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Position Statement Against Assembly Bill 397

April 30, 2003

For many years, Nevada courts, the Nevada Legislature and the State Bar have promoted different methods of dispute resolution and other alternatives to litigation through the courts. The clear trend across the country is also toward reducing court congestion and encouraging settlement of disputes. The Nevada Rules of Civil procedure, like the rules in most other states, require, for many cases, that the parties submit to arbitration. For many years, parties to a lawsuit have had the ability to make offers of judgment to the opposing party which, if that party does not do better at trial, would result in the party not taking the offer being precluded from recovering costs and attorney's fees. That party may also be subject to paying the attorney's fees and costs of the party making the offer. The Nevada Rules of Appellate Procedure now require parties in an appeal to the supreme court to appear before a mediator and make a good faith effort to settle the case. It is well known that the court dockets are becoming more and more crowded, especially in urban areas. We all should seek more ways to promote reasonable settlement of disputes and ways to reduce court congestion.

Assembly Bill 397 creates a path that is completely contrary to the trend and efforts just described. This bill would not only discourage offers of judgment by a public agency in an eminent domain action, it would eliminate the opportunity altogether. This bill would not just discourage landowners from accepting offers to purchase their property, it would encourage landowners to litigate. As seen below, there is no constitutional right for a landowner to be paid attorney's fees and costs and there is no constitutional right against having to pay the condemnor's attorney's fees and costs when an offer of judgment is not accepted and is not bettered at trial. It is also a matter of state statutes and rules as to whether a party must pay attorney's fees and costs. The better policy is to encourage settlements and to reduce litigation with the incentives provided by the rules governing offers of judgment.

There is No Constitutional Right to Fees and Costs and No Prohibition to Requirement to Pay Fees and Costs of Condemnor

In 1968, the Nevada Supreme Court said: "There is no constitutional right in the condemnee to recover his attorney's fees as a part of the 'just compensation' awarded for his property. It has long been established law that attorney's fees are not embraced within just compensation for land taken by eminent domain." *Lamar v. Urban Renewal Agency*, 84 Nev. 580, 581, 445 P.2d 869, 869 (1968), *overruled on other grounds*, *Casey v. Williams*, 87 Nev. 137, 142 n.6, 482 P.2d 824, 827 n.6 (1971). The *Lamar* case cited the United States Supreme Court case of *Dohany v. Rogers*, 281 U.S. 362 (1930), and a 1960 Iowa case.

The United States Supreme Court said the same thing in 1979 and also cited its 1930 *Dohany* case. The United States Supreme Court explained:

> The Fifth Amendment forbids the taking of "private property . . . for public use, without just compensation." This Court has often faced the problem of defining

> just compensation. One principle from which it has not deviated is that just compensation "is for the property, and not to the owner." *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 326 (1893). As a result, indirect costs to the property owner caused by the taking of his land are generally not part of the just compensation to which he is constitutionally entitled. See, *e. g., Dohany v. Rogers*, 281 U.S. 362 (1930); *Mitchell v. United States*, 267 U.S. 341 (1925); *Joslin Mfg. Co. v. Providence*, 262 U.S. 668 (1923). See generally 4A J. Sackman, Nichols' Law of Eminent Domain, ch. 14 (rev. 3d ed. 1977). Thus, "[attorneys'] fees and expenses are not embraced within just compensation . . . ." *Dohany v. Rogers, supra*, at 368.

United States v. Bodcaw Co., 440 U.S. 202, 203 (1979).

Whether Fees and Costs Are Awarded Is a Matter of Statute or Rule

It is generally held in Nevada that attorney's fees and costs cannot be awarded to a party in a lawsuit absent a statute or provision in a contract. *Sun Realty v. District Court*, 91 Nev. 774, 776, 542 P.2d 1072, 1074 (1975); *Dixon v. District Court*, 44 Nev. 98, 101, 190 P. 352, 353 (1920). In Nevada, section 17.115 of the Nevada Revised Statutes and Rule 68 of the Rules of Civil Procedure provide the authority to award fees and costs with regard to offers of judgment. These generally state that a court cannot award fees and costs to a party who rejects an offer and does not obtain a more favorable judgment and a court may award costs and attorney's fees against such party. Section 37.200 incorporates Nevada statutes and the Rules of Civil Procedure into eminent domain law.

> The Nevada Supreme Court has spelled out the purpose of NRCP 68 and NRS 17.115.
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> NRCP 68 and NRS 17.115 are designed to facilitate and encourage settlement. *See Morgan v. Demille*, 106 Nev. 671, 674, 799 P.2d 561, 563 (1990). They do so by placing the risk of loss on the non-accepting offeree, with no risk to the offeror, thus encouraging both offers and acceptance of offers. Placing the risk of loss of eligibility for fees and costs on an offeror . . . would have the opposite result and would discourage plaintiffs from making offers to settle. Such a result would attenuate Nevada's policy of encouraging both parties to make pre-trial settlement offers, as illustrated by our rule's specific departure from the unilateral federal model.[1]

Matthews v. Collman, 110 Nev. 940, 950, 878 P.2d 971, 978 (1994). Offers of judgment apply to all civil cases.

[1] The federal rule, F.R.C.P. 68, only considers offers made by the defendant.

Pursuant to supreme court cases, before a court can exercise its discretion and make an award of attorney's fees against a party who rejected an offer of judgment and did not beat it at trial, the court must consider several factors:

1. whether a plaintiff's claim was brought in good faith
2. whether the offeror's offer of judgment was brought in good faith
3. whether the offeree's decision to reject the offer and proceed to trial was grossly unreasonable or in bad faith
4. whether fees sought by the offeror are reasonable and justified in amount

See Uniroyal Goodrich Tire v. Mercer, 111 Nev. 318, 322-24, 890 P.2d 785, 789 (1995); *Beattie v. Thomas*, 99 Nev. 579, 587-89, 668 P.2d 268, 273-74 (1983).

Nevada law also provides for costs to be awarded to the "prevailing party" in certain situations. NRS 18.020. Whether a condemnor or a landowner is a "prevailing party" in any case may be a matter of debate. *See State of Hawaii v. Davis*, 499 P.2d 663, 667 (Hawaii 1972). This issue is outside the issue involving offers of judgment.

The Better Policy is to Retain the Rules for Offers of Judgment in Eminent Domain Cases

The concerns about unreasonable litigation and larger numbers of cases apply to eminent domain cases, just like any other litigation. There are also many other constitutional rights, which may require litigation in order to protect those rights, and the rules regarding offers of judgment apply to those cases like any other civil litigation. Some of the other constitutional rights which are a subject of litigation are: first amendment freedoms of speech, press and religion; second amendment right to bear arms; fourth amendment search and seizure rights; and fourteenth amendment rights to freedom from discrimination based on race, nationality or gender. Most of these are also protected by federal law under section 1983 of Title 42. Like a landowner, individuals asserting these rights may have done nothing wrong but must engage in litigation to protect those rights.

There is a constitutional right to just compensation for the property being taken. There is no constitutional right for a landowner to be unreasonable in litigation and to protract unnecessary litigation. A landowner's rights should not outweigh the needs of the public to reduce unreasonable litigation and to promote settlements. This can be seen by the opinion in *Hartland Township v. Rodd*, 474 N.W.2d 306, 311 (Mich. App. 1991), *appeal denied*, 479 N.W.2d 666 (1992). The property owner offered judgment to the plaintiff township for $385,690.95. The township rejected the offer and counter offered $150,000.00, which was rejected. At trial, the property owner asked for $583,000 and the township sought a value of $136,000. The trial court awarded the landowner $182,242.23. The offer of judgment rules in Michigan focus on whether the parties do better at trial as compared to the average of the offers, which in this case was $267,845.48 ($385,690.95 plus $150,000 divided by 2). The township did better at trial than the average of the offers. The trial court felt that there "was a lot of wasted time in this case... protracted litigation...." The appellate court ultimately found that the conduct of the property owner's counsel "resulted in much needless delay. In addition, the

amount of the judgment entered in the trial court demonstrated the patent unreasonableness of defendant's offer of judgment." The court said that the purpose of the court rule on offers of judgment was "to encourage settlement and avoid protracted litigation. Failure to award costs and attorney fees to [the township] on the facts of this case certainly defeats the purpose of the court rule."

There Will Be Significant Costs to State and Local Agencies if Offers of Judgment Are Not Allowed in Eminent Domain Proceedings

The cost to public agencies resulting from this bill will be very large, in spite of the notation at the beginning of the bill that there is no fiscal impact to local or state governments. This cost increase is very real, even though it may be difficult to calculate. First, the cost will depend on how many efforts by public agencies to purchase property will be litigated rather than negotiated. Because this bill encourages more litigation by landowners, the number of cases will increase. Second, any settlement offers by public agencies will not be offers of judgment as we know them now. The offers will have to be much higher than they otherwise might simply to entice settlement because landowners will not have to consider any risks from rejecting an offer of judgment. Because there will be no more offers of judgment with consequences, public agencies will likely be paying higher amounts to settle.

Court calendars are already overloaded, especially in Clark County. Courts are already unable to accommodate their current court dockets. Eminent domain cases have a priority setting in that the case is to be heard within two years of filing the case. Offers of judgment help handle these caseloads and prevent congestion in the courts. If AB 397 is passed, the courts will continue to be overloaded and even the eminent domain cases will not be heard within the statutory time period. This amendment would prevent any attempts to alleviate this backlog of trials.

The current rate of success a state or local agency has in purchasing property without litigation will likely go down. Then, it would have to be estimated as to how many more cases filed would go on to trial. Finally, offers by the condemning agency would have to be much higher because there will be no other incentive for a landowner to settle except for a price in excess of just compensation from the condemning agency which is way above its appraised value.

While eminent domain is usually very difficult and even emotional for landowners, it is a necessary tool for a growing state. Landowners are clearly entitled to the fair market value of their property taken. But settlements and alternative methods of resolution also need to be encouraged. That is not done when encouragement is given to make the process more adversarial and litigious. When litigation is encouraged, the taxpayers of this state are the ones who will needlessly have to pay beyond what is required by the constitutions or a sense of fairness.