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IN THE SUPREME COURT OF IOWA

No. 18-0984

DUBUQUE COUNTY NOS.
01311 CVCV 103387
& 01311 CVCV 103381

JON D. LUCKSTEAD

Plaintiff-Appellant

vs.

THE IOWA DEPARTMENT OF TRANSPORTATION

Defendant-Appellee

PLAINTIFF-APPELLANT'S FINAL REPLY BRIEF

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STATEMENT OF THE ISSUES

I. THE DOT'S MISREPRESENTATION OF THE FACTS FURTHER ILLUSTRATE THE TRIAL COURT'S IMPROPER CONSIDERATION OF THE CONDEMNATION COMMISSIONER'S AWARD.

Iowa Statute 6B.21

II. A CHANGE OF ACCESS THAT CHANGES THE USE OF THE IMPACTED PROPERTY IS NOT REASONABLE.

Christensen v. Board of Supervisors of Woodbury County, 253 Iowa 978, 114 N.W.2d 897 (1962).
Columbus Holding Corp. v. State, 302 N.Y.S.2d 407 (Ct. Cl. 1969);
Department of Transportation v. Guyette, 520 A.2d 548 (Pa.Cmwlth.1987)
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6B.24
6B.54.8

IV. BOTH THE TRIAL COURT AND DOT REFERENCE SO MANY FACTS THAT ARE NOT SUPPORTED BY THE RECORD.

ROUTING STATEMENT

Appellees argue that this is not a case of first impression. As to the first main issue concerning use of the commissioners' award at trial, there has been no ruing since this language was repealed from 6B.21.

As to the second issue on access, it is true that the Iowa Supreme Court has held "if there is a substantial or material impairment or interference with the right of access the abutting owner or owners are entitled to just compensation therefor" *Simkins v. City of Davenport, 232 N.W.2d 561, 566 (1975)*. However, the question, "what is substantial or material impairment or interference with the right of access?" has not been answered with clarity by the courts. It is Luckstead's position that if the change in access changes the highest and best use of the impacted property, then there has been a substantial or material impairment or interference with the right of access.

ARGUMENT

I. THE DOT'S MISREPRESENTATION OF THE FACTS FURTHER ILLUSTRATE THE TRIAL COURT'S IMPROPER CONSIDERATION OF THE CONDEMNATION COMMISSIONER'S AWARD.

The DOT incorrectly states in their Statement of Facts that "DOT appraisers valued the damages for the takings at $217,954 for Parcel 187 and $45,000 for Parcel 184." As the source for that information, the DOT cites the first page of the Trial Court's judgment. This is the exact error that Luckstead is pointing out to this Court. The Trial Court may have found the value of damages "at $217,954 for Parcel 187 and $45,000 for Parcel 184", but those numbers did not come from the DOT appraisers.

Neither DOT appraiser testified as to the values found by the Trial Court. Moreover, neither DOT appraiser testified at trial, so the only evidence from the DOT appraisers are their numbers in their appraisals. As for Parcel 187, Appraiser Lock's value of the just compensation was $224,364. *Appendix at p. 192, Trial Exhibit A for Parcel 187*. Linnemeyer who reviewed Lock's appraisal came in at the same $224,364. *App. pp. 260-1, Trial Exhibit B for Parcel 187*. The $217,954 number did not come from any appraiser. It was the commissioners' damage number. *See App. 27, 28, 29, and 30. Certified Copy of Assessment at Notice of Appraisement of Damages, Sherriff's Certification as to Awards and Costs, and Report of Commissioners*.

Same holds true for Parcel 184. Appraiser Lock's value of the just compensation was $38,860. *App. p. 40, Trial Exhibit A Part I for Parcel 184; and App. p. 116, Trial Exhibit A Part II for Parcel 184*. Linnemeyer who reviewed Lock's appraisal came in at the same $38,860. *App. pp. 249-9, Trial Exhibit B for Parcel 184*. Again, the $45,000 number did not come from any appraiser. It was the commissioners' damage number. *See App. pp. 13, 15, 16, & 17, Certified Copy of Assessment at Notice of Appraisement of Damages, Sherriff's Certification as to Awards and Costs, and Report of Commissioners.*

Again, the DOT is misrepresenting the Record to this Court in stating that the "DOT appraisers valued the damages for the takings at $217,954 for Parcel 187 and $45,000 for Parcel 184." Only the commissioners used those numbers and the Trial Court's use of the commissioners' numbers requires reversing and remanding this matter back to Trial Court.

It is true that at trial the following exchange occurred:

> Q. Mr. Schiesl, do you recall what the commission awarded at the condemnation hearing for these two parcels?
>
> A. For both 180 -- 184 and 187, combined, the commission award was approximately --
>
> MR. KEADY: Objection, Your Honor.

Relevance.

THE COURT: Overruled. He can answer.

Go ahead.

THE WITNESS: The combined commission award

for both 184 and 187 was approximately $263,000.00.

MR. STEVENSON: I have no further

questions.

See App. p. 1016, Trial Transcript Vol. II for May 24, 2017 at lines:8-20. Luckstead's counsel did object to this information and relevance was the appropriate objection because commissioners' awards are not relevant for determining just compensation under 6B.21 for all the same arguments as stated in Appellant's Brief at Argument I.

Moreover, there was no other mention of the amounts of the commissioners' numbers at trial, so the above testimony of "approximately $263,000.00" did not lead to the Trial Court finding $217,954 for Parcel 187 and $45,000 for Parcel 184. No, the Trial Court did that on its own during the 11 months it took the matter under advisement after the close of trial testimony to come up with the exact amounts the condemnation commissioners used in their award. There is no way Luckstead could have foreseen the Trial Court searching for evidence outside the scope of trial to use in its findings.

The DOT also argues that since the commissioners' appraisement award is part of the Record pursuant to 6B.18(4), and further that "the trial court is entitled to refer to the record". This makes no sense. The Trial Court did not simply just refer to the record. The Trial Court noted the exact amounts awarded by the condemnation commissioners, awarded the same amount as the commissioners, and even confirmed it was upholding those amounts in stating "[t]he decision of the commission is proper in its damage determination". Under such circumstances, the Trial Court must be reversed as relying on inadmissible evidence, and a new trial granted

Finally, without citing to any law, the DOT argues that because the Trial Court commented about other evidence in its order, it somehow negates the fact that the Trial Court relied upon inadmissible evidence. Again, the DOT offers no case law to support its argument. Moreover, the DOT misses the point. For example, with regards to Parcel 187 the range of evidence at trial was from $224,364 (Lock & Linnemeyer) to $286,000 (Reach). *Compare App. p.192 and App. pp.260-1 to App. p. 296 (Trial Exhibit A for Parcel 187 at p. 2 and Trial Exhibit B p. 1 for Parcel 187 to Trial Exhibit 1, p. 3).* However, the Trial Court went outside of this range with its number $217,954. Obviously, Luckstead was prejudiced because the Trial Court went outside of the evidence at trial range and awarded a lower amount which was the exact $217,954 number found by the

condemnation commissioners. Moreover, the Trial Court even admitted that it was upholding those amounts in stating "[t]he decision of the commission is proper in its damage determination".

II. A CHANGE OF ACCESS THAT CHANGES THE USE OF THE IMPACTED PROPERTY IS NOT REASONABLE.

Luckstead does not dispute much of what is contained in the DOT's Argument II, pp. 9-21. However, as discussed in his Initial Brief (Argument II pp. 27-36), the law in Iowa is clear to a point. The Iowa Supreme Court has held "if there is a substantial or material impairment or interference with the right of access the abutting owner or owners are entitled to just compensation therefor" *Simkins v. City of Davenport*, 232 N.W.2d 561, 566 (1975). But then the factfinder is left with the question, "what is substantial or material impairment or interference with the right of access?" Or, as phrased by the DOT, "what is reasonable access?" Iowa law does not answer these questions.

It is Luckstead's position that the answer is the same for both questions:

- If the change in access changes the highest and best use of the impacted property, then there has been a substantial or material impairment or interference with the right of access; or,
- If the change in access changes the highest and best use of the impacted property, then the remaining access is not reasonable (to put it in the terms the DOT uses in its briefing).

Luckstead has cited numerous cases that support the "change in use" standard which include: *Columbus Holding Corp. v. State*, 302 N.Y.S.2d 407 (Ct. Cl. 1969); "(suitability of access is directly related to the highest and best use of claimants' property and that, when the highest and best use is changed as a result of the remaining access, any resulting consequential damages is a compensable damage"); *Slepian v State,* 312 N.Y.S.2d 338 (1970)("[w]here change of access leaves property with access unsuitable for its highest and best use, the resulting loss is compensable"); *Hurley v State*, 143 N.W.2d 722 (South Dakota, 1966)(with the loss of access eliminating the automobile service station highest and best use, the court held that the referee had correctly concluded that the owner's right of access had been materially impaired and that the owner had suffered a compensable loss); *State ex rel. Morrison v. Thelberg*, 350 P.2d 988 (Arizona, 1960)(compensation affirmed where the highest and best use to which the land involved is best suited for "is molested"); *Department of Transportation v. Guyette*, 520 A.2d 548 (Pa.Cmwlth.1987)(" An access is not a reasonable one if it is unsuited for its present use and for the highest and best use of its property").

The DOT and Trial Court only analyze that there was an alternative circuitous access and end their conclusory argument that therefore there is no compensation. Neither the DOT nor the Trial Court analyze the impact the change of access has to the property let alone the highest and best use of the property. As stated in

Luckstead's initial briefing, when such an analysis is done, as it was by Luckstead's appraiser Reach, the impact the change of access has on the property is that it changes the highest and best use of the property. Given this change in highest and best use,

The DOT only makes two substantive argument in opposition to Luckstead and both of which come from the same sentence on page 20 of Appellee's Brief. First, is a line stating that "condemnation cases are factually different in some way"; and second, that inconvenience from a circuitous route is not compensable.

It is true that all properties are unique in their own way and therefore "condemnation cases are factually different in some way". However, a change in highest and best use applies to all cases. The facts may show in one case that the highest and best use has not changed and in another case the highest and best has changed. One case is not compensable, the other is.

As to the "inconvenience" argument, no one is disputing the law as to whether just an inconvenience is compensable. However, as shown by all the cases cited by Luckstead in his Initial Brief, a change in highest and best use is worlds away from an inconvenience. Moreover, as the DOT is always keen on pointing out, Luckstead is seeking a loss of $1 million on loss of access because the use of the properties have changed-this is a far cry from just an inconvenience.

With regards to the *Christiansen* case cited by the DOT, Luckstead's argument on change of use applies. In the Iowa Supreme Court case, the highest and best use of plaintiff's land both in the before condition and after condition was farmland; there was no change in highest and best use. *Christensen v. Board of Supervisors of Woodbury County*, 253 Iowa 978, 114 N.W.2d 897 (1962). The same is true of *Warren v. Iowa State Highway Commission*, 250 Iowa 473, 93 N.W.2d 60 (1958): farmland highest and best use unchanged.

The *Smith* case is a little different. In *Smith*, the Supreme Court did uphold the taking, but it also made modifications to ensure that the highest and best use was preserved. *Iowa State Highway Commission v. Smith,* 248 Iowa 869, 82 N.W.2d 755 (1957)*(" he recent 57th General Assembly has increased this length to 50 feet perhaps it would be a convenience to defendants and their truck customers to have **761 the space between the two driveways increased to 50 feet. Doubtless the commission will be willing to do this. We think it should" and "We think a driveway should be permitted for this dwelling from Hubbell Avenue or, in the absence thereof, just compensation must be paid for the taking of the right of access thereto").*

In the present case, other than a few conclusory statements in the DOT's reports, the undisputed evidence proved that the loss of highway access changed the highest and best use of the Luckstead Property by eliminating commercial and

retail uses. Given this, the Trial Court's ruling that the loss of access was not compensable and inadmissible must be reversed and a new trial granted.

III. THE UNECONOMIC REMNANT DISCUSSED AT TRIAL IS NOT THE SAME AS REFERENCED IN IOWA STAT. 6B.54.8 AND 6B.24 BECAUSE THE APPRAISED VALUE REFLECTS AN ADDED VALUE FROM THE UNECONOMIC REMNANT AT TRIAL.

Both the DOT and the Trial Court misconstrue the evidence and 6B.54.8 and 6B.24. The uneconomic remnant statute is used so there is no double dipping in takings claims. If you have a loss of value because of an uneconomic remnant, you should pursue a claim under 6B.24, not in your condemnation case; meaning you cannot come forward in your condemnation case and say that my property has no value because it is an uneconomic remnant. As explained in Appellant's Initial Brief (Argument III), that is not what Reach is doing. To the contrary, Reach is stating that even though the uneconomic remnant cannot be developed, it can be used for other purposes with the rest of the developed property, so he is valuing the uneconomic remnant (and not stating it is worthless). By valuing, he is stating that the uneconomic property adds value to the rest of the property for purposes of ponding etc.

Luckstead has no idea where the DOT is pulling the number $168,000 from as stated on page 23 of Appellee's Brief since there is no cite. Just guessing, but if it is referencing the $168,600 number from the table on Trial Exhibit 1, Tab 4, p.31

(*App. p. 400*), that number refers to the total amount of severance damages to Property 1 (Parcel 187), most of which are related the access change. There is simply no basis in fact to state that the $168,600 number or any $168,000 is the claim for the damage for the uneconomic remnant.

IV. BOTH THE TRIAL COURT AND DOT REFERENCE SO MANY FACTS THAT ARE NOT SUPPORTED BY THE RECORD.

To justify the Trial Court's decision, the DOT misrepresents so many of the facts and does so without any citation to the Record.

On page 11 of their brief, the DOT argues that "no property had been sold in Luckstead's Tamarack Business Park for quite some time" but fails to mention that the business park was under a County development moratorium because of the Southwest Arterial Project, and even despite this that there still was a pending (2012) sale. *See App. pp. 354 and 368 from Trial Exhibit 1*.

The DOT also mentions that the Trial Court recognized that growth in Dubuque has "been on a downswing" again without any cite to evidence on the Record. This misinformation even contradicts the DOT's own appraisers who state, "Dubuque is economically stable and is expected to remain so for the foreseeable future." *See App. p. 53, Trial Exhibit A for Parcel 184, App. p. 252, Trial Exhibit B for Parcel 184; and, App. p. 204, Trial Exhibit A for Parcel 187, App. p. 264, Trial Exhibit B for Parcel 187.*

The DOT also states that the Trial Court "also found that Luckstead's expert separated the parcels into different and distinct pieces of property….". Later in the brief (p. 26), the DOT even quotes testimony from trial on Luckstead's expert use of his "Parcels 2A, 2B, 2C, and 2D" and labeling it (without absolutely any factual support) as "not using proper appraisal methods when he identified parcels that did not exist". However, again, the DOT's appraiser Lock did the exact same thing (as stated in Appellant's Initial Brief which the DOT does not dispute). DOT's appraiser Lock's Parcel 184 (Court File No. 01311 CVCV 103387 Exhibit A & Exhibit A Part II), he used exactly the parcels as Reach's Property 2:

- Reach's Lot 2A 3.61 acres is Lock's pink property;
- Reach's Lot 2B 3.16 acres is Lock's orange property;
- Reach's Lot 2C 2.91 acres is Lock's yellow property; and,
- Reach's 2D 17.23 acres is Lock's blue property.

Compare App. p. 402, 409 and 410 from Trial Exhibit 1 to App. p. 54 and App. p. 130, from Trial Exhibits A Part 1 and Part 2 for Parcel 184. In fact, Lock has 22 parcels in those same reports. *See App. pp. 70-83, and App. pp.146-159 from Trial Exhibits A Part 1 and Part 2 for Parcel 184.* It is ridiculous to say Luckstead's appraiser used an improper appraisal method when the only other appraisal method on the record did the exact same thing.

As to the Trial Court's finding that:

> The Plaintiff had a great deal of input into the final design of the access to accommodate his vision for the area. His adaptations permitted a larger area to be available on the highway side of the property for development; permitted development on both sides of the new frontage road, avoided impacting the "monument" sign and avoided impacting the advertising billboards on the property.

See App. p. 787, Order and Judgment. The DOT argues that the Court is not making a finding that uses impermissible benefit evidence (as argued Appellant's Initial Brief at Argument IV (b)), but instead is merely "commenting on what Luckstead wanted". Appellee's Brief p. 26. The testimony and evidence at trial was crystal clear "on what Luckstead wanted" and that the right in right out access. *See App. pp. 938-941, Transcript, Vol. I, beginning on line 18; see also App. p. 780, Tr. Ex. 9 Luckstead letter to City Engineer Schiesl dated October 29, 2013* ("I met with you on 2-15-2012 and at that time presented my objection to the alternate layout **unless my present highway entrance could be allowed right in-right out waiver**.")(emphasis added); *and App. p. 781, Tr. Ex. 11 Luckstead letter to City Engineer Schiesl dated December 2, 2013, APP-_* ("We met almost a year ago on Dec. 15, 2012. At that time, I expressed my preference for the original connector layout along the highway R.O.W. unless my entrance could be preserved by using the alternate route. The Tamarak sign 'saved' by the alternate is worthless if at least a right-in can't be retained off of Highway 61."). The Trial Court's finding ignores the undisputed record which renders this finding as misleading and contrary to the evidence.

CONCLUSION

Given the Trial Court referenced the exact amounts awarded by the condemnation commissioners, awarded the same amount as the commissioners, and even confirmed it was upholding those amounts in stating "[t]he decision of the commission is proper in its damage determination", the Trial Court must be reversed as relying on inadmissible condemnation commissioner evidence, and a new trial granted.

In addition, it was a reversible error to hold that the trial should be bifurcated and that evidence of loss access was not admissible. The DOT never met its burden under Rule 1.914. Moreover, evidence of loss of access is admissible if the change in access changes the highest and best use. These rulings are reversible error warrant a new trial.

Finally, the Trial Court's findings on uneconomic remnant, Reach's use of parcels, and Luckstead's approval and benefit from the new access either ignore the law completely disregard the undisputed record or both; and therforefore should be reversed on remand.

Respectfully submitted,
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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served upon all parties to the above cause or to their attorneys of record whose names and addresses appear below this Certificate on the 20th day of November, 2018, by:

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CERTIFICATE OF COMPLIANCE

Pursuant to Iowa Rules of Appellant Procedure 6.903(1)(g)(1), Appellant hereby certifies that this brief contains 3,051 words of a 14-point proportionally spaced Times New Roman font and it complies with the word maximum permitted length of the brief.

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CERTIFICATE OF FILING

I, the undersigned, hereby certify that I will electronically file Plaintiff-Appellant's Final Reply Brief with the Clerk of the Supreme Court by using the EDMS filing system.

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I, the undersigned, hereby certify that I did serve the attached Plaintiff-Appellant's Reply Brief on counsel for all other parties electronically utilizing the EDMS filing system, which will provide notice to:

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