# IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

**AT BECKLEY**

**JAMES SURRATT and ROSE SURRATT, et**

**al. (consolidated),**

**Plaintiffs,**

1. **CIVIL ACTION NO. 5:15-CV-15444**

**(consolidated)**

**PINNACLE MINING COMPANY LLC**

**Defendant.**

**DEFENDANT’S MOTION IN LIMINE TO PRECLUDE OPINIONS OF PLAINTIFFS' EXPERT DEAN DAWSON**

Defendant Pinnacle Mining Company, LLC ("Pinnacle” or “Defendant"), by counsel, moves this Court in limine to preclude the testimony and introduction of any evidence relating to the opinions of Dean Dawson ("Mr. Dawson") at trial.1 Mr. Dawson's opinions are speculative and are irrelevant to the calculation of any potentially recoverable damages in this case.

**Factual Background**

Mr. Dawson submitted reports on behalf of Plaintiffs in this matter. His reports include an approximately 4 page report and then numerous attachments pertaining to subject matters that have little relation to anything in this case. *See, e.g.,* Report of Nelson and Mary Bailey, attached hereto as Exhibit 1.

Ultimately, Mr. Dawson seeks to provide to the jury in this case is the “Assuming no Damages” retrospective market value loss of the subject property and the “As is” value of the

1 Defendant has already moved for sanctions with respect to Mr. Dawson for his failure to comply with Rule 26(a)(2). See Docket Entry Nos. 205-06. Certainly, to the extent that this Court grants that particular motion, this motion would be unnecessary.

property, which assumes damages and for which he provides as a range on the low-end of some figure and the high-end. *See, e.g.,* Ex. 1 at pp. 3-4.

In the case of Mr. and Mrs. Bailey, Mr. Dawson concluded that the “assuming no issues” value of their home was $52,000 and the "As Is" retrospective market value loss of the subject property, as of December 31, 2013

# Eighteen Thousand Two Hundred to Fiftv-Two Thousand Dollars (S18,200-$52,000)

*Id.*.

Mr. Dawson’s appraisal contains a significant caveat that provided as follows: ' The value

loss **does not account** for any structural or cosmetic damage caused by the mining operations. The cost to cure established by an engineer or general contractor should be deducted from the final value opinion once determined." *Id.* at p. 4 (emphasis added).

For the reasons set forth below, all of Mr. Dawson's opinions and any reference to his

reports, including all attachments thereto, must be excluded.

# ARGUMENT

* 1. **Mr. Dawson's Opinions, Reports, and Testimony Must Be Excluded Because He Does Not Employ the Appropriate Measure of Damages and Such Evidence Is Irrelevant and Prejudicial.**

Mr. Dawson appears to be relying upon the theory of "stigma damages" in his evaluation of Plaintiffs' properties in this case. This theory is increasingly advanced by toxic tort plaintiffs claiming that the value of their property has been diminished by the "stigma" caused by the association of that property with some toxic source or incident. 1 L. of Toxic Torts § 7:31 (2011). Notably, this is not a toxic tort case; rather it relates solely to alleged property damage. Further, the stigma damages analysis provided by Mr. Dawson is nothing more than damages to a property's reputation and are not permitted under West Virginia law.

Under West Virginia law, a plaintiffs recovery for damages to residential property includes

only:

the reasonable cost of repairing it even if the costs exceed its fair market value before the damage. The owner may also recover the related expenses stemming from the injury, annoyance, inconvenience, and aggravation, and loss of use during the repair period. If the damage cannot be repaired, then the owner may recover the fair market value of the property before it was damaged, plus the related expenses stemming from the injury, annoyance, inconvenience, and aggravation, and loss of use during the time he has been deprived of his property.

Syl. Pt. 4, *Brooks* v. *City of Huntington,* 768 S.E.2d 97, 99 (W. Va. 2014). "Like all compensatory damage awards, an award of cost of repair for injury to residential real property is still subject to review for reasonableness and effectiveness." *Id.* at 105. Plaintiffs are expressly not permitted to also recover for total diminution in value. *Id.* at 106. ("neither common sense, nor our former holding in *Jarrett* would permit recovery of *both* cost of repair and gross loss of value, as such a recovery is generally duplicative").

Plaintiffs may be able to recover for *some* loss in value, but only if "damaged residential real property maintains a residual loss of value after repairs are effected." *Id.* at 107. Cases where those damages are awarded are "extraordinary." *Id.* at 108. "Mere cosmetic damage, speculative decreased future market value, or damage which can be readily and fully remediated are an insufficient foundation for a claim of residual diminution in value." *Id2.*

Stigma, or perception, damages fall outside the permissible scope of recovery set forth in

*Jarrett.* The *"[Jarrett]* rule encompasses both of the present measures and adds thereto recovery of

2 In fact, the court has instructed that trial courts "must ensure that... any claim for residual diminution in value is 'truly and reasonably necessary to achieve the cardinal objective of making the plaintiff whole." *Id.*

For damage to commercial property, a plaintiff may recover only: the cost of repairing it, plus his expenses stemming from the injury, including loss of use during the repair period. If the injury cannot be repaired or the cost of repair would exceed the property's market value, then the owner may recover its lost value, plus his expenses stemming from the injury including loss of use during the time he has been deprived of his property.

Syl. Pt. 2, *Jarrett* v. *E. L. Harper & Son, Inc.,* 235 S.E.2d 362, 363 (W. Va. 1977).

expenses incidental to irreparable injuries." 160 W. Va. at 404, 235 S.E.2d at 365. In other words, the *Jarrett* Court, in setting forth the list of recoverable damages, already included any and all incidentals and expenses relative to any damage suffered as a result of a third party's negligent injury to property. Thus, any damages that fall outside the scope of the limited *Jarrett* rule set forth above are not proper.

Here, none of the damage calculations offered in Mr. Dawson's reports and opinions are relevant to identifying the damages Plaintiffs have allegedly incurred. For the residential properties at issue, the correct measure of damages hinges primarily on the cost of repair. However, as noted, that calculation, was specifically excluded from Mr. Dawson's reports.

Rule 402 of the Federal Rules of Evidence provides, in relevant part, that "[ejvidence which is not relevant is not admissible." Fed.R.Evid. 402. "Relevant evidence" is defined by Rule 401 as that "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed.R.Evid. 401. Because the alleged loss of value of Plaintiffs' property is not an appropriate measure of damages in this case, evidence thereof is irrelevant. To allow plaintiffs to admit such evidence through their expert witness or otherwise is totally inappropriate in this case. Additionally, any probative value of introducing evidence with respect to the alleged loss of value of plaintiffs' property would be substantially outweighed by the danger of unfair prejudice, confusion of the issues, and misleading of the jury as addressed by Rule 403 of the Federal Rules of Evidence.

Even if this Court were to determine that Mr. Dawson's opinions are relevant, that evidence is nevertheless inadmissible pursuant to Rule 403 of the Federal Rules of Evidence. Rule 403 provides that a court may exclude "relevant evidence if its probative value is substantially outweighed by a danger of on or more of the following: unfair prejudice, confusing the issues,

misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R.Evid. 403.

Applying the Rule 403 balancing test, it is clear the probative value of allowing Plaintiffs to present evidence from Mr. Dawson that is not based upon fact and which employs an incorrect measure of damages is substantially outweighed by its unfair prejudice to Defendant. Further, Mr. Dawson's reports contain information relating to numerous acts and events well outside the realm of the allegations made in this case—which are limited solely to whether surface water runoff has impacted Plaintiffs' properties. There are no claims that Defendant has caused pollution, explosions, or the like. Despite this fact, Mr. Dawson's reports are rife with citations to events like the December 12, 2012 gas explosion in Sissonville, West Virginia, that occurred on a pipeline not owned by Defendant, and which had no relation or impact to this case. Ex. 1 at pp. 71, 84-88. The same is true for the other incidents in the report, such as lawsuits that have been filed against coal companies for alleged environmental damages that are not in any way at issue in this case. Id. at pp. 69, 72-73, 88-89, 91. The probative value of these incidents is absolutely zero.

Conversely, it is highly prejudicial to Defendant to discuss gas explosions or the likelihood of environmental damages when those are not at issue in the case. Likewise, the effect of mining operations on real estate value does nothing but mislead the jury and confuse the issues. Photographs of gas line explosions and discussions about coal slurry serve no other purpose than to be prejudicial. As noted above, the measure of damages here is based on cost to repair, not fair market value. Presenting such evidence does nothing more than cloud the issues and give the jury an improper picture of the evidence. Accordingly, all of Mr. Dawson's opinions, reports, and testimony must be excluded under Rules 401, 402, and 403 of the Federal Rules of Evidence.

# CONCLUSION

For the reasons set forth above, Defendants respectfully requests that this Honorable Court grant this motion *in limine* and issue an Order precluding Plaintiffs' real estate appraisal expert, Dean Dawson, from offering any reports, testimony, or opinions at the trial of this matter.

# PINNACLE MINING COMPANY, LLC

By Counsel

*/s/ John J. Meadows*

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**Defendant.**

**CERTIFICATE OF SERVICE**

I hereby affirm that on this date, April 17, 2017, I caused the foregoing ***“*DEFENDANT’S MOTION IN LIMINE TO PRECLUDE OPINIONS OF PLAINTIFFS' EXPERT**

**DEAN DAWSON*”*** to be filed via the CM/ECF electronic filing system and, by virtue of the same, electronic notification will be served as follows:

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*Counsel for Plaintiffs*

*/s/ John J. Meadows*