In The

Supreme Court of Virginia

RECORD NO. 140929

JAMES M. RAMSEY, JR. and JANET D. RAMSEY,

Appellants,

v.

COMMISSIONER OF HIGHWAYS,

Appellee.

BRIEF OF APPELLANTS

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STATEMENT OF THE CASE

This is an appeal of a final judgment of the Virginia Beach Circuit Court in an eminent-domain action initiated by the Commissioner of Highways. The Commissioner utilized quick-take procedures to acquire a portion of property owned by James and Janet Ramsey, for use in making improvements to an Interstate highway.

During the just-compensation trial, the court barred the landowners from mentioning the Commissioner's statutory pre-condemnation statement of value. A. 82-84. It also prohibited them from cross-examining the Commissioner's appraiser about the foundation for his value opinion.

A jury returned a report of $234,032 for just compensation. The court overruled the landowners' exceptions and entered judgment on the verdict. This Court awarded the landowners an appeal on November 3, 2014.

ASSIGNMENTS OF ERROR

1. The trial court erroneously refused to admit oral and written evidence of the Commissioner's pre-offer statements of value. The statements were admissible as party admissions, and were relevant and material. [Preserved at A. 60-64, 74-80, 83-84, 95-98.]

2. The trial court erroneously prohibited the landowners from cross-examining the Commissioner's appraiser on the basis for his opinions. [Preserved at A. 36-38, 41-44, 98-99.]

FACTS

In 2009, the Commissioner decided to take a portion of the property on which the landowners' home is located. As required by Code §25.1-204(E)(1), before making an offer to purchase the land, he told the landowners that their property was worth $500,000 and that just compensation for the proposed take, including damage to the residue, was $246,292. This information was separately confirmed in a written report prepared by Thomas Moore Savage, a Department of Transportation certified real-estate appraiser. A. 85-86, 89-91. The report was reviewed and confirmed by two other VDOT officials. A. 89, 92-93.

The Commissioner subsequently offered to purchase the needed portion of the property, but was not successful. He then instituted this proceeding by filing a certificate of take and a petition in condemnation. A. 1, 5.

The trial court convened a jury trial to determine just compensation. At trial, the Commissioner used a different appraiser, Lawrence J. Colorito, Jr., to testify about the property's value and the amount of just compensation. In formulating his opinions, this second appraiser had relied in part on Savage's 2009 report. A. 36-37.

When the landowners sought to cross-examine Colorito on that reliance, the court sustained the Commissioner's objection and prohibited questioning. A. 44. The landowners proffered the foreclosed cross-examination outside the hearing of the jury. A. 52-56.

The second appraiser's valuation varied significantly from the Commissioner's pre-condemnation admission and the 2009 report. Instead of an overall value of $500,000, Colorito told the jury that the property was worth only

$250,000. A. 26. And instead of a just-compensation figure of $246,292, which the Commissioner had certified in 2009, Colorito opined that just compensation was only $92,127. A. 27.[1]

The landowners offered into evidence the 2009 report and the Commissioner's oral admission of the property's value. This statement was a party admission, not an offer to purchase, since it must be provided *before* the condemnor makes an offer. The court sustained the Commissioner's objection to the evidence. A. 82-84. It forbade testimony about the oral statement and the exhibit. A. 85-86.

[1] The trial court learned that this practice of sharply reducing appraisal figures for landowners who do not agree to the Commissioner's offer has become common in VDOT takings. A summary of appraisal reductions (A. 108) lists recent instances where the Commissioner has used this punitive tactic, sometimes 90% below the pre-negotiation amount.

ARGUMENT

Standard of Review

Assignment 1, involving the exclusion of evidence, is reviewed for abuse of discretion. *ExxonMobil Corp. v. Minton*, 285 Va. 115, 130 (2013). Assignment 2 implicates the fundamental and absolute right of cross-examination, and is reviewed de novo. *Food Lion, Inc. v. Cox*, 257 Va. 449, 450-51 (1999).

Discussion

1. The statutory pre-offer statement is admissible in just-compensation trials. (Assignment 1)

Since the legislature amended Code §25.1-204 in 2005[2] to require a statement of value and of just compensation before negotiations begin, this Court has not addressed the admissibility of such a statement at trial.

Under the Code, there are three steps in the process of a condemnor's acquisition of property. Step 1 is delivery to

[2] 2005 Va. Acts. Ch. 878.

the landowner of a statement indicating the value of the entire parcel and the amount of just compensation that the condemnor believes will be due. This step must be taken "[b]efore making an offer to acquire or initiating any related negotiations for real property . . .." Code §25.1-204(E)(1).

The second step is the negotiation process. If those efforts fail to produce an agreement, the third step is the initiation of condemnation proceedings in circuit court. In quick-take proceedings such as this one, that process begins with the filing of a certificate of take and the deposit of funds into the court. Code §33.1-122; A. 1.

The trial court erroneously treated the mandatory statement as though it were the second step in the process – an offer to purchase. A. 80-83. But by requiring the Commissioner to provide the statement "[b]efore making an offer" and before "initiating any related negotiations," the General Assembly mandated disclosure of this information before the negotiation process begins.

While this is an issue of first impression in Virginia, the same is not true elsewhere. Other appellate courts have considered this very issue and have concluded that the pre-offer statement is admissible.

United States v. 320.0 Acres of Land, 605 F.2d 762 (5th Cir. 1979), is the leading case on admissibility of pre-condemnation statements. The Fifth Circuit recognized that these statements "are *not* offers," *id*. at 825 (emphasis in original), and described them as "the amount which the Government believes the landowner is constitutionally entitled to should negotiations fail and condemnation proceedings be initiated." *Id*. As such, the statements "are admissible at a subsequent compensation trial as an admission, once it becomes known at trial the Government is valuing the property at a lower figure." *Id*.[3]

[3] The admissibility in evidence of party admissions is emphatically not a matter of first impression. Rule 2:803(0) expressly excludes such admissions from the operation of the hearsay rule. *See also Tyree v. Lariew*, 208 Va. 382, 385 (1967) (admissions are "evidence of a most satisfactory nature and may furnish the strongest and most convincing evidence of the truth.").

Other courts confronting this precise issue have agreed. *Thomas v. Alabama*, 410 So.2d 3, 4 (1981) ("If the State attempts to establish a lower value, the statements are admissible at a compensation trial as an admission by the State."); *Arkansas State Hwy. Comm'n v. Johnson*, 300 Ark. 454, 462, 780 S.W.2d 326, 330 (1989) ("We agree with the conclusion that the statement of just compensation is not a negotiation or settlement figure excluded by A.R.E. 408."); *Dept. of Transportation v. Frankenlust Lutheran Congreg.*, 269 Mich.App. 570 584, 711 N.W.2d 453, 462 (2006) ("... a landowner may, if the condemning authority seeks to establish a lower valuation for the property at trial, introduce evidence of the higher, precondemnation valuation ...."); *Cook v. New York*, 105 Misc.2d 1040, 1045-46, 430 N.Y.S.2d 507, 510 (1980) (adopting approach and reasoning of *320.0 Acres of Land*).

Based on such holdings, the leading eminent-domain treatise concludes that landowners may introduce these statements when the condemnor seeks to reprobate at trial:

> Statements made by or attributable to the condemning authority which are inconsistent with its valuation position at trial are admissible as admissions against interest.

Nichols on Eminent Domain, §18.12[2] (2014).

The landowner cited these authorities to the trial court. A. 63. But the court erroneously viewed the statement as a settlement offer (A. 80-83), and excluded it from evidence.

2. The trial court erroneously curtailed cross-examination of the Commissioner's expert. (Assignment 2)

A. Cross-examination is a fundamental right.

This Court has always guarded a litigant's right to cross-examine opposing witnesses on matters relevant to the litigation. *Basham v. Terry*, 199 Va. 817, 824 (1958) (describing cross-examination of adversary's witness as "not a privilege but an absolute right."). The Court "has never qualified" this rule. *Food Lion, Inc. v. Cox*, 257 Va. at 450.

As the Court explained in *Cox*, "the adjective 'absolute' definitively excludes exceptions." *Id*. at 450-51.

B. The excluded cross-examination was relevant and material to the proceedings.

In a trial such as this one, just compensation is the only triable issue. Code §25.1-230. As is typical in such trials, the parties adduced expert testimony from real-estate appraisers, who gave opinions about compensation for the take and damage to the residue. The prohibited cross-examination related to the basis of the Commissioner's expert's opinion on the sole triable issue.

C. The Code, the Rules of Court, and caselaw permit the prohibited cross-examination.

The legislature has addressed the subject of disclosure of the basis of an expert's opinion:

> The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data .... The expert may in any event be required to disclose the underlying facts or data on cross-examination.

Code §8.01-401.1. The second sentence of this provision, which is case-dispositive on this assignment, is repeated verbatim in Rule 2:705(a).

The leading Virginia decision on the admissibility of such background information is *McMunn v. Tatum*, 237 Va. 558 (1989). There, this Court was careful to note the distinction between direct examination – where disclosure of the hearsay basis of an opinion is prohibited – and cross-examination. *Id*. at 566. *Accord*, *Holmes v. Levine*, 273 Va. 150, 165 (2007) (cross-examination of expert permitted).

Virginia's preeminent treatise on evidence concludes that "the *opponent* should be permitted *on cross-examination* to question the witness regarding the content or language of the source *if the opponent so chooses*." C.E. Friend and K. Sinclair, *The Law of Evidence in Virginia* §13-8[f] (7th ed. 2013) (emphasis in original).

D. Prohibiting cross-examination was error.

The landowner sought to question an opposing party's expert witness about the basis for his value opinion, on a document that the expert acknowledged that he relied upon. By statute and rule, the landowner had a right – one that

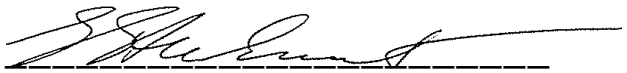
this Court has described as absolute – to cross-examine the expert about that testimony.

CONCLUSION

The General Assembly in 2005 created a new duty for condemnors. According to the plain language of the statute, disclosure occurs *before* the negotiation process begins. The trial court erroneously regarded it as a part of that process.

This Court should reverse and remand this case for a new trial in which the landowners may introduce the precondemnation statement, and may cross-examine the condemnor's appraiser on his reliance on the 2009 report.

JAMES M. RAMSEY, JR.
JANET D. RAMSEY

By: 
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CERTIFICATE

I hereby certify that on this 26th day of November, 2014, pursuant to Rules 5:26(h) and 5:32(a)(3)(ii), fifteen paper copies of the foregoing Brief of Appellants and ten paper copies of the Appendix, along with 10 copies on CD-Rom, have been hand-filed with the Clerk of the Supreme Court of Virginia. The required copies of the Brief and Appendix, along with one copy on CD-Rom, have been served, via U.S. mail, postage prepaid, upon:

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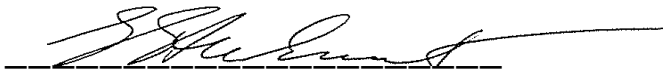

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