2-13-1979

# Amaya v. District Court In and For Pueblo County

IN THE SUPREME COURT OF THE STATE OF COLORADO

NO. 28513

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| GEORGE AMAYA,<br><br>Petitioner,<br><br>-vs-<br><br>DISTRICT COURT IN AND FOR THE COUNTY OF PUEBLO, THE HONORABLE PHILLIP J. CABIBI,<br><br>Respondent. | ) | ANSWER TO RULE TO SHOW CAUSE |

COMES NOW the respondent in the above-designated matter and answers and shows cause why the relief requested by the petitioner should be denied.

## STATEMENT OF THE ISSUE

Whether the respondent abused its discretion in holding the cost bond required in C.R.S. 1973, 1-10-110(2) need not be so great as to cover all expenses of an election contest litigation, including such incidental expenses as attorney fees, travel expenses, deposition expenses, telephone bills and the expense of procuring documents.

## STATEMENT OF THE CASE

This case involves the contest of an election for a county commissioner brought pursuant to C.R.S. 1973, 1-10-110. The petitioner who is the defendant or contestee in the action filed a motion requesting an increase in the cost bond posted pursuant to C.R.S. 1973, 1-10-110(2). The respondent denied the requested increase, which resulted in this rather baseless original proceeding.

## STATEMENT OF FACTS

At the time of the commencement of this election contest, the plaintiff-contestor posted a cost bond in the amount of $250.00 in accordance with C.R.S. 1973, 1-10-110(2). Thereafter, the defendant-contestee, George A. Amaya, filed a motion requesting that the bond be increased to $25,000.00 to cover such expenses as attorney fees, travel expenses, telephone bills, copying expenses, expense for depositions, expense of

obtaining documents and any other expenditure which in any way relates to the litigation. Since this request was not only unprecedented, but was actually contrary to all Colorado precedent, the respondent court quite naturally denied the motion.

## SUMMARY OF THE ARGUMENT

The legislature, in adopting C.R.S. 1973, 1-10-110(2), provided only that a bond for the payment of "all costs" be posted. The term costs has generally been limited to docket fees and, in the absence of an express legislative declaration to the contrary, the term should be so limited in this type of proceeding.

## ARGUMENT

### I. THE RESPONDENT COURT DID NOT ABUSE ITS DISCRETION OR EXCEED ITS JURISDICTION IN ITS DETERMINATION THAT THE COST BOND REQUIRED BY C.R.S. 1973, 1-10-110, DOES NOT INCLUDE ATTORNEY FEES AND OTHER EXPENSES INCIDENTAL TO THE CONDUCT OF LITIGATION.

The award of costs depends upon the sound discretion of the trial court, and this is so even where, as is the case with expert witness fees, the statutes expressly provide for specific expenses to be taxed as costs. Lamont v. Riverside Irrigation District, 179 Colo. 134, 498 P.2d 1150 (1972).

The law in Colorado has long been settled that attorney fees cannot be recovered either as damages or as costs unless specifically provided for by contract or by statute. Williams v. Fidelity and Deposit Co. of Maryland, 42 Colo. 118, 93 P. 1119 (1908); Spencer v. Murphy, 6 Colo. App. 453, 41 P. 841 (1895). It should be noted that Williams v. Fidelity and Deposit Co. of Maryland, supra, involved a bond conditioned upon the payment of "all costs" of an appeal. This is the exact same language found in C.R.S. 1973, 1-10-110(2). In Leadville Water Company v. Parkville Water District, 164 Colo. 362, 436 P.2d 659 (1967), which is an eminent domain case, this Court stated at page 660 of 436 P.2d:

> (2) This Court has held that the inhibitions in and the spirit of the Colorado Constitution, as fundamental law of this state, requires that the owner shall be paid his costs as well as the fair and reasonable value of his property. Dolores No. 2 Land and Canal Co. v. Hartman, 17 Colo. 138, 29 P. 378. In so holding, it was stated that the Constitution clearly covers (only) the class of expenses usually taxed as costs. Attorneys' fees do not fall within that category. Dolores No. 2 Land and Canal Co. v. Hartman, supra; Schneider v. Schneider, 36 Colo. 518, 86 P. 347; Denver and Rio Grand Railroad Co. v. Mills, 59 Colo. 198, 147 P. 681.

It is also settled that the expense of taking depositions cannot be assessed as costs. McNeil v. Allen, 35 Colo.App. 317, 326-27, 534 P.2d 813 (1975). In Morris v. Redak, 124 Colo. 27, 234 P.2d 908 (1951), this Court stated at page 41 of 124 Colo.:

> . . . There is no provision in our Rules of Civil Procedure authorizing the assessment, as costs, of stenographic expense incurred in the taking of a deposition for purposes of discovery. We consider that taking depositions of witnesses in preparation for trial is something in the nature of a luxury, and that one who avails himself of this procedure does so at his own expense. This applies with equal force to expenditures made in procuring transcripts of testimony given at a previous trial. If the testimony of the person whose deposition is taken is not available, at the trial, and the deposition is offered in lieu thereof, then the court would have discretion in determining whether the expense of procuring the deposition should be assessed as costs against the losing party.

No Colorado cases have been decided as to the extent of the cost bond required by C.R.S. 1973, 1-10-110(2). The case of Nicholls v. Barrick, 27 Colo. 432, 62 P. 202 (1900), relied upon so heavily by the petitioner, does not define the term "costs", and therefore, sheds no light upon the issue. The Iowa Supreme Court has recently decided this issue in Walters v. Bartel, 254 N.W.2d 321 (Iowa 1977). The Iowa statute provided:

> "Bond. The contestant must also file with the county auditor a bond, with security to be approved by said auditor, conditioned to pay all costs in case the election be confirmed, or the statement be dismissed, or the prosecution fail." (Emphasis supplied.)

The Iowa Supreme Court stated at page 322-23 of 254 N.W.2d:

> (1,2) We hold the word "all" (in § 62.6, The Code) merely means every item or component of the term "costs" is taxable to the unsuccessful contestant. It does not add any chargeable expense not already included in the "cost" concept. Because attorney fees under our decisions are not included in the "costs", they are not added by the mere presence of the adjective "all."
>
> Neither are we convinced by incumbent's argument that district court's interpretation is inconsistent with other code provisions. Section 66.4, The Code, relates to removal proceedings, not election contests, and requires a bond "to cover the costs of such removal suit, including attorney fees." Incumbent contends § 62.6 and §§ 66.4 should both be interpreted to include attorney fees because both, in the final analysis, accomplish the same result.
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> We think it more reasonable to view these two statutes as demonstrating the legislature knows how to provide for recoupment of attorney fees when that result is intended. Additionally, successive removal proceedings may be instituted under §§ 66.4, while a Chapter 62 contest may be brought only within 20 days after the incumbent is declared elected. See § 62.5, The Code. The legislature could have logically concluded an officeholder potentially exposed to successive removal proceedings should have protection from recurring attorney fees which ultimately could drive him from office.
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> Of course, other statutory instances of the legislature's express provision for attorney fees, in addition to the usual costs, are found throughout the code. See, e.g., §§ 188.47, 327D.16, 451.9, 472.33, 567.6, and 633.673. These sections disclose the type of express authorization for attorney fees required by our decisions.
>
> We hold the term "all costs" in § 62.6 does not authorize imposition of an incumbent's attorneys' fees on an unsuccessful contestant.

Since attorney fees and deposition expenses cannot be taxed as costs, it obviously follows that such incidentals as telephone bills, copying expenses, travel expenses and other incidentals cannot be considered as costs. The petitioner seeks to have the contestor in this election proceeding finance the litigation. This cannot be required. See Bristol Myers Company v. District Court, 161 Colo. 354, 422 P.2d 373, 376 (1967).

Had the Colorado legislature intended that one contesting an election finance the expense of his adversary, it would certainly have so provided. Words and phrases in a statute should be given their familiar and generally accepted meaning. People v. Gallegos, ____ Colo.

_____, 563 P.2d 937, 939 (1977). There is nothing to indicate that the legislature, in adopting section 1-10-110(2) intended to deviate from the common meaning of the term "costs". The petitioner here seeks to have this Court impose prohibitive expenses upon a voter and taxpayer who desires to contest an election. Such a result is contrary to a democratic system. Furthermore, it is contrary to the Colorado Constitution and statutes. The legislature has specifically provided for the contest of an election where the winner may be ineligible to hold the office. C.R.S. 1973, 1-10-101. The Colorado Constitution specifically requires that one seeking a county office reside in the county for one year preceeding his election. COLO. CONST. Art. XIV, § 10. A further indication that the legislature did not wish to impose prohibitive expenses upon the contestor of an election appears from the omission of any type of cost bond requirement in the contest of primary elections. C.R.S. 1973, 1-10-114.

The petitioner in this case has come into Pueblo County, where his residency is, at best, highly questionable and has sought election to a county office. In the course of his quest, the petitioner has expended large sums of money and has allied himself with certain controversial office holders, such as the incumbent district attorney. The petitioner should not be permitted to escape a proper statutorily decreed determination of his residency by asking this Court, by judicial legislation, to impose an unrealistic and prohibitive expense upon one who seeks to contest the election and to expose the petitioner's lack of residency.

## CONCLUSION

As indicated above, the Respondent Court did not abuse its discretion in according to the term "costs" as used in C.R.S. 1973, 1-10-110(2), its usual and commonly accepted meaning. Therefore, the rule must be discharged and the relief sought denied.

Respectfully submitted,

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