

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

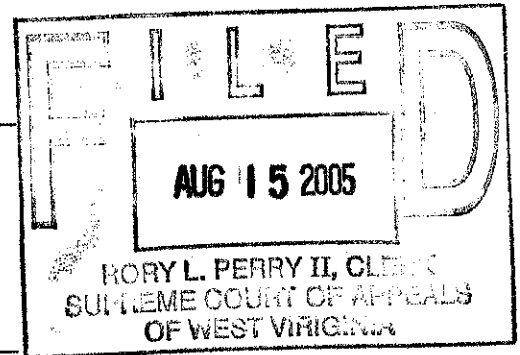
No. 32558

**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



APPELLANT'S REPLY TO APPELLEE'S BRIEF

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APPELLANT'S REPLY TO APPELLEE'S BRIEF
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I. KIND OF PROCEEDING AND NATURE OF THE RULING BELOW

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. INTRODUCTION

This is a reply brief of the Appellant, Dodson Mobile Homes Sales & Service, Inc. (hereinafter "the Dodsons"), filed in support of its appeal of an order of the Circuit Court of Berkeley County, denying the Dodsons' motion to alter or amend a judgment denying the Dodsons' request for attorneys' fees and expenses. The Dodsons filed a counterclaim in a condemnation action in the Circuit Court of Berkeley County demanding that the State purchase property owned by the Dodsons which the State had not condemned in the original proceeding.

The Dodsons obtained an order in conformity with a jury verdict requiring the State to purchase that property for a sum determined by the jury. At issue is whether the Dodsons, having successfully prosecuted their claim for inverse condemnation, are entitled to an award of their attorneys' fees and costs as a consequence of the findings of the jury and the order of the Court requiring the West Virginia Department of Transportation, Division of Highways, a West Virginia corporation, and Fred VanKirk, West Virginia Commissioner of Highways, (hereinafter "the State"), to purchase the Dodsons' property.

III. STATEMENT OF FACTS

The State, in its Statement of Facts, sets forth no factual scenario which differs materially from the facts as set forth in the Dodsons' initial brief. The State recognizes that it sought to condemn 1.08 acres of the 4.3 acres of land on which the Dodsons were operating two businesses. In so doing, it tacitly admits that it did not file a suit to condemn the .73 acres which were the

subject of the Dodson counterclaim for inverse condemnation. The State's own statement of facts confirms that, but for the successful prosecution by the Dodsons of an inverse condemnation action, no order would have been entered requiring the State to pay for and purchase the .73 acre parcel.

IV. ASSIGNMENTS OF ERROR RELIED UPON 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.¹ (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.)

¹ 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, despite the Appellees' reference to it in their Brief, the compound interest portion of the Court's Order is not being appealed.

V. TABLE OF AUTHORITIES

A. West Virginia Constitution and West Virginia Statutes

West Virginia Constitution Art III § 9 16
 W. Va. Code section §54-3-1 *et seq.* 14

B. West Virginia Cases

Brooks v. Isinghood, 213 W.Va. 675, 684, 584 S.E.2d 531, 540 (2003) 7
Hansbarger v. Cook, 177 W.Va. 152, 351 S.E.2d 65 (1986). 7
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State ex rel. West Virginia Highlands Conservancy, Inc. v. West Virginia Div. of
Environmental Protection, 193 W.Va. 650, 458 S.E.2d 88 (1995) 14

D. Federal Cases

Surowitz v. Hilton Hotel Corp., 383 U.S. 363, 373 (1966) 18
National R.R. Passenger Corp. v. Faber Enterprises, Inc., 931 F.2d 438 (7th. Cir., 1991). . . 8
U.S. v. 40.00 Acres of Land, More or Less, in Henry County, Mo., 427 F. Supp. 434
 (W.D. Mo. 1976) 13
U.S. v. 431.60 Acres of Land, More or Less, in Richmond County, State of Ga.,
 355 F.Supp. 1093, 1096 (D.C.Ga., 1973) 14

E. Cases from other States

Bonanza, Inc. v. Carlson, 9 P.3d 541 (Kan. 2000) 14

City of Greensboro v. Pearce, 587, 468 S.E.2d 416 (N.C.App.1996) 8

Department of Transportation v. Bragg, 308 N.C. 367, 302 S.E.2d 227 (1983). 8

Robinson v. State, 20 P.3d 396 (Utah 2001) 13

State v. Armstrong, 779 So.2d 1211(Ala. 2000). 8

Wolfson v. City of St. Paul, 558 N.W.2d 781 (Minn.App.1997). 14

F. Federal Rules

49 C.F.R. § 24.107 3, 4, 8, 13, 14, 17

G. Additional Authorities

1 Am. Jur. 2d Actions § 3. 7

172 A.L.R. Fed. 507 § 6. 8

Black's Law Dictionary 7

VI. STANDARD OF REVIEW

The State recognizes and agrees with the *de novo* standard of review of the trial court's order denying the Dodsons' request for attorney fees.

VII. DISCUSSION OF LAW: A REPLY TO THE POINTS MADE BY THE STATE IN ITS APPELLEE'S BRIEF

A. The State mistakenly argues that the Dodsons did not institute a proceeding in counterclaim.

The first point in the Appellee Brief filed by the State concerns whether the counterclaim

filed by the Dodsons constituted a “proceeding.” A counterclaim was filed seeking an order of mandamus from the trial court requiring the purchase of a portion of the Dodsons' property. The State recognizes that a counterclaim seeking mandamus relief was filed. The State's argument that the Dodsons did not properly plead for inverse condemnation depends on its claim that the Dodsons did not “institute” legal proceedings. The State claims that “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.” (Appellee's Brief p. 5). The State rests its argument on mistaken semantics. A counterclaim, such as the one that the Dodsons filed for inverse condemnation, is certainly a legal proceeding. Black's law Dictionary Seventh Edition (“An act or step that is part of a larger action”); 1 Am. Jur. 2d Actions § 3 (The term "proceeding"[. . .] is broad enough to include all methods of invoking the action of courts and is generally applicable to any step taken to obtain the interposition or action of a court); *see also Hansbarger v. Cook*, 177 W.Va. 152, 155, 351 S.E.2d 65, 68 (1986) (referring to a counterclaim as a proceeding). Similarly, there is no doubt that the Dodsons, as the Defendants in the State's condemnation suit, instituted (“To begin or start; commence” Black's Law Dictionary, Seventh Ed.) the *counterclaim*. Therefore, the Dodsons both instituted and prevailed in a mandamus proceeding which sustained their counterclaim for inverse condemnation.

Not only did the trial court, by allowing inverse condemnation to be filed by counterclaim, ease the burden on the judicial system by appropriately condensing related litigation, but it acted in accord with this Court's own stated policy of "insur[ing] that cases and controversies be determined upon their merits and not upon legal technicalities or procedural niceties" *Brooks v. Isinghood*, 213 W.Va. 675, 684, 584 S.E.2d 531, 540 (2003) (internal quotations, citation, and footnote omitted).

Other courts allow inverse condemnation to be brought by counterclaim as well. *State v.*

Armstrong, 779 So.2d 1211(Ala.,2000) (“if the condemning authority has actually or constructively taken more property than it seeks in its condemnation action, the landowner may assert an inverse-condemnation counterclaim to recover just compensation for the additional property taken” *Id.* at 1214 -1215); *City of Greensboro v. Pearce*, 587, 468 S.E.2d 416 (N.C.App.1996) (saying that inverse condemnation by counterclaim is a better practice but nevertheless allowing it to be filed by answer. “[P]rinciples of judicial economy dictate that the owners of the taken land may allege a further taking by inverse condemnation in the ongoing proceedings” *Id.* at 420) (citing *Department of Transportation v. Bragg*, 308 N.C. 367, 302 S.E.2d 227 (1983); *National R.R. Passenger Corp. v. Faber Enterprises, Inc.*, 931 F.2d 438 (7th. Cir., 1991) *see also* 172 A.L.R. Fed. 507 § 6. *See also* the cases discussed in detail in section V *infra*.

B. The State's public policy concerns over fees awarded as a result of an inverse condemnation claim are unfounded.

Next, the State advances what it calls the trial court's public policy argument. Judge Wilkes states in his Order Denying Defendant's Motion to Amend Judgments Concerning Attorney's Fees and Compound Interest (Record, doc. 00216) that awarding attorney's fees in this case is “a precedent this Court is not willing to set” (*Id.* p. 6). While perhaps Judge Wilkes' reluctance to set precedent is understandable, the Appellant believes his concern to be improperly placed. The Court seems to suggest that it would be too easy for aggrieved landowners to counterclaim for inverse condemnation and be awarded attorney's fees. But that is a fear that the statutory language forestalls. Simply bringing an inverse condemnation claim doesn't warrant attorney's fees: one still has to *win* at trial. 49 C.F.R. § 24.107 (c). There is no automatic award. Far from it, the land owner must prove the merits of his case, just as the Dodsons did. This process is a time consuming and

expensive one. It stands to reason that when the State destroys the value of a parcel of land but does not take the property whose value it destroys, the aggrieved landowner should be made whole, including the expenses he incurred requiring the State to do its duty.

Put in this light, it is obvious that the wronged landowner should be compensated for the cost of bringing the inverse condemnation action. To force the landowner to bear the cost of requiring the State to do what it should have done is to burden the landowner unduly. Not only is the State in the wrong, but the State is the party far more able to bear the burden of the costs of the litigation. For attorney's fees to be reimbursed, the State has to destroy the value of the land to the landowner without condemning the property, the landowner has to file a claim against the state, and, most importantly, the landowner has to prevail. There is no slippery slope here. The prerequisites are clear and must be met in each case. When they are met, the land owner deserves, and is required by law to be, reimbursed for his necessary efforts.

C. The State's argument concerning the amount of attorney fees is unsound and premature.

The State claims that “the major flaws and deception [sic] 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 simply untrue; Appellant's counsel has never made such a claim. It is interesting however that the State wants to argue the amount of attorney fees. It is perhaps reasonable to assume that the State understands that fees are due. If the state wishes to argue the amount of fees, Appellant's counsel welcomes the opportunity on remand. The question before this Court, however, is whether the Dodsons are entitled to their attorney's fees in general, rather than the specific amount of attorney fees to which they may be entitled. Without

wishing to disparage opposing counsel's experience and perspective, Appellant's counsel respectfully disagrees with the claim that only 25% of the fees incurred can be attributed to the counterclaim. Quite simply, a factual determination at the trial court level of the amount of attorney's fees awardable has not yet been made.

D. The State accepted the determination of the .73 acre parcel as an uneconomic remnant and is thus barred from raising it on appeal.

While the Dodsons respectfully direct the Court to their treatment of the issue in their original Brief to this Court, some elements of the State's Brief on the issue of the uneconomic remnant should be addressed. The State argues that the property was not a true uneconomic remnant, but it does so by ignoring the results of the trial, results which it accepted and did not appeal. In fact, the jury found that the property in question was an uneconomic remnant. In fact, the trial court, as a consequence of that finding, ordered the State to purchase the property. In fact, the State did purchase the property and now has fee simple title to the parcel in question. None of these actions would or could have occurred but for the counterclaim. In fact, the consequence of the counterclaim was to force the State to purchase a piece of property which the State had rendered without value to the Dodsons.

The verdict form submitted to the jury contained two special interrogatories. (*See Record, Doc. 00153 Verdict Form*). Special Interrogatory 1: Is the .73 acre tract an uneconomic remnant? Answer: Yes. Special Interrogatory 2: If you have answered yes to the Special Interrogatory 1 above, state the sum that the State is to pay to Dodson Mobile Home Sales and Service, Inc. for the purchase of the .73 acre parcel. Answer: \$73,000. Special Interrogatory 3: If you answered no to Special Interrogatory 1 above, state those damages, if any, which you find that the State is to pay

to Dodson Mobile Home Sales and Service, Inc. for damage to the .73 acre parcel. Answer: (left blank). The State obviously disagrees with the finding of the jury. The State, however, chose not to appeal the finding of the jury. The State chose to allow orders to be entered in conformity with this verdict and chose to acquire the property in question as a consequence of a court ordering them to purchase the property for \$73,000. It is surprising that the State, having accepted the verdict, and having declined to appeal the order issued in consequence, is now, in its brief, indicating that the finding of the jury and the order of the Court are, in fact, incorrect and that, in fact, all that truly happened was that the Dodsons were paid for damages.

The State further argues that nothing prohibited the jury from finding that the residue was damaged 100%. Perhaps they could have so found and perhaps they could have found that the damages were valued at \$73,000. Under those circumstances, they could have allowed the ownership of the property to remain with the Dodsons and simply paid them in full for the damages which occurred. That is not what happened. The verdict clearly says to the contrary. The State's argument that the inverse condemnation action and the subsequent verdict did not result in the Court ordering the purchase of this property by the State is simply not correct. The jury had the opportunity to simply award damages only and chose not to do so. The State goes on to argue that the property couldn't be an uneconomic remnant because the appellant's appraiser limited the damages to 90% on the .73 acre parcel in question. The State apparently perceives that a parcel cannot be an uneconomic remnant unless its value is completely destroyed. A review of the instructions that were given to the jury reflects the statement of the law as applied in this action. The applicable instruction stated: "The Court instructs you that an uneconomic remnant is a portion of property which is so altered in character by the acquisition of other real property of the owner or of

other property adjoining the property of the owner that it has little or no value or utility to the owner". (Official Transcript of Proceedings, Excerpt of Proceedings, December 4, 2003 p. 38). A reading of the State's appellee brief would indicate that the State disagrees with the definition of an uneconomic remnant. Nonetheless, the State chose to accept the verdict, and did not raise the issue of the definition of an uneconomic remnant as set forth in the instructions on appeal.

Indeed, the State is barred from doing so under West Virginia law. The State has not appealed the lower court order directing it to purchase the parcel on the strength of the jury's finding that it was an uneconomic remnant. Any claim of error is therefore waived. *See State v. Miller*, 197 W.Va. 588, 597, 476 S.E.2d 535, 544 (1996) ("Indeed, if any principle is settled in this jurisdiction, it is that, absent the most extraordinary circumstances, legal theories not raised properly in the lower court cannot be broached for the first time on appeal") and *Syl. pt. 17 State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974) ("errors assigned for the first time in an appellate court will not be regarded in any matter of which the trial court had jurisdiction or which might have been remedied in the trial court if objected to there.")

E. The State mistakenly rests its case on the issue of the uneconomic remnant when in fact the federal law that West Virginia implements mandates the awarding of attorney fees in successful inverse condemnation cases.

As the Dodsons have previously noted, the State's emphasis on the status of the parcel as an uneconomic remnant is misplaced. Attorney fees are mandated here not because of the parcel's status as an uneconomic remnant but because the Dodsons prevailed in an inverse condemnation action. 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 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. (Emphasis added)

The Court having jurisdiction in this action rendered a judgment in favor of the owner in an inverse condemnation proceeding. The Code of Federal Regulations states that under those circumstances the owner is entitled to his attorneys' fees and expenses. Not only does the landowner deserve to be reimbursed, but he *shall* be reimbursed, according to the language of 49 C.F.R. § 24.107. The language is mandatory and the few courts that have considered it have followed the black letter law.

In 2001, the Supreme Court of Utah awarded attorney's fees pursuant to 49 C.F.R. § 24.107 in a case in which the Utah Department of Transportation settled an inverse condemnation claim brought against it. *Robinson v. State*, 20 P.3d 396 (Utah 2001). The Court emphasized the mandatory nature of § 24.107 and found that the settlement clearly fell within the language. When the Department of Transportation claimed that the inverse condemnation action was without merit, the Court noted: "UDOT contests this conclusion by arguing that the inverse condemnation proceeding lacked merit. The settlement of such a proceeding is covered by the plain language of section 24.107, however, regardless of the merit of the underlying claim." *Id.* at 399 n.4.

In *U.S. v. 40.00 Acres of Land, More or Less, in Henry County, Mo.*, 427 F. Supp. 434 (W.D. Mo. 1976), the government named as defendants in a condemnation proceeding parties that owned

billboard space on the land that was being condemned. The defendant billboard owners filed a “counter-complaint” that the Court treated as and in fact called a counterclaim. *Id.* at 437. The Court found that the government did not properly address the damage that its condemnation caused to the billboard owners and so the Court awarded the billboard owners their attorney's fees. *Id.* at 442.

The above cases were decided under the same federal act that W.Va. Code §54-3-1 *et seq.* implements and the Dodsons urge this Court to adopt similar reasoning. Section 24.107 uses clear and mandatory language. In the instant case, the Dodsons prevailed. The trial court rendered “a judgement in favor of the owner in an inverse condemnation proceeding” as called for by the law. The law compels the awarding of attorney's fees. Even if the State argues that the underlying inverse condemnation claim had no merit, the only relevant decisional authority has recognized the mandatory nature of the award of attorney's fees. Having prevailed on an inverse condemnation claim, the Dodsons are entitled to that mandatory reimbursement. *See also Bonanza, Inc. v. Carlson*, 9 P.3d 541 (Kan, 2000); *U.S. v. 431.60 Acres of Land, More or Less, in Richmond County, State of Ga.*, 355 F.Supp. 1093, 1096 (D.C.Ga., 1973) (words used in 42 USC § 4654(a) regarding the awarding of attorney's fees are “plain and unambiguous, permitting no unusual construction”) and *Wolfson v. City of St. Paul*, 558 N.W.2d 781 (Minn.App.1997).

Additionally, West Virginia law awards attorney's fees in mandamus cases where the public entity fails to perform its duty. In *State ex rel. West Virginia Highlands Conservancy, Inc. v. West Virginia Div. of Environmental Protection*, 193 W.Va. 650, 458 S.E.2d 88 (1995) this Court ruled that “such costs and attorney's fees are awarded because citizens should not have to resort to lawsuits to force government officials to perform their legally prescribed non-discretionary duties.” *Id.* at

653 (quoting *Nelson v. West Virginia Public Employees Insurance Board*, 171 W.Va. 445, 300 S.E.2d 86 (1982)) (internal quotation marks and alterations omitted). The State had the duty to recognize it had destroyed the value to the Dodsons of the .73 acre parcel in question. It did not. As a result of the State's failure to do its duty, the Dodsons were forced to file a motion to state a counterclaim for mandamus relief, a motion that the Court granted. Therefore, the Dodsons are entitled to their attorney's fees under West Virginia law as well as the implemented federal statutes and regulations.

F. The Dodsons' brought and prevailed upon a mandamus action

Finally, the State challenges argues that the Dodsons did not properly bring a mandamus action. A review of the law and the facts of the case demonstrates that the Dodsons did in fact bring and prevail upon a mandamus action.

1. The Dodsons' actions satisfied the substantive elements of a mandamus action.

In West Virginia, before a writ of mandamus can be issued, three substantive elements must be met: "(1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy." Syl. pt 2, *State ex rel. Kucera v. City of Wheeling*, 153 W.Va. 538, 170 S.E.2d 367 (1969).

The first two substantive elements are fairly straightforward in this case. The Dodsons' right to the relief sought flows from almost directly from the West Virginia Constitution: "Private property shall not be taken or damaged for public use, without just compensation" Const. Art III

§ 9 See also *State ex rel. Henson v. West Virginia Dept. of Transp., Div. of Highways*, 203 W.Va. 229, 506 S.E.2d 825 (1998). The Dodsons' land was taken for public use. They have the legal right to be justly compensated and the ability, via mandamus relief, to enforce that right.

The duty on the part of the State is equally clear: "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. . ." *Riggs v. State Road Com'r*, 120 W.Va. 298, 197 S.E. 813, 814 (1938). In the condemnation proceedings, the State had the duty to ascertain the damages to the .73 acre parcel of the Dodsons' property. It did not. Mandamus relief is the proper response to the State's failure to perform its duty.

The requirement that there not be another adequate legal remedy is not as exclusionary as it sounds; in fact, it has been interpreted quite liberally. The Court has found that:

"Though the writ of mandamus will be denied where another and sufficient remedy exists, if such other remedy is inadequate or is not equally as beneficial, convenient and effective, mandamus will lie. The tendency in this jurisdiction is to enlarge and advance the scope of the remedy of mandamus, rather than to restrict and limit it, in order to afford the relief to which a party is entitled when there is no other adequate and complete legal remedy."

State ex rel. Myers v. Straughan, 144 W.Va. 452, 454, 108 S.E.2d 565, 566 (1959) (internal quotation marks omitted).

The State claims that the Dodsons did not have to turn the case into an inverse condemnation proceeding by asking for mandamus relief and by arguing for and eventually proving the existence of the uneconomic remnant. The State invites the Court to speculate that absent the inverse condemnation action a jury would have found that the property in question was 100% destroyed and would have awarded adequate compensatory damages. It seems unlikely that a jury would have awarded damages totaling 100% of the value of the property while recognizing that the title would

have still remained with the Dodsons. In fact, the jury had the opportunity, given the verdict form provided, and chose not to do so. The State's argument that another adequate remedy exists is at best conjectural. Even, however, assuming it to be true, the Dodsons would have been left with property to maintain and pay taxes on—property which was without value to them (*See Official Transcript of Proceedings, Stewart Dodson Testimony, December 3, 2003 pp. 23-24, 42-44*). Even under the State's conjecture, the result that the State guesses could have occurred would not have been an equally beneficial result.

2. The State's procedural challenges to the Dodsons' petition for mandamus relief fail

In its Brief, the State cites as a procedural error that “inverse condemnation is brought in West Virginia by mandamus against the Commissioner, which was not done in this case.” (Appellee's Brief p. 10).

The State rests its case on too narrow a technicality. West Virginia law clearly allows mandamus actions to be brought against agencies. *See State ex rel. Allstate Insurance Company v. Union Public Service District*, 151 W.Va. 207, 151 S.E.2d 102 (1966) (“Mandamus is a proper remedy to require the performance of a nondiscretionary duty *by various governmental agencies or bodies.*”); *State ex rel. Henson v. West Virginia Dept. of Transp., Div. of Highways*, 203 W.Va. at 232 (“the appropriate remedy[. . .] is to seek a writ of mandamus to compel the DOT); and *State ex rel. French v. State Road Commission*, 147 W.Va. 619, 620-621, 129 S.E.2d 831,832 (1963) (“the road commission, *an agency of the state*, may be required by mandamus to institute proceedings[. . .]”) (all emphasis added).

Since any duty in this context concerns only the official capacity of the commissioner, reference to the commissioner functions as short hand for reference to the state agency in which the

duty lies. (*State ex rel. Henson v. West Virginia Dept. of Transp., Div. of Highways*, 203 W.Va. at 233 (“State Road Commissioner [DOT]”)(bracketed reference in original) (Starcher, J. dissenting).

Moreover, the State's challenge in this context has already been foreclosed by this Court. Addressing technical challenges to a mandamus petition, the Court found that “[i]f rules of procedure work as they should in an honest and fair judicial system, they not only permit, but should as nearly as possible guarantee that bona fide complaints be carried to an adjudication in the merits. . . .” *State ex rel. Bromelow v. Daniel*, 163 W.Va. 532, 538, 258 S.E.2d 119, 122 (1979) (ruling that lack of verification on a mandamus petition doesn't suffice for its dismissal) (citing *Surowitz v. Hilton Hotel Corp.*, 383 U.S. 363, 373 (1966)) and *State ex rel. Myers v. Straughan*, 144 W.Va. at 454 (“The tendency in this jurisdiction is to enlarge and advance the scope of the remedy of mandamus, rather than to restrict and limit it [. . .]”)

Finally, the Dodsons note once again that if the State believes that the writ of mandamus was improvidently issued, it should have raised that objection below. Whatever challenges to the mandamus action that the State may now have are barred for not having been raised at trial. See section VI. D *supra*.

VIII. CONCLUSION AND PRAYER FOR RELIEF

The Dodsons met the substantive, procedural and policy requirements of a mandamus action necessary to sustain a claim for inverse condemnation. The trial court and jury recognized the appropriateness of the mandamus action and ruled in favor of the Dodsons. Having won an inverse condemnation proceeding, the Dodsons are entitled to recover their attorneys' fees and expenses. The trial court erred in denying the Dodsons' motion for attorneys' fees and expenses.

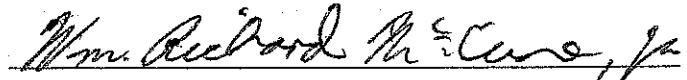
Wherefore, the Dodsons respectfully request that this Court reverse the judgment of the lower court denying their request for attorney's fees and costs, order the lower court to enter an order

requiring the State to pay the Dodsons' reasonable attorney's fees and costs in this action and that this Court grant all other relief in the Dodsons' favor that it deems proper.

Respectfully Submitted,

Appellant, Dodson Mobile Home Sales & Services, Inc.

By Counsel



Wm. Richard McCune, Jr., Esq. (W.V. Bar No. 2429)

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(304) 262-2500

Counsel for Appellant,

Dodson Mobile Home Sales & Services, Inc.

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

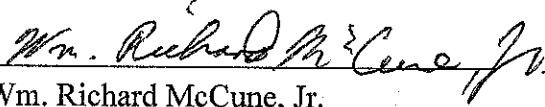
CERTIFICATE OF SERVICE

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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 *APPELLANT'S REPLY TO APPELLEE'S BRIEF* was served upon the following by U.S. First-Class mail, postage pre-paid, this 12th day of August, 2005:

Timothy M. Sirk, Esquire
P.O. Box 602
Keyser WV 26726


Wm. Richard McCune, Jr.