
In The
Supreme Court of Virginia

RECORD NO. 140929

**JAMES M. RAMSEY, JR. and
JANET D. RAMSEY,**

Appellants,

v.

COMMISSIONER OF HIGHWAYS,

Appellee.

**BRIEF OF AMICUS CURIAE
OWNER'S COUNCIL OF AMERICA
IN SUPPORT OF APPELLANTS**

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BRIEF AMICUS CURIAE OF OWNERS' COUNSEL OF AMERICA

Pursuant to Rule 5:30 of the Rules of the Supreme Court of Virginia, Owners' Counsel of America (OCA) submits this brief as amicus curiae in support of Appellants James and Janet Ramsey.

STATEMENT OF INTEREST

This case asks whether the jury can be kept in the dark about the most important evidence in an eminent domain trial—the value of the taken property. The facts of this case also highlight a practice by condemning authorities that is at odds with fundamental fairness and runs afoul of the condemnor's constitutional duty to property owners whose land has been involuntarily pressed into public service.

After presenting the Ramseys the statutorily-required statement of the “amount which it believe[d] to be just compensation” for their property,¹ the Commissioner presented a much lower number (less than half) at trial and asked the circuit court to keep its prior statement of value from the jury. The circuit court obliged the Commissioner’s request, thereby prohibiting the Ramseys from informing the jury about the Commissioner’s previous statement that the Ramseys property was worth twice the amount it told the jury.

If affirmed, the Commissioner’s actions and the circuit court’s ruling will not only work injustice on the Ramseys, but will serve as the template for future governmental conduct and systematic undercompensation. Owners like the Ramseys, whose property was taken prior to the determination of just compensation at trial, will be forced to yield to the condemnor’s demands or face a trial at which the condemnor will present a significantly lower value and the jury will not be permitted to hear the condemnor’s prior, inconsistent statement. In this case, the

¹ See Va. Code § 25.1-204(E)(1).

circuit court instructed the jury to make its decision regarding the value of the Ramseys' property without ever knowing the Commissioner prior, inconsistent statement of value that the property was worth twice as much as what the Commissioner told the jury. Many owners placed in such a position will have no choice but to surrender in the face of such undue pressure and fundamental unfairness.

STATEMENT OF THE CASE

Amicus adopts and incorporates by reference the Statement of the Case set forth in the Brief of the Appellants. This brief highlights the condemnor's constitutional duty to citizens forced to surrender their property for public use. It also illustrates how the circuit court's ruling encourages further governmental conduct inconsistent with this constitutional obligation.

Eminent domain actions are not like other civil lawsuits where the parties have leeway to pursue arguments with nearly unrestricted zeal. Rather, the duties of the plaintiff in these cases are different from those in any other civil action. The role of the condemnor in an eminent domain action is analogous to that of

the public prosecutor in criminal cases—not to win at all costs, but to do justice.

Consistent with this duty and longstanding legal principles regarding party admissions, the condemnor's statement of value should not be withheld from the jury's eyes even if the condemnor changes its mind regarding its former statement of value. The Ramseys are asking only that they be treated like every other civil litigant and that this Court apply the rule of party admissions equally against the condemnor as it applies against owners and all other litigants.

Here, in order to establish jurisdiction of the court, the Commissioner made the statement of just compensation as required by Virginia Code § 25.1-204(E)(1). But the Commissioner presented a different statement of value to the jury at trial, even though the valuation date for determining just compensation had not changed (it is always the date of the taking). The Commissioner then asked the circuit court to prohibit the jury from hearing the Commissioner's prior, inconsistent statement of value despite the fact that the value of the property

was the sole issue in this case. In an effort to hide its admission and prior inconsistent statement, the Commissioner improperly conflated its statutorily required statement of value, which must be made regardless of any settlement offer, with the offer. While appellate courts that have addressed this issue have seen through this façade, the circuit court improperly obliged the Commissioner's request.

ASSIGNMENTS OF ERROR

1. The trial court erroneously refused to admit oral and written evidence of the Commissioner's pre-offer statements of value. The statements were admissible as party admissions, and were relevant and material. [Preserved at A. 60-64, 74-80, 83-84, 95-98.]

2. The trial court erroneously prohibited the landowners from cross-examining the Commissioner's appraiser on the basis for his opinions. [Preserved at A. 36-38, 41-44, 98-99.]

ARGUMENT

A. Standard of Review

This Court reviews the trial court's exclusion of evidence for an abuse of discretion. *ExxonMobil Corp. v. Minton*, 285 Va. 115, 130 (2013). It reviews the trial court's prohibition of cross-

examination, de novo. *Food Lion, Inc. v. Cox*, 257 Va. 449, 450-51 (1999).

B. *The Ruling of the Circuit Court Works Injustice, Encourages Governmental Action that Disregards the Condemnor's Constitutional Duty to Owners, and Runs Contrary to Longstanding Evidentiary Legal Principles*

1. *The Nature of Eminent Domain and the Condemnor's Duty*

This Court has described "the power of eminent domain" as "more harsh and peremptory in its exercise and operation than any other [governmental power]." *Norfolk & W. Ry. Co. v. Lynchburg Cotton Mills Co.*, 106 Va. 376, 376 56 S.E. 146, 146 (Va. 1907). This Court also recognized the "power of eminent domain [is] a power essentially harsh in its application at times." *Chairman of Highway Commission of Virginia v. Fletcher*, 153 Va. 43, 46, 149 S.E. 456, 457 (1929). The United States Supreme Court rightly described the power of eminent domain as a "despotic power" because of the harshness of its operation. See *VanHorne's Lessee v. Dorrance*, 2 U.S. 304, 311 (1795). The Court also once characterized eminent domain as a barometer of "political ethics," meaning that government's integrity can be

measured by how it wields the condemnation power against its own citizens. *See United States v. Cors*, 337 U.S. 325, 332 (1949).

Given the harsh nature of eminent domain and the condemnor's constitutional obligation to make the owner whole, the condemnor's duty in eminent domain cases is not to win at all costs, but to do justice.

Just as the Government's interest 'in a criminal prosecution is not that it shall win a case, but that justice shall be done,' *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 633 79 L.Ed. 1314 (1935), so its interest as a taker in eminent domain is to pay 'the full and perfect equivalent in money of the property taken,' *United States v. Miller*, 317 U.S. at 373, 63 S.Ct. at 279, 87 L.Ed. 336, neither more nor less—not to use an incident of its sovereign power as a weapon with which to extort a sacrifice of the very rights the Amendment gives.

United States v. Certain Prop. Located in Borough of Manhattan, City, Cnty. & State of New York, 306 F.2d 439, 452-53 (2d Cir. 1962). An owner in an eminent domain action has done nothing wrong, broken no promises, and committed no negligence; he or she is mired in litigation solely because their property is coveted by another. This venerable Court has

repeatedly recognized an eminent domain action is no ordinary proceeding. *See, e.g., Trout v. Commonwealth Transp. Comm'r of Virginia*, 241 Va. 69, 73, 400 S.E.2d 172, 174 (1991) (“[T]he parties to a condemnation proceeding are not in the position of plaintiffs and defendants in traditional actions or suits. The exercise of the power of eminent domain, and the implementation of the constitutional just-compensation clause which circumscribes it, grow out of an entirely different history.”).

In order for a court to grant the condemning authority the exercise of the power of eminent domain to take a person’s property, the condemning authority must transmit a good faith estimate of value for the property. Virginia Code § 25.1-204(E)(1). That is a jurisdictional prerequisite. In this case, after the court granted jurisdiction to allow the condemnation, the value must then be determined by trial before a jury. Here, the Commissioner came into the same court with no change of circumstance—the date of taking had not changed, and thus just compensation was the same— and told the jury that the value was less than the statement he had made to gain jurisdiction to

take the Ramseys' property. The owner sought to show the jury the Commissioner's jurisdictional valuation, but the circuit court refused. It takes a lot of audacity for a condemnor to come into the same court it solemnly swore was to take a property worth \$246,292, and then in the same court when it became time to have a jury valuation, say that the property was really worth only \$92,127. Justice and fairness demand that the owners at least be able to tell the jury about the Commissioner's initial valuation.

2. The Circuit Court's Ruling Works Injustice and Violates the Longstanding Law of Party Admissions

In this case, Virginia Code § 25.1-204(E)(1) required the Commissioner to tell the Ramseys what the Commissioner believed to be the value of just compensation, as well as the summary and basis therefore, in order to establish the jurisdiction of the circuit court over this matter. *See Charles v. Big Sandy & C.R. Co.*, 142 Va. 512, 517, 129 S.E. 384, 385 (1925) (stating statutory requirements "are regarded as in the nature of conditions precedent, which are not only to be observed and complied with before the courts can exercise their

compulsory powers to deprive the owner of his land, but the party instituting such proceedings must show affirmatively such compliance"). After using that statement to establish jurisdiction, the Commissioner later sought to tell the jury the amount of just compensation and the value of the Ramseys' property was much less than what the Commissioner represented when seeking to establish jurisdiction.

As a result of the Commissioner's changed position, the Commissioner then asked the jury to award the Ramseys an amount that required the Ramseys to pay back money for property the Commissioner had already paid for and taken.² Worse yet, the Commissioner asked the circuit court to prohibit the jury from hearing the amount the Commissioner previously represented was the value of the property and just compensation. The Commissioner's tactics place an undue burden on owners such as the Ramseys, since they are forced to take the amount

² The Virginia Code allows the Commissioner to take property by the quick-take power. This extraordinary power allows the Commissioner to pay the owner what it believes to be the value of just compensation by depositing that amount into court, upon which the Commissioner gets immediate possession of and title to the owner's property.

dictated by the Commissioner or face a trial where the jury will not hear all the relevant evidence and yet will be asked by the Commissioner to make the owner pay back money for property that was already taken. This practice denies due process of law and naturally coerces the owner to accept a lower value instead of pursuing just compensation in further proceedings. It forces property owners such as the Ramseys to either take the offer, or have their hands unreasonably tied when trying to prove a higher amount. Here, by the time of trial, the Commissioner had already taken the Ramseys' property and built its highway. Meanwhile, the Ramseys had taken the money the Commissioner paid for the property and had used it to satisfy other obligations, some of which were related to the protracted litigation. It is harsh enough to ask for money back; it is unconscionable to also ask that the jury making the decision on value not be allowed to know of the Commissioner's previous and inconsistent statement of value. While the law charges the jury with carrying forth the justice required by Article I, § 11 of the Virginia Constitution, the Commissioner's actions require the jury to do so without hearing

all the relevant facts, including the Commissioner's prior inconsistent statement. The Commissioner is using this tactic to coerce owners to surrender their right to have a jury determine just compensation, thereby depriving the owners of the full measure of due process of law intended by Virginia's quick-take statutes. The law is not intended to provide the Commissioner with a mechanism to coerce the owner into foregoing the remedy of due process, especially when their property has been summarily taken.

In cases such as this, the courts are the only thing standing between the owners and overzealous actions of governmental entities exercising the power of eminent domain. Nevertheless, the trial court in this case improperly conflated the statutorily-required statement of just compensation, which is required regardless of any settlement offer, with a settlement offer. Every appellate court that has addressed this issue under similar statutes has recognized that the statutorily required statement of just compensation is not an offer. *See United States v. 320.0 Acres of Land*, 605 F.2d 762 (5th Cir. 1979) (interpreting federal

statute with nearly identical language from which Virginia Code §§ 25.1-204 and 25.1-417 were taken); *Thomas v. Alabama*, 410 So.2d 3 (Al. 1981); *Arkansas State Highway Comm'n v. Johnson*, 780 S.W.2d 326 (Ark. 1989); *Dep't of Trans. v. Frankenlust Lutheran Congregation*, 711 N.W.2d 453 (Mich. App. 2006); *Cook v. New York*, 430 N.Y.S.2d 507 (App. Div. 1980).

By holding contrary to these numerous cases, the circuit court issued a ruling contrary to longstanding evidentiary rules regarding admissions. The ruling also establishes one standard for admissions by owners and a separate, more limited standard for admissions by government. For example, tax assessments are generally inadmissible in eminent domain cases. However, if an owner challenges his or her tax assessment and thereby makes a statement about the value of their property, that admission is admissible against them.

When the condemnor makes a statement about the value of the owner's property, such as the statutorily required statement here, that statement should be equally admissible against the condemnor. As the United States Court of Appeals for the Fifth

Circuit noted, the statutorily-required statement is "a good faith assessment of what the owner is constitutionally due, made by one authorized by this statute to make that very [sic] statement." *320.0 Acres of Land*, 605 F.2d at 825. "As the law of admissions is really the law of agency, not evidence, one can hardly imagine a statement more fitting the definition than this a statement made by one acting within his authority asserting a position contrary to the one asserted at trial." *Id.* The statement does not become inadmissible when the condemnor later tries to disavow it at trial and hide it from the jury. As the Fifth Circuit so aptly proclaimed, "[T]he Government is not completely free to play fast and loose with landowners telling them one thing in the office and something else in the courtroom." *Id.*

CONCLUSION

For these reasons, this court should reverse the judgment of the circuit court, and remand the case for a new trial.

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CERTIFICATE

I certify on this 15th day of December, 2014, in compliance with Rule 5:26(h), fifteen bound copies of the foregoing Brief of Amicus Curiae, with one electronic copy on CD-Rom, were hand-filed with the Clerk of the Supreme Court of Virginia. On this same day, three bound copies, along with one electronic copy on CD-Rom, were served, via UPS Ground Transportation upon:

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