

6-17-2016

# Ada County Highway Dist. v. Brook View Appellant's Brief Dckt. 43452

Follow this and additional works at: [https://digitalcommons.law.uidaho.edu/  
idaho\\_supreme\\_court\\_record\\_briefs](https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs)

---

## Recommended Citation

"Ada County Highway Dist. v. Brook View Appellant's Brief Dckt. 43452" (2016). *Idaho Supreme Court Records & Briefs, All*. 6264.  
[https://digitalcommons.law.uidaho.edu/idaho\\_supreme\\_court\\_record\\_briefs/6264](https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs/6264)

This Court Document is brought to you for free and open access by the Idaho Supreme Court Records & Briefs at Digital Commons @ UIIdaho Law. It has been accepted for inclusion in Idaho Supreme Court Records & Briefs, All by an authorized administrator of Digital Commons @ UIIdaho Law. For more information, please contact [annablaine@uidaho.edu](mailto:annablaine@uidaho.edu).

# IN THE SUPREME COURT OF THE STATE OF IDAHO

ADA COUNTY HIGHWAY DISTRICT, a body  
politic corporate of the State of Idaho,

*Plaintiff-Appellant,*

vs.

BROOKE VIEW, INC., d/b/a THE SENATOR,  
INC., an Idaho corporation; BENCH SEWER  
DISTRICT; JOE J. HON AND WILLIAM A.  
HON d/b/a FRANKLIN WATER COMPANY;  
TILLIE MAE SAXTON, a widow; VINCENT  
LEE HUMPHREYS AND ESTHER C.  
HUMPHREYS, husband and wife; KENNETH  
RICHARDSON AND EFFIE R. RICHARDSON;  
and all unknown lessees and tenants in possession  
of any or all of the property which is subject to this  
action, and any other person or entity, who has or  
may have an interest in and to the property which  
is subject of this action, referenced for  
convenience by the fictitious designations of  
DOES 1 THROUGH 10,

*Defendants-Appellees.*

Supreme Court Docket No. 43452

Ada County District Court  
No. CV-2012-12275

## APPELLANT'S OPENING BRIEF

Appeal from the Fourth Judicial District, Ada County, Idaho  
Honorable Cheri C. Copsey, Presiding

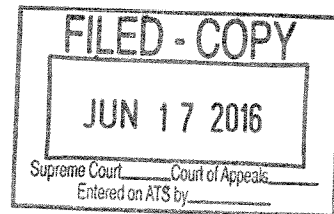
Mary V. York  
Scott D. Hess  
A. Dean Bennett  
HOLLAND & HART LLP  
800 West Main Street, Suite 1750  
P.O. Box 2527  
Boise, ID 83701

Kimbell D. Gourley  
JONES GLEDHILL FUHRMAN  
GOURLEY, P.A.  
225 N. 9th Street, Suite 820  
P.O. Box 1097  
Boise, ID 83701

*Attorneys for Appellant*

E Don Copple  
Heather A. Cunningham  
DAVISON, COPPLE, COPPLE & COPPLE  
199 N. Capital Blvd., Suite 600  
P.O. Box 1583  
Boise, ID 83701

*Attorneys for Appellees*



## IN THE SUPREME COURT OF THE STATE OF IDAHO

ADA COUNTY HIGHWAY DISTRICT, a body  
politic corporate of the State of Idaho,

*Plaintiff-Appellant,*

vs.

BROOKE VIEW, INC., d/b/a THE SENATOR,  
INC., an Idaho corporation; BENCH SEWER  
DISTRICT; JOE J. HON AND WILLIAM A.  
HON d/b/a FRANKLIN WATER COMPANY;  
TILLIE MAE SAXTON, a widow; VINCENT  
LEE HUMPHREYS AND ESTHER C.  
HUMPHREYS, husband and wife; KENNETH  
RICHARDSON AND EFFIE R. RICHARDSON;  
and all unknown lessees and tenants in possession  
of any or all of the property which is subject to this  
action, and any other person or entity, who has or  
may have an interest in and to the property which  
is subject of this action, referenced for  
convenience by the fictitious designations of  
DOES 1 THROUGH 10,

*Defendants-Appellees.*

Supreme Court Docket No. 43452

Ada County District Court  
No. CV-2012-12275

### APPELLANT'S OPENING BRIEF

Appeal from the Fourth Judicial District, Ada County, Idaho  
Honorable Cheri C. Copsey, Presiding

Mary V. York  
Scott D. Hess  
A. Dean Bennett  
HOLLAND & HART LLP  
800 West Main Street, Suite 1750  
P.O. Box 2527  
Boise, ID 83701

Kimbell D. Gourley  
JONES GLEDHILL FUHRMAN  
GOURLEY, P.A.  
225 N. 9th Street, Suite 820  
P.O. Box 1097  
Boise, ID 83701

*Attorneys for Appellant*

E Don Copple  
Heather A. Cunningham  
DAVISON, COPPLE, COPPLE & COPPLE  
199 N. Capital Blvd., Suite 600  
P.O. Box 1583  
Boise, ID 83701

*Attorneys for Appellees*

## TABLE OF CONTENTS

	Page
I. INTRODUCTION .....	1
II. STATEMENT OF THE CASE .....	5
A. NATURE OF THE CASE. ....	5
1. ACHD Project. ....	5
2. The Brooke View Property and the Taking. ....	6
B. COURSE OF PROCEEDINGS. ....	8
1. ACHD’s Amended Complaint, the Scope of the Take, and Order for Possession. ....	9
2. The Pre-Trial Proceedings Spanned Nearly Three Years. ....	9
3. The Issue of Whether Brooke View Could Recover Damages for Activities That Occurred <i>During</i> Construction of the Project Became The Central Focus of The Litigation. ....	10
4. The District Court’s Denial of ACHD’s Second Motion for Summary Judgment. ....	12
5. The District Court’s Denial of ACHD’s Motion for Reconsideration of Second Motion for Summary Judgment and ACHD’s Third Motion for Summary Judgment. ....	13
6. This Court’s Denial of ACHD’s Request for Interlocutory Appeal. ....	15
7. The District Court’s Denial of ACHD’s Fourth Motion for Summary Judgment. ....	15
8. ACHD’s Settlement Offers And Attempts to Resolve The Case Before Trial. ....	17
9. The Trial and Jury Instructions. ....	17
10. The Jury’s Verdict and Entry of Judgment. ....	22

11. The District Court’s Award of Attorney Fees and Costs to Brooke View.....	23
III. ISSUES PRESENTED ON APPEAL .....	23
IV. ARGUMENT .....	24
A. STANDARD OF REVIEW.....	24
B. THE RIGHT TO SEVERANCE DAMAGES IN AN IDAHO CONDEMNATION ACTION ARISES FROM IDAHO CODE § 7-711. ....	26
C. THE DISTRICT COURT ERRED IN ITS LEGAL CONCLUSION AS TO THE PROPER INTERPRETATION OF IDAHO CODE § 7-711.....	29
1. The District Court’s Erroneous Interpretation of § 7-711(2)(a) is Contrary to Well-established Standards for Determining Severance Damages in Condemnation Actions and is Directly Contrary to the Requirements of § 7-712. ....	30
2. The District Court’s Interpretation of § 7-711 is Contrary to Long-Standing Idaho Case Law That Precludes Severance Damages for Impacts or Damage Occurring During Construction.....	33
a. The Case of <i>Oregon-Washington Railroad &amp; Navigation Company v.</i> <i>Campbell</i> Precludes Severance Damage Awards for Construction Activities that Take Place After the Date of Summons. ....	34
b. Consistent with <i>Campbell</i> and <i>Idaho-Western</i> , Numerous Other Idaho Cases Have Applied § 7-711(2)(a) to Mean the Structures or Improvements to Be Built and Not to Physical Construction Activities and Alleged Damage Caused During Those Activities. ....	38
3. Idaho Code § 7-711 Does Not Permit A Landowner to Recover for Every Type of Damage Caused to His or Her Property As Part of Just Compensation.....	40
4. Cases In Other Jurisdictions Are In Accord with <i>Campbell</i> and <i>Idaho-</i> <i>Western</i> and Require That Damage Caused During Construction Are Not Compensable In A Condemnation Action. ....	42
5. The District Court’s Interpretation of § 7-711(2)(a) Invalidates 30 Years of Eminent Domain Case Law Governing Attorney Fee Awards in Condemnation Actions.....	46

6. The District Court’s Interpretation of § 7-711(2)(a) Effectively Eliminates the Design Immunity Afforded to Public Entities.....	49
7. The District Court’s Erroneous Decision to Allow Evidence of Damage Caused During the Acts of Construction was Further Compounded Because it Prohibited ACHD From Offering Tort Defenses. ....	52
8. The District Court’s Interpretation of § 7-711(2)(a) Will Lead to Inconsistent Results.....	54
a. Scenario 1: Two Adjoining Property Owners and the Condemnation of the Property of Only One Owner. ....	55
b. Scenario 2: Two Adjoining Property Owners and the Condemnation of Property of Both Owners. ....	55
D. THE DISTRICT COURT’S ERRONEOUS INTERPRETATION OF IDAHO CODE § 7-711(2)(A) RESULTED IN IRRELEVANT EVIDENCE OF DAMAGE BEING PRESENTED TO THE JURY AND FORMED THE BASIS OF THE JURY’S VERDICT. ....	56
E. THE DISTRICT COURT’S JURY INSTRUCTIONS ARE CONTRARY TO IDAHO’S EMINENT DOMAIN LAWS. ....	58
F. THIS COURT SHOULD VACATE THE JUDGMENT AND REMAND THIS MATTER WITH INSTRUCTIONS TO ENTER JUDGMENT IN THE AMOUNT OF \$8,512.32. ....	60
G. THE DISTRICT COURT ERRED IN DENYING ACHD ITS REASONABLE COSTS AS THE PREVAILING PARTY. ....	61
1. The Criteria for Determining the Prevailing Party in Idaho Condemnation Cases. ....	61
2. ACHD is Clearly the Prevailing Party. ....	63
a. ACHD made an offer of settlement of at least 90% of the verdict. ....	63
b. ACHD’s settlement offers were timely made and within a reasonable period after the institution of action. ....	64
H. THE AWARD OF DISCRETIONARY COSTS SHOULD BE REVERSED OR REDUCED. ....	64
1. The District Court’s Conclusion that this Case Was Extraordinary Was an Abuse of Discretion.....	64

2. The District Court’s Award of Discretionary Costs Should At The Very Least Be Reduced.....	66
I. ACHD IS ENTITLED TO COSTS ON APPEAL.....	67
V. CONCLUSION .....	67

## TABLE OF AUTHORITIES

<u>CASES</u>	<b>Page(s)</b>
<i>Ada Cty. Highway District v. Acarrequi</i> , 105 Idaho 873, 673 P.2d 1067 (1983) .....	<i>passim</i>
<i>Albee v. Judy</i> , 136 Idaho 226, 31 P.3d 248 (2001) .....	25
<i>Arel v. T &amp; L Enter., Inc.</i> , 146 Idaho 29, 189 P.3d 1149 (2008) .....	25
<i>Beehler v. Fremont Cty.</i> , 145 Idaho 656, 182 P.3d 713 (Ct. App. 2008) .....	51
<i>Brown v. City of Twin Falls</i> , 124 Idaho 39, 855 P.2d 876 (1993) .....	41
<i>Canady v. Coeur d'Alene Lumber Co.</i> , 21 Idaho 77, 120 P. 830 (1911) .....	41
<i>City of Anchorage v. Scavenius</i> , 539 P.2d 1169 (Alaska 1975) .....	<i>passim</i>
<i>City of Sandpoint v. Sandpoint Indep. Highway Dist.</i> , 139 Idaho 65, 72 P.3d 905 (2003) .....	49
<i>Cramer v. Slater</i> , 146 Idaho 868, 204 P.3d 508 (2009) .....	52
<i>Davis v. First Interstate Bank of Idaho, N.A.</i> , 115 Idaho 169, 765 P.2d 680 (1988) .....	2, 52
<i>State, Dep't of Transp. v. Hillsboro Ass'n, Inc.</i> , 286 So. 2d 578 (Fla. Dist. Ct. App. 1973) .....	44, 45, 52
<i>Enriquez v. Idaho Power Co.</i> , 152 Idaho 562, 272 P.3d 534 (2012) .....	54
<i>Farber v. Idaho State Ins. Fund</i> , 147 Idaho 307, 208 P.3d 289 (2009) .....	25



<i>Friends of Farm to Mkt. v. Valley Cty.,</i> 137 Idaho 192, 46 P.3d 9 (2002) .....	54
<i>Garcia v. Windley,</i> 144 Idaho 539, 164 P.3d 819 (2007) .....	12
<i>Hadfield v. State ex rel. Burns,</i> 86 Idaho 561, 388 P.2d 1018 (1963) .....	41
<i>Harris v. State, Dep't. of Health &amp; Welfare,</i> 123 Idaho 295, 847 P.2d 1156 (1992) .....	53
<i>Hayden Lake Fire Prot. Dist. v. Alcorn,</i> 141 Idaho 307, 109 P.3d 161 (2005) .....	65
<i>Hoagland v. Ada Cty.,</i> 154 Idaho 900, 303 P.3d 587 (2013) .....	66
<i>Hughes v. State,</i> 80 Idaho 286, 328 P.2d 397 (1958) .....	38, 40
<i>Idaho-Western Ry. Co. v. Columbia Conference of Evangelical Lutheran Augustana Synod.,</i> 20 Idaho 568, 119 P. 60 (1911) .....	<i>passim</i>
<i>Illinois Power &amp; Light Corp. v. Talbot,</i> 152 N.E. 486 (1926) .....	56
<i>Kirk v. Ford Motor Co.,</i> 141 Idaho 697, 116 P.3d 27 (2005) .....	26
<i>Leazer v. Kiefer,</i> 120 Idaho 902, 821 P.2d 957 (1991) .....	60
<i>Lobdell v. State ex rel. Bd. of Highway Dirs.,</i> 89 Idaho 559, 407 P.2d 135 (1965) .....	31
<i>Lubcke v. Boise City Ada Cty. Housing Auth.,</i> 124 Idaho 450, 860 P.2d 653 (1993) .....	26
<i>Mabe v. State,</i> 86 Idaho 254, 385 P.2d 401 (1963) .....	41, 56

<i>Mac Tools, Inc. v. Griffin</i> , 126 Idaho 193, 879 P.2d 1126 (1994) .....	25, 26
<i>Merritt v. State</i> , 113 Idaho 142, 742 P.2d 397 (1987) .....	41
<i>Montana R.R. Co. v. Freeser</i> , 29 Mont. 210, 74 P. 407 (Mont. 1903) .....	3, 44, 52
<i>Moon v. N. Idaho Farmers Ass’n</i> , 140 Idaho 536, 96 P.3d 637 (2004) .....	40
<i>Morales–Izquierdo v. Dep’t of Homeland Sec.</i> , 600 F.3d 1076 (9th Cir. 2010) .....	39
<i>Oregon–Washington R.R. &amp; Navigation Co. v. Campbell</i> , 34 Idaho 601, 202 P. 1065 (1921) .....	<i>passim</i>
<i>Pac. Nw. Pipeline Corp. v. Waller</i> , 80 Idaho 105, 326 P.2d 388 (1958) .....	41, 45
<i>Palmer v. Highway Dist. No. 1, Bonner Cty.</i> , 49 Idaho 596, 290 P. 393 (1930) .....	41
<i>Pocatello Indus. Park Co. v. Steel West, Inc.</i> , 101 Idaho 783, 621 P.2d 399 (1980) .....	53
<i>Porter v. Bd. of Tr., Preston Sch. Dist. No. 201</i> , 141 Idaho 11, 105 P.3d 671 (2004) .....	25
<i>Powell v. McKelvey</i> , 56 Idaho 291, 53 P.2d 626 (1935) .....	39, 40, 56
<i>St. Luke’s Magic Valley Reg’l Med. Ctr., Ltd v. Bd. of Cty. Comm’rs of Gooding Cty.</i> , 149 Idaho 584, 237 P.3d 1210 (2010) .....	32
<i>State, Dept. of Transp. v. HJ Grathol</i> , 153 Idaho 87, 278 P.3d 957 (2012) .....	<i>passim</i>
<i>State ex. rel. Burns v. Blair</i> , 91 Idaho 137, 417 P.2d 217 (1966) .....	38, 40

<i>State ex rel. Moore v. Bastian</i> , 97 Idaho 444, 546 P.2d 399 (1976) .....	<i>passim</i>
<i>State ex rel. Ohman v. Ivan H. Talbot Family Trust</i> , 120 Idaho 825, 820 P.2d 695 (1991) .....	47, 62
<i>State ex rel. Rich v. Dunclick, Inc.</i> , 77 Idaho 45, 286 P.2d 1112 (1955) .....	38, 40
<i>State ex. rel. Rich v. Fonburg</i> , 80 Idaho 269, 328 P.2d 60 (1958) .....	38, 40
<i>State ex rel. Rich v. Halverson</i> , 86 Idaho 242, 384 P.2d 480 (1963) .....	41
<i>State ex rel. Smith v. Jardine</i> , 130 Idaho 318, 940 P.2d 1137 (1997) .....	47, 62, 64
<i>State, Idaho Transp. Bd. v. HI Boise, LLC</i> , 153 Idaho 334, 282 P.3d 595 (2012) .....	40, 41
<i>State v. Barnes</i> , 133 Idaho 378, 987 P.2d 290 (1999) .....	49
<i>State v. Burnight</i> , 132 Idaho 654, 978 P.2d 214 (1999) .....	25
<i>State v. Climer</i> , 127 Idaho 20 896 P.2d 346 (Ct. App. 1995) .....	36, 37
<i>State v. Schulz</i> , 151 Idaho 863, 264 P.3d 970 (2011) .....	25
<i>Telford Lands LLC v. Cain</i> , 154 Idaho 981, 303 P.3d 1237 (2013) .....	63
<i>Vendelin v. Costco Wholesale Corp.</i> , 140 Idaho 416, 95 P.3d 35 (2004) .....	26
<i>Verska v. Saint Alphonsus Reg'l Med. Ctr.</i> , 151 Idaho 889, 265 P.3d 502 (2011) .....	25

<i>Zimmerman v. Volkswagen of Am., Inc.</i> , 128 Idaho 851, 920 P.2d 67 (1996) .....	65
--	----

## **STATUTES**

Alaska Statutes § 09.55.310(a) .....	43
Alaska Statutes § 09.55.330.....	43
Idaho Code § 6-904(7).....	<i>passim</i>
Idaho Code § 7-711 .....	<i>passim</i>
Idaho Code § 7-712 .....	<i>passim</i>
Idaho Code § 7-718 .....	63, 67
Idaho Code § 7-721 .....	32, 56
Idaho Code § 12-121 .....	63, 67

## **OTHER AUTHORITIES**

29A C.J.S. Eminent Domain § 167 (2016).....	45
DICTIONARY.COM, <a href="http://www.dictionary.com/browse/construction">http://www.dictionary.com/browse/construction</a> (last visited June 6, 2016).....	2, 29, 39
IDAHO CONST. art. I, § 14.....	26, 27, 40, 54
Idaho Rule of Civil Procedure 54(d)(1).....	61, 62
Idaho Rule of Civil Procedure 54(e)(3).....	61
LEWIS, EMINENT DOMAIN (3d ed.) § 822.....	35
MINN. CONST. art. I, § 13 .....	26
NICHOLS ON EMINENT DOMAIN § 14.03 (2015).....	45
OR. CONST. art. I, § 18 .....	26
W. VA. CONST. art. III, § 9.....	26

The Plaintiff/Appellant in this case is the Ada County Highway District (“ACHD”). Defendant/Respondent is an Idaho corporation, Brooke View, Inc. doing business as The Senator (“Brooke View”).

## I. INTRODUCTION

ACHD filed this action to condemn an approximately seven-foot wide strip of land belonging to Brooke View along South Curtis Road. The property was necessary as part of ACHD’s roadway project to improve Curtis Road and provide sidewalks for students to safely walk to and from school (the “Project”).

The district court, by its incorrect pretrial rulings, its admission of irrelevant evidence at trial, and its erroneous instructions to the jury, transformed what should have been a straight-forward condemnation action involving a partial taking of 1,425 square feet of land into an expert laden and vigorously litigated dispute over what damages, if any, were caused *during* construction of the Project. This unwarranted detour inextricably conflated condemnation and tort law and improperly authorized the jury to award Brooke View damages never before allowed in over one-hundred years of this Court’s eminent domain jurisprudence.

Under Idaho Law, a condemnee is entitled to an award of just compensation for the “value of the property sought to be condemned” by the condemnor, and in the context of a partial taking, like this case, for “the damages which will accrue to the portion not sought to be condemned, by reason of its severance from the portion sought to be condemned, and *the construction of the improvement in the manner proposed by the plaintiff.*” See Idaho Code § 7-711. The district court’s error, and this appeal, centers on the interpretation of the 12 words of § 7-711(a)(2) italicized immediately above.

These words, when read in isolation, can be interpreted one of two ways: (1) a condemnee is entitled to damages caused *during* the physical acts of construction of the

improvement; or (2) a condemnee is entitled to damages based on the existence of the improvement in its finished condition—the structure itself—as proposed by the condemnor. See DICTIONARY.COM, <http://www.dictionary.com/browse/construction> (last visited June 6, 2016) (“construction” can mean either “the act or art of constructing” or “something that is constructed; a structure”); see also MERRIAM-WEBSTER Online Dictionary, <http://www.merriam-webster.com/dictionary/construction> (last visited June 6, 2016) (either “the process, art, or manner of constructing something” or “a thing constructed”).

These interpretations are mutually exclusive because a statute can only have one meaning, and the district court adopted the former interpretation. This means that the district court instructed the jury to award Brooke View just compensation for events, activities, and damages allegedly sustained to its remainder parcel *during* the construction of Project. This interpretation of § 7-711(2)(a) was error for no fewer than seven reasons.

*First*, pursuant to Idaho Code § 7-712, damages under § 7-711 accrue at the date of the summons, which as a matter of fact always predates construction. Thus damage that allegedly accrues during construction cannot form the basis of damage under § 7-711(2)(a).

*Second*, this Court has already addressed Idaho Code §§ 7-711 and 7-712 as they relate to claimed property damage to the remainder parcel during construction, and that decision is *stare decisis*. In *Oregon-Washington Railroad & Navigation Company v. Campbell*, 34 Idaho 601, 604-05, 202 P. 1065, 1066 (1921) (hereafter “*Campbell*”) this Court held that damages caused during construction necessarily accrued long after the date of summons and thus were not compensable as just compensation in a condemnation action. The Court said, if the condemnee sought damages caused during construction, it would have to bring a “separate action.”

*Third*, this Court has already specifically addressed the 12 words at issue in this case, holding that the words “clearly authorize the landowner to introduce evidence showing the

damage and injury that the particular improvement or structure for which the condemnation is sought will cause to the remainder of his property.” *Idaho-Western Ry. Co. v. Columbia Conference of Evangelical Lutheran Augustana Synod.*, 20 Idaho 568, 581, 119 P. 60, 64 (1911) (“*Idaho-Western*”).

*Fourth*, other state supreme courts interpreting statutes with the very same language as Idaho §§ 7-711 and 7-712 have concluded that damages incurred during construction by a condemnor sound in tort, not in condemnation. *See City of Anchorage v. Scavenius*, 539 P.2d 1169 (Alaska 1975); *Montana R.R. Co. v. Freeser*, 29 Mont. 210, 74 P. 407 (Mont. 1903).

*Fifth*, affirming the district court’s interpretation would undermine 30 years of this Court’s rulings on attorney fees awards under the standards set forth in *Ada County Highway District v. Acarrequi*, 105 Idaho 873, 673 P.2d 1067 (1983), overruled in part by *State, Dept. of Transp. v. HJ Grathol*, 153 Idaho 87, 278 P.3d 957 (2012), and its progeny cases. A comparison of a good faith market-based offer to a jury’s verdict is meaningless if the jury is allowed to consider damage incurred *during* construction because when the condemnor makes its *Acarrequi* offer, in all likelihood, construction is not complete and the condemnor would be unable to fairly incorporate any sums potentially attributable to such damage as part of its offer.

*Sixth*, the district court’s reading of § 7-711(a)(2) reads design immunity out of the Idaho Tort Claims Act. Idaho Code §§ 7-711(2)(a) and 6-904(7) both address plans for the construction of improvements—§ 7-711(2)(a) with regard to a governmental entity’s proposed improvements, and § 6-904(7) with regard to a governmental entity’s plan or design for “highways, roads, streets, bridges, or other public property.” The Tort Claim Act is *in pari materia* with § 7-711(a)(2) and must be read in harmony with it, not simply ignored.

*Seventh*, if affirmed, the district court’s ruling would lead to inconsistent results not contemplated by Idaho’s statutes, and it would have significant practical ramifications on future

cases. Under the court's ruling, no condemnation action could be resolved before construction was completed because any case could include damages caused during construction, yet the condemnor would not be entitled to any defenses that it would otherwise have in a tort case.

The district court's erroneous interpretation of § 7-711(a)(2) caused it to admit several days worth of testimony and hundreds of trial exhibits regarding events, activities, and damages that occurred *during* construction. And after the presentation of all of this irrelevant evidence, the district court instructed the jury that ACHD was responsible for all of the "construction work" on the Project. The district court's legal conclusions, its admission of irrelevant evidence, and its instructions to the jury are all reviewed by this Court *de novo*. These errors substantially prejudiced ACHD and constitute reversible error.

The outcome of this appeal will have long and lasting impacts on the law of eminent domain in this state and, if the district court's error is upheld, will result in a fundamental change in the way just compensation is calculated in a condemnation action. When due consideration is given to Idaho Code § 7-712, the on-point case law of this Court including *Campbell* and *Idaho-Western*, the case law of other states with the same eminent domain statutes, this Court's *Acarrequi* jurisprudence, another statute *in pari materia*, and the practical considerations in future condemnation actions, damages allowable under Idaho Code § 7-711(2)(a) cannot include damage caused *during* construction. The district court erred as a matter of law in its interpretation of Idaho Code § 7-711(2)(a), and its legal conclusions are properly reversed.

ACHD respectfully requests this Court vacate the judgment entered by the district court and remand this case with instructions to the district court to enter judgment in Brooke View's favor in the amount of \$8,512.32 as just compensation for the taking of its property. Moreover, because the district court erred in its interpretation of § 7-711(2)(a), it also erred in its prevailing party determination and in its award of attorney fees, costs as a matter of right, and discretionary



costs to Brooke View. Accordingly, ACHD respectfully requests this Court vacate the district court's judgment as to fees and costs and direct the district court on remand to make a finding that ACHD is the prevailing party and entitled to its reasonable costs. Finally, ACHD is entitled to its costs on appeal before this Court.

## **II. STATEMENT OF THE CASE**

This appeal arises out of the trial, verdict, and judgment entered by the district court, Fourth Judicial District, Ada County, Judge Cheri Copsey presiding, in the condemnation action brought by ACHD.

### **A. NATURE OF THE CASE.**

#### **1. ACHD Project.**

In 2012, ACHD was engaged in a roadway project to improve Curtis Road between Overland Road and Franklin Road in the city of Boise. CR<sup>1</sup> 61, ¶ 11; CR 74. The Project is commonly referred to as ACHD's "Safe Routes to School Project on South Curtis Road, ACHD Project No. 809028. CR 61, 74, 933.

The Project was not a typical roadway expansion project that involved the widening of roadways to increase traffic capacity. Rather, the Project involved a "Safe Routes to School" Project, which was designed to build sidewalks and walkways to allow students safe routes to walk to and from schools.<sup>2</sup> See TT 2962-74; Ex. 1030, 1031.

---

<sup>1</sup> The Clerk's Record on Appeal contains two parts. Part 1 contains the pleadings that are part of the record on appeal and Part 2 contains the trial exhibits. Part 1, which is consecutively paginated from 000001-006636, will be cited as "CR \_\_\_\_". Part 2 of the Clerk's Record, which is not paginated and contains 2296 pages of trial exhibits and published deposition transcripts, will be referred to by trial exhibit number and cited as "Ex. \_\_\_\_". The Trial Transcript is consecutively paginated from 1-4224 and will be cited as "TT \_\_\_\_".

<sup>2</sup> The "Safe Routes to School" Program is part of ACHD's Community Programs that were established in 2008-2009 as part of ACHD's on-going efforts to be responsive to the concerns of citizens, neighborhoods, school districts, and cities. See TT 2962-74. The Community Programs

In order to construct the Project, ACHD needed to acquire, through its powers of eminent domain, a narrow strip of land belonging to Brooke View. CR 62, 75-77. The Project also required a temporary easement to allow for the construction of the Project improvements. *Id.* at 62-63, 76. This action involved a partial taking.

As it related to the Brooke View property, the Project included the installation of a concrete sidewalk, curbs, gutters, and a storm drainage/infiltration system. CR 61, ¶ 11. According to the Project plans, the infiltration trench was approximately five feet wide and eleven feet deep and was designed to dispose of storm water drainage from the west half of Curtis Road near the Brooke View property. CR 291-92. The Project also involved the replacement of an irrigation pipe that was located near the entrance to Brooke View's Property adjacent to the Curtis Road right-of-way. CR 287. The Project did not involve the widening of any traffic lanes or the addition of any bike lanes or turn lanes on Curtis Road. CR 291, 75.

Construction work on the Project began in September 2012. CR 930, 933; Ex. 30. The portions of the Project involving the Brooke View property were completed in mid-December 2012. CR 930, 933.

## **2. The Brooke View Property and the Taking.**

The Brooke View property is located at 421 South Curtis Road in Boise, Ada County (the Property"). The Property is an irregular shape with approximately 150 feet of frontage along Curtis Road.<sup>3</sup> *See* CR 256, 2753. The Property was originally improved as a planned residential

---

are construction projects that are separate from ACHD's traditional roadway projects, which focus on the specific needs of the area's local communities. *See id.*

<sup>3</sup> During the case, the parties disagreed on the actual size of the Brooke View Property before and after the taking. *Compare* CR 844-45, 852, 856-57, 864 (providing that the Property consisted of 20.47 acres before the taking) *with* CR 1244, 1249, 1257 (providing that the Property consisted of 18.99 acres or 18.87 acres). Ultimately, the issue was not central to the case, since the focus of the trial centered on the damage that allegedly occurred to the Entry Walls during construction of the Project.

development, referred to as the “Senator Mobile Home Park,” and it has transitioned over the years from trailer homes to manufactured homes and site-built homes. CR 1158. The Property is improved with 130 manufactured house pads and a club house. CR 256, 1159, 2739. The Property has a masonry wall on the north boundary and the Ridenbaugh Canal on its southern and western boundaries.

The primary dispute between the parties involved Brooke View’s entry walls (“Entry Walls”) that mark the entrance to the Property off of South Curtis Road. The Entry Walls were constructed in 2003. CR 930. The prior entry walls were removed in 2001 after they were damaged when a car hit them. The Entry Walls and related facilities are located along Brooke View’s boundary adjacent to Curtis Road, and span the driveway entrance into the Brooke View Property. *Id.* Brooke View’s Entry Walls are constructed with rebar-reinforced cement footings and a stem wall constructed of Concrete Masonry Units (“CMU”) with grout and mortar. CR 292. On top of the stem wall is an approximately seven-foot CMU wall with stucco painting on the interior side of the walls and brick fascia applied to the South Curtis Road side of the walls. *Id.*

The portion of Brooke View’s Property acquired by ACHD as part of this action is 1,425 square feet (0.033 acres). CR 68-70. The temporary easement required for the construction of the Project is 2,706 square feet (0.062 acres). CR 71-73. The Property acquired by ACHD for the Project did not include any portion of the Entry Walls or the property underneath the Entry Walls. The Entry Walls remained in their current location and were not moved or taken as part of the Project.<sup>4</sup>

---

<sup>4</sup> The take did require the removal of a small stub wall that was located apart from the entrance way walls and the northern boundary wall. TT 742-43. The current appeal does not involve any issues relating to this wall.

During the litigation, a dispute arose between the parties over whether there was an additional taking by ACHD beyond the 1,425 square feet described in ACHD's Amended Complaint. CR 1140. On February 27, 2015, the district court entered an order declaring that an additional taking of 9.87 square feet had occurred due to the installation of project improvements outside the original take area and that there was an additional taking of property located within the Ridenbaugh Canal, which is owned by the Nampa & Meridian Irrigation District ("Nampa & Meridian").<sup>5</sup> See CR 3276. The parties subsequently stipulated to the size of the additional taking within the canal and agreed that it consisted of 131.2 square feet. CR 4122-23. Thus the total amount of the Brooke View Property that was taken as part of this action totaled 1,566.07 square feet. CR 4900. The size of the temporary construction easement did not change. *Id.*

**B. COURSE OF PROCEEDINGS.**

The dispute between the parties centered on whether Brooke View could seek and recover severance damages for impacts and injury it believed was caused to its Entry Walls during the course of construction of the Project. Brooke View argued that its Entry Walls were in fact damaged by the Project construction activities and that the amount of just compensation owed should include the decrease in value of the Property allegedly caused by the damage that occurred to the Entry Walls or a sum equivalent to the cost-to-cure the damaged Entry Walls. *See, e.g.*, CR 6591. By contrast, ACHD argued that any damages caused by construction activities were not properly included as part of just compensation as a matter of law and that Brooke View's claim for such damages must be sought in a separate cause of action. *See, e.g., id.* Consistent with the parties' respective positions, ACHD initially offered Brooke View \$7,738 as the amount of just compensation owed, and later increased its offer to \$8,512.32. *Id.*

---

<sup>5</sup> The Ridenbaugh Canal is sometimes referred to as the Nampa & Meridian Canal. For ease of reference and consistency, this brief will refer to the canal as the Ridenbaugh Canal.

Brooke View rejected ACHD's offers because it believed it was owed additional amounts of compensation due to construction activities. *Id.*

**1. ACHD's Amended Complaint, the Scope of the Take, and Order for Possession.**

When the parties could not agree on the amount of just compensation owed, ACHD filed its Verified Complaint and Summons on July 11, 2012, and its Amended Complaint on August 28, 2012. CR 31-57, 58-83, 952-53. As required by Idaho Code § 7-712, the date of valuation in this case is the date of the summons, which is July 11, 2012. Through its Amended Complaint, ACHD sought "to take and condemn a portion of the Defendants' property for a public purpose, namely, the alignment, reconstruction, and improvement of 421 S. Curtis Road, Boise, Idaho, with said project to include placement of curbs, gutters, concrete sidewalks, and storm drainage systems, ACHD Project No. 809028.0 (the "Construction Project")." CR 61 at ¶ 11.

On August 7, 2012, the parties stipulated to allow ACHD to take possession of the property required for the Project, and the district court entered its Order for Possession of Real Property on August 23, 2012. *See* CR 6587. Thus, the only issue that remained for trial was the determination of just compensation owed to Brooke View pursuant to Idaho Code § 7-711.

**2. The Pre-Trial Proceedings Spanned Nearly Three Years.**

After the filing of the case in July 2012, the trial was originally set for December 16, 2013. TT 34-35, 7122. During the course of proceedings, however, the case was reset to allow sufficient time for hearings and rulings on several motions submitted by the parties. TT 113-23. The trial was reset for a 10-day jury trial starting on March 31, 2014. *See* CR 757. The trial was again continued until April 6, 2015, to allow for ACHD to seek an interlocutory appeal after the

district court denied its Second Motion for Partial Summary Judgment.<sup>6</sup> See CR 900-02, 6593. In its Order Governing Proceedings and Setting Trial dated April 11, 2014, the district court re-opened discovery and allowed the parties to submit new expert disclosures despite the fact that significant discovery had taken place, the parties had already disclosed their respective expert opinions, and numerous depositions had been taken. CR 920, 932-43. ACHD objected to the new pre-trial order and the re-start of discovery and expert disclosures because of the significant time and expense already incurred by the parties and filed a motion to amend the pretrial order. CR 925-28. Brooke View opposed ACHD's motion and specifically advocated for all new expert disclosure deadlines so that the case could start anew. CR 1130-35. The district court agreed with Brooke View and denied ACHD's motion. CR 1136-38. As a result of the court's April 2014 Order, Brooke View made new expert disclosures with revised opinions, and ACHD responded to the new opinions with its own supplemental disclosures. See Section II.B.3, *infra*. The case proceeded to trial on April 6, 2015, the jury entered its special verdict on April 23, 2015, and Judgment on the jury's verdict was entered on June 12, 2015. CR 4889-90, 5757-59.

**3. The Issue of Whether Brooke View Could Recover Damages for Activities That Occurred *During* Construction of the Project Became The Central Focus of The Litigation.**

The issue of Brooke View's claim of severance damages due to damage caused to its Entry Walls during construction of the Project first arose in Brooke View's initial expert disclosures in June of 2013, after the Project construction was completed. See CR 236-85; see Ex. 30. In its disclosures, Brooke View offered expert opinions asserting that physical damage was caused, or may be caused in the future, to the Entry Walls due to activities that occurred

---

<sup>6</sup> A discussion of the relevant motions in the case, including ACHD's Second Motion for Partial Summary Judgment, is detailed in Section II.B.4 below.

during construction, and that as a result, Brooke View was entitled to severance damages. CR 192-204, 236-85, 2814-18. Brooke View's experts' allegations of injury caused to the Entry Walls (or that might be caused in the future) were based upon activities that accrued nearly a year after the date of the summons, which was July 11, 2012.

Brooke View's experts identified several potential causes of the damage to the Entry Walls that allegedly occurred during construction of the Project, but did not identify one specific cause for the damage. *See, e.g.*, CR 193-94 (David O'Day), 260-62 (Roger Dunlap), 2815-17 (Richard Evans), 3153-58 (Brian Smith). The opinions of Brooke View's experts changed and shifted throughout the course of litigation with several subsequent supplemental expert disclosures and disclosures of entirely new experts in 2014. *See, e.g.*, CR 1798-99, 3590-92 (David O'Day); CR 346-47, 536, 2844-46, 2852 (Richard Evans); CR 2058-63 (Rodney Boone); CR 1973 (Dr. Paul Michaels); CR 1340-41 (Jon Pullman); CR 2175 (Patrick Dobie). Each shift of opinion resulted in increased costs for both parties. Brooke View's experts began to narrow their causation theories in 2014, although some experts never identified a specific causal mechanism. *See, e.g.*, CR 1798-99 (David O'Day); CR 1973 (Dr. Paul Michaels); CR 2175 (Patrick Dobie). Nevertheless, despite the constant revisions of its experts' opinions, none of Brooke View's experts calculated the value of the taking or associated damages without considering the physical construction activities during the Project. *See* CR 260-02, 2735, 2742, 2802-04 (Roger Dunlap); CR 254, 1167, 2593 (Mark Butler); CR 275, 3214-15 (Roger Wood); CR 3054-55, 3106 (Mark Richey); CR 1823-32, 2595-98 (David Roylance).

Although ACHD adamantly disagreed that Brooke View's opinions that damage to the Entry Walls that occurred during construction of the Project were proper, and although ACHD sought to exclude those opinions through numerous motions—all of which were denied by the district court—ACHD was forced to tailor its case to respond to Brooke View's arguments. CR

1129 (ACHD witness list), 5375-81 (describing witness disclosures); *see also* ACHD's expert reports at CR 497-98, 506 (Gordon Smith and Kenneth Colson), CR 4457-58 (Mat Fielding), CR 626-28 (Daniel Gado), CR 3895, 4063-64 (Tim Johnson).

**4. The District Court's Denial of ACHD's Second Motion for Summary Judgment.**

In response to Brooke View's expert disclosures and its claim for damages for alleged physical damage caused, or which may be caused in the future, to the Entry Walls during the construction of the Project, ACHD filed its Second Motion for Partial Summary Judgment<sup>7</sup> on August 8, 2013. CR 233-35, 290-308.<sup>8</sup>

In its Motion, ACHD argued that while Idaho Code § 7-711 allows for just compensation for property taken and the damages for the diminution in value caused to the remainder property, it does not authorize compensation for alleged physical damage caused during construction of the Project. *See* CR 297-302. As stated by ACHD in its briefing, such damages are not properly part of a condemnation action but must instead be pursued in an independent action for damages under a tort, nuisance or trespass theory. CR 298. Additionally, ACHD argued that Brooke View's claimed damages were impermissibly speculative, improperly based upon alleged future damages and purported physical invasion of property, and contrary to Idaho eminent domain statutes and case law governing severance damages in condemnation actions. CR 298-306.

---

<sup>7</sup> ACHD acknowledges that an appeal may not be taken from an order denying a motion for summary judgment. *Garcia v. Windley*, 144 Idaho 539, 542, 164 P.3d 819, 822 (2007). Consistent with Idaho case law on this issue, ACHD is not appealing from the district court's summary judgment rulings in this case. However, ACHD is providing the procedural background of the summary judgment motions and rulings by the district court to provide context for the legal errors committed by the district court in this case and to demonstrate how pervasive the issues relating to construction activities and damages alleged to have been caused by those activities were both pretrial and at trial.

<sup>8</sup> ACHD's first Motion for Partial Summary Judgment, filed on June 27, 2013 sought to reduce the scope of the trial by obtaining judgment on Requests for Admissions and is not relevant to the issues on appeal.



Accordingly, ACHD argued that “Brooke View has failed to plead a viable claim for damages to the Wall and summary judgment upon that claim is necessary and appropriate.” CR 306.

The district court held a hearing on ACHD’s Second Motion for Partial Summary Judgment on September 12, 2013. TT 39-129. The district court concluded that there were genuine issues of material fact that precluded granting ACHD’s Motion. TT 104. The district court ordered the parties to submit additional briefing on the issue of whether there had been an additional taking of Brooke View’s Property or property interests—specifically whether there had been a taking of lateral support from the Property. TT 106-07. The district court subsequently denied ACHD’s Second Motion for Partial Summary Judgment in a single-page Order that did not contain any written analysis. CR 594-95.

**5. The District Court’s Denial of ACHD’s Motion for Reconsideration of Second Motion for Summary Judgment and ACHD’s Third Motion for Summary Judgment.**

Following the district court’s denial, ACHD filed a Motion for Reconsideration of its Second Motion for Summary Judgment (CR 665-67) and a Third Motion for Partial Summary Judgment (CR 662-64). Both Motions were supported by a single Memorandum. CR 668-89. In its supporting Memorandum, ACHD provided the information requested by the court on the issue of lateral support, noting that Brooke View had not asserted any claim for inverse condemnation based upon the taking of its lateral support and that it had not disclosed any expert opinions to support such a takings claim. CR 671-76. Additionally, ACHD requested clarification of the grounds for the district court’s denial of ACHD’s Second Motion for Partial Summary Judgment and again requested the court grant partial summary judgment against Brooke View on its damage theory of recovery based upon alleged physical damage caused during construction of ACHD’s Project. CR 663, 669-70, 678-86. ACHD argued that such

damages must be raised in claims brought in tort and were not compensable in a condemnation action. CR 682.

The district court heard argument on ACHD's Motion for Reconsideration and its Third Motion for Partial Summary Judgment in November 2013. TT 130-208. During the hearing, the district court addressed the issue of the interpretation of Idaho Code § 7-711(2)(a) and held that the statute should be interpreted to include damages for "things that flow from the construction of the improvement as proposed by the plaintiff." TT 170-71; *see also* TT 178. Under the district court's interpretation, severance damages in a condemnation action included damages caused during construction of the Project.

The district court entered a single page Order Denying ACHD's Motion for Reconsideration of its Second Motion for Summary Judgment without written analysis. CR 767-68. It also entered a two-page Order Denying ACHD's Third Motion for Partial Summary Judgment, again without further written analysis. *See* CR 761-63.

In its Order Denying ACHD's Third Motion for Partial Summary Judgment, the district court held that Brooke View's assertion that ACHD's Project "caused physical damage to the entrance way walls on the remaining Brooke /View (sic) property, via underground water trespass, vibration, or taking of lateral support, are encompassed within and a part of the ACHD eminent domain claim and no counterclaim or affirmative defense must be pled by the Defendants, Brooke View, Inc. to assert the same." CR 762. The district court also held that although Brooke View had the burden to prove that construction of the improvement caused physical damage to the Entry Walls on the Brooke View Property, "Brooke View, Inc. is not required to prove the specific mechanism of how the Brooke View entrance way walls were allegedly physically damaged, but rather simply construction of the improvement in the manner proposed by Plaintiff pursuant to the Project was the cause of the alleged physical damage." *Id.*

This legal determination by the court unqualifiedly put at issue the alleged damage to the Entry Walls that occurred during construction.

**6. This Court's Denial of ACHD's Request for Interlocutory Appeal.**

Believing the district court's holdings to be in error, on December 3, 2013, ACHD filed a Motion for Permission to Appeal Interlocutory Orders. In its Motion, ACHD requested this Court consider "[w]hether causes of action normally classified as tort, nuisance, trespass or other claims are encompassed within an eminent domain claim pursuant to Idaho Code § 7-711." The district court granted ACHD's motion. CR 900-02. This Court, however, declined to hear ACHD's request for interlocutory appeal and the litigation proceeded before the district court.

**7. The District Court's Denial of ACHD's Fourth Motion for Summary Judgment.**

In December 2014, ACHD filed its Fourth Motion for Partial Summary Judgment, or, in the Alternative, Motion in Limine. CR 1302-07.<sup>9</sup> In its Motion, ACHD requested summary judgment on Brooke View's allegations of property damage on the grounds that Brooke View's claimed damages incurred during construction of the Project, were not recoverable in a condemnation action, and that Brooke View's disclosed expert opinions were remote and speculative, lacked the foundational requirements for expert opinion testimony, failed to establish the requisite causal connection, and were unsubstantiated by the facts. *See* CR 1374-75, 1379-85. ACHD also argued that summary judgment was proper because of the immunity

---

<sup>9</sup> Brooke View also filed its own motion for partial summary judgment on the issues of the width of the Nampa & Meridian easement along the Ridenbaugh Canal, the setback requirements for Brooke View's entrance walls, whether a permit could have been obtained for the walls, whether an additional taking had occurred by ACHD, and whether ACHD's appraiser's valuation methodologies were in compliance with Idaho Code § 7-711. CR 1139-41. The district court granted Brooke View's motion. *See* CR 3276-77, 3303-04, 3306. Subsequently, the parties entered into a stipulation wherein they agreed upon the size of the additional taking, and the court accepted the parties' stipulation. CR 4121-23.

protections set forth in Idaho Code § 6-904(7), relating to plans or designs “for construction or improvement to the highways, roads, streets, bridges, or other public property,” which precluded Brooke View from recovering damages for its allegations of physical property damage incurred during construction. CR 1386-88.

The district court heard argument on ACHD’s Fourth Motion for Partial Summary Judgment on February 12, 2015 and entered its Order denying ACHD’s Motion on February 26, 2015. *See* CR 3281-84. The Court held, “[t]his is a constitutional claim, not a tort claim, and tort principles do not apply.” CR 3282. The Court also held that Brooke View had to prove that damages were caused during construction, but that it did not have to prove proximate cause or the mechanism of damage. *Id.* According to the district court, it was not Brooke View’s burden to “figure out who did what in relation to the project which necessitated the taking.” *Id.* Therefore, “[w]hether there is evidence the damage done to Brooke View by [the local water utility] and its contractor may have been one or the only cause of damage is irrelevant” and “[a]ll Brooke View needs to do is show it is the construction of this project that caused damage; the project including all of its ramifications.” *Id.* The district court also made the following conclusion about Idaho’s eminent domain laws: “The way we determine how much compensation is paid is by the change in value to the property, which in Idaho includes change from construction of the project in the manner proposed.” CR 3282-83.

Based upon these rulings, the district court granted summary judgment in Brooke View’s favor—as the non-moving party—concluding that ACHD was responsible to Brooke View for property damage caused during the construction of the Project, even if others were “the only cause of damage.” *See id.* The district court also held that the immunity for “a plan or design for construction or improvement to the highways, roads, streets, bridges, or other public property”

set forth in Idaho Code § 6-904(7) is inapplicable to Brooke View's allegations of physical property damage to the remainder property during construction. *See* CR 3283.

#### **8. ACHD's Settlement Offers And Attempts to Resolve The Case Before Trial.**

ACHD made numerous attempts to settle this case before trial. In May 2013, ACHD offered Brooke View \$45,000. CR 5919. On January 6, 2015, ACHD significantly increased its settlement offer and pursuant to requirements of *Acarrequi*, 105 Idaho 873, 673 P.2d 1067 and its subsequent cases, ACHD made a new offer at \$204,600 and then subsequently at \$257,000 on January 13, 2015. CR 5882-83. Brooke View rejected the first offer on January 6th and later countered the January 13th offer with an offer in excess of \$300,000. CR 5921. Brooke View clarified three days later that its offer was actually more than \$670,000. CR 5901-02, 5921. On January 25, 2015, ACHD sent Brooke View a settlement offer of \$275,000. CR 5883, 5922. Brooke View rejected this offer without any counter-proposals and expressed a desire to cease settlement negotiations entirely. CR 5882-83, 5905. As a result of the failed settlement attempts, the parties proceeded to trial.

#### **9. The Trial and Jury Instructions.**

The trial in this case began on April 6, 2015. Consistent with its pretrial rulings, at trial the district court again concluded that Idaho Code § 7-711(a)(2) permitted Brooke View to recover damages for impacts and injury caused during construction of the Project. For example, during trial, the district court noted how the issue of the compensability of the damages caused during construction kept coming up "over and over again." TT 2508. The court stated,

that portion that we're dealing with the construction -- the damage allegedly caused by construction -- and I'm saying allegedly -- it hasn't been determined yet, the jury's going to make that determination -- is not a tort action. That's what has caused much of the frustration that I feel. I think sometimes we have constantly gone back to the same issue over and over again.

TT 2508-09. The court went on to chastise ACHD stating that,

[t]o some extent ACHD has some difficulty in understanding that this is – the damage issue is not a negligence issue. Period. Not. I don't know how many times I have to say that. It is simply was there damage caused.

*Id.* The district court then “urge[d] ACHD to go back and read the statute” (referencing § 7-711(2)(a)) and made the following ruling:

The statute is clear and unambiguous. *They are entitled to damages, I would call traditional severance damages, and for any damages caused by the construction.* It says that. We have gone over that repeatedly. It is not unusual.

*Id.* (emphasis added).

The court reiterated its legal conclusion as to the measure of damages that could be recovered by Brooke View by stating:

THE COURT: Here's the deal, Counsel. Everyone here is forgetting *either damage was caused by the construction or it wasn't. If it was, then she is entitled to compensation for that damage.* This is an eminent domain case. This is not a negligence case. And I think the parties keep veering off into negligence concepts and it is not a negligence case.

TT 3271-73 (emphasis added). ACHD attempted to explain its disagreement with the ruling, but was cut off by the court before a full explanation could be provided.

MS. JUDD: Your Honor, fortunately in most of their case in chief it was about duty of ACHD and they should have done a preconstruction survey, why didn't they do a preconstruction survey, and it was setting the stage for all of the things they claim ACHD –

THE COURT: Can I -- before you go down that path very far. That's not why they were doing it. The reason they were doing it is to establish that ACHD had the opportunity to design this project so that -- *assuming they prove by a preponderance of the evidence that, in fact, this construction caused the damage* -- and I'm not the fact finder. The reason they bring that in is to show that it could have been designed differently and that ACHD had the opportunity to design it differently. It is not because they're saying you had a duty of some sort. You're getting hung up on tort concepts. This is not a tort case.

...  
I don't know how many times to say this is not a tort case. *You need to either prove it didn't damage or it did. One or the other. Not they have to prove that it damaged. Once they prove that, then it's just a question of valuation.* There's no way that they could have mitigated the damage that you did, if you did it. And I'm making that clear. Every time I say "you did," there's the caveat: I don't know. That's going to be up for the jury to decide that.

TT 3271-73 (emphasis added).

Consistent with the district court's legal conclusions as to the interpretation of Idaho's severance damage statute, the Court extended its rulings at trial to declare that ACHD was responsible for all aspects of the Project, including all damages resulting from the physical construction during the Project. The district court's legal rulings on this issue were made throughout trial, further communicating to the jury that damages occurring during construction of the Project were ACHD's responsibility and that Brooke View could recover such damages:

THE COURT: Number one, I'm not going to give any of these questions. I'm going to tell them I'm not giving these questions because *this is ACHD's project and it is legally responsible for its project.*

TT 3344-45 (emphasis added).<sup>10</sup> The court then told the jury,

THE COURT: Thank you, ladies and gentlemen. Thank you for being so prompt. Ladies and gentlemen, I have gone through all of these jury questions and a couple things. I'm not actually going to give any of them for a couple of reasons. First, *this is ACHD's project and it is legally responsible for its project.* So any questions relating to responsibility are not relevant.

---

<sup>10</sup> After the district court declared its ruling as to ACHD being legally responsible for the Project, the court asked the parties if there was anything about the statement that does not accurately state the legal rule. TT 3344-45. In response, counsel for Brooke View agreed. Counsel for ACHD, however, merely stated "That's fine, Your Honor." ACHD did not agree with the court's ruling but rather merely acknowledged that the court was intent on its conclusion and that it would be informing the jury of its determination. ACHD renewed its objections to the court's ruling during the jury instruction conference in which it objected to Jury Instruction No. 27, which paralleled the court's ruling. See TT 3998-4000 (ACHD's objection to Jury Instruction No. 27, which is consistent with the court's ruling, stated "[f]or purposes of your decision you are to assume ACHD is responsible for all construction work performed as part of the Curtis Road Project.").

TT 3347 (emphasis added).

Based upon its legal rulings made during trial, Brooke View was permitted to present evidence to the jury of the work and related activities that took place during construction of the Project. This evidence was permitted despite the court's statements that this was not a tort case. *See, e.g.*, TT 3271-73. The parties called 35 witnesses during trial, and more than one-third of those witnesses testified at length about the construction of ACHD's Project and how that construction damaged the Entry Walls, resulting in hundreds of pages of testimony. *See, e.g.*, TT 1946 ("I think that the damage to the wall is a direct result of the ACHD construction project." Patrick Dobie); TT 1560 (same, Richard Evans); TT 1703 (same, David O'Day); TT 2092-93 (same, Dr. Paul Michaels); TT 2235-36 (same, Brian Smith); TT 941-45 (describing progress of construction activities, Rodney Boone); TT 1682-86, 1695-96 (same, David O'Day); TT 1904-08 (same, Patrick Dobie); TT 3057-63 (same, Diane Miller); TT 3253-57, 3280-318 (same, Sam Howell); TT 3351-67 (same, Chris Hawkins); TT 3495-500 (same, Dan Gado); TT 1014-49 (describing progress of construction and personal observations of cracks in the Entry Walls, John Guerrero); TT 1052-62. (same, Robert Ware). A detailed listing of the witnesses and their testimony is attached to this Brief as Addendum A.

Additionally, at least 181 of the 301 exhibits admitted at trial were solely directed at establishing the fact of and scope of damage that occurred during construction. This evidence included 66 exhibits containing more than 400 photographs of hundreds of cracks in the Entry Walls that allegedly appeared during construction. A complete listing of the exhibits admitted at trial that fall in this category is attached to this Brief as Addendum B.

In addition to the evidence of damage purportedly caused during construction, Brooke View was also permitted to put on substantial evidence of the negligence of ACHD and its contractors in its design, preparation and construction activities—again, this evidence was



permitted despite the court's rulings that the case did not involve a tort claim and that "tort principles do not apply." CR 3282. For example, Patrick Dobie identified six separate actions ACHD should have taken in order to protect the Entry Walls. TT 1859, 1868, 1896-97, 1943-45, 1977-78. David O'Day identified seven ways ACHD should have protected the Entry Walls prior to and during construction. TT 1580, 1583, 1585-86, 1709-10, 1809-12. Brooke View elicited similar opinions from Rodney Boone (TT 946-47), Richard Evans (TT 1476), and Dr. Paul Michaels (TT 2008, 2139-40). Based upon Brooke View's evidence, all of its valuation witnesses included as part of their conclusions of just compensation, severance damages based upon damage caused during construction of the Project. CR 5473 (Roger Dunlap), 5503 (Mark Richey), 5549 (Richard Evans); TT 2625-30 (Mark Richey), 2707-10 (Roger Dunlap), 2819-20 (Richard Evans).

In its case, ACHD presented witnesses who responded to Brooke View's claims of damages caused during construction. TT 3497-500, 3524-28, 3535, 3543, 3562, 3571-72, 3579-81, 3588-89, 3592-93, 3596-97, 3618 (Daniel Gado); 3651-53, 3667, 3669-70, 3710-11, 3746 (Tim Johnson). However, because it maintained that such evidence was irrelevant and not compensable in a condemnation action, it did not put on valuation evidence and instead ACHD conceded that Brooke View was entitled to just compensation in the amount of \$8,512.32 (CR 4901)—a sum which did not include any severance damages for the activities or damages that occurred during construction of the Project.

At the conclusion of the presentation of evidence, the district court gave the following jury instructions directing the jury to award Brooke View damages without proof of causation and imposing strict liability on ACHD for all damages purportedly caused to the Entry Walls during construction of the Project:

- *Jury Instruction No. 15* – “Just compensation means the fair market value of the property taken, including all permanent improvements thereon together with any direct damages suffered by Brooke View as a result of the taking *or construction* of the improvement project in the manner proposed by ACHD, all measured as of July 11, 2012.” CR 4906 (emphasis added).
- *Jury Instruction No. 20* – “In this case, Brooke View claims the taking and the construction of the ACHD improvement project in the manner proposed by ACHD caused its remaining land to decrease in market value. Brooke View has the burden of proving construction of the ACHD improvement project in the manner proposed by ACHD caused damage to its property or improvements on that property. *Brooke View does not have to prove the mechanism for how such damage, if any, occurred. If you find Brooke View has met its burden of proof, Brooke View is entitled to the lesser of the decrease in the market value of the remaining property or the cost to cure any proven damages, but not both.* Cost to cure is the amount required to restore the property to the condition it was in before it was damaged.” CR 4911 (emphasis added).
- *Jury Instruction No. 24* – “There has been evidence Brooke View did not notify ACHD *at the time it claims it discovered cracks on its walls on or about November 1, 2012.* This issue has been the subject of prior rulings by this Court and the Court ruled that this fact has no relevancy to any issue to be decided by you. Therefore, you are instructed that you are not to consider this fact in arriving at your decision or to discuss it in deliberations.” CR 4915 (emphasis added).
- *Jury Instruction No. 27* – “For purposes of your decision *you are to assume ACHD is responsible for all construction work performed as part of the Curtis Road Project.*” CR 4918 (emphasis added).

#### **10. The Jury’s Verdict and Entry of Judgment.**

At the conclusion of trial, the jury returned a verdict in the amount of \$146,291.68. CR 4889-90. The jury’s verdict consisted of the following: \$3,915.18 for the fair market value of the property taken; \$676.50 for the fair market value of the temporary easement; \$700.00 for the value of the 16.547 square feet of improvements taken; and \$141,000 for the cost to cure the severance damages. *Id.* The jury also determined that Brooke View was entitled to \$257,836.16 in severance damages. *Id.* However, because Brooke View is only entitled to recover the lesser

of severance damages or the cost-to-cure amount, the jury awarded Brooke View \$141,000 instead of the larger severance damage amount.<sup>11</sup> *Id.*

On June 12, 2015, the district court entered Judgment on the Verdict in the amount of \$148,390.21, which consisted of \$146,291.68 awarded by the jury and an additur of \$2,098.53 in order to increase the jury's award to the assessed value of the Property. CR 5758. Additionally, the district court awarded prejudgment interest from July 11, 2012 through June 11, 2015 in the amount of \$48,792.66, which sum would continue to accrue in the amount of \$46.24 per day until the Judgment was paid. *Id.* The Judgment was satisfied by ACHD upon the Court's release of the funds on deposit with the Court. CR 6227-28.

**11. The District Court's Award of Attorney Fees and Costs to Brooke View.**

The court concluded that Brooke View was the prevailing party and awarded attorney fees in the amount of \$744,243.56, costs as a matter of right in the amount of \$44,051.46, and discretionary costs in the amount of \$365,703.63 for a total award of \$1,151,699.99. CR 6616. ACHD timely filed an amended notice of appeal on July 24, 2015. CR 6565.

**III. ISSUES PRESENTED ON APPEAL**

1. Where Idaho's eminent domain statutes and case law limit severance damage awards in a partial taking case to damages to the remainder property that accrue as of the date of the summons for "the construction of the improvement in the manner proposed by the plaintiff," did the district court err in:

a. its legal conclusions during pretrial, and in its instructions to the jury at trial, holding that Idaho law allows an award of just compensation for physical damage

---

<sup>11</sup> For consistency and ease of reference, ACHD will refer to "severance damages" as a general term that also includes the cost-to-cure amount that can off-set severance damages.

allegedly caused to the remainder property for *all* work performed *during* the construction of the Project for which the taking was required;

b. admitting testimony and other evidence of events and activities that occurred *after* the date of the summons and *during* the construction of the Project for which the taking was required;

c. admitting testimony and other evidence of physical damage to the remainder property that accrued *after* the date of the summons and that was allegedly caused by work performed *during* the construction of the Project for which the taking was required.

2. Did the district court err as a matter of law in determining Brooke View to be the prevailing party and awarding Brooke View attorney fees, cost as a matter of right, and discretionary costs.

3. Did the district court err as a matter of law in failing to conclude that ACHD was the prevailing party and denying ACHD its costs.

4. Is ACHD the prevailing party on appeal and entitled to an award of its costs on appeal.

#### **IV. ARGUMENT**

##### **A. STANDARD OF REVIEW.**

The central issues on appeal involve: (1) the district court's erroneous interpretation of Idaho's eminent domain statutes governing the award of severance damages owed to Brooke View; (2) the district court's error in admitting evidence regarding activities, events, and damage allegedly caused *during* construction of the Project; and (3) the district court's improper instructions to the jury based on its flawed statutory interpretation.

The [i]nterpretation of a statute is a question of law over which this Court exercises free review.” *Grathol*, 153 Idaho at 91, 278 P.3d at 961. “Judicial interpretation of a statute begins with an examination of the statute’s literal words.” (citing *State v. Burnight*, 132 Idaho 654, 659, 978 P.2d 214, 219 (1999)). This Court interprets statutes “according to their plain, express meaning, and resorts to judicial construction only if the statute is ambiguous, incomplete, absurd, or arguably in conflict with other laws.” *Id.* (citing *Arel v. T & L Enter., Inc.*, 146 Idaho 29, 32, 189 P.3d 1149, 1152 (2008)).

The starting point for interpreting statutes “begin[s] with the literal words of the statute; those words must be given their plain, usual, and ordinary meaning; and the statute must be construed as a whole.” *Verska v. Saint Alphonsus Reg’l Med. Ctr.*, 151 Idaho 889, 893, 265 P.3d 502, 506 (2011). “A statute is ambiguous where the language is capable of more than one reasonable construction.” *Id.* at 896, 265 P.3d at 509 (quoting *Porter v. Bd. of Tr., Preston Sch. Dist. No. 201*, 141 Idaho 11, 14, 105 P.3d 671, 674 (2004)). Where statutory language is ambiguous this Court will “look to rules of construction for guidance and consider the reasonableness of proposed interpretations.” *Albee v. Judy*, 136 Idaho 226, 231, 31 P.3d 248, 253 (2001). “The objective of statutory interpretation is to derive the intent of the legislative body that adopted the act.” *State v. Schulz*, 151 Idaho 863, 866, 264 P.3d 970, 973 (2011) (quoting *Farber v. Idaho State Ins. Fund*, 147 Idaho 307, 310, 208 P.3d 289, 292 (2009)). Thus, “the Court must give effect to all the words and provisions of the statute so that none will be void, superfluous, or redundant.” *Id.*

Decisions regarding the admission of evidence at trial are subject to an abuse of discretion standard. See *Mac Tools, Inc. v. Griffin*, 126 Idaho 193, 199, 879 P.2d 1126, 1132 (1994). “However, the question of relevancy under I.R.E. 402 is not a discretionary matter because there is no issue of credibility or finding of fact for the trial court to resolve prior to

deciding whether to admit the evidence.” *Id.* “Thus, this Court reviews the trial court’s relevancy decisions under the *de novo* standard of review.” *Id.* (citing *Lubcke v. Boise City Ada Cty. Housing Auth.*, 124 Idaho 450, 466, 860 P.2d 653, 669 (1993)).

The question of whether the jury was properly instructed is also subject to free review. *Kirk v. Ford Motor Co.*, 141 Idaho 697, 701, 116 P.3d 27, 31 (2005) (quoting *Vendelin v. Costco Wholesale Corp.*, 140 Idaho 416, 432, 95 P.3d 35, 50 (2004)). “The standard of review for issues concerning jury instructions is limited to a determination whether the instructions, as a whole, fairly and adequately present the issues and state the law.” *Vendelin v. Costco Wholesale Corp.*, 140 Idaho 416, 432, 95 P.3d 34, 50 (2004).

**B. THE RIGHT TO SEVERANCE DAMAGES IN AN IDAHO CONDEMNATION ACTION ARISES FROM IDAHO CODE § 7-711.**

Under Idaho’s Constitution, a landowner is entitled to compensation when property is “taken” for public use. IDAHO CONST. art. I, § 14. Idaho’s eminent domain provision states that “[p]rivate property may be taken for public use, but not until a just compensation, to be ascertained in the manner prescribed by law, shall be paid therefore.” *Id.*

Idaho’s Constitution is one of the *majority* of states whose constitutions provide for compensation only when property is “taken,” as opposed to the *minority* of states whose constitutions permit compensation when property is taken *and* when property is merely “damaged.” Compare IDAHO CONST. art. I, § 14 (requires compensation for *taking* of private property) and OR. CONST. art. I, § 18 (requires compensation for *taking* of private property), with MINN. CONST. art. I, § 13 (requires compensation for *taking, destruction or damage* caused to private property); W. VA. CONST. art. III, § 9 (requires compensation for *taking or damage* caused to private property).

The Idaho Supreme Court discussed the significance of Idaho's constitutional limitation on just compensation awards in *Idaho-Western*, 20 Idaho 568, 119 P. 60. In that case, the Supreme Court discussed at length Idaho's "take" constitution and explained that "the Constitution of this state provides simply for the payment of 'a just compensation' for the 'taking' of private property, and does not require the payment for *damages* sustained." *Id.* at 583, 119 P. at 65. The Court noted that "[t]he omission of the damage clause is significant":

And when the convention in Idaho framed the Constitution of that state, omitting such clause, and it was so adopted, the conclusion must be that the omission was deliberate and because the people of that state believed that, owing to the conditions there existing, the public interests demanded that *the additional burden of paying consequential damages should not be imposed on those taking property for public uses*. And there is nothing in the Idaho constitution requiring compensation except for the taking of property.

*Id.* at 584, 119 P. at 65 (emphasis added).

The Idaho Supreme Court in *Idaho-Western* went on to explain that "the omission of the words 'or damaged' from the constitution does not prevent the legislature from imposing a condition to that effect by statutory enactment[.]" and it observed that the Idaho Legislature had in fact enacted legislation authorizing awards of severance damages. *Id.* at 585, 119 P. at 65 (citing Section 5220 of the Revised Codes).

Section 5220 of the Revised Code referred to in the *Idaho-Western* case is substantively identical to Idaho Code § 7-711—the current Idaho Code that establishes the statutory mechanism for determining just compensation awards, including severance damages. Thus, where the present dispute is over the permissible scope of Brooke View's severance damage award, this appeal turns on the language of § 7-711 and the district court's interpretation of, and legal conclusions regarding, the language of that statute.

The relevant portions of Idaho Code § 7-711 provide that for the assessment of severance damages in a condemnation action,

The court, jury or referee must hear such legal testimony as may be offered by any of the parties to the proceedings, and thereupon must ascertain and assess:

1. The value of the property sought to be condemned, and all improvements thereon pertaining to the realty, and of each and every separate estate or interest therein; if it consists of different parcels, the value of each parcel and each estate or interest therein shall be separately assessed. For purposes of ascertaining the value of the property, the minimum amount for damages shall be the greater of the assessed value for property tax purposes unless the court, jury or referee finds the property has been altered substantially, or the plaintiff's highest prelitigation appraisal.
2. If the property sought to be condemned constitutes only a part of a larger parcel: (a) the damages which will accrue to the portion not sought to be condemned, by reason of its severance from the portion sought to be condemned, and the construction of the improvement in the manner proposed by the plaintiff; and (b) the damages to any business qualifying under this subsection having more than five (5) years' standing which the taking of a portion of the property and the construction of the improvement in the manner proposed by the plaintiff may reasonably cause.

Idaho Code § 7-711. Thus, under this statute a landowner who is subject to a condemnation action involving a partial taking of property, such as in the present case, is entitled to just compensation that consists of (1) the value of the property taken, and (2) damages “which will accrue to the portion not sought to be condemned, by reason of its severance from the portion sought to be condemned, and the construction of the improvement in the manner proposed by the plaintiff.” *Id.*<sup>12</sup> This appeal centers on the phrase “the construction of the improvement in the manner proposed by the plaintiff” and whether the district court properly interpreted the phrase

---

<sup>12</sup> A landowner may also be entitled to business damages. Idaho Code § 7-711(2)(b). However, Brooke View did not claim business damages in this case and therefore, the business damage provision of § 7-711 is not at issue on appeal. CR 178.



to allow a claim for severance damages to the remainder property that allegedly occurred *during* construction of the Project.

**C. THE DISTRICT COURT ERRED IN ITS LEGAL CONCLUSION AS TO THE PROPER INTERPRETATION OF IDAHO CODE § 7-711.**

The district court concluded that the phrase “the construction of the improvement in the manner proposed by the plaintiff” within § 7-711(2)(a) refers to activities, and the consequences of such activities, that occurred during Project construction. *See* discussion of the district court’s rulings in Sections III.B.4-11, *supra*. The district court’s conclusions were based upon a narrow reading of this specific clause, to the exclusion of the remainder of the statute and the other applicable eminent domain provisions. The court’s limited focus resulted in an erroneous interpretation of the statute, irrelevant evidence being presented to the jury at trial, improper instructions being given to the jury, and the improper inclusion of non-compensable damages in Brooke View’s award of just compensation. *See* discussion of evidence admitted at trial and instructions given to the jury in Section III.B.10, *supra*; *see also* Addendum A, B.

ACHD acknowledges that these 12 words of 7-711(2)(a) if read in isolation could result in two equally reasonable and conflicting interpretations—one where the term “construction” means the physical act or process of constructing something and the other where it means the structure or thing that is constructed. *See* DICTIONARY.COM, <http://www.dictionary.com/browse/construction> (last visited June 6, 2016) (“construction” can mean either “the act or art of constructing” or “something that is constructed; a structure”); *see also* MERRIAM-WEBSTER Online Dictionary, <http://www.merriam-webster.com/dictionary/construction> (last visited June 6, 2016) (either “the process, art, or manner of constructing something” or “a thing constructed”). However, when the statute is read as whole, within the context of Idaho’s entire statutory framework, and consistent with long-standing Idaho case law, the district court’s interpretation is

unreasonable and contrary to law, and its admission of evidence based upon its erroneous legal conclusions constituted reversible error.<sup>13</sup> As properly interpreted, damages caused during construction are not recoverable as severance damages in a condemnation action.

**1. The District Court's Erroneous Interpretation of § 7-711(2)(a) is Contrary to Well-established Standards for Determining Severance Damages in Condemnation Actions and is Directly Contrary to the Requirements of § 7-712.**

The district court's conclusion that Brooke View could seek, and eventually recover, severance damages for physical injury or damage caused to its Entry Walls during construction of the Project is contrary to the established standards for determining severance damages, and it effectively invalidates the requirements Idaho Code § 7-712. Such an interpretation is clear error.

Idaho Code § 7-712 provides that the determination of just compensation and severance damages must be made as of the date of the summons. *See* Idaho Code § 7-712. The express language of § 7-712 provides:

[f]or the purpose of assessing compensation and damages, the right thereto shall be deemed to have accrued *at the date of the summons*, and its actual value, *at that date*, shall be the measure of compensation for all property to be actually taken, and the basis of damage to property not actually taken, but injuriously affected, in all cases where such damages are allowed, as provided in the last section.

---

<sup>13</sup> During the proceedings before the district court, ACHD argued that the language of § 7-711(2)(a) was unambiguous in that Idaho's eminent domain statute read as a whole does not allow for the recovery of damages alleged to have accrued during construction. *See* CR 298-99. The district court disagreed with ACHD's interpretation, concluding that the language of § 7-711(2)(a) allowed Brooke View to recover severance damages for activities, events, and damages that occurred during construction of ACHD's project. *See* CR 6591, n.3. It remains ACHD's position that the statute is unambiguous because the district court's interpretation is unreasonable and inconsistent with Idaho's eminent domain statute and this Court's body of case law as a whole. However, ACHD does acknowledge that there are two competing interpretations before the Court, such that canons of statutory construction may be useful tools for this Court in determining the meaning of § 7-711(2)(a).

Idaho Code § 7-712 (emphasis added). The Idaho Supreme Court has made clear that this statute means what it says. *State ex rel. Moore v. Bastian*, 97 Idaho 444, 449-50, 546 P.2d 399, 404-05 (1976) (“In Idaho, the value of the property actually taken in an eminent domain proceeding and the damages which will accrue to the remaining property by reason of the severance are computed as of the date of the issuance of the summons, not the date that the property is actually taken.”); *Lobdell v. State ex rel. Bd. of Highway Dirs.*, 89 Idaho 559, 566, 407 P.2d 135, 139 (1965) (“I.C. § 7-712 provides that the time for assessment of damages in an ordinary condemnation action is to be determined as of the date of the summons.”).

There is no discretion permitted by § 7-712; rather, the language of the statute speaks in mandatory terms requiring that damages “*shall* be deemed to have accrued” as of the date of the summons and the value of the property as of the date of summons “*shall* be the measure of compensation.” Idaho Code § 7-712 (emphasis added). Similarly, § 7-712 also provides that “[t]he compensation and damages awarded *shall* draw lawful interest from the date of the summons.” *Id.* (emphasis added). In clear mandatory language, this statutory scheme establishes the date of the summons as the date for determining just compensation including severance damage.<sup>14</sup>

---

<sup>14</sup> Idaho’s statutory requirement that property must be valued as of the date of the summons is set forth in the Idaho Civil Jury Instructions. See IDJI2d 7.05, 7.05.1, 7.05.5, 7.07, 7.16, and 7.18. Idaho’s jury instructions provide that “[J]ust compensation means the fair market value of the property taken, measured as of [date].” IDJI2d 7.05. Subsection 7.05.1 states, “Just compensation means the fair market value of the property taken, including all permanent improvements thereon, measured as of [date].” IDJI2d 7.05.1. Additionally, for partial takings, like in the present case, Idaho’s jury instructions provide that “[j]ust compensation means the fair market value of the property taken, including all permanent improvements thereon, together with any direct damages suffered by the defendant, all measured as of [date].” IDJI2d 7.05.5; see *id.*, comments (“In a direct condemnation action, the date inserted in the instruction will be the date of issuance of the summons - I.C. § 7-712.”); IDJI2d 7.07 (fair market value determination to be assessed as of date of summons, as required by I.C. § 7-712); IDJI2d 7.16 (Just compensation is to be determined based upon before-and-after valuation, measured as of date of summons).

Moreover, § 7-711 cannot be read in isolation without § 7-712, as the district court did in its interpretation. Idaho Code § 7-712 must be read together with § 7-711 because § 7-712 provides specific requirements as to the manner in which severance damages must be calculated, and it specifically cross-references § 7-712. Thus a reading of one statute without the other results in an incomplete, and inaccurate, interpretation of Idaho's requirements for severance damage awards.

Reading the two statutes together leads to the logical conclusion that severance damages under § 7-711 cannot include damages caused *during* the construction of the project because in condemnation actions, the summons always comes before the construction of the improvement. This is so because the complaint and summons are filed before the condemnor may take possession of the property required for the public project and begin construction. Idaho Code § 7-721 (providing that condemnor may seek lawful possession of the property being condemned “[a]t any time after an action for condemnation has been commenced under the provisions of this chapter and after the defendant has made an appearance”). Further support of this interpretation comes from the plain language of § 7-711(2)(a), which uses the phrase “in the manner proposed by the plaintiff,” and not “in the manner constructed” or “in the manner built.” Thus, to give full meaning to both § 7-711(2)(a) and § 7-712, the proper interpretation must be that evidence of actual construction activities that occur after the date of summons may not be considered as part of severance damages. To conclude otherwise would undermine the entire framework for severance damage awards in condemnation actions and invalidate the requirements of § 7-711(2)(a) and § 7-712.

Additionally, words in one place in a statute usually have the same meaning in every other place in the statute. *St. Luke's Magic Valley Reg'l Med. Ctr., Ltd v. Bd. of Cty. Comm'rs of Gooding Cty.*, 149 Idaho 584, 589, 237 P.3d 1210, 1215 (2010). In § 7-711, the same language

“the construction of the improvement proposed by plaintiff” appears in subsection (3) of the statute. That portion of the statute addresses special benefits that the taking may have on the remainder parcel. There is no conceivable way that the acts of construction and the disruption, dust, and inconvenience that construction work typically brings would somehow benefit the remainder property. Thus, the word “construction” must mean the existence of the improvement or the structure as proposed by the condemnor, because that is what could result in a benefit to the remainder parcel—not the construction work required to build the improvement. Carrying the argument to its logical conclusion, if the term “construction” means the existence of the improvement or structure in subsection (3) of § 7-711, then it must also have the same meaning in subsection (2)(a).

The district court’s ruling to the contrary, which allowed Brooke View to present evidence of, and recover severance damages for, activities that occurred after the date of the summons and during construction and during construction, is in direct conflict with the plain language of the statute read as a whole. The district court erred as a matter of law in its interpretation of Idaho Code § 7-711(2)(a), and ACHD respectfully requests this Court reverse that error.

**2. The District Court’s Interpretation of § 7-711 is Contrary to Long-Standing Idaho Case Law That Precludes Severance Damages for Impacts or Damage Occurring During Construction.**

In addition to being contrary to the plain language of §§ 7-711 and 7-712, the district court’s interpretation of § 7-711(a)(2) also runs afoul of long-standing Idaho case law interpreting these very provisions. *E.g., Campbell*, 34 Idaho at 604-05, 202 P. at 1066 (holding that damages caused during construction of respondent’s railroad accrued long after the date of summons were not compensable in the condemnation action but “could be recovered only in a separate action”); *Idaho-Western*, 20 Idaho at 581, 585-86, 119 P. at 64, 66 (affirming a

severance damage award for the impact the existence of the specific improvement proposed by the condemnor—a rail line—had on the remainder property, not for the acts the condemnor or its agents undertook during construction of the rail line).

**a. The Case of *Oregon-Washington Railroad & Navigation Company v. Campbell* Precludes Severance Damage Awards for Construction Activities that Take Place After the Date of Summons.**

The *Campbell* case is squarely on point with this case and further demonstrates that the district court's legal conclusions as to the permissible scope of damages under § 7-711(2)(a) were in error. 34 Idaho 601, 202 P. 1065. In *Campbell*, the Oregon-Washington Railroad & Navigation Company ("Railroad") filed a condemnation action against the Campbells to condemn a right of way through their property. *Id.* at 603, 202 P. at 1065. The Campbells sought compensation for the value of land taken as well as severance damages for lands not taken. *Id.* Based upon an application by the Railroad, the district court appointed a commission to determine the amount of just compensation owed to the Campbells. *Id.* The Commission issued its decision, but the Railroad refused to accept it. *Id.* Instead, the Railroad deposited the amount determined by the commission into the district court so that it could take possession of the property and move forward with construction. *Id.* After the railroad had been constructed across the Campbells' land, a jury was impaneled, and the case tried. The jury returned a verdict awarding compensation for the land taken but no award of severance damages for the remainder property. *Id.*, 202 P. at 1066. The Campbells appealed.

On appeal, the Campbells argued was that the district court committed error in rejecting the Campbells' proffer to prove certain damages to the remainder property caused by the actual construction of the railroad. *Id.* at 604, 202 P. at 1066. They claimed that the construction activities released hazardous materials poisoning a creek running through their property. *Id.* Addressing this argument, the court reviewed and applied the then applicable condemnation

statutes as to severance damages—statutes that share the same language as §§ 7-711(2)(a) and § 7-712.

First, the court quoted the relevant portion of C.S. § 7414, which is identical to the relevant portions of § 7-711(1)(a) at issue in the present case, observing that “the jury was required to ascertain and assess the damages accruing ‘to the portion not sought to be condemned, by reason of its severance from the portion sought to be condemned, and the construction of the improvement in the manner proposed by the plaintiff.’” *Id.* The court then quoted the relevant portion of C.S. § 7415, which is identical to the current § 7-712. Applying these two statutes, the court held that the damages complained of “accrued long after the date of the issuance of summons, and were not damages which, at that date, could have been anticipated as a result of the construction of respondent’s railroad, and therefore were not deemed by law to have accrued at that date.” *Id.* at 605, 202 P. 1066 (citing *LEWIS, EMINENT DOMAIN* (3d ed.) § 822). The court therefore concluded that if respondent was liable for the poisoning of Campbell’s stream caused by the construction of the railroad project, such damages “could be recovered only in a separate action.” *Id.* The court’s decision in *Campbell* is binding precedent that damages that accrue during construction and after the date of summons are not recoverable in a condemnation action.

The *Campbell* case has significant similarities to the present case. First, in both instances the damage complained of occurred during construction and after the date of summons. *Id.* Second, in both the *Campbell* case and the present case, the construction of the project had been completed as of the time of trial such that the full impact of the damage purportedly caused by the construction activities could be seen at trial. *Id.* at 604-05, 202 P. at 1066. In fact, the jury in both cases visited the property and saw first-hand the impacts of the projects. *Id.* at 604-05, 202 P. at 1066; *see* CR 2215. Despite these similarities and the express ruling by the Supreme Court,

the district court reached the opposite conclusion. The district court's ruling in this case cannot be reconciled with the decision in *Campbell* and is therefore properly reversed. *See State v. Climer*, 127 Idaho 20, 22 896 P.2d 346, 348 (Ct. App. 1995) (noting that the doctrine of *stare decisis* applies to the interpretation and construction of statutes).

**a. Under the *Idaho-Western* case, § 7-711(2)(a) Does Not Permit Severance Damages for Injury Caused During Construction.**

In addition to being at odds with the court's decision in *Campbell*, the district court's conclusion that Brooke View could recover damages that occurred during project construction is also contrary to the Idaho Supreme Court's decision in *Idaho-Western*, 20 Idaho at 568, 119 P. at 60. In that case, a railway company brought a condemnation action to acquire a 100-foot wide strip of land on the southwest side of the landowner's premises to construct a rail line. *Id.* at 573, 119 P. at 61. The property at issue involved what was then known as the Coeur d'Alene College. *Id.*

On appeal, the Supreme Court analyzed the language of Section 5220 of the Revised Codes, which is identical to the current § 7-711(2)(a), and specifically discussed the provision at issue in the present case—"the damages which will accrue to the portion not sought to be condemned, by reason of its severance from the portion sought to be condemned, and the construction of the improvement in the manner proposed by the plaintiff." *Id.* at 580-82, 119 P. at 64. In its analysis, the court noted, "that statute specifically authorizes taking into consideration 'the construction of the improvement in the manner proposed by the plaintiff.'" *Id.* at 581, 119 P. at 64. The court explained that this provision "clearly authorizes the landowner to introduce evidence showing *the damage and injury that the particular improvement or structure for which the condemnation is sought will cause to the remainder of his property.*" *Id.* (emphasis added). In order to permit the landowner to present such evidence, the court further



explained that the condemnor was required to disclose the purpose for which the property is sought “and the general nature and character of the improvement or structure he expects to erect.” *Id.* at 581-82, 119 P. at 64. The entire focus of the court’s interpretation of what is now § 7-711(2)(a) centered on the specific “improvement or structure” that was being proposed, the particular character of that “improvement or structure,” and the “damage and injury that the particular improvement or structure will cause to the remainder of [the landowner’s] property.” *Id.* By contrast, nothing in the court’s analysis suggests that the statutory language of § 7-711(2)(a) implicates damages caused by the physical act of constructing the railway.

Additionally, the court’s interpretation of Section 5220 as applied to the facts of that case further supports the conclusion that the statute’s reference to “the construction of the improvement in the manner proposed by the plaintiff” means the structure or improvement to be built on the property being taken. In its analysis, the court acknowledged that severance damages might exist because “[a] result of the construction and operation of that [railroad] line will be noise from passing trains and locomotives.” *Id.* at 585, 119 P. 66. In other words, the court’s consideration of severance damages was based upon the impact the existence and operation of the structure proposed by the condemnor had on the remainder property—not for the acts the condemnor or its agents did or did not undertake *during* construction of the rail line. Thus, the district court’s interpretation of § 7-711(2)(a) directly conflicts with that of *Idaho-Western* and must be reversed. *See Climer*, 127 Idaho at 22, 896 P.2d at 348.

**b. Consistent with *Campbell* and *Idaho-Western*, Numerous Other Idaho Cases Have Applied § 7-711(2)(a) to Mean the Structures or Improvements to Be Built and Not to Physical Construction Activities and Alleged Damage Caused During Those Activities.**

Numerous other cases are consistent with *Campbell* and *Idaho-Western*, demonstrating that severance damage awards arise from the existence of the particular structure to be built as part of the project—not from the physical acts of construction. These include:

- *Bastian*, 97 Idaho at 447, 546 P.2d at 402 (condemnation action in which term “construction” was used to mean the structure built—“The taking of defendants’ property through the process of eminent domain and the consequent damage to the remaining property had no necessary relationship to the median *construction*. The placement of the medians and any consequent injury such might cause are the results of an exercise of the State’s police power rather than a taking under its power of eminent domain.” (emphasis added));
- *State ex. rel. Burns v. Blair*, 91 Idaho 137, 138-140, 417 P.2d 217, 218-220 (1966) (condemnation action in which the Idaho Supreme Court analyzed severance damages based upon the structure that would be located on the property, and not based upon the physical act of construction);
- *State ex. rel. Rich v. Fonburg*, 80 Idaho 269, 279-280, 328 P.2d 60, 65-66 (1958) (eminent domain proceeding in which Idaho Supreme Court applied the severance damage language of § 7-711 in reference to the structure built as part of the project and not to the physical act of construction, stating that the severance damages would “consist of [1] the reasonable market value of the land taken, together with all improvements thereon located and taken in this proceeding, [and 2] severance damage to the remainder, *through which the road runs* due to its severance from the whole, which severance damage would include, among other damage sustained, the curtailment and restriction of access to highway No. 95, as formerly enjoyed, and access to the railroad as enjoyed prior to the construction of the new road.” (emphasis added));
- *Hughes v. State*, 80 Idaho 286, 290 & 296, 328 P.2d 397, 398 & 402 (1958), overruled on other grounds by *Covington v. Jefferson Cty.*, 137 Idaho 777, 53 P.3d 828 (2002) (inverse condemnation action in which Idaho Supreme Court discussed “construction” of project by way of reference to the structures being built—there the “construction of a new bridge”—and not the physical act of constructing the project itself);
- *State ex rel. Rich v. Dunclick, Inc.*, 77 Idaho 45, 286 P.2d 1112, 1116-17 (1955) (condemnation action in which term “construction” within context of § 7-711 was used to refer to the structure built as part of the project, and not the actual construction work to build the project – “Convenience of access to a highway, formerly enjoyed by appellant, and impaired by reason of the new *construction*, could be considered by the jury with the other testimony in fixing the amount of damages sustained[,]” and “The jury should have been instructed that nothing could be deducted from damages sustained to the remainder

because of claimed special or direct benefits by *the construction of the improvement in the manner proposed.*” (emphasis added));

- *Powell v. McKelvey*, 56 Idaho 291, 302-18, 53 P.2d 626, 630-37 (1935) (holding that the construction of a subway in the middle of the street did not constitute a compensable taking and referencing the term “construction” to refer to the structure that would be built or the manner in which such structure would be used).

These cases demonstrate how the Supreme Court has consistently interpreted the term “construction” as it relates to severance damage awards to mean the structure or improvement being built as part of the project, and not the physical acts that occur during construction.

To be sure, if the term “construction” is interpreted to mean acts occurring during construction, as applied by the district court, it would preclude landowners from recovering severance damages that are typically awarded for the existence of the structure of the improvement, as proposed, on the property taken. This is because the term “construction” as used in Code § 7-711(2)(a) cannot at the same time mean both the acts of construction and the thing that is proposed to be constructed, as these are two different meanings of the same word. *See Morales-Izquierdo v. Dep’t of Homeland Sec.*, 600 F.3d 1076, 1083 (9th Cir. 2010) (*overruled in part on other grounds by Garfias-Rodriguez v. Holder*, 702 F.3d 504, 516 (9th Cir. 2012) (it is a fundamental principle of statutory interpretation that “a statute can have only one meaning.”); *see also* DICTIONARY.COM, <http://www.dictionary.com/browse/construction> (last visited June 6, 2016) (“construction” can mean either “the act or art of constructing” or “something that is constructed; a structure”).

If the district court’s interpretation of § 7-711(2)(a) is affirmed, then the phrase “the construction of the improvement in the manner proposed by the plaintiff” can *only* mean that severance damages are those damages arising from the physical acts of construction. A landowner would then be precluded from also recovering severance damages resulting from the structure that is proposed to be built on the property taken or the contemplated use or operation

of that structure. Were this Court to uphold the district court's interpretation of § 7-711(2)(a), it would overrule myriad decisions of this Court that have upheld severance damage awards for the existence of the proposed structure or improvement. *See, e.g., Idaho-Western*, 20 Idaho at 584-85, 119 P. at 65 (concluding that the prior version of § 7-711(2)(a) authorizes the landowner to introduce evidence showing the damage and injury the proposed structure or improvement will cause to the remainder property); *see also Burns, Fonburg, Hughes, Powell, Bastian, Dunclick* cases, *supra*. Such a result cannot stand, and the district court's interpretation must be rejected.

**3. Idaho Code § 7-711 Does Not Permit A Landowner to Recover for Every Type of Damage Caused to His or Her Property As Part of Just Compensation.**

The rulings discussed above are consistent with the entire body of Idaho eminent domain decisions which consistently hold that under Idaho's Constitution and eminent domain statutes, a landowner is *not* entitled to receive compensation for every type of damage to his or her property. *See, e.g., State, Idaho Transp. Bd. v. HI Boise, LLC*, 153 Idaho 334, 338, 282 P.3d 595, 599 (2012) (upholding district court's grant of summary judgment, concluding that "not all government impairments of an access right are compensable"); *Moon v. N. Idaho Farmers Ass'n*, 140 Idaho 536, 541, 96 P.3d 637, 642 (2004) (holding that "before an owner is entitled to compensation for a violation of Article I, § 14 of the Idaho Constitution, his property must be 'taken' and not merely 'damaged'").

In its decisions, the Court has defined what is and is not legally compensable in condemnation cases in Idaho and has specifically concluded that certain forms of damages are barred as a matter of law.

- Damages that are barred by law or that are not caused by the taking of a compensable property right are not recoverable in a condemnation action. *Fonburg*, 80 Idaho at 277-78, 328 P.2d at 64.
- No compensable taking occurs and no damages result where a right of access "is not destroyed or substantially impaired and the remaining

access is reasonable.” *HI Boise*, 153 Idaho at 338, 282 P.3d at 599; *see also Merritt v. State*, 113 Idaho 142, 145, 742 P.2d 397, 400 (1987).

- Damages caused by the restriction of access or the diversion of traffic held not recoverable. *Bastian*, 97 Idaho at 447, 546 P.2d at 402; *Brown v. City of Twin Falls*, 124 Idaho 39, 43, 855 P.2d 876, 880 (1993).
- Damages resulting from lost business profits held not recoverable. *Bastian*, 97 Idaho at 448, 546 P.2d at 403; *State ex rel. Rich v. Halverson*, 86 Idaho 242, 247, 384 P.2d 480, 483 (1963).
- Damages caused from claims of loss of visibility held not recoverable. *HI Boise*, 153 Idaho at 341-43, 282 P.3d at 604.
- Damages caused by the temporary obstruction of access, unless the action is unreasonable, unnecessary, arbitrary or capricious held not recoverable. *Hadfield v. State ex rel. Burns*, 86 Idaho 561, 567, 388 P.2d 1018, 1022 (1963).
- Future claims for damages based on possible negligent operation of public project are improper and not recoverable. *Pac. Nw. Pipeline Corp. v. Waller*, 80 Idaho 105, 109, 326 P.2d 388, 390-91 (1958).
- Damages that are contingent, speculative or remote are not recoverable. *Palmer v. Highway Dist. No. 1, Bonner Cty.*, 49 Idaho 596, 602, 290 P. 393, 394 (1930).
- Noise damages “should not be considered as an element of damage in the ordinary case.” *Idaho-Western*, 20 Idaho at 585-86, 119 P. at 66.
- Damages that are shared in common with the rest of the general public are not recoverable. *Canady v. Coeur d’Alene Lumber Co.*, 21 Idaho 77, 90, 120 P. 830, 834 (1911).
- Damages must be limited to those losses that arise directly from the taking itself and not from other aspects of the project. *HI Boise*, 153 Idaho at 339-42, 282 P.3d at 600-03; *Mabe v. State*, 86 Idaho 254, 259-60, 385 P.2d 401, 404 (1963).
- Damages caused to remainder property during construction of the project and that had accrued after the date of summons is not compensable in a condemnation action and must be brought in a separate action. *Campbell*, 34 Idaho at 604-05, 202 P. 1066.

The damages sought, and ultimately recovered, by Brooke View in this case for physical injury caused to the Entry Walls during construction are not compensable damages in a condemnation case, and the district court erred in concluding as a matter of law that Brooke View could pursue and recover such damages.

**4. Cases In Other Jurisdictions Are In Accord with *Campbell* and *Idaho-Western* and Require That Damage Caused During Construction Are Not Compensable In A Condemnation Action.**

Other state supreme courts in jurisdictions with statutes that mirror the language of Idaho Code §§ 7-711 and 7-712 have addressed whether severance damages for damages occurring during construction are compensable in a condemnation action and have held that they are not. Such damages sound in tort, not condemnation.

The case *City of Anchorage v. Scavenius*, 539 P.2d 1169 (Alaska 1975) is particularly instructive. There, the City of Anchorage filed an action to condemn permanent seven-foot-wide utility easements and temporary thirty-foot-wide construction easements for the placement of a water transmission main across defendants' property. *Id.* at 1171. The defendants contested the amount of just compensation offered by the city and contended that pavement on the remainder portion of their property was damaged by the manner in which the water main was installed. *Id.*

Prior to trial, the defendants indicated that they were going to present a substantial claim for pavement damage, which they alleged occurred at the time that the water main was installed. *Id.* at 1177. The city sought an order preventing consideration of the pavement damage claim at trial on the ground that such a claim alleged tort, rather than condemnation, damages. *Id.* Alternatively, the city argued that the owners should be required to file a counterclaim, in tort, for such pavement damage. *Id.*

The trial court denied the city's request, and the case proceeded to trial. The defendants thereafter put on evidence at trial that a parking lot on their property, not subject to the take, was damaged as a result of the manner in which the water main was installed. *Id.* Given the court's prior ruling permitting the defendants to litigate the pavement damage claim, the city had to meet defendants' causation evidence with evidence of its own. *Id.* The city therefore argued that the parking lot's poor foundation was the cause of the damage, not the construction of the water

main. *Id.* The jury sided with the city. *Id.* After the verdict, the trial court denied the city's motion for fees and costs based upon its earlier conclusion that the claim sounded in condemnation, not tort. The city appealed the denial of its request for fees and costs. *Id.* The Alaska Supreme Court therefore had the occasion to address the same issue that is before this Court—under the very same statutory framework.

The Alaska Supreme Court held, “[w]hen the damage claim is based upon the allegedly negligent construction of the improvement, however, any loss incurred cannot properly be considered a part of the taking.” *Id.* The court reasoned, “[t]his is so because the date set forth by statute when the valuation of the owner's loss is to be measured is generally fixed at a time prior to the actual construction of the improvement.” *Id.* at 1177-78. In support of this conclusion, it quoted Alaska Statutes § 09.55.330, which mirrors the language of Idaho Code § 7-712. *Compare* Alaska Stat. § 09.55.330 *with* Idaho Code § 7-712. The Alaska Supreme Court went on to state the obvious, “[i]t is presumed that the condemnor will build the called for improvement without negligence and the just compensation award is to be determined based on that assumption.” *Id.* at 1178. The court then clarified, however, “[i]f, in fact, the condemnor's actions outside the inherent scope of the taking result in additional injury to the owner, he may be able to bring an action in tort against the condemnor.” *Id.* The same analysis and conclusion applies to the Idaho statutory framework.

The Alaska Supreme Court then focused directly on the language that is at the center of this appeal. Alaska's takings statute, just like Idaho's, allows a condemnee to recover from a condemnor “damages which will accrue to the portion not sought to be condemned by reason of its severance from the portion sought to be condemned, and the construction of the improvements in the manner proposed by the plaintiff.” *Compare* Alaska Stat. § 09.55.310(a) *with* Idaho Code § 7-711(2). The court noted that this portion of Alaska's statute “exclude[s]

consideration of tortious injuries from condemnation damages.” *Id.* at 1178. It also said, “[o]bviously, the condemnor proposes or intends non-negligent construction in every case.” *Id.*

After its analysis of the Alaska statute, the Alaska Supreme Court reversed and remanded the trial court’s decision as to costs and fees because it held that “[t]he issue raised by the defendants concerning damages to the parking lot pavement was one involving a charge of negligent construction or negligent failure to properly repave the areas affected by the construction activity.” *Id.* Particularly relevant here, the court concluded, “[p]ursuant to the City’s request, the trial court should have required the owners here to file a counterclaim in tort.” *Id.*

The Alaska Supreme Court relied, in part, on a Montana Supreme Court decision which came to the same conclusion after reviewing the Montana statutory framework governing condemnation—which, like Alaska, also mirrors Idaho Code §§ 7-711 and 712. *Id.* at 1178-79 (quoting *Freaser*, 74 P. 407):

When damages are appraised prior to the construction of the improvements for which the land is condemned, the estimate should be made on the assumption that the improvements will be properly constructed; and, if they are constructed pending the condemnation proceedings, *the rule under this statute should be the same.* The actual effect of the properly constructed improvements in the manner proposed by plaintiff as to the larger parcel should control the appraisal. If the improvements are improperly or negligently constructed, no additional damage should be given for this reason.

*Freaser*, 74 P. at 408.

A similar conclusion was reached in *Division of Administration, Department of Transportation v. Hillsboro Ass’n, Inc.*, 286 So. 2d 578, 579 (Fla. Dist. Ct. App. 1973). In that case, the Florida Court of Appeals held that severance damages in a condemnation action does not include damages “as a result of the manner in which the construction is performed.” *Id.*



The court stated that “[t]he injury or damage caused is *damnum absque injuria* where the construction is lawful and performed without negligence or misconduct.” *Id.* However, “[i]f the damages result from negligence or misconduct in performing the construction, they would be the proper subject of a separate action in tort (where sovereign immunity is waived) or the proper subject of the claims bill (as was done in this case.” *Id.* Thus the court concluded that such damages that occur during construction “are not properly to be considered in an eminent domain proceeding.” *Id.*

Learned Treatises addressing the same issue have come to the same conclusion. *See* 4A-14 NICHOLS ON EMINENT DOMAIN § 14.03 (2015) (“Some damages, although they arise as a consequence of the taking, are not compensable as part of the just compensation award in the condemnation proceeding, but may be recoverable in a separate action on theories of tort, contract, trespass, nuisance, and the like. For example, acts of trespass by the contractor, although a ‘but for’ consequence of the public project necessitating the taking, are generally not compensable as part of the eminent domain proceeding.”); *see also* 29A C.J.S. Eminent Domain § 167 (2016) (“In proceedings to condemn land or to recover compensation for land already taken or injured, no damages are included except such as necessarily arise from a lawful taking and a proper construction and operation of the improvement. Damages caused by willful, negligent, or improper acts in the construction of an improvement . . . are not recoverable in the condemnation proceedings, the remedy, if any, of the landowner in such cases being an independent action for damages or a legislative claims bill.”) (citing *Waller*, 80 Idaho 105, 326 P.2d 388).

**5. The District Court's Interpretation of § 7-711(2)(a) Invalidates 30 Years of Eminent Domain Case Law Governing Attorney Fee Awards in Condemnation Actions.**

The district court's interpretation would not only undermine Idaho's entire body of case law governing severance damage awards, it would also undermine 30 years of this Court's rulings on attorney fee awards in condemnation actions and make it virtually impossible for any governmental agency to satisfy the standards set forth in *Acarrequi*, 105 Idaho 873, 673 P.2d 1067, and its progeny cases.

It has long been held that the standard for awarding attorney fees in condemnation actions differs from the typical standard applied in other cases. *Grathol*, 158 Idaho at 51, 343 P.3d at 493 (citing *Acarrequi*, 105 Idaho at 876-78, 673 P.2d at 1070-72). In the typical case, attorney fees may be awarded if the action was brought and pursued "frivolously, unreasonably or without foundation." *Acarrequi*, 105 Idaho at 876-77, 673 P.2d at 1070-71. However, because a governmental entity will rarely be found to have initiated a condemnation action "frivolously, unreasonably or without foundation," this Court created a separate rule for awarding attorney fees in such cases. *Id.*

Under the rule announced in *Acarrequi*, cost and attorney fee awards in condemnation actions focus on whether the condemnor made a reasonable pre-trial offer of settlement. *Id.* at 877, 673 P.2d at 1071. A pre-trial offer of settlement is considered reasonable if it is at least 90% of the ultimate jury verdict and made within "a reasonable period after the institution of the action" and not "on the courthouse steps an hour before trial." *Id.* at 878, 673 P.2d at 1072.<sup>15</sup>

---

<sup>15</sup> The *Acarrequi* case also established additional factors for the district court to consider. Those factors consisted of (1) whether the condemnee contested the allegations of public use and necessity, (2) the outcome of any hearing on such a challenge, (3) whether the condemnor made any modifications in the plans or designs of the project that resulted from the landowner's challenge, and (4) whether the condemnee voluntarily granted possession of the property pending the resolution of the just compensation issue. *Id.* at 878, 673 P.2d at 1072.

The rules announced in *Acarrequi* were further developed in *State ex rel. Ohman v. Ivan H. Talbot Family Trust*, 120 Idaho 825, 820 P.2d 695 (1991) (“*Talbot*”), *State ex rel. Smith v. Jardine*, 130 Idaho 318, 940 P.2d 1137 (1997), and *Grathol*, 158 Idaho 38, 343 P.3d 493.

In creating this standard for cost and attorney fee awards in condemnation actions, the Idaho Supreme Court recognized that while

the ultimate jury award is a far from perfect point of departure in attempting to gauge the reasonableness of the positions of the parties, . . . given the entire theory of eminent domain, *i.e.*, that a jury will determine the just compensation to be awarded the condemnee, we must, it seems, assume that a jury verdict at least approximates the fair market value of the property taken and the damages which will result to the remainder.

*Acarrequi*, 105 Idaho at 878, 673 P.2d at 1072. Thus, the goal behind the *Acarrequi* factors is to determine the reasonableness of the condemnor’s settlement offer based upon how that offer compares to the jury’s ultimate determination of just compensation—which, in turn, is based upon the fair market value of the property taken. If the government’s fair-market-value based offer is timely and within 10% of the jury’s fair-market-value based verdict, then the government may be found to be the prevailing party and be relieved of having to pay the landowner’s costs and attorney fees.<sup>16</sup>

In the present case, ACHD offered the condemnee Brooke View the sum of \$7,738.47 and then \$8,512.32 before the Complaint was filed. *See* CR 6591. The jury found the amount of “just compensation” for the taking to be \$5,291.50—not including the jury’s severance

---

<sup>16</sup> The condemnor may also, in the “extreme and unlikely” case, recover attorney fees from the landowner if the condemnor satisfies the standards set forth in *Grathol*, 158 Idaho at 51-52, 343 P.3d at 493-94.

damages/cost-to-cure award for damage allegedly caused during construction.<sup>17</sup> The standard set in *Acarrequi* and confirmed in *Grathol* was thus met by ACHD.<sup>18</sup>

However, the jury also awarded \$141,000 as a “cost to cure” the damages allegedly caused to the Entry Walls during construction of the Project. The additional sums awarded by the jury are not properly part of the amount of just compensation owed under § 7-711(2)(a). Rather, those additional sums represented the jury’s evaluation of the physical damage that was allegedly caused to the Entry Walls during the acts of construction. Accordingly, Brooke View’s claims for damages allegedly caused during construction—and after the date of summons—had no relevance to the amount to be awarded to Brooke View as part of the taking of its property, but rather should have been evaluated and litigated in a separate action. *See Campbell*, 34 Idaho at 604-05, 202 P. at 1066.

The significance of the district court’s error with respect to the *Acarrequi* standards is that the district court’s improper interpretation of § 7-711(2)(a) created a scenario where it would frequently be impossible for the condemnor to satisfy the *Acarrequi* factors. Under the district court’s interpretation, the landowner is permitted to hyper-inflate the jury’s verdict with damages occurring during construction, whereas the condemnor’s *Acarrequi* offer is based upon a pure fair market value and damages analysis. When the condemnor makes its *Acarrequi* offer, the condemnor may not be aware of—and cannot legitimately assess—damage that might occur

---

<sup>17</sup> The district court awarded an additur \$2,098.53 to the jury’s verdict in order to increase the jury’s award to the amount of the Brooke View Property’s assessed value for a total value of the property take of \$7,390.21. CR 5758. If this figure is used as the amount of the jury verdict for purposes of the *Acarrequi* analysis, ACHD still satisfies the requirements.

<sup>18</sup> At trial, ACHD conceded that the amount of just compensation owed to Brooke View was \$8,512.32. CR 4901. If this figure is used as the amount of the jury’s verdict for purposes of the *Acarrequi* analysis, ACHD still satisfies the requirements.

during construction, because construction will likely not yet have occurred. A condemnor cannot fairly be expected to include in its *Acarrequi* offer damages that it cannot contemplate or calculate. Additionally, a jury's verdict that improperly includes damages caused during the construction of the project cannot be a fair approximation of the fair market value of the property taken and the resulting damages, as contemplated by *Acarrequi*. If a jury is allowed to consider what occurs during the construction, the verdict will be based upon unknown elements and information the condemnor was not privy to when it made its good faith pre-trial settlement offer, and it will be supported by elements other than what constitutes "just compensation" and what is contemplated by *Acarrequi*. It might occur that a condemnor is ultimately able to satisfy the *Acarrequi* standards under the district court's interpretation, but if it did—as ACHD did in this case—it would only be because it offered a greater amount than what is properly recoverable in a condemnation action.

The effect of such an interpretation is not only to raise the bar to make it nearly impossible for a condemnor to satisfy the *Acarrequi* standards, but it will also render meaningless the *Acarrequi* analysis and undo more than 30-years of eminent domain case law. The district court's interpretation is incorrect and should not be permitted to stand.

**6. The District Court's Interpretation of § 7-711(2)(a) Effectively Eliminates the Design Immunity Afforded to Public Entities.**

Statutes should be construed *in pari materia*. *City of Sandpoint v. Sandpoint Indep. Highway Dist.*, 139 Idaho 65, 69, 72 P.3d 905, 909 (2003). Statutes are *in pari materia* if they relate to the same subject. *Id.* Conflicting statutes pertaining to the same subject are, so far as reasonably possible, to be construed in harmony with each other. *State v. Barnes*, 133 Idaho 378, 380, 987 P.2d 290, 292 (1999).

Idaho Code §§ 7-711(2)(a) and 6-904(7) both address plans for the construction of improvements—§ 7-711(2)(a) with regard to a governmental entity’s proposed improvements, and § 6-904(7) with regard to a governmental entity’s plan or design for “highways, roads, streets, bridges, or other public property.” *Compare* Idaho Code § 7-711(2)(a) *with* § 6-904(7).<sup>19</sup> Section 7-711(2)(a) allows recovery of severance damage for “the construction of the improvement in the manner proposed by the plaintiff”, while § 6-904(7) provides a governmental entity immunity for a claim “aris[ing] out of a plan or design for construction or improvement.” Indeed, for a condemnee like Brooke View to recover severance damages under § 7-711(2)(a), it must concede that the condemnor has a plan or design for the construction of the improvement. This is because the condemnee must prove damage based upon “the construction of the improvement *in the manner proposed by the plaintiff*.” Idaho Code § 7-711(2)(a) (emphasis added).

The only way to read Idaho Code §§ 7-711(2)(a) and 6-904(7) in harmony is to interpret § 7-711(2)(a) to apply to the existence of the improvement in the manner proposed by the plaintiff (consistent with the requirements of § 7-712)—not to the acts involved in the physical construction of the improvement. This is because § 6-904(7) provides a governmental entity immunity for the construction of an improvement that arise out of a design prepared in

---

<sup>19</sup> Idaho Code § 6-904(7) provides:

A governmental entity and its employees while acting within the course and scope of their employment and without malice or criminal intent shall not be liable for any claim which: . . .

7. Arises out of a plan or design for construction or improvement to the highways, roads, streets, bridges, or other public property where such plan or design is prepared in substantial conformance with engineering or design standards in effect at the time of preparation of the plan or design or approved in advance of the construction by the legislative body of the governmental entity or by some other body or administrative agency, exercising discretion by authority to give such approval.

substantial conformance with engineering and design standards. Read otherwise, and in the manner adopted by the district court, § 7-711(2)(a) would grant the very damages for which § 6-904(7) provides immunity. Instead, § 7-711(2)(a) must be read to address what § 6-904(7) does not—severance damage created by the impact, if any, the proposed improvement or structure may have on the remainder parcel. This is particularly so, because § 7-711(2)(a) addresses the existence of the structure “in the manner proposed”—not in the manner constructed.<sup>20</sup>

In this case, the district court eliminated ACHD’s right to assert design immunity against Brooke View’s claim of property damage allegedly caused during construction of the improvement proposed by ACHD. After the district court denied ACHD’s Third Motion for Summary Judgment and held that no evidence of negligence would be admissible at trial, *see* CR 763,<sup>21</sup> ACHD moved for summary judgment under the Idaho Tort Claim Act. *See* CR 1302-07; 1386-88. This motion was justified, even compelled, because if ACHD constructed the Project as proposed, pursuant to a plan or design prepared in substantial conformance with engineering and design standards, the design immunity of § 6-904(7) would apply. Notwithstanding the compelling nature of this argument, the district court rejected the application of the Idaho Tort Claim Act stating:

---

<sup>20</sup> If “construction” in § 7-711(2)(a) was interpreted to mean physical damage caused by the act of construction and not simply the damage caused by the existence of the improvement or structure proposed to be built, § 7-711(2)(a) and § 6-904(7) would be an irreconcilable. In that case, the more specific and later in date statute controls. *See Beehler v. Fremont Cty.*, 145 Idaho 656, 658, 182 P.3d 713, 715 (Ct. App. 2008). Section 6-904(7) is later in date and specific to plans and designs for construction or improvement to the highways, roads, streets. Section 6-904(7) should therefore control.

<sup>21</sup> Although the court initially held that evidence of negligence would not be allowed, it changed its position and held that ACHD was liable for “all of the ramifications of the construction.” TT 320; *see also* CR 4918 (Jury Instruction No. 27: “For purposes of your decision you are to assume ACHD is responsible for all construction work performed as part of the Curtis Road Project.”).

. . . [I]f this were a tort case, that would be completely different. It's not. And for that reason I'm not going to really address the exemptions and things in the Tort Claims Act. The Tort Claims Act doesn't apply here. I've already overruled (sic) that and if they overrule me, they overrule me.

TT 322-23; *see also* CR 3281-84.

The trial record establishes that ACHD constructed the Project pursuant to a plan or design prepared in substantial conformance with engineering and design standards. *See* TT 3199. Thus, the district court erred not only in its interpretation of § 7-711(2)(a) but also in its failure to apply the immunity of Idaho Code § 6-904(7) to Brooke View's claim to damages allegedly caused during construction.

**7. The District Court's Erroneous Decision to Allow Evidence of Damage Caused During the Acts of Construction was Further Compounded Because it Prohibited ACHD From Offering Tort Defenses.**

As discussed in Section IV.C.2, 4, *supra*, Brooke View should have been required to pursue its allegations of damage caused during construction of the Project in a separate tort action. *See Campbell*, 34 Idaho at 604-05, 202 P. at 1066; *City of Anchorage*, 539 P.2d at 1178-79; *Freeser*, 74 P. at 408; *Hillsboro Ass'n.*, 286 So. 2d at 579. And had Brooke View appropriately done so, ACHD would have been afforded the opportunity to put on evidence of tort defenses. However, because of the district court's legal rulings and its instructions to the jury, including Instruction Nos. 20, 24, and 27, while Brooke View was allowed to try tort theories, ACHD was precluded from trying tort defenses. *See, e.g.*, CR 4911, 4915, 4918.

In a tort action, a defendant is entitled to litigate numerous defenses. *See, e.g., Davis v. First Interstate Bank of Idaho, N.A.*, 115 Idaho 169, 170, 765 P.2d 680, 681 (1988) (holding that mitigation, "also known as the doctrine of avoidable consequences, provides that a plaintiff who is injured . . . is ordinarily denied recovery for damages which could have been avoided by reasonable acts"); *Cramer v. Slater*, 146 Idaho 868, 875, 204 P.3d 508, 515 (2009) (requiring the



plaintiff to demonstrate proximate cause); *Pocatello Indus. Park Co. v. Steel West, Inc.*, 101 Idaho 783, 787, 621 P.2d 399, 403 (1980) (holding “a jury must have the opportunity to consider the negligence of all parties to the transaction, whether or not they be parties to the lawsuit and whether or not they can be liable to the plaintiff”); *Harris v. State, Dep’t. of Health & Welfare*, 123 Idaho 295, 300, 847 P.2d 1156, 1161 (1992) (applying immunity under the Idaho Tort Claims Act).

In this case—a tort case tried in a condemnation case—the district court afforded ACHD absolutely no tort defenses. The result, therefore, was to hold ACHD strictly liable for the acts of every person or entity in any way related to the Project, which included contractors, third-party utilities, and even Brooke View’s owner, Diane Miller.

Through Instruction No. 20, the district court relieved Brooke View from having to prove proximate cause. CR 4911 (“Brooke View does not have to prove the mechanism for how such damage, if any, occurred.”). Through Instruction No. 24, the district court precluded ACHD from arguing that Brooke View, and its owner Diane Miller, failed to mitigate damages or contributed to the damage. CR 4915 (“There has been evidence Brooke View did not notify ACHD at the time it claims it discovered cracks on its walls on or about November 1, 2012. This issue has been the subject of prior rulings by this Court and the Court ruled that this fact has no relevancy to any issue to be decided by you. Therefore, you are instructed that you are not to consider this fact in arriving at your decision or to discuss it in deliberations.”).<sup>22</sup> And through Instruction No. 27 the district court told the jury that ACHD was responsible for every person, activity, or event related to the Project. CR 4918. (“For purposes of your decision you are to

---

<sup>22</sup> The district court ruled that Diane Miller’s testimony that she identified the first crack in the wall on November 1, 2012 but told no one about it was irrelevant. *See, e.g.*, TT 3141. The court would not allow ACHD to present evidence regarding what would have happened if Ms. Miller had reported the crack so ACHD made an offer of proof regarding the issue. TT 3274-75.

assume ACHD is responsible for all construction work performed as part of the Curtis Road Project.”).<sup>23</sup>

Under the district court’s approach, if the jury concluded that the Entry Walls were damaged, the jury was required to infer that ACHD caused the damage.<sup>24</sup> Further, regardless if others contributed to the damage—whether intentionally or negligently—the district court also required the jury to hold ACHD 100% responsible. And at the end of the day, the damage award rendered by the jury was in the form of “just compensation” for a taking pursuant to article I, section 14 of Idaho’s Constitution and Idaho Code § 7-711(a)(2), so the usual recovery mechanisms for a tort judgment, indemnification or contribution from other responsible parties, were unavailable to ACHD.

The district court committed legal error by allowing Brooke View to try tort theories in this condemnation case, and the district court compounded this error by precluding ACHD from trying any tort defenses.

**8. The District Court’s Interpretation of § 7-711(2)(a) Will Lead to Inconsistent Results.**

Construction of a statute “that would lead to absurd or unreasonably harsh results are disfavored.” *See Friends of Farm to Mkt. v. Valley Cty.*, 137 Idaho 192, 197, 46 P.3d 9, 14

---

<sup>23</sup> In this case, Owyhee Construction performed work for United Water. ACHD had no authority or ability to control Owyhee Construction, yet the district court ruled as a matter of law that ACHD was responsible for Owyhee Construction and its work. *See, e.g.*, TT 3320-21, 3332-33. If the district court is affirmed, in other future condemnation cases, the condemnor will likewise be held strictly liable for the consequences of all municipalities, power companies, irrigation districts, cable providers, or any other utility or entity that work in the area of the project.

<sup>24</sup> This legal determination and instruction to the jury is equivalent to the application of the doctrine *res ipsa loquitur*. *See Enriquez v. Idaho Power Co.*, 152 Idaho 562, 566, 272 P.3d 534, 538 (2012) (describing the doctrine of *res ipsa loquitur* as a method of establishing liability by means of inferences, rather than direct proof) (quotation marks and citation omitted). Indeed, the district court even acknowledged the similarities to the doctrine of *res ipsa*. (“THE COURT: It’s like a *res ipsa*.”). *See* TT 57:3.

(2002). Allowing a condemnee to recover damage caused during the act of construction would indeed lead to absurd results. The inconsistent results stemming from such an interpretation is demonstrated below:

**a. Scenario 1: Two Adjoining Property Owners and the Condemnation of the Property of Only One Owner.**

In the first scenario, two adjoining property owners, owner A and owner B, have fee title to land adjacent to a roadway right-of-way. The owner of the right-of-way seeks to improve the right-of-way, and to do so it must condemn a small portion of the land owned by owner A, but none of the land owned by owner B.

Both owner A and owner B claim that during construction the project caused physical property damage to their remainder property. Under the district court's reading of Idaho Code §§ 7-711 and 7-712, owner A, as a condemnee, will be able to seek damages from the owner of the right-of-way without addressing Idaho's Tort Claim Act including Idaho Code § 6-904(7), without establishing proximate cause, and without regard to well-established tort defenses, such as mitigation and apportionment of liability. Yet, owner B, who alleges the very same damages, will have to address and comply with Idaho's Tort Claim Act including Idaho Code § 6-904(7), will have to establish proximate cause, and will have to overcome standard tort defenses.

**b. Scenario 2: Two Adjoining Property Owners and the Condemnation of Property of Both Owners.**

In the second scenario, the same facts exist as in scenario 1 with two adjoining property owners, owner A and owner B, each owning fee title to land alongside a roadway right-of-way. The owner of the right-of-way seeks to improve the right-of-way, and to do so it must condemn a small portion of the land owned by both owner A and owner B.

Prior to construction, owner A and condemnor agree to just compensation for the taking of owner A's property. This amount necessarily includes damage "by reason of . . . the

construction of the improvement in the manner proposed by the plaintiff” as provided in Idaho Code § 7-711. Owner B and the right-of-way owner cannot agree as to just compensation, but the right-of-way owner is able to take possession of the portion of owner B’s property under Idaho’s “quick take” statute, Idaho Code § 7-721, pending a trial. Later, both owner A and owner B claim that their property was damaged during the construction of the project.

Under the district court’s reading of Idaho Code § 7-711, owner B could seek the “during-construction” damages in his condemnation action and would not have to comply with the Idaho Tort Claim Act nor address duty and proximate cause. Whereas, owner A would be precluded from any further recovery. *See, e.g., Powell v. McKelvey*, 56 Idaho 291, 53 P.2d 626 (1935) (holding that a condemnee is allowed to receive just compensation one time from property taken). Based upon the district court’s ruling, disparate and inconsistent results would arise. Additionally, no condemnation action could be resolved prior to the completion of construction because of the risk of additional damages that might be caused during construction. This cannot be what was contemplated by Idaho’s statutes.

**D. THE DISTRICT COURT’S ERRONEOUS INTERPRETATION OF IDAHO CODE § 7-711(2)(A) RESULTED IN IRRELEVANT EVIDENCE OF DAMAGE BEING PRESENTED TO THE JURY AND FORMED THE BASIS OF THE JURY’S VERDICT.**

Idaho law is clear that compensation must be assessed for each source of damage separately (Idaho Code § 7-711(5)), and non-compensable elements must be eliminated from the amount of just compensation sought. *Bastian*, 97 Idaho at 449, 546 P.2d at 404. In particular, this Court has held that opinions of witnesses in condemnation actions that are based upon elements of damage not recognized by law are not to be presented to the jury. *Mabe*, 86 Idaho at 261-62, 385 P.2d at 406. “Only such opinions as are based upon evidence of lawful elements of damage can be of benefit to a jury in the assessment of the amount of damage.” *Id.* (quoting *Illinois Power & Light Corp. v. Talbot*, 152 N.E. 486, 488 (1926)). An expert whose opinions

include elements of damage that are not compensable must either “eliminate that portion of the damages which is noncompensable,” and if he or she cannot, then “their testimony must be stricken and the jury advised to disregard it in its entirety.” *Bastian*, 97 Idaho at 449, 546 P.2d at 404.

The district court’s legal conclusion as to the interpretation of § 7-711(2)(a) resulted in improper and irrelevant evidence being presented to the jury, which formed the basis for the jury’s damage award to Brooke View. *See* discussion at Section II.B.9-10, *supra* describing witnesses testimony and evidence presented at trial. Specifically, more than one-third of the 35 witnesses called at trial testified at length about the construction of ACHD’s Project and how that construction damaged the Entry Walls. *See, e.g.*, TT 1946, 1560, 1703, 2092-93, 2235-36, 941-45, 1682-86, 1695-96, 1904-08, 3057-63, 3253-57, 3280-318, 3351-67, 3495-500, 1014-49, 1052-62. A detailed listing of the witnesses and their testimony is attached to this Brief as Addendum A. Additionally, at least 181 of the 301 exhibits admitted at trial were solely directed at establishing the fact of and scope of damage that occurred during the acts of construction. This evidence included 66 exhibits containing more than 400 photographs of hundreds of cracks in the wall allegedly caused during construction. A complete listing of the exhibits admitted at trial that fall in this category is attached to this Brief as Addendum B.

The district court’s rulings resulted in expert opinions and evidence of non-compensable elements of damage to be submitted to the jury and that improperly influenced the jury’s verdict. The effect of the district court’s error caused substantial prejudice to ACHD and the portion of the Judgment that was based upon this error should be vacated.

**E. THE DISTRICT COURT’S JURY INSTRUCTIONS ARE CONTRARY TO IDAHO’S EMINENT DOMAIN LAWS.**

The district court erred in providing jury instructions at trial that misstated the law. When combined with the extensive evidence regarding construction activities and alleged damage that occurred during the Project construction—which was the direct result of the district court’s erroneous rulings—the instructions misled the jury and required them to award damages based on the events that occurred during construction. As a result, the jury awarded Brooke View non-compensable severance damages that occurred during construction of the Project.

The district court gave a “before and after” instruction to the jury (Instruction No. 22) that is virtually identical to IDJI 7.16.5, and it gave instructions that identified the date of the summons Value as July 11, 2012 (Instructions No. 9, 15, 16), which is the date as of which Brooke View’s damages were to be assessed. CR 4900, 4906, 4907, 4913. While these instructions are seemingly in accordance with Idaho law and the model jury instructions, the district court nullified these instructions by giving other instructions (Instruction Nos. 15, 20, 27) that advised the jury to depart from the “before and after” rule and consider evidence that occurred after the date of the summons by instructing the jury to consider damages incurred *during* “construction of the improvement project.” CR 4906, 4911, 4918.

Instruction No. 15 misstated the law of damages in an eminent domain case:

Just compensation means the fair market value of the property taken, including all permanent improvements thereon together with any direct damages suffered by Brooke View as a result of the taking *or construction of the improvement project* in the manner proposed by ACHD, all measured as of July 11, 2012.

CR 4906 (emphasis added). ACHD objected to this instruction, and more specifically to the language added by the district court that did not conform with the pattern jury instructions. TT 3925-26. By inserting additional language into the pattern instruction, the district court created two separate categories of direct damages for the jury to consider: (1) direct damages as a result

of the taking; and (2) direct damages incurred during construction. Because the focus of the trial was on whether the Entry Walls were damaged during construction, the jury had no choice but to award these improper damages.

Moreover, the district court made it known from the beginning of this case that, in her view, severance damages that include damage occurring during construction are compensable under Idaho law:

The legislature -- and I can't emphasize this enough -- our Constitution guarantees to property owners that if their property is going to be taken by the government in pursuant -- pursuant to their governmental powers, they are going to compensate that property owner because that property belongs first to the property owner and does not belong to the government. The government must pay for that property. And the way we determine how much is paid is we have established case law on how that is. *And it's based in -- for the most part on the change in value to the property, which in the state of Idaho includes, in my view, and apparently I'm one of few, but in my view it includes the construction of that project. Because I think the legislature took seriously the idea that property owners' rights are inviolate and if you are going to violate them, you're going to pay them for it and you're going to pay them the full value. The full value of it.*

*So that includes the change -- changes that are caused by damage to that property if it's caused in the construction. And it's not proximate causation. And if the Supreme Court wants to overrule me, they can overrule me. That's fine.*

TT 321-22 (emphasis added). The court also made it clear that the jury would not be limited to considering damages as of the date of the summons:

And I do have some problems with some of the jury instructions that have been provided to me so far. Mr. Gourley, in particular I think the description of what they may consider isn't correct because you want the damage to be as of the date of the taking. And for severance damages I would agree, but for the -- that seems to me it would suggest to the jury that they can't consider all of the damages allegedly caused by the construction and that's a completely different thing.

TT 561. The district court communicated these views to the jury through the phrase “construction of the improvement project,” which appears in several instructions. *See, e.g.*, CR 4911 (Instruction No. 20), 4919 (Instruction No. 28). When read together, the phrase “construction of the improvement project” can only refer to the physical acts of construction, which all took place after July 11, 2012, and which cannot be legally compensated in an eminent domain proceeding.

The district court also erred in giving Instruction No. 27:

For purposes of your decision you are to assume ACHD is responsible for all construction work performed as part of the Curtis Road Project.

CR 4918. ACHD properly objected to this instruction and the Court noted and acknowledged ACHD’s objections. TT 3998-4000. The basis of ACHD’s objection to this instruction relates back to the court’s decision on ACHD’s Fourth Motion for Summary Judgment. *See* CR 3281-84. The evidence presented during trial, based on the court’s prior legal rulings, improperly focused on the construction activities and alleged damage caused during those activities. Brooke View was not required to prove how the Entry Walls were damaged, only that they were not cracked prior to construction, *see, e.g.*, CR 761-63, and this instruction made ACHD liable for all damages that might have occurred during construction.

As a whole, the district court’s instructions constitute reversible error because they misstate applicable law, mislead the jury, caused prejudice to ACHD, and forced the jury to award non-compensable damages in an eminent domain proceeding. *Leazer v. Kiefer*, 120 Idaho 902, 904, 821 P.2d 957, 959 (1991).

**F. THIS COURT SHOULD VACATE THE JUDGMENT AND REMAND THIS MATTER WITH INSTRUCTIONS TO ENTER JUDGMENT IN THE AMOUNT OF \$8,512.32.**

Judgment was entered in the amount of \$148,390.21. CR 5757-59. Given the district court’s error in interpreting Idaho Code § 7-711(2)(a), the judgment improperly included



\$141,000 in a cost-to-cure award due to the damages that allegedly occurred during construction of the Project. Accordingly, ACHD respectfully requests this Court vacate the Judgment and remand this matter with instruction to the district court to enter judgment in favor of Brooke View in the amount of \$8,512.32.<sup>25</sup>

**G. THE DISTRICT COURT ERRED IN DENYING ACHD ITS REASONABLE COSTS AS THE PREVAILING PARTY.**

The district court's misinterpretation of § 7-711(a)(2) resulted in an over-inflated jury verdict. Had the jury verdict not been improperly impacted by the court's erroneous rulings and improper jury instructions, ACHD would have been the prevailing party in this matter and entitled to an award of the costs incurred. Accordingly, ACHD respectfully requests the Court: (1) reverse the district court's determination of prevailing party and award of costs and attorney fees to Brooke View, (2) reverse the district court's denial of costs to ACHD, and (3) remand the case with instructions to the district court to determine the appropriate amount of costs to be awarded to ACHD as the prevailing party.

**1. The Criteria for Determining the Prevailing Party in Idaho Condemnation Cases.**

The standards for determining whether an award of costs is appropriate in a condemnation action requires a two-part analysis. First, the district court must make a determination of who the prevailing party is under Rule 54(d)(1)(B) and the guidelines established in *Acarrequi*, 105 Idaho 873, 673 P.2d 1067, and its progeny of cases. Second, once the prevailing party has been identified, the court is to determine the amount of costs to be awarded based on the provisions of Rules 54(d)(1) and 54(e)(3).

---

<sup>25</sup> The difference between the Judgment amount of \$148,390.21 less \$141,000—which totals \$7,390.21—and the amount of the requested revised Judgment of \$8,512.32 is due to the fact that ACHD conceded this amount at trial. CR 4901. Therefore the revised Judgment should not be less than this amount.

The cases setting forth the rules governing an award of costs in eminent domain proceedings are *Acarrequi*, 105 Idaho 873, 673 P.2d 1067; *Talbot*, 120 Idaho 825, 820 P.2d 695; *Jardine*, 130 Idaho 318, 940 P.2d 1137; and *Grathol*, 158 Idaho 38, 343 P.3d 480. *Acarrequi* established guidelines to assist the trial court in determining the prevailing party and whether an award of costs and fees should be made. *Acarrequi*, 105 Idaho at 878, 673 P.2d at 1072. Those guidelines are:

- (1) whether the condemnor reasonably made a timely offer of settlement of at least 90 percent of the ultimate jury verdict;
- (2) whether the offer was timely and not made “on the courthouse steps an hour prior to trial”; and
- (3) whether the offer was made within a reasonable period after the institution of action.

*Id.* The Supreme Court in *Acarrequi* also outlined other factors that the trial court may consider:

- (1) whether the condemnee contested the allegations of public use and necessity;
- (2) the outcome of any hearing on such a challenge;
- (3) whether the condemnor made any modifications in the plans or designs of the project that resulted from the landowner's challenge; and
- (4) whether the condemnee voluntarily granted possession of the property pending the resolution of the just compensation issue.

*Id.*

In determining the prevailing party, the district court is to apply both the *Acarrequi* guidelines and I.R.C.P. 54(d)(1)(B). *Talbot*, 120 Idaho at 829, 820 P.2d at 699. And the provisions of Rule 54(d)(1)(B) only apply to the extent that they do not conflict with the *Acarrequi* guidelines. *Jardine*, 130 Idaho at 321, 940 P.2d at 1140. The issue of whether a reasonable offer of settlement was timely made is a case-specific determination, and “[e]ach case will depend on its own circumstances.” *Id.*

Recently, this Court's decision in *Grathol* clarified Idaho's standards for cost awards to condemnors. There, the Court cited to Idaho Code § 7-718, noting that the provision states that "[c]osts may be allowed or not, and, if allowed, may be apportioned between the parties on the same or adverse sides in the discretion of the court." *Grathol*, 158 Idaho at 52, 343 P.3d at 494 (quoting Idaho Code § 7-718). Based upon this provision, the Court overruled the implication from *Acarrequi* that cost awards to condemnors could only occur in the "extreme and unlikely" situation, and confirmed that costs can be awarded to either party within the district court's discretion (citing *Telford Lands LLC v. Cain*, 154 Idaho 981, 992, 303 P.3d 1237, 1248 (2013)). The Supreme Court in *Grathol* thereby affirmed the district court's award of costs as a matter of right and discretionary costs to the condemnor. *Id.* After *Grathol*, it is clear that condemnors may be awarded its costs as the prevailing party. *Id.*

**2. ACHD is Clearly the Prevailing Party.**

**a. ACHD made an offer of settlement of at least 90% of the verdict.**

On March 1, 2012—prior to the filing of its Complaint—ACHD made an offer of settlement to Brooke View in the sum of \$7,738.47. CR 5908, 5876. This amount was based upon the appraised fair market value of the portion of Brooke View's property being taken as part of the Project and the resulting damages caused to the remainder property. *Id.* Subsequently, ACHD made a second settlement offer of \$8,512.32 on May 22, 2012—again, before the Complaint was filed.<sup>26</sup> *Id.* ACHD's offer represented the fair market value of the property taken and damages cause to the remainder, plus an additional ten percent (10%). *Id.*

---

<sup>26</sup> ACHD made several additional settlement offers in excess of the initial pretrial offers, including a \$45,000 offer on June 5, 2013, which was renewed in September 2013; an offer of \$204,600 on January 6, 2015; an offer of \$257,000 on January 13, 2015; and an offer of \$275,000 on January 25, 2015. CR 5870-85. Each of these offers included sums for non-compensable damages occurring during construction, but nevertheless they satisfied the requirements of *Acarrequi*. See *Acarrequi*, 105 Idaho at 878, 673 P.2d 1072; see also CR 5919-6019, 6056-6100.

By comparison, the amount of just compensation awarded by the jury—excluding the improper damages for impacts and damage allegedly caused during construction—was \$5,291.68. Where the offers made exceeded the jury’s verdict, as properly reduced to exclude non-compensable severance damages occurring during construction, ACHD clearly made an “offer of settlement of at least 90 percent of the ultimate jury verdict,” and satisfied this element of the prevailing party analysis. *Acarrequi*, 105 Idaho at 878, 673 P.2d at 1072.

**b. ACHD’s settlement offers were timely made and within a reasonable period after the institution of action.**

As noted above, ACHD made its offers of settlement on March 1, 2012 and May 22, 2012. Trial began on April 6, 2015. Therefore, the offers were not “on the court house steps an hour prior to trial.” *Jardine*, 130 Idaho at 320, 940 P.2d at 1139. To the contrary, the offers were made before the institution of the action and therefore were timely made. ACHD’s settlement offers of March 1, 2012 and May 22, 2012 were made prior to the filing of the Complaint, which was dated July 11, 2012. Where the offers were made before the filing of the action, ACHD clearly satisfies this requirement.

Because ACHD satisfied the *Acarrequi* requirements, the district court erred when it failed to conclude that ACHD was the prevailing party. Accordingly, ACHD respectfully requests the Court reverse the district court’s prevailing party determination and attorney fee and remand the matter with instructions to the district court to enter an order that ACHD is the prevailing part and entitled to an award of its reasonable costs incurred.

**H. THE AWARD OF DISCRETIONARY COSTS SHOULD BE REVERSED OR REDUCED.**

**1. The District Court’s Conclusion that this Case Was Extraordinary Was an Abuse of Discretion.**

The district court awarded Brooke View discretionary costs in the amount of \$365,703.63. CR 6609-15. Because ACHD was the prevailing party at trial, the district court’s

award of discretionary costs should be reversed. Additionally, the district court's award of discretionary costs should also be reversed because the court's justification for this award, finding the case to be exceptional based on ACHD's pre-trial and trial strategy, was an abuse of the court's discretion.

This Court reviews discretionary decisions to determine “(1) whether the trial court correctly perceived the issue as discretionary; (2) whether the trial court acted within the boundaries of its discretion and consistent with the applicable legal standards; and (3) whether the trial court reached its determination through an exercise of reason.” *Hayden Lake Fire Prot. Dist. v. Alcorn*, 141 Idaho 307, 313, 109 P.3d 161, 167 (2005) (citing *Zimmerman v. Volkswagen of Am., Inc.*, 128 Idaho 851, 857, 920 P.2d 67, 73 (1996)). Discretionary costs can only be awarded when the costs incurred by the prevailing party are “necessary and exceptional, reasonably incurred, and should in the interests of justice be assessed against the adverse party.” *Id.* at 314, 109 P.3d at 168 (quoting I.R.C.P. 54(d)(1)(D)). In this case, the district court abused its discretion because the basis for concluding that this case was extraordinary was inconsistent with applicable legal standards.

The district court identified eight reasons to support its conclusion that this entire case was extraordinary. CR 6609-12. Those eight interrelated reasons can be divided into four categories: (1) ACHD's pre-trial strategy to exclude evidence of the act of construction and damages occurring during construction; (2) ACHD's pre-trial strategy that negligence evidence should not be submitted to the jury unless ACHD was allowed to present negligence defenses and Brooke View was required to prove proximate cause; (3) ACHD's trial strategy of not conceding damaging the Entry Walls; and (4) ACHD's expert and lay witness disclosures. *Id.* The district court concluded that ACHD's trial strategy, and its persistence in that strategy

despite erroneous rulings by the court, led to unnecessary waste of time and resources and increased the cost of litigation. *Id.*

ACHD's initial pre-trial strategy to exclude acts of construction, including negligence, and damages occurring after the date of the summons from a condemnation case is consistent with Idaho Code and precedent. *See* Section IV.C., *supra*. Similarly, ACHD's initial pre-trial strategy regarding tort causation and defenses is also consistent with Idaho law. *See* Sections IV.C.6, 7, *supra*. The district court's rulings to the contrary were inconsistent with legal standards and could not serve as a basis to conclude that this case was exceptional. That leaves only the district court's criticism of ACHD's expert and lay witness disclosures. ACHD's purported failings with regard to expert and lay witness disclosures do not make this case extraordinary. *See Hoagland v. Ada Cty.*, 154 Idaho 900, 914, 303 P.3d 587, 601 (2013) ("Particular standards a court should consider include, but are not limited to, whether there was unnecessary duplication of work, whether there was an unnecessary waste of time, the frivolity of issues presented, and creation of unnecessary costs that could have been easily avoided."). The district court's award of discretionary costs should therefore be reversed.

**2. The District Court's Award of Discretionary Costs Should At The Very Least Be Reduced.**

In the event this Court does not reverse the district court's award of discretionary costs, that award should at a minimum be reduced. The district court awarded Brooke View \$33,255.74 in discretionary costs for trial exhibits and supplies.<sup>27</sup> CR 6612-13. This award included \$32,319.96 for John Roters' time preparing trial exhibits for himself and other expert witnesses on behalf of Brooke View. CR 5371. This amount was incorrectly awarded to Brooke

---

<sup>27</sup> The district court awarded Brooke View \$500 of this amount as a non-discretionary cost for trial exhibits. CR 6613.

View twice – once as Mr. Roters’ expert witness fee, and a second time as a cost for preparing trial exhibits.

Brooke View clarified in its briefing, but not in its math, that it was requesting \$5,000 as expert fees, and the remaining \$32,319.96 for preparation of trial exhibits. CR 5371, 5392, 5396. However, the district court failed to identify this mathematical double-counting and awarded Brooke View \$2,000 in expert fees as a matter of right (CR 6606-08), \$35,319.96 as discretionary expert fees, and an additional \$32,319.96 for Mr. Roters’ preparation of trial exhibits. CR 5371-72, 6612-13. Therefore, Brooke View’s award of discretionary costs should be reduced by \$32,319.96, the amount of the double-counted trial exhibit preparation costs.

**I. ACHD IS ENTITLED TO COSTS ON APPEAL.**

ACHD respectfully requests that the Court award ACHD its costs on appeal pursuant to Idaho Code §§ 7-718, 12-121 and the standards set forth in *Acarrequi*, and its progeny cases, which apply on appeal. 105 Idaho at 876-78, 673 P.2d at 1069, 1070-72. Under a corrected judgment that is consistent with Idaho law and excludes non-compensable elements of damage, ACHD made an offer of settlement that was at least 90% appropriately determined portion of the verdict in this case, its settlement offer was timely, and it was made within an reasonable time after the commencement of this lawsuit. In fact, the offer was made prior to the lawsuit being filed. Accordingly, ACHD is the prevailing party in this matter and entitled to an award of its costs on appeal.

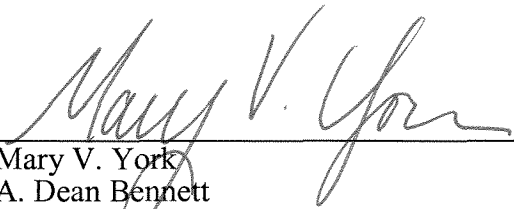
**V. CONCLUSION**

For all of the foregoing reasons, ACHD respectfully requests this Court vacate the judgment entered by the district court and remand this case with instructions to enter judgment in Brooke View’s favor in the amount of \$8,512.32 as just compensation for the taking of its Property. ACHD further requests this Court vacate the district court’s judgment as to fees and

costs and direct the district court on remand to make a finding that ACHD is the prevailing party and entitled to its reasonable costs. Finally, ACHD is entitled to its costs on appeal before this Court.

DATED this 6th day of June, 2016.

By

  
\_\_\_\_\_  
Mary V. York  
A. Dean Bennett  
Scott Hess  
HOLLAND & HART LLP

Kimbell D. Gourley  
JONES GLEDHILL FUHRMAN  
GOURLEY, P.A.

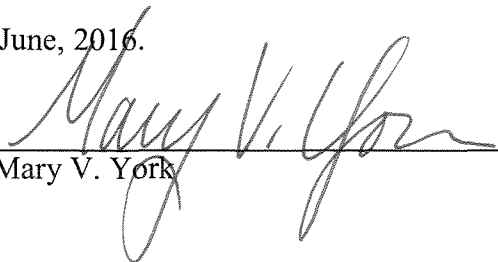
*Attorneys for Appellant*

### **CERTIFICATE OF COMPLIANCE**

The undersigned does hereby certify that the brief submitted is in compliance with all of the requirements set out in I.A.R. 34.1, and that two bound copies were served on each party via U.S. mail.

DATED AND CERTIFIED this 6th day of June, 2016.

By

  
\_\_\_\_\_  
Mary V. York



## CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of June, 2016, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

E Don Copple  
DAVISON, COPPLE, COPPLE & COPPLE  
199 N. Capital Blvd., Suite 600  
P.O. Box 1583  
Boise, ID 83701

☐ U.S. Mail  
☒ Hand Delivered  
☐ Overnight Mail  
☐ Facsimile

Kimbell D. Gourley  
JONES GLEDHILL FUHRMAN  
GOURLEY, P.A.  
225 N. 9th Street, Suite 820  
P.O. Box 1097  
Boise, ID 83701

☐ U.S. Mail  
☒ Hand Delivered  
☐ Overnight Mail  
☐ Facsimile

  
\_\_\_\_\_  
of HOLLAND & HART LLP

# ADDENDUM A

## ADDENDUM A

Name	Transcript	Description
Rodney Boone	927-928	Describing construction evidence he reviewed in forming his opinions, including pictures of construction in progress, construction logs, and a conversation with Chris Hawkins from Alta, the general contractor for ACHD's Project.
	941-945	Reviewing ACHD's construction log and progress of construction activities.
	946-970, 980-988	Describing how he identified construction equipment used on ACHD's Project from photographs and describing machinery used, its purpose, and the details of construction in progress.
	988-990	Describing how soil type affects vibrations from compacting during construction and identifying the specific equipment used in the ACHD Project.
	998-999	Assuming multiple pieces of equipment working at the same time.
Patrick Dobie	1859	Stating that ACHD's construction plans do not indicate a need to protect the entry wall.
	1864	Stating that ACHD gave contractor notice to proceed with construction in September 2012.
	1868	Stating that ACHD did not perform preconstruction survey.
	1890, 1894-1898, 1975-1976	Relying on actual construction equipment used during construction of the ACHD Project to calculate anticipated vibration levels; discussing the peak particle velocity created by ACHD's actual construction of the Project.
	1904-1908	Describing progress of construction during site visits and as depicted in photographs.
	1920-1921	Discussing the timing of construction and the appearance of cracks in the wall.
	1925-1932	Describing cracks in the wall.
	1933, 1946	Discussion how cracks in the entry wall were caused by vibration and construction of the ACHD Project.
	1954-1958	Explaining vibration calculations using actual equipment from construction of ACHD's Project.
	1974	Explaining that one piece of equipment in particular used during construction of the ACHD Project is the most likely cause of vibration damage to the wall.
Richard Evans	1371	Stating that entry wall was damaged by vibration or other construction of ACHD's Project.
	1393-1394	Explaining that there were no cracks in the wall prior to construction of ACHD's Project.

	1460, 1472	Explaining that the entry wall is failing structurally because of the construction of ACHD's Project.
	1474-1475	Identifying equipment used during construction of ACHD's Project.
	1476	Discussing compaction logs during ACHD's Project.
	1483-1486	Explaining that the entry wall is damaged beyond repair.
	1531-1532, 1558-1560	Stating that cracks and damage to the entry wall occurred during construction of ACHD's Project.
Dan Gado	3495-3500	Describing progress of construction and equipment used based on photographs.
	3501-3521	Describing test pit excavation and findings; also water infiltration test.
John Guerrero	1014-1020, 1022-1038, 1041-1043, 1048-1049	Describing progress of construction of ACHD's Project and his observations of the cracks in the Entry Walls and the foundation of his home.
Chris Hawkins	3351-3367	Describing personal observations of progress of construction of ACHD's Project.
Sam Howell	3253-3257	Describing general process of construction for ACHD's Project.
	3280-3318	Describing his personal involvement and knowledge of construction of ACHD's Project.
Dr. Paul Michaels	2003-2005	Discussing how entry wall being out of plumb is evidence of vibration damage and how vertical cracks are also evidence of vibration damage.
	2086-2087	Discussing how there were no cracks in the wall prior to construction of ACHD's Project and how all of the cracks are consistent with vibration damage.
	2092-2093	Stating that vibration and compacting damaged the wall.
	2126-2127	Stating that cracks in the columns were also caused by compaction vibrations.
	2139-2140	Reviewing ACHD's documentation to determine vibration data.
	2146-2147	Stating that vibrations could have been caused by excavation during construction of ACHD's Project.
Diane Miller	3055	Discussion how took photos of construction work in progress.
	3057-3063	Describing actual construction work performed as part of ACHD's Project.
David O'Day	1583-1586	Explaining ACHD's failure to perform a preconstruction survey or take other preventative measures.
	1587-1588	Describing how he identified the equipment used during construction of ACHD's Project.

	1665-1668	Stating that cracks were not caused by shrinkage or temperature changes.
	1682-1686, 1695-1696	Describing progress of construction of ACHD's Project.
	1703	Determining that the wall's structural integrity was damaged by construction of ACHD's Project.
	1709-1711	Explaining how he concluded that vibration from construction of ACHD's Project damaged the wall.
	1713	Describing excavation activities that are likely to cause vibration damage.
	1721-1723, 1733	Opining on specific excavation equipment that could have caused vibration damage and that vibration from ACHD's project damaged the wall.
	1746-1750	Identifying steps ACHD could have taken to monitor vibrations during construction.
	1792-1793	Describing his initial assignment as understanding the effects of the construction by ACHD on the soil and damage to the wall.
	1809-1812	Stating that ACHD should have done additional testing before beginning construction and could have prevented damage to the wall and discussing ACHD's failure to conduct testing breached standards in the industry.
John Roters	2307-2310	Describing debris in landscaping area left by the construction of ACHD's Project.
Brian Smith	2205-2206	Opining that the wall has been structurally compromised.
	2235-2236	Opining that vibration from construction of ACHD's Project damaged the wall.
Robert Ware	1052-1062	Describing his observations of cracks in the Entry Walls and his personal observations of vibrations during construction of the ACHD Project.

# ADDENDUM B

## ADDENDUM B

<b>Exhibit Number (By/No.)</b>	<b>Description</b>
Def 27	Construction equipment used
Def 28	Examples of work done close to walls
Def 30	ACHD construction logs
Def 31	Elements of the project
Def 32	Compaction areas of project
Def 33	Photo: foundation crack
Def 34	Photos of back of wall
Def 35	Photos of cracks in wall
Def 41	Caltrans/FTA vibration formula
Def 42	Calculated PPV for average soil conditions
Def 44	Field measurements – north wall
Def 45	Field measurements – south wall
Def 48	Photos: removed stucco
Def 49	Photo: crack with paint tear
Def 50	30” HDPE pipe
Def 51	12” water pipe
Def 52	Photos: wall crack #1
Def 53	Photos: wall crack #2
Def 54	Photos: wall crack #3
Def 55	Photos: wall crack #4
Def 56	Photos: wall crack #5
Def 57	Photos: wall crack #6
Def 58	Photos: wall crack #7
Def 59	Photos: wall crack #8
Def 60	Photos: wall crack #9
Def 61	Photos: wall crack #10
Def 64A-64R	Stucco samples
Def 65	Photo: south wall rebar locations
Def 66	Photo: north wall rebar locations
Def 67	Photo: wall crack #1
Def 68	Photo: wall crack
Def 69	Photo: wall crack
Def 70	Photo: foundation cracks
Def 71	Photo: brick veneer cracking
Def 78	Compacting machines
Def 80	PPV motion-distance relationship
Def 81	PPV jumping jack soil decay
Def 82	PPV estimates: plate whacker
Def 83	PPV estimates: jumping jack
Def 84	PPV estimates: hoe pack

<b>Exhibit Number (By/No.)</b>	<b>Description</b>
Def 85	PPV estimates: double drum roller
Def 86	PPV estimates: single drum roller
Def 87	Multiple areas of compaction
Def 88	Site amplication
Def 89	In plane vs. out of plane
Def 91	PPV of compactors in compacted areas
Def 98	9/11/14 crack map
Def 99	North wall segment photos
Def 100	South wall segment photos
Def 101	Crack photos: segments N1 – N4
Def 102	Crack photos: segments N4 – N5
Def 103	Crack photos: segment N5
Def 104	Crack photos: segments N5 – N7
Def 105	Crack photos: segment N7
Def 106	Crack photos: segment N8
Def 107	North wall – east crack photos
Def 108	Crack photos: segments S1 – S2
Def 109	Crack photos: segments S2 – S3
Def 110	Crack photos: segments S3 – S4
Def 111	Crack photos: segment S4
Def 112	Crack photos: segments S4 – S5
Def 113	Crack photos: segment S5
Def 114	South wall – east crack photos
Def 115	North wall plumb measurements
Def 116	South wall plumb measurements
Def 119	Terracon Boring Logs, Location Plan
Def 120	O'Day Field Measurements
Def 121	O'Day north wall photos 7/20/13
Def 122	O'Day south wall photos 7/20/13
Def 123	Crack width computation N-1
Def 124	Crack width computation N-2
Def 125	Crack width computation N-3
Def 126	Crack width computation N-4
Def 127	Crack width computation N-4.5
Def 128	Crack width computation N-5
Def 129	Crack width computation N-7
Def 130	Crack width computation S-1
Def 131	Crack width computation S-2
Def 132	Crack width computation S-3
Def 133	Crack width computation S-4
Def 134	Crack width computation S-5
Def 135	Crack width computation: drying
Def 136	Crack width computation: carbonation



<b>Exhibit Number (By/No.)</b>	<b>Description</b>
Def 137	Crack width computation: temperature
Def 145	Cemented soil in storm drain trench
Def 146	Strata test pit log
Def 147	O'Day in 8/5/13 Strata test pit
Def 148	8/5/13 Strata test pit
Def 149	Curtis Rd. section A-A
Def 155	Photos of ACHD construction
Def 157	Pear tree removal
Def 158	Tip of boundary wall removal by ACHD
Def 159	Tip of boundary wall built by ACHD
Def 160	Concrete in landscape area
Def 161	Irrigation lines destroyed
Def 164	Landscape bark
Def 165	Cracks in home interior
Def 201	Crack width computation N-8
Def 203	Storm drain construction
Def 204	Foundation crack map
Def 206	Photo: showing efflorescence on wall
Def 207	Examples: cracks near control joints
Def 208	Crack #8.1 with/without stucco
Def 209	Photos: block cracks
Def 210	Total stucco depth on wall
Def 222	Mini hoe pack
Def 225	Construction fencing
Def 233	Landscape elements id'd - north
Def 234	Landscape elements id'd - south
Def 236	Picture of cracks in wall
Def 238	Crack #2 – with/without stucco
Def 245	Photo: crack measurement
Def 246	Photo: crack in wall
Def 250	Michael's drawings on plumb measurements
Def 251	Sprinklers running
Def 252	Concrete in landscape area
Def 253	Photo of wall
Def 254	Photo of wall
Def 257	Back of wall
Def 258	Back of wall
Def 260	Photo of road-widening work
Def 261	Photo of road-widening work
Def 262	Replacement of irrigation pipe
Def 264	Photo of wall crack
Def 265	Photo of wall crack
Def 266	Landscape in front of wall

<b>Exhibit Number (By/No.)</b>	<b>Description</b>
Def 268	Curtis St. canal bridge
Def 269	Curtis St. sidewalk
Def 270	Sidewalk construction over canal
Def 271	Photo – paint crack & human hair
Def 278	Photo: crack in stucco sample
Pltf 1123	Photo – ACHD project
Pltf 1124	Photo – trench
Pltf 1125	Photo – trench
Pltf 1126	Photo – pipe into manhole
Pltf 1127	Photo – irrigation pipe trench
Pltf 1128	Photo – roller compacting trench
Pltf 1129	Photo – sidewalk
Pltf 1130	Photo – excavation near wall
Pltf 1131	Photo – excavation near wall
Pltf 1132	Photo – test pit 1A near wall
Pltf 1133	Photo – concrete remnants
Pltf 1134	Photo – test pit 1B near wall
Pltf 1135	Photo – manhole lid
Pltf 1139	Photo – wall
Pltf 1140	Photo – wall
Pltf 1141	Photo – wall
Pltf 1142	Photo – wall
Pltf 1143	Photo – SE corner Lot 1
Pltf 1144	Photo – SE corner Lot 1
Pltf 1145	Photo – SE corner Lot 1
Pltf 1146	Photo – SE corner Lot 1
Pltf 1147	Photo – SE corner Lot 1
Pltf 1240	12 Photos of wall
Pltf 1241	13 Photos of wall
Pltf 1242	6 Photos of wall samples
Pltf 1243 - Page 1	Photo – wall sample
Pltf 1244	2 Photos of wall sample D
Pltf 1245A	13 Photos of crack
Pltf 1246	25 Pages – Photos of wall samples
Pltf 1247	6 Pages – Photos of cracks
Pltf 1249	Wall sample A in plastic container
Pltf 1250	Wall sample B in plastic container
Pltf 1251	Wall sample C in plastic container
Pltf 1252	Wall sample D in plastic container
Pltf 1253	Wall sample E in plastic container
Pltf 1254	Wall sample F in plastic container
Pltf 1316	Photos: wall and cracks
Pltf 1317	Photos: wall and cracks

<b>Exhibit Number (By/No.)</b>	<b>Description</b>
Pltf 1318	Photos: wall and cracks
Pltf 1319	Photos: wall and cracks
Pltf 1320	Photos: wall and cracks
Pltf 1321	Photos: wall and cracks
Pltf 1322A	Photo: wall
Pltf 1322B	Photos: wall and cracks
Pltf 1323	Photos: wall and cracks
Pltf 1324	Photos: wall and cracks
Pltf 1325	Photos: wall cracks
Pltf 1326	Photos: wall
Pltf 1328	Photo: street view of wall
Pltf 1330	Photos: wall

8836418\_1