

---

In The  
**Supreme Court of Virginia**

RECORD NO. \_\_\_\_\_

**JAMES M. RAMSEY, JR. and JANET D. RAMSEY,**  
*Petitioners – Appellants,*

v.

**COMMISSIONER OF HIGHWAYS,**  
*Respondent – Appellee.*

**PETITION FOR APPEAL**

**L. Steven Emmert (VSB No. 22334)**  
**SYKES, BOURDON, AHERN & LEVY, P.C.**  
**281 Independence Boulevard, 5th Floor**  
**Virginia Beach, Virginia 23462**  
**(757) 499-8971 (Telephone)**  
**(757) 456-5445 (Facsimile)**  
**emmert@virginia-appeals.com**

**Jeremy P. Hopkins (VSB No. 48394)**  
**Brian G. Kunze (VSB No. 76948)**  
**WALDO & LYLE, P.C.**  
**301 West Freemason Street**  
**Norfolk, Virginia 23510**  
**(757) 622-5812 (Telephone)**  
**(757) 622-5815 (Facsimile)**  
**jph@waldoandlyle.com**  
**bgk@waldoandlyle.com**

*Counsel for Petitioners – Appellants*

*Counsel for Petitioners – Appellants*

## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES .....	ii
STATEMENT OF THE CASE.....	1
ASSIGNMENTS OF ERROR.....	2
FACTS.....	2
ARGUMENT .....	5
Standard of Review .....	5
Discussion .....	5
1. The statutory pre-offer statement is admissible in just-compensation trials .....	5
2. The trial court erroneously curtailed cross- examination of the Commissioner's expert .....	9
A. Cross-examination is a fundamental right .....	9
B. The excluded cross-examination was relevant and material to the proceedings ....	9
C. The Code, the Rules of Court, and caselaw permit the prohibited cross- examination.....	10
D. The prohibition of cross-examination was error.....	11
CONCLUSION .....	11
CERTIFICATE .....	13

## TABLE OF AUTHORITIES

### Page(s)

#### CASES

<i>Arkansas State Hwy. Comm’n v. Johnson</i> , 300 Ark. 454, 780 S.W.2d 326 (1989) .....	7
<i>Basham v. Terry</i> , 199 Va. 817 (1958) .....	9
<i>Cook v. New York</i> , 105 Misc.2d 1040, 430 N.Y.S.2d 507 (1980) .....	8
<i>Dept. of Transportation v. Frankenlust Lutheran Congreg.</i> , 269 Mich. App. 570, 711 N.W.2d 453 (2006) .....	7-8
<i>Exxon Mobil Corp. v. Minton</i> , 285 Va. 115 (2013) .....	5
<i>Food Lion, Inc. v. Cox</i> , 257 Va. 449 (1999) .....	5, 9
<i>McMunn v. Tatum</i> , 237 Va. 558 (1989) .....	10
<i>Thomas v. Alabama</i> , 410 So.2d 3 (1981) .....	7
<i>Tyree v. Lariew</i> , 208 Va. 382 (1967) .....	7
<i>United States v. 320.0 Acres of Land</i> , 605 F.2d 762 (5 <sup>th</sup> Cir. 1979) .....	6, 7, 8

## **STATUTES**

Va. Code §8.01-401.1 .....	10
Va. Code §25.1-204 .....	5
Va. Code §25.1-204(E)(1).....	2
Va. Code §25.1-230 .....	9

## **RULES**

Va. Sup. Ct. R. 2:705(a) .....	10
Va. Sup. Ct. R. 2:803(0) .....	7

## **OTHER AUTHORITIES**

2005 Va. Acts. Ch. 878.....	5
C.E. Friend and K. Sinclair, <i>The Law of Evidence in Virginia</i> §13-8[f] (7 <sup>th</sup> ed. 2013) ....	11
<i>Nichols on Eminent Domain</i> , §18.12[2] (2013) .....	8

## **STATEMENT OF THE CASE**

This is an appeal of a final judgment of the Virginia Beach Circuit Court in an eminent-domain proceeding initiated by the Commissioner of Highways. The Commissioner utilized quick-take procedures to acquire a portion of property owned by James and Janet Ramsey, for use in making improvements to an Interstate highway.

During the just-compensation trial, the court prohibited the landowners from adducing evidence about the Commissioner's statutory pre-condemnation statement of the property's value. The court also barred the landowners from cross-examining the Commissioner's appraiser about the foundation for his value opinion.

A jury returned a report of just compensation in the amount of \$234,032. The court overruled the landowners' exceptions and entered final judgment on the verdict on April 21, 2014. The landowners appeal.

## **ASSIGNMENTS OF ERROR**

1. The trial court erroneously refused to admit oral and written evidence of the Commissioner's pre-offer statements of value. The statements were admissible as party admissions, and were relevant and material. [Preserved at Tr. 457-61, 473-79, 482-83, and in the landowners' exceptions, at 1-4.]

2. The trial court erroneously prohibited the landowners from cross-examining the Commissioner's appraiser on the basis for his opinions. [Preserved at Tr. 312-14, 317-20, and in the landowner's exceptions, at 4-5.]

## **FACTS**

In 2009, the Commissioner decided to take a portion of the property on which the landowners' home is located. As required by Code §25.1-204(E)(1), before making an offer to purchase the land, the Commissioner told the landowners that their property was worth \$500,000, and that just compensation for the proposed take, including damage to the residue, was \$246,292. This information was separately confirmed in a written report prepared by Thomas Moore

Savage, a certified real-estate appraiser. Respondents' Exhibit 3 (refused); Tr. 484-85.

The Commissioner subsequently offered to purchase the needed portion of the property, but was not successful. He then instituted this proceeding by filing a certificate of take and a petition in condemnation.

The trial court convened a jury trial to determine just compensation. At trial, the Commissioner used a different appraiser, Lawrence J. Colorito, Jr., to testify about the value of the property and the amount of just compensation. This second appraiser had relied in part on Savage's 2009 report in formulating his opinions. Tr. 312-13.

When the landowners sought to cross-examine Colorito on that reliance, the court sustained the Commissioner's objection and prohibited the examination. Tr. 320. The landowners proffered the foreclosed cross-examination outside the hearing of the jury. Tr. 351-55.

The second appraiser's valuation varied significantly from the Commissioner's pre-condemnation admission and

the 2009 report. Instead of an overall value of \$500,000, Colorito told the jury that the pre-condemnation property was worth only \$250,000. Tr. 220. And instead of a just-compensation figure of \$246,292, which the Commissioner had certified in 2009, Colorito opined that just compensation was only \$92,127. Tr. 241.<sup>1</sup>

The landowners offered into evidence the 2009 report and the Commissioner's oral admission, to show the jury what the Commissioner had declared to be the property's value. They noted that this statement was not an offer to purchase, since the statute mandates that it be delivered before the Commissioner makes an offer, and argued that the statement was a party admission and therefore admissible. The court sustained the Commissioner's objection and refused to admit the exhibit (Respondents'

---

<sup>1</sup> The trial court (though not the jury) learned that this practice of sharply reducing appraisal figures for landowners who do not agree to sell has become common for the Commissioner. A summary of appraisal reductions filed March 27, 2014, listed recent instances where the Commissioner has used this punitive tactic, sometimes 90% below the pre-negotiation amount.



Exhibit 3); it also forbade testimony by the landowner about the oral statement and the exhibit. Tr. 484-85.

## **ARGUMENT**

### **Standard of Review**

Assignment 1 relates to the exclusion of evidence; such rulings are reviewed for abuse of discretion. *Exxon Mobil Corp. v. Minton*, 285 Va. 115, 130 (2013). Assignment 2 implicates the fundamental and absolute right of cross-examination, and is reviewed de novo. *Food Lion, Inc. v. Cox*, 257 Va. 449, 450-51 (1999).

### **Discussion**

#### **1. The statutory pre-offer statement is admissible in just-compensation trials. (Assignment 1)**

Since the legislature amended Code §25.1-204 in 2005<sup>2</sup> to require delivery of a statement of value and just

---

<sup>2</sup> 2005 Va. Acts. Ch. 878.

compensation before negotiations begin, this Court has not addressed the admissibility of such a statement.

The trial court erroneously treated the statement as though it were the second step in the condemnation process – an offer to purchase. Tr. 480-81. But by requiring the Commissioner to deliver the statement “[b]efore making an offer,” the General Assembly mandated delivery of this information before the negotiation process begins.

While this is an issue of first impression in Virginia, the same is not true elsewhere. Other appellate courts have considered this very issue and have concluded that the pre-offer statement is admissible.

The best illustration of this principle is *United States v. 320.0 Acres of Land*, 605 F.2d 762 (5<sup>th</sup> Cir. 1979), interpreting a parallel federal requirement for a pre-condemnation statement by the condemnor. The Fifth Circuit recognized that these statements “are *not* offers,” *id.* at 825 (emphasis in original), and described them as “the amount which the Government believes the landowner is

constitutionally entitled to should negotiations fail and condemnation proceedings be initiated.” *Id.* As such, the statements “are admissible at a subsequent compensation trial as an admission, once it becomes known at trial the Government is valuing the property at a lower figure.” *Id.*<sup>3</sup>

Other courts confronting this precise issue have agreed. *Thomas v. Alabama*, 410 So.2d 3, 4 (1981) (“If the State attempts to establish a lower value, the statements [of just compensation] are admissible at a compensation trial as an admission by the State.”); *Arkansas State Hwy. Comm’n v. Johnson*, 300 Ark. 454, 462, 780 S.W.2d 326, 330 (1989) (“We agree with the conclusion that the statement of just compensation is not a negotiation or settlement figure excluded by A.R.E. 408.”); *Dept. of Transportation v. Frankenlust Lutheran Congreg.*, 269 Mich. App. 570, 584,

---

<sup>3</sup> The admissibility in evidence of party admissions is emphatically not a matter of first impression. Rule 2:803(0) expressly excludes such admissions from the operation of the hearsay rule. *See also Tyree v. Lariew*, 208 Va. 382, 385 (1967) (admissions are “evidence of a most satisfactory nature and may furnish the strongest and most convincing evidence of the truth.”).

711 N.W.2d 453, 462 (2006) (“ . . . a landowner may, if the condemning authority seeks to establish a lower valuation for the property at trial, introduce evidence of the higher, precondemnation valuation . . . .”); *Cook v. New York*, 105 Misc.2d 1040, 1045-46, 430 N.Y.S.2d 507, 510 (1980) (adopting approach and reasoning of *320.0 Acres of Land*).

Based on such holdings, the leading eminent-domain treatise concludes that landowners may introduce these statements when the condemnor seeks to reprobate at trial:

Statements made by or attributable to the condemning authority which are inconsistent with its valuation position at trial are admissible as admissions against interest.

*Nichols on Eminent Domain*, §18.12[2] (2013).

The landowner presented the trial court with these authorities. But the court erroneously viewed the statement as a settlement offer (Tr. 480-81), and excluded it from evidence.

**2. The trial court erroneously curtailed cross-examination of the Commissioner's expert.  
(Assignment 2)**

A. Cross-examination is a fundamental right.

This Court has always guarded a litigant's right to cross-examine opposing witnesses on matters relevant to the litigation. *Basham v. Terry*, 199 Va. 817, 824 (1958) (describing cross-examination of adversary's witness as "not a privilege but an absolute right."). The Court "has never qualified" this rule. *Food Lion, Inc. v. Cox*, 257 Va. at 450.

As the Court explained in *Cox*, "the adjective 'absolute' definitively excludes exceptions." *Id.* at 450-51.

B. The excluded cross-examination was relevant and material to the proceedings.

In a trial such as this one, just compensation is the only triable issue. Code §25.1-230. As is typical in such trials, the parties adduced expert testimony from real-estate appraisers, who gave opinions about compensation for the take and damage to the residue. The prohibited cross-

examination related to the basis of the Commissioner's expert's opinion on the sole triable issue.

C. The Code, the Rules of Court, and caselaw permit the prohibited cross-examination.

The legislature has addressed the subject of disclosure of the basis of an expert's opinion:

The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data .... The expert may in any event be required to disclose the underlying facts or data on cross-examination.

Code §8.01-401.1. The second sentence of this provision, which is case-dispositive on this assignment, is repeated verbatim in Rule 2:705(a).

The leading Virginia decision on the admissibility of such background information is *McMunn v. Tatum*, 237 Va. 558 (1989). There, this Court was careful to note the distinction between direct examination (where disclosure of the hearsay basis of an opinion is prohibited) and cross-examination. *Id.* at 566.

Virginia's preeminent treatise on evidence concludes that "*the opponent* should be permitted *on cross-examination* to question the witness regarding the content or language of the source *if the opponent so chooses.*" C.E. Friend and K. Sinclair, *The Law of Evidence in Virginia* §13-8[f] (7<sup>th</sup> ed. 2013) (emphasis in original).

D. The prohibition of cross-examination was error.

The landowner sought to question an opposing party's expert witness about the basis for his value opinion, on a document that the expert acknowledged that he relied upon. By statute and rule, the landowner had a right – one that this Court has described as absolute – to cross-examine the expert about that testimony.

## **CONCLUSION**

The General Assembly in 2005 created a new duty for condemnors. This step, according to the plain language of the statute, occurs *before* the negotiation process begins.

The trial court erroneously regarded it as a part of that process.

This Court should award the landowners an appeal, and thereafter reverse and remand the case for a new trial in which the landowners may adduce evidence of the precondemnation statement, and may cross-examine the condemnor's appraiser on his reliance on the 2009 report.

JAMES M. RAMSEY, JR.  
JANET D. RAMSEY

By:   
Of Counsel

L. Steven Emmert, Esq. (VSB No. 22334)  
Sykes, Bourdon, Ahern & Levy, P.C.  
281 Independence Blvd., 5<sup>th</sup> Floor  
Virginia Beach, Virginia 23462  
Telephone: (757) 499-8971  
Facsimile: (757) 456-5445  
emmert@virginia-appeals.com

Jeremy P. Hopkins, Esq. (VSB No. 48394)  
Brian G. Kunze, Esq. (VSB No. 76948)  
Waldo & Lyle, P.C.  
301 W. Freemason Street  
Norfolk, Virginia 23510  
Telephone: (757) 622-5812  
Facsimile: (757) 622-5815



## **CERTIFICATE**

Pursuant to Rule 5:17(i) of the Supreme Court of Virginia, I hereby certify the following:

1. The Appellants are:

James M. Ramsey, Jr. and Janet D. Ramsey

2. Counsel for Appellant are:

L. Steven Emmert, Esq. (VSB No. 22334)  
Sykes, Bourdon, Ahern & Levy, P.C.  
281 Independence Boulevard, 5<sup>th</sup> Floor  
Virginia Beach, Virginia 23462  
Telephone: (757) 499-8971  
Facsimile: (757) 456-5445  
emmert@virginia-appeals.com

Jeremy P. Hopkins, Esq. (VSB No. 48394)  
Brian G. Kunze, Esq. (VSB No. 76948)  
Waldo & Lyle, P.C.  
301 West Freemason Street  
Norfolk, Virginia 23510  
Telephone: (757) 622-5812  
Facsimile: (757) 622-5815  
jph@waldoandlyle.com  
bgk@waldoandlyle.com

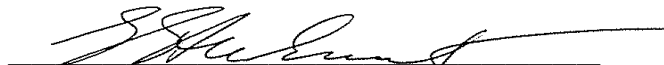
3. The Appellee is:

Commissioner of Highways

4. Counsel for the Appellee are:

David B. Oakley, Esq.  
James Webb Jones, Esq.  
Poole Mahoney PC  
860 Greenbrier Circle, Suite 401  
Chesapeake, Virginia 23320  
Telephone: (757) 552-6035  
Facsimile: (757) 962-6180  
doakley@poolemahoney.com  
jjones@poolemahoney.com

5. Seven copies of the foregoing Petition for Appeal were hand-filed with the Clerk of the Supreme Court of Virginia and one copy was hand-delivered to counsel for the Appellee this 12<sup>th</sup> day of June, 2014.
6. Counsel for the Appellants desire to state orally and in person to a panel of this court the reasons why this petition should be granted.

A handwritten signature in black ink, appearing to read "L. Steven Emmert", is written over a horizontal line.

L. Steven Emmert