Case No. 2009AP001557

State of Wisconsin

Supreme Court

260 North 12th St., LLC and Basil E. Ryan, Jr.,

Plaintiffs- Appellants-Petitioners,
v.

State of Wisconsin, Department of Transportation,

Defendant-Respondent.

An appeal from a judgment entered in Case No. 2005-CV-005482 on April 30, 2009 in Milwaukee County, Judge William Sosnay, Branch 8, And affirmed by the Court of Appeals on September 14, 2010

BRIEF OF PLAINTIFFS-APPELLANTS-PETITIONERS

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Dated: April 14, 2011

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

STATEMENT OF ISSUES

Should contamination and remediation evidence be admitted in Chapter 32 condemnation cases where: just compensation remedies must be liberally construed in favor of the property owner; there exists separate statutory frameworks (both federal and state) to address contamination and remediation costs; and there are due process concerns and the danger of a double taking where the State reduces the just compensation by contamination remediation estimates while it still can assess penalties for remediation under other regulations?

The Circuit Court answered in the affirmative by allowing such evidence at trial.

The Court of Appeals answered in the affirmative by affirming the Circuit Court but it did not address any of the concerns in the issue presented.

Was the trial court's conduct in excluding Appellants' two expert witnesses without weighing the probative value of the witnesses against the prejudice to the Respondent beyond the limits of its discretion?

The Circuit Court answered in the negative.

The Court of Appeals answered in the negative by affirming the Circuit Court even though it did not address the probative value of the witnesses

Did the high probative value Appellants' two expert witnesses outweigh limited prejudice to the Respondent of being inconvenienced with two more witnesses with six weeks of discovery and eleven weeks before trial?

The Circuit Court did not weigh the probative value against prejudice.

The Court of Appeals answered in the negative by affirming the Circuit

Court but did not weigh the probative value against prejudice

Was the trial court's conduct in excluding Appellants' two expert witnesses for a scheduling order violation without finding an egregious noncompliance that lacks a clear and justifiable excuse beyond the limits of his discretion?

The Circuit Court made no finding of egregious noncompliance.

The Court of Appeals answered in the negative by affirming the Circuit Court but did not address the egregious noncompliance issue

Should speculative evidence of the impaired value of the property be admitted into evidence in a condemnation case where Respondent relied on estimates that had no basis in fact?

The Circuit Court answered in the positive by allowing such evidence at trial.

The Court of Appeals answered in the affirmative by affirming the Circuit Court but it did not address any of the concerns in the issue presented.

Should remediation and contamination evidence be admitted into evidence in condemnation cases without issuing standards for evidence, methodology, and burdens of proof in instructing the jury?

The Circuit Court answered in the positive by allowing such evidence at trial without issuing standards for evidence, methodology, and burdens of proof in instructing the jury.

The Court of Appeals answered in the affirmative by affirming the Circuit Court but it did not address any of the concerns in the issue presented.

STATEMENT ON ORAL ARGUMENT

Given that this is a case of first impression and that the Court's decision will impact the rights of property owners under Chapter 32 of the Eminent Domain Code, oral argument is necessary.

STATEMENT ON PUBLICATION

Given that this is a case of first impression and that the Court's decision will impact the rights of property owners under Chapter 32 of the Eminent Domain Code, publication of this Court's decision on this appeal is necessary.

STANDARDS OF REVIEW

When the facts are undisputed, this Court decides the remaining question of law independent of earlier court decisions. Ball v. District No. 4, Area Bd. of Vocational, Technical and Adult Educ., 117 Wis.2d 529, 345 N.W.2d 389 (Wis.,1984).

A trial court's imposition of sanctions is reviewed under an erroneous exercise of discretion standard. Industrial Roofing Servs. v. Marquardt, 2007 WI 19, ¶ 41, 299 Wis.2d 81, 726 N.W.2d 898. In determining whether the trial court abused its discretion in excluding Petitioners' two expert witnesses the appellate court will sustain a trial

court's discretionary decision if it "'has examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." Id.

However, if a judge bases the exercise of his discretion upon an error of law, his conduct is beyond the limits of discretion. State v. Hutnik, 39 Wis.2d 754, 763, 159 N.W.2d 733 (1968), quoted in Kenosha Hosp. & Med. Ctr. v. Garcia, 2004 WI 105, ¶ 15, 274 Wis.2d 338, 683 N.W.2d 425.

Whether the statutory construction of Chapter 32 contemplates inclusion of contamination and remediation evidence is a question of law and reviewed de novo. Spiegelberg v. State, 291 Wis.2d 601, 717 N.W. 641 (2006). The proper construction of a statute presents a question of law, which this Court reviews de novo. Kolupar v. Wilde Pontiac Cadillac, Inc., 2007 WI 98, ¶ 14, 303 Wis.2d 258, 735 N.W.2d 93.

Whether Petitioners' due process rights were violated by the admission of contamination and remediation evidence is reviewed in two ways: clearly erroneous as to the facts, but de novo review as whether those facts show a violation of constitutional rights. State v. McMorris, 213 Wis.2d 156, 165, 570 N.W.2d 384 (1997).

Whether the trial court erred in admitting the DOT's speculative evidence of the impaired value of the property is reviewed under an abuse of discretion standard. Leathem Smith Lodge, Inc. v. State, 94 Wis.2d 406,

288 N.W.2d 808 (Wis., 1980).

Whether the trial court abused its discretion in admitting remediation and contamination evidence without issuing instructions on standards for evidence, methodology, and burdens of proof concerning impaired and unimpaired values, as well as contamination and remediation evidence is reviewed under an erroneous exercise of discretion standard. Nowatske v. Osterloh, 198 Wis.2d 419, 543 N.W.2d 265 (1996). *abrogated on other grounds by* Nommensen v. American Continental Ins. Co., 2001 WI 112, 246 Wis.2d 132, 629 N.W.2d 301. If there is error in the instructions, a new trial is warranted only if the substantial rights of a litigant have been affected. Nommensen, 246 Wis.2d 132, 629 N.W.2d 301. A litigant's substantial rights are affected if there is a reasonable possibility that the error contributed to the outcome of the action. Id., ¶ 52. A reasonable possibility of a different outcome is a possibility sufficient to undermine our confidence in the outcome. Id.

STATEMENT OF THE CASE

A. Acquisition of property by DOT

This is a condemnation case brought under Wis. Stat. 32.05.

Plaintiffs-Appellants-Petitioners (collectively "Ryan") were the owner occupants of the property located on 260 North 12th Street, in the City of Milwaukee, Wisconsin just southwest of the Milwaukee Interchange ("Property").[1]

Ryan initially retained Alan Marcuvitz ("Marcuvitz") to represent his interests with regards to this proceeding and two other proceedings related to it after spending many years negotiating with the DOT regarding its desire to lease the majority of the property as a staging area during this Marquette Interchange Project. [2] However, the DOT decided to acquire the property rather than execute a lease for the substantial majority not actually needed for the Interchange Project.[3] After the project, the DOT would transfer the property to the City of Milwaukee ("City"). As part of this decision the DOT provided Appellant Basil Ryan with an appraisal indicating a value for the property to be acquired.[4]

Since the Property was only being used for a staging area during the period of construction, Ryan inquired of Marcuvitz about challenging the

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[1] See Appendix at APP- 6, Record for Appeal at 59, Affidavit of Basil Ryan at ¶ 1.
[2] Id., at ¶ 2.
[3] Id., at ¶ 3.
[4] Id..

right to take because the DOT only needed a temporary easement rather than a fee simple interest to accomplish the project's goals. In discussing this challenge to the right to take with Ryan, Marcuvitz advised Ryan to not pursue that challenge because the appraisal report prepared by the DOT, while significantly undervalued in his opinion, did not raise the issue of contamination.[5] Marcuvitz explained that that was significant because, by not incorporating contamination in the appraisal report, it indicated that the DOT would not be able to raise that issue in the ultimate determination of damages for the property.[6] Based upon this advice, Ryan decided to not challenge the taking of the Property for the Interchange Project.[7]

Instead, Marcuvitz retained Lawrence Nicholson ("Nicholson") of the Nicholson Group to determine a value for the Property for Ryan.[8] His report was completed and produced in February, 2005.[9]

By filing the Award of Damages recorded March 30, 2005, the DOT took Ryan's property.

B. Marcuvitz neglect on contamination issue.

Ryan first learned that contamination might be an issue in the case when he received a copy of the deposition transcripts of Ken Wade and

[5] Id., at ¶ 2.
[6] See Record for Appeal at 59, Affidavit of Basil Ryan at ¶ 5.
[7] Id.
[8] See Record for Appeal at 59, Affidavit of Basil Ryan at ¶ 6.
[9] Id.

Scott MacWilliams at the end of summer of 2006.[10] This was over a year and a half after Nicholson had completed his trial appraisal, an appraisal that did not factor contamination into the valuation analysis.

Upon reviewing the DOT appraisal, Ryan immediately questioned Marcuvitz about the inclusion of contamination in the report.[11] Marcuvitz assured Ryan that the issue would be resolved and eliminated from consideration in the case.[12] When nothing seemed to happen on this issue, Ryan raised the issue with Marcuvitz on numerous occasions.[13] An easement holder (ATC) had been involved with some environmental issues on the Property in the past. Marcuvitz told Ryan that if ATC or environmental issues were ever raised in Appellants' case, he could not discuss that issue. This caused Ryan great concern because he began to feel that he would not have any legal representation with an issue that he believed was critical to the determination of damages on his property.[14]

Marcuvitz filed and served a witness list in accordance with the trial court's first scheduling order[15] which expressly reserved the right to call rebuttal witnesses.[16]

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[10] Id., at ¶ 7.
[11] Id., at ¶ 8.
[12] See Record for Appeal at 59, Affidavit of Basil Ryan at ¶ 8.
[13] Id.
[14] Id.
[15] See Record at 11, Plaintiff's Witness List.
[16] Id., at p. 3.

The contamination issue surfaced again during Ryan's deposition. Ryan stated that he couldn't address it because he had never discussed this issue with Marcuvitz. Ryan's deposition was continued so Marcuvitz and Ryan could talk about this issue after Ryan's deposition. Instead, Marcuvitz withdrew from the case in October, 2007.[17]

C. Ryan's effort to obtain a new attorney

After Marcuvitz withdrew, Ryan began the process of contacting other law firms in Milwaukee to identify an attorney who would handle the case. This process was delayed because Marcuvitz did not release (until the end of 2007) Ryan's files to Ryan until right before the holidays even though Ryan had addressed this matter with the circuit court three times.[18]

Ryan contacted many different law firms. After repeatedly being rejected by firms in Milwaukee for various reasons, it was finally suggested to Ryan that he would probably need to look for counsel outside the Milwaukee area.[19] This led Ryan to make contact with Wausau's Shane Vander Waal at the end of 2007. Ryan had several conversations with Vander Waal over the course of the next few months. During these conversations he indicated that Richard Weber ("Weber") would be assisting on the case. Vander Waal said Weber's assistance would be a positive because Weber and Marcuvitz knew each other well and had even

[17] See Record for Appeal at 59, Affidavit of Basil Ryan at ¶ 9.

worked on cases together.[20] Initially, Ryan thought that Vander Waal and his firm would be a good fit for Ryan's case. This feeling changed after a meeting Ryan had with Vander Waal and Weber in Milwaukee. During this meeting Weber kept stating what a wonderful attorney Marcuvitz was and that he had high respect for the decisions made by Marcuvitz.[21] This made Ryan uncomfortable because he believed the actions which Marcuvitz had taken were the reason why they were in a difficult situation with their case.

In a conversation with Vander Waal soon after the above meeting, Ryan confronted Vander Waal about Weber's comments because Vander Waal had previously told Ryan that Marcuvitz had not handled the case properly. Vander Waal simply reiterated the longstanding relationship that existed between Weber and Marcuvitz. Ultimately, Vander Waal agreed that his firm would not be a good fit for the case because of this issue.[22]

After the Vander Waal meetings, Ryan went online and discovered an attorney by the name of George Curtis who represented an individual who sued Marcuvitz for actions or inactions that Marcuvitz was responsible for in handling a case for that individual.[23] Ryan explained his situation to Curtis who strongly advised him not to hire an attorney who knew

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[18] Id., at ¶ 10.
[19] Id., at ¶ 12.
[20] Id., at ¶ 13.
[21] See Record on Appeal at 59, Affidavit of Basil Ryan at ¶ 14.
[22] Id., at 15.
[23] Id., at ¶ 16.

Marcuvitz well or was a good friend of his.[24] He also said that Ryan's case was complex and would require a lawyer with an extensive eminent domain background who handled eminent domain cases on a full-time basis. Based upon that requirement, Curtis suggested that Ryan contact Dan Biersdorf at the firm of Biersdorf and Associates.[25]

Within days of receiving this advice from Curtis, Ryan made contact with Dan Biersdorf in mid-March, 2008. Biersdorf immediately evaluated the case and agreed to represent Ryan within less than one week from the time that initial contact had been made.[26] Voluminous documents[27] were immediately delivered to Biersdorf's office for this case and two others related to it.[28] The first order of business was to address a discovery deadline of March 15, 2008, that had been imposed by a court order. Biersdorf was able to amicably amend the terms of the order with opposing counsel in order to provide some additional time to become familiar with the case and prudently respond to the discovery demand in a timely fashion.[29]

During the course of Biersdorf's evaluation of the documents in this case and in discussions with Ryan, they discovered that there was a

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[24] Id., at ¶ 17.
[25] Id., at ¶ 18.
[26] See Record on Appeal at 49, Affidavit of Dan Biersdorf at ¶ 2.
[27] See Record on Appeal at 161, Transcript of June 4, 2008 hearing at p.47, l.21-22, counsel even refers to "4 -5 bankers boxes" and "90 pounds of documents".
[28] See Record on Appeal at 49, Affidavit of Dan Biersdorf at ¶ 2.

significant valuation issue associated with the subject property caused by a claim of environmental contamination.[30] This issue had an impact upon the damage assessment made by the DOT in excess of $600,000.[31] Biersdorf learned from Ryan and a review of the documents that virtually nothing had been initiated on behalf of Ryan relative to this issue prior to Biersdorf's employment as attorneys in this case.[32]

D. Preparing the contamination issue

In early April, Dan Biersdorf focused his attention toward the contamination issue.[33] Based upon his experience handling contamination issues in other cases, Dan Biersdorf knew that Ryan needed to identify an environmental consultant and obtain an appraisal opinion from a qualified appraiser regarding the effect of contamination on value in an eminent domain proceeding and the proper procedure for addressing that evaluation.[34]

Biersdorf soon learned from Ryan and a former attorney for Ryan on a different case that Ryan had employed an environmental consultant to address environmental issues on the subject property relative to this other

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[29] Id.
[30] See Record on Appeal at 49, Affidavit of Dan Biersdorf at ¶ 3.
[31] Id.
[32] See Record on Appeal at 49, Affidavit of Dan Biersdorf at ¶ 3.
[33] Id., at ¶ 4.
[34] Id.

case.[35] Upon learning this information Dan Biersdorf contacted this consultant, Joe Michaelchuck, to inquire about his availability to provide the environmental opinions that Ryan needed within the relatively short timeframe before the May 15th deadline for filing dispositive motions. Since the DOT had previously employed an environmental consultant to analyze the effects of contamination on the subject property, it was not necessary for Michaelchuck to perform any field testing or analysis. He was able to provide his opinions based upon the data which had been compiled by the DOT's consultant. Given that circumstance, Michaelchuck believed that he would be able to provide his opinions by the end of April.[36]

During this same early April timeframe, Dan Biersdorf contacted Ryan's appraiser in this case, Nicholson, to inquire about his availability to provide the necessary valuation opinions relating to the environmental contamination issue.[37] Nicholson said that for valuation opinions relating to the environmental contamination issue, it would be best if Ryan hired a separate appraiser who had special expertise in that area.[38] Biersdorf inquired of Nicholson whether he would recommend an appraiser in the area that he felt would be qualified for that assignment. Nicholson said he

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[35] Id., at ¶ 5.
[36] See Record on Appeal at 49, Affidavit of Dan Biersdorf at ¶ 5.
[37] Id., at ¶ 6.
[38] Id., at ¶ 6.

did not believe an appraiser with that expertise existed in the State of Wisconsin, but he recommended Jason Messner ("Messner") who lived in Minnesota.

Dan Biersdorf subsequently spoke with Messner and explained this situation to him, including the May 15th deadline. Messner explained to Biersdorf that he believed he could provide his opinions that would be needed for the summary judgment motion if he received the relevant environmental opinions by the end of April or early May.

The opinion from Michaelchuck was received in Biersdorf's office in early May. Dan Biersdorf personally discussed those opinions with Michaelchuck during the first week of May. Those opinions were then delivered to Messner who promptly completed his contamination valuation analysis and delivered it to Biersdorf's office which left the law firm with only a few days to incorporate these two expert reports into motion papers that could be filed by May the 15th deadline.[39]

From Biersdorf's experience handling the valuation of contaminated property, the above process (from reviewing documents, identifying issues, hiring experts, consulting with experts and obtaining one expert's report for another) normally occurs over many months' time.[40] The Biersdorf firm would normally begin this process soon after the issue was identified,

[39] Id., at ¶ 8.

which would have been in the middle of 2006 when the issue was first raised in the DOT's appraisal. Given the short time that the Biersdorf firm had to address this issue since becoming involved with this case, it would be practically impossible to identify and disclose the experts necessary to address the contamination issue any sooner than actually occurred in this case.[41]

E. The battle over rebuttal witnesses and the ultimate trial

The issue of contamination and its potential impact upon valuation and damages in this case did not arise until the issue was first raised in the appraisal report presented by the DOT. The environmental and contamination valuation experts, which were identified by Ryan, were retained to rebut this issue.[42] The scheduling order dated December 2005 had no language addressing the disclosure of rebuttal witnesses. When Ryan did disclose their witnesses in February 2006, they included the following reference: "*Plaintiff reserves the right to call any witnesses named by defendant and to name witnesses to be called in rebuttal…*".[43] The contamination issue first surfaced when the DOT disclosed its appraisal in May 2006.[44]

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[40] Id., at ¶ 9.
[41] See Record on Appeal at 49, Affidavit of Dan Biersdorf at ¶ 9.
[42] See Record at 6, December 2005 scheduling order.
[43] See Record at 11, Plaintiff's Witness Disclosure at p. 3.
[44] See Record at 14, Defendant's Witness Disclosure.

On May 15, 2008 Appellants Ryan the two rebuttal witnesses in a summary judgment motion to exclude the DOT's appraisal on multiple grounds associated with the contamination issue.[45] As of May 15th, discovery ended in the beginning of July and the scheduled trial date was in early August.[46]

In response to the disclosure of rebuttal witnesses and summary judgment motion, the DOT filed a motion to exclude Michaelchuck and Messner as witnesses on the grounds that their disclosure violated the trial court's scheduling order.[47] The DOT filed its motion to exclude the witness before Ryan could file a formal motion to amend the Scheduling Order (the trial court did admit that it would have denied such a motion to amend the scheduling order if Ryan would have brought such a motion).[48]

The trial court granted the DOT's motion to exclude on the grounds that "good cause" did not exist to allow Michaelchuck and Messner to testify at trial.[49] In determining whether good cause existed, the trial court weighed its previous August 7, 2007 order and the prejudices to the parties.

In addition to excluding Michaelchuck and Messner, the trial court also stated that it would have denied a motion to amend the scheduling

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[45] See Record at 41.
[46] See Record on Appeal at 38, Scheduling Order dated January 10, 2008.
[47] See Record on Appeal at 46, DOT's motion to exclude.
[48] The trial court did stated that it would have denied such a motion to amend the scheduling order if Ryan would have brought such a motion. See Record at 156 at p. 71, l. 25, p. 72, l. 1-2.

order to include those witnesses if Ryan would have brought such a motion.[50]

Ironically, at a later hearing, the trial court did extend the discovery deadline and even extended the trial date at the DOT's request because of unrelated issues of concern to the DOT.[51]

Contamination became a major issue at trial. The DOT called two engineers (Wade and Haak) to testify about the nature of the contamination and the costs to clean it up. It also called an appraiser (MacWilliams) to testify who included a huge discount ($675,000) for contamination in his damage analysis.

Ryan had no witnesses on contamination and remediation issues because of the trial court's ruling excluding Michaelchuck and Messner, and was left trying to prove its rebuttal case through the DOT's witnesses. However Ryan was able to prove that the MacWilliams discount included $500,000 of costs for an environmental remediation cap that is not now required and may never be required.[52] In addition, the total universe of information that Wade testified was the basis for his estimate is the very same information about which the DNR concluded that "based upon the

[49] See APP-84, 85, Record at 161, June 4, 2008 Transcript at p. 59, l. 24 & 25, p. 60, l. 1-3.
[50] See Record at 156 at p. 71, l. 25, p. 72, l. 1-2.
[51] The trial was originally scheduled to commence August 4, 2008 but was changed at the request of the DOT to begin August 25, 2008.

data available ***it is not possible to determine what type of remediation would be required***".[53]

When the testimony at trial concluded, the evidence of just compensation by the DOT was 2,001,725[54]. Ryan's case for just compensation amounted to $3,497,000 less the remediation costs.[55] The jury's verdict was $2,001,725.

F. Evidence the jury never heard

Appellants presented an offer of proof to the trial court containing evidence that Michaelchuck and Messner would have presented to the jury (see Appendix at APP-11). Important components of that evidence are listed below:

Testimony to be elicited from Jason Messner:

- He is an MAI designated appraiser who has extensive experience valuing contaminated properties. His expertise has been sought in 23 states plus the District of Columbia. In Wisconsin alone he has been retained 26 times prior to this case to provide expertise relative to contaminated properties.
- The proper methodology for valuing contaminated properties is explained in USPAP Advisory Opinion 9. This methodology requires an appraiser to first determine the clean, uncontaminated

[52] See Record at 168, August 28, 2008 Transcript at p.113, l. 13-25, p. 114, p. 115, l. 1-2.
[53] See Record at 149, at Trial Exhibit 114, June 7, 2004 DNR letter.
[54] $1,968,200 plus the $33,525 adverse possession claim ((6,022 square feet x $2.25/sq.ft.) plus (4,439 square feet x $4.50/sq.ft.) The square footage is taken from the Stipulation Concerning State Highway Right of Way Easement (Trial Exhibit 28) at paragraph 3. The $4.50/sq.ft. figure is MacWilliams impaired value per square foot figure and the $2.25/sq.ft. figure is MacWilliams impaired value per square foot figure for the are encumbered by the DOT's ROW. See Record at 170, transcript of closing arguments at p. 148, l. 9-25, p. 149, l. 1-3.
[55] Id., at pp. 163-4.

value of the property ("Unimpaired Value") and then deduct for three components of contamination. These components are Cost Effects (remediation and related costs), Use Effects (effects on site usability), and Risk Effects (environmental risk/stigma). These three Effects are deducted from the Unimpaired Value to generate an "Impaired Value".

- In this case there were no Use Effects or Risk Effects that would be applied as a discount to the Unimpaired Value of the property.
- The Cost Effects would only be $10,000 after credit is given for government grant funding that would be available for the subject through the PECFA program.
- The appraiser for the DOT (MacWilliams) did not follow the methodology in Advisory Opinion 9. He simply concluded to one value for the subject property by incorporating a Site Conditioned adjustment to sales that he identified in the marketplace.
- MacWilliams' Site Condition adjustment included a $645,000 discount for the effects of contamination. His discount failed to acknowledge the cleanup cost estimates by the engineering firm hired by the DOT. His contamination estimate also failed to acknowledge the grant funding that could have been utilized to reduce the actual payment of cleanup costs by Appellants to $10,000 if the project by the DOT had not acquired the subject property.

Michaelchuck would have provided the following significant points to the jury:

- He is a licensed professional engineer in the State of Wisconsin who has been a registered PECFA consultant since 1996. In the past 13 years he has provided consultation for dozens of sites that qualified for PECFA funding.
- The RMT report obtained by the DOT provides sufficient information so that the DNR would consider the site investigation complete for the subject property. Based upon his experience and the review of that report, he believes that the cleanup cost estimate of $75,000 to $100,000 provided by RMT is more than sufficient to achieve case closure with the DNR.
- Based upon his experience site closure for the subject property could be achieved at a cost of less than $60,000.

- Based upon the conclusions by RMT, the subject property would be eligible to receive PECFA funds.
- PECFA funding will provide reimbursement for cleanup costs up to $190,000. PECFA claimants must pay an "out-of-pocket" deductible of $10,000 per occurrence. Based upon the costs needed to obtain closure for the subject property, the maximum funds which Appellants would pay themselves to complete the cleanup would be $10,000.
- Appellants lost their ability to qualify for PECFA funding when the DOT acquired the subject property on March 30, 2005.

Ryan moved for a new trial and judgment notwithstanding the verdict on essentially the same grounds as stated in the appeal. The trial court denied Ryan's post-trial motions.[56]

Judgment was entered on June 12, 2009.[57]

Ryan appealed the matter on June 16, 2009.[58]

On September 14, 2010, the Court of Appeals affirmed the trial court's judgment.[59]

On October 14, 2010, Ryan filed this petition of review of the Court of Appeals' decision.

On March 16, 2011, this Court granted the petition for leave to review.

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[56] See Record at 96, 97, 98, Appellants' post trial motion papers and Record at 156, transcript from hearing.
[57] See Record at 129.
[58] See Record at 152, Notice of Appeal.
[59] See Appendix at APP-100.

ARGUMENT

The Court of Appeals treated this case as if it is any other civil case. It is not. This is a condemnation case, and it is treated differently than other civil cases. As the Wisconsin Supreme Court has held:

> This is because the exercise of the power of eminent domain has been characterized as an "extraordinary power," and the rule of strict construction is intended to benefit the owner whose property is taken against his or her will.... Conversely, **statutory provisions in favor of the owner, such as those which regulate the compensation to be paid to him or her, are to be afforded liberal construction.**[60]

In following this mandate, Wisconsin courts have held that "*if a procedural statute can reasonably be construed in a manner that favors the appealing condemnee, we must apply that interpretation*".[61] It is against this backdrop that the issues in this condemnation case must be decided where contamination/remediation evidence was allowed at trial to reduce just compensation over the property owners fairness, equity, and due process objections. Furthermore, when the evidence was let in, the trial court allowed *speculative estimates* to be submitted when those estimates had been proven wrong while not allowing the property owner *any* contamination/remediation witnesses. Given the liberal construction in this area of the law for the property owner and that "just compensation"

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[60] Standard Theatres, Inc. v. DOT, 118 Wis.2d 730, 349 N.W.2d 661 (Wis.1984) (emphasis added); see also Spiegelberg v DOT, 2006 WI 75, 717 N.W.2d 641.

[61] The Landings v. DOT, 703 N.W.2d 689 (Wis.App. 2005).

requires fairness, equity, and making the property owner whole for the taking,[62] Ryan respectfully requests this Court reverse the lower courts.

I. CONTAMINATION AND RELATED REMEDIATION COSTS SHOULD NOT BE CONSIDERED IN DETERMINING JUST COMPENSATION FOR EMINENT DOMAIN TAKINGS.

This is a case of first impression for Wisconsin where, surprisingly, the Court of Appeals refused to discuss contrary opinions while resting on the fact that its decision is "consistent with the 'majority rule' in the United States" citing Nichols on Eminent Domain, an Iowa Law Review article[63], and two cases.

In fact, there really is no majority view. The DOT cites six cases in its briefing.[64] With a new case from the Minnesota Supreme Court filed on September 2, 2010 (Moorhead Economic Development Authority v. Anda, 2010 WL 3430871 (Minn.)[65]), Ryan, now, also cites six cases[66]. With six

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[62] City of Janesville v. CC Midwest, Inc., 302 Wis.2d 599, 646, 734 N.W.2d 428, 452 (2007)

[63] Ironically, Iowa is one of the states that excludes contamination evidence in eminent domain proceedings. See Aladdin, Inc. v. Black Hawk County, 562 N.W.2d 608, 614-617 (Iowa,1997).

[64] See e.g. Finkelstein v. Department of Transp., 656 So.2d 921 (Fla.,1995); Redevelopment Agency of the City of Pomona v. Thrifty Oil Co., 4 Cal.App.4th 469, 474 n. 9, 5 Cal.Rptr.2d 687; State of Tennessee v. Brandon, 898 S.W.2d 224 (Tenn.1994); Silver Creek Drain Dist. v. Extrusions Div., 468 Mich. 367, 663 N.W.2d 436 (2003); City of Olathe v. Stott, 253 Kan. 687, 861 P.2d 1287 (1993) ; and, Northeast Ct. Economic Alliance v. ATC, 256 Conn. 813, 776 A.2d 1068 (2001).

[65] A copy of Moorhead Economic Development Authority v. Anda, 2010 WL 3430871 (Minn.) is in the Appendix at APP-120.

[66] In addition to Moorhead Economic Development Authority v. Anda, 2010 WL 3430871 (Minn.), persuasive authority is found in New York where a majority of their appellate courts have found that evidence of contamination and remediation costs associated with the contamination of the property should not be considered in determining fair market value. See the

cases to six, it is a split with most courts in the same position as Wisconsin with no precedence on the issue.

This Court, respectfully, should review the new Minnesota Supreme Court case, Moorhead Economic Development Authority v. Anda, 2010 WL 3430871 (Minn.) attached in the appendix (at APP-120). Anda was a case of first impression for the Minnesota Supreme Court, exactly the same position as this Court. However, contrary to the decision by the Court of Appeals, Anda discussed and weighed many of the issues raised not only by Ryan but by other jurisdictions faced with the admissibility of contamination evidence in eminent domain.[67]

At the outset, in reviewing the basis for the Court of Appeals decision (that all factors are to be considered including contamination), we see that the Anda Court struggled with the same issue. Just like the Court of Appeals in this case, the Minnesota Court of Appeals in Anda held that since "the measure of compensation is the amount a willing buyer would

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Second, Third, and Fourth Departments of New York's Appellate Division (Matter of City of New York v. Mobil Oil Corp., 12 A.D.3d 77, 82-84, 783 N.Y.S.2d 75; Matter of Northville Indus. Corp. v. State of New York, 14 A.D.3d 817, 788 N.Y.S.2d 464, In re City of Syracuse Indus. Development Agency, 20 A.D.3d 168, 796 N.Y.S.2d 503 (N.Y.A.D. 4 Dept.,2005.). Other jurisdictions have also found that contamination evidence or remediation evidence, or both, should be excluded in condemnation proceedings. See Housing Auth. of City of New Brunswick v. Suydam Invs., 177 N.J. 2, 23-24, 826 A.2d 673, 686-687 (N.J.,2003); Aladdin, Inc. v. Black Hawk County, 562 N.W.2d 608, 614-617 (Iowa,1997).

[67] Although argued in Ryan's briefing in its Appellants' brief at pages 35-39, the Court of Appeals failed to address concerns such as fairness, due process, and risk of double liability, PECFA, and this Court's mandate to liberally construe provisions in favor of the condemnee. See Standard Theatres, Inc. v. DOT, 118 Wis.2d 730, 349 N.W.2d 661 (Wis.1984); Spiegelberg v DOT, 717 N.W.2d 641, 2006 WI 75 (Wis. 2006).

pay a willing seller for the property" in condemnation cases that the fuel oil contamination found on the Anda property "legitimately bears on the market value"; consequently it found that contamination/remediation evidence is admissible. See Moorhead Econ. Dev. Auth. v. Anda, Nos. A07-1918, A07-1930, 2008 WL 4705663, at *1 (Minn.App. Oct. 28, 2008). In its opinion in this case, the Wisconsin Court of Appeals relied on the same argument as the Anda Court of Appeals.[68]

So what is the justification for excluding contamination/remediation evidence if all factors legitimately bearing upon the market value of the property should be considered?

In Anda, the Minnesota Supreme Court first took a step back (much like this Court did in Standard Theaters[69]) reminding us of the "extraordinary power" of eminent domain, the restrictions enumerated in federal and state constitutions, and further that "[t]he right of compensation thus granted is absolute, precedent to the constitution itself, inherent without recognition therein; and no attempt to deprive the citizen of this incontestable right could be tolerated in any system of free government." See Moorhead Economic Development Authority v. Anda, 2010 WL 3430871 (Minn.) at ¶¶ 8& 9 and also citing State ex rel. Ryan v.

[68] See APP-109-110, at ¶¶ 21, 22 & 23.
[69] Standard Theatres, Inc. v. DOT, 118 Wis.2d 730, 742, 349 N.W.2d 661, 669 (Wis.1984).

Dist. Court of Ramsey Cnty., 87 Minn. 146, 151, 91 N.W. 300, 302 (1902).

In a recent case, this Court has also reminded us of the tenets in eminent domain:

> In the discharge of its duties, a government may appropriate private property, but it may not do so without being liable to the obligation to pay just compensation. *United States v. Lynah,* 188 U.S. 445, 465, 23 S.Ct. 349, 47 L.Ed. 539 (1903). This obligation bars the government "from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Dolan v. City of Tigard,* 512 U.S. 374, 384, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994); *Armstrong v. United States,* 364 U.S. 40, 49, 80 S.Ct. 1563, 4 L.Ed.2d 1554 (1960).
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> The phrase "just compensation" evokes ideas of fairness and equity. *United States v. Va. Elec. & Power Co.,* 365 U.S. 624, 631, 81 S.Ct. 784, 5 L.Ed.2d 838 (1961). "The guiding principle of just compensation is reimbursement to the owner for the property interest taken." *Id.* at 633, 81 S.Ct. 784. The owner shall receive the "full monetary equivalent" of what he loses. *United States v. Reynolds,* 397 U.S. 14, 16, 90 S.Ct. 803, 25 L.Ed.2d 12 (1970). He is entitled to be put in as good a position pecuniarily as if his property had not been taken. *Olson v. United States,* 292 U.S. 246, 255, 54 S.Ct. 704, 78 L.Ed. 1236 (1934).

City of Janesville v. CC Midwest, Inc., 2007 WI 93, ¶¶ 77-78, 302 Wis.2d 599, 646, 734 N.W.2d 428, 452 (2007).

In this same vein of fairness, equity, and making the property owner whole for the taking, the Minnesota Supreme Court analyzed how other jurisdictions addressed the contamination issue in condemnation cases. The Anda Court discussed both approaches: the *inclusion* approach

argued by the DOT and cited by the trial court in this case; and the *exclusion* approach adopted by jurisdictions and their concerns about unfairness to the property owner.[70]

Upon reviewing both approaches (remember the Court of Appeals in this case did not even comment on any of the *exclusion* approach cases), the Minnesota Supreme Court held:

> After having analyzed the two primary approaches utilized by other courts, we conclude that the exclusion approach with certain modifications is the better approach. While evidence of contamination and remediation may be admissible for the limited purposes later discussed, evidence of remediation costs should not be admissible in an eminent domain proceeding and property taken under the government's eminent domain power should be valued as remediated. We adopt this approach because we conclude that it does a better job of ensuring that property owners will be justly compensated and made whole when the power of eminent domain is used to take their property. This approach has the greatest likelihood of placing the property owner "in as good a position pecuniarily as if his property had not been taken," *see Olson,* 292 U.S. at 255, 54 S.Ct. 704, but will also provide a mechanism to prevent the condemning authority from paying more for the property than it is worth. Several reasons support our choice of a modified exclusion approach, including fairness and due process concerns.

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[70] See Housing Auth. Of City of New Brunswick v. Suydam Inv., 177 N. J. 2, 23, 826 A.2d 673, 682-3; Matter of City of New York v. Mobil Oil Corp., 12 A.D.3d 77, 82, 783 N.Y.S.2d 75, 79; and Aladdin, Inc. v. Black Hawk County, 562 N.W.2d 608, 615 (Iowa,1997) where the Iowa Supreme Court held:

> before a landowner is held responsible for cleanup cost in Iowa, an action must be brought by the DNR, or by a citizen, *id.* To hold a property owner responsible for cleanup cost, the DNR or citizen must prove the owner generated the contamination. If this procedure is not followed and the value of the property condemned is reduced by the estimated cost of cleanup, the landowner will not receive just compensation because the award will be less than full value. In addition, the property owner will still have the same legal liability for cleanup cost as before....

See Moorhead Economic Development Authority v. Anda, 2010 WL 3430871 (Minn.) at APP-137. As for the fairness reason, the Anda Court reasoned:

> admitting evidence of remediation costs in a condemnation proceeding may subject an owner of contaminated property to "double liability" for that property, or to a "double-take." This double-take may occur under the inclusion approach because when the government condemns contaminated property, environmental liability laws and condemnation proceedings intersect in a way that unfairly punishes a property owner. *See Suydam Investors,* 826 A.2d at 686. Admitting evidence of contamination and remediation costs during the condemnation proceeding encourages a jury to value the property as contaminated, often times reducing the condemnation award dollar-for-dollar by the actual or estimated cost of remediation. *See Aladdin,* 562 N.W.2d at 614. At the same time, the property owner may be held liable for the contamination under environmental liability law. *Id.* at 615. The New Jersey Supreme Court described this risk of a double-liability in *Suydam Investors:*
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> > **When property is devalued for contamination in condemnation, landowners first receive discounted compensation in the condemnation proceeding and then are subject to the full cleanup costs, thus suffering what is colloquially denominated as a "double-take." Under that scheme, the condemnor receives a windfall by ultimately obtaining the property in a remediated state at the condemnee's cost, yet paying a discounted price due to the contamination.**

Id., at APP-137. The Anda Court recognized that excluding contamination evidence, as a matter of law, is likely to result in a fictional property

value[71] (this same fictional value[72] argument was argued by the DOT and cited by the trial court in this case, too) that may even result in the State overpaying for the contaminated property. However, there are safeguards against this because the "condemning authority will often have the opportunity to rectify any such fairness issue by filing a separate action against the party responsible for the contamination-whether it be the current owner or some other person, entity, or owner under an appropriate environmental liability statute to compel that party to remediate the property or pay damages." Id., at APP-138-9.

As for the due process concerns, the Anda Court stated:

> We also conclude that procedural due process concerns under both the United States and Minnesota Constitutions support our adoption of our modified exclusion approach. An eminent domain action does not have the same procedural safeguards as an environmental-contamination action, including the opportunity for the property owner to contest liability for the contamination, bring third-party actions against former owners, assert certain defenses, or recover from any insurance coverage. **Allowing a condemning authority to recoup environmental remediation costs through a reduced award permits the condemnor "to circumvent the procedures established by the legislature and the Environmental Protection Agency for recovering environmental remediation costs."**

[71] APP-136, at Moorhead Economic Development Authority v. Anda, 2010 WL 3430871 (Minn.).

[72] For better or worse, eminent domain law requires the use of fictional conditions all the time. For example, under Wis. Stat. 32.09(5)(b) the influence of the project cannot be taken into consideration in valuing the property for condemnation. In the real world, most projects will impact what a willing buyer will pay a willing seller, but Wisconsin law dictates that a fictional property be valued where no project exists that could impact the value of the subject property.

Id., at APP-139. The Anda Court also recognized that under an *inclusion* approach, a condemnee:

- can be forced to pay for contamination through a reduced condemnation award even though he was not liable for the contamination;
- cannot implead other potential responsible parties or assert defenses as he would in an environmental liability action;
- cannot explain how the property came to be contaminated and who may be responsible because these issues are not relevant in a condemnation proceeding. Id., at APP-140-1.

Given all of the above, the Minnesota Supreme Court concluded "that a rule of law excluding cost-of-remediation evidence more adequately protects a property owner's procedural due process rights". Id., at APP-139.

The above due process concerns are just as valid in Wisconsin as they are in Minnesota given the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) applies to both states and the state of Wisconsin also has its own statutory scheme where it prosecutes responsible parties for contamination. See Wis. Stat. §§ 292.11(3), 292.31(8)(c).

The DOT will likely argue (they consistently have before) that the

goal of an eminent domain action is to determine just compensation not to determine responsibility for environmental contamination. Actually that is exactly the point Ryan wants to make. If contamination/remediation evidence is allowed (especially in this case where no rebuttal contamination/remediation evidence was allowed) then the property owner is assessed with all the costs without any due process to determine whether the property owner is the responsible party. The property owner is penalized (in this case at least $645,000) without any determination or due process as to responsibility. In addition (the double dip) the property owner loses the ability to recover the loss in value which the State can still do since it can collect remediation costs. That is the definition of a violation of due process rights.

It should also be pointed out to the Court that Minnesota does not have the same mandates set down by their supreme court to protect property owners in condemnation cases as our state. See Standard Theatres, Inc. v. DOT, 118 Wis.2d 730, 349 N.W.2d 661 (Wis.1984); Spiegelberg v DOT, 2006 WI 75, 717 N.W.2d 641. Even without the above precedence and the guidance from this Court in City of Janesville v. CC Midwest, Inc. (that " 'just compensation' evokes ideas of fairness and equity"...and that the owner is "entitled to be put in as good a position

pecuniarily as if his property had not been taken")[73], the Minnesota Supreme Court was able to reach the only fair decision of adopting the exclusion approach.

The Minnesota Supreme Court's reasoning is also consistent with W.S.§ 32.09(5)(b), provides in pertinent part:

> any increase or decrease in the fair market value of real property prior to the date of evaluation caused by the public improvement for which properties acquired... may not be taken into account in determining the just compensation for the property.

Since the cleanup costs being deducted against the fair market value for the subject property were created only because of the public improvement being built by the DOT, the determination of just compensation for Ryan has been wrongfully diminished in violation of their rights under W.S.§ 32.09(5)(b). In order to comply with this statute, the costs associated with contamination remediation must not be considered in determining just compensation in this case.

In this case, the project influence rule affected remediation costs in another way, too. If it is ruled that contamination costs are to be considered for the just compensation determination, it is only fair and equitable that available grants to offset those costs also be considered. As the offer of proof showed, Ryan would have qualified for a PECFA grant that would

[73]City of Janesville v. CC Midwest, Inc., 302 Wis.2d 599, 646, 734 N.W.2d 428, 452 (2007).

have offset all but $10,000 of the remediation costs that Ryan would incur. When Ryan's property was taken for the project, though, Ryan no longer qualified for this grant money, i.e. the project caused Ryan to lose the right to receive grant money. This is a classic project influence scenario which the DOT's expert totally ignored. Without an expert to explain this to the jury, the offset claim was lost to Ryan, and his just compensation was decreased due to the influence of the project.

Finally, Ryan respectfully requests this Court to reverse the Court of Appeals especially under these facts where the DOT's witness at trial admitted (under questioning by the DOJ attorney) that the DOT and DNR are "partners" in environmental contamination clean up issues.[74] Given this, any fear of the DOT overpaying for the property is safeguarded because the DOT and DNR, the "partners", are free to pursue whoever the responsible party for the contamination in a separate action. Moreover, in this case, the reduction in value to the property was based on estimates that were proven unreliable and speculative at trial.[75] This Court should reverse and remand

[74] See Record at 168, Transcript from August 28, 2008 trial date at p. 116, l. 19-22.

[75] The evidence at trial not only implied, but proved, that the Ken Wade estimate was unreliable and speculative. First, the Wade estimate included $500,000 of costs for a cap that is not now required and may never be required. See Record at 168, August 28, 2008 Transcript at p.113, l. 13-25, p. 114, p. 115, l. 1-2. Second, the total universe of information that Wade testified was the basis for his estimate is the very same information about which the DNR's June 7, 2004 letter explicitly states that "based upon the data available ***it is not possible to determine what type of remediation would be required***" (despite this DNR finding, the DOT and MacWilliams went right ahead and determined $645,000 in remediation work was required). See Record at 149, at Trial

simply on the basis of the admittance of contamination/remediation evidence, however, the above facts show how egregious such a policy can be to a property owner under the decision by the Court of Appeals and the trial court.

II. THE IMPAIRED VALUE EVIDENCE OFFERED AT TRIAL BY THE DOT WAS SPECULATIVE AND INADMISSIBLE.

Admitting contamination and remediation costs in this case would be especially egregious where the appraiser has ignored USPAP methodology, typical market norms, and failed to provide a nexus between the remediation costs and the value deductions. His remediation cost discount is entirely speculative, and his report, or at least any reference to his Site Conditions adjustment, must be excluded.

Appraisal opinions are not to be based upon speculation. According to the United States Supreme Court, "elements affecting value that depend upon events or combinations of occurrences which, while within the realm of possibility, are not fairly shown to be reasonably probable, should be excluded from consideration." Olson v. United States, 292 U.S. 246, 257 (1974).[76] The Wisconsin Court of Appeals has also expounded on this

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Exhibit 114, June 7, 2004 DNR letter which the DOT's appraiser even included this in his report at p.12.

[76] See also discussion in United States v. 320.0 Acres of Land, 605 F. 2d, 762, 814-820 (5th Cir. 1979).

standard. In discussing factors to be considered for analyzing comparable sales, the court said "other appropriate factors may be considered where they are relevant and not remote or speculative." Arents v. ANR Pipeline Co., 281 Wis. 2d 173, 189, 696 N.W.2d 194,201 (Wis. App. 2005) (emphasis added). The standard was restated again in Hoekstra v. Guardian Pipeline, LLC, 298 Wis. 2d 165, 192, 726 N.W. 2d, 648, 661 (Wis. App. 2006) when it generally discussed the breadth of comparable sales evidence to be utilized in eminent domain proceedings. It stated that "any factor affecting the value of property that could influence or sway the decision of a prospective buyer should be considered in the valuation of property in a condemnation proceeding, as long as the evidence is relevant, and not remote or speculative." Id. (emphasis added).

Clearly, Wisconsin courts have set a broad standard for admitting evidence to be considered by the trier of fact in determining valuation eminent domain proceedings. However, there is a limit on the introduction of evidence when that evidence is speculative. For example, the income approach to valuation is the third rail in condemnation cases and is excluded in condemnation cases.[77] The exclusion results because Wisconsin courts have found the income approach to be based on speculation.[78]

[77] See Leathem Smith Lodge, Inc. v. State, 94 Wis.2d 406, 288 N.W.2d 808 (Wis., 1980).
[78] Id.

Contamination/remediation evidence also involves speculation especially considered how it was handled in this case.

USPAP Advisory Opinion 9 (AO-9) describes the proper methodology for valuing contaminated properties.[79] According to that methodology an appraiser must first determine the clean, uncontaminated value of the property in question and then deduct for three components of contamination. Those components are Cost Effects (remediation and related costs), Use Effects (effects on site usability) and Risk Effects (environmental risk/stigma). [80]

At trial, the DOT's appraiser Scott MacWilliams acknowledged that he did not use the impaired value analysis methodology prescribed in USPAP Advisory Opinion 9 (AO-9) or by the Appraisal Institute. By his own admission, the total universe of evidence that he utilized for his contamination discount was the Reed Street sale and the Wade estimate (dated June 2006).[81] He further acknowledged that, if the Wade estimate was not reliable, he could not give an impaired value opinion on the Reed St. sale alone.[82]

The evidence at trial not only implied, but proved, that the Wade estimate was unreliable and speculative. First, it included $500,000 of costs

[79] See APP-23, Offer of Proof at page 3 of the May 6, 2008 Messner report that is attached to his affidavit.
[80] Id.
[81] See Record at 169, August 29, 2008 Transcript at pp. 191-2, 200-1.

for a cap that is not now required and may never be required.[83] Second, the total universe of information that Wade testified was the basis for his estimate is the very same information about which the DNR concluded that "based upon the data available ***it is not possible to determine what type of remediation would be required***".[84] Despite this DNR finding, the DOT and MacWilliams had no problem speculating $645,000 in remediation work was required.[85] Consequently, not only did MacWilliams ignore accepted methodology, he used estimates that were 1) undisputedly proven wrong (the $500,000 cap) and 2) unable to be generated according to the DNR. This creates speculation at its worst and should not be rewarded. According to Arents and Hoekstra, the MacWilliams report, or at least the Site Condition Adjustment, should have been excluded from evidence.

In addition, concerning the June 7, 2004 DNR letter which states that "based upon the data available it is not possible to determine what type of remediation would be required"[86] (despite this the DOT and MacWilliams went right ahead and determined $645,000 in remediation work was required), the DOT has previously argued that Ryan waived this as a ground for objection because it was not raised in the motion in limine. This

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[82] Id.
[83] See Record at 168, August 28, 2008 Transcript at p.113, l. 13-25, p. 114, p. 115, l. 1-2.
[84] See Record at 149, at Trial Exhibit 114, June 7, 2004 DNR letter.
[85] MacWilliams even included this in his report at p.12.
[86] See Record at 149, at Trial Exhibit 114, June 7, 2004 DNR letter.

argument misses the point. This DOT argument ignores that admissions made at trial by MacWilliams is what lead to further grounds for objecting to MacWilliams testimony as speculative concerning the June 7, 2004 DNR letter. At trial, MacWilliams admitted that the total universe of evidence that he utilized for his contamination discount was the Reed Street sale and the Wade estimate (dated June 2006).[87] He further acknowledged that, if the Wade estimate was not reliable, he could not give an impaired value opinion on the Reed St. sale alone.[88] These admissions which trigger the impact the June 7, 2004 DNR letter did not materialize until the trial testimony could not have been made in pretrial motions in limine but were promptly made in the post verdict motions.

The DOT argued and the trial court (and Court of Appeals) agreed that the above evidence only goes to credibility, not admissibility. Given the above, Ryan respectfully disagrees under Arents and Hoekstra. Moreover, this Court must remember that even though Ryan's counsel was able to secure the above admissions concerning the Site Condition Adjustment, the Court did not allow Ryan to present its own witnesses concerning contamination and remediation. Furthermore, forcing a property owner to try a case with both hands tied his back while allowing the DOT to speculate on the after value is hardly liberally construing

[87] See Record at 169, August 29, 2008 Transcript at pp. 191-2, 200-1.

eminent domain remedies to the benefit of the property owner.

III. THE EXCLUSION OF WITNESSES MESSNER AND MICHAELCHUCK WAS REVERSABLE ERROR.

In the sequential appraisal exchange in this case, the issue of contamination and its effects on the market value of the subject property was presented for the first time in the appraisal disclosed by the DOT. This occurred three months after Ryan disclosed the Nicholson appraisal.[89]

Ryan retained an environmental expert Joe Michaelchuck ("Michaelchuck") and an appraiser experienced with contaminated properties Jason Messner ("Messner")[90] to provide rebuttal testimony on this issue. The key points of Messner's testimony would be:

- According to an Advisory Opinion 9 of USPAP, an appraiser must first determine the clean, uncontaminated value of the property in question and then deduct for three components of contamination which are Cost Effects (remediation and related costs), Use Effects (effects on site usability) and Risk Effects (environmental risk/stigma)[91] (The DOT's appraisal expert did not do this)
- The opinions of the DOT's appraiser opinions are entirely speculative and not supported by any reliable or credible foundation.[92]
- Appellants actual clean up cost liability for the

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[88] Id.

[89] See Record at 11 (Plaintiff's Witness List) and 14 (Defendant's Witness List).

[90] Messner is an MAI designated appraiser who has extensive experience valuing contaminated properties. His expertise in this area has been sought in 23 states plus the District of Columbia. In Wisconsin alone he has been retained 26 times prior to this case to provide his expertise relative to contaminated properties. See Messner Affidavit at ¶ 4 (his CV is attached to the end of his report at APP-47&48).

[91] Id., APP-23, Offer of Proof at page 3 of the May 6, 2008 Messner report that is attached to his affidavit.

[92] Id., APP-26, Offer of Proof at page 6 of the May 6, 2008 Messner report that is attached to his affidavit.

contamination identified by RMT on the subject property would not exceed $10,000 (as opposed to the $645,000 offered by the DOT's appraiser).[93]

The key points from Michaelchuck are:

- Total remediation costs would be below the PECFA limit for cleanup grants.[94]
- If the DOT project had not intervened, Appellants would have qualified for PECFA grant funds.[95]
- The total cleanup costs would be less than estimated by the DOT, because PECFA requires a bid process while the DOT did not. [96]
- Misidentification of the most significant source of contamination by the DOT consultant at the "hot spot" caused cleanup costs to be extraordinarily high[97].
- The cost of a $500,000 impermeable barrier or "cap" would not be required by the DNR.[98]

The DOT appraiser used a $645,000 environmental cost deduction in his just compensation analysis. By excluding the testimony of Messner and Michaelchuck, the trial court prevented Ryan from explaining that this $645,000 in costs the DOT deducted off of the just compensation were speculative or should have been no more than $10,000 (the PECFA deductible).

Ryan appreciates the facts that these two witnesses were not disclosed until *fourteen* weeks before trial[99] and that the trial court can

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[93] Id., APP-25, Offer of Proof at page 5, #8, of the May 6, 2008 Messner report that is attached to his affidavit. This opinion incorporates expert testimony from Michaelchuck.
[94] See APP-54, Offer of Proof at Michaelchuck Report at #7 & #8 of the report.
[95] See APP-54, Offer of Proof at Michaelchuck Report at #5 of the report; see also APP-13, Offer of Proof at p.3 (last item at the bottom of the page as to what Michaelchuck would testify at trial)..
[96] See APP-14, Offer of Proof at p.4 (starting at line 4 from the top of the page as to what Michaelchuck would testify at trial).
[97] See APP-14 to APP-165, Offer of Proof at pp.4-6.
[98] See APP-52 to APP-54, Offer of Proof at Michaelchuck Report at #2, #3, & #4 of the report; see also APP-16, Offer of Proof at p.6 (last item at the bottom of the page as to what Michaelchuck would testify at trial).
[99] The witnesses were disclosed on May 15, 2008 and the trial commenced August 28, 2008.

police its own orders. However, as shown below, this sanction was far too harsh especially when the issue at trial concerned the amount of just compensation for the taking of property.

A. The trial court excluded Messner and Michaelchuck without applying the unfair prejudice/probative value test

A trial court may exclude relevant evidence if the danger of the unfair prejudice or surprise outweighs the probative value of the evidence. Wis. Stat. 904.03; Magyar v. Wisconsin Health Care Liability Ins. Plan, 211 Wis.2d 296, 564 N.W.2d 766 (Wis.1997); Fredrickson v. Louisville Ladder Co., 52 Wis.2d 776, 191 N.W.2d 193 (1979). In Fredrickson, the Court made the unfair prejudice/probative value comparison and allowed the witness to testify where the trial was interrupted to allow the opposing party to conduct a deposition. Significantly, the Court added that, "***Forbidding a party to call a witness is a drastic measure in a trial, where truth is sought.*** *Perhaps the hardship to appellants would have been entirely alleviated if they had been given additional time to prepare for the testimony*". Fredrickson, 191 N.W.2d at 196. In Magyar, the Wisconsin Supreme Court affirmed the use of the Frederickson unfair prejudice/probative value test and held that, since the trial court found that the testimony had probative value and the opposing party would suffer little prejudice, the trial court erroneously excluded the evidence. Id., 564 N.W.2d at 771.

Neither the trial court nor the Court of Appeals considered the unfair prejudice/probative value test. Instead, the trial court analyzed whether "good cause" existed to allow Michaelchuck and Messner to testify at

trial.[100] In determining whether good cause existed, the trial court weighed its previous August 7, 2007 scheduling order and the prejudices to the parties.[101] A review of the transcript shows that the probative value of the Michaelchuck and Messner testimony was never analyzed.[102] *This fact alone mandates a reversal.* See State v. Hutnik, 39 Wis.2d 754, 763, 159 N.W.2d 733 (1968) ("If a judge bases the exercise of his discretion upon an error of law, his conduct is beyond the limits of discretion."), quoted in Kenosha Hosp. & Med. Ctr. v. Garcia, 2004 WI 105, ¶ 15, 274 Wis.2d 338, 683 N.W.2d 425.

If the trial court had properly applied the Magyar/Fredrickson test, there is no doubt both Michaelchuck and Messner would be allowed to testify at trial. From a probative value perspective, there testimony is absolutely essential to Ryan's case. Without it, Ryan has basically been denied the right to present a case to the jury. This is evident from the jury's verdict which adopted the DOT position where even the trial judge acknowledged that Ryan's attorney did "a nice job" trying to elicit the necessary contamination/remediation evidence from the opposing side's expert witnesses.

By contrast, the prejudice to the DOT was paltry, if at all. The only prejudice claimed by the DOT was that it "had no opportunity to depose these individuals and it is too late at this point to fully prepare and respond

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[100] See Record at 161, June 4, 2008 transcript at p. 59, l. 24 & 25, p. 60, l. 1-3 (see also APP-84 & 85).

[101] Id., at p. 63, l. 5-25, p. 64, and p. 65, l. 1 (see also APP-88 & 89). The trial court also mentioned that Appellants had not moved to amend the scheduling order but later stated that the court would have denied such a motion Id., at p. 71, l. 25, p. 72, l. 1-20 (see also APP-96).

[102] See Record at 161.

to these witnesses...".[103] At that time there was still six weeks left for discovery to occur and a total of 11 weeks before the trial was to begin. Under Fredrickson, where it was **not** prejudicial to require a party to interrupt a trial to conduct a deposition, it certainly is not prejudicial to impose the same requirement where six weeks of discovery remain with an additional five weeks before the trial even starts.

This Court stated that, "when a circuit court applies the proper legal standard to the relevant facts and arrives at an unreasonable conclusion, it goes beyond the limits of discretion." Magyar, 564 N.W.2d at 771. Thus, even if it is determined from the record before the Court that the trial court did apply the proper unfair prejudice/probative value test, under the facts of this case, especially when compared to the facts in Fredrickson, the trial court reached a totally unreasonable conclusion. Therefore, the trial court went beyond the limits of its discretion and its ruling should be reversed allowing Michaelchuck and Messner to testify at a new trial in this case.

Ironically, at a later hearing in this case, the DOT requested an extension of time to conduct other discovery. That request was granted by the trial court along with a continuance of the start of trial (giving the DOT what would have been over three months to conduct discovery on Michaelchuck and Messner). This inconsistency by the trial court only reinforces the improper exercise of discretion which it exercised with regards to his decision to exclude Ryan's witnesses at trial.

B. Disclosure of two rebuttal witnesses did not violate the scheduling order, and even if it did, denying Appellants their ability to call the witnesses was not an appropriate sanction.

[103] See Record at 46, DOT's motion to exclude at p.5, ¶ 9.

First and foremost, it is important to note that the scheduling order is silent as to rebuttal witnesses. Moreover, in originally identifying its witnesses to Defendant, Ryan through his former attorney Marcuvitz, specifically stated "Plaintiff reserves the right to call any witnesses named by defendant ***and to name witnesses to be called in rebuttal***...".[104] Clearly, Messner and Michaelchuck rebut DOT testimony and are permissible rebuttal witnesses. In spite of this, the trial court agreed with the DOT argument that Appellants could not call Messner and Michaelchuck as rebuttal witnesses.

Appellants concede that exclusion of a witness is, under the appropriate circumstances, a means of sanctioning a party for its failure to comply with a scheduling order. See Schneller v. St. Mary's Hosp. Medical Center, 162 Wis.2d 296, 470 N.W.2d 873 (Wis.,1991). However, as this Court cautioned, "***exclusion of a witness is an extreme sanction for egregious noncompliance that lacks a clear and justifiable excuse***". Id., at 311, 470 N.W.2d 873 (emphasis added), cited favorably by Magyar v. Wisconsin Health Care Liability Ins. Plan, 211 Wis.2d 296, 564 N.W.2d 766 (Wis.1997).

It is clear in the transcript of the hearing granting the DOT's motion to exclude Michaelchuck and Messner, that the trial court made no finding that Ryan's conduct was an egregious noncompliance that lacks a clear and justifiable excuse.[105] This fact alone mandates a reversal.

Moreover, there is no noncompliance for two reasons. First, the scheduling order had no deadline for disclosing rebuttal witnesses. The

[104] See Record at 11, Plaintiff's witness disclosure.
[105] See Record at 161, Transcript from the June 4, 2008 hearing.

argument that the scheduling orders did not distinguish between case in chief witnesses and rebuttal witnesses has no merit because it would be impossible to disclose all your rebuttal witnesses before you know the opposing side's case. Second, as stated above, in originally identifying its witnesses to the DOT, Ryan specifically stated "Plaintiff reserves the right to call any witnesses named by defendant *and to name witnesses to be called in rebuttal...*".[106] Clearly, the disclosure of Messner and Michaelchuck on May 15 complied with the previous scheduling order (especially since there was plenty of time to depose the two witnesses) and could not be an egregious noncompliance that lacks a clear and justifiable excuse.

In its order excluding Messner and Michaelchuck, the trial court based its reasoning upon Ryan's failure to formulate the contamination issue at an earlier time in these proceedings. While the failure to formulate an issue earlier in litigation may be a shortcoming from a trial preparation or litigation practice perspective, that reasoning is not a basis for the sanction of excluding evidence. As the affidavits of Biersdorf[107] and Ryan[108] show, the failure to formulate this issue earlier was due to the actions (or inactions) of Marcuvitz, the former counsel representing Ryan; not Ryan.

Improper attorney conduct and its impact on a party has been previously addressed by the Court of Appeals. This Court has stated that "under the statutes providing for the relief of a party and the consequences of mistake, and burdens, surprise, or excusable neglect... a party may

[106] See Record at 11, Plaintiff's witness disclosure.
[107] See App-1, Biersdorf Affidavit.
[108] See App-6, Ryan Affidavit.

properly be held excusable for the negligence of his attorney, and be relieved from such negligence on proper terms." Village of Big Bend v. Anderson, 103 Wis. 2d 403, 408, 308 N.W.2d 887, 890 (Wis.App.1981) citing Paschong v. Hollenbeck, 13 Wis.2d 415, 423, 108 N.W.2d 668, 673 (1961). While this Court went on to note that the decision is discretionary with the trial court, that decision "should be guided by the interests of justice."

Wis.Stat. §806.07[109] is the statute which addresses excusable neglect. Under that statute a new trial may be granted up to one year after the excusable neglect is called to the court's attention. If the failure to develop the contamination issue earlier is actionable error, the conduct of Marcuvitz constituted excusable neglect. Ryan presented the excusable neglect argument to the trial court, so it was aware of it in relation to Marcuvitz' conduct. This is evident by the court's reference to Marcuvitz when its discussed scheduling order failures. In its ruling the trial court effectively denied Ryan's relief for excusable neglect nearly three months before the trial, while § 806.07 allows relief up to 12 months after trial. This relationship reinforces the egregiousness of the abuse of discretion in this case.

The DOT has previously argued that Ryan never technically moved to amend the scheduling order to include Michaelchuck and Messner.

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[109] Wis. Stat. 806.07 states:

Relief from judgment or order
(1) On motion and upon such terms as are just, the court, subject to subs. (2) and (3), may relieve a party or legal representative from a judgment, order or stipulation for the following reasons:

(a) Mistake, inadvertence, surprise, or excusable neglect...

However the trial court was clear that it would have denied such a motion.[110] Moreover, the scheduling order was silent on rebuttal witnesses.

In this particular case, with all the previously identified mitigating factors in existence, the reasoning for the trial court's decision is not in the interests of justice. The *de facto* exclusion of Ryan's appraisal report (i.e. testimony as to the impaired value) at trial is a harsh remedy not justified by the facts in the case-particularly where the fault rests squarely at the feet of Ryan's former counsel. The proper remedy would be to modify the scheduling order, if that is needed, in order to adequately allow the parties to complete their preparation for trial. This would allow the DOT adequate opportunity to conduct whatever discovery is necessary on this issue.

IV. IF A NEW TRIAL IS GRANTED REMAND SHOULD GIVE GUIDANCE FOR JURY INSTRUCTIONS.

Appellants are entitled to a new trial based on the jury instructions given to the jury over Appellants' objections. The trial court refused to instruct the jury on the proposed Impaired and Unimpaired Value and Remediation Costs instructions offered by Appellants. Appellants' instructions were not only tailored to the evidence at trial, but they were consistent with the impaired value analysis methodology prescribed in USPAP Advisory Opinion 9 (AO-9) and by the Appraisal Institute, two independent third party appraisal authorities. Failure to use these instructions is grounds for a new trial. Furthermore, if

[110] See Record at 156, p. 71, l. 25, p. 72, l. 1-2.

contamination/remediation evidence is allowed at a new trial, jury instructions consistent with USPAP Advisory Opinion 9 (AO-9) and by the Appraisal Institute, as offered by Appellants, must be used. The trial court gave no guidance and its refusal to accept Appellants' instructions left the jury with instructions that were insufficient for a complicated trial such as in this case, consequently a new trial is required with a remand concerning instructions for contamination/remediation evidence if such evidence is allowed at a new trial.[111] Nowatske v. Osterloh, 198 Wis.2d 419, 543 N.W.2d 265 (1996). *abrogated on other grounds by* Nommensen v. American Continental Ins. Co., 2001 WI 112, 246 Wis.2d 132, 629 N.W.2d 301.

In this case, it is clear from the jury's 100% adoption of the DOT's case in chief that Ryan's rights have been affected by the lack of instructions for the jury's deliberation and therefore Ryan is entitled to a new trial. Nommensen, 246 Wis.2d 132, 629 N.W.2d 301.

CONCLUSION

The trial court's admission of contamination and or remediation evidence is grounds alone for reversal. Allowing a property owner's just compensation to be reduced by contamination and or remediation evidence is in direct conflict with public policy as well as this Court's mandate to

[111] See Muscoda Bridge Co. v. Grant County, 200 Wis. 185, 227 N.W. 863 (Wis. 1929).

liberally construe eminent domain remedies in favor of the property owner. Allowing contamination and or remediation evidence is fundamentally unfair in condemnation proceedings in general and even more so in this case where: most of the remediation numbers were speculative estimates, not actual costs; and, no credit was recognized for public funding Appellants could receive for contamination remediation.

If this Court finds that contamination and remediation evidence is not admissible at trial and that the property taken must be valued by its unimpaired value, the only unimpaired value on the record is that of Nicholson ($3,497,000) which this Court could find as a matter of law to be the just compensation in this case.

Under an Anda approach where estimations of or the actual cost of remediation are not admissible and the property taken should be valued "as remediated" rather than as contaminated or as clean, this case would need to be remanded for a new trial consistent with the Anda standard.

Even if this Court finds that contamination and or remediation evidence is admissible at trial, this case must still be reversed on several grounds.

Since the trial court did not balance the probative value of Messner and Michaelchuck's testimony (despite being offered reports and affidavits

by both[112] and later an offer of proof at trial[113]) against the prejudice to the DOT as mandated in Frederickson and Magyar, his conduct was beyond the limits of discretion and the matter must be reversed.

Even if the trial court balanced the probative value of Messner and Michaelchuck's testimony against the prejudice to the DOT as mandated in Frederickson and Magyar, given the undisputed facts before the trial court, it would have been an abuse of discretion to exclude the two witnesses.

Moreover, since the trial court made no finding that Ryan's conduct was an egregious noncompliance that lacked a clear and justifiable excuse, the court's conduct in sanctioning Ryan by excluding Messner and Michaelchuck as witnesses was beyond the limits of discretion and the matter must be reversed when Ryan's conduct is considered, the undisputed facts on the record establish that egregious noncompliance simply doesn't exist. If there is a question that Ryan's conduct is egregious noncompliance, the conduct was that Ryan's attorney which is justifiable excusable neglect. Given these facts, and the additional fact that there were six weeks of discovery remaining and that the trial did not commence until more than three months after the disclosure of the two witnesses, it would

[112] See Record at 43 & 57, Affidavits of Jason Messner; see also Michaelchuck Report attached to the Messner Affidavit and Record at 49, May 28, 2008 Biersdorf Affidavit at Exhibit B, Michaelchuck affidavit.
[113] See APP-11, Offer of Proof.

have been an abuse of discretion to sanction Ryan by excluding Messner and Michaelchuck's testimony at trial.

Finally, if contamination/remediation evidence is allowed at a new trial, not only should Messner and Michaelchuck be allowed to testify, but jury instructions consistent with USPAP Advisory Opinion 9 (AO-9), as offered by Ryan, must be used to allow the jury to make informed deliberations.

Dated: April 14, 2011

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FORM AND LENGTH CERTIFICATION

I certify that this brief conforms to the rules contained in Wis. Stat. §(Rule) 809.19(8)(b) and (c) for a brief produced using the following font: Times New Roman, 13 point. The word count for the brief is 9,362 words.

Dated: April 14, 2011

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AFFIDAVIT OF SERVICE

STATE OF MINNESOTA)
)
COUNTY OF HENNEPIN)

E. Kelly Keady being duly sworn and on oath, does certify:

1. That on the 14th day of April, 2011, I caused to be mailed by United States mail three true and complete copies of Plaintiffs-Appellants-Petitioners' Brief, and on the 14th day of April, 2011, I caused to be mailed by United States mail three true and complete copies of and Plaintiffs-Appellants-Petitioners' Appendix to Respondent's counsel at the following addresses:

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FURTHER AFFIANT SAYETH NOT.

E. Kelly Keady

Subscribed to and sworn before me
this 14th day of April 2011.
Christine Lindahl
Notary Public

CHRISTINE LINDAHL
Notary Public
Minnesota
My Commission Expires January 31, 2015

CERTIFICATE OF COMPLIANCE WITH RULE 809.19 (12) & (13)

I hereby certify that:

I have submitted an electronic copy of this Plaintiffs-Appellants-Petitioners' Brief and Appendix which complies with the requirements of s. 809.19 (12) & (13)

I further certify that: this electronic Plaintiffs-Appellants-Petitioners' Brief and Appendix is identical in content and format to the printed form of the Plaintiffs-Appellants-Petitioners' Brief and Appendix filed as of this date.

A copy of this certificate has been served with the paper copies of this Plaintiffs-Appellants-Petitioners' Brief and Appendix filed with the court and served on all opposing parties.

Dated: April 14, 2011

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