IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

APPELLEE'S ANSWERING BRIEF

FOX ROTHSCHILD LLP

Gregory B. Williams (I.D. No. 4195)
Austen C. Endersby (I.D. No. 5161)
Wali W. Rushdan II (I.D. No. 5796)
Citizens Bank Center
919 N. Market Street, Suite 1300
Wilmington, DE 19801
(302) 622-4211

Attorneys for Appellee
State of Delaware Department of Transportation

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NATURE OF PROCEEDINGS

This is an appeal from an Order issued by the Superior Court of the State of Delaware in and for New Castle County (the "Superior Court") which denied the Motion For Award Of Litigation Expenses (the "Motion") filed by Appellants, Defendants below, Jack W. Lawson and Mary Ann Lawson (the "Lawsons"). The underlying action in which the Lawsons sought to recover their litigation expenses was a condemnation proceeding brought in the Superior Court (the "Condemnation Action") by Appellee, Plaintiff below, State of Delaware Department of Transportation ("DelDOT"). In the Condemnation Action, DelDOT sought to acquire portions of the Lawsons' property pursuant to its powers of eminent domain for use in the construction of a state highway known as U.S. Route 301 (the "Route 301 Project").

DelDOT initially prevailed in the Superior Court. The Lawsons appealed the Superior Court's ruling, and this Court reversed the judgment of the Superior Court and remanded with instructions to dismiss the Condemnation Action without prejudice. This Court's reversal rested on narrow grounds which amount to a correctable procedural violation of the Real Property Acquisition Act ("RPAA"). Specifically, this Court concluded that "DelDOT violated RPAA Section 9505(3) when it relied on its Appraisal, which did not take into account that DelDOT's

proposed driveway significantly reduced the Lawsons' ability to commercially develop their Remainder." *Lawson v. State*, 72 A.3d 84, 92-93 (Del. 2013).

In accordance with this Court's directive, the Superior Court dismissed the Condemnation Action without prejudice. Thereafter, the Lawsons filed their Motion, requesting attorneys' fees pursuant to 29 *Del. C.* § 9503 ("Section 9503") and the Bad Faith Exception to the American Rule, and costs pursuant to 10 *Del. C.* §§ 5101 and 5104. The Superior Court properly denied the Motion, correctly concluding that neither Section 9503 nor the Bad Faith Exception to the American Rule entitles the Lawsons to recoup attorneys' fees in this case. The Lawsons are now appealing that decision.

The Lawsons initiated this appeal by filing a Notice of Appeal on September 30, 2013. The Lawsons filed their Opening Brief ("Opening Brief" or "Op. Br.") on November 14, 2013. This is DelDOT's Answering Brief.

SUMMARY OF ARGUMENT

Although the "Summary of Argument" section of the Lawsons' Opening Brief resembles a series of *Questions Presented* instead of a summary of their legal arguments, DelDOT will provide responses below in accordance with Delaware Supreme Court Rule 14(b)(iv).

1. Denied. Because the Superior Court's dismissal without prejudice of the Condemnation Action did not constitute a "final judgment…that the real property cannot be acquired by condemnation," the Superior Court correctly ruled that the Lawsons are not entitled to an award of litigation expenses pursuant to 29 *Del. C.* § 9503. The Superior Court's dismissal without prejudice resulted from DelDOT's reliance on a flawed appraisal – a correctable procedural violation of the RPAA. DelDOT still intends to and is taking the appropriate steps to acquire the property by condemnation.

2. Denied. The Superior Court correctly ruled that the Lawsons are not entitled to an award of attorneys' fees pursuant to the Bad Faith Exception to the American Rule. Neither this Court nor the Superior Court concluded that DelDOT abused its discretion or acted in bad faith in bringing the Condemnation Action. Therefore, there is no basis to award attorneys' fees under the Bad Faith Exception.

3. Denied. The Superior Court did not err in denying the Lawsons' request for costs under 10 *Del. C.* §§ 5101 and 5104. DelDOT is not aware of any

Delaware case where a court has awarded costs under those statutory provisions in a condemnation case that was dismissed without prejudice. Further, it would be inconsistent to require DelDOT to reimburse the Lawsons for their costs when they are clearly not entitled to recover attorneys' fees. In any event, the amount of costs requested by the Lawsons is excessive under Delaware law.

STATEMENT OF FACTS

A. The Delaware Supreme Court Concluded That DelDOT Violated The RPAA By Relying On A Flawed Appraisal, Which Is A Correctable Procedural Violation and Thereby Dismissed the Action Without Prejudice

In the underlying Condemnation Action, DelDOT sought to acquire two discrete areas on the Lawsons' 10.1-acre property: (1) 1.51 acres as a fee acquisition; and (2) 0.14 acres as a temporary construction easement (together, the "Taking Area"). After the acquisition, the Lawsons would still have approximately 8.42 acres of land remaining (the "Remainder"). As previously explained to this Court, the proposed acquisition of the Taking Area is necessary for a clear public purpose — improvements to U.S. Route 301.

Following months of diligent but unsuccessful efforts to negotiate with the Lawsons in good faith, DelDOT initiated the underlying Condemnation Action on January 18, 2012. During the good cause hearing held on March 15, 2012, the Superior Court ruled on the record, *inter alia*, as follows: (1) DelDOT's negotiations with the Lawsons were adequate; (2) DelDOT's offer on the Taking Area was made in good faith; and (3) DelDOT's just compensation deposit with the Superior Court was satisfactory. On May 15, 2012, the Superior Court entered an Order granting DelDOT's Motion for Possession and denying the Lawsons' Motion to Dismiss. On May 17, 2012, the Court entered DelDOT's proposed Order on the Motion for Possession.

On July 22, 2013, this Court reversed the judgment of the Superior Court, vacated the Superior Court's Orders, and remanded with instructions to dismiss without prejudice. *Lawson v. State*, 72 A.3d 84 (Del. 2013) (the "Opinion"). In the Opinion, this Court held that "the Superior Court judge erred when he found that [DelDOT] complied with Delaware's Real Property Acquisition Act before it moved to condemn property." *Id.* at 84. Specifically, the Court held that "DelDOT violated RPAA Section 9505(3) when it relied on its Appraisal, which did not take into account that DelDOT's proposed driveway significantly reduced the Lawsons' ability to commercially develop their Remainder." *Id.* at 92-93. The Court concluded that "the appropriate remedy is dismissal without prejudice."[1] *Id.* at 93.

Significantly, this Court did not hold that DelDOT abused its discretion or acted in bad faith in bringing the Condemnation Action. Nor did this Court conclude that DelDOT has no right to possess the Taking Area because it lacks a public purpose or otherwise. Rather, this Court reversed the judgment of the Superior Court on narrow grounds based on a correctable procedural violation — i.e., DelDOT's filing of the Condemnation Action was premature since the appraisal it relied on to support its just compensation offer was flawed.

[1] DelDOT is in the process of having the Lawsons' property reappraised and intends to continue its efforts to acquire the Taking Area through condemnation by negotiation or litigation. (*See* A-93, A-112-114.)

Accordingly, this Court remanded with instructions to dismiss the Condemnation Action without prejudice.

On August 5, 2013, in accordance with this Court's directive, the Superior Court issued an Order dismissing the Condemnation Action without prejudice. (A-73).

B. The Lawsons Improperly Sought Litigation Expenses and Costs

The Lawsons filed their Motion for Award of Litigation Expenses on September 12, 2013. (A-20.) In their Motion, the Lawsons argued that they are entitled to an award of litigation expenses under Section 9503 of the RPAA, which provides that landowners may recover attorneys' fees and other litigation expenses if the court renders a "final judgment…that the real property cannot be acquired by condemnation…." 29 *Del. C.* § 9503. The Lawsons asserted the misguided argument that "§ 9503's plain meaning is that where a final judgment is entered in a condemnation action which concludes that property cannot be acquired by said condemnation action, the landowner is entitled to reimbursement of litigation expenses." (A-22 at ¶ 8) (emphasis added). In addition, the Lawsons argued that they are entitled to attorneys' fees pursuant to the Bad Faith Exception to the American Rule. Finally, the Lawsons' Motion sought an award of costs pursuant to 10 *Del. C.* §§ 5101 and 5104.

DelDOT filed an Opposition to the Lawsons' Motion on September 23, 2013. (A-91.) As DelDOT explained in its Opposition, neither Section 9503 nor the Bad Faith Exception apply in this case. In addition, the Lawsons are not entitled to recover costs. (A-95.)

C. The Superior Court Properly Denied The Lawsons' Motion for Award of Litigation Expenses

By Order dated September 25, 2013 (the "September 25 Order"), the Superior Court denied the Lawsons' Motion on the following grounds:

> 1. 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.
>
> 2. DelDOT did not act in bad faith.

(September 25 Order, Trans. ID No. 54562358.)

While succinct, the September 25 Order accurately and appropriately explains the Superior Court's reasoning as to why the Lawsons are not entitled to an award of litigation expenses under Section 9503. Further, the Superior Court correctly found that DelDOT did not act in bad faith. Finally, the fact that the September 25 Order does not explicitly state that the Lawsons are not entitled to recover costs is of no moment. As explained below, under the circumstances, it is clear that the Lawsons are not entitled to recover costs.

ARGUMENT

I. THE LAWSONS ARE NOT ENTITLED TO AN AWARD OF LITIGATION EXPENSES UNDER 29 *DEL. C.* § 9503

A. Question Presented

Whether the Superior Court erred in denying the Lawsons' request for litigation expenses pursuant to 29 *Del. C.* § 9503 where the Superior Court's dismissal without prejudice of the Condemnation Action resulted from a correctable procedural violation of the RPAA?

B. Scope of Review

The "standard and scope of review of the Superior Court's interpretation of the condemnation statute is *de novo*." *Cannon v. State*, 807 A.2d 556, 559 (Del. 2002).

C. Merits of Argument

i. Section 9503 Is Triggered Only Where There Is A Final Judgment That The Subject Property Cannot Be Acquired Under The Condemning Authority's Eminent Domain Power

The core issue before the Court is the scope of the phrase "cannot be acquired by condemnation" in Section 9503. This is an issue of first impression in this State.

As understood by DelDOT and interpreted by other courts, the phrase "cannot be acquired by condemnation" means "cannot be acquired by eminent domain." Litigation expenses are recoverable under Section 9503 only where there

is a final judgment that the condemning agency lacks authority to acquire the subject property under its powers of eminent domain. *See, e.g., United States v. 4.18 Acres of Land*, 542 F.2d 786 (9th Cir. 1976); *Board of Commissioners of the County of Knox v. Wyant*, 672 N.E.2d 77 (Ind. Ct. App. 1997). DelDOT's understanding of the phrase is strongly supported by the plain meaning of the words themselves, the statute's legislative history, and the decisions of numerous Federal and State courts which have interpreted analogous Federal and State statutory provisions.

According to the Lawsons, however, the phrase "cannot be acquired by condemnation" means "cannot be acquired by the condemnation proceeding instituted by the agency." (Op. Br. at 13.) This interpretation should be rejected. Under the Lawsons' interpretation, a landowner would be entitled to an award of litigation expenses under Section 9503 whenever the condemnation action against him is dismissed for any reason – including, for example, a dismissal without prejudice for a correctable minor procedural violation of the RPAA. This proposed interpretation ignores the plain meaning of the statutory phrase and is not supported by the great weight of authority existing in Federal courts and other State courts that have decided the issue in interpreting the Federal statute upon which the RPAA is modeled, and similar statutes in other States.

1. The Language of Section 9503 and the Analogous Federal Provision

This inquiry must begin with the words of the statute themselves. Section 9503 provides as follows:

> 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 or the proceeding is abandoned, the owner of any right, title or interest in such real property 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. The awards of such sums will be paid by the agency.

29 *Del. C.* § 9503 (emphasis added).

This provision was modeled directly on the analogous litigation expenses provision of the Uniform Relocation Assistance and Real Property Acquisition Policies Act (the "URA"), 42 U.S.C. § 4654(a), a federal statute enacted in 1970 that "establishes minimum standards for federally funded programs and projects that require the acquisition of real property (real estate) or displace persons from their homes, businesses, or farms."[2] *See, e.g.*, Session Laws, 58 *Del. Laws*, c. 413, § 3 ("WHEREAS, the Federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 establishes a new and different program of relocation assistance and uniform real property acquisition policy; . . . WHEREAS,

[2] http://portal.hud.gov/hudportal/HUD?src=/program_offices/comm_planning/affordablehousing/training/web/relocation/overview

continued eligibility of the State of Delaware for various types of Federal aid is made contingent upon compliance with the terms and provisions of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970"). The RPAA was modeled after the URA.

The URA's litigation expenses provision, which is worded very similarly to Section 9503, provides as follows:

> The Federal court having jurisdiction of a proceeding instituted by a Federal agency to acquire real property by condemnation shall award the owner of any right, or title to, or interest in, such real property such sum as will in the opinion of the court reimburse such owner for his reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred because of the condemnation proceedings, if—
>
> (1) the final judgment is that the Federal agency cannot acquire the real property by condemnation; or (2) the proceeding is abandoned by the United States.

U.S.C. § 4654(a) (emphasis added).

2. The Plain Meaning Rule Supports DelDOT's Straightforward Interpretation of the Phrase "Cannot Be Acquired by Condemnation"

It is axiomatic that "[i]f a statute is unambiguous, there is no need for judicial interpretation, and the plain meaning of the statutory language controls." *Eliason v. Englehart*, 733 A.2d 944, 946 (Del. 1999).

By its plain terms, Section 9503 unambiguously applies only in cases where there is a final judgment that the subject property "cannot be acquired by condemnation." The language "by condemnation" means just that: by condemnation – i.e., "by eminent domain." This interpretation should control, as it respects the plain and unambiguous words of the statute.

According to the Lawsons, however, "[t]he plain meaning of the word 'condemnation' is a 'condemnation proceeding.'" (Op. Br. at 12.) The Lawsons further assert that the phrase "cannot be acquired by condemnation" means "cannot be acquired by the condemnation proceeding instituted by the agency" — i.e., *this very condemnation proceeding*. (*Id.* at 13.) This interpretation is overly broad and lacks support. In asserting that the term "condemnation" means "condemnation proceeding" or "the condemnation proceeding instituted by the agency," the Lawsons are reading words into the statute that simply are not there in an apparent attempt to avoid the consequences of the clear and unambiguous words of the statute. Section 9503 does not speak of a "final judgment that the property cannot be acquired by condemnation in this action." Nor does a plain reading of the statute suggest that the phrase "cannot be acquired by condemnation" should be construed as "cannot be acquired in the condemnation action instituted by the agency."

The Lawsons further argue that "[i]f 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." (Op. Br. at 15.) This argument is unavailing. By the same token, if Section 9503 was intended to apply whenever a condemnation proceeding is dismissed for any reason, the General Assembly would have so stated – e.g., "cannot be acquired by the condemnation proceeding instituted by the agency." But it did not. Instead, the General Assembly adopted the unambiguous phrase "cannot be acquired by condemnation" to make clear that landowners may be entitled to litigation expenses only if they prevail *on the merits*.

3. Numerous State and Federal Cases Support DelDOT's Position on the Correct Interpretation of Section 9503

Numerous Federal and State courts have held that, under analogous litigation expense provisions in the URA and in other States' condemnation statutes, a landowner is not entitled to receive litigation expenses unless and until there is a final judgment that the condemning agency cannot acquire the land because it lacks the authority or a public purpose to do so. Under this jurisprudence, the dismissal of a condemnation action without prejudice due to a correctable procedural defect – such as the flawed but correctable Appraisal in this case –

would not trigger the litigation expense provisions. Because the issue before the Court is one of first impression in this State, it is entirely appropriate for this Court to look to these Federal and State court decisions for guidance.

One of the leading and most widely cited Federal cases on this issue, *United States v. 4.18 Acres of Land*, 542 F.2d 786 (9th Cir. 1976), is directly on point. In *4.18 Acres*, the Ninth Circuit held that in condemnation actions that have been dismissed without prejudice due to a correctable procedural defect, landowners are not entitled to recover attorneys' fees or other expenses under the litigation expenses provision of the URA.

Similar to this case, the district court in *4.18 Acres* had dismissed the condemnation proceeding without prejudice due to a correctable procedural error committed by the condemning agency — i.e., prior to bringing the action, the U.S. Forest Service had not complied with certain regulations published by the Advisory Council on Historic Preservation under the National Historic Preservation Act. *4.18 Acres*, 542 F.2d at 787-88, n.1. The landowners subsequently sought attorneys' fees and other expenses under the URA. *Id.*

In holding that the landowners were not entitled to recover their litigation expenses under the circumstances, the Ninth Circuit noted that the URA's legislative history supported a narrow construction of the litigation expenses provision, and reasoned as follows:

> It seems fair to conclude that Congress intended by section 304(a) to create a narrow exception to the general rule of nonrecovery of litigation expenses. Recovery of litigation expenses in the present case could be justified only by a most expansive reading of the statute.
>
> The trial court held only that the action was premature, dismissing without prejudice because of a correctable procedural flaw. Such a dismissal is not a final judgment that the federal agency 'cannot acquire the real property by condemnation.' This language 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.
>
> *****
>
> Were we to construe section 304(a) as requiring an award of litigation expenses whenever the initial proceeding was dismissed for whatever reason, the award would often be largely fortuitous, depending upon the effect given by the trial court to errors committed during or prior to trial. Had the district court in this case permitted the government to amend the complaint to reflect the correction of the procedural error, rather than dismissing the action, appellants would not be entitled to expenses. Congress could not have intended that the right to recover expenses turn upon such a difference.

4.18 Acres, 542 F.2d at 789 (emphasis added).

The holding and reasoning of *4.18 Acres* strikes the appropriate balance between protecting landowners' rights under the statute and preventing fortuitous litigation expense awards, while also respecting the plain words of the statute and the legislative history that led to its passage.

The Lawsons' attempt to distinguish *4.18 Acres* is unavailing. Here, as in *4.18 Acres*, there was a dismissal without prejudice due to a correctable procedural error.

In addition, the Lawsons' statement that, "[i]n 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" (Op. Br. at 17), rings hollow. First, the court in *4.18 Acres* did look to the plain meaning of the statute in addition to examining its legislative history, noting that the statutory language "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." *4.18 Acres*, 542 F.2d at 789. Second, the Lawsons provide no legitimate rationale (and there is none) for the notion that this Court should decline to follow a federal case that relies in part on federal legislative history where: (1) this Court is tasked with interpreting a Delaware statute that was modeled after the federal statute at issue in the federal case; (2) there is no Delaware authority on point; and (3) numerous other States have followed that same federal decision (as discussed further below).

Further, the Lawsons' argument that federal decisions such as *4.18 Acres* are "irrelevant" because the URA is "exhortatory," and not mandatory, is unavailing. As explained above, Delaware's RPAA is modeled after the URA. Thus, federal

decisions that interpret the URA are certainly a viable source of persuasive authority. Moreover, because the RPAA is directory in nature and not mandatory, *see City of Dover v. Cartanza*, 541 A.2d 580, 583 (Del. Super. Ct. 1988), the Lawsons' attempt to distinguish the URA on this basis lacks merit.

Notably, several other State courts have followed the Ninth Circuit's decision in *4.18 Acres.* One such case, *Board of Commissioners of the County of Knox v. Wyant*, 672 N.E.2d 77 (Ind. Ct. App. 1997), is particularly noteworthy for its striking similarity to the instant case. The lower court in *Wyant* had dismissed the condemnation proceedings without prejudice because "[t]he complaint [did] not properly describe the property to be taken…[and] [t]he ***appraisal was made based on the defective description and cannot be proper***." *Wyant*, 672 N.E.2d at 79 (emphasis added). The lower court further noted the following:

> No good faith offer to the Defendants could be made since there is no proper description of the land and matters to be taken. The appraisals were based strictly on a per acre price and not on actual loss to each specific property. The same formula was used on each property ignoring the fact that each property is unique with obvious differences in the effect of the taking.

Id. Thus, like the instant case, the condemnation action in *Wyant* was dismissed because the condemning authority had failed to obtain a valid appraisal prior to filing suit.

Following the dismissal, the landowners sought reimbursement of their litigation expenses under Indiana's counterpart to Section 9503, which provides that a landowner is entitled to an award of "reasonable attorney, appraisal, and engineering fees, actually incurred because of the condemnation proceedings, if…'[t]he final judgment is that the agency cannot acquire the real property by eminent domain.'" *Id.*, quoting Ind. Code § 8-23-17-27 (emphasis added). The Court of Appeals of Indiana held that the landowners were not entitled to recoup their litigation expenses because the lower court "did not enter a final judgment stating that the County cannot acquire the land by eminent domain." *Id.* at 79.

Notably, like the Delaware RPAA, the Indiana statute was modeled after the URA, yet—unlike the RPAA and the URA— it employs the phrase "cannot acquire the real property by eminent domain" instead of the phrase "the real property cannot be acquired by condemnation." *See id.* at 79-80. Thus, it is evident that at least one State legislature has interpreted the term "condemnation" as used in Section 4654(a)(1) of the URA to be synonymous with the term "eminent domain." This notion directly contradicts the Lawsons' misguided position that the term "condemnation" in Section 9503 means "the condemnation proceeding instituted by the agency" and not "eminent domain."

The court in *Wyant* ultimately "agree[d] with the court in *4.18 Acres of Land* that this statute should be strictly construed," and reasoned as follows:

> Like *4.18 Acres of Land*, the condemnation proceeding in this case was dismissed because of a procedural flaw. Here, the trial court found that the County had demonstrated a valid public purpose but dismissed the case due to correctable procedural defects. Contrary to the Landowners' assertions, the trial court's dismissal does not amount to a determination that the County cannot acquire the land by eminent domain. Rather, the order of dismissal simply requires the County to refile the claims after correcting the procedural flaws noted by the trial court. Thus, Indiana Code § 8-23-17-27(a)(1), which requires a final judgment that the agency cannot acquire the real property by eminent domain, is not satisfied.

Wyant, 672 N.E.2d at 80-81.

Several other State courts follow *4.18 Acres* as well. *See, e.g., Sorensen v. Lower Niobrara Natural Res. Dist.*, 340 N.W.2d 164 (Neb. 1983) (agreeing with the reasoning of *4.18 Acres* and concluding that district court's dismissal without prejudice due to condemning agency's "fail[ure] to comply with the statutory requirements for notice and hearing concerning the proposed acquisition before commencing the condemnation proceeding" did not constitute a "final judgment…that the agency cannot acquire the real property by condemnation"); *Town of Wheatland v. Bellis Farms, Inc.*, 806 P.2d 281 (Wyo. 1991) (affirming district court's denial of landowners' application for attorneys' fees pursuant to Wyoming statute which entitles landowners to litigation expenses where there is a "final judgment…that the real property cannot be acquired by condemnation" because "the district court has not issued a final judgment that the land can never

be acquired by condemnation"); *Dep't. of Transp. v. Winston Container Co.*, 263 S.E.2d 830 (N.C. Ct. App. 1980) (concluding that dismissal without prejudice "for the reason that the resolution of the Board of Transportation authorizing condemnation of defendant's property was insufficient" did not constitute a final judgment that the Board of Transportation "cannot acquire real property by condemnation").

By contrast, the Ohio and New Jersey court decisions relied upon by the Lawsons conspicuously do not cite — and therefore presumably failed to consider — *4.18 Acres* or any of the foregoing State court cases. Indeed, in its opinion, the Court of Appeals of Ohio curiously stated: "We cite absolutely no case law—because there is none to cite. As far as we can determine, the parties have gotten themselves into a situation never before ruled upon in a reported opinion." *Metro, SW. Ohio Reg'l Transit Auth. v. Capozzolo*, 796 N.E.2d 583, 584 (Ohio Ct. App. 2003). Thus, it is apparent that the Ohio court did not have the benefit of reviewing and considering any of the foregoing Federal and State cases when it decided *Capozzolo*. Likewise, the court that decided the New Jersey case cited by the Lawsons – *Town of Kearny v. Discount City of Old Bridge, Inc.*, 2012 WL 3116817 (N.J. Super. Ct. App. Div. July 20, 2012) – appears not to have considered *4.18 Acres* or the numerous State court decisions that follow it. Moreover, these Ohio and New Jersey court decisions are inherently flawed in that

they depart from the plain meaning of their States' respective litigation expense statutes by adopting an overly expansive view of the statutory language "cannot be acquired by condemnation." Thus, the Ohio and New Jersey opinions should not be followed by this Court.

Rather, this Court should follow the sound reasoning of the Federal and State cases, like *4.18 Acres*, that have held that landowners are not entitled to recover attorneys' fees or other expenses when the condemnation action has been dismissed without prejudice due to a correctable procedural defect.

4. There Is No Credible Support for the Lawsons' Overly Broad Interpretation of Section 9503

The Lawsons' overly broad interpretation of Section 9503 should be rejected for numerous additional reasons.

First, because Section 9503 conflicts with the American Rule,[3] it must be strictly construed. *See Colonial Sch. Bd. v. Colonial Affiliate, NCCEA/DSEA/NEA*, 449 A.2d 243, 247 (Del. 1982) ("It is axiomatic that statutes in derogation of the common law are to be strictly construed."); *see also Wyant*, 672 N.E.2d at 81 ("The legislative intent is in accord with the general principle of statutory construction which states that statutes in derogation of the common law should be strictly construed….As noted above, the American Rule generally prohibits an

[3] The American Rule generally prohibits an award of attorneys' fees to the winning party. *Johnston v. Arbitrium (Cayman Islands) Handels AG*, 720 A.2d 542, 545 (Del. 1998).

award of attorney fees to the winning party. Thus,…the statute must be narrowly construed.").

Second, the Lawsons' argument that "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" is an overstatement. (Op. Br. at 21.) So too is their argument that DelDOT's proposed reading of Section 9503 "would lead to an absurd result." (Op. Br. at 20-21.) Indeed, the Lawsons have argued *in this very case* that DelDOT lacks a public need to acquire the Taking Area within a reasonable time. Had the Lawsons prevailed on that argument, they might have been entitled to litigation expenses under Section 9503, thereby defeating their own argument that DelDOT would "never be required to pay for litigation expenses as a matter of law" under DelDOT's interpretation of Section 9503. Further, the fact that a statute is designed to address a rare circumstance (here, where a condemning authority lacks eminent domain power) does not make the statute *per se* absurd.

Finally, it must be noted that the Lawsons appear to be advancing two competing and inconsistent interpretations of the term "condemnation": (1) "***the*** condemnation proceeding instituted by the agency"; and (2) "***a*** condemnation proceeding." (Op. Br. at 12-13.) Indeed, the Lawsons make no effort to explain, in light of their argument that "condemnation" means "condemnation proceeding,"

why they believe the phrase "cannot be acquired by condemnation" must mean "cannot be acquired by the condemnation proceeding instituted by the agency" and not simply "cannot be acquired by a condemnation proceeding."

While the former (by "the condemnation proceeding instituted by the agency") suggests that litigation expenses are available under Section 9503 whenever a condemnation proceeding is dismissed for any reason, the latter (by "a condemnation proceeding") suggests that litigation expenses are available under Section 9503 only if the condemnation action is dismissed for some fundamental substantive reason. Thus, even if the Court were to construe the term "condemnation" as "condemnation proceeding," the Lawsons still would not be entitled to recover their litigation expenses under the circumstances, as substituting the phrase "condemnation proceeding" for the word "condemnation" would have no effect on the scope of the statute. (*Compare* "final judgment…that the real property cannot be acquired by condemnation" *with* "final judgment…that the real property cannot be acquired by a condemnation proceeding.") In order for the Lawsons to prevail, this Court would have to adopt the interpretation — "final judgment that the real property cannot be acquired by the condemnation proceeding instituted by the agency." As discussed above, this interpretation should be rejected because it is overly broad and contrary to the plain meaning of the words in the statute.

In light of the foregoing, the Superior Court's determination that the Lawsons are not entitled to an award of litigation expenses pursuant to Section 9503 should be affirmed.

ARGUMENT

II. THE BAD FAITH EXCEPTION TO THE AMERICAN RULE DOES NOT APPLY IN THIS CASE

A. Question Presented

Whether the Superior Court erred in denying the Lawsons' request for attorneys' fees pursuant to the Bad Faith Exception to the American Rule where neither the Superior Court nor the Delaware Supreme Court concluded that DelDOT initiated the Condemnation Action in bad faith?

B. Scope of Review

This Court reviews a trial court's determination regarding attorneys' fees under the Bad Faith Exception to the American Rule for abuse of discretion. *Versata Enters., Inc. v. Selectica, Inc.*, 5 A.3d 586, 607 (Del. 2010). Under this standard, the Court considers whether the Superior Court's decision was arbitrary or capricious. *Id.* at 608.

C. Merits of Argument

The Superior Court's ruling that "DelDOT did not act in bad faith" should be affirmed.

First, it is undisputed that this Court never concluded that DelDOT's actions amounted to "fraud, bad faith, or gross abuse of discretion." *See Cannon*, 807 A.2d at 561. While the Lawsons attempt to recast this Court's holding in the *Lawson v. State* Opinion as a conclusion "that it was clear that DelDOT never

should have initiated the condemnation action" and "that DelDOT knowingly initiated the condemnation action in contravention of the RPAA," the Opinion states no such conclusions.

Second, none of the case law cited by the Lawsons supports their position that the Bad Faith Exception applies in this case. For example, in *Johnston v. Arbitrium (Cayman Islands) Handels AG*, the Bad Faith Exception applied because the defendants "had no valid defense and knew it," "unnecessarily required the institution of litigation, delayed the litigation, asserted frivolous motions, falsified evidence and changed their testimony to suit their needs." 720 A.2d 542, 546 (Del. 1998). The Court in *Johnston* noted that "[a]lthough there is no single definition of bad faith conduct, courts have found bad faith where parties have unnecessarily prolonged or delayed litigation, falsified records or knowingly asserted frivolous claims." *Id.* (citing cases). No such misconduct occurred in this case.

Third, the Lawsons have made no effort to satisfy their high burden of establishing "clear evidence" that DelDOT acted with subjective bad faith. *See Auriga Capital Corp. v. Gatz Props. LLC*, 40 A.3d 839, 880-81 (Del. Ch. 2012). Instead, the Lawsons improperly conflate their burden of establishing bad faith by "clear evidence" with the "clearly erroneous" standard that this Court applies when reviewing a trial court's factual determinations. *See* Op. Br. at 25-26 (acknowledging the requirement to establish "clear evidence" of subjective bad

faith, which requires "a fact intensive inquiry," and then stating that "[s]ince 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"). The Lawsons are simply incorrect. The "clear evidence" standard for establishing bad faith has nothing to do with the "clearly erroneous" standard of review.

In light of the foregoing, the Bad Faith Exception to the American Rule does not apply in this case. Accordingly, the September 25 Order should be affirmed.

ARGUMENT

III. THE LAWSONS ARE NOT ENTITLED TO AN AWARD OF COSTS

A. Question Presented

Whether the Superior Court erred in denying the Lawsons' request for costs under 10 *Del. C.* §§ 5101 and 5104?

B. 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. Merits of Argument

The Lawsons' primary argument is that the Superior Court's judgment should be reversed solely because the Superior Court did not explicitly state its reasons for denying the Lawsons' request for costs. (*See* Op. Br. at 27-28.) This argument should be rejected, as it is well settled that this Court — to the extent it concludes that the Superior Court did not reach the costs issue — has the "power to decide issues not reached below." *Weinberg v. Balt. Brick Co.*, 112 A.2d 517, 518 (Del. 1955). "The exercise of that power is controlled by balancing considerations of judicial propriety, orderly procedure, the desirability of terminating litigation, and the position of the lower court as the primary trier of issues of fact." *Id.*

Further, the Lawsons fail to provide any basis for their request for costs other than their own *ipse dixit* statement that "costs are clearly awardable, as the Lawsons prevailed based upon this Court's dismissal of [the Condemnation Action]…." (Op. Br. at 27.) Contrary to the Lawsons' assertions, however, "final judgment does not automatically lead to costs being awarded to the prevailing party"; rather, "[d]etermining when costs should be awarded is…a matter of judicial discretion." *Barnett v. Braxton*, 2003 WL 21976411, at *2 (Del. Super. Ct. Aug. 15, 2003). This Court should, in its discretion, decline to award costs to the Lawsons.

As explained in DelDOT's opposition to the Lawsons' Motion, the Lawsons provide no authority in support of their request for costs. Indeed, DelDOT is not aware of any Delaware case law where a court has awarded costs under 10 *Del. C.* §§ 5101 or 5104 in a condemnation action that was dismissed without prejudice. In the absence of such Delaware authority, this Court should look to federal case law. Federal courts have declined to award costs (as well as fees) under 42 U.S.C. § 4654 to landowners in cases that were dismissed without prejudice due to a correctable procedural flaw. *See 4.18 Acres*, 542 F.2d at 789. Indeed, in the context of the dismissal without prejudice in this case, it would be inconsistent to require DelDOT to reimburse the Lawsons for their costs when they are not entitled to fees under Section 9503.

However, in the event this Court concludes that the Lawsons are entitled to recover costs, such costs should be limited to "the court costs required by the [Superior Court] Prothonotary." *Barnett*, 2003 WL 21976411, at *2. This would include only the LexisNexis filing fees set forth in Exhibit D to the Lawsons' Motion (A-89), totaling $937.00.

CONCLUSION

For the foregoing reasons, DelDOT respectfully requests that this Court affirm the Superior Court's September 25 Order denying the Lawsons' Motion for Award of Litigation Expenses.

Respectfully submitted,

FOX ROTHSCHILD LLP

By: /s/ *Gregory B. Williams*
Gregory B. Williams (I.D. No. 4195)
Austen C. Endersby (I.D. No. 5161)
Wali W. Rushdan II (I.D. No. 5796)
Citizens Bank Center
919 N. Market Street, Suite 1300
Wilmington, DE 19801
(302) 622-4211

Attorneys for Appellee
State of Delaware Department of Transportation

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