

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**Rosetta McDaniel and Randy McDaniel,
Plaintiffs Below, Petitioner**

vs) **No. 11-0529** (Harrison County 09-C-498-2)

**West Virginia Division of Highways,
Paul Mattox, Jr., Commissioner,
Defendants Below, Respondents**

FILED
March 30, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioners Rosetta and Randy McDaniel appeal the circuit court’s order denying their petition for writ of mandamus against respondents, the West Virginia Division of Highways (“DOH”) and its commissioner. Petitioners filed a petition for appeal and a reply brief by their attorney, Vincent Trivelli. Respondents filed a response brief by their attorney, Eric B. Hudnall.

This Court has considered the parties’ briefs and the record on appeal. The facts and legal arguments are adequately presented in the parties’ written briefs and the record on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision affirming the circuit court is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

In 1999, the DOH paved a gravel road adjacent to petitioners’ property. The DOH also installed a larger culvert and a drainage pipe under the road. Petitioners assert that this construction has resulted in flooding and extensive erosion of their land. In November of 2009, petitioners filed a petition for mandamus asking the circuit court to order respondents to institute eminent domain proceedings to compensate petitioners for the damage to their property. Petitioners rely on the following syllabus point of this Court:

If a highway construction or improvement project results in probable damage to private property without an actual taking thereof and the owners in good faith claim damages, the West Virginia Commissioner of Highways has a statutory duty to institute proceedings in eminent domain within a reasonable time after completion of the work to ascertain the amount of damages, if any, and, if he fails to do so, after reasonable time, mandamus will lie to require the institution of such proceedings.

Syllabus point 1, *State ex rel. Rhodes v. West Virginia Department of Highways*, 155 W.Va. 735, 187 S.E.2d 218 (1972).

Syl. Pt. 2, *Shaffer v. W.Va. Dept. of Transp., Div. of Highways*, 208 W.Va. 673, 542 S.E.2d 836 (2000) (per curiam).

The circuit court issued a rule to show cause and held a hearing. Thereafter, the circuit court issued a final order denying the mandamus petition. The circuit court found that a ditch on petitioners' property did sustain noticeable erosion, causing water to occasionally flow across petitioners' property during the heaviest of rains. However, the circuit court found that petitioners had not convinced the court that the DOH's actions proximately caused this damage. The circuit court noted that petitioners' property is low-lying and in a natural drainage area, and that petitioners did not complain to the DOH until four or five years after the road work was completed. "A writ of mandamus will not issue unless three elements coexist – (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)." Syl. Pt. 1, *263 Towing, Inc. v. Marcum Trucking Co., Inc.*, 222 W.Va. 80, 662 S.E.2d 522 (2008). The circuit court found neither a clear legal right in petitioners, nor a clear legal duty on the part of respondents.

Petitioners argue that the circuit court overstepped its authority in the mandamus action and ruled on matters that should have been addressed in a subsequent eminent domain proceeding. They assert that the circuit court's ruling is contrary to the following syllabus point:

Where a petitioner seeks in a mandamus proceeding to compel the State Road Commissioner to institute proceedings to ascertain damages to private property allegedly caused by the State Road Commissioner in a highway construction or improvement, the clear legal right which the petitioner must show is not that there has been damages or what the amount of the damages is, but that there is reasonable cause to believe that these questions should be resolved by a judge and a jury of freeholders in the county in which the property is located. Syllabus point 2, *State ex rel. Phoenix Ins. Co. v. Ritchie*, 154 W.Va. 306, 175 S.E.2d 428 (1970).

Syl. Pt. 4, *Shaffer*.

"A *de novo* standard of review applies to a circuit court's decision to grant or deny a writ of mandamus." Syl. Pt. 1, *Harrison County Com'n v. Harrison County Assessor*, 222 W.Va. 25, 658 S.E.2d 555 (2008). We review a circuit court's underlying factual findings and conclusions of law in a mandamus case under a clearly erroneous standard. *O'Daniels v. City of Charleston*, 200 W.Va. 711, 715, 490 S.E.2d 800, 804 (1997), citing, *Staten v. Dean*, 195 W.Va. 57, 62, 464 S.E.2d 576, 581 (1995).

Upon a review of the law and the parties' arguments, we conclude that mandamus does not lie and the circuit court should be affirmed. The circuit court did not rule against petitioners on the issues of whether there has been damage or what the amount of damage is. Indeed, the circuit court acknowledged the existence of erosion on petitioners' property. Instead, the circuit court found that there is no proximate cause to believe that this damage was caused by respondents. The proximate cause determination falls within the circuit court's purview to determine whether "there is reasonable cause to believe that these questions should be resolved by a judge and a jury[.]" Syl. Pt. 4, in part, *Shaffer*. We find no error in the circuit court's finding as to a lack of proximate cause.

Affirmed.

ISSUED: March 30, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Margaret L. Workman
Justice Thomas E. McHugh

DISSENTING:

Justice Brent D. Benjamin