In The

Supreme Court of Virginia

RECORD NO. 180178

RICHARD H. DWYER,

Appellant,

v.

TOWN OF CULPEPER,

Appellee.

BRIEF OF APPELLANT

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SCV: Submitted on 11-05-2018 15:17:10 EST for filing on 11-05-2018

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STATEMENT OF THE CASE

This is an appeal of a final judgment of the Culpeper County Circuit Court in an eminent-domain case. Appellee the Town of Culpeper initiated proceedings to condemn real property owned by appellant Richard H. Dwyer.

Dwyer's property comprises eight contiguous parcels; the Town condemned parts of three of them. The primary issue in this litigation is whether Dwyer was entitled to just compensation for damage to all eight parcels, based on the unity-of-lands doctrine.

At trial, the Town moved to strike Dwyer's claim for damages to the five parcels from which no land was taken. The court denied the motion. But at the close of the evidence, when Dwyer submitted a unity-of-lands instruction, A. 531, based on this Court's holding in *Commonwealth Transp. Comm'r v. Glass*, 270 Va. 138 (2005), the trial court refused it.

The jury returned a report fixing just compensation. A. 506. The court overruled Dwyer's exceptions, A. 532, and entered a final order in favor of the Town. A. 538. This Court awarded Dwyer an appeal on September 27, 2018.

ASSIGNMENTS OF ERROR

1. The court erroneously refused Dwyer's jury instruction on the unity-of-lands doctrine. [*Preserved*: A. 343-45]

2. The court erroneously refused to allow the landowner to cross-examine the Town's expert, Richard Marchitelli, by confronting him with evidence of his company's listing of the subject property for sale. [*Preserved*: A. 299-304]

3. The court erroneously excluded testimony about previous offers to purchase the entire assembled property for multifamily residential development. [*Preserved*: A. 115-18, 129-31]

4. The court improperly commented on the evidence in its jury instruction on the precondemnation offer. [*Preserved*: A. 358-59]

FACTS

Richard Dwyer is the fee simple owner of 25.65 acres of real property in eight contiguous tracts. The property is zoned consistent with multifamily housing. A. 145, 166-67. He assembled the property over the course of several transactions between 1995 and 2006. A. 227-33. Over the years, Dwyer preserved his ability to develop the property for multifamily residential purposes, including by vacating lot lines, retaining existing sewer and water taps on the assembled properties, and entering into month-to-month leases for the seven homes located on the properties. A. 230, 237.

In 2007, Dwyer hired a land planner and engineer, R. Lee Baines, P.E., who prepared and submitted a site plan (A. 429) to the Town of Culpeper for development for multifamily residential use. A. 235. The Town returned the plan with comments for revisions. A. 147. Baines considered the Town's comments to be "fairly routine." A. 153, 163-64.

Due to the 2008 economic slowdown, Dwyer chose not to address the comments until 2012, at which time he asked Baines to prepare a revised plan for submission to the Town. A. 147-48. Dwyer submitted that plan on March 20, 2013. A. 164; A. 460. In all, he paid $185,000 in engineering fees for the development. A. 237A. He also paid the Town a $12,272 fee to review the revised plan. A. 237.

The application was pending before the Town when, on July 17, 2013, the Town condemned nearly 5.4 acres of Dwyer's property on three of the tracts, to build a road. The taking severely limited Dwyer's ability to develop the property in the same manner as before. A. 154-62; A. 491.

ARGUMENT

Preliminary note on finality

The trial court entered a September 11, 2017 order overruling Dwyer's objections and vesting title in the Town. The order retained jurisdiction over the case to enable the court to resolve two pending matters. A. 535. The court later entered a final order resolving all remaining issues, on November 7, 2017. The Town claims that the September 11 order is final and appealable under Code §25.1-239 ("The order confirming ... the report of just compensation shall be final.").

When a trial court enters an otherwise final order that expressly "retains jurisdiction" to adjudicate other matters in the case, that retention postpones finality. In *Super Fresh Food Mkts. of Va., Inc. v. Ruffin*, 263 Va. 555, 562 (2002), this Court explained the effect of a trial court's express retention of jurisdiction in what would otherwise be a final order: The phrase *retain jurisdiction* in such an order means that the order is not yet final, so appellate deadlines do not begin to run.

This Court has consistently reaffirmed this boundary between final and nonfinal orders. For example, in *Johnson v. Woodard*, 281 Va. 403, 409-10 (2011), the Court observed that "specific language stating

that the court is retaining jurisdiction to address matters still pending before the court" is sufficient to postpone finality.

The trial court did that here. Its September 11 order used the exact phrase that this Court has prescribed to postpone the finality of what would otherwise be a final order: ". . . the Court shall retain jurisdiction in this case" to resolve two remaining issues. A. 535.

The phrase *retain jurisdiction* is an essential component of this doctrine. Merely retaining a case on the docket does not postpone finality. *City of Suffolk v. Lummis Gin Co*., 278 Va. 270, 277 (2009).

Trial courts retain authority over their dockets. That includes the authority to postpone finality in an order that would, by statute or common law, otherwise be final. The trial court can do so in the manner that this Court has prescribed, by "retaining jurisdiction."

Because the trial court here expressly retained jurisdiction over an otherwise final order, appellate deadlines did not begin to run until the court disposed of the matters remaining before it, by order entered on November 7, 2017. This appeal is therefore timely.

1. The trial court erroneously refused the landowner's unity-of-use instruction. (Assignment 1)

Standard of review

This Court reviews de novo the refusal to grant an instruction, viewing the evidence in a light most favorable to the proponent. *Lawlor v. Commonwealth*, 285 Va. 187, 228-29 (2013).

Discussion

In *Commonwealth Transp. Comm'r v. Glass*, 270 Va. 138 (2005), this Court addressed claims based on the unity-of-lands doctrine. The landowner envisioned joint development of several contiguous parcels, and sought damages when the Commissioner's take impaired his ability to do that. This Court rejected that claim in memorable language:

> The record affirmatively demonstrates, however, that Glass' "business plan" was an illusion. Glass **had no site plan** or plat of the 125 acre tract as of the date of take. Glass **had expended nothing for any development expense** regarding engineering, site development, financing or anything else that is reflected in the record. There was no evidence Glass had any **firm offers**, much less a contract, lease, or other binding document from any entity to purchase or develop any part of the 125 acre tract. There was no evidence Glass, personally, had any **plans to develop** any part of the 125 acre tract for **any specifically identifiable purpose**.

270 Va. at 151 (emphasis supplied).

This appeal presents the opposite end of the development-planning spectrum. Here, Dwyer had completed the surveying, engineering, and site-development planning for a specific development project, and had submitted it to the appropriate planning authorities for approval. These plans were far from an illusion; they were on the brink of construction before the take forced a radical reconfiguration. And because the sole remaining step, site-plan approval, is ministerial, Dwyer's development plans were by-right. *Town of Occoquan v. Elm St. Devel., Inc.*, Rec. No. 110075, slip op. at 4 (April 6, 2012).

Under these circumstances, Dwyer made out a jury issue for application of the unity-of-lands doctrine. That doctrine requires three showings: unity of ownership, physical unity, and unity of use. *Glass*, 270 Va. at 148. The first two factors were never in question; Dwyer owns all of the parcels, and they are contiguous. His extensive and expensive efforts to bring the entire tract to the point of development created a jury issue on unity of use.

While unity of use requires "actual joint use … present at the date of take," *Glass*, 270 Va. at 150, this Court in *Glass* considered the contention that the landowner had a then-current plan to develop the entire property. Instead of rejecting this approach out of hand, the Court

evaluated it on the merits before finding Glass's evidence wanting. *Id*. at 150-53. This approach recognizes economic reality, that property can be effectively unified due to its owner's efforts to develop it.

The trial court here recognized as much when it denied the Town's motion to strike Dwyer's damage claim: "If the Court construed the [*Hylton*] case as counsel was asking the Court to do, then it would mean that unless there [is] basically a finished product, that no one would ever be able to establish unity of use." A. 333-34. The court correctly ruled that the question of unity is for the jury to resolve. A. 334-35; *see also Glass* at 149.

But the court then effectively took this issue away from the jury by refusing an instruction, based on *Glass* and other authority, that would enable the jury to evaluate Dwyer's unity-of-lands claim. That instruction would have informed the jury that, using the approach discussed in *Glass*, the multiple parcels could be considered as a unit:

> … if, as of July 17, 2013, there was such a connection or relation of adaptation, convenience, and actual and permanent use, as to make the enjoyment of the parcel taken reasonably and substantially necessary to the enjoyment of the parcel left, in the most advantageous and profitable manner in the business for which it was used.

See VEPCO v. Hylton, 29 Va. 92, 116 (2016) (quoting *Glass*).

This refusal effectively overruled the court's prior decision on the motion to strike, since the instruction the court gave limited the jury to considering the "actual, permanent, and present joint use being made" of the property. In doing this, the trial court rewrote *Glass* by excising the explanation given at 270 Va. at 150-53, and refused to instruct the jury on by-right development plans.

There can be no doubt that there was substantial evidence to support the giving of Dwyer's instruction, so he was entitled to have the jury instructed on his theory of the case. *Bennett v. Sage Payment Solutions, Inc.*, 282 Va. 49, 55 (2011). The court simply declined to tell the jury what the law is.

2. The trial court erroneously restricted cross-examination of the Town's expert, Richard Marchitelli. (Assignment 2)

Standard of review

In general, the admission or exclusion of evidence is reviewed for abuse of discretion. *Wright v. Kaye*, 267 Va. 510, 517 (2004).

Discussion

One triable issue below was whether the entire 25-acre site was suitable for multifamily-housing development. On this issue, the Town called as an expert witness Richard Marchitelli, an appraiser with the commercial real-estate firm Cushman and Wakefield. Marchitelli opined that there was no market in the Culpeper area for such development.

In cross-examination, Dwyer sought to question Marchitelli about an earlier real-estate listing in which Cushman and Wakefield had offered the assembled site – all eight parcels – for sale in a single package for multifamily development. A. 299, 302-03. This listing was positive evidence of unity of use, in that Dwyer had previously listed the entire property for sale, with a highly reputable real-estate brokerage, for multifamily residential development. The listing made a fact in issue more likely, thus satisfying the test for relevance. Rule 2:401.

The listing appears in Marchitelli's expert disclosure as within the scope of his trial testimony. A. 508. This means, at a minimum, that the listing is among the sources he consulted in formulating his opinion. By statute, Dwyer was permitted to cross-examine him on the facts underlying that opinion. Code §8.01-401.1.

But after entertaining argument, the trial court forbade Dwyer to use the listing in cross-examining Marchitelli, ruling that it had "no probative value" and would be "unfairly prejudicial." A. 304.

Cross-examination of a witness "is not a privilege but an absolute right." *Basham v. Terry*, 199 Va. 817, 824 (1958). This court has never qualified that rule. *Food Lion, Inc. v. Cox*, 257 Va. 449, 450 (1999).

It is important to note that in these contexts, the listing is not barred by the hearsay rule. In its most basic form, it is not hearsay at all, since Dwyer did not offer it to prove the truth of its assertions – for example, its statements about the quality of the property or its value. The evidence was admissible to show simply that the property had indeed been listed for a unitary sale. Because the relevance was not the truth of the matter asserted, but merely that such a listing existed, the document is not hearsay. Rule 2:801(c).

3. The trial court erroneously excluded testimony about previous offers to purchase the assembled property. (Assignment 3)

Standard of review

This Court reviews decisions excluding evidence for abuse of discretion.

Discussion

As part of his effort to show that development of the assembled property for multifamily residences was reasonably to be expected, and was not a post-take fantasy to elevate its value, Dwyer sought to inform the jury about two previous purchase offers he had received. Those offers, made in 2005 and 2007, both involved multifamily residential development. A. 116-18, 129.

The Town argued vigorously below that there was no unity of use among the eight parcels. Because evidence of these offers would have impaired that argument by showing that such unity was quite real, the Town fought with equal vigor to prevent the jury from receiving it.

The trial court sustained the Town's motion in limine to exclude the offers themselves; but when the Town then injected the unity-of-use issue at trial, Dwyer asked the court to revisit that pretrial ruling.

A. 115. He explained to the court how the evidence fit within *Glass*'s analytical framework. A. 116-18. But the court refused to change its ruling, despite the new development in the case. A. 131.

Beyond question, this evidence met the criteria for relevance. It bore directly on the unity-of-use issue, and showed that Dwyer was in a dispositively different situation than the landowner in *Glass*. 270 Va. at 151 ("There was no evidence Glass had any firm offers, much less a contract, lease, or other binding document from any entity to purchase or develop any part of the 125 acre tract.").

To be admissible under Rule 2:402(a), this testimony did not have to prove fully Dwyer's position on unity of use. It merely needed to have "any tendency" to make his contention more probable. Rule 2:401. In conjunction with his earnest and concerted efforts over the years to achieve this development, the offers were relevant to this component of the trial to establish unity of use over a period of several years.

4. The trial court improperly commented on the evidence. (Assignment 4)

Standard of review

While the Court has addressed judicial commentary on evidence on several occasions, none of these decisions specify a standard of review. The cases cited below suggest that this review is plenary; a trial judge has, for example, no "discretion" to comment on the evidence.

Discussion

Unlike their colleagues on federal benches, Virginia judges may not comment to the jury on the evidence. *Compare Quercia v. United States*, 289 U.S. 466, 469, 53 S.Ct. 698, 698-99 (1933) with *Spence v. Miller*, 197 Va. 477, 482 (1955). This Court has described such comment as "of course, not permissible." *Oak Knolls Realty Corp. v. Thomas*, 212 Va. 396, 398 (1971). If a judge does so comment, the error is "presumed to be prejudicial." *Spence*, *id*.

On other occasions, this Court has disapproved comments that "single out for emphasis a part of the evidence tending to establish a particular fact." *Medina v. Hegerberg*, 245 Va. 210, 212 (1993). It is for counsel, in closing argument, to choose which evidence to emphasize,

without a judicial thumb on the scale. *Spotsylvania County v. Seaboard Surety Co.*, 243 Va. 202, 213-14 (1992).

And yet the trial court here did just what this Court has forbidden. At the Town's request, it instructed the jury on the Town's precondemnation offer, including this comment:

> *You may give the town's initial estimate of just compensation*, and the appraisal on which that estimate was based, *whatever weight, if any, that you determine to be appropriate* based on your consideration with all of the evidence you have heard and find to be more persuasive, and also based on your consideration of the instructions of law that you have been given.

A. 373 (emphasis supplied).

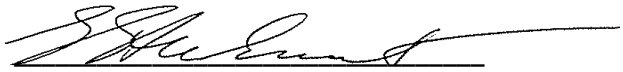
This statement singled out one aspect of the evidence for a form of negative emphasis. While such might feature prominently in a lawyer's jury argument, it has no place in an instruction.

Virginia judges do not have the authority to emphasize evidence. The trial court here decided to "place a judicial imprimatur on selective evidence," injecting its views of evidentiary significance into the jury's deliberations. *Nelms v. Nelms*, 236 Va. 281, 286 (1988).

CONCLUSION

The Court should reverse the judgment and remand this case for a new trial.

RICHARD H. DWYER

By: 
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CERTIFICATE

I hereby certify that on this 5th day of November, 2018, pursuant to Rules 5:26 and 5:32(a)(3)(i), three paper copies of the Brief of Appellant and three paper copies of the Appendix have hand-filed with the Clerk of the Supreme Court of Virginia and electronic copies of the Brief and Appendix were filed, via VACES. On this same day, an electronic copy of the Brief of Appellant was served, via email, and electronic copies on CD of the Brief and Appendix were served, via UPS Ground Transportation, upon:

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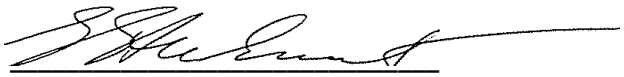

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