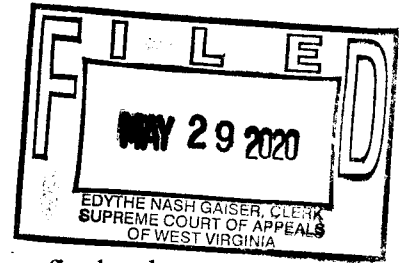


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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 19-1065

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**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)

RESPONDENT'S REPLY BRIEF

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I. SUMMARY OF ARGUMENT

In West Virginia, a condemning authority has the burden of establishing its right to condemn the property sought to be acquired. Once the condemning authority has satisfied its burden, the property owner then has the burden of proving the just compensation owed for the property condemned—i.e. the fair market value of the property. *United Fuel Gas Co. v. Allen*, 137 W.Va. 897, 901-902, 75 S.E.2d 88, 91 (1953). Here, the Wheeling Creek Watershed Protection and Flood Protection Commission (“Wheeling Creek”), the condemning authority, satisfied its burden of proving that it had the right to condemn the property at issue after a hearing held on June 15, 1990. J.A. 30-32. From that date until the fall of 2018, the defendants, Thomas E. Scherich, Bertha Scherich, Orange E. Scherich, and Margaret Scherich, never took any action to satisfy their burden of proving the fair market value of the property acquired. Only now, over 28 years since Wheeling Creek condemned the property at issue, do the Scherichs and/or their heirs, successors, or assigns (collectively, the “Scherichs”) come forward and attempt to satisfy their burden of proving the fair market value of the property acquired.

Because the Scherichs chose not to come forward to satisfy their burden for a period of over 28 years, the Circuit Court ruled, as a matter of law, that the Scherichs were precluded from resurrecting this long-abandoned action on the basis of waiver, estoppel, laches, statutes of limitation or repose, and/or accord and satisfaction. J.A. 52-54. Thus, the Circuit Court’s Final Order was not a dismissal for failure to prosecute pursuant to W. Va. R. Civ. P. 41(b) but sounded in summary judgment pursuant to W. Va. R. Civ. P. 56. The Scherichs were afforded reasonable notice and a hearing before the Court’s *sua sponte* ruling as is required under West Virginia law. *E.g., Loudin v. National Liability & Fire Ins. Co.*, 228 W.Va. 34, 716 S.E.2d 696 (2011). Even assuming, *arguendo*, that the notice and hearing provided were insufficient, such insufficiency is

harmless error as there are no set of facts that could explain a 28-year failure of the Scherichs to satisfy their burden. *See Talkington v. Barnhart*, 164 W.Va. 488, 264 S.E.2d 450 (1980).

Finally, Wheeling Creek should be deemed to have indefeasible title to the property at issue in light of the fact that the Scherichs failed to carry their burden and prosecute this case to its conclusion. Wheeling Creek's title to the property should not be clouded due to the Scherichs' failure to act.

II. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Wheeling Creek asserts that oral argument is unnecessary pursuant to Rule 18(a) because the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument.

III. ARGUMENT

A. APPLICABLE STANDARD OF REVIEW

To the extent the Circuit Court's Final Order is considered a grant of summary judgment, such grant is reviewed *de novo*. Syl. Pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994).

B. THE CIRCUIT COURT DID NOT ERR BECAUSE THE FINAL ORDER SOUNDS IN SUMMARY JUDGMENT PURSUANT TO RULE 56

The Scherichs assert that the Circuit Court erred by dismissing the action pursuant to Rule 41(b) of the West Virginia Rules of Civil Procedure. However, the Scherichs incorrectly assume that the Final Order was made on the basis of Rule 41(b). Indeed, the Circuit Court's Final Order does not mention Rule 41(b), let alone state that that rule was the basis for the dismissal.

When the Final Order is considered in its entirety, it clearly sounds in summary judgment pursuant to Rule 56. To wit, the Final Order asserts several bases for dismissal, including, among other things, waiver, estoppel, laches, and accord and satisfaction because of the extreme time

period of inactivity in this case. To put it another way, because of the Scherichs' failure to even attempt to carry their burden in this action for over 28 years, the Circuit Court ruled, as a matter of law, that they were precluded from now doing so under these doctrines. If the Circuit Court were dismissing the action under Rule 41(b), there would be no need to discuss waiver, estoppel, laches, and accord and satisfaction. Pursuant to Rule 41(b), the mere passage of time is sufficient to dismiss the case upon proper notice and opportunity to be heard.

i. The Circuit Court is permitted to *sua sponte* grant summary judgment

Generally speaking, the Circuit Court is not permitted to *sua sponte* grant summary judgment. However, “[a]n 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.” Syl. pt. 4, *Loudin, supra*.

In this instance, the Circuit Court provided the Scherichs with notice, in the form of an Order, of the status hearing in response to the Scherichs' motion for further proceedings. J.A. 50. In particular, the Order states that the hearing is being scheduled “as a result of but not to address the Motion for Further Proceedings to Determine Just Compensation.” *Id.* Under the circumstances, such notice was reasonable to alert the Scherichs as to what is to be heard—the 27 years of inactivity in the action and the reasons, if any, therefor.

Thereafter, a hearing was held on July 3, 2019, a hearing was held at which the Scherichs had ample opportunity to explain the reasons for their failure to even attempt to carry their burden in the action for over 28 years. *E.g.*, J.A. 72, lines 8-18; J.A. 76, lines 21-24. In response to several inquiries related to this 28-year failure to prosecute, the Scherichs failed to provide any kind of explanation therefor. Instead, the Scherichs incorrectly insisted that it was Wheeling Creek's burden to prosecute the action in regard to just compensation. J.A. 76, line 23.

As a result, the Scherichs were provided with reasonable notice and a hearing on their failure to carry their burden in this action for a period of over 28 years. Because the Scherichs were unable to provide any explanation for such inaction, and thus there being no dispute as to material facts, the Circuit Court granted what can only reasonably be viewed as summary judgment in favor of Wheeling Creek.

ii. Even assuming, *arguendo*, that the notice and hearing provided were not sufficient, said insufficiency is harmless error

If the Circuit Court's notice and/or hearing are deemed insufficient to enable it to *sua sponte* grant summary judgment, such insufficiency does not rise to the level of reversible error. Generally speaking, failure to comply with notice and hearing requirements are harmless error unless "a party can show actual prejudice affecting substantial rights." *E.g.*, Syl. Pt. 1, *Talkington, supra*.

In the instant matter, the Scherichs can show no prejudice affecting substantial rights, because they can present no evidence supporting a good-faith basis for their 28-year failure to pursue an award of just compensation. If they cannot present any such evidence, there is no question of material fact, and the 28-year failure to prosecute speaks for itself. Thus, the Scherichs can suffer no prejudice, and any failure to provide proper notice or hearing is harmless error.

C. THE CIRCUIT COURT DID NOT ERR BY GRANTING SUMMARY JUDGMENT WITHOUT THE SCHERICHS' CONSENT

Under West Virginia law, once the condemning authority has satisfied its burden of proving its right to condemn, the landowner thereafter has the burden of proving just compensation. As stated in *United Fuel, supra*. at 901-902:

The right of the utility company to condemn the property sought to be acquired having thus been established...*the defendants proceeded to carry the burden of proving the value of the property*, together with the damages to the residue. This defendants were

required to do under the holding of this Court in *Strouds Creek & Muddlety R. Co. v. Herold*, 131 W.Va. 45, 45 S.E.2d 513, 514. See generally 18 Am.Jur., Eminent Domain, 342, and 6 M.J., Eminent Domain, Section 87.
(emphasis supplied)

Thus, it is axiomatic that at all times after Wheeling Creek satisfied its burden of proving that it had the right to condemn the property on June 15, 1990, the Scherichs had the burden of proving just compensation—*i.e.* the value of the property condemned. What is more, once a property is condemned there are no other issues left in the action except to determine the amount of just compensation owed.

Accordingly, the Scherichs' claim that Wheeling Creek abandoned the action is at odds with West Virginia law. It is beyond reasonable dispute that the Scherichs are the parties who had the burden of proving just compensation. And, as that was the only remaining issue in the action after June 15, 1990, it was incumbent upon the Scherichs to prosecute the action. Instead, it seems that either the Scherichs accepted the good faith estimate of just compensation as final compensation or simply abandoned the action.

As a result, the Scherichs' reliance upon language in W.Va. Code § 54-2-14a prohibiting the condemning authority from abandoning the action without the consent of the property owner is misplaced. If any party abandoned the action, it was the Scherichs.

D. THE CIRCUIT COURT DID NOT ERR BY GRANTING SUMMARY JUDGMENT BECAUSE THE SCHERICHS HAD THE BURDEN OF PROVING JUST COMPENSATION

As discussed above, West Virginia law is clear that the Scherichs had the burden of proving just compensation in this action. Despite the foregoing, the Scherichs continue to assert that Wheeling Creek did. In support thereof, the Scherichs cite case law that is unavailing.

First, the Scherichs quote *State ex rel. Phoenix Ins. Co. v. Ritchie*, 154 W.Va. 306, 175 S.E.2d 428 (1970) for the proposition that Wheeling Creek has an obligation to “take all necessary steps under our condemnation statutes to ascertain damages to the owners of private property.” However, a closer review of *Ritchie*, in which *Hardy v. Simpson*, 118 W.Va. 440, 190 S.E. 680 (1937) is quoted, reveals that that case dealt with a governmental authority that causes damage to private property, *without condemning the property*. Because, as the *Ritchie* court states, the damaged landowner cannot sue and “has no other remedy [and] the plain provisions of the constitution are nullified,” the governmental authority has an obligation to operate under the condemnation statutes to make her whole. *Ritchie*, supra. at 313. This is made clear by the unabridged version of the *Ritchie* language quoted by the Scherichs—“A duty rests on the state to take necessary steps under our condemnation statutes to ascertain damages to the owners of private property, *whether the same is actually taken, or damaged only*.” (emphasis supplied).

Next, the Scherichs cite *Chenowith v. Keenan*, 61 W.Va. 108, 55 S.E. 991 (1906) and *Pickenpaugh v. Keenan*, 63 W.Va. 304, 60 S.E. 137 (1908) for the general proposition that a defendant is under no duty to prosecute a case. While that may be the normal rule, as explained above, the defendant does carry the burden of proving just compensation in a condemnation action. Moreover, neither *Chenowith* nor *Pickenpaugh* are condemnation cases or involve any condemning authority and have no substantive bearing on the issues present in this appeal.

While the Scherichs cite to case law from other jurisdictions, including Florida, holding that the condemning authority has the burden of proving just compensation and prosecuting the action to conclusion, that is not the law of West Virginia. Simply stated, in West Virginia, the landowner has the burden of proving just compensation. *United Fuel, supra*.

E. THE CIRCUIT COURT DID NOT ERR BY GRANTING SUMMARY JUDGMENT UPON THE DOCTRINES OF WAIVER, ESTOPPEL, AND/OR LACHES

As detailed previously, a logical reading of the Circuit Court's Final Order is that it was a grant of summary judgment ruling, as a matter of law, that the Scherichs failed to carry their burden of proving just compensation and are now barred from doing so under the doctrine of waiver, estoppel, and laches. A "waiver may be express or may be inferred from actions of conduct, but all of the attendant facts, taken together, must amount to an intentional relinquishment of a known right." Syl. Pt. 3, *Bruce McDonald Holding Co. v. Addington, Inc.*, 241 W.Va. 451, 825 S.E.2d 779 (2019). Equitable estoppel applies when "a party is induced to act or refrain from acting to her detriment because of reasonable reliance on another party's misrepresentation or concealment of material fact." Syl. Pt. 2, *Ara v. Erie Ins. Co.*, 182 W.Va. 266, 387 S.E.2d 320 (1989). Lastly, the "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).

Because the Scherichs failed to even attempt to carry their burden of proving just compensation in this action for 28 years, the Circuit Court ruled as a matter of law that no set of facts exist wherein the Scherichs had not waived their right to now carry their burden and/or are otherwise estopped from doing so by virtue of equitable estoppel or laches. Clearly, and especially in light of the fact that they were represented by counsel, the Scherichs knew they had the right to proceed to a hearing on just compensation and chose not to do so. Taking all of the attendant facts into consideration, there is no other reasonable conclusion than that the Scherichs waived their right to proceed in this case long ago. They cannot now resurrect that right after it has already been waived.

As it applies to equitable estoppel, again, the Circuit Court correctly ruled that there were no set of facts wherein the Scherichs were not now equitably estopped from proceeding with this

action. The Scherichs accepted \$97,000 from Wheeling Creek as a good-faith estimate of just compensation and took no action for approximately 28 years. Such acceptance and prolonged inactivity amounts to a misrepresentation that they had abandoned their claim for just compensation. Wheeling Creek has relied upon said constructive misrepresentation to its detriment by, among other things, making significant use of the property to deal with backwaters. J.A. 82, lines 6-13.

Similarly, the Circuit Court correctly ruled that there were no sets of facts wherein the Scherichs were not barred by laches from proceeding with this action. There can be no dispute that 28 years is an unreasonable delay, and Wheeling Creek has suffered significant prejudice as a result. For example, Wheeling Creek informed the Circuit Court that it was having difficulty locating its file on this action due to the passage of almost three decades. J.A. 82, lines 21-24.

Accordingly, the Circuit Court did not err by granting summary judgment in favor of Wheeling Creek on the basis of waiver, estoppel, and laches.

F. WHEELING CREEK SHOULD BE DEEMED TO HAVE INDEFEASIBLE TITLE TO THE PROPERTY AT ISSUE IN LIGHT OF THE FAILURE OF THE SCHERICHS TO CARRY THEIR BURDEN OF PROVING JUST COMPENSATION IN THIS CASE

It cannot be disputed that W. Va. Code § 54-2-14a states that “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.” It also cannot be disputed that a hearing on just compensation was not held before a panel of commissioners or a jury verdict on the same. However, the parties responsible for the *status quo* of this action are the Scherichs, and it would be inequitable to hold Wheeling Creek accountable for the Scherichs’ failure to carry their burden. At any time since June 15, 1991, the Scherichs could have come forward and requested that commissioners be empaneled and/or a jury trial be held. Instead, the Scherichs did

nothing and cannot provide any evidence to reasonably explain why they did nothing for over 28 years. Simply put, the Scherichs abandoned this action. As a result, Wheeling Creek should be deemed to have indefeasible title to the property at issue.

G. THE CIRCUIT COURT'S GRANT OF SUMMARY JUDGMENT DOES NOT VIOLATE EITHER THE WEST VIRGINIA CONSTITUTION OR THE UNITED STATES CONSTITUTION

As previously discussed, the Scherichs waived their right to now carry their burden of proving just compensation because of their failure to do so for over 28 years. Constitutional rights are waivable just like other rights as long as the waiver is "knowing and intelligent, that is a voluntary relinquishment of a known right." Syl. Pt. 3, *Losh v. McKenzie*, 166 W.Va. 762, 277 S.E.2d 606 (1981). The Scherichs' 28-year absence of action in this case is clear and conclusive evidence that they waived their rights both under the relevant statute and the West Virginia and United States Constitutions.

As it relates to the quantity and nature of the property interests acquired, it is important to note that a hearing was held on those matters on June 15, 1990. Counsel for the Scherichs did not appear at that hearing but undoubtedly had notice of it in light of the fact that counsel filed a written answer. J.A. 27. By Order entered June 15, 1990, the Circuit Court held that Wheeling Creek had the right to condemn the property sought and that "the lands sought to be acquired in this proceeding are necessary for its use for the purpose aforesaid and are not in excess of the quantity reasonably necessary for such purposes." J.A. 27-28. Thus, the Scherichs had notice of and a fair hearing on the quantity and nature of the property interests condemned, and they failed to appear at the hearing. The Scherichs should not be permitted to attack the Circuit Court's June 15, 1990 Order and the property condemned by that Order some 28 years later.

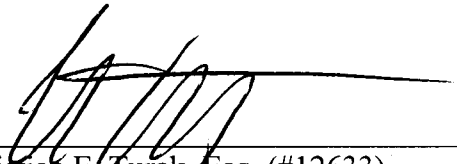
H. SHOULD THIS COURT AFFIRM THE CIRCUIT COURT'S GRANT OF SUMMARY JUDGMENT, WHEELING CREEK SHOULD BE DEEMED TO HAVE INDEFEASIBLE TITLE TO THE PROPERTY AT ISSUE

Wheeling Creek respectfully refers this Court to Section (F), above in response to Section (L) of the Scherichs' argument, and incorporates said Section (F) as if set forth fully herein.

IV. CONCLUSION

West Virginia law is clear. The Scherichs have the burden of proving just compensation in this action, and, with that burden, came the duty to prosecute. The Scherichs simply failed to do so—without explanation—for a period of over 28 years. Because of that failure and the time span involved, the Circuit Court correctly granted summary judgment in favor of Wheeling Creek, essentially ruling that, as a matter of law, the Scherichs were now prohibited from proceeding with the case on the basis of waiver, estoppel, and laches. And, because the Scherichs failed to carry their burden, Wheeling Creek should not be punished by having a cloud placed on their title but, rather, should be deemed to hold indefeasible title to the property at issue.

Respectfully submitted,



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Appeal from a final order
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CERTIFICATE OF SERVICE

Service of the foregoing **Respondent's Reply Brief** was had upon the Petitioners by mailing a true and correct copy thereof by U. S. mail, postage prepaid, this 28th day of May, 2020, to:

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