

STATE OF MICHIGAN  
IN THE SUPREME COURT

MICHIGAN DEPARTMENT OF  
TRANSPORTATION,

Plaintiff-Appellant,

Supreme Court No. 132983

-vs.-

Court of Appeals No. 256038

Rodney Tomkins and Darcy Tomkins,

Kent County Circuit Court  
File No. 01-07548-CC

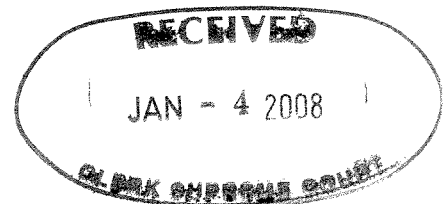
Defendants-Appellees.

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SUPPLEMENTAL BRIEF OF AMICUS CURIAE  
ACKERMAN ACKERMAN & DYNKOWSKI

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At the oral argument in this matter, this Court made inquiries of the parties which Amicus Curiae Ackerman Ackerman & Dynkowski may be able to address in a manner that will assist this Court in its analysis of the issues before it.

The Michigan Constitution of 1963 was accompanied by an "Address to the People" which maintained the language followed the predecessor Constitutions. The Constitutions approved in 1908 and 1850 provided that both necessity and just compensation were to be determined by the fact finder.

The jury proceedings in condemnations under the 1850 and 1908 Michigan Constitutions allowed for the jury to act as a "jury of inquest", which permitted it to act as judges of the law and fact. The jury had discretion as to all evidentiary issues, taking testimony, and reviewing any other type of evidence during the trial. The jury was not bound by strict rules of evidence or normal trial procedures. Chicago D & C Grand Trunk v. Jacobs, et al, 225 Mich 677, 196 NW 621 (1924); Toledo A.A. & G.T.R. Co. v. Dunlap, 47 Mich 456, 11 NW 271 (1882); Grand Rapids L. & D. R. Co. v. Cheseboro, 74 Mich 466, 42 NW 66 (1889); Fort Street Union Depot Co. v. Backus, 92 Mich 34, 52 NW 790 (1892).

The 1908 Constitution made the jury something more than merely a finder of fact. "According to the Constitution of 1908, art. 13, sec. 2, the action of condemnation was inquisitorial in nature, and therefore, the jury or commissioners, were judges of the law and the facts." People on Behalf of State Board of Education v. von Zellen, 1 Mich App 147, 155-6; 134 NW2d

828 (1965); In re Civic Center in City of Detroit, 335 Mich 582; 56 NW2d 387 (1953); In re Widening of South Dix Avenue Southwesterly from River Rouge, 262 Mich 233; 247 NW 166 (1933); In re Petition of Detroit Edison Company, 365 Mich 35, 112 NW2d 109 (1961).

In 1963, the delegates contemplated a constitutional minimum with the Legislature and courts controlling the specific laws and procedures for condemnation actions; this would be a change from the prior system wherein the Commission or jury controlled evidentiary matters. In People on Behalf of State Board of Education v. von Zellen, 1 Mich App 147; 134 NW2d 828 (1965), our Court of Appeals had the first opportunity to review the changing procedures under the 1963 Constitution and the 1961 Supreme Court Rule 37. Id. at 155.

The judicial interpretation of the 1908 Constitution provided the jury with such absolute discretion that a court would have less likelihood of reversal if it gave no instruction at all than if an improper instruction was given. In re Public Highway in Elba Township, 236 Mich 282, 284; 210 NW 297 (1926).

Under the 1908 Constitution, the jury could be provided with the cost of the total project, including those parcels that settled, to determine whether there was a necessity for the project.

At the oral argument of this appeal, this Honorable Court requested information from counsel as to what occurred under the predecessor Constitution. There are very few cases, which deal

with "project created damages" of the nature presented here. The most applicable case which can be found under the application of the predecessor Constitution is one which was ruled upon after the 1961 Constitution was ratified, but not yet effective. This is the case of Mackie v. Schultz, 370 Mich 78; 120 NW2d 733 (1963). In Schultz, a reading of the trial record in the Briefs and Records on Appeal, as well as a statement in the Opinion, confirms the damages for "general nuisance" of the project construction in the amount of \$300.00 was allowed because of a bridge being placed near the property. Id. at 83.

The underlying tension of the instant case is whether inverse and direct condemnations are to be treated in a similar fashion for compensation purposes. An inverse condemnation requires a taking of a vested property right, which must meet a threshold prior to creating a cause of action for which compensation is to be paid. In direct takings, there is no threshold to be met by the property owner, and the type of damages sought by the Tomkins is a proper measure in a direct partial-taking claim.

In inverse condemnations, there is a clear black-line rule that there must be the destruction of a vested right to meet the threshold of compensation. This black-line test has not been applied in partial taking settings because liability is not an issue in traditional eminent domain cases.

Implied in the questions raised at oral argument was whether the factual determination was applied under the predecessor Constitution. One only needs to review case law prior to the

Constitution ratification and the statutes enacted subsequent thereto to fully comprehend the effect of the old Constitution on not only the procedure but also the substantive rules of evidence to then apply.

Under the predecessor Constitutions, as title did not vest until after the money was actually tendered under almost all of the statutes, the transfer during the period between the filing of the lawsuit and the time of vesting would terminate the rights of the original owner who had lost an interest in the property prior to confirmation of a verdict. Anderson Trust Co. v. American Life Ins. Co., 302 Mich 575; 5 NW2d 470 (1942). In re Conway Lumber Co., 252 Mich 116; 233 NW 172 (1930).

Condemning agencies frequently withdrew from a taking prior to the confirmation of the verdict if they believed the verdict was excessive. In Petition of City of Detroit, 259 Mich 524; 244 NW 150 (1932), the court held that a condemning agency may withdraw a verdict before it is confirmed. Once withdrawn, a condemning agency could either walk away from the project or adopt a less expensive plan of acquisition. Id. at 527. As a result, countless condemnation awards were not binding on record due to the agency's ability to withdraw the verdict prior to confirmation.

MCL 213.67 ended the abuses of factual settings, such as in City of Detroit v. Empire Development Co., 259 Mich 524; 224 NW 150; In re Widening of South Dix Avenue Southwesterly from River Rouge, 262 Mich 233; 247 NW 166 (1933), when the City filed and

dismissed the same case, only to modify the taking in order to obtain what it perceived to be a more favorable monetary decision. However, due to the nature of condemnation actions and a condemning agency's ability to withdraw actions prior to the confirmation of the verdict, very few reported cases on the measure of damages existed. Although the evidence was admitted, and an award rendered, an agency could simply dismiss the action and re-file it for a second attempt at obtaining a verdict more favorable to itself.

In at least part, under the predecessor Constitution, in order to challenge necessity, owners were allowed to present evidence that the value of the project or a cost/benefit analysis could not be justified, and the condemnor had the ability to withdraw from the condemnation if the just compensation was too great. The process allowed the fact finder great discretion, and allowed for what was consistently called a "liberal admission of evidence" in the quasi-judicial proceeding of an eminent domain action. See City of Detroit v Cristy, 316 Mich 215, 219-20; 25 NW 2d 174 (1946).

The clear delineation available premised upon a destruction of a vested interest in inverse condemnation simply is not applicable for a partial taking, where it is the market perception of dealing with a property being bought and sold in consideration of the effect of the project. The question is one of how is the market value of the property affected by the taking and whether an otherwise non-compensable police power is to be considered when a

part of the taking itself. This returns us to the presentation of who was to be paid at the Constitutional Convention. Those living near the project but not being physically taken clearly were excluded. The original eminent domain proposal was rejected. At no time did the delegates to the Convention, or do any of the writings contemporaneous or prior to the Convention, contemplate those not being touched somehow not having the right to receive compensation. The earlier Constitutions clearly allowed the evidence to go to the jury, despite its often speculative nature, which can only lead one to answer the question raised at the oral argument of whether compensation would be allowed in such circumstances with an emphatic "Yes".

At the oral argument, two Justices of this Honorable Court treated the case of City of Grand Rapids v. Barth, 248 Mich 13; 226 NW 690 (1929) (hereinafter referred to as Fulton Street), as the seminal case on the subject of compensation for partial takings. What is being sought by the Tomkins is precisely the opposite of what the owners requested in Fulton Street. In Fulton Street, where the front 16 feet of a property was taken, the owner made the illogical claim that his property of 100 feet in depth should be split into two properties. The valuation would be separately placed upon the 16 feet physically being taken as a separate parcel, with no consideration to the "increase" (benefit) to the remainder as an offset. The Fulton Court also recognized that what the Fulton owners sought was exactly the opposite of Tomkins in sharply rejecting the theory of a separate parcel:

As to the amount of the damages for the land taken, if assessed under the rule adopted by the Court, it is not a very material variance in the testimony of the witnesses produced by respective parties; but the Appellants' claim that they would be paid as damages occasioned by taking the front 16 feet of their respective properties at fair market value obtainable therefore by its sale as a parcel separated from the remaining portion of the property. 248 Mich 13 at 19.

In its petition for rehearing, the Fulton owner argued that no benefit should be included and a future assessment should not be presented to the jury, a request for relief which was rejected by the Supreme Court.

When one compares Fulton Street to In re Bagley Avenue in City of Detroit, 248 Mich 1; 226 NW 688 (1929), the inappropriateness of the Fulton owner request is apparent. Relying on Mayo Company v. Voorheis, 2 Mich 506, in Grand Rapids, etc. R. Co. v. Heisel, 47 Mich 393, the In re Widening of Bagley Avenue Court concluded:

Where only part of a parcel is taken, just compensation is to be determined by the amount which the value of the parcel from which it is taken is diminished. The value of the part actually taken is allowed as direct compensation, but the decreased value of the residue or parcel on account of the use made of the land taken is also allowable as compensation. Port Huron, etc., R. Co. v. Voorheis, supra; Fitzsimons & Galvin, Inc., v. Rogers, 243 Mich 649; Johnstone v. Railway Co., 245 Mich 65.


In conclusion, Michigan case law clearly supports the Tomkins position that all damages resulting from the taking, even those classified as "general" damages by the MDOT, are compensable if they are due to the project. The bright-line rule as clarified by the 1963 Michigan Constitutions also supports the Tomkins position that owners whose property is taken are entitled to damages which

may not be compensable in inverse condemnation actions.

WHEREFORE, Amicus Curiae Ackerman Ackerman & Dynkowski requests that this Honorable Court affirm the findings of the Michigan Court of Appeals.

Respectfully submitted,

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