



IN THE SUPREME COURT OF THE STATE OF DELAWARE

JACK W. LAWSON and : No. 518,2013
MARY ANN LAWSON, :
 :
 :
 Defendants Below, :
 Appellants, :
 :
 v. : Lower Court: Superior Court In
 : And For New Castle County
 : C.A. No. N12C-01-128 JAP
 STATE OF DELAWARE, upon the :
 Relation of the Secretary of the :
 DEPARTMENT OF :
 TRANSPORTATION, :
 :
 :
 Plaintiffs Below, :
 Appellees. :

APPELLANTS' OPENING BRIEF

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NATURE OF PROCEEDING

This is an appeal from a relatively summary Order issued by the Superior Court *sans* oral argument which denied the Motion For Award Of Litigation Expenses (the “Motion”) filed by Appellants Jack W. and Mary Ann Lawson (the “Lawsons”). The Lawsons’ Motion was based upon: 1) the “Litigation Expense” law contained in the Delaware Real Property Acquisition Act (“RPAA”) at 29 *Del. C.* § 9503 (the “Litigation Expense Reimbursement Statute” or “§ 9503”); 2) the Bad Faith Exception to the American Rule; and 3) the Cost reimbursement statutes: 10 *Del. C.* §§ 5101 and 5104.

The Motion was based upon this Court’s Opinion issued July 22, 2013 in *Lawson v. State*, 72 A.3d 84 (Del. 2013)(en Banc) (the “Opinion”) and the resulting Mandate and Superior Court dismissal Order (the “Order of Dismissal”). *See* A-18 and A-19. The Opinion and Order of Dismissal caused the condemnation action filed by Appellee State of Delaware *ex rel.* Secretary of Department of Transportation (“DelDOT”) to be dismissed based upon the holding that: DelDOT could not have reasonably believed that it offered Just Compensation to the Lawsons, a necessary RPAA prerequisite to initiating condemnation proceedings.

The parties submitted 4-page legal memorandum, as limited by Superior Court Directive, regarding the Motion. The Trial Court entered an Order

denying the Motion two (2) days prior to the duly noticed oral argument date (the "Denial Order"). The sum and substance of the bases for the Denial Order was the conclusory statement that there was no final judgment indicating that DelDOT could not condemn the Lawsons' property and that DelDOT did not act in bad faith. The Denial Order did not address the Lawsons' statutory cost reimbursement request. This appeal followed pursuant to the filing of a Notice of Appeal on September 30, 2013.

On September 30, 2013, the Clerk issued the briefing schedule. This is the Lawsons' Opening Brief on appeal regarding their request for reimbursement of attorneys fees, litigation expenses, and costs.

SUMMARY OF ARGUMENT

- I. Whether The Superior Court Erred In Denying The Lawsons' Motion For An Award Of Litigation Expenses Pursuant To The RPAA Reimbursement Statute, 29 *Del. C.* § 9503, Where A Final Judgment Determined That DelDOT Could Not Condemn The Property Due To Violation Of RPAA § 9505(3)?
- II. Whether The Superior Court Erred In Denying The Lawsons' Reimbursement Of Their Attorneys Fees And Litigation Expenses Pursuant To The Bad Faith Exception To The American Rule Where The Delaware Supreme Court Held That It Was "Clear" The Condemnation Action Should Not Have Been Filed?
- III. Whether The Superior Court Erred In Denying The Lawsons' Request For Costs Under 10 *Del. C.* §§ 5101 And 5104 Where They Were The Prevailing Party In The Dismissed Condemnation Action?

STATEMENT OF FACTS

A. The Supreme Court Final Judgment Concluded DelDOT Could Not Condemn Due To An Unexcused Violation Of The RPAA

In a unanimous Opinion issued on July 22, 2013 (the “Opinion”), this Court held as follows:

[W]e hold that the Superior Court judge erred when he found that a state agency complied with Delaware’s Real Property Acquisition Act before it moved to condemn property. Where a state agency bases its initial offer to purchase property on an appraisal that contains flawed assumptions about the property’s post-taking use, that agency cannot reasonably believe that it offered just compensation. The statute requires a state agency to make an offer that it reasonably believes is just compensation for the property before it initiates condemnation proceedings. Therefore, we hold the state agency violated the statute when it relied on its fundamentally flawed appraisal. Accordingly, we REVERSE the Superior Court’s judgment, VACATE the Superior Court’s orders, and REMAND with instructions to dismiss the condemnation action without prejudice. *Lawson v. State*, 72 A.3d 84, 85 (Del. 2013)(en Banc)(emphasis added).

Consequently, DelDOT’s lack of compliance with the RPAA requirement to offer, and negotiate based upon, a good faith estimate of Just Compensation based on a valid appraisal as a prelude to initiating condemnation caused the action to be dismissed.

In the Opinion’s analysis, this Court concluded that “ DelDOT failed to comply with the RPAA, and DelDOT has not demonstrated a valid excuse for

its non-compliance.” *Lawson v. State* at 88. Further, the Court concluded that “[b]ecause we conclude that DelDOT inexcusably failed to comply with Section 9505(3), we do not reach the other bases for the Lawsons’ appeal.” *Id.* (emphasis added).

Other notable findings contained in the Supreme Court’s Opinion include:

1. “The record is clear that DelDOT regulations require a driveway significantly wider than twelve feet in order for a property owner to obtain a commercial entrance permit.” at 90-91 (emphasis added).
2. “The Appraisal’s basic assumptions were facially flawed and the Lawsons immediately indicated their concern during their September 12, 2011 meeting with DelDOT...that their 12-foot wide relocated driveway would not be sufficient for a commercial entrance.” at 91 (emphasis added).
3. “The Appraisal cannot establish an amount which is ‘reasonably believed [to be] just compensation’ because it fails to consider how the Lawsons’ reduced ability (or inability) to obtain a commercial entrance permit after the taking affects the Remainder’s ‘highest and best use’ for valuation purposes.” *Id.* (emphasis added).

4. “Contrary to the Superior Court judge’s factual determination that nothing in the record disputed DelDOT’s Appraisal, the record clearly shows that the taking would severely compromise the Lawsons’ ability to use their property at a commercial regional level, its highest and best use, and the basis for the appraisal.” (emphasis added) at 92 (emphasis added).
5. “Because the record does not support the trial judge’s determination that the appraisal was indisputable, that conclusion is clearly erroneous.” (emphasis added) *Id.* (emphasis added).
6. “The record is clear that DelDOT’s continued reliance on obviously flawed Appraisal frustrated the parties’ negotiations.” (emphasis added) *Id.*

In sum, this Court issued a final judgment dismissing the condemnation action based on DelDOT’s failure to comply with RPAA provisions requiring a valid Just Compensation appraisal, offer and negotiations as a prerequisite to initiating the action. This Court held that it was so clear that the appraisal was fatally flawed that DelDOT could not have reasonably believed it satisfied the RPAA requisites necessary to initiate the condemnation action, and therefore it should be dismissed.

B. The Superior Court Order Misinterpreted The Litigation Expense Reimbursement Statute, Conclusorilly Denied The Bad Faith Exception Argument, And Ignored The Statutory Cost Award Request

1. The Motion Was Well Founded; Clear Statutory And Common Law Standards Were Met

In the Motion, the Lawsons sought an Order awarding them the full amount of their \$63,461 in attorneys fees, litigation expenses, and statutory costs incurred. A-21 to 24 and A-89. The attorney fee and litigation expense components of the Lawsons' request were based upon the Litigation Expense Reimbursement Statute contained in the RPAA at 29 *Del. C.* § 9503 and the Bad Faith Exception to the American Rule. *Id.* In addition, the Lawsons requested an award of costs pursuant to 10 *Del. C.* §§ 5101 and 5104. A-24.

The Litigation Expense Reimbursement Statute provides that:

Where a condemnation proceeding is instituted by the agency to acquire real property for such use and the final judgment is that the real property cannot be acquired by condemnation..., the owner...shall be paid such sum as will, in the opinion of the court, reimburse such owner for reasonable attorney, appraisal and engineering fees, actually incurred because of the condemnation proceedings.

It is codified at Title 29, § 9503 of the Delaware Code, and constitutes part of the RPAA. The statute which triggered this Court's dismissal of the condemnation action pursuant to the Opinion and subsequent Order of Dismissal is 29 *Del. C.* § 9505(3), which is also a component part of the RPAA.

The general prevailing party cost statute provides that where there is an involuntary dismissal of the action, “there shall be judgment for costs for the defendant.” 10 *Del. C.* § 5101. In addition, it provides that “[g]enerally a party for whom final judgment in any civil action, or on a writ of error upon a judgment is given in such action, shall recover, against the adverse party, costs of suit, to be awarded by the court.” *Id.* The Lawsons were the prevailing party and defendants in an action involuntarily dismissed.

Additionally, 10 *Del. C.* § 5104 provides that “[i]f final judgment is given for the defendant in a civil action, which is in the name of the State for the use of any person or corporation, judgment for costs shall be given against such person or corporation.” The condemnation action was a civil action brought in the name of the State for the use of the Secretary of DelDOT, and therefore § 5104 applies as well.

2. The Superior Court Denied The 3 Components Of The Motion Summarily, Conclusorilly, and Without Any Valid Reasoning

In the September 25, 2013 Denial Order, the Trial Court summarily denied the Lawsons’ request for reimbursement of statutory costs. In addition, the Denial Order conclusorilly denied the request based upon the Bad Faith Exception to the American Rule, stating only that “DelDOT did not act in bad faith.” Because the Trial Court denied the Motion prior to the noticed motion

argument date of September 27, 2013, no transcript is available to provide any further elucidation of the Trial Court's rationale.

Additionally, the Denial Order contained the following reasoning for denying the Lawsons' request pursuant to the Litigation Expense Reimbursement Statute:

There has been no final judgment that DelDOT cannot acquire the property. The dismissal here, which was without prejudice, merely results from DelDOT's improper appraisal. There has been no determination that the property is not subject to condemnation for the purpose stated by DelDOT.

No explanation was provided, however, as to how the Trial Court had interpreted the Litigation Expense Reimbursement Statute to mean that: 1) a dismissal must be with prejudice; 2) a final judgment must be based on lack of a "public use"; or 3) the final judgment must hold that DelDOT may never acquire the property in the future. Therefore, even though the face of the Denial Order appears to contain a rationale, it actually contains nothing more than a series of conclusory sentences.

ARGUMENT

I. THE SUPERIOR COURT ERRED IN DENYING THE LAWSONS' MOTION FOR AN AWARD OF LITIGATION EXPENSES PURSUANT TO THE REIMBURSEMENT STATUTE, 29 DEL. C. § 9503

A. Question Presented

Whether the Superior Court erred in denying the Lawsons' Motion for an Award of Litigation Expenses pursuant to the Litigation Expense Reimbursement Statute, 29 Del. C. § 9503, where a final judgment determined that DelDOT could not acquire the Property in the condemnation proceeding due to its violation of 29 Del. C. 9505(3)? The question was preserved in Defendants Jack W. Lawson and Mary Ann Lawson's Motion For Award Of Litigation Expenses filed in the Trial Court. A-21 to 23.

B. Standard and Scope of Review

This Court reviews the Superior Court's legal determinations concerning the RPAA *de novo*. *Lawson v. State, supra*. at 88. The Litigation Expense Reimbursement Statute, 29 Del. C. § 9503, is part of the RPAA.

C. Argument

Pursuant to 29 Del. C. § 9503, reimbursement of litigation expenses is required if: 1) a condemnation proceeding is instituted by an agency to acquire real property for a public use; and 2) a final judgment is entered, 3) which concludes that the property may not be acquired by condemnation. In the case

at bar, the first two elements are satisfied: 1) DelDOT instituted a condemnation action; and 2) a final judgment was entered dismissing the condemnation action. Thus, the sole issue in dispute is whether the Opinion satisfied the § 9503 requirement “that the [Lawsons’] property cannot be acquired by condemnation.”

Because the Opinion concluded that DelDOT could not acquire the Lawsons’ property by condemnation, the Superior Court erred. The Lawsons’ request for payment of more than \$60,000 incurred should have been granted pursuant to the Litigation Expense Reimbursement Statute.

1. The Litigation Expense Reimbursement Statute Applies Based Upon This Court’s Final Judgment Dismissing The Condemnation Action Under The RPAA

The sole issue in construing the § 9503 phrase “cannot be acquired by condemnation” is the meaning of the term “condemnation.” The word “cannot” is clearly in the negative, and “acquired” means to obtain. Because in the context of § 9503 the term means “condemnation proceeding” (a procedural device), the dismissal of a condemnation action *ipso facto* triggers an entitlement to reimbursement.

(a) The Plain Meaning Rule & Statutory Interpretation Principles

When construing a statute, this Court will “attempt to ascertain and give effect to the General Assembly’s intent.” *Sussex County Dept. of Elections v. Sussex County Republican Comm.*, 58 A.3d 418, 422 (Del. 2012)(en Banc). The first step is to determine if the statute is ambiguous – *i.e.* 1) “it can reasonably be interpreted in two or more different ways”; or 2) “a literal reading of its terms would lead to an unreasonable or absurd result not contemplated by the legislature.” *Id.*

Absent ambiguity, the plain meaning of the statutory language is applied (the “Plain Meaning Rule”). *Sussex County Dept. of Elections* at 422. If ambiguous, then the statute is considered in its entirety, and each section is read in light of the others to achieve one harmonious whole. *Id.* In addition, related statutes should be read in *pari materia* so as to create one harmonious whole. *Richardson v. Bd. on Cosmetology And Barbering*, 69 A.3d 353, 357 (Del. 2013).

(b) The Word “Condemnation” In § 9503 Means “Condemnation Proceeding”

The plain meaning of the word “condemnation” is a “condemnation proceeding.” As a matter of law, “condemnation” refers to the statutory procedure for the government to take private property for public use. *See*

Delaware Condemnation Act, 10 *Del. C.* Ch. 61. It is not synonymous with the term “eminent domain,” which is a substantive power. *See Cannon v. State*, 807 A.2d 556, 559 (Del. 2002)(“as a sovereign governmental entity, the State of Delaware retains the power of eminent domain”).

Additionally, the Litigation Expense Reimbursement Statute itself establishes that “condemnation” means “condemnation proceeding.” Indeed, the opening portion of § 9503 - “[w]here a condemnation proceeding is instituted by the agency...and the final judgment is that the real property cannot be acquired by condemnation or the proceeding is abandoned” - reveals that the terms “condemnation proceeding,” “condemnation,” and “proceeding” are all used interchangeably and are therefore analogous. In addition, a reading of § 9503 in its entirety results in the conclusion that the word “condemnation” refers to the statute’s earlier reference to a “condemnation proceeding” which is “instituted by the agency.” Thus, the phrase “cannot be acquired by condemnation” plainly means “cannot be acquired by the condemnation proceeding instituted by the agency.” Since the Opinion clearly established that DelDOT could not acquire the Lawsons’ property in that condemnation action, the Trial Court erred.

(c) The Condemnation Act Also Establishes
That “Condemnation” Means
“Condemnation Proceeding”

Further, to determine the Legislature’s intended meaning of the word “condemnation” in § 9503, reference should be made to related statutory provisions contained in the Delaware Condemnation Act. Therein, it is established that “condemnation” is a legal procedure, not a substantive legal power. At the very outset of the Condemnation Act, it establishes that “condemnation” is a proceeding, and that the State’s sovereign eminent domain power is separate and distinct:

This chapter shall govern the procedure for all condemnations of real and personal property within this State under the power of eminent domain...

In addition, the term “condemnation proceedings” and “condemnation proceeding” are used throughout the Condemnation Act to refer to the Superior Court procedure. *See e.g.* 10 *Del. C.* §§ 6102, 6103, 6109, and 6110.

Identical language is contained in the Litigation Expense Reimbursement Statute (“where a condemnation proceeding is instituted...”). Thus, it is evident that § 9503’s wording was intended to track the Condemnation Act, so that the term “condemnation” in 29 *Del. C.* § 9503 means the procedure for acquiring property pursuant to the power of eminent domain.

The distinction between condemnation procedure and the eminent domain power is significant in the construction of the Litigation Expense Reimbursement Statute. Because the term “condemnation” refers to the “condemnation proceeding,” the meaning of the phrase “cannot be acquired by condemnation” is “cannot be acquired in the condemnation proceeding instituted by the agency.” Thus, dismissal of a condemnation action triggers § 9503’s mandate to reimburse litigation expenses.

If the Litigation Expense Reimbursement Statute was intended to apply only when a dismissal occurred due to a problem with the power of eminent domain, then the General Assembly would have so stated – *e.g.* “cannot be acquired by the power of eminent domain.” But it did not. Thus, § 9503 requires reimbursement of litigation expenses when a condemnation action is dismissed; an agency obviously cannot acquire by condemnation if the proceeding is dismissed.

(d) Under A Contextual Reading, Dismissal
Based On RPAA Violations Trigger
§ 9503

The conclusion that § 9503 applies where a “condemnation proceeding” is dismissed is also supported by an interpretation of § 9503 in the context of the entire RPAA. In *Lawson v. State* and its progeny, this Court has held that unexcused violations of the RPAA constitute grounds for dismissal of a

condemnation proceeding. As a related component of the RPAA, § 9503 must have been intended to apply to such RPAA-based dismissals. A dismissal clearly blocks the ability to acquire in the proceeding. Accordingly, the Trial Court's reasoning was flawed.

(e) Dismissals Need Not Be With Prejudice
Or Based On Lack Of Eminent Domain
Or Public Use For § 9503 To Apply

Under the plain reading of the Litigation Expense Reimbursement Statute, it does not require that a dismissal be with prejudice. Instead, it only requires a "final judgment," which includes within its purview any type of unappealable dismissal.

Nor does § 9503 state that the final judgment must conclude that the condemning agency lacks the power of eminent domain in order to trigger an entitlement to payment. Instead, the General Assembly utilized the term "condemnation," which clearly refers to a "condemnation proceeding."

Since the condemnation proceeding was in fact dismissed by final judgment, DelDOT obviously was unable to acquire the Lawsons' real property interests pursuant to condemnation. It could not be any clearer; the Litigation Expense Reimbursement Statute mandates DelDOT's payment to the Lawsons of their more than \$63,000 in litigation expenses incurred in fighting DelDOT's "clearly erroneous" litigation misadventure.

2. The Three (3) Federal Cases Relied Upon By DelDOT Are Inapposite

DelDOT's proposed narrow reading of the Litigation Expense Reimbursement Statute was based on three (3) federal cases. The decisions are based upon language similar to (but not the same as) § 9503 contained in federal law, 42 U.S.C. § 4654. But the cases are all distinguishable.

(a) Legislative History, Minor Procedural Errors, Voluntary Dismissal & No Dismissal Circumstances Are Not Present In The Instant Action

In *U.S. v. 4.18 Acres of Land*, 542 F.2d 786, 788-89 (9th Cir. 1976), the court relied upon legislative history regarding § 304(a) of the Uniform Relocation Assistance and Real Property Acquisition Policies Act, 42 U.S.C. § 4654(a) (the "URA") to affirm the trial court's decision. Specifically, the Court reasoned that a dismissal without prejudice on the grounds of a minor, correctable procedural flaw did not constitute a final judgment that the federal agency "cannot acquire the real property by condemnation."

In direct contradistinction to *U.S. v. 4.18 Acres of Land*, the Courts of this State do not look to federal legislative history, but instead apply the Plain Meaning Rule of statutory construction. In addition, the dismissal without prejudice ordered in *Lawson v. State* was based on the violation of substantive

RPAA requirements, and not a minor procedural flaw.¹ Accordingly, the decision in *U.S. v. 4.18 Acres of Land* is not persuasive.

In *U.S. v. 410.69 Acres of Land*, 608 F.2d 1073, 1076 (5th Cir. 1979), the court relied upon URA legislative history in determining that it should apply a narrow reading. In addition, the court held that reimbursement of litigation expenses was not appropriate where the condemnation proceeding was voluntarily dismissed by the government and the landowner subsequently sold the property to the government. *Id.* The decision is not on point: 1) Delaware courts construe statutes based on the Plain Meaning Rule, not federal legislative history; 2) DelDOT did not voluntarily dismiss the condemnation action; and 3) the Lawsons have not sold the property to DelDOT.

Notably, *U.S. v. 410.69 Acres of Land* did include a statement which supports the Lawsons' request for fees:

If, when a motion to recoup litigation expenses is filed in the District Court, the Government has not already purchased the land in question from the landowner, we might well reach a different result notwithstanding the Government's intention to take the property at some future time. *Id.*

As a result, the decision actually supports the Lawsons' cause.

¹ Dismissal of a condemnation action based upon violation of a statutory provision precluding institution of condemnation in the absence of prior *bona fide* negotiations has been construed to be: 1) more than a mere "technicality"; and 2) not a matter of form, but one "of high moral principle for violation of which redress should be liberally given." *Morris County v. 8 Court Street Ltd.*, 537 A.2d 1325, 1327 (N.J. Super. A.D. 1988).

Finally, the case of *U.S. v. 5,553.80 Acres of Land*, 451 F.Supp. 220 (W.D. La. 1978) is also inapposite. In that action, the Court held that the failure of the owner to contest the taking or entitlement of the United States to condemn the property precluded a litigation expense reimbursement award under 42 U.S.C. § 4654(a)(1). In fact, that condemnation action was not dismissed. Contrastingly, the Lawsons: 1) vigorously contested DelDOT's right to take; and 2) the condemnation was dismissed based on DelDOT's violation of the RPAA. Consequently, the case is not of any persuasive value.

(b) Federal Decisions Are Irrelevant Since
URA Violations Are Not Grounds For
Condemnation Dismissal

All three (3) decisions and the URA are further distinguishable on the grounds that dismissal of an action for violation of the URA is not legally possible. It is well established that the URA is merely "exhortatory," not directory or mandatory. *U.S. v. 416.18 Acres of Land*, 525 F.2d 450, 454 (7th Cir. 1975). Indeed, 42 U.S.C. § 4602(a) expressly provides that "[t]he provisions of section 4651 of this title create no rights or liabilities and shall not affect the validity of any property acquisitions by purchase or condemnation."

The federal courts have consistently held that URA provisions constitute mere guidelines; they need only be followed "to the greatest extent possible." *Tennessee Gas Pipeline Co. v. New England Power, C.T.L., Inc.*, 6 F.Supp. 2d

102, 104 (D. Mass. 1998). Similarly stated, 42 U.S.C. § 4651 creates no rights in landowners and is nothing more than a statement by Congress as to what it perceives to be the preferred method of dealing with landowners when the government acquires land. *U.S. v. 410.69 Acres of Land*, 608 F.2d 1073, 1074 n.1 (5th Cir. 1979).

The URA is merely a statement of laudatory goals. It does not create any substantive legal rights. In contrast, the RPAA establishes substantive legal rights of a directory nature. Indeed, violation of the RPAA, if not excused, is grounds for dismissal of a condemnation action. Therefore, the URA and federal decisional law based on the URA are not on all fours with the RPAA.

3. DelDOT's Proposed Reading Of § 9503
Would Lead To An Absurd Result; It
Would Never Have To Pay Litigation
Expenses Despite Violating The RPAA

DelDOT contended in the Court below that an award of litigation expenses to the Lawsons was not called for under § 9503 since: 1) a dismissal without prejudice permits it to try to acquire the property again in the future; and 2) the Opinion did not conclude that DelDOT lacked the power of eminent domain or a valid public use. A-93 to 94. The Court should reject such a proposed reading of the Litigation Expense Reimbursement Statute, however,

since it would lead to an absurd result: DelDOT would never be subject to § 9503.

DelDOT possesses the power of eminent domain pursuant to 17 *Del. C.* §§ 132 and 137. Indeed, its eminent power is extremely broad; anything remotely related to highways and roads is within the purview of DelDOT's eminent domain power. *See* 17 *Del. C.* §§ 101(a)(8), 132(c)(4), 132 (d), and 137(a)(1) and *Cannon v. State, supra*. And DelDOT frequently condemns property pursuant to those statutory delegations of eminent domain power in order to construct public roads, a quintessential and clear cut "public use." So if § 9503 only applied based on lack of eminent domain power or public use, then DelDOT could never be required to pay for litigation expenses as a matter of law.

Additionally, DelDOT immunity from § 9503 based on a condemnation's dismissal being without prejudice would render the statute mere surplusage. Since it is highly unlikely that dismissal of a DelDOT condemnation proceeding would ever be with prejudice, it would never be subject to § 9503 liability. This would permit DelDOT to bring condemnation proceedings with total disregard for the RPAA prerequisites to filing – no appraisal, offer or negotiations on Just Compensation - with no penalty. Owners would then have to spend huge, unreimbursable sums to fight DelDOT or capitulate to such DelDOT bullying.

Such an absurd result could not have been intended by the General Assembly when it adopted the Litigation Expense Reimbursement Statute. As a result, DelDOT's proposed interpretation should be rejected by the Court.

4. Decisional Law From Other Jurisdictions
Supports The Lawsons' Interpretation Of
§ 9503

In *Town of Kearny v. Discount City of Old Bridge, Inc.*, 2012 WL 3116817, *2-3 (N.J. Super. A.D., July 20, 2012), the Court held that a Supreme Court decision that a condemnation complaint be dismissed without prejudice for failure of the condemnor to engage in *bona fide* negotiations before filing its condemnation complaint qualified as a final judgment that the condemnor "cannot acquire the real property by condemnation." Indeed, the New Jersey Appellate Court rejected the condemnor's argument to the contrary as being "without sufficient merit to warrant discussion and a written opinion." This decision is on all fours with the facts in the case *sub judice*: 1) Supreme Court decision, 2) dismissing a condemnation proceeding without prejudice, 3) based on violation of a statute requiring valid pre-filing negotiations.

Similarly, an Ohio Appellate Court has held that the dismissal of a condemnation proceeding based on the failure to properly negotiate before filing condemnation satisfied the statutorily required showing that there was a "final judgment...that the agency cannot acquire the real property by

condemnation.” *Metro, Southwest Ohio Regional Transit Auth. v. Capozzolo*, 796 N.E. 2d 583, 584-85 (Ohio App. 2003). The Court rejected the governmental agency’s argument that the statute should be interpreted to foreclose recovery of litigation expenses unless it was established that it could never acquire the property. *Id.* In holding that the governmental agency’s suggested interpretation was too narrow, the Court relevantly noted as follows:

We conclude that the ‘final judgment’ in the statute pertains to one particular appropriation proceeding, not all potential appropriation proceedings as a whole. To hold otherwise would potentially negate the statute, because after losing a case based on anything other than a determination that the property could never be appropriated, the state agency could merely claim that it planned to attempt appropriation again and could always avoid a ‘final judgment.’ We hold that once a particular appropriation proceeding has reached a final judgment, the fee-awarding statute is triggered, and the trial court may award costs and attorneys fees to the property owner. *Id.* at 585.

The New Jersey and Ohio decisions’ reasoning comport with the plain meaning of § 9503. The Court should follow their reasoning. Accordingly, reversal and remand for entry of an award of litigation expenses to the Lawsons is called for.²

² This should include an award of attorneys fees and litigation expenses incurred in prosecuting this appeal and obtaining final payment of reimbursement amounts from DelDOT.

ARGUMENT

II. THE SUPERIOR COURT ERRED IN DENYING THE LAWSONS' REIMBURSEMENT OF THEIR ATTORNEYS FEES AND LITIGATION EXPENSES PURSUANT TO THE BAD FAITH EXCEPTION TO THE AMERICAN RULE

A. Question Presented

Whether the Superior Court erred in denying the Lawsons' reimbursement of their attorneys fees and litigation expenses pursuant to the Bad Faith Exception to the American Rule where the Delaware Supreme Court held that the condemnation action should have never been initiated in the first place? The question was preserved in the Motion. A-23.

B. Standard and Scope of Review

The standard of review regarding an award of attorneys fees under the Bad Faith Exception to the American Rule is abuse of discretion. *Versata Enterprises, Inc. v. Selectica, Inc.*, 5 A.3d 586, 607 (Del. 2010). The standard looks to whether the decision was arbitrary or capricious. *Id.* at 608.

C. Argument

An Award Pursuant To The Bad Faith Exception Was Warranted; This Court Held That The Condemnation Action Was Improvidently Filed

An award of fees under the Bad Faith Exception to the American Rule may be granted where an action is commenced in bad faith. *Versata Enterprise*,

Inc. v. Selectica, Inc., 5 A.3d 586, 607 (Del. 2010). Indeed, the knowing assertion of frivolous claims has previously been held to justify a Bad Faith Exception fee award. *Johnston v. Arbitrium (Cayman Islands) Handels AG*, 720 A.2d 542, 546 (Del. 1998). The proponent of a request for an award of attorneys fees bears the burden of establishing “clear evidence” of subjective bad faith. *Auriga Capital Corp. v. Gatz Properties*, 40 A.3d 839, 880 (Del. Ch. 2012). And a determination of whether clear evidence of subjective bad faith exists is a fact intensive inquiry. *Id.* at 880-81.

In *Lawson v. State*, this Court held that it was clear that DelDOT never should have initiated the condemnation action since it failed to comply with the prerequisite RPAA requirement to obtain a good faith, valid appraisal of Just Compensation. Because the Court held that it was clear that DelDOT failed to comply with the RPAA and had no valid excuse, it concluded that DelDOT knowingly initiated the condemnation action in contravention of the RPAA. Indeed, this Court’s Opinion sets forth extensive background fact history establishing the numerous indications to DelDOT before it filed this action that its appraisal was fundamentally flawed. These included comments from the Lawsons, their real estate agent Doug Salmon, and their attorney Richard Abbott. A-56 to 58.

Since this Court has held that it was “clear” that DelDOT violated the RPAA and that the Superior Court’s decision was clearly erroneous, the requisite “clear evidence” of DelDOT’s bad faith initiation of the condemnation action is established. Accordingly, the Bad Faith Exception to the American Rule applies.

The Trial Court’s conclusory statement that “DelDOT did not act in bad faith” was arbitrary. Decisional law establishes that DelDOT’s improper initiation of the condemnation action in clear contravention of the RPAA is the type of “bad faith” satisfactory to trigger an award of attorneys fees under the Bad Faith Exception. Therefore, the Court should reverse the Trial Court and remand the matter for entry of an award of attorneys fees and litigation expenses pursuant to the Bad Faith Exception.³

³ This should include an award of attorneys fees and litigation expenses incurred in prosecuting this appeal and obtaining final payment of reimbursement amounts from DelDOT.

ARGUMENT

III. THE TRIAL COURT ERRED IN FAILING TO AWARD STATUTORY COSTS

A. Question Presented

Whether the Superior Court erred in denying the Lawsons' request for costs under 10 *Del. C.* §§ 5101 and 5104 where they were the prevailing party in the dismissed condemnation action? The question was preserved in the Motion. A-24.

B. Standard and Scope of Review

"The Superior Court's construction of a statute is reviewed by this Court *de novo*. The standard of review is whether the trial court erred in formulating or applying legal precepts." *Kivlin v. Nationwide Mut. Ins. Co.*, 765 A.2d 536, 539 (Del. 2000).

C. Argument

The Denial Order did not include any ruling or reasoning regarding the Lawsons' request for an award of costs pursuant to 10 *Del. C.* §§ 5101 and 5104. The Court's failure to decide the issue and include any reasoning *ipso facto* warrants reversal. In addition, costs are clearly awardable, as the Lawsons prevailed based upon this Court's dismissal of a condemnation action brought in the name of the State for the use of DelDOT.

It is well settled that a Delaware Judge must state the reasons for his decision. *B.E.T., Inc. v. Bd. of Adjustment of Sussex County*, 499 A.2d 811 (Del. 1985). In that action, this Court held that the incorporation by reference of a party's brief as the Court's opinion is an unacceptable judicial "shortcut." *Id.* at 812.

Similarly, the Trial Court used an equally impermissible shortcut by failing to decide the issue or include any rationale for its failure to award the Lawsons their court costs. Consequently, the Order should be reversed on that basis alone.

Additionally, 10 *Del. C.* § 5101 provides that where an action law is dismissed, "there shall be judgment for costs for the defendant." Pursuant to 10 *Del. C.* § 5104, where a final judgment is given for a defendant in a civil against brought in the name of the State, judgment for costs shall be given. Pursuant to the Opinion, the Mandate, and Order of Dismissal, DelDOT's condemnation action against the Lawsons was dismissed without prejudice. The Lawsons prevailed. Accordingly, statutory costs are awardable to the Lawsons.

CONCLUSION

Based upon the foregoing, the Court should reverse the Order and remand with instructions to enter an award of reasonable litigation expenses and costs to the Lawsons pursuant to the Litigation Expense Reimbursement Statute, the Bad Faith Exception, and 10 *Del. C.* §§ 5101 and 5104. 29 *Del. C.* § 9503 entitles the Lawsons to an award of all reasonable litigation expenses on the grounds that the condemnation action was dismissed; DelDOT could not acquire the property by condemnation. In addition, this Court's Opinion concluded that DelDOT should have never initiated the condemnation action since it was clear that it had failed to comply with the appraisal of Just Compensation requirement contained in the RPAA, which is a prerequisite to filing condemnation (proving Bad Faith). Lastly, the Trial Court erred in failing to award the Lawsons' reimbursement of their statutory costs as the prevailing party; the Trial Court failed to decide the issue or provide any reasoning therefor. As a result, reversal and remand with instructions to enter an award in favor of the Lawsons and against DelDOT in a reasonable amount, including fees and expenses incurred to obtain the award, is warranted.

ABBOTT LAW FIRM

A handwritten signature in black ink, appearing to read "Richard L. Abbott", written over a horizontal line.

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