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SUPREME COURT OF WISCONSIN

No. 2018-AP-1114

CHRISTUS LUTHERAN CHURCH OF APPLETON,

Plaintiff-Appellant,

v.

WISCONSIN DEPARTMENT OF TRANSPORTATION,

Defendant-Respondent-Petitioner.

Appeal from the Circuit Court for Outagamie County,
Hon. Carrie A. Schneider, Presiding
Outagamie County Case No. 2017-CV-452
Appeal No. 2018AP001114

BRIEF OF AMICUS CURIAE OWNERS' COUNSEL OF AMERICA IN SUPPORT OF PLAINTIFF-APPELLANT

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INTRODUCTION

Owners' Counsel of America (OCA) refers to its Motion for Leave to File Amicus Brief for information about OCA's background, mission and purpose.

This case is about the proper interpretation of the relevant Wisconsin eminent domain statutes and whether DOT complied with the statutes in negotiating with the Church. In addressing these issues OCA argues that DOT's statutory interpretation (1) violates applicable standards regarding how eminent domain statutes should be construed (2) violates Wisconsin eminent domain law (3) undermines the just compensation rights of landowners and (4) is contrary to the legislative history of the relevant statutes.

ARGUMENT

A. Eminent domain statutes must be construed "strictly" against condemnors and "liberally" to favor property owners.

Wisconsin law requires that eminent domain statutes be strictly construed against the condemnor and liberally construed in favor of the landowner. *City of Racine vs. Bassinger*, 163 Wis. 2d 1029, 1037, 473 N.W.2d 526 (Ct. App. 1991). This interpretative standard reflects the difference

between eminent domain proceedings and other civil litigation. Although owners have done nothing wrong, they must defend themselves in court simply for owning property the government wants.

While DOT references Wisconsin's rule of strict statutory construction against the condemnor and liberal construction in favor of the landowner (Br. at 21), it applies the opposite of what the rule says in construing Wis. Stat. § 32.05(2)(a). This results in a skewed interpretation of the phrase "all property proposed to be acquired" that favors DOT's position while harming the Church's.

DOT's failure to apply the proper interpretative standard is not form over substance. Cases nationwide employ this rule of statutory construction whenever necessary to deliver justice to property owners in eminent domain proceedings.[1]

B. Just compensation includes damages and damages are driven by the property taken.

DOT concedes that "the ultimate constitutional requirement of eminent domain proceedings is just

[1]*See e.g. McMurrer v. Marion Cnty.*, 936 So. 2d 19, 21 (Fla. Dist. Ct. App. 2006); *Independent School District v. Taylor*, 324 P.3d 415, 422 (Okla. Civ. App. 2013); *Little Rock v. Raines*, 411 S.W. 2d 486, 491 (Ark. 1967); and *Platte River v. Nelson*, 775 P.2d 82, 83 (Colo. App. 1989).

compensation." Br. at 26. Although the jury renders the *final* "just compensation," a jury relies heavily on appraisal testimony. Appraisals therefore play a critical role in resolving compensation.

To support its argument that an appraisal finding no damages can properly sustain a "jurisdictional offer" containing significant damages, DOT claims that Wis. Stat. § 32.05(2)(a) does not require that the appraisal address damages to remaining property. Rather, DOT asserts that the phrase "all property proposed to be acquired" means an appraisal solely of the property being taken. DOT further argues that the terms "property" and "damages" are separate elements, meaning that it is appropriate to value the property being taken in an appraisal, while leaving damages *caused by the property being taken* to be addressed through "an internal administrative process" of DOT's creation.

OCA disagrees. The value of the property taken and damages are not two distinct elements, but rather essential spokes supporting the same just compensation wheel. Accordingly, both elements must be considered in the same

appraisal, if that appraisal is to serve as the basis for a "jurisdictional offer" which itself contains damages.

To be clear, OCA is not suggesting that DOT's appraisal must always include severance damages. However, under Wisconsin's statutory scheme, OCA will show that in order for DOT to make a valid "jurisdictional offer" which includes damages, the underlying appraisal that provides support for the offer must include them as well.

Over 100 years ago the U.S. Supreme Court ruled that just compensation includes money for the property taken and damages to remaining property. *See Bauman v. Ross*, 167 U.S. 548, 574 (1897). DOT agrees, stating in its Brief that value for the property taken and damages to remaining property are both "*components of the equation"* that determines just compensation. Br. at 16

Because *damages* result from the condemnor's project being built on the *"property proposed to be acquired,"* the two elements are closely related. That is why in partial taking cases the appraisal always addresses the part taken and damages, if any, to remaining property—not as separate valuation concepts, but as equal parts of just compensation.

While DOT maintains these elements can be treated separately, its own appraisal standards say otherwise. Relying on the judicial notice statute (Wis. Stat. § 902.01) OCA references Chapter 2 of DOT's Real Estate Manual at https://wisconsindot.gov/Pages/doing-bus/eng-consultants/cnslt-rsrces/re/repm.aspx requiring that an appraisal include the value of the property taken and damages to remaining property. This chapter further details a multi-step process for determining damages involving several critical factors. (§ 2.0.2.1.1, at 10-11.) Further, DOT's Form 1041 at https://wisconsindot.gov/Pages/doing-bus/eng-consultants/cnslt-rsrces/re/repm-forms.aspx requires appraisers working for DOT to acknowledge a "specific understanding of Chapter 2. "

DOT's counter to the undisputed evidence requiring that the part taken and damages be evaluated in the same appraisal is to argue that "property" is not the same as "damages" within the meaning of Wis. Stat. § 32.05(2)(a). Br. at 32. But it is not that "property" and "damages" are the same; rather it is that the "property proposed to be acquired" cannot be appraised in a partial taking case without an

analysis of "damages" *caused by the property proposed to be acquired*. Otherwise, the appraisal would be incompetent under Wisconsin law and DOT's own appraisal standards.

When one understands what makes up just compensation, the statutory meaning of Wis. Stat. § 32.05(2)(a) is obvious. Because damages are a necessary part of "just compensation" in a partial taking case, and an "appraisal" is the primary determinant of just compensation, when the Wisconsin legislature instructs the condemnor to appraise "all property proposed to be acquired," it reasonably assumes that the resulting report will incorporate a proper damage analysis of the impacts of "all property proposed to be acquired" on any remainder. Stated differently, because a damage analysis is essential to the valuation process in a partial taking case, it is unnecessary to state this explicitly in the statute. The point is best made by this question, "What possible reason would the Wisconsin legislature have to require that the condemnor's appraisal value one component of just compensation, while ignoring the other equally important and interrelated element?" OCA can think of no reason and DOT does not offer one.

Lastly, this interpretation of the statute is consistent with the directive that eminent domain statutes be interpreted strictly against the condemnor and liberally in favor of the landowner.

C. DOT's statutory interpretation undermines a landowner's right to just compensation.

DOT argues that interpreting the statute to free it from the constraints of the appraisal, thereby allowing DOT employees to manipulate the jurisdictional offer as they choose is good for landowners. The facts do not support this assertion.

DOT's statutory interpretation treats the Church's damages as an afterthought, resolved by cobbling numbers together through an "internal administrative revision process." Br. at 7. But damages deserve serious consideration and analysis—not as part of some departmental review—but by an independent, experienced and licensed appraiser. DOT acknowledges that "appraisals involve licensed experts reaching an opinion on an overall whole, based on considerations of many interrelated factors." Br. at 14. Yet DOT would have its own employees acting as

unlicensed appraisers in contravention of Wisconsin law. *See* Wis. Stat. § 458.08.

DOT states that damages are "one of the most contentious and difficult issues" in the world of eminent domain. Br. at 17. Once again, DOT would have that "contentious and difficult" issue—described as a complicated analysis within its own Manual—left to the discretion of DOT employees, rather than a professional appraiser.

DOT acknowledges that Wis. Stat. § 32.05(2) is designed to provide the landowner with "sufficient information—based on an expert appraisal—to meaningfully negotiate and assess whether the jurisdictional offer is fair." Br. at 2. DOT claims that its "revised offer" conforms to these requirements and clearly shows how DOT got from the appraisal to its jurisdictional offer. Br. at 27.

But DOT's assertions are unpersuasive in the face of two critical questions it fails to answer. First, "How can an appraisal that finds no damages possibly serve as a basis for judging whether a jurisdictional offer that includes significant damages is fair and reasonable?" Second, "How can the Church know (without a supporting appraisal) the

basis for the damage amounts included in DOT's revised offer? For instance, are the itemized costs based on market data? Reliable construction bids? Are the highway proximity damages derived from paired sales, where the prices of properties close to highways are compared to those further removed?

In DOT's own "Appraisal Guidelines and Agreement" at https://wisconsindot.gov/dtsdManuals/re/repmforms/RE1003-appr-guide-agreement.pdf. a "full narrative appraisal" that includes damages must also provide the *"appraiser's rationale for determining the damage estimate*" and the "*market data"* supporting them. But neither of these requirements were included in the "jurisdictional offer" provided to the Church.

DOT seeks do-gooder status for extending an offer to the Church above the appraisal. But the fact is we don't know what DOT's real damage number is in this case because it failed to follow the statute. If a proper condemnor appraisal had been performed, the actual damages may have been even higher, in which event DOT's "revised offer" undervalues the Church's just compensation.

Furthermore, while this case involves a situation where DOT's internal review resulted in an offer above the appraisal, given an open license to revise the jurisdictional offer as it sees fit, what is to stop DOT in a future case from offering less damages than its appraisal would indicate? Under DOT's reading of the statute either action would be appropriate because the final say so on damages would be left to DOT's sole discretion, regardless of what the underlying appraisal says. How can such a practice possibly be good for landowners? Indeed, to accept DOT's position would represent a major step backwards for all Wisconsin property owners.

D. DOT's jurisdictional offer was not "based on" the appraisal.

DOT engages in interpretative gymnastics to define the word "based" in a way that supports its crabbed reading of the statute. It also minimizes the difference between the jurisdictional offer and the appraisal by claiming that the court's decision prevents it from including a "*particular type of damage"* in its jurisdictional offer if the appraisal does not provide for it. Br. at 2 (emphasis added). But the Court did

not reject the jurisdictional offer because it included damage items not found in the appraisal. The jurisdictional offer was rejected because it acknowledged $234,895 in damages, whereas the appraisal expressly held no damages existed.

In the end, the significant disconnect between DOT's jurisdictional offer and the appraisal on the critical issue of damages prevents the jurisdictional offer from being "based" on the appraisal and, alternatively, prevents the appraisal from being a "supporting" and "fundamental ingredient" to the jurisdictional offer under *Otterstatter v. City of Watertown*, 2017 WI App 76, 378 Wis. 2d 697, 904 N.W. 2d 396.

E. The legislative history of the relevant statutes refutes DOT's interpretation.

In *Justmann v. Portage County*, 2005 WI App 9 ¶11, 278 Wis. 2d 487, 692 N.W. 2d 273, the Wisconsin Court of Appeals reviewed the legislative history of Wis. Stat. §32.09(6) and held *that only beginning in 1978* did the legislature change this statute to recognize a method for valuing the "property being taken" by adding the following underlined language:

> [T]he compensation to be paid by the condemnor shall be the greater of either the fair market value of the property taken as of the date of evaluation or the sum determined by deducting from the fair market value of the whole property immediately before the date of evaluation, the fair market value of the remainder immediately after the date of evaluation… 2005 WI App ¶ 11.

DOT's argues that "all property proposed to be acquired" in Wis. Stat. § 32.05(2)(a) only requires an appraisal of the part taken. But the legislative history of Wis. Stat. § 32.09(6) proves that prior to 1978 Wisconsin was strictly a "Before and After" state, meaning there was no breakdown between *the part taken* and *damages to remaining property*. Instead, compensation was a lump sum arrived at by subtracting the value of the remainder from the value of the whole. And yet, during this same time frame, when Wisconsin law was exclusively following the Before and After rule, the phrase "all property proposed to be acquired" within Wis. Stat. § 32.05(2)(a) did not change.

This history contradicts DOT's argument that the language "all property proposed to be acquired" refers exclusively to *the property taken*. At the time this language was crafted, there was no such thing under Wisconsin law *as the property taken*. As a result, the phrase "all property

proposed to be acquired" within Wis. Stat. § 32.05(2)(a) can only be referring to an appraisal that includes the value of the part taken *and* damages to the remainder.

F. DOT's "jurisdictional offer" is designed to pressure the Church in contravention of Wisconsin's policy to protect landowners.

DOT claims that this case is about the Church wanting to recover its attorney fees under Wis. Stat. § 32.28(3). In reality, it is DOT who seeks to gain a litigation advantage by the "jurisdictional offer" it constructed and now defends so vigorously.

By obtaining an appraisal without severance damages, but then presenting a jurisdictional offer that includes them to document a substantially higher offer, DOT gains leverage over the Church in two ways. First, this tactic establishes a higher monetary threshold for the Church to exceed when challenging the prior offer at trial. Second, this tactic subjects the Church to DOT's appraisal testimony at trial *that the Church did not suffer any severance damages*, since the "jurisdictional offer" indicating otherwise is inadmissible in court under Wis. Stat. § 32.05(10)(a).

Both tactics provide an obvious win for DOT. Not only is it free to present valuation evidence at trial significantly below its jurisdictional offer, but it also gets to use the jurisdictional offer to set a higher bar for the landowner to chin in order to be reimbursed litigation expenses.

This strategy is akin to a practice called "sandbagging," where a condemnor obtains an initial appraisal to make the pre-litigation offer, only to obtain a second, much lower appraisal, for trial purposes. This bait-and-switch strategy, much like DOT's unsupported jurisdictional offer, is intended to exert pressure on the landowner to accept the pre-litigation offer or risk the condemnor 's evidence of far less compensation at trial.

Courts throughout the country have penalized condemnors who engage in such coercive practices, either by admitting the condemnor's higher appraisal at trial or allowing the higher offer to be introduced as an admission or in rebuttal. *See, e.g.*, *Ramsey v. Commissioner*, 770 S.E.2d 487, 489-491 (Va. 2015); *Dept. Transportation v. Frankenlust Lutheran Congregation*, 711 N.W.2d 453, 462 (Mich. Ct. App. 2006); *Arkansas State Highway Commission*

v. Johnson, 780 S.W.2d 326, 330-331 (Ark. 1989); *Thomas v. Alabama*, 410 So. 2d 3, 4–5 (Ala. 1981); and *United States v. 320.0 Acres*, 605 F.2d 762, 824-825 (5th Cir. 1979).

This Court has ruled that it will not sanction condemnor actions that undermine landowner protections under Wisconsin law. *See Nesbitt Farms, LLC v. City of Madison*, 2003 WI App 122 ¶¶ 21-27, 265 Wis. 2d 422, 665 N.W. 2d 379. OCA urges the Court to respond similarly here.

G. DOT's additional claims are without merit.

DOT exaggerates when characterizing the Court's decision as "paralyzing" its duty to negotiate. Br. at 37. This case is not about DOT making a settlement offer above its appraisal. Rather, it is about DOT (1) recasting its settlement offer into a statutory "jurisdictional offer" and then (2) stubbornly insisting that the offer was based on the prior appraisal, when clearly it was not. DOT's ability to negotiate remains the same as it was before, as long as it adheres to the statute.

DOT argues that the Court's decision forces it to get a second appraisal when the first is deemed incomplete, resulting in delays. But DOT does not consider the delays

caused by its own actions in approving a flawed appraisal in the first place, and then submitting it to the Church as the basis for the initial offer. The same "administrative review" that DOT touts to document damages was available to analyze the initial appraisal *before* it was provided to the Church, at which point DOT should have caught the problematic damage analysis. In a case where the highway right-of-way moved from 147 ft. to 9 ft. from the Church's property, it should have been obvious that there would be significant negative impacts.

Such a review could have led DOT to speak (not "coerce" referring to DOT's inflammatory term) with the appraiser about possibly reinvestigating the damage issue by conducting a more thorough market search. It is surprising how a second look, particularly one invited by the condemnor, often leads to the discovery of information not initially found.

Alternatively, DOT could have engaged a second appraiser to determine if the valuation outcome would be different. While DOT asserts that obtaining a new appraisal

causes time delays, think of the time lost by DOT not proceeding properly.

Finally, DOT argues that the Court's decision encourages more litigation in eminent domain cases. It is counterintuitive that a legal standard which promotes a stronger connection between the "jurisdictional offer" and the condemnor's appraisal would lead to more, rather than less, disputes and controversies between the parties.

CONCLUSION

For the reasons set forth above, the Court of Appeals' decision should be affirmed.

Dated this 7th day of August, 2020.

Respectfully submitted.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in WIS. STAT. §§ 809.19(8)(b) and 809.62(4), for a brief produced using proportional serif font. The length of this brief is 2,934 words.

Dated this 7th day of August, 2020.

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