

IN THE  
INDIANA COURT OF APPEALS

CASE NO. 22A01-0802-CV-00055

WYMBERLEY SANITARY WORK,	)	
	)	
Appellant/Cross-Appellee	)	Appeal from the Floyd Circuit Court
(Petitioner Below),	)	
vs.	)	
	)	
EARL L. BATLINER, JR.,	)	Trial Court Cause Nos.:
THOMAS L. CAIRNS and	)	22C01-0607-PL-475
BETTY JANE CAIRNS,	)	22C01-0607-PL-476
EDWARD BALMER, JR. and	)	22C01-0607-PL-477
ROSEMARY BALMER,	)	22C01-0607-PL-478
DANIEL FRANK DANZL and	)	
JOANNA DANZL	)	
	)	
Appellees/Cross-Appellants	)	Honorable H. Lloyd Whitis, Special Judge
(Respondents Below).	)	

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**BRIEF OF AMICUS CURIAE, INDIANA AGRICULTURAL LAW FOUNDATION,  
INC., IN SUPPORT OF APPELLEES/CROSS-APPELLANTS**

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### Statement of Interest

The Indiana Agricultural Law Foundation, Inc. ("IALF") is a 501(c)(3) not-for-profit organization whose purpose includes furthering the understanding of agricultural legal issues within the agricultural community, the judicial branch, and the public at large through education, research, and litigation of issues that are of common concern to the agricultural community. This case is of great interest to the IALF because agricultural land is frequently subject to eminent domain proceedings. Agricultural professionals own and lease significant amounts of land on which they rely for their livelihoods. Agricultural land is developed and well-suited for its particular purpose. This land is used to provide food and other necessities to the American public and people across the globe. However, this land is frequently looked to as land that is ripe for development. Unfortunately, it is viewed as the path of least resistance for utilities desiring to serve residential and commercial development. Agricultural landowners need the protection of the Fifth and Fourteenth Amendments to the U.S. Constitution if they are to find economically feasible ways to use their land and remain in the agricultural business.

Although, agricultural land is likely to be subject to an eminent domain proceeding, agricultural landowners, and landowners in general, are typically not aware of their rights when threatened with eminent domain. Unlike the entities who exercise the awesome power of eminent domain, the landowner is frequently inexperienced with the legal issues surrounding eminent domain. The landowner has a relatively short timeframe to learn about their rights in an eminent domain proceeding and can fall prey to intimidation employed by some entities. It is important that those entities that have the power to exercise eminent domain strictly follow the law when it comes to exercising this power to take someone's private property away from them. When this power is abused, there must be consequences, such as requiring those that abuse the power to pay the landowner's attorney fees. The landowner should not be in a worse position

than he was before the threat of eminent domain.

The IALF desires to be an amicus curiae party in this case. "Courts undoubtedly have the right to allow an attorney, or other person, to appear as a friend of the court in a case, to act as an adviser of the court, and to make suggestions as to matters appearing upon the record, or in matters of practice." *In re Perry*, 83 Ind. App. 456, 148 N.E. 163, 165 (Ind. App. 1925). The IALF's desire to fill that role is founded in its knowledge of eminent domain proceedings and the potential harm caused to agricultural land by such proceedings, as well as the experience counsel for the IALF has gained in addressing these types of issues.

#### Summary of Argument

The trial court appropriately awarded costs and attorney fees to Earl L. Batliner, Jr., Thomas L. Cairns and Betty Jane Cairns, Edward Balmer, Jr. and Rosemary Balmer, Daniel Frank Danzl and Joanna Danzl ("Landowners"). The power of eminent domain is an awesome power. Entities capable of exercising this power must do so in good faith and with strict compliance of the law. If an entity acts in bad faith when attempting to exercise the power of eminent domain, that entity is required to pay costs, including attorney fees to the opposing parties.

The trial court found multiple examples of bad faith on the part of the utility. These examples go towards proving the motive of the utility in its attempt to exercise eminent domain. Motive is important in determining whether a party litigated in bad faith. If motive is ignored by the courts, the threat of eminent domain could be used to obtain property interests from landowners that fall prey to intimidation by a party claiming to have the power of eminent domain.

The Indiana Eminent Domain Act allows a court to render a judgment that it deems just.

The trial court found it just to attempt to make the Landowners whole and awarded them their costs and attorney fees associated with the utility's failed attempt at taking an interest in their land through eminent domain.

An appellate attorney fee award is also appropriate in this situation as Indiana statutory law authorizes attorney fees. Without receiving their appellate attorney fees, the Landowners will not be made whole. If landowners were not allowed their costs and attorney fees when an entity wrongly attempts eminent domain, future landowners would have little incentive to fight the proposed eminent domain action because of the costs associated with litigation.

#### Argument

Farmland accounts for 15 million acres of land in Indiana. *Indiana State Agriculture Overview – 2007* (visited November 3, 2008) <[http://www.nass.usda.gov/Statistics\\_by\\_State/Ag\\_Overview/AgOverview\\_IN.pdf](http://www.nass.usda.gov/Statistics_by_State/Ag_Overview/AgOverview_IN.pdf)>. The production value of this land for 2007 was over 6.5 billion dollars. *Id.* Once farmland is disturbed, it takes time to reach the production level it was at pre-disturbance, if the land is ever able to recover. Public projects such as the installation of public roadways, utilities and schools have converted productive agricultural land into land that is no longer agriculturally productive. *Much Ado About Kelo: Eminent Domain and Farmland Protection* (visited November 4, 2008) <[http://www.farmlandinfo.org/documents/30393/Kelo\\_updateii.pdf](http://www.farmlandinfo.org/documents/30393/Kelo_updateii.pdf)>. Such projects have also split farm tracts into smaller parcels that render the farms unworkable. *Id.* Even projects such as placement of overhead and buried utility lines can create serious impediments to farmland by restricting drainage options, tree plantings, and creating crop disruptions. “More insidious than direct conversion is that some public projects—particularly infrastructure projects—drive new residential and/or commercial development on surrounding acres, accelerating farmland loss.” *Id.*

**1. Wymberley Acted in Bad Faith and the Trial Court Appropriately Awarded**

**Attorney Fees.**

This Court will apply an abuse of discretion standard when reviewing an award for attorney fees. *Weiss v. Harper*, 803 N.E.2d 201, 208 (Ind. Ct. App. 2003). “A trial court has wide discretion in awarding attorneys fees, and we will reverse such an award only if it is clearly against the logic and effect of the facts and circumstances before the court.” *Id.* The trial court’s decision to award attorney fees is not “against the logic and effect of the facts and circumstances” that were before the trial court. *Id.*

The Trial Court made several specific findings that Wymberley Sanitary Works, Inc. (“Wymberley”) acted in bad faith. These findings include the following:

- (1) Wymberley’s proposed taking of easements from the Landowners constituted bad faith because Wymberley promised the IURC that it would provide service to as many customers as possible but in reality it planned to serve a single customer, a private developer named Robert Lynn (“Lynn”) (Appellant’s App. 28-29);
- (2) “Wymberley promised the IURC that it would use the existing right-of-way in extending its sewer lines and its proposed route uses only a minimal amount of existing public right-of-ways” (Appellant’s App. 28);
- (3) Wymberley’s representative stated that it could not acquire real estate interests from private property owners until after Floyd County authorities approved the plan for the development; however, Wymberley offered to acquire the land from the Landowners prior to such approval (Appellant’s App. 29);

- (4) The Floyd County Plan Commission required Lynn to voluntarily obtain any required easement rather than Wymberley exercising its power of eminent domain (Appellant's App. 29);
- (5) Wymberley failed to provide the Landowners with the appraisals upon which it relied in its offers as required by Indiana statutory law (Appellant's App. 33-34);<sup>1</sup> and
- (6) Wymberley's proposed takings are for a private use. (Appellant's App. 33).

Indeed, Wymberley's failure to follow its testimony to the IURC is particularly unsettling. Unlike Wymberley's assertion that there was no guarantee by Wymberley that it would serve any specific new customers, Wymberley's testimony to the IURC suggests otherwise.<sup>2</sup> There is no suggestion that Wymberley attempted to serve other customers than Lynn, the private developer who approached Wymberley for the expansion of the sewer lines. In fact, Wymberley argues that "[i]f future potential customers seek service from Wymberley and cannot be served from the sewer line at issue in this case, Wymberley can construct other lines to serve them." (Appellant's Br. 42). It would be logical for Wymberley to attempt to serve as many people as possible with this sewer expansion rather than merely state that it can construct

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<sup>1</sup> Wymberley states that Indiana Code section 32-24-1-5 became effective on March 24, 2006, several months before Wymberley filed its eminent domain complaints against the Landowners on July 28, 2006. Ind. Code § 32-24-1-5 (2008); (Appellant's Br. 36; Appellant's App. 12). The statute sets forth the requirements that must be taken prior to filing a condemnation complaint. The statute was clearly in effect before Wymberley filed its condemnation complaint; therefore, Wymberley did not follow Indiana statutory law prior to filing its eminent domain complaints against the Landowners.

<sup>2</sup> Thomas Bruns, a Vice President and Regional Manager for Aqua America, Inc., of which Wymberley is a part, stated several times in his testimony that the expanded CTA would serve the proposed development and existing customers:

- "Wymberley intends to have all contributed facilities sized and otherwise designed so it is possible to serve existing homes currently on individual septic systems that may be capable of being served by them." (Appellant's App. 182);
- "This will ensure that Wymberley's services will not be limited to just residences in new subdivisions, but also be available to existing residences as well." (Appellant's App. 184); and
- "Granting authority to serve the Expansion Area now would provide developers and existing residences in that area with a known source of service and provide assurance to local officials concerning the availability and source of needed services." (Appellant's App. 186).



other sewer lines to serve other potential customers. Wymberley should have to honor its testimony or bear the burden of demonstrating why it cannot.

**2. Indiana Statutory Law Supports an Award of Attorney Fees to the Landowners.**

**a. Wymberley Litigated in Bad Faith**

Wymberley argues that the trial court improperly awarded attorney fees because the Landowners did not allege that it litigated in bad faith. (Appellant's Br. 45). Rather, Wymberley argues that the Landowners merely allege that Wymberley's bad faith actions occurred prior to the filing of the complaint and therefore, Wymberley did not litigate in bad faith. (Appellant's Br. 45). Wymberley essentially argues that the word "litigate" should be taken literally and not encompass pre-litigation conduct. However, courts have not interpreted Indiana law as such. In fact, the Indiana Supreme Court stated that Indiana Code section 34-52-1-1 "subsection (b)(3) – 'litigated the action in bad faith' – by its terms requires scrutiny of the motive or purpose of the non-prevailing party." *Mitchell v. Mitchell*, 695 N.E.2d 920, 924 (Ind. 1998). The Indiana Supreme Court went on to state that

bad faith is not simply bad judgment or negligence. Rather, it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity. It is different from the negative idea of negligence in that it contemplates a state of mind affirmatively operating with furtive design of ill will. *Id.*

Indiana Code section 34-52-1-1(b)(3) allows for an attorney fee award in this case and the trial court had the discretion to decide whether to award the fees. Ind. Code § 34-52-1-1(b)(3)(2008); *See Patel v. United Fire & Casualty Company*, 80 F. Supp.2d 948, 963 (N.D. Ind. 2000).

In *Mitchell*, the trial court awarded the plaintiff's, Pamela, attorney fees finding that the defendant's, Flossie, behavior justified such an award. *Mitchell*, 695 N.E.2d at 922. Flossie was married to Pamela's father. *Id.* at 924. After Pamela's father died, Pamela and Flossie entered into an agreement that Flossie would turn over some items of sentimental value to Pamela. *Id.*

The agreement called for Flossie to act in a “prompt and reasonable manner.” *Id.* Pamela sued for specific performance two years later. *Id.* The trial court made several findings of bad faith including that Flossie “willfully and intentionally” refused to give Pamela items in her possession; that Flossie falsely represented that a particular item existed; and that Flossie’s behavior forced Pamela to hire an attorney to enforce the agreement. *Id.* The Indiana Supreme Court found that “Flossie acted with ‘furtive design or ill will’ both before and after the suit was filed.” *Id.* at 925. The Indiana Supreme Court specifically held that the trial court’s finding of bad faith because Flossie failed to honor the agreement with Pamela met the “statutory legal standard that Flossie ‘litigated in bad faith’”. *Id.*

Like the court in *Mitchell*, the trial court in this case looked to the motive and purpose of Wymberley. In that regard, the trial court found that Wymberley had acted in bad faith in its attempt to acquire an interest in the Landowners’ property. Wymberley’s motives in this case are important to the ultimate outcome in the litigation. Further, Wymberley, the party with the power to exercise eminent domain, decided not to follow the strict guidelines of Indiana law to acquire property. “Statutes of eminent domain are in derogation of common law property rights, and therefore must be strictly construed both as to the extent of the power and the manner of its exercise.” *Calumet National Bank v. American Tel. and Tel. Co.*, 647 N.E.2d 689, 691 (Ind. Ct. App. 1995). When a party with the power of eminent domain attempts to use that power inappropriately, the condemning party should have to pay the costs incurred by those whose land interest it was trying to obtain.

Wymberley’s position, that only actions taken after the condemnation lawsuit is filed should matter, would result in bad faith pre-trial negotiations and actions without judicial recourse. Wymberley cites to *Turner v. Board of Aviation Commissioners*, 743 N.E.2d 1153

(Ind. Ct. App. 2001), for support of its interpretation of what constitutes litigation contact. It is true that in *Turner*, this Court discusses behavior that occurred after the filing of the lawsuit, such as requesting continuances and filing motions. *Id.* at 1171. However, in *Turner*, this Court did not attempt to limit the definition of litigation; rather, this Court was responding to specific arguments made by the parties. If Wymberley's position is followed, a condemnor in an eminent domain case could employ scare tactics and misrepresentations when initially approaching a landowner without being concerned that a court might someday evaluate those actions. In fact, that is exactly what Wymberley and Lynn did in this case. (Appellant's App. 21 ¶ 59; 22 ¶ 66) Lynn approached Mrs. Danzl and told her that he wanted to purchase easements across her property. (Appellant's App. 21 ¶ 59). Lynn then offered Mrs. Danzl a sum of money and told her that if she did not accept, Wymberley would use its power of eminent domain to take a property interest in her land and that she would be paid much less at that time. *Id.* Indeed, this is one of the serious dangers of eminent domain.

b. **Indiana Eminent Domain Act.**

The Landowners also argued for attorney fees under Indiana Code section 32-24-1-11(b) which provides that "The court may make orders and render findings and judgments that the court considers just." Ind. Code § 32-24-1-11(b)(2002). Indiana Code section 32-24-1-11(b) allows the trial court to do what it believes is just. *Id.* In this case, the trial court awarded litigation and attorney fees because it was appropriate. The Landowners spent significant sums of money fighting Wymberley's proposed condemnation. Most landowners do not have the financial resources to fight such condemnations. Wymberley, on the other hand, had all of its expenses paid for by Lynn, the private developer who wants an interest in the Landowners' property for his own financial gain. (Appellant's App. 15 ¶ 23). Wymberley let the interests of

the private developer take priority over its own responsibilities for exercising eminent domain. Wymberley relied solely on those people hired by the private developer to determine the proposed route for the sewer, a route that will most benefit the private developer. (Appellant's App. 16 ¶¶ 24-31, 17 ¶¶ 33-35). Wymberley did not follow the testimony of its own vice president to the IURC. (Appellant's App. 182, 184, 186). Wymberley also did not follow Indiana statutory law prior to filing a condemnation complaint against the Landowners. Wymberley now argues that it should not have to pay the Landowner's litigation and attorney fees. To require the Landowners to bear such a significant financial burden when Wymberley clearly abused its power of eminent domain would have a chilling effect on other landowners who feel unfairly threatened by eminent domain.

Additionally, allowing litigation and attorney fees in this case would not compromise an entity's legitimate use of the power of eminent domain. Wymberley's actions in this case constitute bad faith. (Appellant's App. 28, 29, 33-34). An entity acting in good faith and properly using the power of eminent domain would likely not be subject to the same outcome as Wymberley. Wymberley abused its power and now is fighting to avoid having to pay for such abuse.

Further, when the State of Indiana attempts to exercise its power of eminent domain but pursuant to a final judgment cannot acquire the property interest, the state must repay the landowner "for reasonable costs, disbursements, and expenses, *including reasonable attorney, appraisal, and engineering fees*, actually incurred because of the condemnation proceedings." Ind. Code § 8-23-17-27 (2001)(emphasis added). This is similar to a requirement placed on the Federal Government. A Federal Court is required to award the landowner a sum "that in the opinion of the court provides reimbursement for the owner's reasonable costs, disbursements,

and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred because of the condemnation proceedings” when the Federal Government initiates a condemnation proceeding “and the final judgment is that the Federal agency cannot acquire the real property by condemnation, or the proceeding is abandoned.” See 23 C.F.R. § 710.603. Public policy seems to dictate that if it is appropriate for taxpayers to pay the costs of a failed attempt by the government to acquire land by eminent domain, surely it is appropriate for a private utility to be expected to do the same especially in light of a finding of bad faith on the part of the utility.

Due to a landowner’s relative disadvantage in eminent domain proceedings, public policy favors awards of attorney fees in eminent domain proceedings, particularly where the condemnor acts in bad faith. This will provide a much needed incentive for landowners to defend themselves against unwarranted eminent domain proceedings in protection of their individual rights.

**3. Appellate Attorney Fees are Appropriate in this Case.**

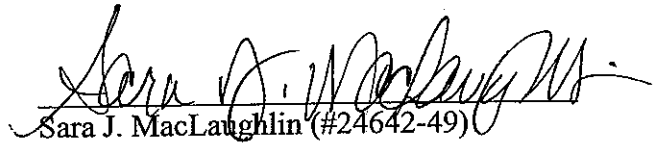
“Where a statute authorizes reasonable attorney fees, such fees include appellate attorney fees.” *Hayes v. Chapman*, 894 N.E.2d 1047, 1054 (Ind. Ct. App. 2008); see also *City of Hammond v. Marina Entertainment Complex, Inc.*, 681 N.E.2d 1139, 1145 (Ind. Ct. App. 1997). Appellate attorney fees are included when a statute authorizes attorney fees, otherwise “a reasonable fee for the prosecution of the claim alone would not be a reasonable fee for those services plus the costs of defending the judgment on appeal.” *St. Vincent Hospital and Health Care Center, Inc. v. Steele*, 766 N.E.2d 699, 706 (Ind. 2002). Indiana Code section 34-52-1-1, upon which the Landowners relied, specifically authorizes attorney fees. I.C. § 34-52-1-1(b)(3). Additionally, it is clear that the trial court anticipated awarding appellate attorney fees.

In its July 8, 2008 Order, the trial court ordered Wymberley to post an appeal bond, the amount of which to include the anticipated appellate attorney fees. (Appellant's App. 43). The Landowners should not have to pay to defend the trial court's decision since Wymberley litigated in bad faith. Therefore, appellate attorney fees should be included in the attorney fees awarded to the Landowners by the trial court.

Conclusion

For the forgoing reasons, the IALF respectfully requests that this Court affirm the trial court's order dismissing the complaint against Earl L. Batliner, Jr., Thomas L. Cairns and Betty Jane Cairns, Edward Balmer, Jr. and Rosemary Balmer, Daniel Frank Danzl and Joanna Danzl. This Court should also affirm the trial court's award of attorney fees and award appellate attorney fees.

Respectfully submitted,



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**Certificate of Service**

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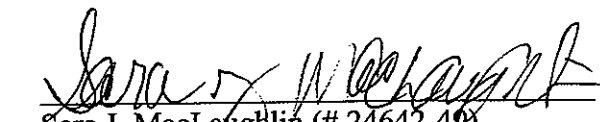
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