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# ORIGINAL

NOT FOR OFFICIAL PUBLICATION  
*See Okla. Sup. Ct. R. 1.200 before citing.*

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION II

OKLAHOMA TURNPIKE )  
AUTHORITY, )  
Plaintiff/Appellant, )  
vs. )  
DWB FAMILY TRUST, by and through )  
DARRIN WESLEY BREWER & )  
SAMANTHA R. BREWER TRUSTEES,)  
DARRIN WESLEY BREWER; and )  
SAMANTHA R. BREWER; )  
Defendants/Appellees, )  
and )  
ADVANTAGE BANK; OCCUPANT(S) )  
OF THE PREMISES; OKLAHOMA )  
GAS AND ELECTRIC CO.; )  
OKLAHOMA COUNTY TREASURER )  
and BOARD OF COUNTY )  
COMMISSIONERS OF OKLAHOMA )  
COUNTY, OKLAHOMA, )  
Defendants. )

**FILED**  
COURT OF CIVIL APPEALS  
STATE OF OKLAHOMA

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APPEAL FROM THE DISTRICT COURT OF  
OKLAHOMA COUNTY, OKLAHOMA

HONORABLE DON ANDREWS, TRIAL JUDGE

**AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR  
FURTHER PROCEEDINGS**

Kelly F. Monaghan  
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MONAGHAN•WARRICK•KING  
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For Plaintiff/Appellant

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For Defendants/Appellees

**OPINION BY JANE P. WISEMAN, PRESIDING JUDGE:**

The Oklahoma Turnpike Authority appeals a judgment in favor of Defendants DWB Family Trust, by and through Darrin Wesley Brewer and Samantha R. Brewer, Trustees, Darrin Wesley Brewer and Samantha R. Brewer entered on a jury verdict in this condemnation case.<sup>1</sup> After review, we affirm in part, reverse in part, and remand for further proceedings.<sup>2</sup>

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<sup>1</sup> The July 8, 2024 journal entry of judgment stated that Defendants Advantage Bank, Oklahoma Gas and Electric Co., the Oklahoma County Treasurer and the Board of County Commissioners of Oklahoma County, Oklahoma, did not appear at trial. It also determined that “[a]ny Defendant(s) that neither plead nor answered herein, or filed exceptions to the Report of Commissioners, or Demand for Jury Trial, or disclaimed any interest herein have, therefore, defaulted and waived their right to contest the taking herein or to object to the ultimate award of compensation to be paid to the [Defendants], for the acquisition of the real property and property rights as set forth in OTA’s Amended Petition.” The trial court also concluded that “all other Defendants have no right, title or claim to the property acquired by OTA, nor to the just compensation which has been fixed and awarded to the [Defendants].”

<sup>2</sup> Defendants’ application for leave of court to file a surreply brief is denied.

## FACTS AND PROCEDURAL BACKGROUND

On May 1, 2018, OTA initiated this action invoking its authority of eminent domain to take a part of Defendants' property for purposes of constructing the Kickapoo Turnpike. Before this condemnation proceeding, Defendants owned approximately 140.51 acres in Oklahoma County. OTA took approximately 46.07 acres in fee simple, including the house, and two parcels of 0.02 acres in utility easements which bisected the property leaving about 55.62 acres in remainder to the west of the Turnpike (Western Remainder) and 32.34 acres in remainder to the east of the Turnpike (Eastern Remainder). The issue raised in this appeal concerns accessibility to the Western Remainder after construction of the Turnpike.

The trial court appointed Commissioners who appraised the subject property and filed a report on July 20, 2018, finding just compensation for the taken property, including the house, to be \$1,140,000. The Commissioners determined that this amount is the "just compensation due said [D]efendants by reason of the acquisition of the property and any damages to the remainder, including compensation for relocation, refitting, and reestablishment expenses." On August 8, 2018, Defendants filed an exception to the Commissioners' Report challenging the necessity of the taking and filed a demand for jury trial.

On February 22, 2019, OTA filed an amended petition to add the two 0.02-acre utility easements. The trial court reappointed the Commissioners to supplement their previous report to include compensation for these easements. On March 5, 2019, the Commissioners returned a supplemental report awarding Defendants an additional \$500 for both easements, resulting in a new total of just compensation of \$1,140,500. Defendants requested and received the disbursement of the award as set forth in the Commissioners' Reports. They also filed an exception to the Supplemental Commissioners' Report and a demand for jury trial. After significant briefing on Defendants' exceptions to the Commissioners' Report, the trial court denied Defendants' exceptions and confirmed the appraisals in the Commissioners' Reports. Defendants appealed this order. In an opinion filed on March 24, 2021, the Oklahoma Court of Civil Appeals in Case No. 118,747 affirmed the trial court's order. The case returned to the trial court for a jury trial.

Before trial, the parties filed motions in limine regarding the admissibility of evidence as to accessibility to the Western Remainder from 10th Street which abuts the southern boundary of Parcel E-320. Defendants filed a motion in limine regarding the scope of the taking. Defendants specifically argued OTA took "all rights of light, airspace, access, view and abutters rights in the scope of the taking, as set forth in the Amended Petition, in this case from the Defendants

and left [them] with a landlocked tract of land.” They further asserted that “[m]ore than four (4) years later, by way of the unilateral deed by OTA, OTA attempts to alter the scope of its taking and avoid the fact that it took all access rights to the Defendants’ property. OTA’s Amended Petition and the Report of Commissioners in this case fixes the scope of the taking.” Defendants then asked the trial court to exclude any evidence of the November 2022 quitclaim deed “for the purposes of mitigating damages owed to Defendants for the loss of access to their remaining part of their property that was bisected by OTA’s taking.”

In its Sixth Motion in Limine, OTA argued the opposite, asking the trial court to exclude “Defendants’ claim of loss of access to the Western Remainder of its property.” OTA first argued the trial court “should find that Defendants’ right to access N.E. 10th Street has not been taken by OTA and any argument asserting that Defendants are entitled to compensation for the taking of all rights of access to N.E. 10th Street should be excluded.” Among other arguments, OTA also contended that “[t]he driveway actually constructed by the OTA and the recording of the quitclaim deed are relevant and properly admissible for the jury’s consideration.”

Both parties responded to each other’s motions in limine on this issue. During a hearing on November 8, 2023, the ruling of which was later captured in an order filed March 21, 2024, the trial court denied OTA’s Sixth Motion in

Limine and granted Defendants' motion in limine regarding the scope of the taking and the November 2022 quitclaim deed. It determined that OTA "will be excluded from introduction of evidence concerning the post-taking November 2022 Quitclaim Deed and plans concerning placement of a driveway connected to 10th Street, specifically, [OTA's] Exhibits 1-6 presented in this Hearing. In making this decision, the District Court found instructive *State ex [rel.] Department of Transportation v. Mehta*, 2008 OK CIV APP 25 and *Stinchomb v. Oklahoma City*, 1921 OK [154].” At the beginning of trial, OTA asked the trial court to reconsider its ruling on this question which was denied.

In November 2023, Defendants filed a motion to amend the pretrial conference order filed in May 2023, stating that “[a]s a result of said discovery, including depositions, Defendants deem it necessary to amend the Pre-Trial Conference Order prior to this matter going to trial.” In February 2024, Defendants filed a supplement to their motion to amend the pretrial conference order requesting in relevant part that the trial court “[c]larify the taking to include [sic] to specifically state that the taking is comprised of the legal rights and real property identified in OTA's Amended Petition filed on February 22, 2019.” Under the “general statement of facts” in the original pretrial conference order, the parties state: “The property acquired is set forth in Exhibit ‘A’ of Plaintiff's Amended Petition.” Defendants assert in their supplemental motion that an

amendment was necessary because “it became abundantly apparent that OTA’s expert witnesses were of the opinion that [Defendants’] Western Remainder had legal access after the taking.” Defendants further argued that when the original pretrial conference order was entered, expert witness discovery was not yet completed, and they were unaware of “OTA’s legal position that the Western Remainder had legal access.” Despite OTA’s objection, the trial court granted Defendants’ motion to amend the pretrial order subsequently entered on March 28, 2024, allowing the change to the “general statement of facts” omitting the language that the description in the property can be found in Exhibit “A” of the amended petition and instead stating, “The property acquired is set forth in [OTA’s] Amended Petition, filed on February 22, 2019.”

On January 12, 2024, OTA filed an application for leave to file a second amended petition and to resend to the Commissioners an amended “legal description attached as Exhibit ‘A’ to the Amended Petition to include an additional 55.82 acres in fee simple, consisting of” the rest of Defendants’ Western Remainder. OTA states it requested this after Defendants’ “assertions and the [t]rial [c]ourt’s ruling that OTA took all rights of access to and abutters’ rights from the Western Remainder.” OTA determined “the Western Remainder is an ‘uneconomic remnant’” under 27 O.S. § 13(9). Defendants objected. The trial court denied OTA’s application.

The jury trial began March 25, 2024, and ended on March 28, 2024. After Defendants' direct examination of Todd Gore, OTA's Director of Right-of-Way and Utilities, OTA again asked the trial court to reconsider its ruling about damages to the Western Remainder, arguing defense counsel opened the door on the issue. The trial court denied this request.

The "jury rendered its unanimous verdict finding in favor of [Defendants] fixing and determining the amount of just compensation to be paid by OTA to [Defendants]" in the amount of \$2,970,000. After being credited for the Commissioners' award previously paid to Defendants in the amount of \$1,140,500, OTA owed a remaining amount of \$1,829,500 with "pre-judgement interest computed thereon at the rate of six percent (6%) per annum" from the date of taking—*i.e.*, July 27, 2018, to the date of the filing of the judgment. OTA appeals.

### **STANDARD OF REVIEW**

"Condemnation proceedings involve both factual determinations and legal rulings." *Natural Gas Pipeline Co. of Am. LLC v. Foster OK Res. LP*, 2020 OK 29, ¶ 7, 465 P.3d 1206. "On appeal in eminent domain proceedings, the verdict of the jury may be set aside only when it manifestly appears that it is unjust and not supported by any competent evidence." *State ex rel. Dep't of Transp. v. Lamar Advert. of Oklahoma, Inc.*, 2014 OK 47, ¶ 8, 335 P.3d 771.

“The range of inquiry into the value of property taken or damaged in eminent domain proceedings is left largely to the discretion of the trial court, and unless that discretion is abused the trial court’s ruling admitting or excluding such evidence will not be disturbed.” *State ex rel. Dep’t of Transp. v. Little*, 2004 OK 74, ¶ 11, 100 P.3d 707.

“[T]he standard of review for jury instructions given or refused is whether a probability exists that jurors were misled, thereby reaching a different conclusion than they would have reached *but for* [the] questioned instruction(s).” *Cimarron Feeders, Inc. v. Tri-County Elec. Coop., Inc.*, 1991 OK 104, ¶ 5, 818 P.2d 901. “Reversible error exists upon discovery of a probability that jurors may have been misled and therefore reached a different result.” *Id.*

## ANALYSIS

The question before us concerns the accessibility of Defendants’ Western Remainder after construction of the Kickapoo Turnpike.

### *I. Jury Instructions*

OTA argues the trial court erred in denying its request for a modified jury instruction. OTA asked the trial court to provide a modified version of Oklahoma Uniform Jury Instruction No. 25.1. The original OUJI 25.1 states:

The term “eminent domain” describes a special legal proceeding in which a [(government agency)/railroad/(public utility)] acquires private

property for a public purpose. It is also called a condemnation proceeding.

The Oklahoma Constitution allows private property to be taken for a public use if just compensation is paid to the owners of the property that is being condemned.

In this case, [Condemnor] is authorized by law to take [describe the property being condemned] for [state the purpose for the taking]. In your deliberations, you should not consider whether or not the taking was necessary, wise, or proper. That has already been decided, and it is not an issue in this case.

As jurors, it will be your duty to determine the amount of just compensation to be paid by [Condemnor] to [Owner].

(Emphasis omitted.) The trial court provided its own modified version as follows:

The parties to this action are Plaintiff, Oklahoma Turnpike Authority, (hereinafter referred to as “OTA”), and the Defendants DWB Family Trust, by and through Darrin Wesley Brewer & Samantha R. Brewer Trustees, and as individuals, (hereinafter referred to as the “Defendants”).

The term “eminent domain” describes a special legal proceeding in which a government agency may acquire private property for a public purpose. It is called a condemnation proceeding. In this case, the OTA is authorized by law to acquire the property for highway improvements.

The Oklahoma Constitution allows private property to be taken for public use only if just compensation is paid to the owners of the property. A reasonable effort must be made to obtain the real property necessary for public improvements by purchase. If the property cannot be acquired by agreed purchase, OTA may file a legal proceeding, as has been done here, to take the property.

The OTA's public project for which the Defendants' land was taken is for the new construction of the Kickapoo Turnpike located in Eastern Oklahoma County. Whether the taking of the property was wise, necessary or proper is not an issue in this trial. That matter has already been decided and determined by the District Court. The only issue for you, as the Jury in this case, to decide is the amount of money that the OTA should pay to the Defendants as "Just Compensation".

As jurors, it will be your duty to determine the amount of just compensation to be paid to the owners of the property . . .<sup>3</sup>

You must determine just compensation as of July 27, 2018.

OTA requested the following additions to the modified instruction to further explain Oklahoma's condemnation process, a request the trial court refused:

Oklahoma law requires that an initial assessment of just compensation be made at the direction of the court and such amount must be deposited by OTA with the court and payable to the owner prior to OTA having the right to enter upon the property.

The initial assessment of just compensation may be challenged by both the owners and OTA. If such a challenge is made, then the amount of just compensation is to be determined by a jury. It is not important nor material to your consideration which party, or if both, challenged the initial assessment of just compensation. Nor is it material to your consideration or to be disclosed to you the amount of the initial assessment of just compensation.

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<sup>3</sup> Land description omitted.

In OTA's motion for modified jury instruction, it asserts the current OUJI 25.1 "fails to accurately reflect the applicable law regarding condemnation." OTA urges its modified instruction provides information "concerning the condemnation process, and importantly, informs the jury that OTA may not 'take' property or otherwise enter upon the property until an initial assessment of just compensation has been determined and paid into court for the benefit of and payable to the property owners." OTA also argues:

This is significant in this case because it involved a full taking of the property. A proper instruction is also necessary due to Defendants' misleading representation to the public that they have not yet been 'properly compensated' on a Facebook post . . . that only confuses the public's already limited understanding of proper condemnation procedure.

OTA complains that, without advising the jury of the condemnation process, the "jury is left with the erroneous assumption that the law allows OTA to take private property and use it for years before the property owner is paid any compensation for the property taken." In its appellate briefing, OTA similarly argues:

Absent disclosing the existence of the payment (but not the amount) of an initial assessment of just compensation prior to taking possession of the property, the jury is instructed the landowner does not receive compensation from the condemnor for the taking of property until after the jury renders its verdict. In this case, the jury would have understood that for nearly six years the [Trust] had received nothing from OTA for

the taking of the property, including the house in which the Trustees of the Trust lived. This erroneous assumption was prejudicial to OTA and demonstrates that OTA did not receive a fair trial.

.... Arguably this case presents the worst of the worst—where the landowner’s property is bisected and their home they built years earlier is taken and demolished. The jury charged with determining just compensation heard Samantha Brewer testify at great length regarding the Trust’s custom-built home in which she and her husband intended to live the remainder of their life. They then began their deliberations without any knowledge that compensation has been paid by OTA to the Trust prior to the property being taken and home demolished. It is difficult to comprehend how any reasonable and fair-minded person would not conclude that such a process is inherently unfair to the property owner—property taken, home demolished, and being made to wait five years to be compensated.

After review, we conclude the trial court did not misstate the law in OUJI 25.1; it simply excluded additional statements of the law regarding the condemnation process as requested by OTA. We note a similar argument was made in *State ex rel. Department of Transportation v. Caliber Development Co., LLC*, 2016 OK CIV APP 1, 365 P.3d 1067 (approved for publication by the Supreme Court):

The Department also argues that the district court erred in refusing to give two requested instructions. Instruction No. 4, the Department contends, is an accurate statement of the law and explains that the condemnation process requires it to pay the amount of the Commissioners’ award before it can take

[landowner's] property. By not instructing the jury on that fact and in light of [landowner's] argument that they had been waiting five years for the jury to determine the amount of just compensation, the Department contends the jury was prejudiced and misled into believing that the Department had not paid any compensation prior to trial. The fact that the Department's requested instruction accurately states the law is not the issue. The issue is whether the instructions that were given fairly and accurately presented the applicable law. "Where the instructions given fairly and reasonably present the issues in the cause, it is not error to refuse to submit requested instructions to the jury." *Oklahoma Tax Comm'n v. Price*, 1946 OK 85, ¶ 19, 167 P.2d 873, 876.

The Department acknowledges that the amount of the Commissioners' report is not admissible. "[W]here a trial by jury is had in a condemnation proceeding, the jury determines the damages from the evidence submitted and the award of the Commissioners is not competent evidence." *Oklahoma Turnpike Auth. v. Daniel*, 1965 OK 7, ¶ 5, 398 P.2d 515, 517. Nonetheless, the Department concludes that the fact that the commissioners made an award and that the Department paid that award is competent and necessary to inform the jury they should not take into account the value of the time between the taking and trial. It is equally plausible to speculate that if the jury is informed that an award has been paid the jury would infer that the amount of that award was more than the Department's trial evidence and less than the landowner's evidence regarding the value of the property taken. In other words, the jury would speculate about a fact the Supreme Court has determined is not competent evidence. *Id.*

*Id.* ¶¶ 25-26. As in *Caliber*, the issue here is whether the trial court's instruction accurately and fairly stated the law applicable to the evidence adduced at trial.

Given the facts presented, we cannot conclude the trial court abused its discretion in denying OTA's request to supplement OUJI 25.1.

Nor are we able, on a more general plane, to conclude that the jurors were probably misled by this instruction and would have reached a different verdict in its absence, thus necessitating reversal. "When reviewing jury instructions, the standard of review requires the consideration of the accuracy of the statement of law as well as the applicability of the instructions to the issues." *Johnson v. Ford Motor Co.*, 2002 OK 24, ¶ 16, 45 P.3d 86. "The instructions are considered as a whole." *Id.*

When the trial court submits a case to the jury under proper instructions on its fundamental issues and a judgment within the issues and supported by competent evidence is rendered in accord with the verdict, the judgment will not be reversed for refusal to give additional or more detailed instructions requested by the losing party, if it does not appear probable that the refusal has resulted in a miscarriage of justice or substantial violation of constitutional or statutory rights.

*Id.* We reject the proposition that this judgment should be reversed for error in the court's decision on this instruction. The better practice may be to attempt to introduce or discuss this part of the condemnation process during other appropriate phases of the trial, but OTA has not persuaded us that refusal to modify the applicable OUJI instruction in this instance was reversible error.

## *II. Admissibility of OTA's Project Plans*

OTA also argues the trial court erred in excluding its project plans at trial although they existed before the date of take. “In condemnation cases, the [OTA] gets to decide what property it is going to take.” *Oklahoma Turnpike Auth. v. Vorel*, 2025 OK CIV APP 5, ¶ 21, 566 P.2d 614. A petition that seeks “condemnation of private property is sufficient which describes the specific property sought to be taken.”” *Id.* (quoting *McCrady v. Western Farmers Elec. Co-op*, 1958 OK 43, ¶ 0, 323 P.2d 356 (syl. no. 2 by the court)). Further, “Ordinarily, absent an amendment to the petition, the only property a condemnor may condemn is that described in the petition.” *State ex rel. Dept. of Transp. v. Mehta*, 2008 OK CIV APP 25, ¶ 26, 180 P.3d 1214. “Neither a landowner nor a trial judge may expand the taking beyond that specified in the condemnation petition.” *Id.* “It is the condemnor who determines, and thereafter petitions to condemn, the land they deem necessary for the purpose of the public use at issue.” *Id.* “The taking, as described in the petition, may be properly challenged by the condemnee(s) by excepting to the commissioners’ report.” *Id.* And, “a property owner is entitled to just compensation not only for the property taken, but also for damages to the owner’s remaining property not taken, i.e., ‘damages to the remainder.’” *Id.* ¶ 27 (quoted citation omitted).

Further, “When possession is taken of property condemned for any public use, the owner shall be entitled to the immediate receipt of the compensation awarded, without prejudice to the right of either party to prosecute further proceedings for the judicial determination of the sufficiency or insufficiency of such compensation.” Okla. Const. art. 2, § 24; *see also* 66 O.S.2021 § 54.

OTA describes its taking of Defendants’ property in the amended petition. Exhibit A includes the physical taking of the property with a metes and bounds description. Defendants do not dispute the physical taking. Paragraph Six of the amended petition describes the property rights taken which include access rights to the property. Defendants argue that OTA’s taking severed access to the Western Remainder.

Before the July 27, 2018, take of Defendants’ property, OTA acquired three tracts of property west of the West Remainder. Two conveyances were recorded on May 23, 2018. OTA also acquired part of a third tract of land as recorded on June 22, 2018. OTA created project plans showing its intent to construct a driveway on one of these tracts connecting Defendants’ Western Remainder to 10th Street. This intent appears as early as the preliminary plans created in June 2017, more than a year before the take. The revised project plan dated April 2018 redraws the driveway to the Western Remainder from straight to curved. These plans were also created before the date of take. Further, the

Commissioners were provided a copy of the final plan dated June 2018 showing the driveway to the Western Remainder before they issued their final report. The June 2018 final plan, among other documents, was attached to the June 26, 2018 email from OTA's attorney to the three court-appointed Commissioners. Defense attorneys were copied on this email. As OTA points out, the project plans were attached as exhibits to its Sixth Motion in Limine, to its response to Defendants' motion in limine regarding the scope of the taking, to its trial brief, presented to the trial court during the November 8, 2023 hearing, and reasserted during trial.

In an order filed March 21, 2024, the trial court excluded OTA's project plans from being presented at trial stating:

2. Defendants' Motion in Limine Regarding the Scope of the Taking and the November 2022 Quitclaim Deed Executed by Plaintiff is sustained based upon *Oklahoma Turnpike Authority v. Burk*, 1966 OK 113[.] The Plaintiff will be excluded from introduction of evidence concerning the post-taking November 2022 Quitclaim Deed and plans concerning placement of a driveway connected to 10th Street, specifically, Plaintiff's Exhibits 1-6 as presented in this Hearing. In making this decision, the District Court found instructive *State ex [rel.] Department of Transportation v. Mehta*, 2008 OK CIV APP 25 and *Stinchomb v. Oklahoma City*, 1921 OK [154].

In its trial brief, OTA asked the trial court to reconsider its order excluding the project plans as evidence arguing the evidence shows the project plans were

in place before the date of take and shows its intent to construct a driveway providing access to the Western Remainder. OTA further argued:

After their appointment by the Court, the Commissioners visited the Subject Property for physical inspection, accompanied by counsel for both parties. The parties agreed to share OTA's "final plan showing the driveway to the remainder of the property" with the Commissioners because technical difficulties prevented OTA from providing physical copies to the Commissioners at the time of their physical inspection. This communication shows that the Commissioners, as well as Defendants, knew of OTA's final plans, including the construction of the Driveway, weeks before the Date of Take and undermines the exclusion of the OTA Access Exhibits.

(Citation to record omitted.) In short, OTA asserts the project plans which showed access to the Western Remainder were provided to the Commissioners during their consideration process *before* the date of take and it was error to exclude the plans at trial rather than allowing the jury to consider them in determining just compensation. At the beginning of trial, after hearing argument on OTA's motion to reconsider, the court denied it.

After defense counsel's direct examination of Todd Gore, OTA's Director of Right-of-Way and Utilities, OTA renewed its motion to reconsider the ruling on damages to the Western Remainder, arguing defense counsel opened the door on the issue. OTA counsel argued:

I think you allow the jury to decide, Judge, you know, is that adequate access or not. Should the jury

agree with this acquisition appraiser that damaged it 75 percent or not, and I think Mr. Gore as the authorized representative of the OTA is entitled to express his opinion. They can disagree with it. They can argue to the jury that it's not proper. They can argue to the jury all about how they believe this access is inadequate. . . . But the fact is Mr. Gore doesn't agree with that damage to the remainder, and he should be allowed to express that opinion as to why.

Defense counsel responded:

It is not a question of fact of the rights that have been taken and the rights that are remaining. That is not a question of fact. That is a question of law governed by the petition, and that petition says all rights of access—light, air, view, to, from—that red area that separates 10th Street from my clients' western remainder, that is not a question of fact to submit to this jury.

OTA then rebutted:

I disagree. It's always a question of fact for the jury to determine how much should be compensated. That's always a question of fact for the jury. And they can argue all they want about legal rights; the fact is the jury is being asked to determine just compensation. And so they can talk all they want about these legal rights and access rights.

The fact is he purposely put that into evidence about the acquisition appraiser damaging the remainder, and this representative of the OTA should be able to express his opinion whether he agrees with that or not.

The trial court denied this request, and OTA's counsel made an offer of proof.

On appeal, OTA argues the trial court erred in failing to allow these exhibits/evidence showing access to the property before the date of take. In support of its argument, OTA cites *State ex rel. Department of Highways v. Maloney*, 1975 OK CIV APP 35, 537 P.2d 464. In *Maloney*, the State Department of Highways “called the project resident engineer to testify as to the construction of the road, and to introduce into evidence construction plans and specifications concerning the new road to which [landowner] objected and which was sustained by the trial court.” *Id.* ¶ 5. The Court determined that, with the trial court’s refusal to allow the State Department of Highways to introduce this evidence, “the jury may have assumed that the [landowner’s] remaining land would not have any frontage on the existing road” which “could have greatly affected the jury’s assessment of damages to [landowner’s] remaining land.” *Id.* ¶ 19. The Court ultimately concluded:

It is the opinion of this Court that in order for the plaintiff and defendant to receive a just verdict, the testimony excluded and the plans and specifications should have been available to the jury to aid in their deliberations.

*Id.* ¶ 21. Based on the exclusion of this evidence, the Court reversed the trial court’s judgment and remanded with instructions for a new trial. *Id.* ¶ 22. Acknowledging this conclusion in *Maloney*, the Court in *State ex rel. Department of Transportation v. Pennington*, 2018 OK CIV APP 39, 417 P.3d 1274 stated:

Forty years ago, the Court of Appeals held that the actual plans by which the condemnor would build the highway improvements were admissible to determine the extent of the condemnee's damages, and that the trial court erred in refusing to admit such plans for consideration by the jury.

*Id.* ¶ 14.

We find these cases persuasive and agree with OTA that the trial court erred in failing to admit the project plans created before the date of take and considered by the Commissioners before they issued their report. OTA correctly argues that the trial court erred in holding that OTA took all rights of access from 10th Street to the Western Remainder as opposed to just the rights of access to the Kickapoo Turnpike, thus impermissibly expanding the scope of the property interests taken in violation of *State ex rel. Department of Transportation v. Mehta*, 2008 OK CIV APP 25, ¶ 26, 180 P.3d 1214. The project plans for construction of the driveway, which OTA completed, do not involve the condemned property itself, but they certainly aid in determining the question of damages to Defendants' Western Remainder related to accessibility. Because the trial court committed reversible error on this point, the judgment must be reversed and the case remanded for a new trial.

### *III. Scope of the Taking*

OTA also asserts that the taking issue in this case is identical to the taking in *Oklahoma Turnpike Authority v. Vorel*, 2025 OK CIV APP 5, 566 P.3d 614, as

they both involved the construction of the Kickapoo Turnpike.<sup>4</sup> OTA states it is “directly on point on the issues in this appeal” as it relates to “access and a property owner’s interpretation of a condemnation petition to expand the property actually taken.”

*Vorel* also involved property taken for purposes of the Kickapoo Turnpike construction which similarly bisected the landowner’s property creating an East and West Remainder. *Id.* ¶ 2. The issue in *Vorel* was “whether the district court correctly construed the allegations in [OTA’s] petition regarding the scope of the [landowner’s] property taken by [OTA]” and whether it properly “determined that the description of the property taken included all access from a portion of the [landowner’s] property rather than just access to the limited access turnpike being constructed across the [landowner’s] property.” *Id.* ¶ 1. Like the facts in this case, Exhibit A of the petition contained the “metes and bounds” legal description of the property taken. *Id.* ¶ 6. Commissioners were appointed and appraised the property taken as outlined in their report. *Id.* ¶ 3. And, the “Commissioners determined that this was ‘the value of the property or rights or interest therein,’ taken for the Kickapoo Turnpike, ‘as set forth in Exhibit A.’”

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<sup>4</sup> We note the trial court’s judgment in this case entered on July 8, 2024, occurred before the *Vorel* decision filed on July 22, 2024. The trial court was thus unable to take advantage of the *Vorel* analysis when it adopted Defendants’ incorrect interpretation of OTA’s amended petition including the property being taken by it in this case.

*Id.* The landowners filed exceptions to the Commissioners' report. *Id.* ¶ 4. During trial, landowners argued that "based on the district court's legal interpretation of [OTA's] petition, that all access from the West Remainder to any abutting road had been taken . . . [and] that, as a result, the West Remainder was worthless, and introduced evidence regarding the value of the entire West Remainder." *Id.* The jury determined just compensation for the property and access rights to the property taken totaled \$1,166,940. *Id.* OTA appealed. *Id.*

In *Vorel*, OTA had asked the trial court to allow it to reform the legal description of the property set forth in its petition to clarify it was not taking access rights to the West Remainder. *Id.* ¶ 7. Specifically, it sought to clarify that the scope of "all rights of access" language in the petition was not intended to take the access rights to the West Remainder. *Id.* Further,

Attached to [OTA's] motion were exhibits showing the [landowner's] property, the location of the existing and proposed turnpikes and the location of driveways constructed by [OTA] to permit access from the West Remainder to Luther Road and N.E. 164th Street. Also attached were the affidavits of Todd Gore and Russell Beaty.

*Id.* ¶ 9. The trial court denied OTA's motion to reform the legal description of the property and on the same day granted landowner's motion in limine raising the same issue. *Id.* ¶ 13. The trial court determined the legal description was unambiguous and "resulted in a taking of all of the [landowner's] 'abutter's rights

along the entire border of the taking area.”” *Id.* It also concluded that OTA “was precluded from offering evidence at trial that would show that it did not take the [landowner’s] access from the West Remainder to Luther Road or N.E. 164th Street.” *Id.* The trial court’s “construction of the legal description in Exhibit A of [OTA’s] petition presents a question of law.” *Id.*

On appeal, both parties argued their different interpretations regarding the following description: ““together with all abutter’s rights . . . including, without limitation, all rights of access from the remaining portion of the [landowner’s] land onto the Limited Access Turnpike to be constructed.”” *Id.* ¶ 14. Land-owners assert this language describes “access from the West Remainder to Luther Road and N.E. 164<sup>th</sup> Street, in addition to direct access onto the Turnpike from the north and east borders of the West Remainder.” *Id.* ¶ 15. OTA on the other hand argues that “it did not intend to take, has no use for, and the legal description in Exhibit A of its petition does not describe the [landowner’s] access from the West Remainder to Luther Road or N.E. 164th Street.” *Id.*

This Court held that because “[b]oth interpretations cannot be correct,” it must be ambiguous absent clear language showing otherwise. *Id.* ¶ 16. The Court first determined that it was “undisputed that [OTA] did not intend to take the [landowner’s] access from the West Remainder to Luther Road or N.E. 164th Street” but that more analysis had to occur to determine “whether that intent is

reflected by the legal description in Exhibit A of its petition.” *Id.* ¶ 21. In its analysis, the *Vorel* Court proceeded to thoroughly explain how OTA’s intent is reflected in the Exhibit A legal description. *Id.* ¶¶ 22-36.

Defendants in the present case argue that *Vorel* can be distinguished when comparing the takings by OTA in the two cases. Defendants argue that in *Vorel*, “OTA did not take a swath of property that severed the remainder property from the existing streets. Also, in *Vorel*, there is no indication in the opinion that the condemnor’s Petition included the taking and restricting of rights like that which is contained in Paragraph 6 of OTA’s Amended Petition in this case, to and from the remainder property, and, to and from the actual area taken by OTA for present and future purposes.” Defendants assert these differences in the scope of the takings distinguish *Vorel* from the present case. They contend that OTA, “by the operation of the language in Paragraph 6 of the Amended Petition, committed a taking of a swath of property between their remainder and 10th Street which included the taking and restricting of access to and from that take area” and thus the “West Remainder was landlocked by the project.” We disagree.

As previously stated, OTA describes its taking of Defendants’ property in the amended petition. Exhibit A includes the physical taking of the property with a metes and bounds description, undisputed by Defendants. Paragraph Six of the amended petition describes the property rights taken which include access rights

to the property. Defendants argue that OTA's taking severed access to the Western Remainder. Paragraph Six provides in part:

[OTA] further states that it is necessary to acquire said title or interest and equivalent rights, title or interest in and to the light, airspace, access and view above said property and abutters rights, if any, including, without limitation, any rights of access, light, air, or view, to or from the property described above and the remaining portion of larger parcel of property including the Property onto the turnpike project and limited access facility, including limited access highways, expressways, arterial highways, frontage roads, public roads and the auxiliary service highways to be constructed now or in the future on the property being acquired in order to accomplish the public purpose of constructing and/or maintaining turnpike projects and related facilities.

We reiterate: "In condemnation cases, the [OTA] gets to decide what property it is going to take." *Vorel*, 2025 OK CIV APP 5, ¶ 21.

Based on the persuasive reasoning in *Vorel*, we agree with OTA that the trial court erred in holding that it took all rights of access from 10th Street to the Western Remainder by way of its amended petition as opposed to just the rights of access to the Kickapoo Turnpike, thus impermissibly expanding the scope of the property interests taken. We must reverse this issue and remand for a new trial consistent with this Opinion.

## **CONCLUSION**

We find no error in refusing to give OTA's requested modified jury

instruction, but refusing to admit OTA's project plans in existence before the take and impermissibly expanding the scope of the take require reversal. Because we reverse and remand for a new trial, we will not address OTA's remaining issues on appeal.

**AFFIRMED IN PART, REVERSED IN PART, AND REMANDED  
FOR FURTHER PROCEEDINGS.**

FISCHER, J., concurs, and BLACKWELL, J., concurs in part and dissents in part.

BLACKWELL, J., concurring in part and dissenting in part:

I respectfully dissent in part, as I disagree with the majority's application of *Oklahoma Turnpike Authority v. Vorel*, 2025 OK CIV APP 5, 566 P.3d 614, to this case. The facts of *Vorel* differ in one vital respect, such that I cannot agree with the majority's instructions on remand as based on that case.

In *Vorel*, the defendants received a judgment based on an argument that their remainder property was landlocked, specifically arguing that access to Luther Road and NE 164th Street had been cut off. *Id.* ¶¶ 4, 6-7. *However, the property at issue in that case was adjacent to those roads. See id.*, ¶ 6, 618 (“The rest of the West Remainder is bordered . . . on the west by Luther Road and on the south by N.E. 164th Street.”) (emphasis supplied)). The defendants in *Vorel* thus based their no-access argument on a peculiar and ultimately legally incorrect interpretation of

the phrases “all rights of access” and “abutters rights,” which this Court rightly corrected on appeal. *See ¶¶ 35-36.*

However, in this case, the defendants’ claim that they have lost legal access to NE 10th street is unimpeachable, *as it is undisputed that the remainder parcel is not adjacent to that (or any other) road.* Thus, the defendants’ argument here is not in any way reliant on the *Vorel* defendants’ unusual interpretation of “all rights of access” or “abutters rights.” *It is undisputed that the defendants in this case have no legal access to NE 10th Street from the western remainder after the take.* The fact that OTA might have planned (and is perhaps planning to continue) to grant *gratuitous* access to that road over OTA’s *own* land is not relevant to the question of what has been legally taken (though, as other portions of the Court’s opinion correctly acknowledge, it may speak to the question of damages). Thus, the trial court did not err in “impermissibly expanding the scope of the property interests taken.” *Majority Opinion*, pg. 27. The legal descriptions speak for themselves.

Because *Vorel* is factually inapposite, I would not rely on it here. In all other respects, I concur with the Court’s opinion.

February 2, 2026