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Summary of State, Department of Transportation v. Cowan, 120 Nev. Adv. Op. No. 90

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*State, Department of Transportation v. Cowan, 120 Nev. Adv. Op. No. 90, 103 P.3d 1 (Nev. 2004)*¹

PROPERTY – COMPENSATION FOR EMINENT DOMAIN

Summary

Appeal and cross-appeal from a judgment of the Eighth Judicial District Court, State of Nevada, awarding damages to the lessee of property condemned by the Nevada Department of Transportation (NDOT).

Disposition/Outcome

Affirmed. The district court did not abuse its discretion and properly ruled on evidence regarding the lessees' damages for lost business goodwill. The district court also properly excluded evidence of lost business opportunity. Moreover, there is no evidence to support a damage award for inverse condemnation.

Factual and Procedural History

In November 1999, NDOT condemned a one-half acre parcel of real property at Sahara Avenue and Rancho Drive in Las Vegas as part of the Interstate 15 expansion project. Lou's Texaco, a franchise gas station and convenience store, occupied the site. The Cowans purchased this franchise in October 1994 for \$410,000, which included \$260,000 for business goodwill. They paid an annual lease of \$100,584 to Equilon Enterprises, the owner of the property.

In response to the condemnation action, the Cowans filed an inverse condemnation claim against the State, seeking compensation for lost business opportunity and lost business goodwill. Before trial, the State moved to dismiss the Cowans' counterclaim and to exclude evidence of lost business opportunity and lost business goodwill. The district court denied the motion to dismiss the counterclaim and permitted evidence of lost business goodwill. However, the court excluded evidence of lost business opportunity.

At trial, Stuart Cowan testified that he was unable to find a comparable gas station franchise available for purchase in the Las Vegas Area. The parties to this action agreed that Lou's Texaco was strategically located to attract business near the I-15 on and off-ramps and a hotel casino. Stuart Cowan testified that the freeway and street traffic passing the gas station exceeded 400,000 cars daily.

The jury awarded the Cowans \$260,000 as compensation for lost business goodwill. The State appeals from this portion of the judgment and also challenges the district court's calculation of costs and attorneys fees. The Cowans cross-appeal, contending that several errors before, during and after the trial resulted in inadequate recovery. They also appeal the amount of attorneys fees awarded.

Justice Miriam Shearing, writing for the majority opinion for the Nevada Supreme Court, affirmed the lower court's decision, ruling that the Cowans were entitled to compensation for

¹ By Beth Rosenblum.

destruction of their business, as an exception to the undivided-fee rule. Furthermore, business goodwill, rather than lost profits, was the appropriate measure of damages.

Discussion

Inverse Condemnation

Inverse condemnation is an “action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of power of eminent domain has been attempted by the taking agency.”² Here, the State exercised eminent domain by filing its complaint for title to the parcel and naming the Cowans as parties. Thus, an inverse condemnation counterclaim by the Cowans was inappropriate in this case.

Compensation for Loss of a Business in a Condemnation Action

The State’s argument against damage awards for lost business is goodwill is generally supported by this court’s case law. In *Clark County v. Sun State Properties*, the Nevada Supreme Court held that NRS 37.115 codifies the undivided-fee rule, by which condemned property is first valued as though it were unencumbered and then the total award is apportioned among various interests.³ Ordinarily, under this rule, the lessee would be compensated only for the value of the leasehold but not for damages based on business loss.⁴ Traditionally, damage to a business has been treated as a non-compensable loss, even when the damage or destruction occurs because a condemning agency takes the land on which the business is conducted.⁵

However, the Nevada Supreme Court has recognized that under certain exceptional circumstances, the business owner may be compensated over and above the value of real property. In *National Advertising Co. v. State, Department of Transportation*, the Nevada Supreme Court recognized that when the condemnation of the real property results in the business being destroyed, the business owner should be compensated.⁶ Specifically, the Nevada Supreme Court reasoned that lessees of billboards should be compensated for lost advertising income when the State condemned the underlying property, and the billboards could not be relocated.⁷

The instant case is analogous to *National Advertising*. When the State condemned the Sahara-Rancho property, the Cowans’ business was destroyed and they were unable to relocate because oil companies were not extending new leases for gas station franchises in Las Vegas. Thus, the undivided-fee rule does not adequately compensate the lessees and the State must compensate the Cowans for the destruction of their business.

² *Thornburg v. Port of Portland*, 376 P.2d 100, 101 n.1 (Or. 1962), *quoted in* *United States v. Clarke*, 445 U.S. 253, 257 (1980)).

³ 119 Nev. 329, 337 (2003).

⁴ *Id.* at 336-37.

⁵ 8A PATRICK J. ROHAN & MELVIN A. RESKIN, *NICHOLS ON EMINENT DOMAIN* § 29.02(1), at 29-12 to 29-18 (3d ed. 2004).

⁶ 116 Nev. 107, 113 (2000).

⁷ *Id.* at 113-14.

Measure of Damages

The district court determined that the measure of damages is the business's goodwill. In *Nichols on Eminent Domain*, the damages issues are discussed as follows:

If the business cannot be relocated, or is relocated only at a substantial cost of patronage and profits, the business owner suffers the loss of an intangible business asset, in addition to whatever tangible assets may have been taken. This intangible asset is commonly referred to as business goodwill. While different jurisdictions vary slightly in their definitions of goodwill, the term generally is used to describe that component of value attributed to a business's reputation in the community, loyal customer base, and ability to attract new customers. This intangible element imbues a business with value which cannot be accounted for by a mere examination of its physical or tangible assets; in short, where the whole business exceeds the sum of its tangible parts, business goodwill accounts for the additional value.⁸

Here, the appropriate measure of damages is business goodwill, not lost business opportunity or lost income as argued by the lessees. Although the court allowed compensation for lost income in *National Advertising*, that case is distinguishable because goodwill cannot be valued for billboards but can be assessed for an existing business.⁹ Valuation based on business goodwill is a more appropriate measure of the Cowans' damages. Accordingly, the district court did not err.

Admission of Original Purchase Price

The Cowans argue that the district court abused its discretion in admitting evidence of the price they paid to purchase the business-goodwill interest in 1994. They maintain the 1994 amount did not fairly reflect the value of their business goodwill on the date the State took the property in 1999.

However, the five-year gap in time is not so remote, nor is the increase in business value so extensive, that the original purchase price was an unfair criterion for the jury to consider. The trial court has wide discretion in determining the admissibility of evidence in a condemnation action,¹⁰ and here, it did abuse this discretion.

Comparable California Sales

The Cowans also maintain that the district court abused its discretion when it excluded evidence of comparable California sales and appraisals. Pursuant to Nevada Revised Statute 48.035(1), the district court has discretion to exclude evidence if the probative value is

⁸ 8A NICHOLS, *supra* note 5, § 29.01(1), at 29-5 to 25-6.

⁹ See 116 Nev. 107.

¹⁰ See *City of Elko v. Zillich*, 100 Nev. 366, 269 (1984) (nothing that "trial court is allowed wide discretion in passing on matters relating to expert testimony").

substantially outweighed by the danger of unfair prejudice or undue delay.¹¹ Here, the district court properly excluded evidence of California property sales and appraisals because it was not probative of the real property situation in Nevada and would be highly misleading to the jury.

Exclusion of Gaming Value

The Cowans allege that the district court erred in not considering the gaming value of their business. However, their contention that they had an unrestricted gaming license to install thirteen slot machines is not supported by the record.

Evidence of Value

Additionally, the Cowans argue that the \$260,000 award is too low and not in the range of testimony presented. Although the Cowans presented testimony that they should receive between \$1.6 and \$1.8 million in damages, the jury was free to disbelieve that testimony. Other evidence, including the purchase price five years earlier, also suggested a lower value. The district court did not err in entering judgment on the jury's verdict.¹²

Attorneys Fees and Costs

The district court awarded the Cowans attorney's fees in the amount of \$97,650, based on \$325 per hour for the estimated hours. The Cowans argue that the fees should have been higher, because the federal Uniform Relocation Assistance and Real Property Acquisitions Policies Act¹³ requires payment of fees "actually incurred" in an inverse condemnation proceeding. As noted, this was not an inverse condemnation proceeding. Furthermore, the State's argument that the Cowans' counsel did not properly demonstrate the amount of hours worked and that costs exceeded statutory limits is erroneous.

Miscellaneous Allegations

There is no merit to allegations that the State's attorney and expert witnesses engaged in misconduct because there was no contemporaneous objection,¹⁴ and the alleged misconduct was appropriate cross-examination.

Post-Trial Motions

The district court did not abuse its discretion in denying the Cowans' post-trial motion to enter judgment notwithstanding the verdict. The fact that the jury award was less than the Cowans anticipated does not justify reversing the jury's verdict.

¹¹ NEV. REV. STAT. 48.035(1) (2005).

¹² K-Mart Corp. v. Washington, 109 Nev. 1180 (1993) (observing that damages awards within a jury's province are generally infirm only if influenced by passion or prejudice).

¹³ 42 U.S.C. §§ 4601-4655 (2000) (codified in Nevada by NRS 342.105).

¹⁴ Ringle v. Bruton, 120 Nev. 82 (2004).

Concur/Dissent

MAUPIN, J.:

Justice Maupin agreed that the Cowans were entitled to damages for lost business goodwill. However, juries in eminent domain actions should receive limiting instructions concerning the probative value of evidence relating to the original purchase price of the property. Such evidence is relevant to provide context to the various opinions of the values of the property at the time of taking. Moreover, Justice Maupin recommended reversing and remanding the case for a new trial because the district court should have allowed the Cowans to present evidence of comparable sales from other states.

GIBBONS, J.:

Justice Gibbons agreed with the majority that business owners must be compensated for the fair market value of their businesses where they cannot be relocated. However, Justice Gibbons argued that the fair market value should be calculated according to the date of condemnation, as set forth in NRS 37.120.¹⁵ Like Justice Maupin, Justice Gibbons also maintained that evidence of comparable sales and appraisals in California was admissible.

Conclusion

The Nevada Supreme Court's decision is similar to other cases that have allowed compensation for business goodwill. In *Michigan State Highway Commissioner v. L & L Concession Co.*, the court held that a concessionaire at a racetrack that had been condemned could be compensated for his business's going-concern value separate and apart from the leasehold value.¹⁶ Similarly, in *City of Lansing v. Wery*, the court compensated a restaurant operator who could not relocate from a condemned site.¹⁷

¹⁵ NEV. REV. STAT. 37.120(1) (2005) provides:

To assess compensation and damages as provided in NRS 37.110, the date of the first service of the summons is the date of valuation, except that, if the action is not tried within 2 years after the date of the first service of the summons, and the court makes a written finding that the delay is caused primarily by the plaintiff or is caused by congestion or backlog in the calendar of the court, the date of valuation is the date of the actual commencement of the trial. If a new trial is ordered by a court, the date of valuation used in the new trial must be the date of valuation used in the original trial.

¹⁶ 187 N.W.2d 465 (Mich. Ct. App. 1971).

¹⁷ 242 N.W.2d 51 (Mich. Ct. App. 1976).