8-2-1984

Beckord v. District Court of County of Larimer in Eighth Judicial Dist.

84SA[illegible]

SUPREME COURT, STATE OF COLORADO

Case No.

BRIEF IN SUPPORT OF ORIGINAL PROCEEDINGS IN THE NATURE OF PROHIBITION AND MANDAMUS

BRUCE M. BECKORD, BOB COPPER, ROBERT L. COLLARD, EDWARD GRUEFF, GERARD PEARSON, JAMES DURWARD, GORAN SVENONIUS, NICK KANE, PENNY L. KANE, NICKY'S RESTAURANT AND LOUNGE, LTD., a Colorado Corporation; NICKY'S RESTAURANT, LOUNGE AND MOTOR LODGE, a Colorado Corporation; PERRY E. BARTLETT AND AUDREY M. BARTLETT, d/b/a DEER CREST CHALETS, DON L. HEINEMANN AND NELROSE R. HEINEMANN, d/b/a THE VILLAGER MOTEL; CROSSED FINGERS, INC., d/b/a EIKER'S MOTOR INN, a Colorado Corporation; ALDON AND ELIZABETH OLSON, RONALD C. BRODIE; BRODIE'S SUPERMARKET, INC., LONIGAN'S, a Colorado General Partnership; PARKWHEEL CORPORATION, a Colorado Corporation, STEVEN NAGL, LON KINNIE; LLOYD MEYERS AND MARY M. MEYERS; CHARLOTTE MILLER, d/b/a "INDIAN VILLAGE" and APROPO, INC.,

Petitioners,

vs.

THE DISTRICT COURT OF THE COUNTY OF LARIMER IN THE EIGHTH JUDICIAL DISTRICT, STATE OF COLORADO; and THE HONORABLE WILLIAM F. DRESSEL, one of the Judges thereof,

Respondents.

ORIGINAL PROCEEDINGS IN THE NATURE OF PROHIBITION AND MANDAMUS

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I. INTRODUCTION
Statement of Facts

I. Petitioners are property and business owners located in and about the Town of Estes Park who suffered damage and injury as a result of the Lawn Lake Dam failure of July 15, 1982.

Petitioners filed actions in 1982 and 1983 against the Farmers Irrigating Ditch & Reservoir Company, the alleged owner of the Reservoir, its shareholder, officers, directors and employees, the State of Colorado and various agencies and employees thereof, and the Town of Estes Park in which they assert claims for such damages. All actions arising out of the incident were consolidated before the Honorable William F. Dressel pursuant to C.R.C.P. 42.1 (i) by Order of this Court dated April 15, 1983. (Exhibit "G").

Various Motions for Summary Judgment and Cross Motions were filed concerning the resolution, as a matter of law, of the liability of the State of Colorado, and its employees, the Town of Estes Park, and the constitutionality of Section 37-87-104(2), C.R.S. 1973, as amended.

On June 1, 1984, oral argument was heard before the Honorable William F. Dressel on all pending motions, the motions being taken under advisement. In late June of 1984, Judge Dressel called attorneys Frank Dubofsky and David Brougham (attorney for the State of Colorado), indicating that there was a problem with him deciding the issues as to the State of

Colorado and that he would reassign the issue to another judge for determination, as set forth more fully in the Affidavit of Frank Dubofsky (Exhibit "H"). In the two years during which the case has been pending, however, Judge Dressel never indicated to counsel any problems with him deciding any of the issues as to any defendant, including the State of Colorado.

On July 17, 1984 Petitioners Bruce Beckord, et al., by and through their attorney, Frank N. Dubofsky, filed a Motion and Memorandum to Disqualify Judge William Dressel and Motion to Request Clarification based upon the foregoing contacts. (Exhibits "A" and "B").

On July 18, 1984 Judge Dressel issued Orders regarding the liability of the Town of Estes Park and the Defendant shareholders, directors and employees of the Farmers Irrigating Ditch & Reservoir Company, and further issued an Order assigning the determination of the issue of the liability of the State of Colorado to Judge Arnaud Newton to hear arguments and rule on the issues, with legal argument to be held on August 9, 1984. (Exhibits "C"through "E").

In one of those Orders (Exhibit "C"), Judge Dressel ruled that Petitioners would have 20 days from the date of said Order, or until August 7, 1984 in which to file amended claims against the Defendant shareholders, directors and employees of the Defendant ditch company. Additionally, the cutoff date for filing a Motion for New Trial or to Alter or Amend the Judgment is August 2, 1984. See C.R.C.P. 59.

On or about July 26, 1984 Petitioners Nick Kane, et al., filed their Motion to Set Aside Orders and Rulings of July 18, 1984 and Joinder in Plaintiff Beckord's, et al., Motion and Memorandum to Disqualify Judge William Dressel and Motion for hearing forthwith.(Exhibit "F"). Similar motions were filed by counsel for other Plaintiffs.

On or about August 1, 1984, Petitioners' counsel, Frank Dubofsky, was informed by Judge Dressel that the Motions regarding the disqualification of Judge Dressel and the Motion Requesting Clarification were denied, and that since he was appointed by the Chief Justice of the Colorado Supreme Court, he had not and would not refer it to the local chief judge.

Petitioners, by this petition, challenge the propriety of the Respondent Court's actions in denying their Motions to Disqualify, and proceeding further in the action below.

Statement of the Case

The subject of the action below is the assertion of claims for damages and injury caused by the Lawn Lake Dam failure of July 15, 1984 in Rocky Mountain National Park, Petitioners claim that the State of Colorado, Town of Estes Park and the shareholders, directors and employees of the owner of the reservoir are liable for all such damage and injury.

This proceeding involves the propriety of the actions of Judge Dressel in failing to disqualify himself from the entire action below as required by C.R.C.P. 97 and to immediately stay any proccedings in the action until this matter is finally resolved by this Court. An emergency situation is created by certain cutoffs for the filing of Rule 59 Motions and amendments

to pleadings in the action on August 2, 1984 and August 7, 1984 respectively, as Petitioners face the peril of waiving their objection to further proceedings before Judge Dressel should they file such pleadings requesting any further relief. Petitioners therefore seek emergency relief, including a stay of further proceedings in the action below until this matter is resolved.

II. ARGUMENT

A. AN ORIGINAL PROCEEDING PURSUANT TO COLORADO APPELLATE RULE 21 IS THE PROPER PROCEDURE FOR THE REVIEW OF THE RESPONDENT COURTS DENIAL OF PETITIONERS' MOTION FOR DISQUALIFICATION.

This proceeding is to review the actions of the Respondents in failing to grant Petitioners' Motions to Disqualify Judge Dressel from the entire action as mandated by C.R.C.P. 97, and to stay further proceedings in the action below until this matter is finally determined. Although Petitioners are unaware of any case wherein this issue has been expressly determined by this Court, they would submit that it falls squarely within the purpose underlying Rule 21 proceedings.

The purpose of original proceedings before this Court are to test whether the trial court is proceeding without or in excess of its jurisdiction and to further review a serious abuse of discretion where an appellate remedy would not be adequate. Margolis vs. District Court, 638 P.2d 297 (Colo. 1981). Where the damage that may result from the Court's abuse of discretion cannot be cured on appeal, mandamus will lie to insure observance of the rules of civil procedure. Tyler vs. District Court, 193 Colo. 31, 561 P.2d 1260 (1977). Further, the general function of a Writ of Prohibition is to enjoin an excessive or improper assumption of authority. Vaughn vs. District Court, 192 Colo. 348, 559 P.2d 222 (1977).

In the present case, an appeal will not be an adequate remedy. Should Petitioners attempt to comply with the Order of the Court in filing amended pleadings, Rule 59 motions, or in requesting any further relief, they must proceed at the peril of waiving their objections to any further proceedings before Judge Dressel. See Aaberg v. District Court, 136 Colo. 525, 319 P.2d 491 (1957). The situation Petitioners face is identical to that presented in cases where a motion for change of venue is improperly granted. Original proceedings under C.A.R. 21 are proper in such cases. See Jamieson v. District Court, 115 Colo. 298, 172 P. 2d 449 (1946). In proceeding to trial after a motion to change venue is improperly granted without objection or seeking relief by original proceeding in the Supreme Court, the party is deemed to have waived the error in changing venue. Smith v. Huber, Colo. App., 666 P.2d 1122 (1983).

As Petitioners are faced with immediate deadlines for the filing of Motions for New Trials or Motions to Alter or Amend and additionally for the filing of amended pleadings which may further constitute waivers of their Motions to Disqualify Judge Dressel immediate relief is necessary and appeal will not provide an adequate remedy to Petitioners.

Further, as Judge Dressel was appointed under C.R.C.P. 42.1 by this Court's Order of April 15, 1983 consolidating all cases before him, it is proper for this Court to now address the issues raised pertaining to his disqualification.

B. C.R.C.P. 97 REQUIRES THAT JUDGE DRESSEL DISQUALIFY HIMSELF NOT ONLY AS TO THE ISSUES PERTAINING TO THE STATE OF COLORADO, BUT ALSO AS TO THE REMAINDER OF THE CASE.

The Petitioners hereby challenge the ruling of Judge William Dressel in failing to disqualify himself entirely from this action, but rather, to disqualify himself from only a

portion of the action, reassigning the issues pertaining to the State of Colorado to another judge in the Eighth Judicial District for hearing and determinations.

The Motion and Memorandum to disqualify Judge William Dressel was clearly filed by Petitioners Beckord, et al., prior to Judge Dressel's rulings of July 18, 1984. As a result, pursuant to Rule 97, any further proceedings should have been stayed. Further, Colorado caselaw is clear that where a Judge disqualifies himself due to an ethical problem, the proper way to proceed is for the Court to refer the matter to the Chief Judge for reassignment. See Aaberg v. District Court, supra. and C.R.C.P.97. There is no provision for partial disqualification in Rule 97, and this Court's attempt to do so is improper. See, Judicial Canon of Ethics 3C(1)(a-c); Wood Bros. Homes vs. City of Ft. Collins, 670 P.2d 9 (Colo. App. 1983). Rule 97 requires disqualification from the entire action, rather than piecemeal litigation caused by disqualification only as to certain claims or parties. See Chalpin vs. Mobile Gardens, 18 Ariz. App. 231, 501 P.2d 407 (1972), in which the Court held that a law requiring disqualification from an action required the Judge to disqualify himself from the entire case. The Arizona Court of Appeals stated at page 412:

> ". . . It would appear more reasonable that the "action" as used in "transfer the action" and "preside" at the trial of the action was intended to be used in its generic sense as the entire judicial proceeding. Webster's New International Dictionary. . . this is based upon the rationale of the rules of civil procedure which were designed to avoid duplicity of litigation and to consolidate and simplify rather than to fragment and complicate [citing cases]. . . Under the interpretation urged by Acosta, it would be possible for several separate judges to hear several lawsuits all of which initially could have been determined in a single litigated setting. Such could further

result in duplicity of presentation of evidence and possibly conflicting rulings on similar issues of law and evidence."

See also Stefonic vs. District Court, 117 Mont. 86, 157 P.2d 96 (1945), in which the Court held that a claim of prejudice as to only certain claims requires disqualification as to the entire case. Petitioners would submit that Judge Dressel should be restrained from taking any further action in this case, and should be required and pursuant to C.R.C.P. 97, the case should be reassigned by the Chief Judge of the Eighth Judicial District in accordance with said rule. Aaberg vs. District Court, supra.

III. CONCLUSION

In summary, in light of the foregoing arguments and authorities, Petitioners would urge that this grant the relief requested in their Petition and such other relief as this Court deems just and proper.

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Original Proceedngs in the Nature of Prohibition and Mandamous was placed in the U.S. Mails, postage prepaid thereon, this 2nd day of August, 1984, addressed as follows:

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