ShortCircuit340

Wed, Sep 18, 2024 10:33AM 51:02

SUMMARY KEYWORDS

railroad, court, fifth circuit, killian, ramirez, public, officer, railroads, pennsylvania, opinion, gonzalez, case, kilo, jury, wolves, eminent domain, argued, dog, condemn, established

SPEAKERS

John Wrench, Anthony Sanders, Betsy Sanz

A Anthony Sanders 00:16

Faster than ferries, faster than witches / bridges and houses, hedges and ditches / and charging along like troops in a battle / all through the meadows, the horses and cattle / all of the sights of a hill and the plain / fly as thick as driving rain / and ever again in the wink of an eye, painted stations whistle by. Well, that was Robert Louis Stevenson's "From a Railway Carriage," and when we think of trains, isn't that what we like to think of? Traveling through the countryside, seeing all kinds of horses and houses and all the wonderful things of the world. What we don't realize, though, is that that railway has been created often by eminent domain: the forcible taking of someone's property. We're going to talk about that, and also some other issues that listener discretion will be advised for, today onSshort Circuit, your podcast on the Federal Courts of Appeals. I'm your host, Anthony Sanders, Director of the Center for Judicial Engagement at the Institute for Justice. We're recording this on Tuesday, August 27, 2024. We're going to have this case about eminent domain and railways. It should be a uplifting story of property rights, actually. And then before that, we are going to have a story that I should preface that there's some listener and viewer discretion advised, because there are some dogs who are not going to make it through the story and some language that, younger listeners, you may not want to be listening to. But in the meantime, we have some great people to bring these stories to you. So one of them is my colleague, Betsy Sanz, IJ attorney. Betsy, welcome back to Short Circuit.

B Betsy Sanz 02:00

Thank you, Anthony. It's always fun to be with you.

A Anthony Sanders 02:04

And before that, we're going to have a case that John Wrench, my colleague, is going to bring to you. Now, John is an attorney at IJ, but I am very happy to say for the first time on Short Circuit that he is joining us at the Center for Judicial Engagement as our new Assistant Director. So he is joining me and John Ross and the CJE team in all the great things we do at CJE. We do

this podcast, we do other podcasts—Bound by Oath, especially—we do events, we do scholarship, we do writing, we do all that stuff. And now we are on full thrusters because John is joining us. So John Wrench, not to be confused with John Ross, welcome to Short Circuit.

J John Wrench 02:52

Thank you so much, Anthony, and thank you for the welcome.

A Anthony Sanders 02:56

So John's going to give us this story, and then Betsy is going to give us the railroad tale in a little bit. John, take it away. But you can also tell us a little bit about who might not want to listen to what you're about to say.

J John Wrench 03:12

Yeah, so as Anthony mentioned, this case is going to require a bit of a disclaimer. It's one of those cases that's about something that happens—I think it's probably fair to say that it happens pretty often, unfortunately—that's pretty disturbing, which is pets being shot by police officers. So be forewarned that there are some pretty unfortunate and disturbing facts about that. There's also going to be some language used in the case that's a little bit harsh. So if you're sensitive to that, just kind of be on the lookout. And so this is a Fifth Circuit decision, and it begins on an afternoon in June of 2016. An officer with the Collinsworth Sheriff's Office receives a tip from a neighbor of the plaintiffs, Rubicela Ramirez and Francisco Gonzales, that there may be a domestic disturbance at Ramirez and Gonzales's home. They are boyfriend and girlfriend. It is Rubicela's home that she shares with Francisco Gonzales. Officer Killian responds to this call that there's potentially a domestic disturbance. He gets outside the home, and he says that he hears what sounds like a fight going on inside. So it corroborates this call that had been made by a neighbor. And he waits a couple of minutes, about two minutes, and then he turns on his body camera, and he enters the home with his gun and pepper spray drawn. He yells "police," he announces himself as he enters the house without a warrant. He goes through the living room and into the kitchen. And the next scene that's about to unfold happens in the kitchen of their home. And what I'm about to say happens within about 38 seconds. You can tell this from the body camera footage, so it's kind of good to note here that both the district court and the Fifth Circuit, as it's reviewing this case, are actually looking at the body camera footage, which captures everything I'm about to say. And so Officer Killian enters the kitchen, and there's no one in there immediately, but then very quickly, Ms. Ramirez steps into the kitchen from another door, and he says, I'm gonna quote, "Come here. Get over here. Get over here and face the wall. Get over there and face that goddamn wall, bitch." That's the first thing he says to Ramirez when she enters into the kitchen.

A Anthony Sanders 05:56

Great way to turn the volume down on a domestic dispute.

J John Wrench 06:00

Yeah, yeah. That's his first interaction with someone as he comes into a home where there's potentially a domestic dispute. And here's kind of the icing on the cake of this crazy first interaction: he is simultaneously pepper spraying her in the face while he is saying this. So about at the same time, Gonzales then enters the kitchen from a different door, and he's standing there seeing this happen. And then from a different door, their dog, who's named Bruno, enters the kitchen. And he—I'm gonna include this, but it, it hurts—the dog, Bruno, walks in and he walks over to Gonzales, wagging his tail, and Officer Killian yells at Gonzales, "Get over here," and he says, "I'll shoot your dog." Those are the two things that he says. The dog, Bruno, then just starts to walk towards Officer Killian. He's not running at him. There's no dispute about that. He just starts walking towards Officer Killian, and Officer Killian just shoots the dog, three times. He shoots Bruno, and then he orders Ramirez and Gonzales to get on the ground as he continues to pepper spray both of them. And then, at that time, a second dog enters into the kitchen from a different door and again, walks towards Killian, and the court says, immediately, Killian backs into the living room and shoots that dog as well—four times. So at this point, he has ordered both Ramirez and Gonzales to get on the ground, which, as the Court notes, is covered in their dog's blood. And Officer Killian, after shooting the second dog, actually leaves the house briefly, and he radios for backup. He goes back into the house. He continues to order Ramirez and Gonzales to get on the ground, and they eventually get on their knees, and he is pepper spraying them this entire time. So he continues to do that. The Sheriff eventually arrives after Officer Killian has been able to handcuff both Gonzales and Ramirez and sit them on the couch. When the sheriff—the backup—arrives, Ms. Ramirez actually stands up—because she apparently knows the sheriff, she addresses him by his first name—and asks for help. And the court notes that immediately when Ramirez stands up and says this, Officer Killian grabs her by the hair and wrestles her to the ground. The body camera footage briefly goes off at that point, and Ramirez and Gonzales say that Officer Killian slams Ramirez's head on the floor as he wrestles her to the ground. And so Ramirez and Gonzales sue Officer Killian under Section 1983 and they allege three different Fourth Amendment violations. The first is a warrantless entry into their house. So they allege that Officer Killian, when he got to the house, needed a warrant to enter their home like you would in basically any other situation. The second claim is an unreasonable seizure, which is shooting their dog Bruno—that's the first dog that was shot, the dog that walked in and wagged its tail. And then the third Fourth Amendment claim is excessive force against Ramirez and Gonzales. And in response to all three of those claims, Officer Killian asserts qualified immunity, so the district court acknowledges that the question is going to be twofold. One, was there a constitutional violation, and second, was the right clearly established at that time? And the district court grants summary judgment for Officer Killian on both the warrantless entry and the excessive force claims. That's excessive force against Ramirez and Gonzales, but the district court sends the unreasonable seizure claim, the shooting of Bruno, to the jury. And when the district court sends the question to the jury, the court explains that there is a clearly established right to be free from the an officer's use of force against your pet when they're not in imminent danger. And so the jury's job is to decide whether there was a constitutional violation, and the jury does. The jury decides the case in favor of Ramirez and Gonzales, finding that there was a Fourth Amendment violation when Officer Killian shot Bruno, and the jury awards Ramirez and Gonzales $100,000 in compensatory and punitive damages. However, after the jury verdict, Officer Killian files a post-verdict motion for judgment as a matter of law, and what he's essentially asking is that the court set aside the jury verdict on the ground that Ramirez and Gonzales didn't establish sufficient evidence of what an objectively reasonable officer would do, and the district court agrees with Officer Killian. The Court essentially sets aside the jury verdict and grants summary judgment for Officer Killian, even on the the unlawful seizure claim. So

Ramirez and Gonzales appeal. This goes to the Fifth Circuit, and the panel is Judges Elrod, Higginbotham, and Smith, and we have an opinion by Judge Elrod. The court begins again by saying, really, at the end of the day, in all three of these claims, the question is whether Officer Killian had qualified immunity. And so starting with the warrantless entry claim, the court dispenses with that pretty quickly and says, you know, the lower court was right to grant summary judgment here because the officer had reason to believe that there was an exigency or emergency when he arrived at the house, and at least at the time of this event, it wasn't clearly established that he couldn't wait for two minutes before going in. And the court says, you know, there are all these cases that allow warrantless entries, even where someone has waited a little bit longer. It's quite different when you're waiting several hours or 48 hours or something like that, because the emergency has usually been dispelled. But here, he went there on a tip. The sounds coming from the house seemed to confirm that. So the Fifth Circuit affirms summary judgment for the officer on the warrantless entry. However, the Fifth Circuit says the excessive force claim should have gone to a jury, and so the court says it was inappropriate to grant summary judgment for Officer Killian on the excessive force claim. And there's two instances of alleged excessive force. The first is pepper spraying Ramirez and Gonzales, and the problem with Officer Killian pepper spraying them is that he was saying both 'come here' and 'go there' at the same time as he was pepper spraying them. And so the court says there was either no coherent order, or they were conflicting orders, and if they were conflicting orders, they were potentially complying with at least one of those conflicting orders. And even as the officer was telling them to get down and things like this, at one point, they were on their knees. And so the court says a reasonable jury could find that this was unconstitutional and violated a clearly established right. And so the second excessive force issue, the court also says is actually even easier, is Officer Killian slamming Ramirez's head on the ground. The court says there's no evidence that she was resisting. There was no evidence that she was trying to escape, she stood up and addressed the Sheriff and Officer Killian,without really thinking, seems to have just grabbed her hair and slammed her on the ground. So the court says the excessive force claim should have gone to a jury, and so that will be remanded. But the third claim, the unlawful seizure of Bruno, I think, is probably the most interesting part of the court's opinion. Recall, the jury had issued a verdict for Ramirez and Gonzales, but then the district court had granted Officer Killian's post-verdict motion for judgment, and that was based on the finding that Ramirez and Gonzales hadn't established sufficient evidence of what an objectively reasonable officer would have done. And the Fifth Circuit says, well, when you instructed the jury on what their job was, you actually got it right, and you messed it up later. Because when the district court told the jury what their job was—said there is a clearly established right and defined the scope of that clearly established right, and it's to be free from this kind of seizure of a pet, the use of force against a pet or destruction of a pet is the term that's used, where the officer is not actually in imminent danger. And so that's a totally legal question. And so the Fifth Circuit said that was correct to make a determination about whether there was clearly established law, a legal question, and to then send the factual question to the jury whether there was a constitutional violation. The jury made that decision. The jury reached a factual conclusion about whether there was a constitutional violation, and the Fifth Circuit says that's where it should have ended. There didn't need to be any conversation about whether the plaintiffs had come up with some additional evidence to establish what an objectively reasonable officer would have done their understanding of clearly established law. In essence, what the Fifth Circuit is saying is the legal question was whether it was clearly established law. The plaintiffs didn't need to come up with a bunch of evidence for that. That was a legal question for the court, and the factual question was correctly given to the jury, and that should have been that. And so the Fifth Circuit reinstates the jury verdict against Officer Killian. And so then just to kind of recap on where the claims stand at this point: the Fifth Circuit has affirmed the summary judgment for the officer

on the warrantless entry, has remanded the excessive force claims to go to a jury. So the plaintiffs will, if this does go to a jury, they're going to have to go through this process again on the excessive force claims, which, I think, in light of these facts, is a pretty hard thing to do, and then the court reinstates the jury verdict about the shooting of Bruno. So it's, I think that all the way through this is a pretty thoughtful decision that gets the law essentially right on most of these issues. But it's a hard case to go through, but it's one of those where I think it highlights why you do need courts to really be looking at these facts deeply, to be engaged with those legal arguments deeply, and to be able to distinguish between the types of claims that are going on. And I think that the Fifth Circuit did a pretty good job of that here. I do too. Yeah, I was gonna say, I do too. I feel like justice for Ms. Ramirez. You know, it was particularly hard, I thought, not just because of the dog, but this poor woman. I think the call was because she was apparently being beaten up, and then she got beat up by the cop who came to ostensibly help. It was just really sad. So, yeah, good for her that she had this outcome. I thought it was interesting, how whether a shooting of a dog was a seizure was this question of first impression at the Fifth Circuit, except it wasn't—because it had all this unpublished opinions, apparently, Anthony, that were in place, but they were not a precedential force—

A **Anthony Sanders** 17:18

But they were good enough. They were good enough, is the bottom line. Yeah, it is. It's inefficient and I think it highlights one of the more common criticisms of qualified immunity is that you could have this case over and over and over again in different but essentially the same forms, and have two things going on: as long as a court chooses not to determine that there is a constitutional violation and instead starts with the clearly established prong, or there's no precedential opinion at the end of the day, it's, it's very hard, even though there is, in some essential way, a law, there's law here you it eventually takes the court making a jump. Or like you said, Betsy, the Fifth Circuit here looked at the sister circuits and said, you know, we might be the last circuit to not actually have a precedential opinion on this. And so I think they fixed that.

B **Betsy Sanz** 18:16

Yeah, but they ended up deciding it based on persuasive evidence outside of their circuitinstead of these unpublished opinions. That's inefficient. Good for them.

A **Anthony Sanders** 19:21

Yeah, that the Fifth Circuit of all circuits, too, doesn't have a fact pattern involving shooting a dog that's published opinion kind of surprises me. A few years ago, when there was this big batch of cert petitions going to the court that all of us thought the court was finally going to address qualified immunity in a more substantial way, in a more critical way. One of those was a dog shooting... I mean, Anya and Patrick, our friends, would kill me right now, but I can't remember what circuit was. I think it might have been the Fourth Circuit, but there the fact was, it was shooting a dog, I think on a lawn when it was non-threatening, and they said there's no qualified immunity there. And so it's interesting here, in the Fifth Circuit, when there is also no precedent, they do a bit more than that. There's more thinking, more reasoning. They're less narrow with the qualified immunity analysis. So I don't know if you can come up with a trend

from that, but this is an encouraging result in this case. Another thing I thought was interesting to note, so you you harkened back, John, to the show we did a few months ago, where the last time we had a parental advisory, where it wasn't a case like this, but it did have some language in the opinion, and in that opinion, they just put it right on out there. I'm not going to repeat it, but it was much more harsh language than what the cop actually said to Ms. [Ramirez] in this case. And so we thought it was very relevant to the show. And so our friend Sam Gedge said those words, those naughty words. And there it's in the opinion, that was Judge Kirsch in the Seventh Circuit. And here we have just much more mild—I mean, I can even say them, I think, without YouTube or anyone caring, "get over there and face that goddamn wall," is one thing that says, but Judge Elrod has them, well, what do you call it when you edit language?

J John Wrench 22:45

Censored?

A Anthony Sanders 22:47

Yeah, I mean, it's not bleeped out because it's written. But anyway, it's G-dash-dash D-dash-dash-dash. And the B-word is also like that. So, you know, I don't know if that's a Fifth Circuit thing, a Judge Elrod thing versus Judge Kirsch thing, but it's interesting to see the contrast and what language makes it into a judicial opinion.

J John Wrench 23:08

It is interesting. And I was thinking of this when I was reading it that, I mean this might be because I'm a dog person, it may be because this language doesn't bother me. But the thing that's the most disturbing in the entire opinion, to me, is the footnote about telling them to lay down on the ground in their dog's blood. That is significantly more disturbing to me than a few swear words. So it's interesting to see where the sensibilities kind of shake out.

A Anthony Sanders 23:42

You know, it's like the old question about, like, what gets an R-rating, right? Is it the language, or is it the nudity or the graphic violence? Graphic violence usually doesn't seem to matter in the movies. I guess it doesn't matter in opinions either. Well, one thing that does matter is property rights. So Betsy, tell us about this. So this is actually not a Circuit Court of Appeals opinion. It is from the Pennsylvania Supreme Court, and it involves the Pennsylvania law and the Pennsylvania constitution. But we're talking about it today because it's got an important result for property rights.

B Betsy Sanz 24:17

It actually involves the United States Constitution just as much, so that's why it's so fun. This case is Wolfe v. Reading Blue Mountain and Northern Railroad Company, but I'm just going to refer to them as the Wolfes and the railroad. This case is great, a great outcome too. And it's a

really fun look at, under what circumstances a railroad that has the power to exercise the state's power of eminent domain satisfies the public use clause, in the United States Constitution's Fifth Amendment, and in most state constitutions as well. In the 21st century, when can a railroad exercise the power of eminent domain and say, successfully, that it's a public use? That's what this case is about. So I'll just remind everybody that the Fifth Amendment to the United States Constitution says that private property cannot be taken unless it's for a public use, and a lot of states delegate that power to public utilities, which we all know why. I mean if we want power, and people are running power lines, states will let those private companies condemn land in order to do that kind of thing, to bring this great benefit to many people, is the logic, right? A lot of states will categorize their railroads along with public utilities. They're considered public utilities for the purposes of eminent domain and so they are given the power to condemn under certain circumstances. And what we find is that oftentimes, a public utility, including a railroad, will have to go to its state agency that regulates public utilities. So it's often like the Public Utility Commission, that's what it's called in Pennsylvania. It's a little unclear from the opinion that the railroad went there first, but I think we can assume they did. So what happens is a railroad will go to the agency, and the agency will determine whether the railroad is condemning for a public use, essentially, and with that determination, the railroad can go to the trial court and initiate condemnation proceedings. And so there's this kind of like step zero that happens at the state agency before going into court. Well, in this case, presumably that happened. But then it also went to trial court, and then it went to the appeals court, which in Pennsylvania is Commonwealth Court, and then it went up to the Pennsylvania Supreme Court, and that's where this opinion comes from. So I'm going to give you some what will feel like, a lot of like little detail facts about the railroad in question. But it's for a reason. So there was a couple, the Wolfes, they bought this property, and on that property, when they bought it, there was an easement that a railroad had for a siding track, which is like a separate track from a main track, where cars and trains can get over on the side and trans-load goods or whatever, and then get back on the main track. And there was a siding track that was on this couple's property. Also on their property, they have several things going on. They've got a tenant who's a roofing company. They've got three residences on that property. They also have a storage unit. They've got, like, a lot going on. And there were these tracks. And they had a termination clause in their easement agreement saying that, if they demanded it, the railroad would have to remove the tracks within 90 days. That easement came with their property, so the terms were already in place. Anyway, after the Wolfes bought the property, it was like many, many years and the railroad hadn't used the siding tracks. They were meant to go over a crossing, and that crossing was repaved, and all the crossing tracks were covered up. And there was just no use going on with these tracks for many, many years. And then all of a sudden, the railroad wanted to use them again, and they went to the Public Utility Commission, and said, Hey, we want to use this crossing again. And the utility commission said, Sure. And so when the Wolfes found out about that, they said, no, no, and they called on that termination provision and told the railroad to get their siding tracks out of there. They knew it was coming, they're going to start using that thing again, right, and they don't want it. And so the railroad refused, and the Wolfes filed for an injunction. They got it, preliminarily, pending a hearing. And at that point, the railroad just said, You know what, we're just going to condemn. And they filed a declaration for taking and proceeded with condemnation. So while there was this injunction in place, they went that route. So what they had to show was that they were condemning for a public use. And so at the trial court, the railroad said, this is a public purpose, and we can take it because we're going to promote the health, safety and general welfare of Pennsylvania by serving the public need to have goods transported via rail.

A Anthony Sanders 30:07

Who could argue with that?

B Betsy Sanz 30:09

Yeah I mean, you know, generally speaking, and they would further that purpose by getting this crossing going again to serve this business. Well, it turns out that the business they want to serve is this one private business, an asphalt plant. I think it was a plant, but an asphalt company. And we'll give you some more facts about the asphalt company later. But the Wolfes, they invoked the United States Constitution, and it's a little unclear from the opinion anyway, what role the Pennsylvania Constitution had to play. It's not explicitly stated that the Pennsylvania constitution is invoked by Wolfes, but the court does say that the Pennsylvania constitution and the United States Constitution, as far as public use goes, they're interpreted similarly. And so as you'll see, the court ends up pulling on Pennsylvania case law and all that. So they invoke the United States Constitution. They say it's not for a public purpose, and these are the kinds of things that they point the court to to identify that it's not a public purpose. Number one was that it was for a private benefit to one customer, and they point out that the asphalt company was already transporting its goods by truck, and so it wasn't like it was new access to transport. It was apparently just because they wanted it instead of truck options. Also, there were some use of the of the Wolfes property that were going to be implicated. So its roofing tenant would have its services disrupted. And another fun thing that they pointed out was that the taking of that property for the siding tracks would mean that they would have less parking spaces on their property, and the local zoning ordinance required a certain minimum parking spots be available. So shout out to our Zoning Justice Project and our Texas mechanic case.

A Anthony Sanders 32:21

So eminent domain causes zoning problems. All the bad guys are coming together.

B Betsy Sanz 32:27

It made me wonder, like, who would win, right? Like the zoning ordinance or the taking declaration. I don't know. It would be a fun cage match.

J John Wrench 32:36

It's like watching your two least favorite people just beat each other up.

B Betsy Sanz 32:41

Although, kind of fun. And also that the railroad had not even tried to identify any alternative routes, and there were some indications that the siding could have been located on the asphalt company's property, but maybe they didn't want to disturb the possible customer. So the

Wolfes point all of this out to the trial court. And the trial court says yeah, there's no public use here. They pointed to that there's just one customer that's probably going to be benefited, and there's no public transportation that's going to be employed here. The public's going to get those goods anyway. They're already moving their stuff by truck. So the trial court was like, no,this is not a public use, get out of here. And the Commonwealth Court, which is the appeals court here, reversed unanimously, and they relied on two railroad cases. As you know, there are abundant railroad cases on which to rely from past centuries, and indeed they do. So the twocases, these are Pennsylvania Supreme Court cases that the Commonwealth Court relies upon to find that the public use requirement is satisfied here. They were both takings serving just one private business. The railroad would serve just one private business. One was a coal mine. But in that case, the Supreme Court said about the coal mine that the life, happiness and prosperity of the people of Pennsylvania depended to a very large degree upon getting the coal supply.

A Anthony Sanders 34:26

I love, by the way, that that coal case is from 1922 the same year as Pennsylvania coal versus Mahon, which is this regulatory takings case, showing what a big deal coal was at that time in Pennsylvania. And if viewers and listeners want to check it out, our second episode of our current Bound by Oath season is all about the background of that case. And so you learn about railroads, coal, all that stuff, takings. We'll put a link in the show notes.

B Betsy Sanz 35:01

The other thing to point out about that is that coal, at the time was an energy source in a way that, it still is, but, but it was a bigger share of the energy source for a lot of people, potentially at that point. So you can kind of see the public welfare connection if you care about energy, I guess. So, the coal case was from 1922; the other case that the Commonwealth Court relied upon was the case from 1931 where, in that case, another single private customer was going to be served by the railroad. It was a manufacturing plant, but it was also like a post office kind of facility. Apparently, there were like 75 postal workers who worked for this company that was going to be benefited. And it was like hundreds of thousands of customers, and the scale of the operation was pretty big. So those were the qualities of those two cases that the the appeals court relied upon, but they were both for single customers, and they just found that there was really no difference between a coal mine and a manufacturing plant and this asphalt plant. So the Wolfes appealed, and they went to the Supreme Court of Pennsylvania, and there they argued to the court that the the appeals court erred because it relied on these old cases. The world is different. And then also, this thing happened in 2005 in Pennsylvania, which was the legislature saw the Supreme Court's decision in Kelo—of course, that's Kelo versus City of New London—which is a famous case where the Supreme Court basically said that takingsfor economic development were public uses under the US Constitution. A lot of states responded with passing laws that narrowed the reasons why state entities could condemn land, because they didn't want to see this private use overtake the public requirement that they thought that Kelo represented. And so the Pennsylvania legislature passed what they call the Property Rights Protection Act. And the Wolfes said that because that was passed in 2005 and these cases are from a long time ago, the court should consider that the legislators' intent is to essentially narrow the circumstances of appropriate condemnation circumstances. But the thing was, in that act it explicitly exempted public utilities, and it categorized railroads as public

utilities. But they said, nevertheless, it still gives you an idea of the intent here and and those cases are from a long time ago. So they also argued that the court should update its standard for when something is a legitimate, sufficient public use. And they argued that in more recent case law, there is a standard—well, I should back up. The standard that came out of the coal case, was that, and I'll quote here, "what constitutes public use requires the section of road about to be constructed will in some way directly tend to contribute to the general public welfare, or the welfare of a considerable element of the public" and that kind of vague standard was what the Commonwealth Court relied upon. The Wolfes argued that more recent precedent from the Pennsylvania Supreme Court in regard to eminent domain should be that the primary and paramount beneficiary should be the public, and that should be the new standard, or the recognized standard in this case. Well the railroad argued that this was a public purpose because it allowed the movements of goods and commerce, and a more economical service to a customer will result in cheaper goods for consumers, and that even if the private company was the only one benefiting, well, it doesn't lose its public character just because it benefits one private company.

A Anthony Sanders 39:47

Sounds like the reasoning in Kelo.

B Betsy Sanz 39:48

Oh yeah, it's all that. And also, they argued that others might use the railroad in the future. And of course, they pointed to the long standing precedent, which is like a hundred million years of railroads being able to freely condemn. The Wolfes came back and said that if the standard is allowing goods to move in commerce, then laying down track is the only standard. Then, as long as a railroad lays down track then it's a public use, is essentially what the railroad was arguing. And the court agreed with them. First, it addressed the Wolfes' argument about theProperty rights protection act, and they didn't quite endorse the idea that it should represent a narrowing of the public use inquiry to railroads, because they were explicitly exempted. But it also said that it didn't remove any requirements from the railroad to make their showing either. So it was a little bit of that the act just didn't mean much for this circumstance, and we can come back to that if we want. But what they did say was that the Constitution forbids this taking. The reasoning was because incidental benefits to the public do not rise to the level of a legitimate taking. They didn't use the word legitimate, but to a sufficient level to have it be for the public. And so they kind of warned against that theory of incidental benefits to the public that the railroad is arguing. Also, they pointed out that in their long ago precedents those courts analyzed whether the taking directly benefited the public by considering things like, what are the goods that are being moved by these railroads? What are the number of Pennsylvania consumers that are going to be impacted and relying on this service, and what are the possible alternatives? So these are all things that the Court pointed to that we've looked at these things before in determining that it's a public use. And then they pointed out the that Pioneer and the other case, C.O. Struse, that the Commonwealth Court had relied upon, were distinguishable. Even though they were serving one customer, there were clear benefits to a broader swath of the public, and potentially a more important good that was moving along the rail. So they recognize that those are old, old cases, and they agreed with the Wolfes that the most recent precedent provided that a taking will be seen as having a public purpose only where the public is to be the primary and paramount beneficiary. That wasn't the

case here. Ultimately, the court "easily concluded," they say that "we easily conclude" that this is a private use. And they pointed to the railroad's argument that essentially the Commonwealth Court panel held that the taking serves a public purpose as a matter of law simply because it was effectuated by a railroad. And it didn't really focus on the fact that it was one customer. It just said, it matters that it's a private customer, is what they said so, and it matters that they were already using trucks and and that it mattered that the railroad had not submitted evidence that there were benefits to the public—only relied on its inherent quality as a railroad that would be—I'm sorry, I'll just quote it: "They were relying instead on the inherent benefits purportedly created by railroads, qua railroads generally. So I think that what the opinion stands for is that there's such thing as a rigorous review for railroads, and it's not the case that just because you're a railroad and you're laying down track, that you're automatically a public use. We're, of course, glad to hear this, since, you know, IJ is currently—

A Anthony Sanders 44:04

Why might that be?

B Betsy Sanz 44:19

We are currently involved at the Georgia Public Service Commission in that process that I described earlier, where a railroad has petitioned the Georgia Public Service Commission to condemn several portions of several pieces of private property in order to run a railroad for a handful of companies, one of which is wholly owned by the railroad, moving very common products that the Georgia Supreme Court has identified as private uses: things like asphalt and wood chips and that kind of thing. So we are arguing that that does not rise to the level of a public use under the US Constitution or the Georgia constitution. And we think that Georgia's 2005-2006 amendments after Kelo, which they also did, matter here as well. So we're happy with that outcome. We're interested to see how that might help us in that case.

A Anthony Sanders 45:25

Well, we'll put a link in the show notes that you can see to that case where Betsy is counsel. John, do you think this is a way to run a railroad?

J John Wrench 45:37

No. I mean, if the railroad is the Pennsylvania Supreme Court, I think Pennsylvania is doing a good job of running this. I think this is a great decision. And like Betsy said, I think one of the interesting parts of it, which you know, which Kelo is an epitome of, is you can't have this area of law adequately policed when you use something like 'railroad therefore public use' as the logic. It has to be an actual analysis of it. And I think that the fact that the court even says that it can reach this determination pretty easily that this is not a public use is important because it's easy to forget—probably, probably not for us, but for other people—sometimes, that entities that do things sometimes for public uses do not always do things for public uses. And it requires courts to kind of sift through these assertions, instead of allowing entities like railroads to use as cover the fact that they do do some things that are public uses. And I think that this

opinion does a really good job of sifting through that, of actually looking at this and saying, you may do other things that are public uses, but this is not one of them. And then I was curious about, the other thing I found kind of interesting is, even though the post-Kelo reforms don't seem to be, you know, the court looks at them and says they might not dictate the outcome here—it is interesting that they seem to create a bit of a paradigm change, and a lens that the court is looking at and saying, clearly, there was a reaction to these concerns, and I bet that made the court take a little bit of a closer look.

B Betsy Sanz 47:33

That was my instinct, too. They didn't spend a lot of time discussing those changes, the impact on this inquiry, but certainly atmospherically, I think it made a difference. I will say, the thing that's encouraging about a rigorous look like this is that what I've seen, and what comes up in this case too, is that the railroads seem to take the path of least resistance, which you know is everybody right, I think. And when they knew that they were going to get some pushback on their plan, they just went straight to condemnation. So instead of working inside of the easement issue, they have this power and they exercised it. And we saw that there was a case, not the case that we're working right now in Georgia, but there was a case in Georgia some years ago where something like that happened, where there was a dispute between a church and a railroad who wanted to rehabilitate a track, and there was conflict over title, and the parties were going through a quiet title action in court, and the railroad just decided that was going to take too long. And they said, it's easier to just condemn, we'll just do that. And they said that explicitly. So I think that holding railroads to a standard is important, because they will take the path of least resistance.

A Anthony Sanders 49:05

One thing I'd like to close on is, I love how this case kind of takes Kelo and does some jiu jitsu with it, because you have these old cases that are very permissive, and then Kelo's even more permissive than anything, right? And so you could have had a court say, Well, if more taxes are public use, then of course, anything on rails is a public use. But instead they have this cute little cite near the end: See also Kelo, and they quote from Kelo "viewed as a whole, our jurisprudence has recognized that the needs of society have evolved over time in response to changed circumstances." And whenever at IJ, you hear those kind of words, you're like, Oh, they're gonna get the government whatever they want. Instead, here it's okay, coal used to be a really big deal. Now it's not really that big a deal. And this is asphalt. And so you don't get what you want. And the irony is that it's Kelo that is doing that work instead of some other case. Because all the time at IJ, we find some old case that maybe helps an economic liberty or property rights claim, and then the more modern case will just say, ah, times have changed. needs of society, blah, blah, blah. And this turns that whole thing on its head. So that was beautiful to see.

B Betsy Sanz 50:25

And I don't mind it.

A Anthony Sanders 50:27

Ha. Well, I don't mind you coming on, Betsy, and it's beautiful to see you and John. And so this has been a great Short Circuit. Thank you for coming. Thank you everyone for listening. Please be sure to follow Short Circuit on YouTube, Apple podcasts, Spotify, and all other podcast platforms, and remember to get engaged.