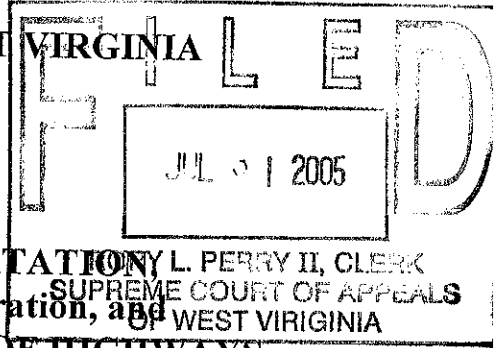


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 32558



WEST VIRGINIA DEPARTMENT OF TRANSPORTATION,
DIVISION OF HIGHWAYS, a West Virginia Corporation, and
FRED VANKIRK, WEST VIRGINIA COMMISSIONER OF HIGHWAYS
Plaintiffs Below, Appellees.

vs.

DODSON MOBILE HOMES SALES AND SERVICES, INC.,
a West Virginia Corporation,
Defendant Below, Appellant.

Honorable Christopher C. Wilkes
Circuit Court of Berkeley County
Civil Action No. 95-C-329

BRIEF OF THE APPELLANT

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I. KIND OF PROCEEDING AND NATURE OF THE RULING BELOW

Dodson Mobile Homes Sales and Services, Inc., the Defendant below and Appellant herein, (hereinafter referred to as "the Dodsons") brought this appeal to challenge the Circuit Court's denial of its Motion for Attorney's Fees and Costs, filed on December 22, 2003, pursuant to 49 C.F.R. § 24.107. The Dodsons filed a Rule 59 Motion to Alter or Amend the Judgment, which was denied by the lower court on July 14, 2004.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

This condemnation action was initially filed by the Plaintiff below and Appellee herein, the West Virginia Department of Transportation, Division of Highways, and Fred VanKirk, the West Virginia Commissioner of Highways (hereinafter referred to as "the State"), in July 1995. The condemnation in question involves the taking by the State of a portion of a 4.3 acre parcel along U.S. Route 9 in Berkeley County, West Virginia owned by Dodson Mobile Home Sales and Services, Inc., a corporation owned and operated by the Dodson family. The Dodsons are engaged in two businesses on the property in question. On the south end of the property facing U.S. Route 9 they own a building from which they operate a retail furniture business. On the north end of the property they operate a mobile home sales lot.

The State took a portion of the Dodsons' property as part of a Route 9 expansion project in Berkeley County, West Virginia. The project took part of and materially altered other portions of the frontage of the Dodsons' property on Route 9. The project also resulted in the construction of a road through the middle of the Dodsons' property, leaving two separate tracts of land. The main tract contains a furniture store and the remainder of a mobile home lot, the size of which was substantially reduced by the State's construction project. The second tract is a .73 acre triangular

shaped remnant located on the other side of the new road. From the time of the construction forward, the Dodsons were unable to use this remnant in connection with their furniture or their mobile home business. (Trial Tr. 12/3/03 pp. 23-24, 30, 39-44)

Following extended periods first of construction and then of litigation and discovery¹, this matter was scheduled for a Commissioners Hearing on September 20, 2002. (See Record, doc. 00078, Notice of Hearing.) On the morning of the hearing, the State's attorney and representative were involved in a car accident, and the hearing was canceled. The Commissioners Hearing was rescheduled for October 28, 2002. (See Record, doc. 00087, Notice of Hearing.) The Dodsons appeared with their attorney and their expert witness on October 28, 2002, ready to proceed with the Commissioner's Hearing. However, prior to the Hearing, the State suggested that the parties discuss the possibility of reaching a settlement. A settlement agreement was reached in which the State would pay the Dodsons the sum of \$190,000, which would be in addition to those amounts already deposited by the State. The State's attorney indicated that the settlement would have to be approved by the Commissioner of Highways, but that such approval was routinely granted. The Dodsons consented to the adjournment of the Commissioners Hearing in reliance upon the settlement agreement reached with the State. The Special Commissioner presiding over the Commissioners Hearing recommended in his report to the Court that the State bear the cost of the Dodsons' witnesses appearing at the hearing in the event that the settlement was not approved in Charleston. (See Record, doc. 00091, Report of Commissioner Upon Commissioners Hearing.)

The necessary approval of the settlement by the Commissioner of Highways was, in fact, not

¹ The difficulties encountered during discovery resulting in this delay will be discussed in further detail below.

granted, and the settlement fell apart. The Dodsons filed a motion for sanctions against the State, seeking attorney's fees associated with mediation², expenses associated with the first Commissioners Hearing, and attorney's fees and expenses associated with the second Commissioners Hearing. (See Record, doc. 00093, Defendant's Reply to Report of Commissioner Upon Commissioners Hearing and Motion for Attorney's Fees and Costs.) The lower Court granted that motion, and awarded to the Dodsons \$7,703.20 in attorney's fees and expenses. (See Record, doc. 00105, Order awarding sanctions.) At the Dodsons' request, the Court scheduled the case for a jury trial on September 29, 2003. (See Record, doc. 00108, Defendant's Renewed Motion to Schedule Jury Trial; doc. 00110, Order Scheduling Pretrial and Jury Trial.) The State filed a motion to continue, based on the fact that the State's expert would be attending a conference at that time. (See Record, doc. 00112, Motion to Continue.) The trial was rescheduled for October, but did not occur due to the priority taken by a criminal trial. (See Record, doc. 00117, Order; doc. 00127, Order.)

The Dodsons filed a motion seeking leave to file an amended answer and state a counterclaim for inverse condemnation. (See Record, doc. 00128, Defendant's Motion for Leave to Amend Its Answer and File Counterclaim.) The State's construction project had placed a road through the middle of their property, leaving a .73 acre tract severed from the rest of the Dodson property. In their amended answer, the Dodsons alleged that this .73 acre tract was an uneconomic remnant, and sought a writ of mandamus to require the State to purchase this .73 acre tract. (See Record, doc. 00133, Exhibit A to Memorandum In Reply to Petitioner's Response to Defendant's

² The Dodsons learned from a Divisions of Highways staff attorney that the State sends representatives to mediation with only limited settlement authority, and approval for additional authority must come from Charleston. The Dodsons argued that the State's actions violated the mediation provisions of the Trial Court Rules, specifically, Rule 25.10.

Motion for Leave to Amend Its Answer and File Counterclaim.) The State opposed the motion but the Court nevertheless permitted the requested amendment, and this case ultimately was tried to a jury in December 2003. (See Record, doc. 00135, Order.)

The State's initial valuation of damages to this property owned by the Dodsons was \$64,700. The Dodsons did not challenge the State's measure of compensation for an easement in the amount of \$3,500. The portion of the Dodsons' property actually submitted to the jury was valued by the State at \$61,200. The jury found that the .73 acre tract in question was, in fact, an uneconomic remnant, and assessed total damages to the Dodsons in the amount of \$201,800, including \$73,000 for the .73 acre tract, which amount is \$140,600 greater than the State's initial valuation and deposit. (See Record, doc. 00153, Verdict Form; doc. 00163, Judgment Order.) Pursuant to the finding of the jury, the Court ordered the State to purchase the uneconomic remnant for \$73,000. (See Record, doc. 00163, Judgment Order.)

Following the entry of the Judgment Order, the Dodsons sought an award of attorney's fees and costs incurred during this action as permitted by the federal regulations applicable to the State's construction project, and, specifically, 49 C.F.R. § 24.107. (See Record, doc. 00164, Defendant's Motion for Attorney's Fees and Costs.) The Court denied the Dodson's motion on April 15, 2004. (See Record, doc. 00020, Order.) The Dodsons filed a motion to alter or amend judgment pursuant to Rule 59 of the West Virginia Rules of Civil Procedure, and that motion was denied on July 14, 2004. (See Record, doc. 00206, Defendant's Motion to Alter or Amend Judgments Concerning Attorney's Fees and Compound Interest; doc. 00216, Order Denying Defendant's Motion to Amend Judgments.) The Dodsons now appeal the trial court's denial of their motion seeking an award of attorney's fees and costs.

III. ASSIGNMENTS OF ERROR AND MANNER IN WHICH THEY WERE DECIDED IN THE LOWER COURT.

A. The lower court erred in failing to grant the Dodsons' Motion for Attorney's Fees and Costs.

On December 22, 2003, the Dodsons filed a Motion for Attorney's Fees and Costs, seeking attorney's fees and expenses pursuant to 49 C.F.R. § 24.107. That section provides for an award of attorney's fees and expenses to a landowner who prevails on an inverse condemnation claim. The trial court denied that motion by Order entered April 15, 2004. (See Record, doc. 00204, Order.)

B. The lower court erred in failing to grant the Dodsons' Motion to Alter or Amend Judgment regarding attorney's fees.

On April 29, 2004, the Dodsons filed a Motion to Alter or Amend Judgment pursuant to Rule 59 of the West Virginia Rules of Civil Procedure, requesting that the trial court reverse its April 15 Order denying their request for attorney's fees and expenses, and that the court further award those fees and expenses sought by the Dodsons.³ (See Record, doc. 00206, Defendant's Motion to Alter or Amend Judgments Concerning Attorney's Fees and Compound Interest.) The trial court denied the Dodsons' Motion to Alter or Amend Judgment by Order entered July 14, 2004. (See Record, doc. 00216, Order Denying Defendant's Motion to Amend Judgments.)

IV. AUTHORITIES RELIED UPON

A. United States Constitution

³ The Dodsons' Motion to Alter or Amend Judgment also sought the reversal of a trial court Order which denied the Dodsons' previous motion seeking an award of compound interest. However, that portion of the Court's Order regarding compound interest is not being appealed.

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V. **STANDARD OF REVIEW**

“[W]here the issue on an appeal from the circuit court is clearly a question of law or involving the interpretation of a statute,” this Court applies the de novo standard of review. Frank P. Bush, Jr. & Associates, L.C. v. Hammer, 600 S.E.2d 311, (W. Va. 2004). The standard of review with respect to motions to alter or amend a judgment is “dependent upon the nature of ‘the underlying judgment upon which the motion is based and from which the appeal . . . is filed.’” Strahin v. Cleavenger, 216 W.Va. 175, 603 S.E.2d 197 (2004). Because this appeal concerns the trial court's decision regarding a question of law and the interpretation of a statute, this Court's standard of review is de novo.

VI. **DISCUSSION OF LAW**

A. **Federal regulations applicable to the State's project permit an award of attorney's fees and expenses to a litigant prevailing on an inverse condemnation claim.**

The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (hereinafter “the Act”) applies to federal and federally assisted road construction projects. See P.L. 91-646 42 U.S.C. § 4601 et seq. and 49 C.F.R. § 24.101. As a condition of receiving federal assistance on a project resulting in the acquisition of real property, a State agency must agree to

comply with the terms of the Act. See 42 U.S.C. § 4655. West Virginia has adopted the principles set forth in the Act by statute. See W.Va. Code § 54-3-1 et seq.; Huntington Urban Renewal Authority v. Commercial Adjunct Co., 161 W.Va. 360, 367-68, 242 S.E.2d 562, 566 (1978). The project at issue in this litigation, which resulted in the condemnation of the Dodsons' property, was a federally assisted project subject to the provisions of the Act.

The Act provides, in part:

(8) If any interest in real property is to be acquired by exercise of the power of eminent domain, the head of the Federal agency concerned shall institute formal condemnation proceedings. No Federal agency head shall intentionally make it necessary for an owner to institute legal proceedings to prove the fact of the taking of his real property.

(9) If the acquisition of only a portion of a property would leave the owner with an uneconomic remnant, the head of the Federal agency concerned shall offer to acquire that remnant. For the purposes of this chapter, an uneconomic remnant is a parcel of real property in which the owner is left with an interest after the partial acquisition of the owner's property and which the head of the Federal agency concerned has determined has little or no value or utility to the owner.

42 U.S.C. § 4651.

A number of regulations also have been adopted, the purpose of which is to promulgate rules to implement The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 . . . in accordance with the following objectives:

(a) To ensure that owners of real property to be acquired for Federal and federally-assisted projects are treated fairly and consistently, to encourage and expedite acquisition by agreements with such owners, to minimize litigation and relieve congestion in the courts, and to promote public confidence in Federal and federally-assisted land acquisition programs;

(b) To ensure that persons displaced as a direct result of Federal or federally-assisted projects are treated fairly, consistently, and equitably so that such persons will not suffer disproportionate injuries as a result of projects designed for the benefit of the public as a whole; and

(c) To ensure that Agencies implement these regulations in a manner that is efficient and cost effective.

49 C.F.R. § 24.1.

With respect to claims for inverse condemnation, the regulations provide:

If the Agency intends to acquire any interest in real property by exercise of the power of eminent domain, it shall institute formal condemnation proceedings and not intentionally make it necessary for the owner to institute legal proceedings to prove the fact of the taking of the real property.

49 C.F.R. § 24.102(I).

The Dodsons filed a counterclaim against the State with respect to the .73 acre remnant which remained after the State's construction resulted in a road traveling through the middle of the Dodsons' property. The Dodsons alleged that this .73 acre tract was an uneconomic remnant, and sought to require the State to purchase this tract and have the jury determine the purchase price.

In the proceedings below, the State argued that the Dodsons were not entitled to an award of attorney's fees because the State's Petition sought to determine just compensation owed to the Dodsons for the taking and damage to their property, and therefore the Dodsons' counterclaim for inverse condemnation was unnecessary. (See Record, doc. 00181, Petitioner's Memorandum in Opposition to Defendant's Motion to Amend Judgment to Award Compound Interest and for Attorney's Fees and Costs.) However, this argument is flawed because neither the State's Petition nor the State's appraisal made any reference to apportioning damages to or purchasing the .73 acre remnant. (See Record, doc. 00006, Petition; see Trial Tr. 12/3/03 Tokarcik testimony, pp. 42-44 and Trial Tr. 12/3/03 Tokarcik testimony, p. 54). Because the State had no intention of purchasing the .73 acre tract, and the State's Petition did not contemplate the purchase of the .73 acre remnant, it was necessary for the Dodsons to seek affirmative mandamus relief through a counterclaim for

inverse condemnation in order to require the State to purchase the remnant. “[T]he proper course of action for an aggrieved property owner who believes his or her property has sustained damage as a result of highway construction or improvement by the DOH, after a reasonable time without appropriate action by the DOH, is to file a complaint in the circuit court seeking a writ of mandamus.” Shaffer v. W.Va. Dept. of Transportation, 208 W.Va. 673, 677, 542 S.E.2d 836, 841 (2000). In their counterclaim, the Dodsons were not merely seeking damages to the .73 acre remnant, but rather sought to compel the purchase of the remnant.

The issue of whether the .73 acre tract was an uneconomic remnant was submitted to the jury. The jury found that the .73 acre tract was an uneconomic remnant, and that the State should purchase that tract for the sum of \$73,000.00. (See Record, doc. 00163, Judgment Order). The Court entered an order adopting the findings of the jury on December 4th, 2003 and ordered the State to purchase the property for the sum of \$73, 000.⁴ (See Record, doc. 00153 Judgement Order) The State took no actions to appeal or otherwise challenge the Court's Judgment Order, dated December 4, 2003, and that Order is now final. Clearly, the Dodsons prevailed on their counterclaim for inverse condemnation.

The federal regulations provide an award of litigation expenses to a landowner who prevails on an inverse condemnation claim against an acquiring agency, which, in this litigation, is the State:

The owner of the real property shall be reimbursed for any reasonable expenses, including reasonable attorney, appraisal, and engineering fees, which the owner actually incurred because of a condemnation proceeding, if:

- (a) The final judgment of the court is that the Agency cannot acquire the real property by condemnation; or
- (b) The condemnation proceeding is abandoned by the Agency other than under an

⁴The Court ordered the State to purchase the .73 acre remnant on March 21, 2005. (Record, doc. 00245 Order).

agreed-upon settlement; or

(c) The court having jurisdiction renders a judgment in favor of the owner in an inverse condemnation proceeding or the Agency effects a settlement of such proceeding.

49 C.F.R. § 24.107.

Because the Court rendered a judgment in favor of the Dodsons on their counterclaim for inverse condemnation, pursuant to subdivision (c) above, the Dodsons are entitled to reimbursement of their reasonable expenses incurred in the litigation.

B. The trial court improperly denied the Dodsons' requests for attorney's fees.

The Dodsons filed their Motion for Attorney's Fees and Costs on December 22, 2003. In its Order denying that motion, the trial court ruled that the Dodsons were not entitled to an award of their attorney's fees and expenses. The Court based its decision on the fact that the .73 acre remnant was not an "uneconomic remnant" as defined by the federal regulations. The term "uneconomic remnant" is defined as "a parcel of real property in which the owner is left with an interest after the partial acquisition of the owner's property, and which the acquiring agency has determined has little or no value or utility to the owner." 49 C.F.R. § 24.2. Because the head of the acquiring agency, i.e. the Division of Highways, had not determined the .73 acre tract to be of little or no value or utility to the owner, the Court reasoned, there was "no inverse condemnation regarding the .73 acre parcel, and because such inverse condemnation is a prerequisite to the award of attorney's fees and costs under 42 U.S.C. § 4651, said fees and costs are not warranted as a matter of law."⁵ (4/15/04

⁵ 42 U.S.C. § 4651 states that "If the acquisition of only a portion of a property would leave the owner with an uneconomic remnant, the head of the Federal agency concerned shall

Order, pp. 2-3.)

The Dodsons found this reasoning to be erroneous, and filed a Motion to Alter or Amend Judgment, requesting that the trial court vacate its Order denying their motion for attorney's fees and costs. (See Record, doc. 00206, Defendant's Motion to Amend Judgments Concerning Attorney's Fees and Compound Interest.) The Dodsons argued that whether or not the .73 acre parcel is an uneconomic remnant within the scope of the federal statutes and regulations is irrelevant to the question of whether the Dodsons prevailed on a claim for inverse condemnation. (See Id.) There is no question that the head of the acquiring agency, here the Division of Highways, did not find the .73 acre parcel to have little or no value or utility to the owner. However, no regulation requires such a finding by the Division of Highways in order for a claim to be one for inverse condemnation. The two issues, i.e. inverse condemnation and uneconomic remnant, are independent of one another. Therefore, in denying the Dodsons' initial motion for attorney's fees, the Court improperly relied upon the definition of "uneconomic remnant" contained in 49 C.F.R. § 24.2.

In its Order denying the Dodsons' Motion to Alter or Amend Judgment, the Court did not address the question raised in the Dodsons' Motion to Alter or Amend Judgment, but rather based its denial of that motion on a new legal theory. (See Record, doc. 00216, Order Denying Defendant's Motions to Amend Judgments.) In the July 14 Order, the Court found that the Dodsons did not prevail on an inverse condemnation claim because the litigation had already been initiated by the State. The Court stated that if it "would now award Defendant attorney's fees based upon the

offer to acquire that remnant. For the purposes of this chapter, an uneconomic remnant is a parcel of real property in which the owner is left with an interest after the partial acquisition of the owner's property and which the head of the Federal agency concerned has determined has little or no value or utility to the owner."

Defendant's argument of having won an inverse condemnation claim arising from a counterclaim filed in response to the State's condemnation proceedings, then future Defendants in condemnation proceedings could possibly file inverse condemnation counterclaims to use such as [sic] argument for the award of attorney's fees. This is a precedent this Court is not willing to set." (7/14/04 Order, p. 6.) The Court's reasoning in this regard is also flawed.

C. **The Dodsons filed and prevailed on an inverse condemnation claim, and are therefore entitled to an award of attorney's fees and costs.**

An inverse condemnation claim occurs when a landowner must "institute an action to establish the fact of a taking, the existence of which the Government denies." Pete v. United States, 569 F.2d 565 (Ct. Cl. 1978). If successful, the plaintiff may obtain a determination of the value of its property and compensation. See id. It is clear from the appraisal prepared by the State's appraiser that the State's assessment of damage for the taking of the Defendant's property did not include an element of damages to the .73 acre tract which the jury found was rendered valueless by the State's take. (See Trial Tr. 12/3/03 Tokarcik testimony p. 53) The State's appraiser did testify that she considered diminution of value to the residue in her appraisal of the Dodson property. She testified that the property remaining was diminished by 3.4 percent (See Trial Tr. 12/3/03 Tokarcik testimony, p. 51.) Her testimony indicates that this value was based either on a cost to cure due to a loss of parking spaces in the front of the building (See Trial Tr. 12/3/03 Tokarcik testimony, p. 50) or it was based on additional rent loss (See Trial Tr. 12/3/03 Tokarcik testimony, p.50). She indicates she assigned no value to damage to the mobile home lot by cutting it in half and isolating the .73 acre parcel because at the time she examined the property it wasn't being used (See Trial Tr.

12/3/03 Tokarcik testimony, p. 54). She apparently gave no thought to the question of whether it had been used at other times or whether it would be used in the future or whether the isolating of almost three quarters of an acre of property would destroy its value to the business.

Inquiry was made of the State's appraiser as to whether she considered the possibility of an uneconomic remnant. She agreed that it was her duty to consider the issue (See Trial Tr. 12/3/03 Tokarcik testimony, p. 6, lines 3-8) but she denied knowing anything about the duty of the agency to offer to buy it. (See Trial Tr. 12/3/03 Tokarcik testimony, p. 6, line 20 - p. 7, line 4).

The duty of the State with regard to uneconomic remnants is clear and unambiguous. The Uniform Relocation Assistance and Real Property Acquisition Policy Act of 1970, (P.L. 91-646 42 U.S.C. § 4601, et seq.) as passed by the United States Congress governs the taking of private property in any federally assisted program (49 C.F.R. § 24.2) Under that act, the State of West Virginia maintains and follows a Uniform Act Appraisal Guide. A copy of the section applicable to uneconomic remnants was supplied by the State as a part of discovery. That guide states in part:

"The appraiser should consider the possibility of uneconomic remnants the agency must offer to buy any remainder that is of little or no value or utility to its owners. A remnant parcel can have a substantial value and still be an uneconomic remainder to the owner".
(See Trial Tr. 12/3/03 Tokarcik testimony, pp. 5-6).

The State's appraiser, on cross-examination, when confronted with this provision, did not deny its legitimacy, but indicated that she had nothing to do with the issue. (See Trial Tr. 12/3/03 Tokarcik testimony, pp. 6-7). Obviously, if she did not bring the issue to the attention of the Department of Highways because she did not consider the .73 acre parcel an uneconomic remnant, the State had no way of considering the issue. As a result, the State failed to buy the .73 acre parcel even though as determined by the jury in this action and as ordered by the Court following that

verdict, it should have purchased the parcel.

The State's Route 9 expansion project did not contemplate taking the .73 acre tract. (See Record, doc. 00006, Petition and attachments.) Likewise, the State's Petition did not contemplate the taking of the .73 acre tract. (See Id.) Accordingly, the Dodsons were required to initiate a counterclaim for inverse condemnation in order to recover damages to and force the State to purchase the .73 acre tract. The Dodsons argued that the .73 acre tract had little or no value after the State's take, and the jury agreed. This Court entered judgment in favor of the Dodsons, and as a result, the State was ordered to and did in fact purchase that parcel. The landowner prevailed on its claim for inverse condemnation.

In this case, the action filed by the State did not condemn or apportion damages to the .73 acre tract, and therefore the Dodsons' counterclaim for inverse condemnation was necessary in order to force the condemnation of that tract and to obtain compensation for its taking. (See Record, doc. 00006, Petition; see Trial Tr. 12/3/03 Tokarcik testimony, pp. 42-44 and Trial Tr. 12/3/03 Tokarcik testimony, p. 54). In fact, the State took no action to compensate the Dodsons for the .73 acre tract, and therefore the Dodsons were required to initiate the litigation with respect to that piece of property. The jury found that there was a taking of the .73 acre tract, and that the Dodsons are entitled to compensation for that taking. Therefore, the Dodsons prevailed on their inverse condemnation claim, and are entitled to an award of attorney's fees and costs.

D. The Court should construe the applicable statutes and regulations to avoid an absurd result.

Although the Dodsons maintain that the definition of "uneconomic remnant" is irrelevant

to the determination of whether they prevailed on a claim for inverse condemnation, the strict reading of the statutes advanced by the State (and by the trial court in its Order denying the Dodsons' initial Motion for Attorney's Fees and Costs) contradicts the legislative intent and would lead to an absurd result.

The statute regarding uneconomic remnants, 42 U.S.C. § 4651, states:

If the acquisition of only a portion of a property would leave the owner with an uneconomic remnant, the head of the Federal agency concerned shall offer to acquire that remnant. For purposes of this chapter, an uneconomic remnant is a parcel of real property in which the owner is left with an interest after the partial acquisition of the owner's property and which the head of the Federal agency concerned has determined has little or no value or utility to the owner.

42 U.S.C. § 4651(9).

The applicable federal regulation, 49 C.F.R. § 24.102, entitled "Basic acquisition policies," states:

Uneconomic remnant. If the acquisition of only a portion of a property would leave the owner with an uneconomic remnant, the Agency shall offer to acquire the uneconomic remnant along with the portion of the property needed for the project. (See § 24.2.)

49 C.F.R. § 24.102.

The section referred to, 49 C.F.R. § 24.2, provides definitions, and states the following with respect to uneconomic remnants:

Uneconomic remnant. The term "uneconomic remnant" means a parcel of real property in which the owner is left with an interest after the partial acquisition of the owner's property, and which the acquiring agency has determined has little or no value or utility to the owner.

49 C.F.R. § 24.2.

It is well-settled that "[a] statute is interpreted on the plain meaning of its provision in the statutory context, informed when necessary by the policy that the statute was designed to serve."

W.Va. Human Rights Commission v. Garretson, 196 W.Va. 118, 123, 468 S.E.2d 733, 738 (1996).

Further, “[i]n expounding a statute, [the Court] must not be guided by a single sentence, but look to the provisions of the whole law, and to its object and policy.” Id., n. 5 (first alteration in original).

“In addition, the plain meaning of a statute is normally controlling, except in the rare case in which literal application of a statute will produce a result demonstrably at odds with the intentions of the drafters.” Id. Where “a literal interpretation of the language used in the statute would lead to an absurd result, it is [the Court’s] duty to construe the statute so as to avoid such result and adopt a reasonable construction.” State ex rel. McLaughlin v. Morris, 128 W.Va. 456, 37 S.E.2d 85 (1946).

The Court “may venture beyond the plain meaning of a statute in the rare instances in which there is a clearly expressed legislative intent to the contrary . . . ; in which a literal application would defeat or thwart the statutory purpose . . . ; or in which a literal application of the statute would produce an absurd or unconstitutional result” State ex rel. Frazier v. Meadows, 193 W.Va. 20,24, 454 S.E.2d 65, 69 (1994) (citations omitted).

The State’s interpretation of the definition of “uneconomic remnant” contained in 42 U.S.C. § 4655(9) and 49 C.F.R. § 24.2 would lead to an absurd result, a construction which is not permitted. If the head of the agency involved must find the parcel to have little or no value or utility for the parcel to qualify as an uneconomic remnant, and the landowner is required to accept the agency head’s conclusions, there would be no reason for the agency head ever to determine that a parcel is an uneconomic remnant. Indeed, there would never be any consequences for an agency’s improper failure to designate a parcel as an uneconomic remnant, and no relief for wronged landowners, like the Dodsons, left with valueless parcels of real estate which the agency refuses to acquire. Such a construction could lead to consistent and repeated unfair treatment of landowners, and a landowner

might never receive compensation for an uneconomic remnant. This result would be absurd, and certainly could not have been the intent of Congress in drafting the Act.

One needs only to look at the facts in this case to see how unfair and indeed how unconstitutional the State's position is. Here a jury found that the State left the Dodsons with an uneconomic remnant. The Court ordered the State to purchase it. The State's appraiser, however, testified that she did not even consider the issue. (See Trial Tr. 12/3/03 Tokarcik testimony p. 54). Since she did not consider the issue, she obviously never brought the issue to the attention of the head of the agency. If the State's interpretation of the statute stands, other landowners could be left with the destruction of a portion of their property to the point where it has no value because of the State's condemnation of other property. If the appraiser fails to do his or her job, and fails to determine the property to be without value, the owner of the property would be left with a valueless parcel; and, absent a counterclaim like that filed in this action for inverse condemnation, the land would effectively be taken by the State with no remedy left the landowner. Such a result is not only absurd, but it amounts to an unconstitutional taking of property without providing just compensation. (See United States Constitution Amendment V and West Virginia Constitution Article III §9)

The legislature specifically included a statute setting forth the policies it sought to achieve in the Act, entitled "Uniform policy on real property acquisition practices."

In order to encourage and expedite the acquisition of real property by agreements with owners, to avoid litigation and relieve congestion in the courts, to assure consistent treatment for owners in the many Federal programs, and to promote public confidence in Federal land acquisition practices, heads of Federal agencies shall, to the greatest extent practicable, be guided by the following policies

42 U.S.C. § 4651

Notably, the Act mandates that "[i]f any interest in real property is to be acquired by exercise

of the power of eminent domain, the head of the Federal agency concerned shall institute formal condemnation proceedings. No Federal agency shall intentionally make it necessary for an owner to institute legal proceedings to prove the fact of the taking of his real property.” Id. These stated purposes, together with the absurd results produced by the State's interpretation, indicate that whether a parcel is an “uneconomic remnant” could not have been intended to be solely within the acquiring agency's discretion, and without review by the courts. An interpretation of the Act which would include an “uneconomic remnant” as a parcel determined to be so by a jury would be consistent with the purpose of the Act, and would prevent an absurd result. Indeed, based on the prior decisions of this Court, it is under an affirmative duty to avoid an absurd result. See State ex rel. McLaughlin v. Morris, 128 W.Va. 456, 37 S.E.2d 85 (1946); Mitchell v. Broadnax, 208 W.Va. 36, 46-7, 537 S.E.2d 882, 892-93 (2000). Accordingly, this Court should avoid such a result, and find that the trial court erred in its denial of the Dodsons' Motion for Attorney's Fees and Costs.

E. An award of attorney's fees and costs would benefit property owners in future condemnation proceedings.

The trial court below was concerned about setting a precedent for property owners in future condemnation cases. However, the State's conduct throughout this litigation demonstrates that such relief should be available to future litigants in the event that the State fails to conduct itself properly during the entire condemnation process.

Discovery began in this action with the State's refusal to provide much of the documentation requested by the Dodsons regarding the appraisal process, including comparables used by the State's appraiser in determining the value of the land condemned. The Dodsons were forced to file a

Motion to Compel to obtain the discovery, which was referred to a Discovery Commissioner for consideration. (See Record, doc. 00033, Motion to Compel; doc. 00045, Discovery Commissioner Reference Order.) At the Discovery Commissioner proceeding, the State conceded that it would supply some of the information requested. The Discovery Commissioner recommended, and the trial court subsequently agreed, that the State should be required to produce the remaining items requested by the Dodsons. (See Record, doc. 00054, Report and Recommendation of Discovery Commissioner.) The Court entered the Order submitted by the Discovery Commissioner on March 28, 2001. (See Record, doc. 55, Order.)

The parties attended mediation on December 4, 2001. The Dodsons were later awarded their attorney's fees incurred during this mediation as a result of the State's failure to send a representative with ultimate settlement authority. (See Record, doc. 00105, Order.) The Dodsons were also awarded expenses incurred as a result of the first canceled Commissioner's Hearing, postponed due to a car accident involving the State's attorney and representative, and their attorney's fees and expenses incurred as a result of a second canceled Commissioner's Hearing, at which the parties reached a "tentative" settlement agreement on which the State later reneged. (Id.)

In addition to the shabby treatment received from the State during this litigation, it is clear based on the jury's verdict that the State at the outset even failed to make anything like a fair assessment of the damage to the Dodsons' property. As mentioned above, the State's appraisal assessed a value of \$64,700 for damages as a result of the Route 9 expansion project, including \$3500 for an easement which was not contested and including the placement of a road through the middle of the Dodsons' property. (See Record, doc. 00007, Notice of Deposit.) The jury awarded damages in the amount of \$201,800, including \$73,000 for the purchase of the .73 acre remnant.

(See Record, doc. 000153, Verdict Form; doc. 000163, Judgment Order.) The State had apportioned no compensation for damages to the .73 acre remnant. Had the Dodsons not filed their counterclaim, the State would not have been ordered to purchase the .73 acre remnant.

The State's conduct throughout this construction project and this litigation demonstrates the need for the federal regulations which entitle the Dodsons to an award of attorney's fees. The State repeatedly disregarded its obligations under the law and conducted itself improperly. Part of that misconduct was in the failure to offer to the Dodsons adequate compensation for the damage to the condemned property, as well as the damage to the residue. However, 49 C.F.R. § 24.107 provides a remedy for that portion of the State's misconduct relating to the .73 acre remnant. The Dodsons are entitled to an award of attorney's fees and costs incurred in this litigation because they had to take the initiative to force the State to purchase the .73 acre remnant and to fulfill its obligations under the law. The Dodsons respectfully request that this Court enforce the applicable federal regulations and award to the Dodsons the relief to which they are entitled.

VII. CONCLUSION

The lower court erred in denying the Dodsons' Motion for Attorney's fees and costs, and it erred in denying their subsequent Motion to Amend the Judgment. Federal regulations applicable to the State's taking mandate the reimbursement of attorney's fees where an aggrieved landowner successfully seeks just compensation through inverse condemnation proceedings. The Dodsons were forced to seek relief via inverse condemnation and, by a clear and specific jury verdict, they prevailed on the merits of their claim. Following the verdict, the lower court ordered that the State purchase and receive transfer of the .73 acre parcel—an order that would not have happened but for

the filing of the Dodsons' counterclaim alleging that the parcel was an uneconomic remnant.


The purpose of the federal act implemented by West Virginia law is to make the damaged landowner whole. Disturbing the jury's findings regarding the uneconomic remnant would render the policy behind the law meaningless and would offend constitutional principles. Therefore, the Dodsons, supported by both law and policy, are entitled to the reimbursement of their attorney's fees.

VIII. RELIEF PRAYED FOR

WHEREFORE, for the foregoing reasons, the Appellant, Dodson Mobile Home Sales & Services, Inc., respectfully requests that this Court grant its Appeal, that the Court reverse the judgment of the lower court regarding the Appellant's requests for attorney's fees and costs, order the lower court to enter an order requiring the Appellee to pay the Appellant's attorney's fees and costs, and that the Court grant all other relief in the Appellant's favor it deems proper.

Respectfully Submitted,

Appellant, Dodson Mobile Home Sales & Services, Inc.
By Counsel


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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 32558

**WEST VIRGINIA DEPARTMENT OF TRANSPORTATION,
DIVISION OF HIGHWAYS, a West Virginia Corporation, and
FRED VANKIRK, WEST VIRGINIA COMMISSIONER OF HIGHWAYS
Plaintiffs Below, Appellees.**

vs.

**DODSON MOBILE HOMES SALES AND SERVICES, INC.,
a West Virginia Corporation,
Defendant Below, Appellant.**

Honorable Christopher C. Wilkes
Circuit Court of Berkeley County
Civil Action No. 95-C-329

CERTIFICATE OF SERVICE

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I, Wm. Richard McCune, Jr., Esq., of the law firm of *Wm. Richard McCune, Jr., P.L.L.C.*, hereby certify that a true and correct copy of the foregoing **BRIEF OF THE APPELLANT** was served upon the following by U.S. First-Class mail, postage pre-paid, this 30th day of June, 2005:

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