8-26-1985

Aldrich v. District Court of Eighteenth Judicial Dist.

85SA291 (2)

IN THE COLORADO SUPREME COURT
IN AND FOR THE DISTRICT OF COLORADO

FILED IN THE SUPREME COURT OF THE STATE OF COLORADO

AUG 26 1985

Mac V. Danford, Clerk

Civil Action No. _____

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.

BRIEF IN SUPPORT OF PETITIONERS' PETITION FOR WRIT OF PROHIBITION

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I N D E X

TABLE OF CASES CITED

OTHER AUTHORITIES CITED

STATEMENT OF ISSUES PRESENTED

1. Did the Respondent District Court grossly abuse its discretion in accepting an Affidavit dealing with matters discussed and factors contained during the course of the Commission's deliberations?

2. Did the Respondent District Court grossly abuse its discretion in accepting the Affidavit of losing counsel for the purposes of Rule 59(d), C.R.C.P., even though said Affidavit contained hearsay and conslusory information?

3. Did the Respondent District Court grossly abuse its discretion in permitting inquiry into the reasons underlying the verdict of the Commission after the Commission had been discharged?

4. Did the Respondent District Court abuse its discretion in overturning as excessive a verdict that was supported by competent evidence before the Commission?

SUMMARY OF THE ARGUMENT AND ISSUES

I.

A Writ of Prohibition is a proper remedy where the District Court has grossly abused its discretion.

II.

Jurisdiction is particularly justified to correct an abuse of discretion which threatens to undermine the very foundation of our jury system.

III.

The appeal process does not provide the Petitioners Aldrich an adequate remedy.

IV.

Consideration of Mr. Windholz' Affidavit is clearly error and a gross abuse of the Respondent District Court's discretion.

V.

The Respondent District Court abused its discretion in not striking the Affidavit of losing counsel as inadmissible as hearsay and conclusory material.

VI.

A commission's verdict cannot be impeached with information gained subsequent to its discharge.

VII.

The Respondent District Court abused its discretion in ruling that the award was excessive even though it was supported by competent evidence.

STATEMENT OF THE CASE

The factual setting of this case is outlined in the Exhibits to the Petition for Writ of Prohibition. The Littleton Riverfront Authority (hereinafter "LRA") acquired by condemnation property owned by the Petitioners, Lauren E. Aldrich and J. Elaine Aldrich. The property included a motorcycle sales and repair business which Mr. Aldrich had owned and operated for 17 years. A Commission was appointed to determine just compensation, and a trial was had to the Commission on May 30 and 31, 1985, and June 3, 1985. During the course of the trial, LRA placed into evidence testimony indicating the fair market value for the property taken to be $475,000. The landowners presented testimony indicating the fair market value to be $664,000. The Commission returned a Certificate of Ascertainment and Assessment finding fair market value to be $623,000.

Subsequently, LRA filed a Motion for New Trial alleging that in its deliberations, the Commission had failed to consider certain evidence and placed unwarranted emphasis on other evidence. Supporting the Motion for New Trial was the Affidavit of Mr. James A. Windholz, attorney for LRA, who had tried the case to the Commission. Mr. Windholz' Affidavit was based entirely upon conversations he had had with each of the three Commissioners. The Affidavit described conclusions arrived at by Mr. Windholz from those conversations, and the Affidavit deals with what

factors were considered during the course of the Commission's deliberations and what matters were discussed during their deliberations.

The Petitioners Aldrich moved to strike the Affidavit of Mr. Windholz and opposed the Motion for New Trial. Judge Joyce S. Steinhardt, Respondent in this proceeding, granted LRA's Motion for New Trial and accepted the Affidavit of Mr. Windholz as sufficient under Rule 59(d), C.R.C.P. Petitioners Aldrich bring this action for an Order to Strike the Affidavit of Mr. Windholz and to reverse the granting of the Motion for New Trial.

I.

A WRIT OF PROHIBITION IS A PROPER REMEDY WHERE THE DISTRICT COURT HAS GROSSLY ABUSED ITS DISCRETION

The Colorado Supreme Court has on many occasions recognized that a writ of prohibition is proper when the district court has grossly abused its discretion. People in the Interest of P.N., ___ Colo. ___, 663 P.2d 253 (1983); Western Food Plan, Inc. v. District Court, 198 Colo. 251, 598 P.2d 1038 (1979); Marks v. District Court, ___ Colo. ___, 643 P.2d 741 (1982). As stated in People in the Interest of P.N., "Relief in the nature of prohibition is a proper remedy in cases where the trial court is proceeding without or in excess of its jurisdiction, or has abused its discretion in exercising its

functions over matters within its authority to decide." 663 P.2d at 256. In filing this Petition for Writ of Prohibition, Petitioners Aldrich allege that the Respondent District Court has grossly abused its discretion in circumstances which make extraordinary relief appropriate.

The grounds for granting the requested writ of prohibition in this case are very similar to those in People in the Interest of P.N., supra. In People in the Interest of P.N., the writ was requested to reverse the District Court's order granting a motion for new trial. Petitioner alleged that the District Court had granted the motion for a new trial on grounds that were clearly erroneous, amounting to a gross abuse of discretion. The Supreme Court found that the District Court had failed to follow the test to be applied when a request for a new trial is based on newly discovered evidence. Even though the error could have been corrected on appeal, the Supreme Court found that the gross abuse of discretion warranted the issuance of a writ of prohibition reversing the order for a new trial. In the case at bar, Petitioners Aldrich urge that the Respondent District Court has similarly grossly abused its discretion in ignoring clearly articulated rules of law which are at the foundation of our jury system. Under such circumstances, issuance of a writ of prohibition is justified.

II.

JURISDICTION IS PARTICULARLY JUSTIFIED TO CORRECT AN ABUSE OF DISCRETION WHICH THREATENS TO UNDERMINE THE VERY FOUNDATION OF OUR JURY SYSTEM.

Although this case was tried to a Commission of three freeholders rather than a jury, the same rules concerning impeachment of the verdict apply to the deliberations of a commission as apply to the deliberations of a jury. As stated in Stark v. Poudre School District R-1, 35 Colo. App. 363, 536 P.2d 836 (1975), rev'd on other grounds, 192 Colo. 396, 560 P.2d 77 (1977), "Although a commission of this type is not a jury, see Board of County Commissioners v. Vail Associates, Ltd., supra, we hold that the same rule applies with respect to impeachment of a certificate of ascertainment and assessment." 536 P.2d at 836. In Evergreen Fire Protection District v. Huckeby, ___ Colo. App. ___, 626 P.2d 747 (1981), rules applicable to jury verdicts were applied to the certificate of ascertainment and assessment.

Petitioners Aldrich allege that granting of the Motion for New Trial on the grounds cited by the Respondent District Court threatens to undermine the confidentiality of the jury system. From the days of Lord Mansfield, affidavits concerning the matters discussed and the reasons for a verdict have been excluded from the consideration of the courts. In endorsing this rule, the United States Supreme Court, in McDonald v. Pless, 238 U.S. 264, 35 S. Ct. 783, 59 L. Ed. 1300 (1915), stated the rationale for the rule as follows:

> But let it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation the constant subject of public investigation; to the destruction of all frankness and freedom of discussion and conference. 59 L. Ed. at 1302.

Wigmore states the basis for the rule as follows:

> The verdict as uttered is the sole embodiment of the jury's act and must stand as such without regard to the motives or beliefs which have led up to its act. The policy which requires this is the same which forbids a consideration of

> the negotiations of parties to a contract leading up to the final terms as deliberately embodied in their deed, namely, the loss of all certainty in the verdict, the impracticality of seeking for definiteness in the preliminary views, the risk of misrepresentation after disclosure of the verdict, and the impossibility of expecting any end to trials if the grounds for the verdict were allowed to effect its overthrow. 8 Wigmore, Evidence Sec. 2348 (McNaughton ed. 1961).

Colorado courts have consistently followed this rule for reasons outlined by the Colorado Supreme Court in Santilli v. Pueblo, 184 Colo. 432, 521 P.2d 170 (1974):

> * * * Colorado has not permitted impeachment of a verdict on grounds which delve into the mental processes of the jury deliberation. Morris v. Redak, 124 Colo. 27, 234 P.2d 908 (1951). To allow such inquiry could subject jurors to harassment and coercion after the verdict and create undertainty on the finality of verdicts. 521 P.2d at 171.

The rule prohibiting investigation into the jury's deliberations stands as a cornerstone of our jury system. The

actions of the Respondent District Court in disregarding this rule threaten to undermine the confidentiality and integrity of the jury system and, therefore, warrant immediate reversal by the Colorado Supreme Court.

III.

THE APPEAL PROCESS DOES NOT PROVIDE THE PETITIONERS ALDRICH AN ADEQUATE REMEDY

Failure to grant the relief requested will subject the Petitioners to the expense, delay and mental anguish attendant to a retrial of this matter and subsequent appeal. It should be borne in mind that a landowner whose land is acquired has done no wrong. His property is taken from him without his consent and he is forced to litigate the fair market value against a governmental entity whose temporal and financial resources exceed his. In People in the Interest of P.N., supra, this Court stated, "There must be finality to litigation involving children." 663 P.2d at 258. Similarly, in matters dealing with the property and, often, the livelihood of citizens, there must be finality and certainty that the fundamental principles of our system of justice will be upheld.

IV.

CONSIDERATION OF MR. WINDHOLZ'S AFFIDAVIT IS CLEAR ERROR AND A GROSS ABUSE OF THE RESPONDENT DISTRICT COURT'S DISCRETION

As stated previously, it is the clearly established

law in Colorado that information regarding the matters discussed and the factors considered during the course of jury deliberations are inadmissible for the purpose of impeaching the jury's verdict. This rule has been embodied in Rule 606 (b), Colorado Rules of Evidence. Rule 606(b), C.R.E., states:

> (b) Inquiry Into the Validity of Verdict or Indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other jurors mind or emotions as influencing him to assent to or dissent from the verdict or indictment; or concerning his mental processes in connection therewith, except that a juror may testify on the question whether an extraneous prejudicial information was improperly brought to the jurors attention; or whether any outside influence was improperty brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.
>
> (Emphasis added)

Examination of the Affidavit of Mr. Windholz clearly indicates that it is evidence of statements made by the

Commissioners concerning matters which they would not be allowed to testify in Court under Rule 606(b), C.R.E. The Affidavit is clearly in violation of Rule 606(b) and should have been excluded from the consideration of the Respondent District Court.

The rule of law embodied in Rule 606(b), C.R.C., has been consistently followed without exception by the courts of Colorado. In the case of The Fort Lyon Canal Company v. Farnan, 48 Colo. 414, 109 P. 861 (1910), the court outlined the rule as follows: "An affidavit by one of the jurors has been filed, tending to show that the question of benefits was neither considered nor passed upon. Under the familiar and well settled rule, jurors are not permitted, by affidavit or otherwise, to impeach their verdict." 48 Colo. at 416. This rule has been recently applied in the case of Kading v. Kading, ___ Colo. App. ___, 683 P.2d 373 (1984), where the court stated: "Accordingly, in the context of an inquiry into the validity of a verdict, and within certain exceptions not applicable here, C.R.E. 606(b) precludes admission or consideration of juror testimony that concerns any matter or statement occurring during the course of the jury's deliberations, or that concerns the mental processes of the jurors at arriving at a verdict." 683 P.2d at 376. The Colorado Supreme Court recently endorsed this view in the case of Blades v. Dafoe, slip opinion 83CV306, decided July 8, 1985, where the Court stated: "In addition, it is the policy of the law to look with disfavor with any

attempt to invade the jury's internal processes of decision making in order to obtain evidence necessary to impeach verdicts, except in relatively rare cases. See C.R.E., 606(b)." The Colorado Court of Appeals stated, in the case of Gunnison v. McCabe Hereford Ranches, slip opinion, 84CA1270, decided May 30, 1985: "Thus, to sustain the City's contention would require us to speculate on the thought processes of the jury. This we cannot do."

The Appellate Courts of Colorado have consistently followed the above-cited rule, and on several occasions have indicated that without exception arguments, discussions and reasons made and advanced by members of the jury among themselves while considering their verdict may not be used in an affidavit to impeach their verdict. Sowder v. Inhelder, 119 Colo. 196, 201 P.2d 533 (1948). See also Noell v. Interstate Motor Lines, 166 Colo. 494, 444 P.2d 631 (1968); Duran v. Roach, 515 P.2d 120 (Colo.App. NSOP, 1973); Ray v. Carpenter, 16 Colo. 271, 27 P. 248 (1890); Richards v. Sanderson, 39 Colo. 270, 89 P. 769 (1907); Lambrecht v. Archibald, 119 Colo. 27, 234 P.2d 908 (1951); Pletchas v. Von Poppenheim, 148 Colo. 127, 361 P.2d 261 (1961).

The rule enunciated in Rule 606(b), C.R.E., in the above-cited cases could not be more clear. The Respondent District Court cannot consider the Affidavit of Mr. Windholz as it deals exclusively with discussions, reasons and considerations formed in the minds of the members of the Commission during the course of their deliberations in returning this verdict.

V.

THE RESPONDENT DISTRICT COURT ABUSED ITS DISCRETION IN NOT STRIKING THE AFFIDAVIT OF LOSING COUNSEL AS INADMISSIBLE AS HEARSAY AND CONCLUSORY MATERIAL

The courts of Colorado have consistently ruled that the affidavit of a losing attorney is insufficient to support a motion for a new trial under Rule 59(d), C.R.C.P. The leading case for this rule is Hansen v. Dillon, 156 Colo. 396, 400 P.2d 201 (1965). There, the Colorado Supreme Court noted that Rule 59(d), C.R.C.P., requires a supporting affidavit and stated:

> This requirement presupposes that the affidavit be from one having first hand information rather than from a person possessing only hearsay. Such is not true in the instant case. There is no affidavit in this record of any juror who served in the trial of this matter, nor is there any claim that these jurors refused to give such. Rather, we have only the affidavit of losing counsel and the affidavit itself is largely hearsay and chocked-full of conclusions. 400 P.2d at 204.

This ruling was later affirmed in the case of People's Natural Gas v. Public Utilities Commission, ___ Colo. ___, 626 P.2d 159 (1981), where the Colorado Supreme Court indicated: "Hearsay and conclusory allegations are insufficient under Rule 59." 626 P.2d at 164. Petitioners have been unable to discover any cases decided in Colorado which allowed a new

trial to be granted under Rule 59(d), C.R.C.P., based on the affidavit of a losing attorney which included hearsay information gathered from the jurors concerning their deliberations.

The rationale of this rule is obvious. Rule 802, C.R.E., states unequivocally that hearsay is not admissible except under certain rules or exceptions, none of which are present in the instant case. The Affidavit of Mr. Windholz clearly attempts to use the statements of the jurors for the truth of the matters which he relates. For Mr. Windholz to take the stand in this proceeding and attempt to present such testimony, his testimony would properly be stricken as hearsay. There is no rule or holding by this Court which would allow hearsay statements contained in an affidavit to support a motion for a new trial under Rule 59(d), C.R.C.P., when those same statements would otherwise be inadmissible as testimony in a court of law.

VI.

A COMMISSION'S VERDICT CANNOT BE IMPEACHED WITH INFORMATION GAINED AS SUBSEQUENT TO ITS DISCHARGE

The case of Evergreen Fire Protection District v. Huckeby, ___ Colo. App. ___, 626 P.2d 744 (1981), clearly states that any inquiry into the reasons or basis for the Commission's verdict should be made at the time the Commissioner's report is returned, and not at some time subsequent. As the Court of Appeals stated:

> Although the trial court has the discretion to submit interrogatories to be answered as part of the commissioners' report in an eminent domain proceeding pursuant to §38-1-115(3), C.R.S., 1973, this statutory provision contemplates that any such interrogatories will be propounded at the time of the valuation hearing. Any objection to commissioners' report must be made when it is returned before the commissioners are discharged. See, Fort Lyon Canal Company v. Farnan, 48 Colo. 414, 109 P. 861 (1910). 616 P.2d at 747.

Through the Affidavit of Mr. Windholz, the Court has opened up the deliberations of the Commission to further investigation at a time subsequent to the returning of the verdict. The Huckeby case is quite clear and is consistent with past decisions of the Supreme Court that any inquiry into findings of a commission or jury in a condemnation case must be made at the time that the verdict is returned.

VII.

THE RESPONDENT DISTRICT COURT ABUSED ITS DISCRETION IN RULING THAT THE AWARD WAS EXCESSIVE EVEN THOUGH IT WAS SUPPORTED BY COMPETENT EVIDENCE

It is the well settled rule in Colorado that an award in a condemnation case will not be overturned as excessive if it is supported by competent evidence in the record which fixes

the value both higher and lower than that found by the commission. 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). There has been no allegation by LRA that the evidence presented by the landowners in this case was not competent. Since the fair market value found by the Commission was less than the highest admissible testimony submitted to the Commission, there are no grounds for overturning the verdict of the Commission as excessive.

The Respondent District Court's action in overturning the verdict in this case as excessive is a particularly egregious abuse of discretion in that the Court did not have an opportunity to hear or review any of the evidence presented. Consistent with the procedure outlined in Board of County Commissioners v. Vail Associates, Ltd., 171 Colo. 381, 468 P.2d 842 (1970), the Respondent Judge Steinhardt instructed the Commissioners on their duties and the Commission then retired to a separate courtroom to receive evidence. At no time did the trial judge hear any of the evidence that was presented to the Commissioners. For the Respondent Judge to enter an Order for a new trial based on an excessive verdict without having heard or considered any of the evidence presented to the fact-finding body represents a gross abuse of discretion.

CONCLUSION

Petitioners Aldrich claim that the Respondent District Court abused its discretion in four areas granting LRA's Motion for New Trial. First, the Respondent District Court failed to strike the Affidavit of Mr. Windholz on the grounds that it violated Rule 606(b) and clearly articulated case law in the State of Colorado prohibiting statements by jurors dealing with discussions, reasons or considerations made by them during the course of their deliberations.

Secondly, the Respondent District Court grossly abused its discretion by failing to strike the Affidavit of Mr. Windholz as hearsay material, inadmissible under Rule 802, C.R.E., and the established case law in Colorado.

Thirdly, the Respondent District Court grossly abused its discretion by allowing, through the Affidavit of Mr. Windholz, an inquiry into the deliberations of the Commission after the verdict had been returned and the Commission discharged.

Finally, the Respondent District Court grossly abused its discretion by overturning a verdict as excessive, even though that verdict was supported by competent evidence on the record and even though the Respondent District Court had heard none of the evidence presented to the fact-finding body. The above-cited gross abuses of discretion warrant an issuance of a Writ of Prohibition directing the trial court to deny LRA's Motion for New Trial.

DATED this 23rd day of August, 1985.

Respectfully submitted,

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