COURT OF APPEALS, STATE OF COLORADO

CASE NO. 90 CA 721

AMICUS CURIAE OF THE COLORADO MUNICIPAL LEAGUE IN SUPPORT OF RESPONDENT, CITY OF NORTHGLENN

JACK J. GRYNBERG,

Plaintiff-Appellee

v.

CITY OF NORTHGLENN, COLORADO

Defendant - Appellant

On Appeal from Weld County District Court, Case No. 88CV 940, Division 1, Honorable Robert A. Behrman

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C. Did the court err by allowing the trier of fact in a valuation hearing to hear evidence other than that relevant to the fair market value of the property thereby increasing the amount of the award and circumventing the Colorado Governmental Immunity Act?

Statement of the Case

Colorado Municipal League adopts and incorporates herein the statement of the case in the City of Northglenn's Opening Brief.

Interest of the Amici

The Colorado Municipal League is a nonprofit corporation and voluntary association of 246 municipalities (99.68% of the total incorporated state population) located throughout the State of

Colorado, including all home rule municipalities, all municipalities greater than 2,000 in population, and the vast majority of those with a population of 2,000 or less. All of these municipalities have the power of eminent domain and are subject to the Governmental Immunity Act. Municipalities have the right and need to exercise the power of eminent domain to provide basic municipal services such as roads, sewer and water services. However, municipalities also have limited funds and are responsible to their taxpayer citizens for how those funds are spent. Tort liability against those municipalities is limited to $150,000 per person and $400,000 per occurrence by the Governmental Immunity Act for the policy reasons set forth in the legislative declaration thereof.

In the case before the court, the court did not find there was a taking by Northglenn. The property owner was allowed to increase the award of compensation in a valuation hearing by introducing evidence of matters other than the fair market value of the property, including evidence of tort claims against independent contractors of Northglenn. The result is that public funds have been ordered to be paid to a person, allegedly for just compensation for a taking that may or may not have occurred, but in reality for tort claims which by law are controlled by the Governmental Immunity Act. The U.S. and Colorado Constitutions, and the state legislature have provided that a government cannot take property without just compensation. Just compensation is

limited to the fair market value of the property taken. The long term result if this decision stands is that individuals will allege a taking in order to circumvent the Governmental Immunity Act and recover, whether or not a taking actually occurred, thereby substantially increasing the cost of government services to taxpayers.

Argument

A. NEITHER THE WELD COUNTY NOR THE DENVER DISTRICT COURT HAD SUBJECT MATTER JURISDICTION OVER THE PROCEEDINGS.

An inverse condemnation claim is to be treated as an eminent domain proceeding conducted strictly according to the procedures set out in § 38-1-101, et seq., C.R.S. Ossman v. Mountain States Telephone & Telegraph, 184 Colo. 360, 520 P.2d 738 (1974); Hayden v. Board of County Commissioners, 41 Colo. App. 102, 580 P.2d 830 (1978). A condemnation action must be filed and tried in the county in which the subject property is located. § 38-1-102, C.R.S.[1]

Where a statute requires an action to be filed in a particular county, failure to file in that county is not simply a matter of venue, but deprives the court of subject matter jurisdiction. Mile

[1] Grynberg acknowledged that the inverse condemnation claims must be filed and pursued in Weld County. See Grynberg's Motion to Transfer to the District Court for Weld County, Colorado, Paragraphs 2 through 5.

High United Way, Inc. v. Board of Assessment Appeals, XIV BTR 515 (Colo. App. April 26, 1990). The only order a court without jurisdiction can make is dismissal. Sam's Automatic Car-Coupler v. League, 25 Colo. 129, 54 P. 642 (1898). Any other action is a nullity. People in Interest of S.B., 742 P.2d 935 (Colo. App. 1987). The applicable statute of limitations applicable to Grynberg's claims is two years. § 13-80-102(1)(h), C.R.S.

Grynberg originally filed his claims against Northglenn in the Denver District Court in 1980. He first made his inverse condemnation claim eight years later and sought a change of venue to the Weld County District Court in October 1988. Northglenn objected to the transfer when requested and renewed its objection in its Motion for Judgment Not Withstanding the Verdict. Therefore, the Denver District Court did not have subject matter jurisdiction to grant Grynberg's change of venue in 1988. The Weld County District Court did not have jurisdiction when Grynberg filed his claim in 1988, because the statute of limitations had expired. Both courts only had the jurisdiction to dismiss Grynberg's claim.

B. THE COURT COULD NOT HAVE FOUND A TAKING IN THIS CASE AND THEREFORE ERRED BY PROCEEDING WITH A VALUATION HEARING.

Prior to proceeding on an inverse condemnation claim, the court must determine a taking has occurred. The Mill v. State Department of Health, 787 P.2d 176 (Colo. App. 1989). 3 Nichols,

Eminent Domain §8.1[4] In order for there to be a taking, there must be a legal interference with the use of the property or physical ouster of the owner by the condemnor. Lipson v. Colorado Department of Highways, 41 Colo. App. 568, 588 P.2d 390 (Colo. App. 1978); Kratzenstein v. Board of County Commissioners, 674 P.2d 1009 (Colo. App. 1983). Failure of the court to find a taking precludes proceeding with a valuation hearing. Morrison v. City of Aurora, 745 P.2d 1042 (Colo. App. 1987); 11 McQuillin, Municipal Corporations §32.132a (3rd Ed.)

In this case, Grynberg could not identify what property interest was taken. Northglenn's Opening Brief, pages 21 - 23. Therefore there could be no taking justifying a valuation hearing.

C. THE COURT ERRED BY ALLOWING THE JURY TO HEAR EVIDENCE OTHER THAN THAT RELATED TO THE FAIR MARKET VALUE OF THE PROPERTY AND BY SO DOING, INCREASED THE AWARD TO GRYNBERG AND CIRCUMVENTED THE COLORADO GOVERNMENTAL IMMUNITY ACT.

By allowing Grynberg to introduce evidence at a valuation hearing of alleged negligence of Northglenn, and its independent contractors, the court allowed:

1. Circumvention of Governmental Immunity Act. The legislature adopted the Governmental Immunity Act, §§24-10-101, et seq., C.R.S (GIA) in 1971 recognizing that a limitation on the liability of state and local governments was necessary in order to

avoid disruption of the provision of essential governmental services and functions or excessive fiscal burdens to taxpayers for those services. §24-10-102, C.R.S. Grynberg's tort claims are subject to the $150,000 limit of the GIA. §§24-10-105 and 24-10-114, C.R.S. An inverse condemnation claim is not a tort claim subject to the GIA. The Mill v. State Department of Health, 787 P.2d 176 (Colo. App. 1989) cert granted. Hayden Board of County Commissioners, 41 Colo. App.102, 580 P.2d 830 (1978). However, in the event a claimant has both tort and an inverse condemnation claim, he must elect between the remedies and any inverse condemnation claim must be conducted in strict compliance with §38-1-101, et seq., C.R.S.; Ossman v. Mountain States Telephone and Telegraph, 184 Colo. 360, 520 P.2d 738 (1974). By allowing evidence of alleged tort claims in the valuation hearing, the trial court nullified the requirement to elect between remedies and the legislative purposes and limitations of the GIA.

2. Increase of the Amount of Just Compensation To Include More Than The Fair Market Value of the Property. The only matters to be heard or decided by the jury at a valuation hearing are those relevant to the fair market value of the property. §§38-1-101, 38-1-105, C.R.S.; Board of County Commissioners v. Vail Associates, 171 Colo. 381, 468 P.2d 842 (1970). Fair market value is what a buyer is willing to pay and a seller willing to accept in cash under normal circumstances for the transfer of property when both are willing, but neither obligated to do so. Department of

Highways v. Schulhoff, 167 Colo. 72, 445 P.2d 402, 404 (1968).

All other issues are to be determined by the court. §38-1-101, C.R.S., Stark v. Poudre School District, 192 Colo. 396, 560 P.2d 77 (1977); Goldstein v. Denver Urban Renewal Authority, 192 Colo. 422, 560 P.2d 80 (1977). This requirement is to ensure that the jury determines the fair market value based upon evidence thereof, not based on speculation, conjecture or claims for other damages. Department of Highways v. Schulhoff, 167 Colo. 72, 445 P.2d 402 (1968); Ruth v. Department of Highways, 145 Colo. 546, 359 P.2d 1033 (1961); Board of County Commissioners v. Vail Associates, 171 Colo. 381 468 P.2d 842 (1970); 11 McQuillin, Municipal Corporations §§32.92e, 32.92g 32.95 (3rd Ed.).

3. Recovery for Dismissed Tort Claims. The Denver District Court dismissed Grynberg's tort claims and Grynberg elected to proceed against Northglenn on an inverse condemnation claim. Grynberg then introduced evidence at the valuation hearing of his tort claims against Northglenn and third parties not party to the proceeding. See Northglenn's Opening Brief, pages 28 - 31 for partial listing of such evidence. Not only did the court allow the evidence, but gave the jury an instruction on Northglenn's alleged tort liability for the third parties under the doctrine of respondent superior. Instruction No. 12a. This action violated Colorado law by allowing Grynberg to recover for tort claims dismissed by the Denver District Court in a proceeding to determine

the fair market value of property. Ossman v. Mountain States Telephone and Telegraph, 184 Colo. 360, 520 P.2d 738 (1974); City of Boulder v. Snyder, 396 F.2d 853, cert denied, 383 U.S. 1051, 89 S.Ct. 692, 21 L.Ed. 2d 693 (1968).

4. Tort Damages for Acts of Third Parties To Be Imputed to Northglenn. Inverse condemnation claims can only be brought against a governmental or public entity having the power of eminent domain. The Mill v. State Department of Health 787 P.2d 176 (Colo. App. 1989); Deets v. Mountain Area Joint Sanitation Authority, 479 A.2d 49 (Pa. Commonwealth 1984). The GIA governs all tort actions against Northglenn. §24-10-105, C.R.S. Northglenn is only liable for the acts of its agents, public employees, as specified in the GIA. §24-10-102, C.R.S. The definition of public employee in the GIA specifically excludes independent contractors such as Sheaffer & Roland, Inc., Chen & Associates, Inc. Cameron Engineers, and Arrow Drilling Company. §24-10-103(4)(a), C.R.S. Grynberg introduced substantial evidence of tort claims at the valuation hearing against independent contractors of Northglenn not party to the suit. See pages 28-31 of Northglenn's Opening Brief. Sheaffer & Roland Inc., Chen & Associates, Inc, Cameron Engineers & Arrow Drilling Company are private entities with no power of eminent domain.

The court gave instruction 12a to the jury in the valuation hearing under a tort respondent superior theory that Northglenn was

responsible for the acts of its independent contractors. The instruction is improper in an inverse condemnation claim, The Hill v. State Department of Health, or a tort claim, §§24-10-103(4)(a) and 24-10-105, C.R.S.

> " . . . the trial court combined elements of the measure of damages of a trespass action and an inverse condemnation action in its instructions. As a result, the verdict which was submitted to the jury was not applicable either to trespass or inverse condemnation. This, of course, was error and requires a reversal of the judgment of the trial court." Ossman v. Mountain States Telephone & Telegraph, 184 Colo. 360, 520 P.2d 738, 741 (1974).

5. Recovery of Damages By Grynberg in Duplicate; Once in Inverse Condemnation Again in Tort. Grynberg's tort claims against Northglenn were limited to $150,000. §§24-10-105 and 24-10-114, C.R.S. Grynberg's inverse condemnation claim against Northglenn was limited to the fair market value of the property exclusive of speculative considerations. §§38-1-101, 38-1-105, C.R.S.; Board of County Commissioners v. Vail Associates, 171 Colo. 381, 468 P.2d 842 (1970). Inverse condemnation is designed to provide a property owner a remedy not otherwise available, not to create a new cause of action. 3 Nichols, Eminent Domain §8.1[4] P. 8-34 (3rd Ed.). The failure of the court to separate the inverse condemnation and tort claims allows impermissible multiple recovery for the same loss. City of Boulder v. Snyder, 396 F.2d 853, cert denied 393 U.S. 1051, 89 S.Ct. 692, 21 L.Ed. 2 693 (1968). Aleman v. Sewerage & Water Board of New Orleans 199 So. 380 (La. 1940).

Conclusion

In providing essential government services, municipalities are responsible for the expenditure of taxpayer funds for the health, safety and welfare of their citizens. They also have a duty to their citizens to spend such funds only for public purposes and not for the benefit of private individuals. Individuals harmed by the acts of municipalities, either in tort or by a taking of property are entitled to recovery for legitimate damages. However, neither the power of the municipality or the rights of the individual are unbridled.

In balancing the interests of the individual taxpayer to benefit from government services and be protected from individual harms, the legislature and the people have adopted several limitations on municipalities and individuals: Municipalities cannot take property without paying just compensation (Article II, § 15, Colorado Constitution); just compensation is the fair market value of property which must be determined by a trier of fact whereas all other related issues are determined by the court; individuals must follow certain procedures to proceed with claims for recovery against a municipality; and the total amount of tort recovery by an individual against a municipality is limited to $150,000. The courts have adopted additional policies to implement these constitutional and legislative provisions: A taking does not occur unless there is a physical invasion of the interests of the

property owner; announcement or plans for property by the government does not constitute a taking; fair market value of property is what a buyer would pay and what a seller would accept for a parcel of property in cash under normal circumstances if both were willing and neither under an obligation to do so; the fair market value does not include claims for other injuries or values based on speculation or conjecture; if a municipality takes property without paying just compensation, the owner may initiate an inverse condemnation action to receive just compensation; if the owner has additional claims against the municipality, he must elect between his tort claims and inverse condemnation claim because he is not entitled to multiple recovery from the government.

In this case, the court has ignored all these procedures and requirements. If this case stands, individuals will be able to obtain excess public funds from a municipality by: circumventing the requirements and limitations of the Governmental Immunity Act by filing inverse condemnation claims; receiving just compensation from a municipality whether or not it has taken property of the individual; recovering more than just compensation from a municipality by introducing evidence of tort claims at a valuation hearing; and artificially inflating the cost of property planned for public improvement.

Governmental entities will not be able to: discuss or plan projects in compliance with open meetings and open records laws

without increasing the cost of the project by the increased land acquisition cost; obtain insurance or self insure for tort claims relying on the limits of the Governmental Immunity Act; or budget or anticipate costs of governmental projects. The net result would be a complete imbalance of the interests of the government and individual taxpayers to the ultimate harm of both.

Wherefore, the Colorado Municipal League respectfully requests that this court uphold the existing balance established by the people, the legislature and the judicial system by reversing the district court and dismissing Grynberg's claims.

Respectfully submitted this 3rd day of December, 1990.

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CERTIFICATE OF MAILING

I hereby certify that on this 3rd day of December, 1990, I placed a true and correct copy of the foregoing in the United States mail, first class postage prepaid at Denver, Colorado, and addressed as follows:

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