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' Reply Brief

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I. LAW AND ARGUMENT

A. Respondent confuses and conflates the concepts of "burden of proof" and "burden to prosecute."

A frequent and misleading theme throughout Respondent's Brief[1] is the false argument that the "burden of proof" somehow equates to the "burden to prosecute." Thus, Wheeling Creek argues that because landowners generally have the burden of proof regarding the amount of just compensation, they likewise have the overall duty to prosecute the condemnation proceedings. That is simply not true.

"Burden of proof" simply means the obligation of a party "***throughout the trial*** to establish by a preponderance of the evidence in a civil case, and beyond a reasonable doubt in a criminal case, proof of his or its allegation in his or its pleading, warrant, or indictment." *Lester v. Flanagan,* 145 W.Va. 166, 113 S.E.2d 87 (1960) (emphasis added). Significantly, the "burden of proof" at trial can actually pass "from one party to the other as the case progresses to meet a prima facie case made by the opposing party." *Id.*

However, unlike the burden of proof, the overall burden to prosecute the action never shifts between the parties and is always on the plaintiff or petitioner. *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. Pt. 1, *Pickenpaugh v. Keenan*, 63 W. Va. 304, 60 S.E. 137 (1908) (holding that "the defendant is under no duty to prosecute the case"). While this Court has never had the opportunity to consider the exact issue, several other jurisdictions have specifically held that the burden of proof is distinct from the burden to prosecute which remains at all times on the

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[1] Wheeling Creek entitled its filing "Respondent's Reply Brief." Under Rule 10(d) of the West Virginia Rules of Appellate Procedure, the document filed by Wheeling Creek should have been entitled "Respondent's Brief." This brief is actually the "Reply Brief" permitted by Rule 10(g). To avoid confusion, Petitioner will refer to Wheeling Creek's filing as "Respondent's Brief" throughout this reply.

plaintiff. *See, e.g., Byrd v. City of Memphis*, 2004 Tenn. App. Lexis 751 (2004) (holding that "[w]hether or not the burden of proof at trial would have been on defendants is irrelevant" and that "it was the Plaintiffs' burden to prosecute their case"); and *Hanson v. Poteet*, 556 So. 2d 828 (Fla. 1990) (holding that "after the entry of partial summary judgment, the [defendants] had the burden of proof on all remaining issues, but they did not have the burden to prosecute").

West Virginia condemnation law further underscores this point and is consistent with the position taken by Petitioners herein. As previously and repeatedly declared by this Honorable Court: "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." *Hardy v. Simpson*, 118 W. Va. 440, 445, 190 S.E. 680, 683 (1937) (emphasis added); and *State ex rel. Phoenix Ins. Co. v. Ritchie*, 154 W. Va. 306, 313; 175 S.E.2d 428, 432 (1970).[2] *See, also, Div. of Admin., State of Florida, Dep't of Transportation v. Grossman*, 536 So. 2d 1181, 1183-84 (Fla. 1989) (holding that "[a] condemnor cannot simply sit idly by . . . hoping that the court will dismiss the cause for want of prosecution. The burden to proceed . . . is not upon the landowner; that burden rests squarely upon the shoulders of the governmental entity which seeks to invoke the harsh procedures which result in the taking of private property").

There is no law that places a similar burden on the landowner. In fact, under the applicable statutory scheme, the landowner is not even required to file an Answer to the condemnation petition or any other pleading to preserve their constitutional right to just compensation. W. Va. Code § 54-2-2. To the contrary, even a landowner who files absolutely nothing with the court is

[2] Respondent makes the patently false argument that the above quote from *Hardy* and *Ritchie* applies only to the situation where the condemning authority "causes damage to private property, *without condemning the property*." Respondent's Brief at p. 6 (emphasis in original). However, the full quote of this Court from those two cases very clearly states that the condemning authority must "take all necessary steps under our condemnation statutes to ascertain damages to the owners of private property, whether the same is actually taken, ***or*** damaged only." *Id.* The property at issue in this case was "actually taken."

still constitutionally entitled to have just compensation decided by five disinterested freeholders who act as condemnation commissioners. W. Va. Code § 54-2-8. It is only after the condemnation commissioners' hearing that the landowner is required to file anything at all to protect their interests and at that stage of the proceedings, they may file exceptions to the report of commissioners to preserve their right to a jury trial. W. Va. § 54-2-10.

It should also be noted that consistent with the above, it was Respondent that made the initial demand in this case for the appointment of condemnation commissioners. Thus, in the underlying petition, Wheeling Creek prayed in part:

> . . . ***that commissioners be appointed [by the Circuit Court] to ascertain a just compensation to the owners thereof*** and other persons, lienors or otherwise, interested therein, ***for the lands described and proposed to be taken for the public purposes and uses aforesaid***, together with any damages, if any, to the residue....

J.A. 000007 (emphasis added).

Furthermore, if the Circuit Court's dismissal of this action is upheld it would directly violate W. Va. Code § 54-2-14a which provides that once the condemning authority institutes condemnation proceedings and enters upon and injures the property:

> it shall not be entitled, without the consent of the defendant, to abandon the proceedings for the condemnation thereof, but such proceedings shall proceed to final award or judgment.

W. Va. Code § 54-2-14a. Wheeling Creek has no good response to this language in W.Va. Code § 54-2-14a so it simply makes the conclusory assertion that Petitioners' reliance upon this language is "misplaced" because they are allegedly the ones who "abandoned" the proceedings. Of course, this argument presumes that Petitioners had some legal duty to prosecute the proceedings in the first place which they did not. This statutory language applies only to the condemning authority and places no burden whatsoever on the landowner.

Finally, this Court should take notice of the fact that under the "quick take" provisions of W.Va. Code § 54-2-14a, the condemning authority is only permitted to have title "indefeasibly vested in the applicant" after it pays the sum for just compensation ascertained by the commissioners or a jury and after it pays "interest thereon at ten percent from the date of the filing of the petition to the date of payment of the excess amount into court." *Id.* This interest rate is significantly higher than the interest rate awardable in other civil proceedings and it was obviously designed by the legislature to motivate condemning authorities to follow through efficiently on their obligation to properly ascertain just compensation. This is also further evidence that our legislature intended for the condemning authority to have the burden of prosecution and the burden to take all necessary steps to determine just compensation.

In short, Petitioners acknowledge that 28 years is a long time for a case to lay dormant. However, the law is clear that it was not Petitioners' fault because they had no duty to prosecute the case or to take any action whatsoever until the commissioner hearing stage of the case which has still not yet occurred. The burden of initiating all required steps to ensure just compensation was entirely on Wheeling Creek yet it is Petitioners who are now paying the price for Wheeling Creek's failure to follow through on what it started. Justice requires that the consequences for the failure to prosecute be laid at the feet of the party that is responsible for the delay.

B. Assuming *arguendo* that the "Final Order" was in effect a *sua sponte* granting of summary judgment, the order is inappropriate because Petitioners were not given reasonable notice and the opportunity to address the grounds for summary judgment.

After devoting a large portion of its brief to attempting to prove that Petitioners had the duty to prosecute the underlying action, Wheeling Creek then argues that the Circuit Court did not actually dismiss the case based upon a failure to prosecute. Instead, Wheeling Creek now claims that the case was actually dismissed under the summary judgment standard even though the Circuit

Court never mentioned Rule 56 of the West Virginia Rules of Civil Procedure in its Final Order. Petitioners submit that it is obvious that the Circuit Court in effect dismissed the action based upon a perceived failure to prosecute under Rule 41(b). However, even if the Circuit Court had attempted to dismiss the action by *sua sponte* granting summary judgment to Wheeling Creek under Rule 56, such a dismissal was clearly inappropriate for reasons very similar to those preciously articulated by Petitioners under Rule 41(b).

As this Court has previously held:

> [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.

Syl. Pt. 4, *Loudin v. Nat'l Liab. & Fire Ins. Co.*, 228 W. Va. 34, 36, 716 S.E.2d 696 (2011).

Wheeling Creek argues that the notice requirement from *Loudin* was satisfied by the Circuit Court because it "provided the Scherich's with notice, in the form of an Order, of the status hearing in response to the Scherich's motion for further proceedings." Respondent's Brief at p. 3. The Order relied upon by Wheeling Creek mentioned only the scheduling of a "Status Hearing...as a result of but ***not to address*** the Motion for Further Proceedings to Determine Just Compensation." J.A. 000050-51 (emphasis in original). The Order did not mention that the Court was considering dismissal of the action at all, and certainly did not provide notice to Petitioners of the "grounds" being considered by the Court for dismissal. As a result, Petitioners obviously never had a fair opportunity to "address the grounds for which the court is *sua sponte* considering granting summary judgment." *Loudin* at syl. pt. 4. Being blindsided by the Circuit Court with previously unasserted legal theories never pled by the opposing party at a "Status Hearing" can hardly be considered reasonable notice or a fair opportunity to respond.

In this regard, this case is very similar to *Hubbard v. Crow*, 2016 W. Va. LEXIS 389 (2016) (memorandum decision). *Hubbard* involved a property line dispute. *Id.* at *2. At a status conference in that case, the petitioners' counsel informed the Circuit Court that petitioners' expert witness would be "unable to render an opinion contrary to that of respondent's expert witness and that, as a result, petitioners 'had no expert opinion to rely upon in this matter.'" *Id.* As a result, the Circuit Court then ruled as a matter of law against the petitioners and struck the matter from its docket. *Id.* at *2-3. The Respondent had never moved for summary judgment before the Circuit Court made its ruling. *Id.* at *4.

This Court found that summary judgment was inappropriate in *Hubbard* because "not only had the respondent failed to move for summary judgment on the specific grounds upon which the circuit court based its decision, the respondent had not moved for summary judgment at all." *Id.* at *4. This Court also found that:

> [T]he specific facts of [the] case do not support a finding that the exception to the rule [in *Loudin*] was satisfied, as the record is devoid of any evidence that petitioners were aware the circuit court was considering granting summary judgment, let alone that they were offered an opportunity to address the grounds in an effort to overcome a granting of summary judgment.

Id. at *4.

Assuming *arguendo* that Respondent is correct that the Final Order is in effect a *sua sponte* summary judgment order, then *Hubbard* is very similar to this case. Respondent never moved for summary judgment. Petitioners were never given prior notice that the Court was considering granting summary judgment or notice of the possible grounds for the granting of summary judgment. Petitioners submit that the notice and opportunity to be heard requirements of *Loudin* should be the same as the notice and opportunity to be heard requirements under Rule 41(b) of the West Virginia Rules of Civil Procedure which this Court has found requires 15 days written notice.

See Dimon v. Mansy, 198 W.Va. 40, 479 S.E.2d 339 (1996). The notice should also obviously require the circuit court considering *sua sponte* summary judgment to identify the grounds being considered for the dismissal so that they can be adequately explored, briefed and argued.

C. Assuming *arguendo* that the Final Order granted summary judgment *sua sponte* to Wheeling Creek, the insufficiency of notice and opportunity to be heard did not constitute "harmless error."

Wheeling Creek next relies upon *Talkington v. Barnhart,* 164 W.Va. 488, 264 S.E.2d 450 (1980) for the proposition that even if the Circuit Court failed to give proper notice and a fair opportunity to respond, then any such error was "harmless error." In this case, Wheeling Creek argues that it was harmless error because Petitioners can show no "prejudice affecting substantial rights" within the meaning of *Talkington* "because they can present no evidence supporting a good faith basis for their 28 year failure to pursue an award of just compensation." Respondent's Brief at p. 4.

Wheeling Creek does not even define what is meant by "harmless error" under the law to properly frame the analysis for this Court. As this Court has held: "[e]rror is harmless when it is trivial, formal, or merely academic, and not prejudicial to substantial rights of the party assigning it." *State v. Salmons*, 203 W.Va. 561, 509 S.E.2d 842 (1998). In this case, the error was certainly prejudicial to "substantial rights" of Petitioners and in fact was prejudicial to clearly established ***constitutional*** rights. *See* discussion, *infra.*

Moreover, this argument completely ignores the fact that it was Wheeling Creek rather than Petitioners that had the duty to move the case forward and seek to have just compensation determined by condemnation commissioners, and, if necessary, a jury. *See,* discussion, *supra.* In reality, it is Wheeling Creek that has no "evidence supporting a good faith basis" for its failure to follow through for 28 years on what it started.

Petitioners had no duty to do anything and in fact, nothing in the law prohibits a landowner in a "quick take" proceeding from waiting as long as it takes for the condemning authority to take the steps necessary to determine just compensation. The applicable code provision compensates the landowner for the delays occasioned by the condemning authority's failure to take action because, while awaiting the outcome of the determination of just compensation, the landowner is entitled to an award of 10% interest per annum on any difference between the estimate and the excess award. *See* W. Va. Code § 54-2-14a. A condemning authority that fails to move a case forward consistent with its duty to protect the constitutional rights of the landowner does so at its own peril. In that situation, the landowner is automatically entitled without exception to the difference between the estimate of just compensation and the just compensation actually determined by the commissioners or a jury, plus 10% interest on the difference. *Id.* The Final Order of the Circuit Court deprived Petitioners of these important constitutional protections based solely upon the dilatory conduct of Wheeling Creek.

It is also noteworthy that even if Petitioners had been the parties with the burden to prosecute this matter which they clearly were not, "a decision for summary judgment before discovery has been completed must be viewed as precipitous." *Board of Educ. v. Van Buren & Firestone, Architects*, 165 W. Va. 140, 144; 267 S.E.2d 440, 443 (1980) (reversing and remanding trial court's grant of summary judgment stating that "the proper course of action for the trial court to have taken would have been to defer action on the summary judgment motion until the completion of discovery and to set a date by which discovery must be concluded"); *see Elliott v. Schoolcraft*, 213 W.Va. 69, 73, 576 S.E.2d 796, 800 (2002) (stating that "[a]s a general rule, summary judgment is appropriate ***only after adequate time for discovery***") (emphasis added); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (finding that "the plain language of Rule 56(c)

mandates the entry of summary judgment, ***after adequate time for discovery and upon motion***, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial") (emphasis added).

In this case, not only was discovery not completed, it never began. Therefore, it was precipitous for the Circuit Court to *arguendo* grant summary judgment when there were no facts upon which to base such a judgment.

D. Assuming *arguendo* the Circuit Court *sua sponte* granted summary judgment, it was error to grant summary judgment based on the doctrines of waiver, estoppel, and/or laches.

Wheeling Creek argues that it was appropriate for the Circuit Court to grant summary judgment based upon the doctrines of waiver, estoppel, and laches. However, the doctrines of waiver, estoppel, and laches are affirmative defenses. *See* Rule 8(c) of the W. Va. R. Civ. Proc. In order to assert an affirmative defense, the affirmative defense must be raised by a party "in a pleading to the preceding party." *Id.; see, e.g., Dep't of Health & Human Resources, Child Advocate Office ex rel. Robert Michael B. v. Robert Morris N.,* 195 W. Va. 759, 466 S.E.2d 827 (1995) (finding that the appellee failed to plead laches as affirmative defense); *Skeen v. C & G Corp.*, 155 W. Va. 547, 556-557, 185 S.E.2d 493, 500 (1971) (reversing and remanding Circuit Court's ruling, finding that "in order for C and G Corporation to have availed itself of the disclaimer provision as a defense, it was essential that it so plead it affirmatively"). Because these defenses were not pled in the original pleading or any amended pleading by Wheeling Creek, they are waived.

Moreover, even if the doctrine of waiver had been raised as an affirmative defense by Wheeling Creek, 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 because that is what triggers the start of the 10 day jury demand period. Wheeling Creek failed to even address this argument in its response brief because it has no good response.

Regarding estoppel, 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). In this case, Wheeling Creek argues (without citing any law) that Petitioners' "acceptance" of the initial deposit and "prolonged inactivity" amounts

to a "misrepresentation." Respondent's Brief at p. 8. However, the actual law is clear that a "misrepresentation" requires the "making of a false or misleading assertion about something usually with the intent to deceive." *Black's Law Dictionary* at 1152 (10th ed. 2014). In this case, Wheeling Creek does not claim that Petitioners made any "assertion" at all, let alone a deceptive one.

Finally, regarding "laches," as this Court has previously 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, Wheeling Creek is the party that had the duty to prosecute this case, and Petitioners had no duty whatsoever to prosecute and could therefore not be guilty of any delay, let alone an unreasonable delay.

Furthermore, there is no evidence that Wheeling Creek was somehow prejudiced by any delay in this matter. The only evidence or argument offered by Wheeling Creek on the issue of prejudice is its claim that it was having "difficulty" locating its file in this matter due to the passage of time. However, Wheeling Creek has failed to identify what documents, if any, it needs from its file to properly prosecute this matter. Upon information and belief, all the documents needed to go forward in this matter are preserved in the Court file. Simply claiming "difficulty" locating a file without specific evidence of actual prejudice is not enough to establish laches as a matter of law.

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.

E. The issues of quantity and nature of the property interests acquired have not already been decided.

West Virginia law is very clear that a condemning authority may only take such quantity of land "as is necessary for the purpose or purposes for which it is appropriated." W.Va. Code § 54-2-14a. Moreover, under West Virginia law, the Circuit Court determines "whether the applicant has a lawful right to take property for the purposes stated in the condemnation petition." *Gomez v. Kanawha Cnty. Comm'n*, 237 W. Va. 451, 787 S.E.2d 904 (2016). A condemning authority may lawfully take a property "if the applicant's expressed use of the property is, ***in fact***, a public one, and the condemnation is not impelled by bad faith or arbitrary and capricious motives." *Id.* at 460 (emphasis added).

Generally, "there is a strong presumption [by the Court] that the condemnor has acted properly. [However,] the issue of ***whether a proposed taking is excessive is a legitimate inquiry and raises an issue of fact, requiring a... court to hear evidence on the issue***." *In re Condemnation of Pa. Tpk. Comm'n of Prop. Located in PTC of Hampton*, 84 A.3d 768, 776 (Pa. Commw. Ct. 2014) (emphasis added). Whether a taking is excessive is determined not only in regard to "the amount or location of the land," but also "the type of estate condemned." *In re Condemnation by the Commonwealth of Pennsylvania, Department of Transportation, of Right of Way for Legislative Route 1021, Section 1B, a Limited Access Highway, in the City of Pittsburgh*, 126 Pa. Commw. 59, 65, 558 A.2d 605, 608 (1989) (finding that a taking of a fee simple estate was excessive as "it was a clear abuse of discretion by DOT in taking a fee simple estate rather than such interest it shall determine was necessary for the temporary storage of the contractor's equipment"). *See, also, In re Condemnation of Real Property of King by Octovara Area School*

Dist., 124 Pa. Commw. 472, 556 A.2d 527 (1989) (finding that "condemnation of an entire working farm for school buildings projected to be needed over the next 5 to 12 years, where the probable need is based on assumptions and possibilities that have been challenged by contrary evidence, is beyond the eminent domain power vested in the Board by the Public School Code and constitutes an abuse of discretion").

Wheeling Creek stated in its Petition for the taking of the Scherich's property that "[i]t is necessary that [Wheeling Creek] take and [Wheeling Creek] desires to take the land . . . for the purpose of constructing a dam structure and for provision of sufficient land surrounding said dam for its construction, access thereto, and for a permanent pool, flood pool, reservoir, and emergency spillway." J.A. 000004-5. The Scherichs specifically asserted defenses in their Answer that the amount of the land being taken was "excessive" and that it was "not necessary [for Wheeling Creek] to acquire the oil and gas interest in the subject property." Respondent's Brief at 9; J.A. 000021-23.

These were fair defenses to raise. Petitioners intend to offer evidence in this case that Wheeling Creek has in fact and practice not used all of the property it acquired for flood control and to also offer evidence that there was no possible reason for Wheeling Creek to take the oil and gas interests. In fact, since taking Petitioners' property, Wheeling Creek has entered into numerous oil and gas leases with various third parties none of whom have anything to do with flood control measures.[3] The leasing of the oil and gas interests to others proves beyond the shadow of a doubt that Wheeling Creek had no reason whatsoever to take those interests when it condemned the property. Thus, Wheeling Creek illegally took more than it needed and is now unfairly reaping

[3] The undersigned has reviewed the records of the Clerk of the County Commission for Marshall County, West Virginia and discovered various leases by Wheeling Creek of the oil and gas interests that include interests arising out of the parcels taken in this case. *See* Marshall County Deed Book 701 at p. 215; Deed Book 790 at p. 618; Deed Book 962 at p. 127; and Deed Book 967 at p. 223.

the financial benefits of its improper taking. Justice requires that these interests be returned to the rightful owner rather than allowing a windfall for the wrongdoer.

Wheeling Creek also claims that the issues of the quantity and nature of the property interests acquired were already decided by the Circuit Court at a hearing on June 15, 1990. Wheeling Creek acknowledges that "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." Respondent's brief at p. 9. However, the corresponding order fails to indicate what evidence and factual determinations were considered by the Court in determining whether the extent of the take was necessary and whether the oil and gas rights were necessary for the construction of the dam and the affiliated structures. J.A. 000027-000029.

Further, there is no evidence that the Scherichs were provided with actual notice of the hearing at which public use was determined. What is clear from the record is that they mailed to the Circuit Clerk an Answer to the underlying Petition the day before the hearing (June 14, 1990). J.A. 000020-000023. As stated previously, in their Answer, the Scherichs specifically asserted defenses that the amount of the land being taken was "excessive" and that it was "not necessary [for Wheeling Creek] to acquire the oil and gas interest in the subject property." *Id.* Those defenses have never been addressed or decided by the Circuit Court.

Moreover, even if the Petitioners had received actual notice of the hearing on June 15, 1990, the notice, which was purportedly served by publication in a Moundsville[4] newspaper on June 1, 1990 and June 8, 1990, did not state that the Circuit Court would be considering whether the amount of land to be taken was excessive nor did it state that the Circuit Court would consider the propriety of the taking by Wheeling Creek of the oil and gas rights. Petitioners submit that

[4] The Scherichs lived in Pennsylvania at the time.

those issues have been properly preserved by them in their Answer and are a part of the issues that remain to be considered by the Circuit Court upon remand.

F. Respondent Wheeling Creek cannot obtain indefeasible title without completing the required steps to ascertain just compensation.

Wheeling Creek freely acknowledges that under W.Va. Code § 54-2-14a, "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 into court." W.Va. Code § 54-2-14a. However, Wheeling Creek claims that this Court should ignore the statute and grant them indefeasible title because it would allegedly be "inequitable to hold Wheeling Creek accountable for the Scherichs' failure to carry their burden." Respondent's Brief at p. 8.

Wheeling Creek again ignores that it alone bore the responsibility to prosecute this action. As explored in previous sections, Wheeling Creek failed to take the necessary steps to prosecute the action to its completion. Wheeling Creek had the ability to obtain indefeasible title by correctly following the procedure, which was in its control the entire time. Wheeling Creek cites absolutely no legal authority for disregarding the language of the statute and granting it indefeasible title even though just compensation has never been determined.

The constitutional, fair, and equitable way to proceed is to either: (1) reinstate the case and remand with instructions for the Circuit Court and Wheeling Creek to follow through with the statutory procedures for determining just compensation; or (2) if this Court allows the dismissal to stand, return the parties to the *status quo* prior to these failed proceedings.

II. 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.

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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 17th day of June, 2020, I served a copy of the **Petitioners' Reply Brief** via U. S. Mail, postage prepaid and sealed in an envelope upon the following:

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