STATE OF MICHIGAN

IN THE MICHIGAN SUPREME COURT

CONSUMERS ENERGY COMPANY,

Plaintiff-Appellant/
Cross-Appellee,

v.

BRIAN STORM and ERIN STORM,

Defendants-Appellees/
Cross-Appellants

Supreme Court Docket No. 162416

Court of Appeals Docket No. 350617

Lower Court Case No.: 2019-0160-CC
Kalamazoo County Circuit Court

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Defendants-Appellees/Cross-Appellants' Reply in Support of Application for Leave to Appeal Under MCR 7.307(A)

***** ORAL ARGUMENT REQUESTED *****

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Introduction

Just like the Court of Appeals, Consumers fails to identify a plain-language meaning of the term "improper" under which a claim that fails on its merits is a "proper" claim. Nor does Consumers explain why the definition of "improper" that was employed in *Escanaba* should not have also been employed in the Storms' case. Instead, Consumers argues that the canon against surplusage can be used to ignore the plain meaning of "improper." But that canon cannot be used to override the plain meaning of the statutory text. And in any event, there is no surplusage in the statute in the first place. The first prong of MCL § 213.66(2) explains what the homeowner must do (initiate a successful challenge to a proposed condemnation), and the second prong explains what the trial court must do (make a finding that the acquisition is "improper").

Both Consumers and the Court of Appeals improperly employ the canon of surplusage to ignore the plain meaning of the term "improper" as used in § 213.66(2)—a term that was already given a plain-meaning construction in *Escanaba*. That error has profound effects. Under the Court of Appeals' published opinion, most homeowners will not be able to defend against condemnation claims on the merits, because they will not be able to afford the attorneys' fees. Part III of the Court of Appeals' opinion should be reversed.

Argument

I. The Court of Appeals' published opinion distorts the law of eminent domain in Michigan.

Consumers first argues that the Storms' application has not identified a sufficient basis under MCR 7.305(B) to justify granting leave to appeal the Court of Appeals' analysis of § 213.66(2). But, as the Storms' application pointed out repeatedly, the Court of Appeals' error has substantially distorted the UCPA's careful management of the parties' incentives in

condemnation proceedings, making it virtually impossible for private homeowners to defend against even substantively unmeritorious condemnation claims.

The Storms' case is a prime example. Despite having successfully defeated Consumers' condemnation claim and then protecting that victory on appeal, the Storms are now being required to pay for tens of thousands of dollars in fees incurred in the trial court, in the Court of Appeals, and in this Court—none of which proceedings the Storms initiated or voluntarily chose to participate in. Even if the Storms prevail, they will have spent tens of thousands of dollars on attorneys' fees. If the Court of Appeals' reasoning is left intact, ordinary homeowners will have no option other than to capitulate to condemnation claims, even when the condemnation claims are substantively wrong.

The Court of Appeals' approach makes even less sense when paired with the rule that a property owner is entitled to recover all of her fees if she manages to identify a minor, procedural error in the condemnation attempt. See *Indiana Michigan Power Co v Cmty Mills Inc*, ___ Mich App ___; ___ NW2d ___ (2020) (Docket No. 349671), 2020 WL 4908531, at *4. Under binding Court of Appeals precedent, a homeowner who wins on a technicality is entitled to 100% of her fees—but a homeowner who wins on the merits is entitled to none.

Upon information and belief, the Storms' case is the only one in the history of the UCPA in which a victorious homeowner has been denied fees. And yet, trial courts will now be required to deny fees to such homeowners if the Court of Appeals' published opinion is not corrected.

II. Consumers fails to identify a plain-meaning interpretation of "improper" under which a condemnation claim that fails on the merits is not "improper."

Consumers' argument on the merits is notable for what it fails to contain. Despite arguing that its failed condemnation attempt does not fall within the plain meaning of the term

"improper," Consumers fails to provide any plain meaning of the term. In this respect, Consumers' analysis is just like that of the Court of Appeals. It claims to be employing a plain-meaning analysis but fails to provide a definition of the term at issue.

This failure is particularly glaring because binding Court of Appeals precedent has already explained the plain meaning of the term "improper" as used in MCL § 213.66(2): it means "not proper; as a: not accordant with fact, truth, or right procedure . . ." *Escanaba & Lake Superior R Co v Keweenaw Land Ass'n, Ltd*, 156 Mich App 804, 812; 402 NW2d 505 (1986).

That definition should have been the end of this case. When a trial court denies a condemnation claim on the merits, the trial court has held that the condemnor's claimed entitlement to condemn that property is "not accordant with fact"—in other words, that the claim is "improper." When the court enters an order denying the plaintiff's claims on the merits, the court has found that it is "improper" for the claims to proceed against the defendant. The Storms are therefore entitled to recover their fees under § 213.66(2).

Despite many opportunities, neither Consumers nor the Court of Appeals have been able to identify any definition of "improper" that excludes a claim that is "not accordant with fact." Consumers argues that the definition of "improper" that is used in *Escanaba* should not control, but Consumers fails to identify any alternative meaning of "improper" that should control instead. That is because all potential alternatives agree: a claim that fails on its merits is not "accordant with fact" and is therefore "improper" within the plain meaning of the term.

The only feint that Consumers makes in a different direction is one that is quite obviously wrong. Consumers suggests that its conduct could not be "improper" because Consumers did not "act[] in bad faith" or "lack[] a good faith belief in the merits of its claim,"

and because its condemnation attempt was not "maliciously motivated." (Consumers' Response Br., at 6). But this argument is wrong for at least two reasons.

First, § 213.66(2) is not a sanctions statute; it is a make-whole statute, intended to "place the property owner in as good a position as before the attempted taking," regardless of the good or bad faith of the condemning agency. *Indiana Michigan Power*, 2020 WL 4908531, at *3. To the extent that Consumers argues that an attempted condemnation claim is "improper" only if the condemning agency acts in bad faith, Consumers is mistakenly trying to convert § 213.66(2) into a sanctions statute.

Second, Consumers' argument requires the word "improper" to mean two different things simultaneously even when the word is used only one time in the statute. In pertinent part, the statute awards fees if "the court finds the proposed acquisition improper." MCL § 213.66(2). Under *Escanaba* and *Indiana Michigan Power*, the term "improper" does not require any showing of bad faith if there is a procedural error. Fees must be awarded regardless of whether the condemnor acts in good faith. But Consumers suggests that the very same statutory term—"improper"—nevertheless requires a showing of bad faith if there is a substantive error, such that fees are not required for a substantive defect unless the condemnor acted maliciously. Consumers fails to explain how a single word that is used a single time in the statute can mean two different things simultaneously, requiring a showing of bad faith when the landowner wins on the merits but requiring only an inadvertent error when the landowner wins on a procedural technicality. To the extent that Consumers argues that the word "improper" means two different things even though it is used only once in § 213.66(2), Consumers is mistaken. *Cf. United States v. Davis*, 139 S. Ct. 2319, 2328 (2019) (rejecting the argument that a single statutory term bears "a split personality").

III. The canon against surplusage cannot override the plain statutory text.

Consumers also fails to explain how, under *Escanaba*, either of § 213.66(2)'s prongs is superfluous. The first prong requires a landowner to oppose and prevail against a condemnation claim. The second prong requires the court to enter an order finding the condemnation improper. There is therefore no superfluity. The first prong is not met unless the landowner opposes the condemnation claim, and the second prong is not met unless the court enters an order denying the condemnation claim. The notion that *Escanaba* collapsed the two prongs into each other is false.

And even if there was some superfluity, the canon against surplusage cannot be used to override the plain meaning of statutory terms. *People v Pinkney*, 501 Mich 259, 284 & n.53; 912 NW2d 535 (2018). Contrary to Consumers' argument, the decision in *Pinkney* is clear about this: *Pinkney* relegated an entire statute to superfluity, notwithstanding the canon against surplusage, because this Court recognized that it is inappropriate to "supplement the otherwise plain text" of the statute. *Id*. at 285.

In this case, no one has identified any plain meaning of the term "improper" other than the one that *Escanaba* landed on. Consumers has failed to identify an alternative meaning of the term "improper." Instead, it follows the Court of Appeals' lead in invoking the canon against surplusage to overcome the otherwise plain meaning of the statutory text. There is no superfluity, and even if there were, the interpretive canon cannot override the plain language of the statute.

IV. The Court of Appeals' ruling conflicts with other Court of Appeals precedent.

Consumers also mistakenly posits a distinction between the Storms' case and cases like *Detroit Int'l Bridge Co v Commodities Exp Co*, 279 Mich App 662; 760 NW2d 565 (2008), and *Grosse Ile Twp v Grosse Ile Bridge Co*, unpublished opinion per curiam of the Court of Appeals, issued Sept. 28, 2010 (Docket No. 291255). Consumers admits that, in the latter two

cases, the condemnation attempt was "improper" because the condemning agency "lacked the constitutional or statutory authority to condemn the property it was attempting to acquire." (Consumers Response Br., at 11). Consumers then argues that the Storms' case is different, because Consumers has the general authority as an electric utility to condemn private property. (*Id*., at 10).

But no condemning agency—including a private agency—has authority to condemn private property for which there is no necessity. For example, the statute that Consumers cites in support of its authority allows Consumers' the right to condemn only land over which it can demonstrate necessity. See MCL § 486.252 (granting electric utilities the authority "[t]o condemn all lands and any and all interests therein . . . *which may be necessary* to generate, transmit, and transform electric energy . . .") (emphasis added).

Consumers' argument conflates the abstract ability to file a lawsuit with the authority to actually condemn a particular parcel of land. The fact that Consumers had standing to file a lawsuit does not mean that it had authority to condemn land over which it could not demonstrate necessity. When the trial court found that Consumers lacked necessity, it found that Consumers could not demonstrate that the proposed acquisition was necessary under MCL § 486.252—that is, that Consumers lacked the authority to condemn the Storms' property. The reasoning of *Detroit International Bridge* and *Grosse Ile Township* is directly on point.

Consumers' attempts to distinguish *Indiana Michigan Power* are similarly infirm. It makes no difference that there were two phases of the condemnation action in that case. The relevant portion of the court's ruling was its holding regarding fees. The court held that, in any failed condemnation attempt, the landowner is entitled to all fees incurred, even those that aren't

directly traceable to the flaw in the condemnation attempt. *Id*., 2020 WL 4908531, at *3. This ruling does not hinge upon whether there are multiple phases of the proceedings or only one.

Consumers also re-characterizes the following sentence in the court's opinion in *Indiana Michigan Power*: "And if the property owner later obtains a favorable outcome in the second action such that there is an entitlement to fees under MCL 213.66(2) or (3), then the owner may not be reimbursed for duplicative fees and costs incurred in the second action." *Id*., at *4 (emphasis added). Although this sentence, taken at face value, indicates that "a favorable outcome" in the second phase of the condemnation proceeding would necessarily entitle the landowner to fees, Consumers argues that the Court of Appeals actually meant to say "if the property owner later obtains a favorable outcome in the second action *in such a way* that there is an entitlement to fees . . ." (Consumers Response, at 14).

The fact that Consumers needs to recast the court's holding using different words is a good indication that Consumers is wrong about what it thinks the court said. Contrary to Consumers' argument, the *Indiana Michigan Power* opinion assumes that, if there is a favorable outcome, then the landowner is entitled to recover her fees. The court used that linguistic construction because that is what the plain language of the statute says.

V. The recognized legislative purpose confirms that the Storms' plain-language interpretation is correct.

Consumers has no response to the observation that it is inconsistent with the UCPA's purpose to shift fees when the condemning agency makes an inadvertent procedural misstep affecting only a third party (as in *Indiana Michigan Power*) but not to shift fees when a condemnation claim is defeated on the merits.

Moreover, contrary to Consumers' argument, the Storms are not advocating that the purpose of the statute should override its plain language. Instead, the point is simply to

illustrate the significant adverse effects of the Court of Appeals' plain-language mistake. By ignoring the statute's plain language, the Court of Appeals has upset the UCPA's carefully balanced fee-shifting scheme. And it has done so in a way that has no textual support in the language of the statute. Binding Court of Appeals precedent now mandates that fees be shifted when a landowner identifies an inadvertent procedural error, but not when a landowner defeats a condemnation claim on the merits. There is nothing in the text of MCL § 213.66(2) that supports such a distinction between the two types of cases.

VI. The issue of fees will not be rendered moot.

Finally, Consumers is wrong when it argues that the Storms' application will be rendered moot if the Court grants Consumers' separate application for leave. Even if the Court grants Consumers' application, Consumers could still lose in this Court. In that event, there would be no remand, and the Storms would not have another ability to seek leave to appeal in this Court on the issue of fees. And even if Consumers wins in this Court and the case is remanded to the Court of Appeals, Consumers could still lose on the merits in the Court of Appeals. In that event, the Storms would incur tens of thousands of dollars in additional attorneys' fees to continue to defend against Consumers' improper condemnation, despite having ultimately prevailed.

Moreover, Consumers' argument fails to appreciate that the Court of Appeals issued a published opinion in this case. Until it is corrected, the Court of Appeals' errors remain binding precedent, with substantial implications for homeowners assessing whether to challenge condemnation claims. This Court should not permit the Court of Appeals' significant mistake to remain uncorrected, regardless of how the Court resolves Consumers' own application for leave.

Relief Sought

The Court should grant the Storms' application for leave to appeal and reverse Part III of the Court of Appeals' opinion.

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