned." *Simms v. Dillon*, 119 W.Va. 284, 193 S.E. 331 (1937) *overruled on other grounds* in *State Rd. Comm'n v. Milam*, 146 W.Va. 368, 120 S.E.2d 254 (1961).

The law used to be that if the relevant state law generally provides an adequate remedy, the landowner must first seek just compensation there and exhaust all state procedures before a claim for violation of the Fifth Amendment's just compensation clause is ripe for determination. *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 105 S. Ct 3108, 87 L. Ed. 2d 126 (1985). However, that law was recently changed in *Knick v. Twp. Of Scott, Pa.*, __ U.S. ___, 139 S. Ct. 2162, 204 L. Ed. 2d 558 (2019) in which the Supreme of the United States overruled *Williamson* after finding that it imposed an "unjustifiable burden on takings" and that it "conflicts with the rest of our takings jurisprudence." *Id.* at 2167. Under the current law, a landowner can immediately assert a claim for violation of their Fifth Amendment rights as soon as a taking without just compensation occurs even if they have not exhausted state remedies.

Petitioners contend that the Circuit Court's October 22, 2019 Order dismissing this case effectively denied them of their fundamental rights under the United States Constitution to due process and just compensation. Under W. Va. Code § 54-1-6 (entitled **Quantity of land acquired)**, Respondent was limited to taking only "such quantity as is necessary for the purpose or purposes for which it is appropriated." *Id.* Petitioners have always contended that Respondent had no use for, and therefore no right to take, the oil and gas rights. It was not up to the "condemnor alone" to decide the quantity of land to be taken but rather "a question for the court upon proper pleadings, or pleadings and proof." *Monongahela Power Co. v. Shackelford*, 137 W.Va. 441, 73 S.E.2d 809 (1952). Petitioners have also always contended that they did not receive just

compensation for the property actually taken by Respondent. Petitioners have never had proper due process regarding those critical issues including a jury trial and the October 22, 2019 Order of the Circuit Court should therefore be overturned.

In addition, the October 22, 2019 Order of the Circuit Court also violates Petitioners' rights under the West Virginia Constitution. Article III § 9 of the West Virginia Constitution provides as follows:

> **§ 9. Private Property, How Taken**
>
> Private Property shall not be taken or damaged for public use, without just compensation;....and when private property shall be taken, or damaged, for public use, or for the use of such corporation, the compensation to the owner shall be ascertained in such manner, as may be prescribed by general law; provided, that when required by either of the parties, such compensation shall be ascertained by an impartial jury of twelve freeholders.

Id. This Section of the West Virginia Constitution not only guarantees just compensation, it also guarantees the condemnee a constitutional right to a jury trial to determine just compensation. *Norfolk & W.R.R. v. Sharp*, 183 W.Va. 283, 395 S.E.2d 527 (1990).

In the instant case, the October 22, 2019 Order of the Circuit Court obviously prevents Petitioners from exercising their constitutional right to a jury trial regarding the claims of excessive take and just compensation. Under W.Va. Code § 54-2-10, a jury trial demand can only be made within ten days after a Report of Commissioners is "returned and filed" under W.Va. Code § 54-2-9. In this case, there was never a commissioners' hearing, and hence, there was never a Report of Commissioners that was "returned and filed" which could have triggered any obligation on the part of Petitioners to make their jury demand.

Petitioners respectfully request that this Court reverse the October 22, 2019 Order and remand this case back to Circuit Court so that a commissioners' hearing can be held, a Report of

Commissioners "returned and filed" and so that Petitioners can then demand and receive a jury trial in this matter.

L. In the alternative, if this Court concurs that this matter should be dismissed due to the passage of time, it should further conclude that Respondent failed to prosecute the condemnation and, therefore, return the parties to the status quo by voiding defeasible title and returning title to the property to Petitioners.

As shown above, Respondent had the legal burden to prosecute this matter. Respondent failed to take any action in this case other than filing the action and paying its estimate into court so that it could obtain immediate access and defeasible title. Respondent never did anything to pursue a commissioners' hearing or jury trial as required by W. Va. Code § 54-2-14a, and even though the lawsuit is over, it still has nothing but "defeasible" title.

To the extent that this Honorable Court allows the dismissal in the October 22, 2019 Order to stand based upon Respondent's failure to prosecute, this Court should find that Respondent in effect abandoned the proceedings and that title reverts to Petitioners. The "quick take" provisions of W.Va. Code § 54-2-14a do not address what should happen in these exact circumstances other than forbidding the condemning authority from abandoning the proceedings. It only makes sense that if a condemning authority fails to follow the procedures required to effectuate a proper taking such that the proceedings are involuntarily dismissed, that title should revert to the prior owner(s).

While West Virginia's statutory scheme does not specifically address this situation, it is noteworthy this is the result that would be reached under the "Model Eminent Domain Code" ("MEDC") which was authored by the Uniform Law Commission.[4] Section 1301 of the MEDC deals with "Involuntary Dismissal" and provides that one of the grounds for involuntary dismissal

[4] The Uniform Law Commission or ULC was established in 1892, and it "provides states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law." ***uniformlaws.org/aboutulc/overview.*** Petitioners, of course, do not contend that the MEDC is binding on this Court but respectfully submit that it is persuasive authority.

is that the "plaintiff has unjustifiably failed to exercise reasonable diligence in prosecuting the action." *Id.* at § 1301(c). The MEDC further provides in § 1304 that:

> [i]f the action is dismissed for any reason, and the defendant has vacated the property under an order of possession or in reasonable contemplation of its taking by the plaintiff, the court, upon demand of the defendant, shall order the plaintiff to (1) ***deliver possession of the property to the defendant or other person entitled thereto, and*** (2) pay damages to the defendant as justice requires, including damages for any injury to or impairment of the value of the property not within the reasonable control of the defendant.

Id. (emphasis added). The MEDC reflects sound reasoning in this regard.

While there is no case directly on point under West Virginia's "quick take" procedure, restoring possession to Petitioners would be consistent with reasoning in this Court's prior decision in *Chesapeake & O. Ry. v. Bradford,* 6 W.Va. 220 (1873). In that case, this Court considered what should happen when a railroad that had initiated condemnation proceedings moved to terminate the proceedings after a Commissioners' Report was issued. This Court found that the Railroad was entitled to terminate the proceedings. However, this Court also noted that:

> [i]f the applicant after the value is ascertained at any time after the confirmation, and recordation of the report, takes or injures the property without first paying the ascertained value, he is a trespasser, just as though he had never caused the value of the property to be ascertained, and is liable to be treated, sued and mulcted [punished] in damages therefor as any other trespasser.... Without the payment of the ascertained value within the time specified, the applicant has no authority or license to take or injure the property more than any other person, and if he does, he is a wrong doer and is liable to be treated as such in every respect.

Id. at 235-36. This case stands for the proposition that a condemning authority that prematurely terminates condemnation proceedings can be deemed a trespasser and must be held liable for the consequences of its actions.

In this case, Respondent filed a proceeding and paid an insufficient amount into court as a deposit and then failed for decades to follow through and ensure proper ascertainment of just

compensation for the property taken. As a consequence, the proceedings were involuntarily dismissed and/or effectively deemed "abandoned" by Respondent, and Respondent never obtained indefeasible title. It would be only fair to return the parties to the positions they were in before the suit was filed and to return possession to Petitioners as one of the consequences of Respondent's failure to prosecute.

VI. CONCLUSION

The Circuit Court erred in its October 22, 2019 Order by dismissing this action, and Petitioners respectfully request that this Honorable Court issue a decision remanding the case with instructions to the Circuit Court to reinstate the case and proceed with a commissioners' hearing and, as is necessary, a jury trial by 12 impartial freeholders on the issues of excessive taking and just compensation. In the alternative, Petitioners respectfully request that this Court issue an Order remanding this case with instructions to the Circuit Court to hold a proper hearing with proper notice under Rule 41(b) of its intent to dismiss the action and instructing the Circuit Court to give the parties a reasonable time to be heard and to file briefs and argument on these matters so that they may be properly heard. In the alternative, Petitioners respectfully request that if dismissal is upheld, that this Court issue an Order requiring the Circuit Court to return possession of the property to Petitioners and returning the parties to their status prior to the filing of the proceeding.

Orange Scherich, Margaret Scherich,
Thomas Scherich, and Bertha Scherich,

By counsel,

LEWIS GLASSER PLLC

By: _____

Webster J. Arceneaux, III (W. Va. Bar No. 155)
James C. Stebbins (W. Va. Bar No. 6674)
Ramonda C. Marling (W.Va. Bar No. 6927)
300 Summers Street, Suite 700
Charleston, West Virginia 25301
Phone: 304.345.2000
Fax: 304.343.7999
wjarceneaux@lewisglasser.com
jstebbins@lewisglasser.com
rmarling@lewisglasser.com

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 19-1065

Orange Scherich, Margaret Scherich, Thomas Scherich, and Bertha Scherich,
Defendants Below, Petitioners,

V.)

Wheeling Creek Watershed Protection and Flood Prevention Commission, a public corporation,
Plaintiff Below, Respondent.

Appeal from a final order of the Circuit Court of Marshall County (90-C-229M)

CERTIFICATE OF SERVICE

I, James C. Stebbins, counsel for Petitioners, do hereby certify that on this 24th day of February, 2020, I served a copy of the **Petitioners' Brief** and **Joint Appendix** via U. S. Mail, postage prepaid and sealed in an envelope upon the following:

Christian E. Turak, Esq.
Gold, Khourey & Turak, L.C.
510 Tomlinson Avenue
Moundsville, West Virginia 26041
Counsel for Respondent

James C. Stebbins (W. Va. Bar No. 6674)
Counsel for Petitioners

LEWIS GLASSER PLLC
300 Summers Street, Suite 700
Charleston, West Virginia 25301
Phone: 304.345.2000
Fax: 304.343.7999
jstebbins@lewisglasser.com