EMINENT DOMAIN: OPENING AND CLOSING TRIAL UNDER MICHIGAN'S UNIFORM CONDEMNATION PROCEDURES ACT

Jason C. Long[*]

2004 MICH. ST. L. REV. 83

TABLE OF CONTENTS

---

* The author is an attorney with Steinhardt Pesick & Cohen, P.C., which focuses its practice on eminent domain matters. A former judicial clerk to the Hon. Michael F. Cavanagh, Michigan Supreme Court, he obtained his B.A., *cum laude,* from Oakland University, and his J.D., *summa cum laude,* from the University of Detroit Mercy.

INTRODUCTION

Condemnation actions are different than traditional lawsuits. In a traditional lawsuit, the plaintiff files a complaint attempting to obtain compensation for some harm that the defendant has allegedly done. Because the plaintiff is alleging the harm, in all but a few exceptional scenarios, the plaintiff must demonstrate to a jury at trial that the defendant caused it harm and should have to compensate the plaintiff for its losses. In this traditional setting, if the plaintiff introduced no evidence to the jury to support its position, the plaintiff would lose its case. Therefore, the traditional rule is that the plaintiff presents its case first at trial, and closes the trial with evidence that attempts to rebut the defendant's position.[1]

In condemnation cases, the plaintiff alleges no harm. In such cases, the plaintiff is generally a governmental agency that does not allege that the defendant has caused harm, but instead alleges that it needs the defendant's property for some public project. In historical condemnation practice, generally the governmental agency had to demonstrate the public purpose and need for the property to the same jury that would decide the amount that the condemned property owner should be paid as compensation if the jury found that taking the property was necessary for a public purpose.[2] So the condemning agency, like a traditional plaintiff, presented its case first at trial, and could close the trial with evidence intended to rebut the condemned property owner's position.

In 1980, Michigan adopted the Uniform Condemnation Procedures Act (UCPA),[3] which further differentiated condemnation cases from traditional lawsuits by changing many aspects of historical condemnation practice. Under the UCPA, when an agency is condemning property for a public project, it may not have to prove the public purpose for the exercise of eminent domain, and does not have to prove the need for the property. Rather, public purpose and necessity are only brought into play if the property owner challenges whether those requirements are satisfied. If the property owner does not bring such a challenge, the UCPA provides that necessity is

---

1. *See*, *e.g.*, *In re* Murray, 219 Mich. 70, 73, 188 N.W. 381, 382 (1922) ("The test is against whom would judgment be rendered if no evidence were introduced; that party has the right to open and close.").

2. Briefly, the Constitution requires that any exercise of eminent domain must predominantly benefit the public, not private interests. Necessity, which is a separate inquiry from public purpose, involves whether particular property is needed for some public project. *See* City of Novi v. Robert Adell Children's Funded Trust, 253 Mich. App. 330, 335-39, 659 N.W.2d 615, 619-21 (2002).

3. MICH. COMP. LAWS §§ 213.51-.77 (1998).

"conclusively presumed" and that the property owner's right to further challenge the condemnation is "waived."[4] The condemning agency immediately takes title to and possession of the property through a "quick-take" procedure.[5] It also pays the condemned property owner the amount that it believes will justly compensate the owner for the loss of the property.

If public purpose and necessity are determined, and title and possession pass to the condemning agency, the only dispute left in a UCPA condemnation action is the value of the condemned property, which must be paid to the property owner as just compensation.[6] Trials concerning just compensation are completely separate from any hearings relating to the public purpose and necessity for the taking. At a just compensation trial, the condemning agency will defend its estimate of the property's value, which it has already offered to the condemned property owner, and the property owner will try to demonstrate that the property's value is greater than the agency's estimate.

This Article contends that when the parties to a condemnation action go to trial over the compensation for the condemned property, even though the property owner is nominally a defendant, under the UCPA a property owner challenging the compensation offered should be allowed to open and close trial like a traditional plaintiff. In support of this position, Part II describes Michigan courts' power to order that trial will proceed in the order that best suits any particular case. Part III explains that when a condemning agency is acquiring property under the UCPA and the property owner challenges only the compensation that the agency has offered, the best order has the defendant property owner opening and closing trial. Also, Part III discusses decisions from other jurisdictions that have decided that when only the amount of compensation is at issue in a condemnation action, the property owner may open and close the trial. Finally, Part IV summarizes and offers conclusions. Like a traditional plaintiff, a condemned property owner challenging

---

4. *Id.* § 213.56.

5. *Id.* §§ 213.57, .59. "The purpose of the [UCPA] and its 'quick take' provision is to enable governmental agencies to quickly obtain title so that public projects can proceed without the delays of normal civil litigation." Goodwill Cmty. Chapel v. Gen. Motors Corp., 200 Mich. App. 84, 87-88, 503 N.W.2d 705, 707 (1993).

6. *See* MICH. COMP. LAWS § 213.62 (1998) (stating that the property owner can demand a trial to determine the compensation that the condemning agency must pay). When private property is taken for public use, of course, the property owner must receive "just compensation." *See* U.S. CONST. amend. V; MICH. CONST. art. X, § 2. Just compensation is based on the market value of the condemned property. *See In re* Jeffries Homes Housing Project, 306 Mich. 638, 649, 11 N.W.2d 272, 276 (1943). Just compensation can also include amounts for damages to property that is not taken in addition to the value of the property that is taken. *See* Johnstone v. Detroit, Grand Haven & Milwaukee Ry. Co., 245 Mich. 65, 86, 222 N.W. 325 (1928).

compensation will have judgement entered against it if no evidence were introduced by either party. Therefore, under the traditional rule governing trial order, property owners should open and close a just compensation trial.

I. OPENING AND CLOSING TRIAL: A TRIAL COURT DECISION

The UCPA prescribes many procedural steps in condemnation actions, but one matter that it does not address is the right to open and close a compensation trial.[7] Instead, the UCPA defaults to the same general principles that apply in other civil cases. Those principles provide trial courts with the power to control which party opens and closes a just compensation trial, just as the courts can control that issue in any civil trial.

A. The UCPA Does Not Prescribe Which Party Should Open and Close Trial in a Compensation Trial

Unlike condemnation statutes in some states, which provide that either the plaintiff condemning authority or the defendant property owner has the right to open and close at a trial to determine compensation,[8] the UCPA does not have a provision governing the order of proofs at such a trial. It is completely silent on the issue of which party presents its opening first, presents evidence first, closes first, and can present rebuttal. With no specific provision governing the order of proofs at a compensation trial, the UCPA's default provision applies. The default provision states that when the UCPA does not provide otherwise, "[a]ll laws and court rules applicable to civil actions shall apply to condemnation proceedings."[9] Further, the UCPA specifically states that if a condemned property owner demands "a trial by jury as to the issue of just compensation," then the compensation trial "shall be

---

7. The UCPA does allocate the burden of proof to the condemning agency when the agency alleges that a partial taking somehow benefits the value of the remaining property. *See* MICH. COMP. LAWS §§ 213.70(2), .73 (1998). Applying the traditional rule to that rare scenario provides the condemning agency the right to open and close trial.

8. *See, e.g.*, ALA. CODE § 18-1A-152 (1975) (granting plaintiff the right to open); N.M. STAT. ANN. § 42-2-13 (Michie 1978) (granting defendant the right to open and close). Also, the Uniform Eminent Domain Code, a model condemnation statute first promulgated by the Real Property, Probate, and Trust Section of the American Bar Association during the late 1960s, provides that the defendant property owner "shall make the first opening statement, proceed first in the presentation of evidence on the issue of the amount of compensation, and make the final closing argument." UNIF. EMINENT DOMAIN CODE § 903(a) (1974). The comment to the Alabama code states that the intent was to reverse the Uniform Eminent Domain Code's provision to be consistent with historic Alabama practice. *See* ALA. CODE § 18-1A-152.

9. MICH. COMP. LAWS § 213.52(1) (1998).

governed by court rules applicable to juries in civil cases in circuit court."[10] Under these provisions, condemnation actions proceed in the same manner as other civil actions. Therefore, the general rule governing the order of proofs at a civil trial, contained in the Michigan Court Rules, applies in condemnation actions.

B. The Michigan Court Rules Provide Trial Courts with Power to Control Which Party Will Open and Close at a Civil Trial

The Michigan Court Rules recite the traditional rule for determining the right to open and close trial, but also provide Michigan trial courts with power to decide which party will open and close a civil trial. Rule 2.507 states that the plaintiff should open first, present its evidence first, and have rebuttal, except when the defendant has the burden of proof on an issue. In that circumstance, the defendant should open and proceed first.[11] The court rule accords with the traditional rule that "the party against whom judgment would be rendered if no evidence were introduced by either party, has the right to open and close the evidence and also the argument."[12] This is the default order of proofs at trial in any Michigan civil lawsuit.

Importantly, the court rule's default to the traditional standard is prefaced by the short, but powerful phrase "unless otherwise ordered by the court." As the Michigan Court of Appeals has stated on several occasions, this language gives trial courts discretion to control the order of the

---

10. *Id.* § 213.62(1). Circuit courts are the trial courts of general jurisdiction in Michigan. *See id.* § 600.601.

11. The governing court rule provides that usually the plaintiff will open the proofs:

> Unless otherwise ordered by the court, the plaintiff must first present the evidence in support of the plaintiff's case. However, the defendant must first present the evidence in support of his or her case, if
>
> (1) the defendant's answer has admitted facts and allegations of the plaintiff's complaint to the extent that, in the absence of further statement on the defendant's behalf, judgment should be entered on the pleadings for the plaintiff, and
>
> (2) the defendant has asserted a defense on which the defendant has the burden of proof, either as a counterclaim or as an affirmative defense.

MICH. CT. R. 2.507(B). The court rule also provides that the "party who commenced the evidence is entitled to open the [final] argument and, if the opposing party makes an argument, to make a rebuttal argument not beyond the issues raised in the preceding arguments." *Id.* 2.507(E).

12. ROBERT DEAN & RONALD S. LONGHOFER, 3 MICHIGAN COURT RULES PRACTICE § 2507.4, at 115 (4th ed. 1998).

presentations at trial.[13] This discretion provides trial courts with the ability to allocate the order at trial in the fairest manner in cases that are unlike the traditional lawsuit. Thus, if an action varies from the traditional lawsuit, as in a condemnation action where there is no burden of proof at all,[14] the trial court can account for that variation by ordering that the proofs and arguments at trial will accord with the circumstances of such a case.

II. OPENING AND CLOSING A UCPA COMPENSATION TRIAL

Though there were historical reasons for permitting the condemning agency to open and close at trial, those reasons dissolved with the UCPA's adoption. Under the UCPA, once necessity and public purpose are established, the condemning agency takes possession of the property, takes title to the property, and pays the amount that it estimates to be just compensation. If the property owner believes that the estimated compensation is inadequate, under the UCPA, it can demand a trial to determine the constitutional just compensation. Courts in jurisdictions with statutes similar to the UCPA have acknowledged that under such circumstances, the property owner, even if it is a defendant, can open and close the compensation trial. Michigan courts should come to the same conclusion.

---

13. *See* Glover v. City of Kalamazoo, 98 Mich. App. 465, 470, 296 N.W.2d 280, 283 (1980); *see also* Fabbrini Family Foods, Inc. v. United Canning Corp., 90 Mich. App. 80, 90-91, 280 N.W.2d 877, 882 (1979).

The authority granted by the Michigan Court Rules is supplemented by the Michigan Rules of Evidence. Michigan Rule of Evidence 611 provides that courts "shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence" at trial. The rule directs trial courts to use this control to aid the discovery of the truth, avoid delay, and protect witnesses from embarrassment or harassment. *See* MICH. R. EVID. 611(a).

14. *See* 2 MICHIGAN MODEL CIVIL JURY INSTRUCTIONS § 90.03 (2d ed. 2002); City of Detroit v. Hamtramck Cmty. Fed. Credit Union, 146 Mich. App. 155, 163, 379 N.W.2d 405, 408 (1985) (rejecting an argument that an instruction on the burden of proof should have been given at a compensation trial). One Michigan decision permitted instructions giving burdens at a compensation trial, but that court actually gave both parties a burden, so they counterbalanced and the effect was as if no instruction had been given. *See* Charter Township of Delta v. Eyde, 40 Mich. App. 485, 489, 198 N.W.2d 918, 920 (1972). In any event, *Eyde* is a pre-UCPA decision. There is no burden of proof at a compensation trial because, all other things being equal, neither party's value estimate is necessarily more likely to be correct than the other party's estimate. *See* State v. 45,621 Square Feet of Land, 475 P.2d 553, 554 (Alaska 1970); Paterson Redev. Agency v. Bienstock, 303 A.2d 598, 599 (N.J. Super. Ct. App. Div. 1973) (stating that the "burden of proof concept has no place" in an inquiry into market value).

A. The Historical Statutes Governing Condemnation Procedures Justified Permitting the Condemning Agency to Open and Close the Proofs in a Compensation Trial

Before Michigan adopted the UCPA, the state's condemnation statutes generally provided that the same jury would decide whether the taking was necessary for a public purpose, and if these requirements were satisfied, the compensation due to the condemned property owner for the loss of its property.[15] That is, these statutes provided for one trial where the jury decided whether the proposed condemnation could proceed at all, and, if so, the amount of compensation the condemning agency had to pay the property owner. For example, under the Condemnation by State Agencies and Public Corporations Act, first adopted in 1911, the condemning agency seeking to take land for a public project had to file a petition requesting that a jury be impaneled to render decisions on public purpose, necessity, and compensation:

> The petition shall ask that a jury be summoned and impanelled to ascertain and determine whether it is necessary to make such public improvement or fulfill such purpose and whether it is necessary to take such property as it is proposed to do for the use or benefit of the public, and to ascertain and determine the just compensation to be made therefor.[16]

---

15. Historically, the Michigan Constitution provided that a board of commissioners determined both necessity and compensation when private property was taken for some public project:

> When private property is taken for the use or benefit of the public, the necessity for using such property and the just compensation to be made therefor, except when to be made by the state, shall be ascertained by a jury of twelve freeholders, residing in the vicinity of such property, or by not less than three commissioners, appointed by a court of record, as shall be prescribed by law.

MICH. CONST. art. XVIII, § 2 (1850). The 1908 Constitution continued this requirement. *See* MICH. CONST. art. XIII, § 2 (1908). Michigan's 1963 Constitution changed that requirement "[p]rivate property shall not be taken for public use without just compensation therefor being first made or secured in a manner prescribed by law. Compensation shall be determined in proceedings in a court of record." MICH. CONST. art. X, § 2. Thus, although the Michigan Constitution at one time required that a jury determine both necessity and compensation, that changed in 1963. Despite that constitutional change, certain Michigan statutes in effect after the constitutional change continued to require a jury to determine both necessity and compensation. *See*, *e.g.*, MICH. COMP. LAWS § 213.21-.41 (1998), *repealed in part by* the UCPA, 1980 Mich. Pub. Acts 87, § 26 (effective April 1, 1983). For that reason, the text discussion focuses on the historical statutes rather than the historical constitutional provision.

16. MICH. COMP. LAWS § 213.25 (1998). Though this section was superseded by the UCPA, it has never been repealed.

Likewise, the Act directed the jury to decide the necessity and public purpose for the taking and, if it found that they were present, to determine the compensation that the property owner should receive for the loss of its property:

> The jury shall determine in its verdict the necessity for the proposed improvement or for the accomplishment of the proposed purpose, and for taking such private property for the use or benefit of the public for the proposed improvement or for the accomplishment of the proposed purpose, and in case it find such necessity exists, it shall award to the owners of such property and others interested therein such compensation therefor as it shall deem just.[17]

The Act actually provided a model verdict form for the jury. Model verdicts were issued in two parts, with the first directed only at the necessity and public purpose of the taking:

> We find that it is . . . necessary to make the proposed improvement, or to accomplish the proposed purpose, and that it is . . . necessary to take the private property described in the petition in this cause for the use or benefit of the public for the proposed improvement, or for the accomplishment of the proposed purpose.[18]

The second part of the model verdict form states that the jury had "ascertained and determined" the "just compensation to be paid for such private property," and divided the just compensation among the various interest-holders in the property.[19]

In addition to the Condemnation by State Agencies and Public Corporations Act, several other historic Michigan condemnation statutes provided that the condemning agency had to prove the necessity for the taking at the same trial where compensation was determined. The act governing general condemnation by the state required a court to appoint three freeholders or a twelve-person jury "to ascertain and determine the necessity of the proposed public use, the necessity for using such property and the just compensation to be paid therefor by the state."[20] Similarly, the act granting certain cities the power to condemn property for water, light, heat, power, or transportation within the city required a condemning city to request "that a jury be summoned and empaneled to ascertain and determine whether it is

---

17. *Id.* § 213.30, *repealed by* the UCPA, 1980 Mich. Pub. Acts 87, § 26 (effective April 1, 1983). The repealer was itself repealed in 1996. *See* 1996 Mich. Pub. Acts 474.

18. MICH. COMP. LAWS § 213.31 (1998), *repealed by* the UCPA, 1980 Mich. Pub. Acts 87, § 26 (effective April 1, 1983) (alteration in original). Again, the repealer was repealed in 1996. *See* 1996 Mich. Pub. Acts 474.

19. *Id.* § 213.31.

20. *Id.* § 213.3.

necessary to take" title to the property for some public use, as well as to "determine the just compensation" for the taking.[21] Other statutes governing condemnation, for example those governing condemnation for boulevards, streets, or alleys,[22] and more modern statutes governing condemnation by county public works departments,[23] and condemnation for county drains,[24] followed similar procedures.

Though these older statutes governed differing acquisitions by various condemning agencies, they all provided that necessity, public purpose and compensation would be decided by the same panel or jury. Under the procedures prescribed by these statutes, at the time the condemning agency presented its case to the panel or jury, it had not taken title to or possession of the condemned property, and had not paid any compensation to the condemned property owner. For the condemning agency to avoid a judgment against it, the jury would had to have decided that the condemnation was necessary for a public purpose, and would then had to have determined the amount of compensation that the condemning agency had to pay the property owner to satisfy the constitutional requirement of just compensation. Even if the condemning agency prevailed, it could not take title and possession of the property until the jury delivered its verdict. But if the condemning agency could not demonstrate necessity, it would lose its case and could not take the property through eminent domain, regardless of the amount of compensation that it might be willing to pay. In such circumstances, the jury would never get to the compensation issue because it would have decided that the condemnation lacked constitutional authorization.

To use the traditional statement of the rule governing the order of proofs at a trial under these historic condemnation statutes where neither party introduced any evidence, the condemning agency would have had judgment rendered against it because it would not have proven that it was necessary to take the condemned property for some public purpose. As the party that would have judgment rendered against it under such circumstances, the traditional rule governing the right to open and close trial provided that the condemning agency should open and close the trial. Therefore, under the pre-

---

21. *Id.* § 213.113.

22. *See id.* § 213.222.

23. *See id.* § 123.773 (1991) (requiring a county public works department that sought to condemn property to "pray for the appointment of 3 special court commissioners to determine the necessity of taking for public use or benefit the property described in the petition and to appraise the damages to be paid as compensation for the taking of each piece or parcel of property").

24. *See* MICH. COMP. LAWS § 280.75 (1994) (directing the circuit court to appoint a panel to "determine the necessity for the taking of private property for the use and benefit of the public, and the just compensation to be made therefor").

UCPA condemnation statutes that generally provided for the same jury or panel to decide both necessity and compensation, permitting the condemning agency to open and close the arguments and the evidence at trial made sense.[25]

B. The UCPA's Adoption Altered the Historic Justification for the Condemning Agency to Open and Close a Compensation Trial

Though the historic condemnation statutes provided reasons for the condemning agency to open and close the trial before the jury that would decide necessity, public purpose, and compensation, those reasons dissipated with the UCPA's adoption. First, the UCPA superseded the procedures provided by the historic condemnation statutes. Although the UCPA "does not confer the power of eminent domain" on any agency,[26] it does require that "[a]ll actions for the acquisition of property by an agency under the power of eminent domain shall be commenced pursuant to and be governed by" it.[27] Thus, the procedures provided in the historic condemnation statutes, were replaced by the UCPA.

1. *In a Change from Historic Condemnation Practice, the UCPA Provides that Necessity and Public Purpose are Decided as Threshold Matters*

Critically, the new procedures adopted by the UCPA totally separate the determinations on public purpose and necessity from the compensation determination, requiring necessity and public purpose to be decided at the beginning of any condemnation action. Under the UCPA, when a condemning agency files its condemnation complaint, the property owner must act if it intends to challenge the necessity of, or purposes for, the condemnation. To challenge the necessity, the condemned property owner must file a motion to review necessity within twenty-eight days after receiving the condemnation

---

25. A few of the pre-UCPA condemnation statutes did provide for quick-taking, *see*, *e.g.*, 1925 Mich. Pub. Acts 352, but the UCPA nevertheless was a significant change in condemnation procedure. Even under those older statutes allowing quick-taking, the traditional rule governing trial procedure would have favored permitting the property owner to open and close the compensation trial.

26. *Id.* § 213.52(1) (1998). This contrasts with the historic condemnation statutes, which both granted the power to condemn property and prescribed the condemnation process. *See*, *e.g.*, *id.* §§ 213.21-.41, *repealed in part by* the UCPA, 1980 Mich. Pub. Acts 87 (effective Apr. 1, 1983).

27. *Id.* § 213.75.

complaint.[28] If such a motion is filed, the UCPA provides that whether the condemnation is necessary and valid is decided as a threshold matter.[29] If the owner does not bring such a motion, "necessity shall be conclusively presumed to exist and the right to have necessity reviewed or further considered is waived."[30] Further, the "court's determination of a motion to review necessity is a final judgment" and cannot be re-opened at the jury trial of the compensation issue.[31]

If the property owner does not challenge necessity or public purpose, or if public purpose and necessity are determined in the condemning agency's favor, the condemning agency can then acquire the property. By operation of the UCPA, title to the property "shall vest in the agency as of the date on which the complaint was filed."[32] Likewise, if public purpose and necessity are established, and the time to appeal has expired, "title to the property shall also vest in the agency as of the date on which the complaint was filed," or on another date set by the court.[33] Once title vests, "the court shall fix the time and terms for surrender of possession of the property to the agency," and if need be, can "enforce surrender by appropriate order or other process."[34]

Thus, absent challenges to public purpose or necessity, the UCPA provides that the condemning agency can acquire the property shortly after filing its condemnation complaint, in contrast with the historic procedure that required a final determination of public purpose, necessity, and compensation before the condemning agency could acquire the property. This procedure of transferring title and possession to the condemning agency at the beginning

---

28. *See id*. § 213.56. This section states that the owner must file a motion challenging necessity within the time the owner would have to file a pleading responsive to the complaint. The Michigan Court Rules provide that a responsive pleading must be filed within twenty-one or twenty-eight days, depending on the manner of service. *See* MICH. CT. R. 2.108.

29. *See* MICH. COMP. LAWS § 213.56(4)-(6) (1998). Also, even though the UCPA provides that necessity and "the validity of the condemnation proceeding" must be challenged by motion, courts often hold evidentiary hearings on such motions. § 213.56(6). The evidentiary hearings can include opening statements, testimony, and closing arguments. *See*, *e.g*., City of Novi v. Robert Adell Children's Funded Trust, 253 Mich. App. 330, 332, 659 N.W.2d 615 (2002) (referencing testimony at a public purpose hearing). This Article does not address the right to open and close at such hearings.

30. MICH. COMP. LAWS § 213.56(7) (1998).

31. *Id*. § 213.56(5). This provision allows a property owner to appeal a court's decision that a condemnation project is necessary without waiting for the compensation trial to conclude before the property owner can appeal. *See* MICH. CT. R. 7.203 (stating that a final judgment is necessary for an appeal).

32. § 213.57(1).

33. *Id*.

34. *Id*. § 213.59(1).

of a condemnation action is known as a "quick take" procedure.[35] "Quick take" legislation was designed to make condemnation more efficient and to make public projects more successful by eliminating delays in their completion.[36] Such legislation furthers these goals by allowing public purpose and necessity to be determined as threshold matters and providing that if these requirements are established, title to the property will transfer to the agency so that it can proceed with its project. So after public purpose and necessity are determined, the agency has the property, and the condemned property owner has a right to receive just compensation.[37]

2. *Once Public Purpose and Necessity are Resolved, the Sole Focus Becomes Determining the Property Owner's Just Compensation*

With title and possession resolved, the condemnation action's focus becomes the amount of compensation that the condemning agency must pay to the property owner. At the time the agency takes possession of the property, the property owner statutorily must receive the amount that the condemning agency offered for the property.[38] But if the property owner does not believe that the estimated compensation will justly compensate it for the loss of its property, it can contest the estimated compensation and pursue a trial to determine the compensation that the agency must pay for taking the property.

If the property owner challenges the offered amount of compensation and goes to trial, it will have judgment entered against it if neither party introduces any evidence. When a compensation trial opens, the condemning agency has everything that it desired when it filed its complaint: it has title to the property, it has possession of the property, and it has paid the property owner the amount that it estimated to be just compensation. The agency's role, therefore, will be to defend the amount that it has already paid for the condemned property. Courts have permitted the condemning agency to inform the jury that the agency has offered, and even already paid, the property owner a certain amount, and that the property owner has brought the case to trial seeking additional compensation.

If the property owner did not pursue a trial over the amount of compensation, it would receive the amount that the condemning agency

---

35. *See* Goodwill Cmty. Chapel v. Gen. Motors Corp., 200 Mich. App. 84, 87-88, 503 N.W.2d 705, 707 (1993).

36. *See supra* note 5; *see also* City of Fenton v. Lutz, 73 Mich. App. 117, 120-21, 250 N.W.2d 579, 580-581 (1977) (discussing quick-take legislation).

37. *See* MICH. COMP. LAWS § 213.57 (1998).

38. *See id.* §§ 213.58(1), .59(5).

offered as compensation for the property, and nothing more.[39] To use the traditional statement of the rule, as to compensation, the property owner is the party against whom judgment would be rendered if no evidence were introduced by either party. Applying the traditional rule, as to compensation, the property owner is the party that "has the right to open and close the evidence and also the argument."[40] Thus, once the unique circumstances of a condemnation case are taken into account, including accounting for the absence of any burden of proof, the traditional standard governing trial procedure favors permitting the property owner to open and close the compensation trial.

C. Courts in Other States Have Concluded that the Condemned Property Owner Can Open and Close a Trial Focusing Only on Just Compensation

Even though the UCPA has been in effect since 1980, no published Michigan decision has addressed its effect on which party should open and close a compensation trial. Older Michigan cases acknowledged that "[i]n condemnation proceedings, the petitioner is not, as to the compensation to be awarded, a plaintiff,"[41] but none have noted that under the UCPA, the traditional rule favors permitting the property owner to open and close trial. Courts in other states, however, have discussed this issue in the context of a

---

39. *See id*. § 213.58(1) (discussing apportionment of the estimated compensation between the property owners); *see also* MICH CT. R. 2.603 (governing default judgments).

40. DEAN & LONGHOFER, *supra* note 12, § 2507.4, at 115.

41. City of Grand Rapids v. Coit, 149 Mich. 668, 672, 113 N.W. 362, 364 (1907). In *Coit*, the city was taking property to extend a road. *See Coit*, 149 Mich. at 671, 113 N.W.2d at 363. The trial court had concluded that the city's power to do so was "express," leaving only the compensation to be awarded to the property owner in issue. *See id.* On that issue, the jury's decision was not within the range established by the evidence, so the property owner asked for a new trial. *See id.* Instead of ordering a new trial, the court offered the city, the plaintiff in the action, the option of paying the property owner compensation that would minimally accord with the trial evidence. The city, of course, accepted that offer. *See id.* When the property owner appealed, the Michigan Supreme Court explained that normally, the option to accept an altered award to avoid the need for a new trial is offered to the plaintiff that received the award. *See id*. at 364. In this situation, however, that was not an option because the city was not, "as to the compensation to be awarded, a plaintiff." *Id.* at 364. Instead, the defendant property owner would receive the verdict, so the plaintiff condemning agency could not accept an increased award. *See* Coit, 149 Mich. at 672, 113 N.W.2d at 364.

In other cases, the property owner has been treated like a traditional plaintiff. *See*, *e.g.*, *In re* Dillman, 263 Mich. 542, 551, 248 N.W. 894, 897 (1933) ("On the hearing before the commissioners the property owners (appellees) took the initiative in offering proof of damages. The State and railroad company followed with other testimony, and thereafter rebuttal testimony was taken in behalf of the property owners").

trial focusing only on just compensation. Those courts have concluded that the condemned property owner should open and close the trial.

For example, in *Department of Public Works & Buildings v. Dixon,*[42] the Illinois Supreme Court concluded that under Illinois' quick-take statute, older cases granting the condemning agency the right to open and close at trial had become obsolete.[43] There, the department was taking the Dixons' property for a right of way, and requested an order vesting title in it immediately.[44] The trial court found that the department had the right to condemn the property, that it was not improperly exercising that power, and that the Dixons' property was subject to the power and reasonably necessary for the right-of-way project.[45] After the department deposited the estimated just compensation in escrow, the court vested title in the department, but granted the Dixons the right to "open and close the argument to the jury."[46] When the department challenged the trial court's decision, the Supreme Court of Illinois noted that over 80 years before, it had held in several cases that it was "reversible error where the trial court permitted the defendant to open and close" trial in a condemnation action.[47] But it also noted that "those cases were decided long before the 1957 'quick-take' amendment which radically changed highway condemnation procedure by the State."[48] In this case, the court stated that the "narrow issue" was the effect of "the 'quick-take' amendment on the right to open and close argument."[49]

The supreme court reasoned that under the Illinois quick-take amendment, the traditional rule governing the right to open and close the trial mandated that the property owner have that right.[50] It stated that the rationale of the older cases was that because the condemning agency "would be defeated if no evidence were introduced on either side," the agency "had the burden of going forward with the evidence and the right to open and close argument."[51] But in light of the agency's deposit of estimated just compensation, and its possession of the land at the time of the compensation trial, the court concluded that the reasons underlying the older cases were "not present" in *Dixon*.[52] The court made clear that in *Dixon*, the "only thing

---

42. 229 N.E.2d 679 (Ill. 1967).
43. *See* Dept. of Pub. Works & Bldgs. v. Dixon, 229 N.E.2d 679, 681 (Ill. 1967).
44. *See Dixon*, 229 N.E.2d at 680.
45. *See id.*
46. *Id.* at 680.
47. *Id.*
48. *Id.*
49. *Id.*
50. *See Dixon*, 229 N.E.2d at 680-81.
51. *Id.* at 680.
52. *See id.* The court pointed out that the department had "built the improvements by

remaining for final determination was the amount of damages."[53] In light of compensation being the only issue at trial, the court held that "in a condemnation proceeding following the immediate vesting of title (quick-take) the condemnee should have the right to open and close argument."[54]

Likewise, under authorities similar to those governing condemnation actions in Michigan, the Supreme Court of Oregon concluded in *State v. Superbilt Manufacturing Co.*[55] that it was proper for the condemned property owner to open and close at a compensation trial.[56] In *Superbilt,* the Oregon highway commission was taking property for a right of way.[57] The commission alleged that it had complied "with all conditions requisite to its authority to maintain the action," and alleged "the public necessity" for the taking.[58] Superbilt, the property owner, admitted all the allegations of the commission's complaint, but asserted that the commission would have to pay it several hundred thousand dollars more than the commission had originally offered as compensation for moving its fixtures.[59] In light of Superbilt contesting only the amount of compensation that the highway commission offered, "the trial court permitted defendant [Superbilt] to open and close the case."[60] The commission argued that the trial court had erred.[61] But the supreme court considered that under state statutes, condemnation actions were to be tried "'in the same manner as an action at law,'"[62] and that although the plaintiff generally opened and closed legal actions, that rule applied unless good cause and sufficient reason dictated otherwise.[63] The supreme court

---

the time of the final trial" in *Dixon*. *Id*.

53. *Id*.

54. *Id*. at 681. The court further stated that it is the property owner "who is seeking just compensation guaranteed to him by the constitution for property over which he has unwillingly lost possession and control." *Dixon*, 229 N.E.2d at 681.

55. 281 P.2d 707 (Or. 1955).

56. *See* State v. Superbuilt Mfg. Co., 281 P.2d 707, 712 (Or. 1955).

57. *See Superbuilt*, 281 P.2d at 708-09.

58. *Id*. at 709.

59. *See id*. at 709-11. *Superbilt* is also an influential case governing fixture qualification in eminent domain. *See* Wayne County v. Britton Trust, 454 Mich. 608, 623, 563 N.W.2d 674, 681-82 n.12 (1997) (citing *Superbilt*, 281 P.2d 707); *see also* Jason C. Long, *Eminent Domain–Fixture Qualification–Property Is a Fixture in Condemnation if it Satisfies the Three-Step Analysis, and the Condemnee May Elect to Receive the Value-in-Place or the Detach/Reattachment Costs for the Fixutres*, Wayne County v. Williams, 563. N.W.2d 674 (Mich. 1997) 75 U. DET. MERCY L. REV. 717 (1998) (describing fixture qualification under Michigan law).

60. *Superbilt*, 281 P.2d at 712.

61. *See id*.

62. *Id*. (quoting OR. REV. STAT. § 366.375(3) (1953) (repealed 1971)).

63. *See id*. at 712 (citing OR. REV. STAT. § 17.210 (1953) (repealed 1971)).

concluded that when the only factual question for trial is the sum to be paid as just compensation, good cause and sufficient reason favor digressing from the usual rule and allowing the condemned property owner to open and close the trial.[64]

Indeed, *Dixon* and *Superbilt* are but two of several authorities holding that when the amount of compensation that a condemning agency must pay to a condemned property owner is the only issue for trial, the property owner should open and close the trial. In varying circumstances, courts in several other states,[65] as well as the federal courts,[66] and eminent domain commentators,[67] have all reached conclusions similar to the holdings in *Dixon* and *Superbilt*. All these authorities weigh in favor of Michigan permitting the condemned property owner to open and close the trial. After all, as the Supreme Court of Illinois recognized in *Dixon,* once the condemning agency has title to the property, possession of the property, and has deposited the estimated just compensation for the property owner's benefit, the property owner will be defeated if nobody does anything. That is precisely the situation under Michigan's UCPA, and for that precise reason, the condemned property owner can be permitted to open and close any UCPA compensation trial.

---

64. *See id.*

65. *See* Springfield & Memphis Ry. v. Rhea, 44 Ark. 258, 264 (1884) ("To the defendant were justly accorded the opening and conclusion of the argument. The land owner is, in such cases, the real actor, no matter which party initiates the proceedings."); Colorado Cent. Ry. Co. v. Allen, 22 P. 605, 607 (Colo. 1889); Evansville & Crawfordsville R.R. v. Miller, 30 Ind. 209, 210 (1868); Burt v. Wigglesworth, 117 Mass. 302, 306 (1875) ("This proceeding is not like an ordinary action at law" because the property owner has "the right to open and close, without regard to the question by which party the petition is filed upon which the trial by jury is had."); St. Louis, Kansas City & Colorado R.R. v. North, 31 Mo. App. 345, 349-50 (1888); State v. Peterson, 328 P.2d 617, 629 (Mont. 1958); Village of Penn Yan Urban Renewal Agency v. Penn Yan Realty Corp., 294 N.Y.S.2d 66, 68-69 (Civ. Ct. 1968) (stating that after the condemning agency makes an offer and takes title and possession, "[n]othing remains for the plaintiff-condemnor to do," and that "defendant-landowners are directed to proceed first with their proof before the commissioners of appraisal").

66. *See* United States v. Crary, 2 F.Supp. 870, 877 (W.D. Va. 1932) ("'the landowner is entitled to open and close the case, and this is true no matter whether his position is plaintiff or defendant'").

67. *See*, *e.g.*, 2 JOHN LEWIS, A TREATISE ON THE LAW OF EMINENT DOMAIN IN THE UNITED STATES § 645, at 1112, 1114 (3d ed. 1909); SIDNEY Z. SEARLES, REAL ESTATE VALUATION IN CONDEMNATION 243-44 (1970) (stating that when necessity is conceded, the property owner "will have the right to open and close because the only remaining issue will be 'value'"); *see also* 27 AM. JUR. 2D *Eminent Domain* § 602 (1996).

CONCLUSION

In sum, good reasons compel that at a compensation trial under Michigan's UCPA, the condemned property owner can open and close the trial. Under the UCPA, at the time the compensation trial begins, the condemning agency has both title to and possession of the property, and has paid the property owner the amount that it believes will justly compensate the property owner for the effect of the taking. Indeed, a compensation trial only occurs when the property owner challenges the condemning agency's estimated compensation. If the property owner does challenge compensation and demands a compensation trial, the property owner will have judgement entered against it if neither party introduces any evidence. Under these circumstances, the traditional rule governing the order of proofs at trial favors permitting the property owner to open and close a compensation trial.

Even though the traditional rule favors permitting the condemned property owner to open and close a compensation trial, the property owner must request that the court enter an order allowing it to do so. After all, the Michigan Court Rules default to permitting the plaintiff, whatever its interest or posture in the litigation, to open and close any trial.[68] The condemned property owner will have to ask the court to "order otherwise" and direct that the property owner will open and close. If it does not, then the court must follow the Michigan Court Rules and permit the plaintiff, the condemning agency, to open and close the compensation trial. But because the property owner would be defeated if neither party were to introduce any evidence at the compensation trial, the traditional rule governing the order of proofs at trial requires that upon the property owner's request, it should be permitted to open the arguments and evidence, and be allowed rebuttal at a compensation trial under the UCPA.

---

68. *See* MICH. CT. R. 2.507.