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10CA2270 Adams 12 v. Auto-trol 11-24-2011

COLORADO COURT OF APPEALS

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Court of Appeals No. 10CA2270
Adams County District Court No. 08CV579
Honorable C. Vincent Phelps, Judge
Honorable C. Scott Crabtree, Judge

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Adams 12 Five Star Schools, a Colorado quasi-municipal corporation,

Petitioner-Appellee and Cross-Appellant,

v.

Auto-trol Real Estate LLC, a Colorado limited liability company, and, Auto-trol Technology Corporation, a Colorado corporation,

Respondents-Appellants and Cross-Appellees.

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ORDERS AFFIRMED

Division VI
Opinion by JUDGE TERRY
Loeb and Richman, JJ., concur

**NOT PUBLISHED PURSUANT TO C.A.R. 35(f)**
Announced December 1, 2011

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Alderman Bernstein, LLC, Jody Harper Alderman, Carrie S. Bernstein, Denver, Colorado, for Petitioner-Appellee and Cross-Appellant

Duncan, Ostrander & Dingess, P.C., Robert R. Duncan, Donald M. Ostrander, James Birch, Denver, Colorado, for Respondents-Appellants and Cross-Appellees

Respondents, Auto-trol Real Estate LLC (RE) and Auto-trol Technology Corporation (Tech) (collectively, Auto-trol), appeal certain orders of the trial court stemming from the petition in condemnation filed by petitioner, Adams 12 Five Star Schools (District), and the District's abandonment of that condemnation. The District cross-appeals three issues relating to those same orders. We affirm.

## I. Background

On March 31, 2008, the District filed a petition in condemnation to acquire by eminent domain a fee simple absolute interest in certain property owned by Tech (Property). The Property consisted of a 127,000 square-foot building on an approximately 19-acre parcel in Thornton, Colorado. The District also recorded a notice of lis pendens on the Property on April 4, 2008.

The trial court entered a stipulated order for immediate possession granting the District possession of approximately 29,000 square feet of the building on June 2, 2008, conditioned on its deposit of $6.9 million into the registry of the court. The District was to gain possession of the remainder of the Property on October

2, 2008. Tech withdrew $6,240,401.57 from the registry.

On July 2, 2008, after RE purchased the Property from Tech, the trial court granted Tech's request to substitute RE for Tech in the ongoing proceedings.

By August 6, 2008, Tech had identified a new location for its business, signed a lease, and tendered a security deposit to the landlord. On August 21, 2008, the District filed a notice of election to abandon the condemnation proceedings. That notice contained a request that the notice of lis pendens remain of record until Auto-trol repaid into the court's registry the funds it had previously withdrawn. On August 25, 2008, referring to the notice to abandon, the trial court ordered Auto-trol to re-deposit the money it had withdrawn from the court registry, and on September 9, 2008, Auto-trol did so.

In response to the District's subsequent motion seeking to obtain the re-deposited funds, RE asserted an equitable estoppel claim, seeking to prevent the District's abandonment. The trial court conducted a hearing on April 30, 2009 to hear that estoppel claim. Tech was then allowed to intervene and re-enter the case.

By order dated July 23, 2009, the trial court held that the District was not estopped from abandoning the condemnation action.

On January 26, 2010, the court set a two-day bench hearing to commence September 9, 2010 to address preliminary matters, and a damages trial before a valuation commission to commence September 20, 2010. Auto-trol filed a witness list for the September 9, 2010 hearing that listed as an expert witness a real estate agent who had been engaged to sell the Property for Auto-trol.

In the trial court's order making findings on the September 9, 2010 hearing, the court found that the period of the District's temporary possession ended on September 9, 2008, the date Auto-trol re-deposited funds in the court registry. Although Auto-trol had claimed damages for diminution in value of the Property as measured by the difference in market value between the date of the stipulated order for possession and the date of the District's abandonment of the condemnation, the court rejected that claim. The court directed a valuation commission to determine the amount of fair rental value owed to Auto-trol for the period of partial possession from June 2, 2008 to September 9, 2008.

In a subsequent damages trial before the valuation commission, the commission found damages of $333,755.19 for the fair rental value of the Property, and the trial court entered judgment against the District in that amount.

The trial court also denied Auto-trol's requests for attorney fees, both under C.R.C.P. 41(a)(2) and under section 38-1-122(1.5), C.R.S. 2011.

## II. Equitable Estoppel

Auto-trol contends the trial court erred in denying its equitable estoppel claim and allowing the District to abandon the condemnation. We are not persuaded.

### A. Standard of Review

Whether the circumstances of a particular case reveal sufficient evidence giving rise to equitable estoppel is a question of fact for the trial court. *City of Black Hawk v. Ficke*, 215 P.3d 1129, 1132 (Colo. App. 2008). We must accept the trial court's findings of fact on review unless they are so clearly erroneous as not to find support in the record. *Id.*; *M.D.C./Wood, Inc. v. Mortimer*, 866 P.2d 1380, 1383 (Colo. 1994).

B. Analysis

The condemnor in an eminent domain proceeding retains the right to abandon the project and discontinue the proceedings at any time before payment or deposit of the sum awarded as compensation, notwithstanding that the condemnor may already have procured an order for possession and may actually have taken possession. *Ficke*, 215 P.3d at 1131 (citing *Johnson v. Climax Molybdenum Co.*, 109 Colo. 308, 310, 124 P.2d 929, 931 (1942)). However, when the landowner has materially changed position in good faith reliance on the condemnation proceeding, a court may apply principles of equitable estoppel to preclude the abandonment. *Id.* (citing *Piz v. Housing Authority*, 132 Colo. 457, 463, 289 P.2d 905, 908 (1955)).

Here, Auto-trol argues that it materially changed its position in good faith reliance on the condemnation proceeding by searching for a new business location, entering a lease at the new location, giving the lessor a $110,000 deposit check, informing customers of the move to the new location, cancelling customer classes at the old

location, and obtaining from certain clients security approval for the new location.

The trial court found that RE, as a separate entity, did not change its position in reliance on the condemnation, as it was Tech that had been taking steps to prepare for delivery of the Property to the District and was negotiating the lease at the new location. The court acknowledged that Tech indeed had taken such actions, but noted that Tech did not attempt to unwind the new lease it had negotiated (which had not yet been executed by the lessor), had not yet moved from the Property, and could have simply unpacked its boxes and continued operating at the Property. Moreover, it noted that the Property was listed for sale during the pendency of the condemnation, and that if the Property had sold, Tech would have been required to take the very same steps it ultimately took following the initiation of condemnation. The court therefore concluded Auto-trol failed to show that it materially changed its position in good faith reliance on the condemnation proceedings.

Because the trial court's factual findings are supported by the record, we will not disturb them on appeal.

Auto-trol argues that the trial court violated the business judgment rule in finding that Tech made no effort to unwind the lease and that Tech could have continued business operations at the old site. Auto-trol asserts that this issue was preserved for appeal by its attorney stating in the April 30, 2009 hearing, "I don't think it's appropriate for us to second guess [Auto-trol employee] Mr. Stroud on his business judgment." The mere mention of business judgment, however, is insufficient to preserve an appeal based on the business judgment rule. To preserve this issue for appeal, Auto-trol would have had to inform the court of the business judgment rule and obtain a ruling as to its application to this case. *See Feldstein v. People*, 159 Colo. 107, 111, 410 P.2d 188, 191 (1966) ("it is incumbent on the moving party to see to it that the court rules on the matter he urges"), *abrogated on other grounds by Deeds v. People*, 747 P.2d 1266 (Colo. 1987); *see also Moses v. Diocese of Colo.*, 863 P.2d 310, 319 n.10 (Colo. 1993) (with few exceptions, issues not raised in trial court cannot form basis for appeal). Accordingly, we decline to address this issue.

Auto-trol further argues that the trial court erred in relying on

*Ficke* to support the conclusion that equitable estoppel applies when "someone has stated facts which are not the 'actual facts.'" Auto-trol has failed to demonstrate how this conclusion, even if it were erroneous, affected the court's decision on the equitable estoppel claim. Thus, we will not review this contention. *See* C.A.R. 35(e) ("appellate court shall disregard any error or defect not affecting the substantial rights of the parties").

Similarly, Auto-trol raises what it refers to as other errors by the trial court. Because Auto-trol has failed to demonstrate how those issues affected the court's ruling on the equitable estoppel claim, we will not address them.

## III. Diminution in Value

Auto-trol contends the trial court erred in precluding it from presenting evidence of the amount of diminution in value of the Property during the pendency of the condemnation. We disagree.

### A. Standard of Review

In an eminent domain proceeding, the court determines all questions and issues except the amount of compensation, which is determined by a board of commissioners or a jury. § 38-1-101(2)(a),

C.R.S. 2011. The court's duties include making evidentiary rulings and ruling on the propriety of the parties' proofs and objections. *Jagow v. E-470 Public Highway Authority*, 49 P.3d 1151, 1156-57 (Colo. 2002).

We review de novo the trial court's legal conclusions, but we afford substantial discretion to its decisions concerning the admissibility of evidence, reversing such decisions only if they are manifestly arbitrary, unreasonable, or unfair. *E-470 Public Highway Authority v. 455 Co.*, 3 P.3d 18, 23 (Colo. 2000).

B. Analysis

Private property may not be taken for public or private use without just compensation. Colo. Const. art. II, § 15. The property owner bears the burden of proving by a preponderance of the evidence the basis and amount of any damages to its remaining property that is caused by the taking. *Jagow*, 49 P.3d at 1158. The landowner must be "put in as good position pecuniarily as if the property had not been taken." *Fowler Irrevocable Trust 1992-1 v. City of Boulder*, 17 P.3d 797, 802 (Colo. 2001) (quoting *United States v. General Motors Corp.*, 323 U.S. 373, 379 (1945)).

However, mere depreciation in value alone does not amount to grounds for awarding compensation. *Jagow*, 49 P.3d at 1161. "The proper measure of compensation for damages . . . is 'the reduction in the market value of the . . . property that is *caused by the taking* . . . .'" *Id.* (quoting *La Plata Elec. Ass'n v. Cummins*, 728 P.2d 696, 698 (Colo. 1986) (emphasis in original)). There must be some evidence linking the before-taking and after-taking property valuations to the condemnation project. *Id.* Causation of damages is a determination that cannot be made solely on the basis of valuation evidence. *Id.* Rather, there must be competent evidence to show that the taking caused the diminution in value. *Id.* Once the property owner has met its burden of showing that the condemnation caused the diminution in value, the evidence of the amount of diminution in value may be presented to the valuation commission. *See* § 38-1-101(2)(a).

Here, Auto-trol cites *Hewitt v. Rice*, 154 P.3d 408, 412-13 (Colo. 2007), for the proposition that the condemnation proceeding and accompanying lis pendens rendered the Property unmarketable as a matter of law, effectively preventing the sale of the Property

during a declining real estate market and causing damages. *Id.* ("A lis pendens has serious consequences because '[o]nce a lis pendens is filed, it renders title unmarketable and therefore effectively prevents the property's transfer until the litigation is resolved or the lis pendens is expunged.'" (quoting *Kerns v. Kerns*, 53 P.3d 1157, 1164 n.6 (Colo. 2002))).

We first note that *Hewitt* is not a condemnation case. Further, we disagree that the language of *Hewitt* establishes as a matter of law that the District's condemnation and lis pendens caused damages to Auto-trol by preventing the sale of the Property. That was not the holding of *Hewitt*. If such a rule were followed here, *Jagow*'s holding that compensation for diminution in value requires proof of causation would be eviscerated because causation of diminution in value would *always* be established in a condemnation case where a lis pendens was filed.

After the September 9, 2010 hearing, Auto-trol filed a motion for reconsideration that, as relevant here, asked the trial court to allow Auto-trol to present its diminution in value claim to the valuation commission based on causation testimony from a real

estate agent whom it had listed as a "will call expert" for the September 9, 2010 hearing, but failed to call. Auto-trol argues that the trial court improperly denied its motion to reconsider and erroneously disregarded the agent's causation testimony. According to Auto-trol, the agent had been engaged to sell the Property and could testify that there was a reasonable probability the Property would have sold if not for the District's condemnation and lis pendens, which rendered the Property unmarketable. Auto-trol asserts that the trial court's ruling – that to recover for diminution in value due to the declining real estate market, Auto-trol would need to show a buyer was ready, willing, and able to purchase the Property for a sum certain – applied a so-called certainty standard to the admissibility of causation evidence, when the correct standard merely required a reasonable probability that the condemnation and lis pendens caused the diminution in value.

Auto-trol has not demonstrated that the trial court reversibly erred. Assuming, without deciding, that the agent's testimony could have helped establish such a reasonable probability, the trial court did not abuse its discretion in denying the motion for

reconsideration to allow him to so testify. Auto-trol could have presented such testimony at the September 9, 2010 hearing, but failed to do so.

Although Auto-trol here argues that it was effectively prevented by the trial court's ruling from presenting this testimony at the September 9 hearing, it has not demonstrated that it made any offer of proof at that hearing to establish what the testimony would have been. *See* CRE 103(a)(2). No transcript of that hearing has been provided, and we must therefore assume the regularity of the proceedings. *See Schuster v. Zwicker*, 659 P.2d 687, 690 (Colo. 1983) (burden is on appellant to provide a record justifying reversal, "for a judgment is presumed to be correct until the contrary affirmatively appears").

Auto-trol merely argued in the motion to reconsider that it "*believes* that [the agent] *can testify* that there is a reasonable probability the . . . Property would have sold absent the condemnation/lis pendens rendering the . . . Property unmarketable" (emphasis added). No supporting affidavit was provided, and no more definitive description of the proffered

testimony was given. On appeal, Auto-trol does not articulate a non-speculative basis on which the agent would have been able to render such an opinion. In any event, Auto-trol's vague description of the broker's testimony is too speculative to warrant reversal. *See Fowler Revocable Trust*, 17 P.3d at 804 (speculative damages are not recoverable).

At oral argument, Auto-trol argued that testimony presented at the damages trial before the commission establishes that the condemnation and lis pendens rendered the Property unmarketable and caused Auto-trol to suffer damages from the diminution in the Property's value. However, under section 38-1-101(2)(a), Auto-trol was required to present any such evidence to the trial court, and the presentation of such evidence to the commission does not satisfy this requirement.

Citing *G&A Land, LLC v. City of Brighton*, 233 P.3d 701 (Colo. App. 2010), Auto-trol contends the District interfered with its power of disposition or use of the property, thus entitling Auto-trol to compensation. It is undisputed in this appeal that compensation was owed, and was in fact ordered by the trial court. To the extent

*G&A* is cited to support increasing the compensation awarded here, its citation is unavailing. The facts here are distinct from those noted in *G&A*, where the division addressed so-called condemnation blight resulting from "affirmative value-depressing acts" by the condemning authority. 233 P.3d at 709-10. There is no basis to equate the lawful filing of a condemnation action, notice of lis pendens, and abandonment of condemnation here with the acts referenced in that case.

Given that no evidence was presented to the trial court to prove the District's condemnation caused the Property's decline in value, the trial court did not err in holding that Auto-trol had failed to satisfy its burden of proof. Thus, it was not error for the trial court to preclude Auto-trol from presenting evidence to the commission of the amount of the Property's diminution in value.

## IV. Cut-Off Date for the Period of Partial Possession

The trial court was called upon to establish an end point (cut-off) date for the period of temporary possession for which just compensation would be due. The court declared the cut-off to be the date when Auto-trol re-deposited in the court registry the funds

that it had initially withdrawn. On appeal, Auto-trol contends that, because the right to abandon a condemnation requires court approval, the cut-off date should be the date on which the court denied its estoppel claim and approved the District's abandonment.

On cross-appeal, the District contends the trial court erred in not establishing as the cut-off date the date on which the District filed its notice of abandonment.

We reject these contentions, and conclude the trial court did not err in determining the cut-off date.

A. Standard of Review

When reviewing a trial court's rulings in eminent domain proceedings, we defer to the trial court's findings of fact, reviewing such findings under a clear error standard. *See Fowler Irrevocable Trust*, 17 P.3d at 802. The trial court's legal conclusions are reviewed de novo. *Id.*

Determination of the cut-off date presents a mixed question of law and fact. The trial court's ruling that the termination of the District's right of possession of the Property established the expiration of the period of partial possession for which just

compensation is due presents a legal conclusion, which we review de novo. However, we review for clear error the court's factual finding that the date on which Auto-trol re-deposited the funds initially deposited by the District to gain possession of the Property terminated the period of partial possession.

B. Analysis

Just compensation must be paid for temporary takings of private property. *Fowler Irrevocable Trust*, 17 P.3d at 802. The basic measure of compensation in a temporary taking case is the fair rental value of the property during the period of the taking. *Id.* To determine the period of the taking, a beginning date and end date must be established.

Section 38-1-105(6)(a), C.R.S. 2011, specifies that the court may authorize a government entity to take possession of a property if the government entity deposits a sum with the court sufficient to pay the compensation when it is later ascertained. *E-470 Public Highway Authority v. 455 Co.*, 997 P.2d 1273, 1276 (Colo. App. 1999). Section 38-1-114, C.R.S. 2011, states that "the right to compensation and the amount thereof . . . shall be determined . . .

as of the date the [government entity] is authorized by agreement, stipulation, or court order to take possession."

Because the amount of compensation is determined as of the date of the government entity's possession of the subject property, it logically follows that the ending date for paying compensation is when the government entity no longer has any right to possess the property.

Here, the parties stipulated that the date of value (the date upon which valuation is assessed) for the amount of compensation was June 2, 2008, when the District was ordered to deposit funds into the court registry and gained possession of the Property. The trial court determined that the termination of the District's right of possession occurred on September 9, 2008, upon Auto-trol's re-deposit of the immediate possession funds it had withdrawn, and thus set that date as the cut-off date for payment of compensation for the taking. We perceive no error in the trial court's determination.

Auto-trol argues that because the right to abandon a condemnation requires court approval, the cut-off date for damages

should be July 23, 2009, when the trial court denied its estoppel claim and approved the District's abandonment. The District contends that court approval of abandonment is not required, and that its abandonment was fully effective when it filed notice of abandonment with the court on August 21, 2008, relinquishing possession of the Property and seeking to have Auto-trol re-deposit the funds it had withdrawn. We need not decide whether such approval was required, because even assuming it was required, such approval was given in the August 25, 2008 order requiring Auto-trol to re-deposit the funds it had withdrawn from the registry of the court.

Auto-trol argues that, because the notice of lis pendens remained in place until May 6, 2009, the cut-off date should extend at least as far as that date. We are not persuaded. A notice of lis pendens does not reflect possession of the property, but merely gives notice that litigation is pending concerning the property. Thus, its pendency did not affect calculation of the period during which the District held possession of the Property.

We reject Auto-trol's argument that Judge Crabtree's

December 20, 2008 order for a hearing on abandonment of the condemnation affects the cut-off date. As previously noted, the trial court's August 25, 2008 order effectively approved the abandonment. Although Judge Crabtree's December order references an issue of whether the District would be permitted to abandon the Property, that discussion does not change our analysis. In effect, Auto-trol's assertion of an equitable estoppel claim was an attempt to reopen the previous abandonment. Auto-trol did not succeed on that claim, and the District cannot be charged with the additional time needed to litigate that retrospective claim.

The District argues on cross-appeal that the court should have used the date it filed its notice of abandonment as the cut-off date, instead of the subsequent date when Auto-trol re-deposited the funds in the court registry. We reject this contention. The trial court correctly determined that the District's notice contained a condition that Auto-trol re-deposit all funds it had withdrawn, and we conclude it did not err in concluding the re-deposit condition needed to be satisfied in order to end the District's period of

occupancy.

For these reasons, we also reject the other possible cut-off dates argued by Auto-trol.

## V. Attorney Fees

Auto-trol contends that the trial court erred in denying its requests for attorney fees under C.R.C.P. 41(a)(2) and section 38-1-122(1.5) based on the inapplicability of the provisions to abandonment of condemnations. Again, we are not persuaded.

### A. Standard of Review

We review de novo the interpretation of statutes and a trial court's legal conclusions concerning the award of attorney fees. *US Fax Law Ctr., Inc. v. Henry Schein, Inc.*, 205 P.3d 512, 515 (Colo. App. 2009).

### B. Analysis

#### 1. C.R.C.P. 41(a)(2)

C.R.C.P. 41(a)(2) provides in relevant part that "an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper." Under this subsection, a court may impose conditions for

voluntary dismissal, including requiring the party dismissing its claims to pay its opponent's attorney fees. *See Haystack Ranch, LLC v. Fazzio*, 997 P.2d 548, 556 (Colo. 2000).

Eminent domain proceedings, however, are special statutory proceedings. *Ossman v. Mountain States Tel. & Tel. Co.*, 184 Colo. 360, 366, 520 P.2d 738, 742 (1974). Condemnation proceedings differ from ordinary civil actions, and abandonment in the former is not analogous to nonsuit in the latter. *Denver & N. O. R. Co. v. Lamborn*, 8 Colo. 380, 383, 8 P. 582, 584 (1885). Auto-trol's attorney fees claim was brought within the context of a condemnation proceeding, and therefore, the statutes, rules, and procedures of eminent domain cases apply, and C.R.C.P. 41(a)(2) does not apply. Thus, the trial court did not err in denying Auto-trol's attorney fees claim under that rule.

2. Section 38-1-122(1.5)

Section 38-1-122(1.5) provides in relevant part:

> In connection with proceedings for the acquisition or condemnation of property in which the award determined by the court exceeds ten thousand dollars, in addition to any compensation awarded to the owner in an eminent domain proceeding, the condemning authority shall reimburse the owner whose property is being acquired or condemned for all

> of the owner's reasonable attorney fees incurred by the owner where the award by the court in the proceedings equals or exceeds one hundred thirty percent of the last written offer given to the property owner prior to the filing of the condemnation action.

Here, the District presented a last written offer to purchase the Property in fee simple absolute for $8.4 million. The trial court's just compensation award, however, was for the fair rental value of the Property for the temporary possession between June 2, 2008 and September 9, 2008. Auto-trol argues that it is entitled to attorney fees because this award of rental value exceeds 130% of the last written offer for fee title to the Property, once the last written offer is prorated by means of its suggested computation.

Auto-trol cites *E-470 Public Highway Authority v. Wagner*, 77 P.3d 902, 904 (Colo. App. 2003), in support of its argument that the last written offer for a property can be prorated to the reduced size of the condemned area for purposes of comparison to the ultimate compensation award under the attorney fees statute. In *Wagner*, the last written offer was easily prorated to the reduced size because the original property to be purchased was thirty-nine acres, and the amended take area was twenty-nine acres. *Id.*

Assuming, without deciding, that section 38-1-122(1.5) applies to the abandonment of a condemnation, we conclude that Auto-trol is not eligible for attorney fees because there is no "last written offer . . . prior to the filing of the condemnation action" of an amount payable for the temporary possession of the Property between June 2, 2008 and September 9, 2008. Prorating an offer for thirty-nine acres down to twenty-nine acres, as in *Wagner*, is not analogous to prorating an offer for fee title down to a months-long rental value. Without a comparable last written offer, there is no benchmark from which to measure whether the award equals or exceeds the last written offer by 130%.

We therefore conclude it was not error for the trial court to deny Auto-trol's request for attorney fees under section 38-1-122(1.5).

## VI. Other Cross-Appeal Issues

We need not address the other issues raised in the District's cross-appeal, because they were raised contingent upon our reversal of the trial court's orders, which we affirm.

Orders affirmed.

JUDGE LOEB and JUDGE RICHMAN concur.