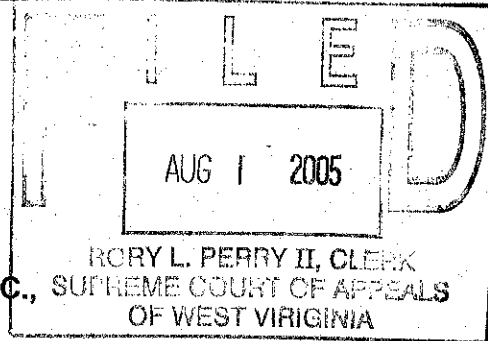


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 32558



**DODSON MOBILE HOMES SALES AND SERVICES, INC.,
A West Virginia Corporation,**

APPELLANT,

-vs-

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

APPELLEES.

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

BRIEF OF THE APPELLEES

Counsel for Appellees

Timothy M. Sirk, Esq.
WV Bar #3428
P. O. Box 602
Keyser, WV 26726
(304) 289-3521

Counsel for Appellant

William Richard McCune, Jr., Esq.
WV Bar #2429
115 West King Street
Martinsburg, WV 25401
(304) 262-2500

AUTHORITIES RELIED UPON

A. West Virginia Constitution

West Virginia Constitution Article III § 9 9

B. State Cases

Shaffer vs W. Va. Dept. of Transportation, 208 W. Va. 673, 542 S. E. 2d 836 (2000) 5

Potomac Valley Soil Conservation District vs Wilkins,
188 W. Va. 275, 423 S. E. 2d 884 (1992)..... 8

B & O RR Co. vs Pittsburg, W. & K. R. Co., 17 W. Va. 812 (1881)..... 8

State ex rel. Henson vs W. Va. Dept. of Transportation,
203 W. Va. 229, 506 S. E. 2d 825 (1998)..... 9

Aetna Casualty & Surety Co. vs Pitrolo, 176 W. Va. 190, 342 S. E. 2d 156 (1986) 10

C. State Statues

W. Va. Code § 54-2-16a 4

W. Va. Code § 54-3-1 4

D. Federal Statues

42 U. S. C. § 4601 et seq..... 4

42 U. S. C. § 4651 et seq..... 7, 9

E. Federal Rules

49 C. F. R. § 24.101 4

49 C. F. R. § 24102(1)..... 5

49 C. F. R. § 24.107 6

I. KIND OF PROCEEDING AND NATURE OF THE RULING IN THE LOWER TRIBUNAL

On the 22nd day of December, 2003, the Appellant served a copy of its Motion for Attorneys Fees and Costs, Memorandum in Support and Proposed Order upon Appellees. On the 23rd day of December, 2003, the Appellant served its Motion to Amend Judgment to Award Compound Interest, Memorandum in Support, and Proposed Order. Appellees served its Supplement to Appellant's Motion for Attorney's Fees and Costs on January 5, 2004. In accordance with the Order of this Court entered December 29, 2003; the Appellees submitted its memorandum in opposition to these motions. By Orders dated April 15, 2004, this Court DENIED the Appellant's Motion for Attorney Fees and Costs, and DENIED the Motion to Award Compound Interest.

The Appellant filed a Motion to Amend or Alter Judgments Concerning Attorney's Fees and Compound Interest on April 29, 2004.

II. STATEMENT OF THE FACTS OF THE CASE

These motions arise out of a proceeding in eminent domain initiated by the West Virginia Division of Highways on August 21, 1995 to determine just compensation to Dodson Mobile Home Sales and Services, Inc. for the acquisition of temporary and permanent right-of-way and easements for the construction of relocated W. Va. Route 9 in Berkeley County, West Virginia, as well as damage to the residue of the Dodson property net of benefit to the residue. The Division sought to acquire a little over an acre (1.08 acres of controlled access, noncontrolled access and permanent utility easement) of a total of 4.3 acres own by the Appellant. On July 21, 1995, Appellees paid into Court \$61,200.00, its estimate of just compensation for the take plus damages to the residue net of benefit, and obtained right-of-entry to the lands sought to be condemned.

After two scheduled but unsuccessful Commissioners' hearings, one of which resulted in costs being assessed against Appellees, this matter was tried before a jury of twelve freeholders in December 2003, resulting in a verdict awarding Appellant a total of \$201,800.00.

Subsequent to the verdict and entry of judgment on the verdict by this Court, Appellant brought its motions to amend the judgment to award compound interest on the entire unpaid balance of the verdict, and to award attorneys fees and costs for the entire preparation and trial of all issues in the case. These motions were denied by this Court.

III. STANDARD OF REVIEW

Appellees do not argue the application of de novo review as proposed by the Appellants.

IV. ARGUMENT

The State and Federal laws and regulations offered as support for the Appellant's position are, in fact, either contrary to the position offered or simply inapplicable.

W. Va. Code § 54-2-16a provides that the Applicant shall pay all "costs" associated with the condemnation. As evidenced by the long standing and well settled practice in all circuits of the State, the Applicant pays the court costs, court reporter fees, filing fees, and other "costs". "Costs" as it is consistently in the jurisprudence of this and other jurisdictions, is a separate and distinct item from "attorney fees". Appellant has not, and cannot, cite any statutory support or other legal precedent defining "costs" to include attorney fees.

Appellees do not despite West Virginia's adoption of the principles of the Uniform Relocation Assistance and Real Property Acquisition Policies Act (Act) 42 U.S.C. § 4601 et seq. and 49 C.F.R. § 24.101 as per W. Va. Code § 54-3-1 et seq. Nor do Appellees deny federal funds were a part of this project and therefore the Act is applicable. The Act, however, does not support the Appellant's position.

Act 42 U.S.C. § 4601, provides "... 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 property." (emphasis added). It is no less than obvious the Appellant did not institute any legal proceedings to prove the fact of the taking. The West Virginia Department of Transportation, Division of Highways (DOH) instituted the suit and the Appellant merely filed a counterclaim

within the same legal proceeding, a legal proceeding which had already been instituted and in which they were already a party Respondent.

If the Appellant did not institute a legal proceeding, it is not necessary to address whether the DOH "intentionally" made it necessary to institute a legal proceeding.

Appellant's reference to 49 C.F.R. § 24-102(1) is similarly answered. The DOH complied with the mandates of this section by instituting formal legal proceedings as required. Again, the landowner did not institute any legal proceedings but merely filed a counterclaim in the existing condemnation action instituted by the DOH which resulted in an award of damages for the .73 acre uneconomic remnant. There was one, and only one, legal proceeding.

It is very interesting, and of critical importance, to examine the language of Shaffer vs West Virginia Department of Transportation, 208 W. Va. 673, 542 S. E. 2d 836, which the Appellant curiously offers as support. In Shaffer, the Court held "the proper course of action... after a reasonable time without appropriate action by the DOH is to file a complaint in the circuit court..." (emphasis added)

First, the Appellant never did file a complaint in the circuit court, which is again tantamount to saying the Appellant never did institute any legal proceedings.

Second, the Shaffer holding clearly contemplates a situation where the landowner is forced to institute legal proceedings because of a failure by the DOH to institute legal proceedings. This is not the case here as the DOH did in fact institute legal proceedings before the landowner was forced to do it.

The trial Court agreed with the DOH's position. The reasoning and conclusions set forth on page 6 of the July 14, 2004 order is clear and correct. This was not an inverse condemnation proceeding absent a condemnation proceeding or an inverse condemnation distinct from the condemnation proceeding.

The trial Courts public policy argument is also noteworthy. In future condemnations, landowner's counsel could file counterclaims seeking to compel the State to purchase what the

landowner considers "uneconomic remnants" where there may be no basis in fact or law for such counterclaims and in that way be compensated by the State for what is in essence simply defending the property owner against a petition for condemnation.

The major flaws and deception in the argument of the Appellant is that the Appellant's counsel pretends that if not for the counterclaim, no legal representation would have been necessary, thus no attorney fees incurred. This is absurd. A condemnation was filed and the Appellant retained Mr. McCune as counsel to represent him as a Respondent in the condemnation action. Mr. McCune was therefore required to file an answer to the Petition, engage in discovery, attend the commissioners' hearing and then try the case. There were necessary services he provided and would have provided in any event, with or without the counterclaim.

The truth is the counterclaim required some additional time, effort, and expense but from this writer's perspective and experience, one could say at least 75% of the attorney fees would have been incurred in defending the condemnation even without the filing of the counterclaim.

The amount of attorney fees requested is shocking to the conscience. On a contingency arrangement, Mr. McCune would have received 1/3 of \$200,000.00 or \$60,000.00. Assuming for the sake of argument, attorney fees were to be awarded, an hourly rate is not appropriate and is by and standards outrageous and completely without justification.

The Appellant claims that costs and attorneys fees associated with the Appellant's preparation and trial of the entire condemnation action are warranted because a small portion of the case involved what the Appellant mischaracterizes as an inverse condemnation. The Appellant cites no state law supporting his claim, but rather founds his claim that an award of attorneys fees and costs may be made in inverse condemnation cases upon federal law providing for awards of such costs in such proceedings, citing 49 C.R.F. 24.107. Specifically,

Appellant argued¹ that Appellees were obliged under federal law to *offer to acquire* any uneconomic remnant. Because the *jury* found that the .73 acre remainder was an uneconomic remnant, Appellant argues that its counterclaim converts the case into an inverse condemnation.

Appellant's argument is flawed for several reasons. First, Appellees sought in the Petition to have a determination of the value of the take *and damages to residue*². It was not in dispute that the .73 acre tract was a residue or remainder of the parcel or tract condemned. Rather, Appellant argues that because Appellees did not *offer to acquire* the .73 acre remainder (as opposed to paying for damages to the remainder), that Appellees therefore violated the requirements of the Federal Relocation Assistance and Real Property Acquisitions Policies Act of 1970, 42 U.S.C. § 4651 et seq.

Appellant appears to read this federal law to require that Appellees must *initially* offer to acquire residues *ultimately determined by a trier of fact* to be uneconomic remnants, and argues that a counterclaim was necessary to obtain just compensation for the remnant. Not only was the counterclaim unnecessary, but Appellant demonstrably misreads the federal requirement upon which Appellant bases its argument. Section 4651 of the Federal Act clearly and expressly conditions the requirement upon a finding *by the head of the agency* that a residue is an uneconomical remnant:

(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.

¹ Memorandum in Support of Appellant's Motion for Leave to Amend its Answer and File Counterclaim, page 2.
² Application of the West Virginia Department of Transportation, Division of Highways, A West Virginia Corporation, and Fred VanKirk, Acting West Virginia Commissioner of Highways, to Condemn Land for Public Use, Filed in the Circuit Court of Berkeley County, West Virginia, Paragraph 12 and Prayer for Relief.

Federal law requires that an agency offer to acquire a parcel of real property that an owner is left with after a partial acquisition **if the head of the federal agency concerned determines** the remaining parcel to have little or no residual value or utility to the owner. That is, under §4651, when a federal agency acquires part of a real property **and** the head of the federal agency determines that the residue is an uneconomical remnant, the agency is required to offer to acquire the remnant. Section 4655 requires that state agencies using federal funds to make partial acquisitions of real property follow the same acquisition procedures to the extent allowed under state law³; i.e., when the **head of the acquiring state agency** determines that a residue from a partial take is an uneconomic remnant, the agency shall offer to acquire the remnant. Where, however, the agency determines that the remnant has residual value, it complies with state and federal law by paying compensation for damage to the residue as determined by a jury. These provisions of federal law for federally funded projects, by conditioning the requirement to acquire a residue upon the agency's determination that the residue is an uneconomic remnant, are entirely consonant with the law in West Virginia and the great majority of jurisdictions which vests in the acquiring agency discretion in determining the quantity of real property necessary for public use.⁴ It bears repeating that, in the instant case,

³ (a) Notwithstanding any other law, the head of a Federal agency shall not approve any program or project or any grant to, or contract or agreement with, an acquiring agency under which Federal financial assistance will be available to pay all or part of the cost of any program or project which will result in the acquisition of real property on and after January 2, 1971, unless he receives satisfactory assurances from such acquiring agency that--

(1) in acquiring real property it will be guided, to the greatest extent practicable under State law, by the land acquisition policies in section 4651 of this title and the provisions of section 4652 of this title, and

(2) property owners will be paid or reimbursed for necessary expenses as specified in sections 4653 and 4654 of this title.

(b) For purposes of this section, the term "acquiring agency" means--

(1) a State agency (as defined in section 4601(3) of this title) which has the authority to acquire property by eminent domain under State law, and

(2) a State agency or person which does not have such authority, to the extent provided by the head of the lead agency by regulation. 42 U.S.C. §4655.

⁴ See, e.g., *Potomac Valley Soil Conservation District v. Wilkins*, 188 W.Va. 275, 423 S.E.2d 884 (1992). Also *B. & O. RR Co. v. Pittsburg, W. & K. R. Co.*, 17 W. Va. 812 (1881), "Private property can only be taken for public use, and no more of such property can be taken than is necessary for such use."

Appellant's own appraiser found that the residue was damaged only 90%, and thus had 10% residual value.

Neither the funding agency, the Federal Highway Administration, nor the acquiring agency, the West Virginia Division of Highways, determined that the .73 acre residue was an uneconomical remnant. Moreover, the jury did not find that either of these agencies made such a determination. Therefore, Appellant cannot show that 42 U.S.C. §4651 required Appellees to offer to acquire the residue rather than to seek a determination of any damages, as required at state law. Since Appellant cannot demonstrate Appellees' duty to offer to acquire under §4651, it cannot show that any action in the nature of a mandamus was necessary for just compensation. Without such a showing, Appellant lacks the "inverse condemnation" necessary to support its claims for costs and attorney fee's.

Second, in West Virginia inverse condemnation cases take the form of proceedings in mandamus⁵. In the instant case, no mandamus was necessary; the Appellees sought assessment of damages to the .73 acre residue in the Petition. Appellant's appraiser found 10% residual value in .73 acre remainder (90% damage). Appellees has estimated and paid compensation for 90% damage to residues (e.g. landlocked parcels having value only when aggregated with adjoining parcels), and juries have included such damage amounts in awards, in scores of condemnation cases across the state. Nothing in state law prohibits a jury from finding that a residue is damaged 100%. The Appellant had at all times, with or without the assertion of a counterclaim, the right to argue that the .73 acre parcel was 100% damaged (notwithstanding that Appellant's own appraiser limited the damages to 90%). In the instant case Appellees and Appellant had a good faith dispute concerning the damage to and value of the .73 acre residue after the take. Neither the Appellant's assertion of a "counterclaim" nor the jury's finding that the .73 acre residue is an uneconomic remnant alters the amount of damages

⁵ W. Va. Const. Art. III, §9. See, e.g. *State ex rel. Henson v. WVDOT, DOH*, 203 W.Va. 229, 506 S.E.2d 825 (1998).

available as compensation for the residue, nor do the counterclaim or the jury's verdict convert the case into an inverse condemnation.

Third, the issue involving the .73 acre remainder comprised only a small part of the case. However, the Appellant appears to seek attorney's fees and costs associated with the preparation and trial of the entire case, involving as it did the take, damage to the residue other than the .73 acre parcel and damages associated with a permanent utility easement. Under the *Aetna Casualty* analysis cited by the Appellant⁶, the time and labor submitted by the Appellant greatly exceeds the amount properly allocable to the preparation and trial of the counterclaim that Appellant mischaracterizes as an "inverse condemnation". Moreover, the Appellant makes no convincing argument that the issues involved in the trial of this case were any more novel or difficult than those in scores of cases tried across the case involving the Division's partial acquisition of commercial property. Accordingly, even under *Aetna Casualty*, Appellant is not entitled to an award of costs and attorneys fees."

Second Argument

Appellant argues that an inverse condemnation occurred, and therefore the Appellants should be entitled to attorney fees. In addition to the arguments already made by the Appellees in opposition to the latest motion for attorney fees (and in addition to the grounds already cited by this Court in its Order denying attorney fees and costs), counsel would again note that inverse condemnation is brought in West Virginia by mandamus against the Commissioner, which was not done in this case. The Appellants did not have to file a separate action to have the Court and the jury consider the question of damages to the residue. Therefore, the Appellant was compensated fully for the take and damages, if any, to the residue within the framework of the present eminent domain action.

⁶ *Aetna Cas. & Surety Co. v. Pitrolo*, 176 W.Va. 190, 342 S.E.2d 156 (1986). Even if Appellant had a supportable claim for costs and attorney fees for the counterclaim, Appellant has provided the court with no means to winnow these costs and fees properly attributable to the counterclaim from the costs associated with the larger condemnation. The court cannot properly be asked to speculate as to allocation of these costs and fees.

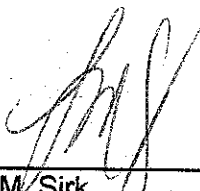
Appellant argues, in its Memorandum in Support of its Motion to Alter or Amend Judgments Concerning Attorney's Fees and Compound Interest, that it should be entitled to compound interest due to the time elapsed between the time of take and the time of trial. This Court already has made the specific finding, in its Order dated April 15, 2004, that the Appellees were not responsible for any undue delay in the proceedings. The Court made that finding aware of all the circumstances surrounding the discovery issues and the two attempted Commissioners' hearings. Without responding to each of the Appellant's factual recountings in its Memorandum before the Court at this time, Appellees would like to note that they disagree with the Appellants on at least one point: the Appellees did not renege on its offer of settlement. The Appellees and Appellants reached a tentative settlement in October 2002, subject to approval by the Appellees' representatives in Charleston. The Special Commissioner made this finding in his report to the Court on the Commissioners' hearing scheduled in October 2002.

V. PRAYER FOR RELIEF

The Appellant invites this Court to make what is clearly under federal and state law reversible error. For the reasons stated, the Appellees respectfully pray that the Appellant's Petition for Appeal be denied.

THE WEST VIRGINIA DEPARTMENT OF
TRANSPORTATION, DIVISION OF
HIGHWAYS,

By counsel,



Timothy M. Sirk,
WVSB No. 3428
West Virginia Department of Transportation
Division of Highways
P. O. Box 602
Keyser, WV 26726
(304) 289-3521

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 32558

DODSON MOBILE HOMES SALES AND SERVICES, INC.,
A West Virginia Corporation,

APPELLANT,

-vs-


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

APPELLEES.

CERTIFICATE OF SERVICE

I, Timothy M. Sirk, counsel for the Appellees, does hereby certify that I have served a true and correct copy of the *Brief of the Appellees*, by depositing same in the United States mail, postage prepaid, this 30th day of July, 2005, addressed as follows:

William R. McCune, Jr., Esq.
Attorney at Law
115 West King Street
Martinsburg, WV 25401



Timothy M. Sirk
WVSB #3428
West Virginia Department of Transportation
Division of Highways
P. O. Box 602
Keyser, WV 26726
(304) 289-3521