



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
STATE OF DELAWARE, upon the	:	C.A. No. N12C-01-128 JAP
Relation of the Secretary of the	:	
DEPARTMENT OF	:	
TRANSPORTATION,	:	
	:	
Plaintiffs Below,	:	
Appellees.	:	

APPELLANTS' REPLY BRIEF

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ARGUMENT

I. IN THIS CASE OF FIRST IMPRESSION, THE LITIGATION EXPENSE REIMBURSEMENT STATUTE SHOULD BE INTERPRETED IN THE CONTEXT OF THE RPAA AND THE ENTIRETY OF § 9503

A. The Underlying Purpose Of The RPAA Is To Make Property Owners Whole

DelDOT submits that the Litigation Expense Reimbursement Statute should be so narrowly construed that it almost never applies. AB at 13-14.¹ But DelDOT ignores the clear intent of the RPAA to make property owners whole when they are impacted by takings and condemnations. Indeed, the RPAA contains numerous provisions which evoke an intent to insure that property owners receive full recompense for the involuntary taking of their property by government. Accordingly, the Litigation Expense Reimbursement Statute, read in the light of the overall “make whole” purpose of the RPAA, should not be narrowly construed.

Delaware Rules of Statutory Interpretation instruct that statutory provisions shall be read in light of their context. 1 *Del. C.* § 303. Thus, the Court should interpret § 9503 in light of related RPAA provisions such as §§ 9502, 9504, 9505, and 9506. Under § 9502, a condemnor is required to reimburse the property owner for expenses arising from conveyance of title,

¹ References herein to “AB at __” are to the Appellee’s Answering Brief dated December 16, 2013.

including mortgage pre-payment penalty costs, recording fees, a *pro rata* portion of prepaid real estate taxes, “and similar expenses incidental to conveying such real property to the State.” Pursuant to RPAA § 9504, a property owner that is awarded compensation for the taking of its property in an Inverse Condemnation action is entitled to an award of attorney, appraisal, engineering, and litigation expenses “actually incurred because of such proceedings” as a part of any settlement or judgment. In addition, § 9505(9) requires a condemning agency to acquire an uneconomic remnant that remains after a partial taking of an owner’s property. And RPAA § 9506(b) entitles a tenant to be paid Just Compensation for any building, structure or other improvement which it constructed on the leasehold premises (regardless of lease language obligating the tenant to remove the improvements).

The four (4) RPAA provisions combine to guarantee persons with an interest in property to be made whole for the impacts of involuntary takings and condemnations. Viewing the Litigation Expense Reimbursement Statute in that context, it is apparent that § 9503 was intended to constitute a broad right to reimbursement of litigation expenses incurred in defending against improvidently filed condemnation proceedings. Indeed, § 9503 requires payment of litigation expenses to property owners where either: 1) “the final judgment is that the real property cannot be acquired by condemnation”; or

2) “the proceeding is abandoned.” Thus, both involuntary and voluntary cessations of condemnation proceedings trigger an owner’s entitlement to an award of litigation expenses. Consequently, the Court should construe the Litigation Expense Reimbursement Statute consistent with the broad, “make whole” intent of the RPAA by concluding that an action such as the case *sub judice*, where an unexcused RPAA violation results in dismissal, triggers an award.

B. DelDOT’s Clear Violation Of The RPAA Constitutes
A Fundamental, Substantive Error, Not A Minor
Procedural Miscue

DelDOT vainly attempts to characterize its significant substantive contravention of the RPAA as a minor procedural mistake. AB at 10 and 14. Not so. The dismissal of the condemnation action per this Court’s Opinion and Mandate was based on significant substantive requirements of the RPAA: the obligation to prepare a valid appraisal of Just Compensation. As a result, the Court should reject the notion that its en Banc decision was founded on a mere technicality.

This Court held that the basic assumptions contained in DelDOT’s appraisal were “facially flawed.” *Lawson v. State*, 72 A.2d 84, 91 (Del. 2013)(en Banc)(emphasis added). Specifically, the Court held that the appraisal could not have constituted a reasonable estimate of Just Compensation since it

failed “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). Finally, the Court held that DelDOT violated RPAA § 9505(3) since “[t]he record is clear that DelDOT’s continued reliance on its obviously flawed Appraisal frustrated the parties’ negotiations.” (emphasis added).

29 *Del. C.* § 9505(3) provides:

Before the initiation of negotiations for real property, an amount shall be established which it is reasonably believed is just compensation therefor, and such amount shall be offered for the property.

This Court has held that DelDOT knowingly relied upon an obviously invalid appraisal in clear contravention of RPAA § 9505(3). Thus, the entire process was tainted by DelDOT’s violation of a fundamental right granted to private property owners: the right to receive Just Compensation before a government taking of their property.

DelDOT’s contention that its clear-cut violation of the Lawsons’ fundamental right to Just Compensation is a mere technicality speaks volumes about its inability to grasp the gravity of its illegal conduct. As a consequence, the Court should reverse the Superior Court and remand this matter with instructions to enter an award of litigation expenses for all proceedings, including the post-dismissal litigation expense proceedings and appeal.

C. The Statutory Term “Condemnation” Is Distinguishable From The Constitutional Power Of “Eminent Domain”; “Condemnation” Refers To A Statutory Procedure Not The Inherent Sovereign Power

DelDOT contends that the word “condemnation” contained in an isolated clause of the Litigation Expense Reimbursement Statute should be construed to mean “eminent domain” based upon its mere *ipse dixit*. AB at 9-10. DelDOT’s argument may be easily dispensed with, however, for at least two (2) reasons: 1) it runs afoul of the Plain Meaning Rule of statutory construction; and 2) the word “condemnation” is distinct and distinguishable from the term “eminent domain” as a matter of Delaware law.

1. Under The Plain Meaning Rule, “Condemnation” Cannot Mean “Eminent Domain”

The fundamental rule of statutory construction applied by this Court is to ascertain and give effect to the intent of the legislature as expressed in the language of the statute. *State Farm Mut. Auto. Ins. Co. v. Mundorf*, 659 A.2d 215, 219-20 (Del. 1995). In order to do so, the courts of this state employ the Plain Meaning Rule, by which the Court gives words of a statute their ordinary meaning. *Id.* at 220. The Court may not engraft upon a statute language which has been clearly excluded by the legislature. *Id.*

Because the Delaware General Assembly utilized the word “condemnation” in the context of the preceding term “condemnation proceeding” in § 9503, it is evident that the General Assembly: 1) intended the term “condemnation” to refer to the “condemnation proceeding” initiated; and 2) did not intend to refer to the inherent sovereign power of “eminent domain.” DelDOT’s argument to the contrary flies directly in the face of fundamental precepts of statutory construction. Therefore, DelDOT’s argument is without any legal merit.

2. The Terms “Condemnation” And “Eminent Domain” Have Different Meanings Per State Law

Under Delaware law, the term “condemnation” expressly refers to the procedural mechanism by which the government may take private property for public use. Indeed, the Delaware Condemnation Act, 10 *Del. C.* 61, establishes *ipso jure* that a “condemnation” is a procedure by which the power of eminent domain is exercised. And words that “have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning.” 1 *Del. C.* § 303.

The Delaware Condemnation Act does not equate the term “condemnation” with the term “eminent domain.” Instead, it expressly contrasts and distinguishes the two terms as being a procedural device on the

one hand *versus* a substantive power on the other. Sections 6101 and 6103 of the Condemnation Act establish that condemnation is a proceeding, while eminent domain constitutes a power.

If the General Assembly had intended the Litigation Expense Reimbursement Statute to only apply where a final judgment determined that an agency lacked the power of eminent domain, then it could have expressly so provided. But it did not. Thus, “condemnation” does not mean “eminent domain.”

3. DelDOT’s Proposed Construction Violates The Anti-Absurdity Doctrine

Even assuming *arguendo* that the term “condemnation” could be magically transmogrified to mean “eminent domain,” such a construction should be rejected on the grounds that it would lead to an absurd result. If a literal reading of a statute leads to an unreasonable or absurd result not contemplated by the legislature, the Court applies certain alternative statutory construction principles: 1) construe related statutory provisions in light of one another to produce one harmonious whole; and 2) attribute purpose to the General Assembly’s use of statutory language and avoid rendering it as surplusage. *In Re Krafft-Murphy Co., Inc.*, __ A.3d __, 2013 WL 6174485, *5 (Del., Nov. 26, 2013)(en Banc).

If the Litigation Expense Reimbursement Statute only applied to DelDOT where a court determined that it lacked the power of eminent domain, then DelDOT would be immune from § 9503 since 17 *Del. C.* Ch. 1 unequivocally delegates the power of eminent domain to DelDOT. Indeed, virtually no agency would ever be subject to § 9503 since it is hard to imagine one lacking eminent domain power would initiate a condemnation action when 10 *Del. C.* § 6105(b) mandates that the complaint expressly State the basis of its power of eminent domain. This would cause the Litigation Expense Reimbursement Statute to be a meaningless appendage, an outcome which this Court directs should be avoided.

D. Case Law Cited By DelDOT Is Inapposite

DelDOT places primary reliance upon a 9th Circuit Court of Appeals decision from 37 years ago – *U.S. v. 4.18 Acres of Land*, 542 F.2d 786 (9th Cir. 1976) – for its decisional law argument that the Litigation Expense Reimbursement Statute only applies in the extraordinary situations where a case is dismissed with prejudice because the agency lacks the power of eminent domain. AB at 15-21. Indeed, the four (4) State Court decisions relied upon by DelDOT are all founded upon the same 9th Circuit decision. *Id.*² But the 9th

² Technically, the Wyoming decision is based on the Nebraska decision, which in turn relies upon the 9th Circuit case.

Circuit decision does not stand for the proposition cited by DelDOT and the four (4) State Court decisions are distinguishable. Accordingly, the five (5) decisions relied upon by DelDOT provide it with no solace.

For starters, *U.S. v. 4.18 Acres of Land* relies upon Congressional legislative history, not any legislative history of the Delaware General Assembly. In addition, the 9th Circuit decision involved a dismissal based on a minor, correctable procedural flaw, whereas this Court's decision in *Lawson v. State* dismissed the action based upon a fundamental, substantive prerequisite to filing a condemnation action: a reasonable estimate of Just Compensation in a valid appraisal.

Next, language in the *U.S. v. 4.18 Acres of Land* case actually supports the Lawsons' cause. Specifically, the Court held that the language of the similar federal statute "suggests a case in which the federal agency has moved to condemn property without warrant for example, in the absence of any authority or of a public purpose." (emphasis added). The general rule laid down by the 9th Circuit was that litigation expenses should be awarded where a condemnation action is improvidently filed. In the case at bar, this Court held that DelDOT's initiation of the condemnation proceeding was obviously unwarranted, since the appraisal it relied upon was facially flawed and clearly

contravened RPAA § 9505(3). As a consequence, the Lawsons are entitled to an award based on the 9th Circuit's interpretation.

DelDOT's reliance upon *Board of Com'rs of County of Knox v. Wyant*, 672 N.E.2d 77, 79 (Ind. App. 1997) is likewise misplaced. In that case, the Court dismissed the complaint based upon a technical inaccuracy in the property description. In direct contradistinction, this Court dismissed DelDOT's condemnation in *Lawson v. State* based upon the fundamental substantive failure of DelDOT to comply with the most important principle in takings law: offering to pay Just Compensation. As a result, the Indiana Appellate Court decision is not on point.

The Indiana decision is also distinguishable since the statute at issue included the term "eminent domain," not the term "condemnation." This is a difference with a significant distinction. Because the Litigation Expense Reimbursement Statute language includes the procedural term "condemnation," rather than the substantive power known as "eminent domain," the Indiana appellate court decision is not on all fours.

The Nebraska, Wyoming, and North Carolina decisions relied upon DelDOT are also distinguishable from the instant facts:

- *Sorensen v. Lower Niobrara Natural Res. Dist.*, 340 N.W.2d 164, 165 (Neb. 1983) involved the failure to comply with pre-

condemnation notice and hearing requirements, which are mere procedural matters *versus* the substantive RPAA § 9505(3) requirement that DelDOT appraise, offer, and negotiate Just Compensation before initiating a condemnation proceeding.

- In *Town of Wheatland v. Bellis Farms, Inc.*, 806 P.2d 281, 285 (Wyo. 1991), the court held that fees were not awardable since the final judgment did not conclude “that the land can never be acquired by condemnation.” But the Litigation Expense Reimbursement Statute’s clear and unequivocal language does not state that the final judgment must conclude that no condemnation action may ever be initiated in the future.³
- And *Dep’t of Transp. v. Winston Container Co.*, 263 S.E.2d 830, 832-33 (N.C. Ct. App. 1980) was based on a technical defect in the resolution that authorized the filing of condemnation. In contrast to the case at bar, no substantive violation of the critically important requirement to appraise and offer Just Compensation before filing condemnation occurred.

³ In fact, if DelDOT follows the RPAA in the future, then the parties will negotiate a voluntary purchase and sale and no new condemnation may be necessary.

E. The Ohio And New Jersey Cases Relied Upon By The
Lawsons Are On Point And Represent The Modern
Trend

The two most recent decisions cited in the briefing in this appeal support the Lawsons' position. Decisions from appellate courts in New Jersey and Ohio from 2003 and 2012, respectively, provide a more current read on *jurisprudential* interpretations of language similar to the Litigation Expense Reimbursement Statute.

In *Metro, Southwest Ohio Regional Transit Auth. v. Capozzolo*, 796 N.E.2d 583, 585 (Ohio App. 2003), the court held that language identical to the Litigation Expense Reimbursement Statute required payment of the landowner's litigation expenses where a condemnation proceeding was dismissed based on the failure to properly negotiate before filing the action. Indeed, the court noted the absurdity of the very same argument being presented by DeIDOT in this action, as it would "potentially negate the statute."

In *Town of Kearny v. Discount City of Old Bridge, Inc.*, 2012 WL 3116817 (N.J. Super. AD., July 20, 2012), the court held that a State Supreme Court decision dismissing a condemnation action without prejudice based on the failure of the condemning agency to engage in *bona fide* negotiations before filing condemnation constituted a final judgment that the condemnor could not acquire the real property by condemnation. The facts in the case at bar are

identical. Accordingly, the Court should follow the reasoning applied by the Ohio and New Jersey courts and Order an award of litigation expenses in favor of the Lawsons for all legal proceedings (in the Trial Court and on appeal).

F. Even If The Litigation Expense Reimbursement
Statute Must Be Narrowly Construed, An Award Is
Warranted Under The Circumstances Here Present

DelDOT suggests that since § 9503 is a statute in derogation of the common law, that it must be strictly construed in favor of DelDOT and against the Lawsons. AB at 21-25. But such a reading conflicts with principles of Judicial Restraint. Regardless, a narrow reading does not prevent an award under the facts *extant*.

The principle of Judicial Restraint counsels against a determination of Constitutional issues when a matter may be decided based on State law. *Tell v. Roman Catholic Bishops of Diocese of Allentown*, 2010 WL 1691199, *15, Parkins, J. (Del. Super., April 26, 2010). This is presumably why the Court did not decide the argument that DelDOT lacked the requisite Constitutional public need within a reasonable time raised in the prior appeal. *See Lawson v. State* at 88 (“Because we conclude that DelDOT inexcusably failed to comply with Section 9503(3), we do not reach the other bases for the Lawsons’ appeal.”). But DelDOT’s proposed reading of § 9503 would require this Court to abandon the principle of Judicial Restraint and decide otherwise unnecessary

Constitutional challenges, thereby impinging upon the independence of the Judiciary.

Although the Lawsons contest that a narrow reading of § 9503 must be applied *ipso jure*, the fundamental substantive RPAA violation committed by DelDOT gives rise to an award of litigation expenses regardless. A narrow construction of the Litigation Expense Reimbursement Statute could foreclose an award where dismissal of a condemnation proceeding results from a mere technical defect. But when DelDOT commits a substantive violation of the RPAA, like failing to obtain a valid appraisal, even a narrow reading of § 9503 would permit an award of litigation expenses. Indeed, why would the General Assembly have placed the Litigation Expense Reimbursement Statute in the RPAA, 29 *Del. C.* Ch. 95, if dismissal based on substantive violations thereof were not intended to give rise to an award?

Because DelDOT's proposed construction of § 9503 runs counter to this Court's discretionary power to exercise Judicial Restraint and would not bar or an award under the facts of this appeal, reversal is appropriate.

ARGUMENT

II. THE BAD FAITH EXCEPTION; REQUISITE TRIAL COURT RATIONALE WAS MISSING AND CLEAR EVIDENCE WAS ESTABLISHED

DelDOT fails to address the lack of any Trial Court explanation of its conclusory decision: “DelDOT did not act in bad faith.” AB at 26-28. In addition, DelDOT: 1) relies upon the wrong legal standard; 2) unsuccessfully attempts to distinguish applicable decisional law; and 3) conclusorily denies that “clear evidence” of bad faith initiation of the condemnation action was presented. *Id.* Consequently, DelDOT’s position is without merit.

DelDOT provides no response to the Lawsons’ argument that the Superior Court decision should be reversed on the grounds that it fails to contain any reasoning for its denial of a request for reimbursement of attorneys fees and litigation expenses based upon the Bad Faith Exception to the American Rule. Since that issue is effectively uncontested, reversal is appropriate.

Next, DelDOT cites the fraud, bad faith, or abuse of discretion standard as the purported legal standard for the Bad Faith Exception. AB at 26. Instead, the standard is whether an action is commenced in subjective bad faith. *Versata Enterprises, Inc. v. Selectica, Inc.*, 5 A.3d 586, 607 (Del. 2010). This Court’s Opinion in *Lawson v. State* is replete with references to “clear” errors

committed by both DelDOT the Trial Court, which resulted in the conclusion that the action should be dismissed due to RPAA violations. Since subjective evidence reveals that DelDOT knew it should not have ever brought the condemnation action due to its obvious failure to abide by RPAA prerequisites, a case of bad faith initiation of litigation could not be any clearer. Accordingly, DelDOT's attempt to deny the obvious is unavailing.

Further, DelDOT amazingly asserts that this action is distinguishable from the case of *Johnston v. Arbitrium (Cayman Islands) Handels AG*, 720 A.2d 542, 546 (Del. 1998). AB at 27. Yet, DelDOT concedes that this Court held in *Johnston* that the Bad Faith Exception applied because the Defendants "had no valid defense and knew it," and "unnecessarily required the institution of litigation." *Id.* In the case at bar, DelDOT knew that it had no basis to initiate a condemnation action but proceeded to do so in direct contravention of the clear RPAA bar. Thus, this case is on all fours with *Johnston*. As a result, bad faith aplenty exists to support an award of fees and expenses under the Bad Faith Exception.

Finally, the Lawsons have met their burden of showing "clear evidence" of DelDOT's subjective bad faith pursuant to the quotation of this Court's own language in the *Lawson v. State* Opinion. This Court held that DelDOT violated the RPAA "when it relied on its fundamentally flawed appraisal." 72

A.3d 84, 85 (emphasis added). In addition, this Court held that: 1) the record was clear that DelDOT regulations required a wider driveway to obtain a commercial entrance permit; 2) the appraisal's basic assumptions were "facially flawed"; 3) the appraisal could not possibly establish an amount which was reasonably believed to constitute Just Compensation; 4) "the record clearly shows that the Taking would severely compromise the Lawsons' ability to use their property at a commercial regional level"; 5) the Trial Judge's determination that the appraisal was valid was "clearly erroneous"; and 6) "the record is clear that DelDOT's continued reliance on the obviously flawed Appraisal frustrated the parties' negotiations" in violation of the RPAA. *Lawson v. State* at 90-92 (emphasis added). This Court's final, non-appealable Opinion which concluded that DelDOT clearly violated the RPAA and clearly had no legitimate appraisal necessary to initiate condemnation proceedings is the very essence of the type of bad faith sufficient to trigger an award under the Bad Faith Exception to the American Rule. Accordingly, the Court should reject DelDOT's position and order that the Trial Court enter an award of all litigation expenses incurred by the Lawsons, including those arising from this appeal.

ARGUMENT

III. AN AWARD OF COSTS IS MANDATORY BY STATUTE, NOT DISCRETIONARY

DelDOT contends that the Lawsons are not entitled to an award of costs despite the fact that they were the prevailing party in the condemnation proceeding and in spite of the Trial Court's failure to decide the issue below. AB at 29-30 DelDOT is wrong in both respects. Thus, reversal is appropriate.

It is undisputed that the Superior Court never decided the Lawsons' motion for an award of costs pursuant to 10 *Del. C.* §§ 5101 and 5104. Reversal is called for.

Next, DelDOT's assertion that the Lawsons have not presented any legal authority in support of their request for an award of costs is patently false. The Lawsons have cited two statutes which mandate that they be awarded costs as prevailing party in the condemnation action. DelDOT cites no decisional law authority to the contrary. Thus, it is effectively uncontraverted that the Lawsons are entitled to an award of all court costs paid in the Trial Court and on appeal since they prevailed based upon a dismissal of the condemnation.

DelDOT's obstinate refusal to pay obviously awardable court costs is unfounded. The Court should award the Lawsons court costs.

CONCLUSION

Based upon the foregoing, the Court should reverse the Trial Court 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 to the American Rule, 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 effectively concluded that it was clear that DelDOT should have never initiated the condemnation action, thereby satisfying the Bad Faith Exception. Finally, two (2) statutes call for an award of court costs since the Lawsons were the prevailing party. Accordingly, reversal and remand for entry of an award of fees, expenses, and costs is warranted.

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

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