9-9-2016

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

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 REPLY 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

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES AND RULE

OTHER AUTHORITIES

I. INTRODUCTION AND SUMMARY OF ARGUMENT

The district court's interpretation of Idaho Code § 7-711(2)(a) resulted in incorrect pretrial rulings, the admission of irrelevant evidence at trial, and erroneous instructions to the jury. The district court erred, and ACHD should prevail in its appeal for the following four reasons:

1. The word construction in § 7-711(2)(a) means "a thing constructed; a structure." Severance damages, therefore do not include damage allegedly caused during the process of construction. Brooke View's attempt to combine two discrete dictionary definitions of the same word to garner a more expansive reading of § 7-711(2)(a) is contrary to applicable rules of statutory interpretation and ignores a century's worth of this Court's case law addressing eminent domain. Moreover, when due consideration is given to: (1) Idaho Code §§ 7-712, 7-711(3); (2) the on-point decisions of the Idaho Supreme Court, including *Oregon-Washington Railroad & Navigation Co. v. Campbell*, 34 Idaho 601, 202 P. 1065 (1921) ("*Campbell*") and *Idaho-Western Railway Co. v. Columbia Conference of Evangelical Lutheran Augustana Synod*, 20 Idaho 568, 119 P. 60 (1911) ("*Idaho-Western*"); (3) the case law of other states with similar constitutional provisions and eminent domain statutes; (4) this Court's *Acarrequi* jurisprudence; (5) Idaho Code § 6-904(7); and (6) the practical considerations in future condemnation actions, damages allowable under § 7-711(2)(a) cannot include damage caused during the process of construction.

2. Even if the word "construction" was read to mean *both* "a thing constructed; a structure" *and* "the process, art, or manner of constructing something," Brooke View's argument still fails because severance damages are limited by two other key components of Idaho's eminent domain statutes. Severance damages are (1) only available for what is

"proposed" by ACHD in the Project plans[1], and (2) measured "at the date of the summons." These limitations, set forth in the plain language of §§ 7-711(2)(a) and 7-712, prevent Brooke View from recovering severance damage for the physical impact of acts that occurred during construction. Brooke View's argument regarding the wisdom, justice, or policy of the plain language of these statutes is not proper for consideration by the Court, as it raises questions for the legislature alone.

3. If Brooke View now contends that ACHD's Project plans, as proposed and evaluated at the date of the summons, somehow support the jury's severance damage award, that argument too must be rejected. Long-standing and well-settled Idaho case law provides that any damage claimed under § 7-711(2)(a) is only available if the condemnor could anticipate the alleged damage at the date of the summons. *See Campbell*, 34 Idaho 601, 202 P. 1065. The record before this Court establishes that Brooke View's ultimate theory of the case (developed years after construction was complete) was that "peak particle velocities from the vibration during construction" caused damage to the walls. What the record also demonstrates is that at the date of the summons, damage to the walls could not have been anticipated because ACHD did not know the specific means and methods the contractor would use to build the Project, including what type of equipment the contractor would use or where or in what manner compaction activities would take place. Because of this, no one, including ACHD, could have anticipated the damage claimed by Brooke View from: (1) the Project plans *as proposed*, and (2) measured *at the date of the summons*. As argued by Brooke View, ACHD could have used the very same Project plans, but its contractor could have performed the construction differently

[1] The roadway project at issue in this case is commonly referred to as the "Safe Routes to School Project on South Curtis Road, ACHD Project No. 809028 ("Project"). The Project plans are contained in the record at CR 1347-1372.

resulting in no damage to Brooke View's walls. Resp. Br. at 4-5, 24-25. Even Brooke View concedes that the damage to the walls could not have been anticipated based on the Project plans at the date of summons. Specifically, after Project construction was complete, and for months and years thereafter, Brooke View's numerous experts could not articulate what caused the complained-of damage to the walls. Therefore, as this Court said in *Campbell*, if ACHD is "liable for such damages, they could be recovered only in a separate action." *Campbell*, 34 Idaho at 604-05, 202 P. at 1066.

4. Finally, Brooke View erroneously asserts that "ACHD's interpretation would leave owners with actual damage caused by a condemnor's construction activity with no legal remedy by which to be made whole." Resp. Br. at 16-17. Brooke View's theory throughout this case—during pre-trial, trial, post-trial and now on appeal—is that ACHD: (1) should have done certain things relating to the Project that it did not do; and (2) should not have done other things, in order to avoid damage to Brooke View's remainder property. Having presented a case based upon the theory that ACHD's conduct was negligent, its recourse is through a separate action, and Brooke View cannot inject its claimed damages into a condemnation proceeding.

In sum, Brooke View offers no reason for this Court to ignore the plain language of §§ 7-711(2)(a) and 7-712. And it offers no reason for this Court to nullify a century's worth of eminent domain jurisprudence in this State. Because of this, ACHD is entitled to the relief that it seeks through this appeal.

II. ARGUMENT

A. WHEN APPROPRIATELY INTERPRETED, IDAHO CODE § 7-711(2)(A) IS UNAMBIGUOUS.

The principle issue on appeal is the appropriate statutory *interpretation* of the unambiguous language of Idaho Code § 7-711(2)(a). Brooke View begins its arguments on

appeal with a repeated, and incorrect, assertion that ACHD contends that § 7-711(2)(a) is ambiguous. *See, e.g.,* Resp. Br. at 12, 14, 16. That is not, and has never been, ACHD's position. ACHD has consistently maintained that this statute is unambiguous, because there is only one reasonable way to read the provision.

Accordingly, the appropriate standard for determining the meaning of the statute is for the Court to interpret the statute in order to determine and give effect to the plain meaning. *St. Luke's Reg'l Med. Ctr., Ltd. v. Bd. of Comm'rs of Ada Cty.*, 146 Idaho 753, 755, 203 P.3d 683, 685 (2009). Such meaning is "derived from a reading of the whole act at issue." *Id.*; *see also State v. Owens*, 158 Idaho 1, 3, 343 P.3d 30, 32 (2015) ("This Court considers the statute as a whole, and gives words their plain, usual, and ordinary meanings."). Applying these standard rules, there is only one reasonable interpretation of § 7-711(2)(a): "damages caused during construction are not recoverable as severance damages in a condemnation action." *See* Opening Br. at 30.

In its Opening Brief, ACHD pointed out that the district court derived a second, though erroneous, interpretation of § 7-711(2)(a) based upon its narrow focus on a limited portion of the statute—namely, the court concluded that severance damages in a condemnation action could include damage caused during construction of a project, as determined after all construction is compete and with years of hindsight analysis. *See* Opening Br. at 29. While a statute is considered ambiguous if the language is capable of more than one reasonable meaning, the district court's interpretation is not reasonable because its conclusion is not supported by the plain language of the statute, it is not supported by the eminent domain act, and it is inconsistent with this Court's prior interpretations of § 7-711(2)(a).

Because there is only one reasonable interpretation of the statute, it is not ambiguous and no statutory *construction* of § 7-711(2)(a) is necessary. Brooke View's criticisms of ACHD's

arguments on this issue are misplaced.[2] ACHD's comments about the statutory construction of § 7-711(2)(a) was contained in a footnote and was presented as an alternative argument in the event the Court determined that the statute was ambiguous. As discussed in detail below, and as set forth in ACHD's Opening Brief, even if statutory construction is appropriate, the proper construction of the statute supports ACHD's position. *See* Section III.D., *infra*.

B. BROOKE VIEW'S ARGUMENT THAT THE WORD "CONSTRUCTION" CARRIES MORE THAN ONE MEANING AS USED IN § 7-711 MUST BE REJECTED—A STATUTE AND THE WORDS WITHIN A STATUTE CAN HAVE BUT ONE MEANING.

Brooke View argues that the use of "; *also*" in the Merriam-Weber dictionary definition of the word "construction" supports its argument that the word construction means at the same time both "a thing constructed; a structure" *and* "the process, art, or manner of constructing something." Resp. Br. at 15.[3] Brooke View misconstrues what "; *also*" means in the context of a dictionary definition; therefore, its preferred interpretation is incorrect.

---

[2] Despite its arguments of whether § 7-711(2)(a) is being properly "interpreted" or "construed," Brooke View fails to note that the district court itself engaged in some *construction* of the statute. For example, the district court relied on information beyond the plain reading of the statute including her personal experience with the legislature:

> And knowing the legislature the way I know it -- when I was doing water law, I spent a lot of time looking at the constitutional convention and looking at how they crafted statutes. And when it comes to things like these eminent domain, as I said, they were very concerned about the private property rights of the individual.

TT 181:23-182:5.

[3] Merriam-Webster's definition of "construction" provides in relevant part, "2 a : the process, art, or manner of constructing something; **also**: a thing constructed b : the construction industry <working in construction > MERRIAM-WEBSTER Online Dictionary, http://www.merriam-webster.com/dictionary/construction (cited in Resp. Br. at 15) (bold added by Brooke View).

As used in Merriam-Webster,[4] "; *also*" is a "sense divider" used to explain the semantic relationship between different meanings of a word. *See* MERRIAM-WEBSTER Online Dictionary, http://www.merriam-webster.com/help/explanatory-notes/dict-definitions (last visited Sept. 9, 2016). A "sense" is "a meaning conveyed or intended: import, signification; *especially*: one of a set of meanings a word or phrase may bear especially as segregated in a dictionary entry." *See* MERRIAM-WEBSTER Online Dictionary, http://www.merriamwebster.com/dictionary/sense (last visited Sept. 9, 2016). Thus, the sense of "construction" as "the process, art, or manner of constructing something" is different from, segregated from, and divided from, the sense of "a thing constructed." *See* MERRIAM-WEBSTER Online Dictionary, http://www.merriam-webster.com/dictionary/construction (last visited Sept. 9, 2016). As two different and segregated senses, they constitute two different meanings of the same word. The order of these different senses in a dictionary definition is not hierarchical, but merely historical: "the sense known to have been first used in English is entered first." *See* MERRIAM-WEBSTER Online Dictionary, http://www.merriam-webster.com/help/explanatory-notes/dict-definitions (last visited Sept. 9, 2016).

Given Merriam-Webster's explanation that "; *also*" is a sense divider, Brooke View's claim that the word construction means at the same time *both* "the process, art, or manner of constructing something" *and* "a thing constructed; a structure" is simply not supported by the definitions it cites. Other dictionaries identify the same two competing definitions of the word construction. *See, e.g.,* DICTIONARY.COM, http://www.dictionary.com/browse /construction

[4] Reference to a dictionary definition is consistent with statutory interpretation of an unambiguous statute. *See, e.g., State v. Dugan*, 157 Idaho 254, 255-56, 335 P.3d 594, 595-96 (Ct. App. 2014); *State v. Allen*, 148 Idaho 578, 580-81, 225 P.3d 1173, 1175-76 (Ct. App. 2009).

(last visited Sept. 9, 2016) (the word construction can mean either "the act or art of constructing" or "something that is constructed; a structure").[5]

When there are competing definitions of a word in a statute, the Court must apply only one definition. *See, e.g., Ex Parte Moore*, 38 Idaho 506, 514-15, 224 P. 662, 664-65 (1924) (addressing numerous dictionary definitions of the word "sabotage" and concluding that the Court had to choose one definition in interpreting the statute at issue); *see City of Boise v. Planet Ins. Co.*, 126 Idaho 51, 56, 878 P.2d 750, 755 (1994) (selecting only one of two dictionary definitions of the term "personal injury"); *State v. Brace*, 49 Idaho 580, 583, 290 P. 722, 722 (1930), *overruled in part on other grounds by State v. McMahan*, 57 Idaho 240, 65 P.2d 156 (1937) (selecting one of several dictionary definitions of the term "customarily"); *State v. Ramirez*, 33 Idaho 803, 814-15, 199 P. 376, 379-80, *modified*, 34 Idaho 623, 203 P. 279 (1921) (selecting one of several definitions of the term "execution"). This conclusion is compelled because it is a fundamental principle of statutory interpretation that "a statute can have only one meaning." *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) (*en banc*); *Rockwell Int'l Corp. v. United States*, 37 Fed. Cl. 478, 486 (1997), *aff'd in part, vacated in part on other grounds*, 147 F.3d 1358 (Fed. Cir. 1998) ("[S]tatutes can have only one meaning and interpretation.").

Brooke View next sets out a false dichotomy arguing that ACHD claims that "construction" means either "*during* construction *or* the *completed* construction." Resp. Br. at 15. *See also* Resp. Br. at 16 ("ACHD is saying that 'construction' must be segregated into *uncompleted* construction activities and *completed* construction, in the form of improvements

[5] ACHD identified these additional dictionary definitions in its Opening Brief at 29, and Brooke View simply chose to ignore them.

actually constructed, even though the statute on its face makes no such distinction.").[6] That is not ACHD's argument. ACHD does not segregate a single definition of the word construction into two separate definitions. Instead, ACHD identified two different and competing definitions of the same word, set forth in the Merriam-Webster dictionary, consisting of the physical acts of construction versus something that is constructed; a structure. Depending upon which definition the Court applies, § 7-711(2)(a) either allows recovery of damage occurring during the process of construction *or* for the improvement that is proposed to be constructed, *but not both*. *See Morales-Izquierdo*, 600 F.3d at 1083; *Rockwell*, 37 Fed. Cl. at 486. As discussed below, the only reasonable interpretation of § 7-711(2)(a) is that damage caused during the process of construction is not recoverable in a condemnation action.

C. ACHD Offers The Only Reasonable Interpretation Of § 7-711(2)(a).

Brooke View claims that "ACHD's interpretation is not reasonable, and does not consider the entire phrase 'construction of the improvement in the manner proposed.'" Resp. Br. at 14. Quite the contrary. ACHD's interpretation is the only interpretation that considers the entire phrase "construction of the improvement in the manner proposed," applies the language "at the date of the summons" contained in § 7-712, is consistent with other portions of Idaho's eminent domain statute including § 7-711(3), and is supported by Idaho's eminent domain precedent. *See Mayflower Ins. Exchange v. Kosteriva*, 84 Idaho 25, 30, 367 P.2d 572, 575 (1961) ("Words may in themselves be ambiguous, yet have a clear meaning when read in the

[6] Brooke View's reliance on *State v. Escobar*, 134 Idaho 387, 3 P.3d 65 (Ct. App. 2000) is misplaced. *See* Resp. Br. at 16-17. In that case the Idaho Court of Appeals was not presented with the interpretation of a statute controlled by the definition of one of the words of the statute as is the case here. Instead, all the court had to do was interpret the unambiguous language of Idaho Code § 37-2732B(c).

light the context affords."). Under a plain reading of the statute, damage caused during construction is simply not an element of just compensation or statutory severance damage.

1. ACHD's Interpretation Appropriately Gives Meaning To The Words "The Construction Of The Improvement In The Manner Proposed By The Plaintiff."

Idaho Code § 7-711(2)(a) provides that "[i]f 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*." (Emphasis added.) The statute does not end with the words "construction of the improvement." That phrase is modified by "in the manner proposed by the plaintiff." Likewise, the statute does not say "in the manner constructed," "in the manner accomplished," or "in the manner completed"—it says in the manner *proposed*.[7] Nowhere does it contemplate or allow damage alleged to be caused *during* construction of an improvement. The statute's plain terms thus require an analysis of the condemning authority's proposal.

Central to the issue of how the phrase "construction of the improvement in the manner proposed by the plaintiff" is to be interpreted is the Court's decision in *Idaho-Western*, 20 Idaho 568, 119 P. 60 (1911). In *Idaho-Western*, the Court squarely addressed the meaning of this phrase and held that the provision refers to "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.* at 581, 199 P. at 64 (emphasis added). Consistent with this holding, the Court held that "[t]he statute requires the condemnor to disclose *the purpose* for which he is seeking to

[7] "Propose" is defined as "to plan or intend to do (something)." *See* MERRIAM-WEBSTER Online Dictionary, http://www.merriamwebster.com/dictionary/propose (last visited Sept. 9, 2016). The word "proposed" as used in § 7-711(2)(a) therefore provides a temporal limitation to the recovery of severance damages.

condemn the property and *the general nature and character of the improvement or structure* he expects to erect[.]" *Id.* at 581-82, 199 P. at 64 (emphasis added). The Court made no reference to, and gave no consideration to, damages caused during construction as being a part of the damages authorized by § 7-711(2)(a).

Brooke View attempts to distance itself from *Idaho-Western's* holding by overlaying onto the Court's decision its preferred interpretation of § 7-711. Resp. Br. at 21-22. In order to do so, Brooke View omits significant portions of the Court's decision. *Id.* In particular, Brooke View quotes only the sentence in which the Court states that important considerations under § 7-711 are "the use to which the property is to be applied, the nature of the improvement, and the manner in which the improvement is to be made and the use carried on." *Id.* at 22 (quoting *Idaho-Western,* 20 Idaho at 582, 199 P. at 64). Based upon its selective reading of the decision, Brooke View attempts to impose its preferred interpretation concluding that the quoted language "can only refer to the manner and method of construction" and therefore it must include damages caused during construction. *Id.* Contrary to Brooke View's assertion, the Court in *Idaho-Western* made no such ruling.

When read in its entirety, the Court's interpretation of the phrase "construction of the improvement in the manner proposed" looks to the "purposes" for which the property is being condemned and "the general nature and character of the improvement" to be constructed—not the physical act of constructing the improvement. *Idaho-Western,* 20 Idaho at 582, 199 P. at 64. The phrase "the manner in which the improvement is to be made" cannot be read in a vacuum, separate from the rest of the Court's holding that focuses on the purposes, nature, and character of the improvement proposed. It also cannot be read to mean that damages occurring during construction are recoverable, particularly when nothing else in *Idaho-Western* addresses the

impact of actual construction activities involved in building the rail line in that case.[8] Brooke View's selective reading of a portion of the *Idaho-Western* decision—that ignores the facts and the actual conclusions reached by the Court—must be rejected.

2. ACHD's Interpretation Appropriately Gives Meaning To The Words "At The Date of the Summons."

In addition to looking at the plain meaning of the statute, the rules of statutory interpretation also require this Court to consider the plain meaning of § 7-711(2)(a) within the entire context of Chapter 7, Title 7 of the Idaho Code. *See St. Luke's Reg'l Med. Ctr.*, 146 Idaho at 755, 203 P.3d at 685. That analysis necessarily includes § 7-712—the statute which immediately follows, and specifically refers to § 7-711.

Brooke View misconstrues § 7-712 in an attempt to improperly expand the damages available to a condemnee. First, Brooke View ignores the plain language of § 7-712, and instead advocates for a "same day" measure of damage without regard to the date of the summons. Resp. Br. at 33-34. Next, unable to legitimately argue around the plain language of § 7-712, Brooke View concedes that severance damages must be "*measured* as of the date of summons." Resp. Br. at 34. However, Brooke View then proceeds to argue that although § 7-712 requires severance damages to be *measured* at the date of the summons, it does not require damages to have "*occurred* as of the date of the summons" because that would be "ludicrous as it is not possible in a direct condemnation case for any damages to have occurred as of the summons." *Id.*[9]

---

[8] *Idaho-Western* is not the only Idaho case with this interpretation and understanding of Idaho Code § 7-711(2)(a). *See Campbell*, 34 Idaho at 605, 202 P. at 1066 (holding that damages that accrue long after the date of summons are not recoverable in condemnation).

[9] Brooke View selectively quotes a portion of IDJI2d 7.18 to suggest that damage caused after the date of summons and during construction is relevant to severance damage under § 7-711. Resp. Br. at 35. It also cites *Pacific Northwest Pipeline Corp. v. Waller*, 80 Idaho 105, 109, 326

Brooke View again ignores the express language of § 7-712. Section 7-712 states in unambiguous terms that a landowner's right to compensation and damages "shall be deemed to have accrued at the date of the summons." The statute further states that "its actual value, *at that date*, shall be the measure of compensation for all property to be actually taken, and the basis of damages to property not actually taken, but injuriously affected, in all cases where such damages are allowed, as provided in the last section." Idaho Code § 7-712 (emphasis added). The statute's reference to "the last section" means § 7-711, including its requirement that recoverable damages are limited to those "which will accrue" to the remainder property because of the "construction of the improvement *in the manner proposed* by the plaintiff." Idaho Code § 7-711(2)(a) (emphasis added).

If any question remains that damages are to be assessed as of the date of the summons, the next sentence of § 7-712 resolves any pending doubt by stating "[n]o improvements put on the property subsequent to the date of the service of summons shall be included in the assessment of compensation or damages." *Id.* The legislature, by including this language, clearly specified that the focus of the entire damages inquiry is on what is *proposed* at the date of summons and not on what is constructed or added as an improvement on the property afterwards.

Severance damages are those that "will accrue," measured "at the date of the summons" from the "construction of the improvement *in the manner proposed*." Idaho Code §§ 7-711(2)(a), 7-712; *see Campbell*, 34 Idaho at 605, 202 P. at 1066 (rejecting a claim under

---

P.2d 388, 392 (1958), for the same proposition. Yet neither the pattern instruction nor the cited case require a deviation from the plain language of the statute which requires an evaluation of the project plans at the date of the summons. IDJI2d 7.18 (requiring that valuation of the property being taken and damages to the remainder are "determined as of [date]"—meaning the date of the summons); *Waller*, at 109-10, 326 P.2d at 390-91 (upholding trial court's jury instruction that "fixed the accrual date of the damages as of the date of the summons").

§ 7-711(2)(a) because the damages could not be "anticipated" as of the date of the summons); *see also Indep. Sch. Dist. of Boise City v. C. B. Lauch Const. Co.*, 78 Idaho 485, 489, 305 P.2d 1077, 1079 (1957) (holding that § 7-712 "provides that the right shall *be deemed* to accrue at that date 'for the purpose of assessing compensation and damages'"); *Portneuf Irrigating Co v. Budge*, 16 Idaho 116, 128, 100 P. 1046, 1050 (1909) (noting that section 5221, which is an earlier version of § 7-712, provides "that the compensation to be assessed shall be fixed as of the date of the issuance of the summons").

Brooke View takes the incredible position that ACHD never made this argument before appeal, citing only a very selective portion of the Trial Transcript. Resp. Br. at 12-13 (citing TT 157:18-158). Brooke View conveniently omits portions of the Transcript that demonstrate that the issue of whether a landowner can assert severance damages for what is *proposed* and not what actually happens *during* construction was not only raised before the district court, but it was discussed by both Brooke View's counsel and the district court. The court even noted its disagreement with the argument.

> [Brooke View's Counsel]: Under Mr. Gourley's interesting interpretation that he put up here where proposed means what they're going to do, but if they actually do it and it causes damage, you don't get those damages, that's a stretch. There's no case that says that. That is a novel interpretation.
>
> THE COURT: Well, I think what he's saying is that you -- in determining whether it's a severance damage due to the construction, you look at the project as proposed to see if it would have caused that. I'm not saying I agree with him. I'm just saying that's what I understand his argument to be.

TT 94:24-95.[10] Given this exchange, it is entirely disingenuous for Brooke View to argue that ACHD failed to raise this issue to the district court.

[10] The district ruled that evidence concerning the physical acts of construction was admissible at trial. *See, e.g.*, CR 3281-84; TT 107, 168-69, 173-75, 187-89, 318-23. Given these rulings,

Brooke View repeats this erroneous contention by claiming that "ACHD made no argument regarding construction of § 7-712 together with § 7-711(2)(a) to the district court." Resp. Br. at 31.[11] But the issue is not one of statutory construction, it is one of interpretation, and § 7-711(2)(a) cannot be properly interpreted in a vacuum separate and apart from § 7-712. *See St. Luke's Reg'l Med. Ctr.*, 146 Idaho at 755, 203 P.3d at 685. And where, as here, the district court's interpretation is incorrect, "neither the ends of judicial economy nor the ends of justice would be well served by [the] acquiescence in the erroneous application of law." *Ochoa v. State, Indus. Special Indem. Fund*, 118 Idaho 71, 79, 794 P.2d 1127, 1135 (1990) (Bistline, J., dissenting) (quoting *Empire Life Ins. Co. of Am. v. Valdak Corp.*, 468 F.2d 330, 334 (5th Cir. 1972)). "Neither the parties nor the trial judge, by agreement or passivity, can force [an appellate court] to abdicate [its] appellate responsibility." *Id.* at 80, 794 P.2d at 1136 (quoting *Empire Life Ins.*, 468 F.2d at 334).

Thus, even if ACHD did not raise this argument previously, which is not the case, this Court "may exercise its discretion to consider a point for the first time on appeal where the point involves a pure question of law determinable from uncontroverted facts." *Id.* at 78, 794 P.2d at 1134; *see also WildWest Inst. v. Bull*, 547 F.3d 1162, 1172 (9th Cir. 2008) (recognizing a limited exception to the rule that an issue cannot be raised for the first time on appeal when the issue "is purely one of law and does not depend on the factual record below").

ACHD had to make no further objection to preserve the issue for appeal. *See, e.g., Kirk v. Ford Motor Co.*, 141 Idaho 697, 702, 116 P.3d 27, 32 (2005) (where "the trial court unqualifiedly rules on the admissibility of evidence prior to trial no further objection is required to preserve the issue for appeal.").

[11] This is not a new issue. In fact, Brooke View clearly understood ACHD's argument and made a point to cite to Idaho Code § 7-712 in Defendant's Pretrial Memoranda and to discuss the accrual date of severance damages. *See* CR 3722.

3. ACHD's Interpretation Is Consistent With Idaho Code § 7-711(3)'s Use Of The Word Construction.

Brooke View concedes that § 7-711(a)(2) must be interpreted in light of § 7-711(3). *See* Resp. Br. at 17-18;[12] *see also Sprouse v. Magee*, 46 Idaho 622, 631, 269 P. 993, 996 (1928) ("Another rule of interpretation is that other portions of the same act or section may be resorted to as an aid to determine the sense in which a word, phrase, or clause is used, and such word, phrase, or clause, repeatedly used in a statute, will be presumed to bear the same meaning throughout the statute, unless there is something to show that there is another meaning intended, such as a difference in subject-matter which might raise a different presumption.").

Brooke View then attempts to address the meaning of the word "construction" in § 7-711(3) of Idaho's eminent domain statute. Resp. Br. at 17-18. The weakness of its argument demonstrates the weakness of its interpretation. Brooke View argues that the term "construction" must refer to activities occurring during construction because those on-going construction activities can have benefits to the remainder parcel. *Id.* The examples provided by Brooke View include, "grading," "compaction," "overall topography," "re-routing of traffic," and "removal of toxic waste." *Id.* Yet, the benefits of each of Brooke View's examples are derived from the proposed improvement and not the acts actually performed during construction—and all of the activities described can be anticipated from project plans measured at the date of the summons. If those items cannot be anticipated from the project plans, they are not appropriately included as part of a severance damage claim under § 7-711(2)(a) or a special benefits analysis under § 7-711(3). Thus, Brooke View's own proffered examples undermine its

[12] Brooke View's positions are inconsistent in that it concedes that the Court should look at § 7-711(3) in its interpretation of § 7-711(2)(a), but at the same time should ignore § 7-712. Brooke View cannot have it both ways and § 7-711(2)(a) cannot be lawfully interpreted apart from § 7-712. *See St. Luke's Reg'l Med. Ctr.*, 146 Idaho at 755, 203 P.3d at 685.

argument and provide further support for the conclusion that the term "construction" as used in § 7-711(3) and § 7-711(2)(a) means "a thing constructed; a structure."

4. ACHD's Interpretation Is Consistent With Idaho Case Law.

As demonstrated by the case law set forth in ACHD's Opening Brief, Idaho Supreme court jurisprudence over the last 100 years has repeatedly allowed severance damages for "something that is constructed; a structure." *See* Opening Br. at 38-39 (citing cases). In response, Brooke View does not address *any* of these cases, nor does it attempt to distinguish this significant, precedent-setting case law.[13] Instead, Brooke View makes the conclusory assertion that if this Court adopts ACHD's position, there will be "a true departure from Idaho's existing body of case law." Resp. Br. at 26. Yet Brooke View fails to cite any authority in support of this statement, nor does it explain what "body of case law" will be overturned. *See id.*[14]

It may be that Brooke View is referring to the three cases cited earlier in the same section of its Response Brief where it makes the "true departure" argument—*Palmer v. Highway District No. 1 Bonner County*, 49 Idaho 496, 290 P. 393 (1930), *State ex rel. Rich v. Fonburg*, 80 Idaho 269, 328 P.2d 60 (1958), and *State ex rel. McKelvey v. Styner*, 58 Idaho 233, 72 P.2d 699 (1937) (*cited in* Resp. Br. at 25). Brooke View cites these cases for the proposition that "any facts which bear on value may be considered by the jury in assessing damages." Resp. Br. at 25. If

[13] In the same vein, Brooke View does not address ACHD's argument that the district court's interpretation of § 7-711(2)(a) 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 *Ada County Highway District v. Acarrequi*, 105 Idaho 873, 673 P.2d 1067 (1983) and its progeny. *See* Opening Br. at 46-49.

[14] Notably, Brooke View acknowledges that although other states have statutes with similar language as § 7-711(2)(a), there is a "dearth" of cases addressing, much less approving, "damages caused during construction of the improvement." Resp. Br. at 21.

this is the "body of case law" referenced by Brooke View, its argument is without merit because the rule of law referenced by Brooke View was expressly rejected by this Court in *State, Idaho Transportation Board v. HI Boise*, 153 Idaho 334, 340, 282 P.3d 595, 601 (2012). There, the Court held that the language cited by Brooke View—that damages in a condemnation case may include "all inconveniences" caused to the remainder property—"is simply a loose and somewhat misleading translation" of § 7-711(2)(a). The Court then held that—contrary to Brooke View's assertion—not "all inconveniences" may be considered by the jury, but only those that are appropriate under Idaho law.[15] *See id.* (holding that as a matter of law, severance damages were not available where access rights had merely been regulated, rather than taken). Thus, Brooke View's argument is simply incorrect.

Brooke View next cites *Rawson-Works Lumber Co. v. Richardson*, 26 Idaho 37, 141 P. 74, 75 (1914) and *State Highway Commission v. Hooper*, 259 Or. 555, 560, 488 P.2d 421, 423 (1971) for the proposition that just compensation is to be considered in terms of what the owner has lost and not what the condemnor has gained. Resp. Br. at 17. From there Brooke View argues that ACHD's reading of § 7-711(2)(a) "defies common sense" and "ignores all the basic principles underlying the meaning of just compensation." *Id.* Contrary to Brooke View's suggestion, ACHD has never advocated that what it gained is in any way relevant to this case. Therefore, these cases are inapplicable.

The primary basis for Brooke View's expansive interpretation of § 7-711(2)(a) is, in fact, not based on Idaho law at all. Brooke View repeatedly claims that the purpose of just

---

[15] The Idaho Supreme Court's holding in *HI Boise* specifically limited the prior ruling in *Fonburg*. *HI Boise*, 153 Idaho at 340, 282 P.3d at 601. However, it also limited the rulings made in the other two cases cited by Brooke View, *Palmer* and *Styner*, because both cases predate *Fonburg*. As such, Brooke View's reliance on these two cases is also misplaced.

compensation "is to put the property owner in as good a position as he would have been absent the taking, and to ensure that no one citizen bears the burden of the public project more than other citizens." Resp. Br. at 17 (citing *United States v. Va. Elec. & Power Co.*, 365 U.S. 624, 633 (1961); *United States v. Miller*, 317 U.S. 369, 373 (1943)). However, this statement of law is premised entirely on decisions of the United States Supreme Court under the Fifth Amendment to the U.S. Constitution, and not on Idaho case law analyzing Idaho's constitution.

In Idaho, just compensation is not defined in the same manner as it is under the federal constitution. Rather, just compensation under Idaho's constitution "is based on fair market value, which is the price for which the property that is taken could be sold by an owner willing to sell to a willing purchaser on the date of the taking." *State, Dep't of Transp. v. HJ Grathol*, 153 Idaho 87, 92-93, 278 P.3d 957, 962-63 (2012) (citing *Ada Cty. Highway Dist. v. Magwire*, 104 Idaho 656, 658-59, 662 P.2d 237, 239-40 (1983)). Just compensation does not include compensation for all injury or damage caused that would otherwise put the landowner back in the position he would have been in absent the taking. *See* Opening Br. at 40-41 (detailing numerous types of claimed damage that are not compensable in Idaho as matter of law). Thus, in Idaho, where a landowner is not permitted to recover for all damages that may accrue as a result of the taking, the amount of just compensation owed may not place the condemnee in "as good a position as he would have been absent the taking."

This is not a novel concept, nor is it unique to Idaho. As stated in Nichols on Eminent Domain:

> A basic principle in valuing a taking is that the property owner is entitled to "full and perfect equivalent" of the property taken. In theory, this means the condemnor should leave the property owner in as good a pecuniary position as he or she would have been if the property had not been taken. Therefore, it would seem that the property owner ought to receive compensation for any damages inflicted by the taking. And, indeed, reported decisions in many

> jurisdictions offer these broad statements about making the property owner "whole." *In reality, however, various exceptions to compensation exist for certain impacts, such that many property owners do not receive compensation equivalent to the total value of their loss.*

4A-14 NICHOLS ON EMINENT DOMAIN § 14.03 (emphasis added and footnotes omitted). This is the case in Idaho, and Brooke View's suggestion to the contrary is incorrect.

5. Brooke View's Reliance On The *Symms* Case Is Entirely Misplaced.

In support of its argument that § 7-711(2)(a) should be interpreted to include damages caused *during* the physical construction of a project, Brooke View cites to *State ex rel. Symms v. Thirteenth Judicial District*, 91 Idaho 237, 419 P.2d 679 (1966), and it takes issue with ACHD not citing the *Symms* case. Resp. Br. at 23. However, ACHD did not cite to the case it has no bearing on the issues presented here. The *Symms* case simply held that allegations of damages caused during construction raised material facts relating to issues framed in the complaint and answer and therefore the State's demand for a jury trial was timely. *Id.* at 239-40, 419 P.2d at 681-82. The Supreme Court did not address the merits or test the legitimacy of the asserted claims or defenses; it did not address the substantive issue of the landowners' damage claims; and it did not conclude that landowners can recover in condemnation actions damages accruing during the process of construction. In fact, the case contains no holding authorizing the recovery of damages caused during construction and therefore fails to provide any meaningful support for Brooke View's argument that such damages are compensable in a condemnation action.

6. The Extra-Jurisdictional Cases Cited By Brooke View Are Inapplicable and Do Not Support Brooke View's Expansive Reading of § 7-711(2)(a).

In support of its interpretation, Brooke View cites cases from several different jurisdictions that have purportedly held that damages caused during construction of a public

improvement may be recoverable in a condemnation action. Resp. Br. at 26-31, 35. All of the cited cases are legally or factually distinguishable.

First, the Virginia, Illinois and Arkansas cases cited by Brooke View are legally distinguishable because the constitutions from those states authorize a broader scope of damages than are afforded under Idaho's more limited constitutional provision. *See* Resp. Br. at 30, 35 (discussing *Tidewater Constr. Corp. v. Manly*, 75 S.E.2d 500 (Va. 1953), *Kane v. City of Chicago*, 64 N.E.2d 506 (Ill. 1945), *Ark. La. Gas Co. v. McGaughey Bros., Inc.*, 468 S.W.2d 754 (Ark. 1971); *Ark. State Highway Comm'n v. Choate*, 505 S.W.2d 731 (Ark.1974)). Each of these jurisdictions permit just compensation awards when property is "taken" or "damaged," whereas Idaho's constitutional limits such awards to property "taken." *Compare* VA. CONST. art I, § 11 ("No private property shall be *damaged or taken* for public use without just compensation to the owner thereof") (emphasis added); ILL. CONST. art I, § 15 ("Private property shall not be *taken or damaged* for public use without just compensation as provided by law.") (emphasis added); ARK. CONST. art II, § 22. ("private property shall not be *taken, appropriated or damaged* for public use, without just compensation therefor.") (emphasis added), *with* IDAHO CONST. art I., § 14 ("Private 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 therefor.") (emphasis added); *see* Opening Br. at 26-29. Indeed, in *Idaho-Western*, the Idaho Supreme Court, in its discussion of the history of various states' constitutional eminent domain provisions, specifically identified Virginia, Illinois, and Arkansas as being among those states whose "take or damage" constitutions afforded greater damages than were available under Idaho's constitution.[16] 20

[16] Additionally, to the extent that Brooke View cites to Arkansas cases in support of its argument that damages caused by construction activities occurring after the date of summons may be taken into consideration in measuring severance damages (Resp. Br. at 35-36), its reliance on these

Idaho at 583-87, 119 P. at 650-66. Thus, these cases cannot be legitimately used as authority to understand or interpret Idaho's eminent domain law.

Like the Virginia, Illinois, and Arkansas cases, the Alaska and Montana cases referenced by Brooke View, *City of Anchorage v. Scavenius*, 539 P.2d 1169 (Alaska 1975) and *Montana Railroad Co. v. Freeser*, 29 Mont. 210, 74 P. 407 (Mont. 1903) are also legally distinguishable. In its Opening Brief ACHD cited these cases—both from "take or damage" jurisdictions—to demonstrate that even in jurisdictions with much broader constitutional provisions, damages caused during construction are disallowed.[17] Brooke View cites these same cases to argue that severance damages should be allowed for non-negligent activities which occur during construction. Its reliance on Alaska and Montana case—with their broader constitutional provisions— to expansively read § 7-711(2)(a) should be rejected. There is nothing under Idaho law to suggest that Idaho's limited "take" constitution would permit damages for activities during construction whether from negligent or non-negligent conduct. And, in fact, the plain language of Idaho's eminent domain statute and Idaho's case law leads to the contrary conclusion. *See* Idaho Code §§ 7-711(2)(a), 7-712; *Campbell*, 34 Idaho at 605, 202 P. at 1066; *Idaho-Western*, 20 Idaho at 583-84, 119 P. at 65-66.

Brooke View's reliance on the Indiana cases of *Elson v. City of Indianapolis, ex rel. Dep't of Redevelopment*, 204 N.E.2d 857, 864 (Ind. 1965) and *State v. Heslar*, 274 N.E.2d 261,

---

cases is equally misplaced. This Court has already considered, ruled on, and rejected, that argument. *Campbell*, 34 Idaho at 605, 202 P. at 1066.

[17] Alaska's constitution provides that "[p]rivate property shall not be *taken or damaged* for public use without just compensation." ALASKA CONST. art I, § 18 (emphasis added). Similarly, Montana's constitution states that "[p]rivate property shall not be *taken or damaged* for public use without just compensation to the full extent of the loss having been first made to or paid into court for the owner. MONT. CONST. art II, § 29 (emphasis added).

266 (Ind. 1971), are also factually and legally distinguishable. From the outset, *Elson* is distinguishable on its facts because the court's decision did not address any claim for damage caused by the construction of a project. Instead, the opinion addressed a landowners' claim for lost profits—an issue wholly irrelevant to this case. *Id.* at 861-63. Additionally, Brooke View's citation to *Elson* comes from a concurring opinion that addresses the history of Indiana's unique damages statute. *See* Resp. Br. at 29 (quoting *Elson*, 204 N.E.2d at 864 (Achor, J., concurring)).[18] In short, when read in full, the concurrence explains that Indiana's statute is particular in its history, context, and language and that as a result, it allows for damages "without regard to whether any of [the landowner's] land was taken or not." *Id.* at 864. Thus, even though the Indiana and Idaho's damage statutes share some of the same language, the significant differences between the statutes limits, if not eliminates, any meaningful guidance that can be drawn from the case.[19]

7. If the Court Considers Extra-Jurisdictional Authority, It Should Consider Cases With A "Take" Only Constitutional Provision Like The *Hillsboro* Case.

Instead of considering cases from around the country with "take" and "damage" constitutional provisions, as Brooke View suggests, if the Court is inclined to look to extra-

---

[18] Indiana's statute provides for four separate components of damages in a condemnation action. The first is for the fair market value of the property taken. The second is for the value of the improvements on the property. The third is for the damages caused to the remainder property caused by the taking. And the fourth—which was a later amendment to the statute—is for "[s]uch other damages, if any as will result to any persons or corporation from the construction of the improvements in the manner proposed by the plaintiff." *Elson*, 204 N.E.2d at 864 (Anchor, J., concurring) (referencing Indiana's then version of Indiana Code § 3-1706 (1946 Repl.), which is identical to current provision § 32-24-1-9).

[19] *State v. Heslar*, 274 N.E.2d at 261, cited by Brooke View, was decided after *Elson*, but is similarly distinguishable based upon the specific statutory provision contained in Indiana's eminent domain statute that is unlike Idaho's § 7-711(2)(a) in background, framework, and language.

jurisdictional cases, decisions from jurisdictions that share Idaho's "take" only constitutional provision should be considered. One such case briefed by both parties is *Division of Administration, State Department of Transportation v. Hillsboro Association, Inc.*, 286 So. 2d 578 (Fla. Dist. Ct. App. 1973). *See* Opening Br. at 44; Resp. Br. at 28.

Brooke View attempts to distinguish *Hillsboro* on the grounds that: (1) Florida's eminent domain statutes on damages do not contain the same language as Idaho Code § 7-711(2)(a); (2) there was no competent evidence of causation in the case as between the damage and the condemnor's construction; and (3) the holding in the case—that injury or damage from non-negligent construction, properly performed was *damnum absque injuria* and not recoverable in a condemnation action—is not applicable because it was based upon tort principles. Resp. Br. at 28-29. Brooke View's assertions are incorrect.

First, Brooke View is correct in its statement that Florida's eminent domain statute on damages is different than Idaho's. But Florida's constitution contains a "take" only provision, and Florida's enabling legislation is significantly broader than Idaho's allowing for the recovery of "*any damages* to the remainder caused by the taking." FLA. CONST. art X, § 6; FLA. STAT. ANN. § 73.071(3)(b) (emphasis added). Yet, even with a similar constitutional provision and a significantly more expansive statutory damages provision, Florida's appellate court still limited the recoverable damages to exclude those damages caused "as a result of the manner in which the construction is performed"—regardless of whether the construction was negligent or not. *Hillsboro*, 286 So. 2d at 579. Contrary to Brooke View's suggestion, the differences between Florida's and Idaho's statutes provide further support for ACHD's position, particularly when coupled with the shared constitutional provision.

Second, while the Florida court did conclude that there was no competent evidence of causation, the court made clear that its ruling did not "detract[] from our holding herein that such

consequential damages to the remainder are not properly to be considered in an eminent domain proceeding." *Id.* at 579. Therefore, Brooke View's causation argument is not a legitimate basis for distinguishing the case.

Third, Brooke View is simply incorrect in suggesting that the Florida court's denial of condemnation damages for non-negligent construction as *damnum absque injuria* was based upon tort principles. Rather, the court's ruling was based upon a fundamental eminent domain principle—that is similarly applied in Idaho—that damages in a condemnation action do not include consequential damages, which are therefore considered *damnum absque injuria*. *Id.* at 579; *see Idaho-Western*, 20 Idaho at 584-85, 119 P. at 65 (1911) (holding that Idaho's constitutional provisions on eminent domain do not provide for the award of consequential damages); *see State ex rel. Rich v. Idaho Power Co.*, 81 Idaho 487, 515, 346 P.2d 596, 612 (1959) (holding that injury sustained from actions that are not compensable in an eminent domain proceeding—i.e., the requirement that utility facilities be relocated from with the public right-of-way—are considered *damnum absque injuria*).

8. Brooke View's Temporary Easement Argument Is Not Properly Before The Court, Is Contrary To Idaho Law, And Is Not Supported By The Cases It Cites.

Brooke View asserts that it is entitled to compensation for damage caused to the walls during construction because the walls were partially within the temporary construction easement. Resp. Br. at 31. Brooke View's argument is both curious and meritless because there is no issue raised on appeal or in a cross-appeal by Brooke View as to the temporary construction easement, its value, or the amount awarded by the jury for the easement. *See* CR 4889-90 (Special Jury Verdict awarding $676.50 for the temporary construction easement). Brooke View's argument should therefore be rejected outright.

As to the substance of Brooke View's argument and its cited case authority, neither provide support for Brooke View's expansive reading of § 7-711(2)(a). The case of *Matter of Kadlec v. State of New York*, makes no holding as to damages caused during construction. 264 A.D.2d 420, 420-21 (N.Y. App. Div. 1999). Rather, the case only concludes that all damages, including consequential damages, are recoverable as a result of a temporary easement—a holding which is contrary to Idaho eminent domain law which provides that consequential damages are not recoverable. *See Idaho-Western*, 20 Idaho at 584, 119 P. at 65. Next, the case of *State ex rel. Missouri Highway & Transportation Commission v. Beseda*, not only fails to support Brooke View's argument but it actually supports ACHD's interpretation of § 7-711(2)(a). 892 S.W.2d 740 (Mo. 1994). Like the *Campbell* case, *Beseda* holds that temporary easement damages are only recoverable if the acts "were not tortious and the damage could have been reasonably anticipated" as of the date of the taking. *Id.* at 742. And where Brooke View's damages could not reasonably have been anticipated, see Section III.F., *infra*, the case is inapplicable. Finally, the case of *Colonial Pipeline Co. v. Weaver*, 310 S.E.2d 338 (N.C. 1984), permitted damages caused during construction, however North Carolina's statutes on just compensation is significantly broader than Idaho's § 7-711 and specifically allows for damages for " increases or decreases caused by the proposed project including any work to be performed under an agreement between the parties." *See* N.C. GEN. STAT. § 40A-66. Thus, this case fails to provide legitimate support for Brooke View's arguments.

D. IF AMBIGUOUS, A STATUTORY CONSTRUCTION OF § 7-711 REQUIRES §§ 6-904(7) AND 7-711 TO BE READ TOGETHER *IN PARI MATERIA*.

If the Court concludes that § 7-711 is capable of two reasonable interpretations, the construction of the statute, including reading other statutes addressing the same subject matter, becomes applicable. *See City of Sandpoint v. Sandpoint Indep. Highway Dist.*, 139 Idaho 65, 69,

72 P.3d 905, 909 (2003); *see also Planet Ins. Co.*, 126 Idaho at 56, 878 P.2d at 755 (concluding that differing dictionary definitions rendered term ambiguous).

Brooke View first claims that §§ 6-904(7) and 7-711 do not have to be read *in pari materia* because the provisions are in separate Titles and Chapters of the Idaho Code. Resp. Br. at 36-37. That is not the law. *See, e.g.*, *Tway v. Williams*, 81 Idaho 1, 7, 336 P.2d 115, 118 (1959) ("it is proper to consider, not only acts passed at the same session of the legislature, but also acts passed at prior and subsequent sessions"). The standard instead is whether the two statutory provisions relate to the same subject matter. *City of Sandpoint*, 139 Idaho at 69, 72 P.3d at 909. And here they do.

Both §§ 6-904(7) and 7-711 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). Where, like here, one statute is specific (§ 6-904(7) relating to "highways, roads, streets, bridges, or other public property") and the other statute is more general, the specific statute controls. *See State v. Barnes*, 133 Idaho 378, 987 P.2d 290 (1999) (noting that "where two statutes appear to apply to the same case or subject matter, the specific statute will control over the more general statute"). And without regard to which statute controls, as enactments in *pari materia*, the statutes must be interpreted in light of each other because they share a common subject matter.

Brooke View describes ACHD's argument as seeking "design immunity from damages caused by construction of the project as designed, pursuant to the plans," and claims this argument is new. Resp. Br. at 37. But as the record reflects, the argument is not new:

> It is undisputed that Brooke View's claim for damage to the Walls arises out of the plan or design of a construction or improvement to the road adjacent to the Brooke View property. It is likewise

> undisputed that ACHD constructed its improvement pursuant to a plan or design prepared in substantial conformance with engineering or design standards.

See CR 1388 (Memorandum in Support of ACHD's Fourth Motion for Partial Summary Judgment, or in the Alternative, Motion in Limine). ACHD made this argument to the district court, preserving the issue for this Court's consideration.

Brooke View cites *Renninger v. State*, 70 Idaho 170, 178-79, 213 P.2d 911, 916-17 (1950), quoting the portion of the case that reads "[t]his provision of the Constitution, therefore, waives the immunity of the State from suit." Resp. Br. at 38.[20] But as discussed in great detail above, Idaho's Constitution is only self-executing as to the "taking of property"—not with regard to severance damages, which are dependent on the statutory enactment.[21] As this Court has recognized, "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." *Idaho-Western*, 20 Idaho at 583, 119 P. at 65. The *Idaho-Western* Court explained 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." *Id.* at 585, 119 P. at 65 (emphasis added). And, indeed, that is what the legislature did through the passage of § 7-711—it allowed a condemnee to recover only certain types of damage as specified by the legislature.

---

[20] Brooke View cites *State ex rel. Flandro v. Seddon*, 94 Idaho 940, 943, 500 P.2d 841, 844 (1972) for the proposition that "[e]minent domain cases are inherently an exception to sovereign immunity." Resp. Br. at 38. *Seddon* does not stand for that proposition. Instead, the case addressed what issues are properly tried to a jury—noting that the only issue properly tried as a jury issue is just compensation.

[21] Brooke View claims that it is ACHD's obligation "to pay just compensation for property taken or damaged pursuant to Idaho Constitution." Resp. Br. at 4 (citing art. I, § 14). This is a blatant misstatement of Idaho's Constitution. *See* Opening Br. at 26-29.

Thus, because the present dispute focuses on the scope of damages allowed by § 7-711(2)(a)'s "as proposed" language, other statutes bearing on the same subject matter, like § 6-904(7), are relevant and must be read in harmony with § 7-711(2)(a). Brooke View's suggestion that the State has somehow entirely waived its limited right of sovereign immunity afforded in the Tort Claims Act is directly contradicted by the *Renninger* case cited by Brooke View. 70 Idaho at 181, 213 P.2d at 918 ("A distinction, however, should be made between the damaging of property and the actual taking, and courts have held that the immunity from suit of a sovereign state cannot be circumvented by an eminent domain theory."). Because the question before the Court is the scope of §§ 7-711(2)(a), this statute and 6-904(7) must be read *in pari materia* before a determination can be made as to what is just compensation, what is tort, and what is potentially subject to design immunity. Section 7-711(2) is not a self-executing waiver of immunity as Brooke View suggests.

The extra-jurisdictional cases cited by Brooke View suffer from a similar deficiency. *See* Resp. Br. at 39, n.58. All of those cases stand for the proposition that a tort claim act cannot abrogate a *constitutional* right to just compensation. *See, e.g., Rose v. State*, 123 P.2d 505, 513 (Cal. 1942) ("[T]he legislature by statutory enactment may not abrogate or deny a right *granted by the Constitution*") (emphasis added). ACHD does not disagree with this concept, however, none of the cases support the proposition that statutes addressing the same subject matter should not be read in harmony with each other.

Brooke View's asserted right to severance damages does not arise from Idaho's constitution, but instead from the language of § 7-711(2)(a)—the same language that must be read *in pari materia* with § 6-904(7). And when § 7-711(2)(a) and § 6-904(7) are read together, it becomes clear that the legislature did not intend to allow recovery in a condemnation action for

damage caused during construction, carried out pursuant to a plan or design prepared in substantial conformance with engineering and design standards.

E. Even If The Word Construction As Used In § 7-711(2)(a) Could Contemporaneously Carry Two Definitions And Mean Two Different Things, Brooke View's Severance Damage Claim Still Fails Under The Plain Meaning of Idaho's Eminent Domain Statute.

Whatever definition the Court decides to apply to the word construction must be read in the context of "in the manner proposed" and "at the date of the summons." *See* Idaho Code §§ 7-711(2)(a) and 7-712. Said another way, regardless whether the word means the physical acts of construction, the improvement that is constructed, or whether it somehow means both things at the same time—as suggested by Brooke View—under the plain wording of §§ 7-711(2)(a) and 7-712, the determining fact is what is proposed at the date of the summons. Contrary to Brooke View's assertion, what actually transpired during construction cannot give rise to a claim of severance damages under § 7-711(2)(a).

Brooke View is not subtle in its position—it openly requests the Court ignore the plain language of Idaho Code §§ 7-711(2)(a) and 7-712. First, Brooke View acknowledges Idaho's eminent domain statute, codified in 1881, stating exactly what the plain language requires: "[a]s no improvements could ever have been constructed by any condemnor [by the date of the summons], damages would have to be assessed based merely on what is *proposed* without consideration of any construction actually undertaken or completed." Resp. Br. at 32 (emphasis in original). Unsatisfied with the plain language, and claiming that the statute "ignore[s] reality," Brooke View asks the Court to look beyond what was "proposed" and beyond the "date of the summons," to what was actually carried out during the process of construction, in hindsight.

Brooke View relies on the enactment of the so called "quick take" statute (Idaho Code § 7-721) to support its position. But what Brooke View actually requests is that the Court usurp

the legislative function and rewrite §§ 7-111(2)(a) and 7-712. *See* Resp. Br. at 32. Brooke View is correct that prior to the enactment of § 7-721 condemnors could commence construction of the improvement on the land to be acquired only by agreement or by the appointment of commissioners and a preliminary assessment of just compensation pursuant to § 7-717. Thus, as acknowledged by Brooke View, prior to the enactment of § 7-721 and consistent with the plain language of §§ 7-711(2)(a) and 7-712, "[j]ust compensation was assessed with damages based on the project plans" without regard to the "actual impacts of the take and the construction of the improvement on the remaining property." Resp. Br. at 32.

What is significant about the addition of § 7-721 to the statutory scheme in 1969—and what is glossed over by Brooke View—is that the legislature did nothing to modify the language of §§ 7-711(2)(a) or 7-712 to allow any consideration of the actual impacts of construction. Instead, the language "as proposed" and "at the date of the summons" remained intact within §§ 7-711(2)(a) and 7-712. So while, after the 1969 statutory amendments, a condemnor may gain possession of property before the just compensation is determined, severance damage, if any, has always been measured, and remains measured, as of the date of the summons and based on the project plans without regard to any actual impact of the take. This includes whatever actual impacts construction activities may, or may not, actually have on the remaining property.

Ignoring the language of the statutes, Brooke View resorts to arguing that valuing just compensation as of the date of the summons and on the project plans is "not ideal because both parties in such a case are making a 'best guess' as to damages which will be sustained as they value the property, which is inferior to an actual assessment based on known conditions, which can occur only after the condemnor completes construction." *Id.* at 33. However, the question of whether it is "ideal" to comply with the legislative requirements of §§ 7-711(2)(a) and 7-712 or whether it is "inferior" to some other measure of just compensation desired by Brooke View is

not for Brooke View or this Court to decide. As this Court has repeatedly said over the past 50 years, that determination is for the legislature not the Court.[22] *See, e.g.*, *Wright v. Ada Cty.*, 160 Idaho 491, 498, 376 P.3d 58, 65 (2016) ("The wisdom, justice, policy, or expediency of a statute are questions for the legislature alone.") (quoting *Berry v. Koehler*, 84 Idaho 170, 177, 369 P.2d 1010, 1013 (1962)); *see also Blackwell Lumber Co. v. Empire Mill Co.*, 28 Idaho 556, 576, 155 P.680, 687 (1916) ("The procedure . . . to ascertain the compensation and to make the right of eminent domain available, has been fully provided by the legislature"); *Portneuf Irrigating Co.*, 16 Idaho at 127, 100 P. at 1050 (1909) (noting that Idaho's Constitution says that just compensation shall be determined "in a manner prescribed by law" and stating that the Legislature has prescribed that method in Section 5226, which is an earlier, identical version of § 7-711).

F. ACHD COULD NOT ANTICIPATE DAMAGE TO THE WALLS DUE TO PEAK PARTICLE VELOCITIES FROM VIBRATION DURING CONSTRUCTION FROM THE PROJECT PLANS AT THE DATE OF THE SUMMONS.

Campbell stands for the unmistakable proposition that for a severance damage claim to exist under § 7-711(2)(a), damages must have been anticipated from the project plans at the date of the summons. *Campbell*, 34 Idaho at 605, 202 P. at 1066. Brooke View's attempt to distinguish this case is entirely unpersuasive. Resp. Br. at 24 (citing *Campbell*, 34 Idaho 601, 202 P. 1065 (1921)). According to Brooke View, *Campbell* should be disregarded because: (1) the damages occurred outside of the area of the take, (2) the damages were along the lines of a tort, because no condemnor would propose construction that would poison a stream, and (3) the

[22] Without citation, Brooke View opines that it is typical for condemnors and condemnees to ignore the plain language of §§ 7-711(2)(a) and 7-712 and to instead measure just compensation only after construction has been completed. Resp. Br. at 33. Even if this unsupported supposition were true, what condemnors and condemnees do by agreement in other cases is not relevant here. It is the legislature's role to create the law, not the parties. *Wright*, 160 Idaho at 498, 376 P.3d at 65. The plain language of §§ 7-711(2)(a) and 7-712 must control.

poisoned stream was not foreseeable. Resp. Br. at 24. These asserted bases for distinguishing *Campbell* are either incorrect or are inapplicable.

Brooke View's first purported distinction, that the damage occurred outside of the area of the actual take, is the very definition of severance damages. *See* Idaho Code § 7-711(2)(a). As ACHD has already explained, not all damages are compensable under Idaho law. *See* Section III.C.4., *supra*. This attempt at distinction is no distinction at all.

Next, Brook View's suggestion that *Campbell* is distinguishable because no condemnor would intentionally propose a project that would poison a landowner's stream is not a basis to distinguish *Campbell*, but instead draws a direct parallel to this case. Just as no condemnor would propose to construct a project that would poison a water source, no condemnor would propose to engage in construction activities that will cause physical property damage to the remainder property. Stated otherwise, just as in *Campbell*, ACHD did not propose a project that would result in physical damage to Brooke View's walls, and Brooke View's attempt to distinguish *Campbell* for this reason is also without any merit.

Finally, after its first two futile efforts to distinguish *Campbell*, and conceding the reality of Idaho's eminent domain statutory framework—that the claimed damage must be anticipated from the project plans at the date of summons—Brooke View next asserts that as of the date of the summons it was "easy to anticipate" that vibrations from construction would cause structural damage to the walls. Resp. Br. at 24. Brooke View's bare assertion is factually unsupportable because as of the date of the summons no one knew what equipment was going to be used by the contractor or where, when, and how much compaction was going to take place.[23] To be sure,

[23] Brooke View's experts opined that damage could have been avoided by selecting other equipment or using alternative ways to operate the equipment. *See, e.g.,* TT 989-90, 998-99, 1003-04, 1584-85, 1710-11, 1721, 1745-46, 1809-11, 1965-66. This testimony establishes that

years after the date of the summons and long after completion of construction, not even Brooke View's experts had a settled theory concerning what caused damage to the walls. And Brooke View's experts had the benefit of hindsight. This is confirmed over and over in the record.

- Resp. Br. at 6—addressing the period of time after construction and conceding "Brooke View did not have experts at that point who identified the exact mechanism of how the walls were damaged during the construction project, although vibration during construction and/or excavation, settlement, and loss of lateral support were all suspected";
- Resp. Br. at 6—"[T]here was not enough data to determine the actual cause at that point.";[24]
- CR 194—months after construction was complete, on May 28, 2013, David O'Day opined "[t]hough I cannot at the moment identify a mechanism that will likely or definitely damage the subject wall, similarly, I cannot conclusively rule out all such mechanisms that could damage the wall";
- CR 3490—four months later, David O'Day had narrowed his conclusion to two potential causes of damage to the walls: expansion of soil beneath the walls caused by moisture from the infiltration trench, or vibration during construction. Mr. O'Day could not determine which of these actually damaged the walls. *See also* CR 1776. It was not until a year later, on September 30, 2014, that Mr. O'Day eliminated expansive soil as a potential cause of damage. CR 1798;
- CR 1840—Brian Smith submitted an affidavit on January 2, 2015 stating that "there is not a way, based on the information available, to specifically allocate what percentage of damage was caused by compaction vs. excavation, or what particular percentage of damage was caused by each machine on the job";
- CR 1973—Dr. Paul Michaels identified five potential causes of damage in September 2014, including excavation, introduction of subsurface materials, replacement of soil, soil improvement by vibratory compaction, and laying new pavement. This opinion relied on a list of equipment actually used, as well as weather phenomena. CR 1974, 1987.

---

the Project could have been constructed consistent with the Project plans without damaging the walls, which further supports ACHD's position that the damage could not have been anticipated.

[24] Brooke View contends that "[t]he fact ACHD did not actually anticipate the damage (despite being warned by the property owner) doesn't mean it was not foreseeable as of the date of the summons." Resp. Br. at 25. But Brooke View cannot have it both ways. Brooke View admits that after construction and after years of hindsight review by its experts there was not enough data to determine a cause. Thus, it must also necessarily follow that there was also insufficient data, at the date of the summons, to anticipate the same.

These record citations demonstrate Brooke View's acknowledgement that not only was the claimed damage not "easy to anticipate," it could not have been anticipated from ACHD's Project plans at the date of the summons. Further, Brooke View admits on appeal that "[t]he makes and models of the equipment and when and where used, were established through the daily photographs Ms. Miller took" during construction—not from the Project plans. Resp. Br. at 8. And Brooke View further concedes that "[s]oil data from ACHD's soil test of 2013 was used as a component of vibration analysis"—tests conducted a year after construction was complete. *Id.* at 8-9. Only then did Brooke View's geophysicist, "using the specifics of the machines, their locations, and the specifics of the soils for the site," opine that "vibrations generated during construction far exceeded known thresholds for causing damage to structures." *Id.* at 9.

All of this information—the makes and models of the equipment to be used, when, where, and how the equipment was to be used, and the specifics of the soils for the site—was not available to ACHD at the date of the summons. *See* Resp. Br. at 3 ("ACHD did not specify any particular equipment for the contractor to use on the project.").[25] Indeed, Brooke View's counsel stated it very clearly in her closing argument at trial: "the evidence is that starting in June of 2013 vibration was identified as a potential cause." TT 4145:9-11. That date is a year *after* the

[25] Alta Construction was ACHD's general contractor for the Curtis Sidewalk Project. TT 940:10-12. ACHD's contract with Alta Construction was a means and methods contract meaning that it was up to Alta Construction to determine what equipment to use, how to use the equipment, and when to use the equipment. As Brooke View's own witnesses testified, with a means and methods contract "the designer does not specify what we call means and methods. In other words, doesn't say get a machine this big and go hit the dirt six times with that. That's usually left to the contractor." TT 1588:4-8. Alta Construction, not ACHD, chose the equipment to be used and Alta Construction decided to run one or more than one piece of equipment at a time. *See* TT 984:21-23.

date of the summons. Brooke View's hindsight analysis—that could not have existed at the date of the summons—is inappropriate to support a severance damage claim.

G. BROOKE VIEW HAS A REMEDY—IT JUST FAILED TO PURSUE IT TO DATE.

Brooke View asserts that because there is no evidence of negligence in the record, "ACHD's interpretation would leave owners with actual damage caused by a condemnor's construction activity with no legal remedy by which to be made whole." Resp. Br. at 16-17. This argument misstates the factual record and is contrary to established Idaho law. *See Campbell*, 34 Idaho 601, 202 P. 1065. In *Campbell*, the Court addressed a factually similar scenario and held that an owner's remedy is to bring "a separate action." *Id.* at 65, 202 P.2d at 1066.

ACHD does not use the adjective "grossly" lightly. Here, however, there is no doubt that Brooke View has *grossly* misrepresented the record. Brooke View repeatedly claims that "[t]he record is absolutely devoid of any evidence of negligence." Resp. Br. at 18-19; *see also* at 1 ("with no allegation or evidence whatsoever of negligence" and "no evidence of negligence"), at 19 ("No evidence at trial was offered by either side to show any negligence"), at 20-21 ("there is no evidence of negligence in this case."), at 24 ("In this case, there is no tort"), at 26 ("absent negligence"), at 27 ("there was no allegation of evidence of negligence" and "[t]he drain and sidewalks were all installed in a perfectly normal, appropriate manner."), at 28 ("There was no improper construction"), at 46 ("There was no evidence of negligence"). But, out of the other side of its mouth, Brooke View has always argued, to the district court, the jury, and now to this Court, that ACHD engaged in negligent conduct that breached duties to Brooke View.[26] Below

[26] Brooke View further contradicts itself in its Response Brief by simultaneously stating that ACHD did not breach any duties. Resp. Br. at 4 ("ACHD actually had no duty to do any of these things."), at 5 ("ACHD was under no duty to keep any particular records...."), at 19 ("[T]here is no legal duty of ACHD which has been breached."), at 19 ("[T]his case cannot possibly be a

are a few examples of Brooke View's statements, testimony, and arguments, with a more complete list contained in Addendum A.

Examples of Brook View's statements before trial:

- "ACHD did not do much analysis prior to construction regarding soils in the area." CR 407.
- "ACHD did not install any devices prior to construction which would have measured movement or settlement of the soils." CR 407.
- "If ACHD wanted to ensure they did not damage the wall during construction there are steps they could have taken, but they did not." CR 408.
- ACHD "did nothing to monitor its construction activities to ensure the wall was not damaged or even to document the condition of the wall prior to construction." CR 723.

Examples of Testimony at Trial:

- ACHD did not have any records "that they had done any kind of analysis on the potential impact of the walls on the storm drain facility." TT 830:22-831:1 (expert Joe Canning).
- ACHD could have moved its Project farther from the walls and "something could have been mitigated much more easily." TT 1897 (expert Patrick Dobie).
- Brooke View's walls should have been identified as a concern by ACHD before the Project construction. TT 1944 (expert Patrick Dobie).
- ACHD could "have gone back and looked at the wall on a regular basis any time they wanted." TT 1945 (expert Patrick Dobie).

Examples of Argument at Trial:

- As to compaction Brooke View's counsel argued "I don't believe they were doing it right." TT 4150:3-4.
- ACHD "could have taken soil samples from the property." TT 4044:24.

---

negligence case."), at 19 ("The plans for the improvement project were designed according to standards, and the contractor followed the plans."), at 27 ("No duty to Brooke View was breached.").

- ACHD "could have followed the AASHTO guidelines and done a pre-construction survey to document the conditions before the project, including the condition of the wall." TT 4044:25-4044:1-4.
- ACHD "could have taken photographs." TT 4045:4.

Examples of Brooke View's Statements Post-trial:

- "ACHD could have, and should have, done a pre-construction survey and considered moving the storm drain and not compacting the sidewalks to be installed (flowable backfill doesn't require compaction)." CR 5063.
- "ACHD should have considered the applicable National Transportation guidelines and AASHTO guidelines regarding anticipated vibration from construction." CR 5063.
- "ACHD should have taken soil samples." CR 5063.
- "ACHD should have kept construction logs." CR 5063.

On appeal, Brooke View Continues to Assert ACHD's Failures:

- "[T]ypically storm drains are ten feet from anything with a structural foundation." Resp. Br. at 2.
- "The problem is that they were installed so close to existing structures (the walls) that those nearby structures were physically damaged." *Id.* at 27.
- "No one from ACHD ever inspected the walls or performed any kind of preconstruction survey prior to the lawsuit, prior to construction, or even during construction of the project." *Id.* at 3.
- "ACHD did not do any soil tests adjacent to Brooke View prior to construction." *Id.* at 3.

Abraham Lincoln reportedly asked, "If you call a dog's tail a leg, how many legs does a dog have?" His answer was, "Four. Calling a dog's tail a leg does not make it a leg." *Alexander v. FedEx Ground Package System, Inc.*, 765 F.3d 981, 998 (9th Cir. 2014) (S. Trott, J., concurring). The same is true here. That Brooke View asserts that it did not make allegations or present evidence or argument of negligence does not make those statements true. With Brooke View's overabundance of allegations, evidence, and argument regarding what ACHD did not do

or what it could have or should have done, Brooke View's assertions sound in tort.[27] As such Brooke View's remedy lies in "a separate action." *See Campbell*, 34 Idaho 605, 202 P. at 1066.

H. THE JURY INSTRUCTIONS ARE AN INACCURATE STATEMENT OF THE LAW AND ERRONEOUSLY REQUIRED THE JURY TO CONSIDER ACTUAL CONSTRUCTION ACTIVITIES

Brooke View's attempts to justify the district court's erroneous jury instructions actually support ACHD's arguments that the district court erred, as a matter of law, in its interpretation of Idaho Code § 7-711(2)(a) and the damages and evidence allowed in a condemnation action.

Instruction No. 15 includes extraneous language that forced the jury to consider damages caused during the act of construction. This instruction, like Instruction No. 20, uses the unique phrase "construction of the improvement project." CR 4906, 4911. Contrary to Brooke View's assertions, that description is not found in any pattern jury instruction or in Idaho Code § 7-711(2)(a). *See* Resp. Br. at 42-43. Combined with the district court's other instructions regarding the acts of construction, Instruction No. 15 improperly focused the jury's attention on the acts of construction rather than the improvement that existed when construction was complete and shifted the jury's focus away from the date of the summons to completion of the Project.

Brooke View's argument that ACHD created the need for Instruction Nos. 20, 24, and 27[28] is misleading and misses the point entirely. Each of those instructions was brought about

---

[27] Brooke View's pervasive assertions about what ACHD could have or should have done with respect to the Project should have been addressed as part of the prerequisite element of necessity for maintaining a condemnation action. *See* Idaho Code §§ 7-704(2). In the present case, the issue of necessity was determined long in the Court's Order for Possession of Real Property dated August 23, 2012. *See* CR 91.

[28] ACHD objected to Instruction No. 27 during the jury instruction conference. TT 3998-4000. The basis for this objection is quite clear from ACHD's briefing on its Fourth Motion for Summary Judgment. CR 1373-91, 2458-67. This is the only objection required to preserve this issue for appeal. Although ACHD did not object to the district court's characterization of the

by the district court's erroneous interpretation of the damages and evidence allowed in a condemnation action.[29] Brooke View's case was all about acts of construction and these instructions effectively eliminated the long-standing rule that condemnation damages are measured as of the date of the summons, before any acts of construction have taken place. *See* Section III.C.2., *supra*.

The district court also misstated the law when it relieved Brooke View of any obligation to prove causation and put full responsibility on ACHD for every person, activity, or event related to the Project. CR 4911 (Instruction No. 20), 4918 (Instruction No. 27). Brooke View claims that its burden to prove general causation was consistent with Idaho Code § 7-711(2)(a). Resp. Br. at 43. And in the very next sentence, Brooke View confirms ACHD's objection to Instruction No. 20, using the theory of *res ipsa loquitur* to justify the lack of a causation requirement. *Id.* ("It seemed obvious that since the walls were not damaged prior to the project and were clearly damaged after the Project (with cracks appearing during), the damage was caused by ACHD."). Brooke View also argues that "ACHD had zero evidence of any other cause of the damage to the walls." Resp. Br. at 46. ACHD had relevant evidence to put to the jury as to causation, but it was precluded from offering or relying on the evidence. By way of

---

law in response to jury question 53, the court's view of the law on this issue was quite clear from the Order on Plaintiff's Fourth Motion for Partial Summary Judgment. CR 3282-83. ACHD acknowledged that the court had made a final decision on the issue, but it did not express agreement with the court's view of the law. *See* TT 3344-45.

[29] Brooke View also criticizes ACHD's failure to object to the district court's pre-trial rulings regarding proximate cause and ACHD's responsibility for the work performed by United Water / Owyhee Construction. Resp. Br. at 45, 57. Both of these rulings appeared in the district court's Order on Plaintiff's Fourth Motion for Partial Summary Judgment. CR 3282-83. It is well-settled 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). Brooke View's criticism is unfounded and illogical.

only a few examples, ACHD had evidence that Brooke View's owner, Diane Miller, knew of the first crack in the walls very early in the construction, but specifically kept that fact from ACHD. *See* TT 3141; 3274-75. Yet the district court did not allow ACHD to put that evidence on and specifically instructed the jury "[t]here 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." *See* CR 4915.

ACHD also had evidence that its contractor, Alta Construction, picked the compaction equipment that was to be used and then decided when and how many times to hit the ground. *See* TT 940:10-12; 984:21-23; 1588. Nonetheless, the district court precluded ACHD from putting on this evidence and instructed the jury as follows: "[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." CR 4918 (Instruction No. 27); *see also* TT 3347:10-13 ("This is ACHD's project and it is legally responsible for its project. So any questions relating to responsibility are not relevant."). These rulings unfairly left the jury with only one party to blame—ACHD.

These incorrect statements of law prejudiced ACHD by focusing the jury's attention on irrelevant evidence and allowing the jury to award noncompensable damages.

I. ACHD IS THE PREVAILING PARTY AND SHOULD BE AWARDED ITS REASONABLE COSTS BOTH BEFORE THE DISTRICT COURT AND ON APPEAL.

Considering the amount of just compensation awarded by the jury—excluding the improper damages allowed by the district court's erroneous interpretation of § 7-711(2)(a)—ACHD made a number of offers that specifically satisfy the requirements of *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). Because of this, the district court also erred when it failed to conclude that ACHD was the prevailing party.

ACHD requests the Court reverse the district court's prevailing party determination and attorney fee award and remand the matter to the district court with instructions to enter an order that ACHD is the prevailing party and therefore entitled to an award of its reasonable costs. Moreover, and for the same reasons, ACHD is the prevailing party on appeal and is entitled to an award of its costs on appeal.

J. THE DISTRICT COURT'S AWARD OF DISCRETIONARY COSTS SHOULD BE REVERSED.

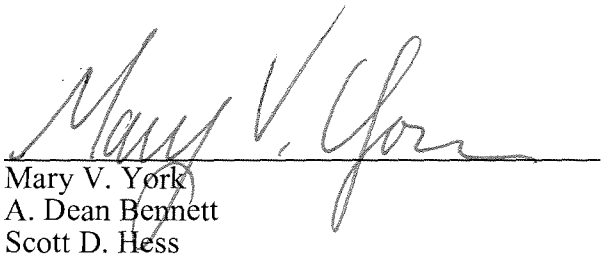
Because of the its erroneous interpretation of § 7-711(2)(a), and for the other reasons set forth in ACHD's Opening Brief, the district court's award of discretionary costs should be reversed in its entirety. Alternatively and specifically as to ACHD's request with regard to the duplicative award of $32,319.96, Brooke View's only challenge is that ACHD failed to raise this issue to the district court either through a motion for reconsideration or a motion to amend the judgment. Resp. Br. at 64. Brooke View cites no authority or case law in support of this misguided argument. While ACHD certainly could have filed either of the motions Brooke View identified, it was not required to do so in order to preserve this issue for appeal. *See In re Guardianship of Doe*, 157 Idaho 750, 758, 339 P.3d 1154, 1162 (2014).

ACHD timely objected to Brooke View's memorandum of costs and it raised a specific objection to the costs claimed for John Roters. CR 6056-98; *see also* Idaho R. Civ. P. 54(d)(5). Under these circumstances, ACHD properly preserved its objection to Brooke View's claim for discretionary costs. Accordingly, even if the Court affirms the district court as to all other issues on appeal, at the very least, the award of discretionary costs should be reduced by $32,319.96.

III. CONCLUSION

For all of the reasons set forth in ACHD's Opening Brief and this Reply, 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 9th day of September, 2016.

By 

Mary V. York
A. Dean Bennett
Scott D. 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 9th day of September, 2016.

By _____
Mary V. York

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of September, 2016, I caused to be served two true and correct copies 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

Examples of Brooke View's Statements, Testimony and Arguments Relating to ACHD's Negligent Conduct

Examples of Brook View's Statements Before Trial:

- "ACHD did not do much analysis prior to construction regarding soils in the area." CR 407.
- "ACHD did not install any devices prior to construction which would have measured movement or settlement of the soils." CR 407.
- "If ACHD wanted to ensure they did not damage the wall during construction there are steps they could have taken, but they did not." CR 408.
- ACHD "did nothing to monitor its construction activities to ensure the wall was not damaged or even to document the condition of the wall prior to construction." CR 723.
- ACHD failed "to document what was actually done during the project (i.e. incomplete construction logs, no monitoring of vibration, no compaction logs from the area of the subject property, no documentation of equipment used or where it was used or when, etc.)" CR 2186.
- ACHD did "no proper pre-construction survey work and [made] no documentation of what was done, where, when, with what and by whom during [the] construction project[]." CR 2187.

Examples of Testimony at Trial:

- ACHD did not have any records "that they had done any kind of analysis on the potential impact of the walls on the storm drain facility." TT 830:22-831:1 (expert Joe Canning).
- ACHD could have moved its Project farther from the walls and "something could have been mitigated much more easily." TT 1897 (expert Patrick Dobie).
- Brooke View's walls should have been identified as a concern by ACHD before the Project construction. TT 1944 (expert Patrick Dobie).
- ACHD could "have gone back and looked at the wall on a regular basis any time they wanted." TT 1945 (expert Patrick Dobie).

- ACHD could have moved the construction farther away from the walls into a "safe zone." TT 2044-2053 (expert Dr. Paul Michaels).
- ACHD should have obtained soil samples prior to beginning construction. TT 1580 (expert David O'Day).
- ACHD should have met national standards for pre-construction testing, should have monitored the vibration in the walls during construction, and could have dug a trench to prevent vibrations from reaching the walls. TT 1584-85 (expert David O'Day).
- ACHD should have moved the location of the infiltration trench. TT 1586 (expert David O'Day).
- ACHD should have done additional preconstruction testing – "a test pit" or measuring how vibrations travel in the ground. TT 1809-11 (expert David O'Day responding to jury instruction).
- ACHD should have followed standard specifications "prepared by American Association of State Highway and Transportation Officials" and conducted a preconstruction survey. TT 1811-12 (expert David O'Day responding to jury question).
- "And so I certainly think that the damage that was done to the wall could have been avoided by some pre-construction testing." TT 1812 (expert David O'Day responding to jury question).

Examples of Argument at Trial:

- As to compaction Brooke View's counsel argued "I don't believe they were doing it right." TT 4150:3-4.
- ACHD "could have taken soil samples from the property." TT 4044:24.
- ACHD "could have followed the AASHTO guidelines and done a pre-construction survey to document the conditions before the project, including the condition of the wall." TT 4044:25-4044:1-4.
- ACHD "could have taken photographs." TT 4045:4.
- ACHD "could have obtained information on how the wall was constructed." TT 4045:4-6.
- ACHD "could have done some computations or analysis." TT 4045:6-7.
- ACHD "could have followed the transportation guidelines which were available to estimate the impact of construction vibrations." TT 4045:8-10.

- "There's tables, published tables, from the Federal Transit Authority that they could have used to make that estimation." TT 4045:13-15.
- ACHD "could have moved the storm drain to another location." TT 4045:16-17.
- ACHD "could have used flowable backfill which doesn't require compaction for the sidewalk so that they weren't compacting right next to the wall." TT 4045:17-20.
- ACHD "could have noted on the project plans to retain and protect the wall to put the contractors on notice that there was something there of concern." TT 4045:21-25.
- ACHD "could have done mitigation to stop vibrations by digging a mitigation trench between the excavation and the wall." TT 4045:25-4046:2.
- ACHD "They could have specified the use of smaller equipment." TT 4046:4-5.
- ACHD "could have done vibration monitoring, which is very common on projects." TT 4046:5-6.
- ACHD "could have done regular inspection for damage before and during construction." TT 4046:8-9.
- ACHD is the "one[] with the obligation to take action to protect private property. And if they don't take action, they have the obligation to pay for any damage that results." TT 4046:12-15.
- "If [ACHD] had done a little investigation, maybe it would have turned out differently." TT 4046:21-23.
- "[M]aybe [the project engineer] didn't pay attention." TT 4047:3.
- "ACHD was so unconcerned that they got no evidence of the condition of the wall and almost no evidence of what they did on the project." TT 4047:20-23.
- ACHD "never sent a single person out there to look at it before the project." TT 4047:23-24.
- ACHD "never told the project inspector or the contractor to be careful of the wall." TT 4047:24-4048:1.
- ACHD "kept almost no construction logs." TT 4048:1-2.
- ACHD "took no photos during construction." TT 4048:2-3.
- ACHD "kept no compaction logs, which is very weird, especially when there's compaction issues throughout the project." TT 4048:3-5.
- ACHD "kept no record of the equipment on the job." TT 4048:5-6.

- ACHD "never had a single person inspect during construction or before." TT 4048:6-8.

Examples of Brooke View's Statements Post-trial:

- "ACHD could have, and should have, done a pre-construction survey and considered moving the storm drain and not compacting the sidewalks to be installed (flowable backfill doesn't require compaction)." CR 5063.
- "ACHD should have considered the applicable National Transportation guidelines and AASHTO guidelines regarding anticipated vibration from construction." CR 5063.
- "ACHD should have taken soil samples." CR 5063.
- "ACHD should have kept construction logs." CR 5063.
- ACHD should have "documented the equipment used." CR 5063.
- "ACHD should have kept compaction logs." CR 5064.
- "ACHD should have put the contractor on notice of the concern about the walls." CR 5064.
- "ACHD should have considered mitigation measures like trenching." CR 5064.

On appeal, Brooke View Continues to Assert ACHD's Failures:

- "[T]ypically storm drains are ten feet from anything with a structural foundation." Resp. Br. at 2.
- "The problem is that they were installed so close to existing structures (the walls) that those nearby structures were physically damaged." *Id.* at 27.
- "No one from ACHD ever inspected the walls or performed any kind of preconstruction survey prior to the lawsuit, prior to construction, or even during construction of the project." *Id.* at 3.
- "ACHD did not do any soil tests adjacent to Brooke View prior to construction." *Id.* at 3.
- ACHD did not "obtain any information about the structural composition of the wall." *Id.*at 3.
- ACHD did not "evaluate the impacts of anticipated construction activities on the walls." *Id.* at 3.

- "ACHD did not consult the available data in transportation publications which estimated the vibrations of construction equipment and the threshold of vibration known to cause damage to nearby structures, although the information was readily available to them." *Id.* at 3.
- "ACHD did not revise the project plans to indicate the walls needed to be retained and protected during construction." *Id.* at 3.
- "ACHD did not specify an particular equipment for the contractor to use on the project." *Id.* at 3.
- ACHD "did not consider moving the storm drain, or using a mitigation trench to mitigate the impacts of vibration from the construction." *Id.* at 3-4.
- "ACHD's construction logs only document that someone from ACHD was on site at Brooke View seven days" during construction. *Id.* at 4.
- "Neither ACHD nor its contactors ever inspected the walls during construction of the project." *Id.* at 4.
- "ACHD did not require its contractor to keep construction logs." *Id.* at 4.
- ACHD did not require its contractor to keep "a record of the equipment used." *Id.* at 4.
- ACHD did not require its contractor to keep "compaction logs for compaction that was done along the walls." *Id.* at 4.
- "ACHD took no photographs and did no vibration monitoring during the project." *Id.* at 4.
- "ACHD did substantial excavation close to both walls." *Id.* at 4.
- ACHD did not consider "using flowable backfill so as to avoid having to compact for the sidewalk just feet from the walls." *Id.* at 4.
- ACHD did "compaction not only for trenches, but for sidewalks all along both walls using a variety of heavy equipment." *Id.* at 4-5.
- "ACHD elected to document almost nothing about construction of its improvement project." *Id.* at 5.
- "ACHD had ready access to transportation publications which contain estimates of peak particle velocities of typical equipment used on an improvement project like this one." *Id.* at 24.
- It had "soils data for soil types like at Brooke View, and tables that set forth the levels of peak particle velocity that can cause damages to structures like the walls." *Id.* at 24.

- "These simple, easy to make calculations would have shown damage to the walls could be expected from construction per the project plans as proposed." *Id.* at 24.
- "ACHD Policy also adopted criteria that recommends a preconstruction survey be done, which would have analyzed potential impacts to the walls and ways to avoid those impacts." *Id.* at 25.
- "ACHD could have made choices which would have avoided causing such damage" *Id.* at 27.

9104987_1.docx