IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

JACKSONVILLE PORT AUTHORITY, a body politic and corporate and an agency of the State of Florida,
Petitioner,
v.
JAX MARITIME PARTNERS, LLC., etc., et al.,
Defendants.
_____/

Case No. 16-2005-CA-007802

Division: CV-G

ORDER DENYING PETITIONER'S MOTION FOR NEW TRIAL

This cause came on to be heard on May 29th, 2008, upon Petitioner, Jacksonville Port Authority's (Jaxport) Motion for New Trial.

In November 2005 Jaxport filed an action to condemn 90 acres of property owned by Keystone Properties, LLC (Keystone). On May 2nd, 2008, after two weeks of trial the twelve jurors returned a verdict of $67,410,000. On May 12th, 2008, Jaxport timely served a Motion for New Trial.

Jaxport alleged in its motion that Keystone's real objective was to recover a verdict so large that Jaxport would abandon this "slow take condemnation", allowing Keystone to keep the property. Jaxport further alleged that to fulfill its objective of halting the taking Keystone developed an improper trial strategy of:

(1) personally attacking the Port Authority and its counsel;

(2) undermining the jury's confidence in the judicial process;

(3) evoking sympathy for the owner, all for the purpose of

(4) convincing the jury to overlook legitimate evidence of value and render a verdict in the amount of the owner's inflated appraisal.

Subsequent to the May 29th hearing each party filed a post-hearing Memorandum of Law.

Did Keystone's attorney personally attack the attorney for Jaxport? Keystone replied to the use of the term "hillbilly" used by Jaxport's attorney to identify the unwilling seller in Keystone's analogy (during voir dire) of a shrewd buyer snatching up a Picasso painting for $10 in a yard sale. Keystone's attorney stated in opening statement:

> "I would like for you to test as judges of the fact what the evidence shows in regards to whether my client, who may come from West Virginia, is simply a hillbilly in his thinking. That's a very powerful term, colorful term. I don't think it was meant in a derogatory fashion."
>
> And that's all right, Mr. Settembrini.
>
> MR. SETTEMBRINI: Your Honor, I misspoke.
>
> THE COURT: You corrected yourself as you were speaking and said that the seller is not a hillbilly.
>
> MR. SETTEMBRINI: And I apologize.
>
> THE COURT: Get on to something more important to the case, gentlemen.
>
> MR. BRIGHAM: Yes, sir.
>
> In reference to that purchase by my client where there was an agreement in April 2005, there's a chronology of facts that occurred before that and after that that are relevant to your consideration of the sale used by the condemning authority's appraiser, the purchase of the property by Keystone from an entity called JMP. And JMP included those people that have that fine pedigree and credentials.
>
> I would like to ask you to consider by your viewing the facts and evidence whether my client, who is a – I think you'll find he has some experience in life and in business that informed him as to the value of the property that may differ from those of the people that he purchased the property from.

If you go to Harvard, it doesn't always mean that you recognize the value in property that's tied to its use."

Jaxport notes that Keystone's only purpose in using the term "hillbilly", and contrasting that term with persons of "fine pedigree" and credentials was to embarrass Jaxport's attorney and to suggest that Petitioner and its counsel were callous elitists crushing the rights of the common man.

The Court's impression was that the exchange was a mere blip in a two week trial during which the jury heard from many witnesses and viewed numerous exhibits. Jaxport's attorney having used the term "hillbilly" opened the door to a reply. Did Keystone's lawyer take advantage of the use of the term? Probably.

During voir dire the Court was surprised at the number of jurors who did not like the idea that governmental agencies could take private property via condemnation proceedings and it would come as no surprise that some members of the trial jury felt the same way.

Did Keystone disparage the Court's prior rulings on the motions in limine thereby suggesting that Keystone was hamstrung in its presentation and the evidence presented was deficient and unworthy of belief? Did that approach undermine the jury's confidence in the judicial process and invite the jury to ignore rather than weight the evidence? Was Jaxport deprived of a trial on value vs. the hearing on the taking?

That is doubtful. The prior rulings were mentioned, but not in detail and it was not suggested what the evidence would have been had the Court not made such rulings.

Did Keystone play the sympathy card throughout the trial? The dialogue recited in Jaxport's motion to illustrate this point was at a side bar conference. The jury did not hear the exchange between Keystone's attorney and the Court.

Jaxport also complains that Keystone's counsel preached to the jury while standing a few feet from the jury box when counsel was questioning witnesses. In fact, counsel would face the jury and ask a question of the witness and continue to face the jury while the witness answered the question. A very distracting technique. Not only did it appear he was talking directly to the jury, often times the jurors were watching counsel and not the witness.

When Jaxport's attorney objected Keystone's attorney at side bar was told that was improper and ordered to stop facing the jury as he questioned a witness. The Court watched counsel to see if he complied. He tried to comply and did so for the most part, but would drift back to that technique and was admonished several more times when Jaxport objected.

Some of Keystone's witnesses also had a tendency to "preach" to the jury and volunteer information not in response to questions. Those incidents were infrequent and are quite common in the testimony of expert witnesses.

The Motion for New Trial goes into some detail of the sales used to support Keystone's appraiser's appraisal. The appraiser was thoroughly cross-examined by Jaxport's attorney and argument made to the jury during closing. The credibility of the appraisers, or lack thereof, was for the jury.

There were some newspaper articles in the *Florida Times-Union* during the trial. None of those articles concerned the property being condemned. Only one of the articles concerned property acquired by Jaxport. Upon inquiry several of the jurors indicated they had seen the articles. No motion for mistrial was made then or at any point during

the trial. The Court instructed the jury not to read any such articles and the trial moved forward.

Jaxport further argues that Petitioner was entitled to separate trials on the taking (before the Court) and on full compensation (before a jury). Petitioner argues that Keystone's injection of the taking into the valuation trial denied Jaxport a separate trial by the jury on full compensation.

Finally, Jaxport argued that the verdict was excessive and should shock the judicial conscience and was influenced by passion or prejudice and is against the manifest weight of the evidence, the jury having been deceived as to the force and credibility of the evidence and influenced by considerations outside of the record.

Jaxport continued that argument in its post-trial memorandum alleging that the $67,410,000 verdict, which is over 800 percent of the arms length purchase price of the property two years ago (more than 2 years ago because condemnation was commenced in November 2005) is excessive and against the manifest weight of the evidence. Jaxport continues to argue that Jaxport was deprived of the right to separately try the issue of full compensation before the jury.

Is the verdict excessive? Certainly seems excessive to this judge, but not so much so that it shocks the judicial conscience. And, more importantly, there was conflicting evidence as to value and the value determined by the jury was within the range of value testimony presented at trial.

Against the manifest weight of the evidence? It was not. In State v. Childers, 979 So.2d 412 (Fla. 1st DCA 2008) the Court wrote:

> "[A]nybody who has had any appreciable exposure to eminent domain proceedings knows, real property appraisal is an art, not a science. In eminent

> domain proceedings, the differences in value asserted are frequently great and the outcome usually turns on which of two or more property appraisers the jury finds to be more credible."

In every eminent domain case it is the intent of the landowner to obtain the highest possible verdict and the motive of the landowner is immaterial.

The Court did not perceive Keystone's attorneys comments as personal attacks on Jaxport's attorney. The attorneys in this case treated each other, the Court and the witnesses with respect. The exchange following the term "hillbilly" was a minor blip in a two week case with difficult testimony. Difficult because it was technical testimony regarding the comparables used by the appraisers. There were very few comparables available and many adjustments were made by the appraisers.

While it is true that the jury was informed that the Court prohibited the use of an income approach to appraise the property, no detail was given the jury and it is doubtful the jury lost confidence in the judicial process because of that ruling.

Did Keystone's attorney play the sympathy card? Not much doubt about it. Did the jury buy into it? Probably to some extent, but that factor is usually present in most cases whether it be government v. private citizen, large corporation v. private citizen, victim in a personal injury case or a criminal case. It is human nature to have sympathy for the underdog and Keystone, in the jury's view in this case, was clearly the underdog.

Scholl's opinion of value was admitted without objection. In fact there were very few objections during the trial considering the length of the trial. Scholl was not cross-examined regarding the basis for his opinion of value. The jury was entitled to consider his opinion of value which established the upper range of value in this case.

This was a complex trial. Each party was represented by excellent attorneys. Although the Court would not have awarded the verdict rendered by the jury, the value of Keystone's property is difficult to determine. Even the Jaxport appraisers recognized the value of $19,000,000, although the property was purchased by Keystone just a few years ago for $8,000,000.

The property has been in litigation since November 2005. The owner is entitled to have the litigation concluded. Until it is finished it is impossible for the owner to use or improve the property and Jaxport may elect not to take the property.

It is therefore,

ORDERED

Jaxport's Motion for New Trial is denied.

DONE AND ORDERED in Chambers at Jacksonville, Duval County, Florida, this 30 day of June, 2008.

Richard O. Watson

Richard O. Watson, Senior Circuit Judge

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