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In The  
**Supreme Court of Virginia**

RECORD NO. 140929

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

*Appellants,*

v.

**COMMISSIONER OF HIGHWAYS,**

*Appellee.*

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**REPLY BRIEF OF APPELLANTS**

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A review of the Commissioner's brief gives the reader an inaccurate view of what this case is about. That's because the Commissioner systematically sets up and then knocks down, like so many straw men, a series of arguments that the landowner has never made. This appeal is much simpler.

This case is about the pre-condemnation statement of value that the Commissioner is required to give to property owners in order to take their property by eminent domain. In 2004, the General Assembly made the pre-condemnation statement an enforceable right and requirement when it copied this provision from Code §25.1-417 into §25.1-204. The Commissioner must provide the owner with this statement as a prerequisite for the court to have jurisdiction to grant the exercise of the power of eminent domain.

In this case, the Commissioner made his prerequisite statement of value to the landowners, telling them that their property was worth \$500,000 and that just compensation was \$246,292. He then asked the trial court to hide this statement of value, so the jury would not learn that he had

certified that the property was worth \$500,000. At no point did he deny making this statement, which was made in order to establish the jurisdiction of the court.

At trial, the Commissioner told a very different tale, asserting that the whole was worth just \$250,000 and just compensation was \$92,127.

As the U. S. Court of Appeals for the Fifth Circuit noted, the Commissioner "is not completely free to play fast and loose with landowners telling them one thing in the office and something else in the courtroom." *United States v. 320.0 Acres of Land*, 605 F.2d 762, 825 (5th Cir. 1979). While the Commissioner notes that the court in *320.0 Acres* was interpreting a federal statute, he fails to state that the federal statute is nearly identical to Code §§ 25.1-417 and 25.1-204, which were adopted from the federal law.

The Commissioner's statement is required by statute and was made to establish jurisdiction over the very taking of the property. The jury was charged with doing justice to the parties; prohibiting it from hearing the undisputed

prerequisite statement of value is contrary to longstanding law governing admissions, and is fundamentally unfair to this owner. It is a practice calculated to pressure owners into submission rather than exercising their due-process right to have a jury determine just compensation.

**1. The landowner sought to introduce the precondemnation statement – not the offer, and not the certificate.**

Throughout his brief, the Commissioner wrongly conflates the statutorily required precondemnation statement with two separate things: an offer to purchase and a certificate of take. Most of his argument is directed to the inadmissibility of the latter two.

No one disputes that the offer and the certificate are inadmissible. The parties endorsed a consent order providing that neither party would “introduce evidence of or mention to the jury the Certificate of Take value [or] the deposit of money into Court . . .” A. 23. This stipulation mirrors the statutory provision that neither party may mention at trial “any amount deposited with the court or represented by a

certificate . . .” Code §33.2-1023(H) (provisions of former Code §33.1-124(H)).

There is no parallel provision barring introduction of the precondemnation statement. If the legislature had intended such a prohibition, it could have included the statement in the list of inadmissible items.

At page 4 of his brief, the Commissioner makes a demonstrably false statement of material fact. He asserts that during the trial, the landowner “made several attempts to introduce evidence of the amount deposited with the Clerk and the value represented on the Certificate of Take.” The Court will note there is no citation to the appendix, or even the record, for this accusation of attorney misconduct.<sup>1</sup>

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<sup>1</sup> The Commissioner offers an *ad hominem* attack on the landowner and trial counsel, asserting in a footnote on page 6 that they “made numerous television appearances and were quoted in newspaper articles which contained false and misleading statements intended to invoke mistrust and prejudice against VDOT.” No citations were given to support this allegation of falsity. Rather than dignify this unsubstantiated attack, the landowners note that this Court is not the proper forum for an alleged grievance such as this, and this attack does not relate to an assignment of error and there is no cross-error.

The landowner never tried to introduce the certificate of take, or to adduce evidence of the Commissioner's offer, expressly disavowing any intention to do so. *See, e.g., A. 74-75, 80.* The landowner wished to tell the jury that the Commissioner had certified, before beginning the negotiation process, that the property was worth \$500,000, and just compensation was \$246,292.

The Commissioner's statement is a different document from his later offer; the Code mandates that the statement be prepared "Before making an offer . . . ." Code §25.1-204(E)(1). All of the Commissioner's arguments – and all of his caselaw – relating to inadmissibility of settlement offers are immaterial to this appeal because of that difference.

**2. The precondemnation statement is not "evidence of" the subsequent offer or certificate of take.**

In an effort to expand §33.2-1023(H) beyond its plain terms, the Commissioner next contends that his pre-condemnation statement is "evidence of" the amount of the certificate. Brief of appellee at 4, 12-15. Thus, even though

the certificate and the statement are different documents, the Commissioner believes that the statement may be excluded if it serves as the foundation for the certificate.

The amount deposited by the Commissioner is a matter of his discretion; he may decide to deposit funds greater than the amount of the statement if he so chooses. It is thus incorrect to state that the statement and a subsequent certificate will reflect the same number.

But this argument fails at an analytically earlier stage. Let us suppose that the Commissioner's view were right, and that reference to the property's appraised value, contained in the precondemnation statement, were inadmissible because it is "evidence of" the amount of the certificate.

Under this view, in any condemnation proceeding in which the condemnor's expert appraiser did *not* change his opinion before trial, he would be powerless to testify, since the statute bars "any party to such proceeding" from introducing "evidence of any amount deposited . . . or represented by a certificate." §33.2-1023(H). If the

Commissioner's original expert, Thomas Moore Savage, had been the condemnor's valuation expert at trial, this interpretation would have barred him from testifying at all, merely because his valuation opinion was the same amount as – and was thus “evidence of” – the certificate of take.

The legislature plainly did not intend such an absurd result. The proper interpretation is the one advanced by the landowner: The parties may not prove that the condemnor's purchase offer was \$X or that the certificate of take was \$Y; but the fact that the Commissioner certified a specific value before initiating negotiations *is* admissible.

### **3. The precondemnation statement is the Commissioner's.**

The heading to this section no doubt seems self-evident. But the Commissioner has attempted to distance himself from Savage, describing him as “a VDOT employee,” brief of appellee at 3, who “had retired from VDOT,” *id.* at 5, and urging that Lawrence J. Colorito's subsequent appraisal was superior. *Id.* at 5-6.

The statutes do not allow the Commissioner to abandon Savage in this way. The precondemnation statement is made by “the state agency.” Code §25.1-204(E)(1). While Savage was the author, the “speaker” is VDOT, and that agency – and its chief executive, the Commissioner – are bound by it.

The record here is stronger still on this point. After Savage completed the statement, he submitted it to another of VDOT’s certified general real estate appraisers, R. Wayne Williams, who reviewed it and certified his agreement with Savage’s “opinions, analyses and conclusions . . .” A. 92.

This, then, is the *Commissioner’s* statement of value, not merely Savage’s. The dates on the statement – August 31, 2009 for Savage and October 23, 2009 for Williams – predate the Commissioner’s first offer to the landowners. This statement is outside the negotiation process, because by law, it was made before that process began.

In a related matter, the Commissioner cites *Nichols on Eminent Domain* for the premise that a condemnor should

not be prejudiced where its appraiser commits an error. Brief of appellee at 21-22. But there is no evidence in the record to indicate that Savage and Williams made an error. The Commissioner found another appraiser who was willing to report a sharply lower value. This does not erase the Commissioner's certified-and-confirmed statement, made before negotiation began, that the landowners' property was worth \$500,000. That statement was admissible under Virginia law. Colorito was free to explain away at trial the differences between the statement and his later opinion; but no provision of law permitted the trial court to shield the statement from the jurors' eyes.

**4. The landowner seeks admissibility of evidence, not a floor for compensation.**

In several places in his brief, the Commissioner contends that it would be improper to allow evidence of the precondemnation statement because doing so would establish "a floor with regard to valuation of the property." Brief of appellee at 2. He renews this argument at page 19,

adding that admitting the precondemnation statement would “not allow any correction of errors later discovered . . . .”

This argument wholly miscasts the landowner’s argument. The statement is merely a piece of evidence. The Commissioner is free to explain away any errors – a circumstance not present here – or offer contrary testimony. The jury is then charged to decide which expert to credit, and to decide what level of compensation is just.

The Commissioner does offer one brief passage from an appellate opinion, presumably to establish a psychological “floor.” At page 21, he cites *WMATA v. One Parcel of Land*, 548 F.2d 1130 (4th Cir. 1977). A panel of that court theorized that allowing evidence of an offer to purchase would inspire juries to always award “at least that much.”

Here again, the Commissioner wrongly conflates the precondemnation statement with an offer to purchase. Regardless of the accuracy of the Fourth Circuit panel’s speculation as to how jurors would respond, the *WMATA*

case relates to an issue that is immaterial to this appeal.

Here is the court's precise holding in that case:

We hold that a landowner who rejects a pre-condemnation offer made pursuant to §301 of the Act may not introduce that offer as proof of value when the government condemns the property.

548 F.2d at 1131. The landowner here did not, in fact, attempt to introduce the Commissioner's offer, but a wholly different document, one not addressed by the *WMATA* court.

**5. The Commissioner no longer opposes admission of the \$500,000 figure.**

Throughout his brief, the Commissioner addresses only one of the two relevant components of the Savage appraisal – the certification of \$246,292 as just compensation. At trial, the landowner was also barred from adducing evidence of the Commissioner's statement that the entirety of the property was worth \$500,000. See A. 85-86, where the landowner proffered this testimony; see also Defendants' Exhibit 3, at pages 28 and 52.

The Commissioner's argument focuses only on the reasons why he believes that the just-compensation

component of the statement was inadmissible. He makes no argument in this Court why the jury should not have been told about the Commissioner's belief that the whole property was worth \$500,000. If he wished to oppose reversal on this ground, he had an obligation to present argument and authorities in his brief; he may not wait until oral argument to do so. Rule 5:28(d).

Accordingly, the landowner's contention that the \$500,000 figure was admissible is now unopposed, and the Court should summarily reverse on that issue.

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## CERTIFICATE

I hereby certify that on this 5th day of January, 2015, pursuant to Rules 5:26(h), fifteen paper copies of the foregoing Reply Brief of Appellants, along with one electronic copy on CD-Rom, have been hand-filed with the Clerk of the Supreme Court of Virginia. Three paper copies of the Brief, along with one copy on CD-Rom, have been served, via UPS Ground Transportation, upon:

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