10-9-1985

Aldrich v. District Court of Eighteenth Judicial Dist.

IN THE COLORADO SUPREME COURT

IN AND FOR THE DISTRICT OF COLORADO

Civil Action No. 85SA291

LAUREN E. ALDRICH, and
J. ELAINE ALDRICH,

Petitioners,

v.

THE DISTRICT COURT OF THE EIGHTEENTH JUDICIAL DISTRICT,
in and for the County of Arapahoe; and
THE HONORABLE JOYCE S. STEINHARDT,

Respondents.

REPLY BRIEF TO MEMORANDUM OF LAW FILED BY LITTLETON RIVERFRONT AUTHORITY

Malcolm M. Murray
GORSUCH, KIRGIS, CAMPBELL,
WALKER AND GROVER
1401 - 17th Street, Suite 1100
Post Office Box 17180
Denver, Colorado 80217
(303) 534-1200

I N D E X

TABLE OF CASES CITED

OTHER AUTHORITIES CITED

SUMMARY OF THE ARGUMENT AND ISSUES

I.

A Writ of Prohibition is Proper to Correct a Gross Abuse of Discretion.

II.

Affidavit of Losing Counsel is Insufficient to Support a Motion for New Trial.

III.

The Same Rules Should Apply to Impeachment of a Commission's Certificate of Ascertainment as Apply to Impeachment of a Jury's Verdict.

IV.

Rule 606(b), C.R.E., Requires That Mr. Windholz' Affidavit be Stricken.

V.

It was Error for the District Court to Consider the Basis for the Commission's Certificate of Ascertainment and Assessment Subsequent to Discharge of the Commission.

VI.

LRA Has Not Demonstrated any Error on the Part of the Commission.

INTRODUCTION

This Memorandum Brief is filed in reply to the Littleton Riverfront Authority's Response to Petition for Writ of Prohibition and Order to Show Cause and Memorandum of Law filed in support thereof. The position of the Littleton Riverfront Authority (hereinafter "LRA") demonstrates a fundamental misunderstanding of the role of a commission in an eminent domain proceeding and of the purpose and provisions of Rule 606(b), C.R.E. In addition, LRA totally misconstrues the difference between rules of evidence and the basis for a jury or commission's verdict. As a result, LRA provides no basis for not striking the Affidavit of Mr. Windholz. Without a supporting affidavit, the Motion for New Trial must be denied by granting the Writ of Prohibition.

I.

A WRIT OF PROHIBITION IS PROPER TO CORRECT A GROSS ABUSE OF DISCRETION.

A Writ of Prohibition is proper to remedy a gross abuse of discretion. As pointed out in Petitioners Aldrich's Petition and Brief, the District Court has committed a gross abuse of discretion by ignoring the established case law regarding affidavits required to support a motion for new trial and by ignoring a time honored rule of evidence barring testimony of

of jurors concerning their deliberations. In the face of the gross abuse of discretion here alleged, a writ of prohibition is a proper remedy necessary to correct injustice and necessary to insure the orderly administration of justice.

The particular abuses committed by the District Court in this action make relief through a writ of prohibition particularly appropriate. In granting the Motion for New Trial, the District Court has totally disregarded Rule 606(b), C.R.E. The Affidavit of Mr. Windholz deals exclusively with his conversations with the individual commissioners regarding the considerations, facts and figures which they took into account and which they discussed in arriving at their verdict. These statements are specifically and unequivocally barred by Rule 606(b).

Rule 606(b) is a fundamental tenet of the Anglo-American jury system. Its intent is to insulate jurors from harassment and coercion by losing parties and to provide some finality to a jury's verdict. Given the District Court's actions in this case, it can be anticipated that other losing parties in cases heard by a jury or commission would immediately call up the jurors and crossexamine them on their discussions, on how they weighed the evidence and on what evidence they considered or disregarded. Then, with an affidavit signed by its counsel, the losing party would seek to overturn the jury's verdict. To fail to do so would amount to less than zealous representation of one's client.

Such a procedure is clearly absurd and would undermine the sanctity of the jury process. Juries would be more concerned with how they would justify their verdict to losing counsel than with making a fair and unbiased determination of the cause. It is also not unlikely that a jury might arrive at a verdict calculated to avoid further inquiry, often by favoring the party most likely to challenge the verdict. The evils of the course suggested by the District Court are myriad. The dangers of such an approach were argued by jurists centuries ago and the approach conclusively rejected. Allowing the District Court's order to stand undermines the jury system and presents the spectre of serious problems in the administration of justice if not immediately corrected.

The import of the District Court's actions is beyond even a gross abuse of discretion. By disregarding a cornerstone of our legal tradition, the District Court has acted outside our system of justice. Under such circumstances, a writ of prohibition is an appropriate remedy.

II.

AFFIDAVIT OF LOSING COUNSEL IS INSUFFICIENT TO SUPPORT A MOTION FOR NEW TRIAL.

Petitioners Aldrich have maintained that the affidavit of losing counsel is insufficient to support a motion for new trial on grounds of misconduct of a jury, Hansen v. Dillon, 156 Colo. 396, 400 P.2d 201 (1965); People's Natural Gas v.

Public Utilities Commission, ___ Colo. ___, 656 P.2d 159 (1981). LRA claims that such an affidavit is sufficient relying on Cawthra v. Greeley, 154 Colo. 483, 391 P.2d 876 (1964). LRA's reliance on Cawthra is misplaced.

An examination of Cawthra will reveal that no affidavit was filed with the motion for new trial in that case. The Supreme Court overturned the order for new trial solely because no affidavit accompanied the motion as required by Rule 59, C.R.C.P. The language quoted in LRA's Memorandum of Law sets out the rationale for requiring an affidavit, but the case does not consider at all the adequacy of an affidavit of someone without first hand knowledge of the events recited in the affidavit.

Hansen, on the other hand, was decided only one year after Cawthra and the opinion was written by Chief Justice McWilliams, who wrote the opinion in Cawthra. In Hansen, Justice McWilliams deals squarely with the adequacy of an affidavit of a losing counsel in stating, "This requirement [of Rule 59] presupposes firsthand information rather than from a person possessing only hearsay." 400 P.2d at 204. It is clear that the rule in Hansen barring the affidavit of a losing counsel for purposes of Rule 59 is an extension of the rule stated in Cawthra. To find support for LRA's position in Cawthra is to ignore subsequent case law building on that opinion.

The Affidavit of Mr. Windholz amply demonstrates the danger of reliance on hearsay statements. The statements attributed to the commissioners by Mr. Windholz are not direct quotes. Inevitably, they represent Mr. Windholz' interpretation of their statements as he chose to paraphrase them. The statements were not made under oath and we do not know the motivation of the commissioners in making the statements. We do not know what questions were asked to elicit the responses purportedly recorded. A clever attorney, by confusing or misleading someone, can generally gain the response desired. The use of hearsay statements deprives the opposing party of any opportunity to crossexamine the commissioners to elicit information which might contradict Mr. Windholz' version of the conversation. Finally, and perhaps most importantly, the affidavit of losing counsel is inherently tainted. A losing counsel has a predisposition to hear what he wants to hear and to record only those aspects of a conversation which favor his views. Reliance on such affidavits is genuinely dangerous.

It should also be noted that even if the information contained in Mr. Windholz' Affidavit were not otherwise inadmissible under Rule 606(b), C.R.E., the Affidavit would be inadmissible as hearsay under Rule 802, C.R.E. It was gross error on the part of the District Court to grant a motion for new trial based on statements which would be inadmissible in open court.

III.

THE SAME RULES SHOULD APPLY TO IMPEACHMENT OF A COMMISSION'S CERTIFICATE OF ASCERTAINMENT AND ASSESSMENT AS APPLY TO IMPEACHMENT OF A JURY'S VERDICT.

It its Memorandum of Law, LRA tries to distinguish between a commission and a jury for purposes of impeachment of the resulting verdict. The distinction is wholly without merit.

The Colorado Court of Appeals, in Stark v. Poudre School District R-1, 35 Colo. App. 363, 536 P.2d 836 (1977), rev'd. on other grounds, 192 Colo. 396, 560 P.2d 77 (1977), stated that the rules governing impeachment of a jury's verdict and a commission's certificate of ascertainment and assessment are identical. This view was the foundation for the Court of Appeals' decision in Evergreen Fire Protection District v. Huckeby, ___ Colo. App. ___, 626 P.2d 744 (1981).

LRA attempts to distinguish between the duties of a jury and commission. On page 5 of its Memorandum of Law, LRA states that the powers and purposes of a commission and a jury vary. LRA mentions that a commission can rule on evidence and issue subpoenas and then states, "...a commission may consider only the evidence presented at the hearing and may not consider facts within their knowledge or other knowledge acquired aside from the evidence presented. Routt County Development Co. v. Johnson, 23 Colo. App. 511, 130 P.2d [sic] 1081 (1913)." This is a very curious statement of the law. If it is implied that

a jury can consider facts not in evidence in arriving at its verdict, LRA is ignoring Butters v. DeeWann, 147 Colo. 352, 363 P.2d 494 (1961), and T.S. by Pueblo County Dept., and J.S. v. G.G., ___ Colo. ___, 679 P.2d 118 (1984). These cases state that a juror cannot make an independent investigation of facts outside the evidence. Routt County, supra, stands for exactly the same proposition with respect to a commission.

LRA claims that the holdings in Routt County and in the Court of Appeals' decision in Stark, supra, are inconsistent with Rule 606(b), C.R.E. It is apparent that LRA has not carefully read Rule 606(b). Routt County and Stark both deal with allegations that a commission made an independent investigation of property values outside the evidence presented. In Routt County, the evidence of the independent investigation was contained in the report of the commissioners. In Stark, the evidence was brought before the Court in the form of affidavit of losing counsel. Rule 606(b), C.R.E., while barring testimony of the jury's deliberations, specifically allows a juror to testify "...on the question whether extraneous prejudicial information was improperly brought to the jurors' attention..." In both Routt County and Stark "extraneous prejudicial information" was allegedly brought to the attention of the commission.

In Routt County, the allegations were taken as true based on statements of the commission and the verdict was overturned. In Stark, the Court of Appeals noted, consistent with the rule based on Hansen, supra (and more fully elaborated

in II. above), that the allegations of improper conduct were only hearsay and not based on firsthand knowledge. As a result, the affidavits of losing counsel were insufficient to support a motion for new trial under Rule 59, C.R.C.P. It is clear that there is no statutory or case law in Colorado that would prevent the application of Rule 606(b) to the deliberations of a commission in an eminent domain case.

IV.

RULE 606(b), C.R.E., REQUIRES THAT MR. WINDHOLZ' AFFIDAVIT BE STRICKEN.

The thrust of LRA's argument is that the commission erred in not considering depreciation on the improvements. Assuming that such is error (which Petitioners Aldrich do not concede; see VI. below), the alleged error and the facts surrounding the error presumes a detailed knowledge of the commission's deliberations, which is improper under Rule 606(b), C.R.E.

The Affidavit of Mr. Windholz and the Offer of Proof submitted to the District Court by LRA are based on Mr. Windholz' discussions with the commissioners subsequent to the trial. He alleges that he was told what values they put on the improvements and what values they put on the underlying land. He further alleges that he was told that the commission disregarded the evidence on depreciation of the improvements. All of these statements fall within the prohibition of Rule

606(b) which bars testimony, affidavits or evidence of statements "...occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith..." What evidence was considered and what weight was given particular evidence falls within the prohibited sphere of Rule 606(b).

It should be noted by the Court that LRA does not dispute the fact the Mr. Windholz' Affidavit falls within the ambit of Rule 606(b). Instead, LRA argues that Rule 606(b), C.R.E., does not apply to commissions in eminent domain cases. This notion is entirely specious as pointed out above (see III. above).

V.

IT WAS ERROR FOR THE DISTRICT COURT TO CONSIDER THE BASIS FOR THE COMMISSION'S CERTIFICATE OF ASCERTAINMENT AND ASSESSMENT SUBSEQUENT TO DISCHARGE OF THE COMMISSION.

In its Memorandum of Law, LRA maintains that its Motion for New Trial was timely filed. Petitioners Aldrich do not contest the timely filing of the Motion for New Trial. However, Petitioners Aldrich do contend that any inquiry or consideration by the District Court of the basis for the commission's certificate is untimely once the commission's certificate has been accepted by the District Court.

The case of Evergreen Fire Protection District v. Huckeby, ___ Colo. App. ___, 626 P.2d 744 (1981), indicates that Sec. 38-1-115(3), C.R.S., allows for interrogatories to be propounded to the commission at the time of the valuation hearing. However, once the commissioners' report is returned and the commission discharged, no further investigation into the propriety of the report is permitted, see also Fort Lyon Canal Co. v. Farnan, 48 Colo. 414, 109 P. 861 (1910). In other words, once the report is returned and the commission discharged, the District Court cannot then inquire into the commission's deliberative process. It cannot inquire into what evidence was accepted or rejected; it cannot inquire into how the commission determined or calculated its ultimate valuation for the property.

In its Motion for New Trial, LRA seeks to place at issue before the District Court the correctness of the commission's verdict. LRA maintains that the commission did not properly calculate the final award. As Huckeby points out, such an inquiry is properly accomplished through interrogatories propounded to the commission at the time of trial pursuant to Sec. 38-1-115(3). However, once the commissions' report has been returned and the commission discharged, such an inquiry, whether through a hearing before the Court or through interrogatories propounded by counsel or through the affidavit of losing counsel purporting to reflect the statements of individual commissioners, is improper.

In the case at bar, no interrogatories were propounded to the commission. As reflected by the Judgment in the District Court (see Appendix 2, Petition for Writ of Prohibition), the commission's Certificate of Ascertainment and Assessment was accepted and approved by the District Court. Under the rule outlined in Huckeby, it was improper for LRA to bring the issue of the proper application of depreciation to the value of improvements or any other issue going to the evaluation by the commission of the evidence before it to the attention of the District Court.

VI.

LRA HAS NOT DEMONSTRATED ANY ERROR ON THE PART OF THE COMMISSION.

Even if LRA's actions in submitting an inadmissible affidavit were overlooked, LRA has not demonstrated that the commission erred in reaching its verdict. LRA claims that the commission erred by not applying depreciation to the value placed by the commission on the improvements. Even if the commission failed to apply depreciation, there is no error.

LRA confuses a rule of evidence in eminent domain cases with a mandatory methodology to be applied by a commission or jury. A witness in a condemnation case must properly apply the accepted appraisal methods of arriving at an opinion. The Supreme Court of Colorado has recognized the replacement cost less depreciation method as a valid method of arriving at an

opinion of the value of real property, DURA v. Berglund-Cherne, 193 Colo. 562, 568 P.2d 478 (1977). But neither Berglund-Cherne nor any other case decided in Colorado has ever required a jury or commission to apply any particular appraisal methodology in arriving at a verdict.

The only requirement placed on a jury or commission is that the verdict be within the range of competent evidence on the record, Denver v. Minshall, 109 Colo. 31, 121 P.2d 667 (1942); McGovern v. Board of County Commissioners, 115 Colo. 347, 173 P.2d 880 (1946); Board of Directors v. Calvaresi, 156 Colo. 173, 397 P.2d 877 (1964). In the case at bar, this requirement has been satisfied. Petitioners Aldrich presented testimony that the total property was valued at $664,000. This evidence has not been challenged in LRA's Motion for New Trial. LRA presented evidence of the property to be $475,000. The commission's verdict of $623,000 is well within the range of the evidence and should not be overturned.

CONCLUSION

In conclusion, LRA provides no reason not to grant the requested Writ of Prohibition. LRA provides no reasons for not excluding the affidavit of losing counsel when it is based on hearsay, as required by Hansen v. Dillon. Hansen is clearly an extension of the holding in Cawthra v. Greeley and LRA has simply ignored the holding in Hansen.

LRA urges that Rule 606(b), C.R.E., should not apply in this case without providing any authority for this notion. Instead, LRA argues that a commission in an eminent domain proceeding is governed by different rules than a jury, but, again, no authority is cited for its assertion in the context of impeachment of verdicts. An examination of the cases cited by LRA, Routt County Development Co. v. Johnson, and Poudre Valley School District R-1 v. Stark, reveals that these cases are entirely consistent with the application of Rule 606(b), C.R.E., to the deliberations of eminent domain commissions.

Finally, it should be noted that the error alleged to have been committed by the commission is not error at all. LRA confuses rules of evidence governing appraisal methodology with a requirement that the commission calculate its verdict in a particular manner. A search of the case law will reveal absolutely no support for this proposition. A jury or commission is free to consider and weigh the evidence in any way it chooses. It may reject some evidence; it may give some evidence more weight than other evidence. In the final analysis, a commission or jury is only required to return a verdict supported by competent evidence on the record. In the case at bar, the commission's verdict was within the range of competent evidence on the record and should not have been overturned as excessive.

In summary, the Affidavit of Mr. Windholz should have been stricken as violating Rule 606(b), C.R.E., and the holding

in Hansen v. Dillon. In addition, there is adequate evidence in the record to support the verdict of the commission. The Motion for New Trial should have been denied and for the District Court to have failed to do so was a gross abuse of discretion.

DATED this 9 day of October, 1985.

Respectfully submitted,

GORSUCH, KIRGIS, CAMPBELL,
WALKER AND GROVER

By: Malcolm M. Murray
Malcolm M. Murray, #7249

1401 - 17th Street, Suite 1100
Post Office Box 17180
Denver, Colorado 80217
(303) 534-1200

ATTORNEYS FOR PETITIONERS,
Lauren E. Aldrich, and
J. Elaine Aldrich

CERTIFICATE OF MAILING

I, the undersigned, hereby certify that a true and correct copy of the foregoing REPLY BRIEF TO MEMORANDUM OF LAW FILED BY LITTLETON RIVERFRONT AUTHORITY was placed in the United States Mail this 9th day of October, 1985, postage prepaid, and addressed to the following:

James A. Windholz
Mehaffy, Rider, Windholz & Wilson
1655 Walnut Street, Suite 310
Boulder, Colorado 80302

Honorable Joyce S. Steinhardt
Arapahoe County District Court, Div. 6
2069 West Littleton Boulevard
Littleton, Colorado 80120

Lois Carnahan