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# Salt Lake City Corporation v. Utah Wool Pulling Co. : Brief of Plaintiff-Appellant

Utah Supreme Court

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Roger F. Cutler; Ray L. Montgomery; Attorneys for Plaintiff-Appellant;  
Glen E. Fuller; Attorney for Defendant-Respondent;

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

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SALT LAKE CITY CORPORATION, )  
a municipal corporation of )  
the State of Utah, )

Plaintiff-Appellant, ) Case No. 14659

vs. )

UTAH WOOL PULLING COMPANY, )  
a Utah corporation, )

Defendant-Respondent.

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BRIEF OF PLAINTIFF-APPELLANT

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Appeal from a judgment of the Third District Court  
in and for Salt Lake County, State of Utah  
Honorable Gordon R. Hall, Judge

ROGER F. CUTLER  
City Attorney

RAY L. MONTGOMERY  
Assistant City Attorney  
Attorneys for Plaintiff-Appellant  
101 City & County Building  
Salt Lake City, Utah 84111  
328-7788

GLEN E. FULLER  
Attorney for Defendant-Respondent  
15 East Fourth South  
Salt Lake City, Utah 84111  
363-7187

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IN THE SUPREME COURT OF THE STATE OF UTAH

SALT LAKE CITY CORPORATION, )  
a municipal corporation of )  
the State of Utah, )

Plaintiff-Appellant, )

Case No. 14659

vs. )

UTAH WOOL PULLING COMPANY, )  
a Utah corporation, )

Defendant-Respondent. )  
\_\_\_\_\_ )

\_\_\_\_\_  
BRIEF OF PLAINTIFF-APPELLANT  
\_\_\_\_\_

NATURE OF THE CASE

This case originated when Salt Lake City initiated condemnation proceedings against the defendant. A settlement was reached on the value of all of the defendant's property, including the value of all defendant's land and buildings and the piping, pumps, reservoirs and associated water diversion facilities, for removing and using underground water at their plant under their water rights. The only issue left in the case by stipulation was the value, if any, of the defendant's water rights. Plaintiff contended full market value had been paid for defendant's properties and that standing alone, the defendant's water rights had no value.

asked time to determine, foolishly granted. Three years later defendant asked for trial on the issue.

#### DISPOSITION IN THE LOWER COURT

This matter was heard before the Honorable Gordon R. Hall, Judge of the Third Judicial District Court in and for Salt Lake County. Despite the fact that the parties had agreed to and defendant had been paid for all elements of value for the defendant's property, including the value of all well pipes, pumps, reservoirs and other facilities for diverting and using water from underground to the defendant's wool pulling operation, the Court allowed the defendant to go into all of the operations of the wool pullery and to examine uses the water was put to and the cost of replacing the water, as opposed only to the value of the water rights in their location and without diversion facilities which has been paid for. The matter went to the jury with instructions from the Judge, over objections of plaintiff, that they could consider the diversionary uses to which the water was put and the value of the water.

#### RELIEF SOUGHT ON APPEAL

Plaintiff-appellant asks that the judgment on the verdict be reversed, or set aside. If set aside, that a new trial be granted centering only on the value of the water rights in locus, and not on water or water right values outside the aquifer basin in which defendant's property was located, or that the may have produced through the water diversion facilities already

paid for by defendant.

STATEMENT OF FACT

On May 8, 1973, the parties entered into a stipulation (R 31-33) upon the market value for all properties to be condemned, except for the value, if any, of water rights, as set forth in paragraph 7 of the parties' stipulation (R 31-32). Judgment was entered (R 29,30) giving possession of the property to Salt Lake City Corporation, and for which payment, pursuant to said stipulation, was made. Included with the amount paid to the defendant was the sum of \$12,749.00 (R245), the agreed market value of the wells, including all piping, pumping connections, and reservoir facilities associated with diverting the water from underground for use by the defendant in the wool pullery.

The only issue, not fully resolved, was the value of the defendant's water rights. The plaintiff contended that the defendant's water rights had no value in view of the fact that defendant had been paid market value for all of the diversionary facilities. Merely by filing application with the State Engineer, a right to drill water in the same area for any amount could be obtained. The value then of water rights in the area where defendant's property was located was only the value of the diversion facilities plus what it cost to obtain the right to drill (R 268, 269). Defendant's witness Mr. C. Francis Solomon, verified this position in his testimony (R 238-272) and also stated that a new well could be drilled according to his investigation for a sum of not

to exceed \$8,000.00 which would produce the same amount of water defendant was producing from five wells (R 267).

Nearly three years later, some time just prior to November 24, 1975, the defendant's attorney apparently called the Court asking for a trial setting. The notice of trial setting (R 36) setting the matter for a non-jury trial, was the result. The defendant had decided to come to Court and attempt to obtain a windfall.

Trial began June 4, 1976 and defendant began with his first witness in attempting to show the value of the use of the water, as opposed to the value of the water right without diversion facilities (R 154-156). Defendant's attempts to do so were resisted by objection, a typical exchange of which is found on line 9 through 19 R 156 and lines 1 through 17 R 157. The Judge ruled against defendant sustaining plaintiff's objection as to relevance (R 163) and defendant made a proffer of proof contending that he could not proceed further and could not put on a case without being allowed to tie the water rights to their specialty use (R 173 lines 27-39). Defendant contended that the value of the water rights had to be evaluated with the total of the value of the property, which had already been paid for.

Defendant admitted that the water rights had no market value after the stipulation and payment by plaintiff (lines 20-25 R 177), and the plaintiff asked for a directed verdict (R 186, 187). The Court reversed itself, in error (R 187, 188), and allowed Mr. Fuller, over the plaintiff's objection to

proceed and bring in evidence concerning the specialty use of the water and value of the water used in error. The plaintiff's motion to strike the testimony of Mr. Summerhays as being irrelevant and improper was denied (R 191, 193).

Plaintiff objected to the valuation approach of Memory Cain, defendant's expert appraiser, which was based on the operation of the wool pullery (R 205) and to the value of the total business (R 207, 208), and comparables outside the aquifer basin in which the defendant's property was located (R 209, lines 4-24, R 211-215). He also improperly used the inherent valuation approach (R 214, lines 28-30, R 215, line 1). The Court acknowledged that the evidence of Mr. Cain came in under the plaintiff's continuing objection (R 215).

The plaintiff moved to strike Memory Cain's entire testimony concerning his inherent valuation methods and comparative sales based upon the fact that his comparables were based upon remotely located sales of water and water rights as opposed to sale of water or water rights in the basin where defendant's property was located (R 233-237). Again the Court ruled against plaintiff in error (R 237-238).

Plaintiff's expert witness, Fran Solomon, stated that the defendant's water rights had no value because any purchaser could readily obtain equivalent water rights and drill his own well for a lesser amount of money than was paid to the defendants for their diversion facilities (R 246-251). He also indicated that there were no comparable sales of water or water rights in that area because water was so readily available with

nothing more than drilling and diversion costs.

An expert engineer, Jay Bingham testified that water quality of the same or better than that claimed by the defendant could be and was produced under his direction, in the same aquifer basin, but even further west and closer to the Salt Lake than the location of the defendant's wells (R 308), and in an even higher volume and at the same or better quality of water (R 308-310).

Mr. Bingham also found no value in the water rights of defendant other than their cost of the filing fee (R 288, 289) since they had already been paid for their diversion facilities.

Mr. Dee Hansen, Utah State Engineer, said there was no cost and no value attaching to the water right (R 319), because the area was open to drilling (R 320) and any person could obtain the same or greater water rights in the same aquifer basin than those held by the defendant (R 321). He further stated that there was no charge for the water used under the defendant's water rights (R 323) and the State Engineer recognized the difference between the sale of water and the water right itself. The water right had no value (R 328) and the only cost of obtaining such rights would be between \$200.00 to \$500.00 to have an engineer certify they had proved up on the water rights (R 332) and the cost of drilling the well, which in this case defendant had already paid for.

The Court erred again in allowing defense witness Mr. Wederbrand to testify concerning the quality and nature of wells in the area, over objection (R 337) without having

qualified him as an expert witness on water and water rights. The Court at first excluded his testimony (R 198) and later allowed it in (R 337) in error and over objections and later motion to strike. Plaintiff concedes Mr. Wederbrand was a wool pullery expert but not a water or water rights expert, which he admitted (R 197, 198).

The case was given to the jury which returned a verdict in favor of the defendant and against the plaintiff in the amount of \$50,000.00.

#### POINT I

CERTIFIED WATER RIGHTS ARE SEPARABLE FROM  
THE LAND AND CAN BE AND ARE VALUED AND SOLD  
APART FROM THE LAND.

It is well settled that a certified water right, whether riparian or otherwise, is separable from the land and can be separately conveyed, 78 Am. Jur.2d, Waters Section 242. Such rights normally pass under a deed of conveyance of land to which they are attached unless expressly reserved, 78 Am. Jur. 2d, Water Section 243. In this case the value of such rights, if any was expressly reserved from said sale in said stipulation. Plaintiff contended full value had been paid, and offered to allow defendant sell those water rights, separate and apart from the land which is a common practice in this State as verified by the Utah State Engineer (R 323). Therefore, in this case the water rights should have been considered separate and apart from the other properties and property rights of defendant, which were previously paid for and not at issue in this case.

POINT II

IN EMINENT DOMAIN, THE SOLE AND PRIMARY  
QUERY IS DIRECTED TOWARD THE FAIR MARKET  
VALUE OF THE CONDEMNED PROPERTY.

Under the Utah Constitution, Article I, Section 22,  
the fair market value is the standard bearer of just compensa-  
tion. The Utah Supreme Court in Southern Pacific Company v.  
Arthur, 10 U.2d 306, 352 P.2d 393 (1960), stated that such  
was the test:

"The standard of what is just compensation in the  
ordinary case is market value of the property  
taken, that is what a willing buyer would pay to  
a willing seller."

In the case at bar, the only property still at issue  
was the certified water rights of defendant and the only  
determination to be made by the Court was the value, if any,  
of that specific property without confusing it or linking it  
to any value previously appraised, estimated or paid for the  
whole property or the water it could produce without the  
diversion facilities which had already been paid for over  
three years prior. The test was what a willing buyer would  
pay for the water rights alone in that aquifer basin.

Can you see a willing buyer paying \$50,000.00 as the  
jury contends, or \$80,000.00 as the defendant contends when  
that well informed buyer knows he can obtain such rights for  
less than \$500.00 at most?

The value of the land, the buildings and water diversion  
facilities and use to which water was put at the wool pullery  
was, at the time of trial, irrelevant. The test was what

would a willing buyer pay for only the water rights. The testimony of plaintiff's three witnesses in Court was that the water rights themselves had no value for the reason that anyone could obtain the right to drill a well and obtain as much water as was wanted in that aquifer basin where the defendant's property was located. See Statement of Facts. Such rights admittedly are not so readily obtainable in other areas of the State, and, therefore, valuations of sales in other aquifer basins would not and did not have any relevance to this sale. It was error for the Court to allow this information into evidence, over plaintiff's objections and motions to strike.

### POINT III

IT WAS ERROR TO ALLOW THE DEFENDANT TO ASSIGN  
A PECULIAR OR SPECIALTY VALUE TO PROPERTY  
BEING TAKEN UNDER EMINENT DOMAIN.

The well settled law in this area is stated in 29(a) Corpus Juris Secundum, Eminent Domain, 136(7), which states the rule as follows:

"The concept of market value judicially applied applies to the property condemned (citing cases) not to the person of the owner (citing cases), and only that value need be considered which is attached to the property (citing cases). In determining the amount of compensation, or the market value of the property taken, generally, no account should be given to the values or necessities peculiar to the owner (citing 43 cases sustaining this rule and 1 against in federal and state jurisdictions), or similarly to values or necessities peculiar to the condemnee (citing cases), nor should account to given to the purposes for which the property is taken (citing cases)."  
(Comment added)

The only case above mentioned as being against the

rule was the case of Kimball Laundry Company v. U.S., Neb., 69 S.Ct. 1434, 338 U.S. 1, 93 L.ed. 1765, 7 A.L.R.2d 1280, wherein the Army temporarily condemned the plaintiff's laundry for the duration of the war. Concerning the issue of peculiar value, the Court allowed compensation for the loss or damage to the laundry's trade routes which the owners could not service during and because of the temporary condemnation.

In view of the foregoing, the only value defendant should be allowed to place on the water rights was the value, if any, a willing buyer would pay for them without diversion facilities, for which plaintiff had already paid, and in the aquifer basin where the rights were located.

#### POINT IV

THE VALUATION OF THE WATER PRODUCED BY DEFENDANT'S CERTIFIED WATER RIGHTS, THROUGH DIVERSION FACILITIES ALREADY PAID FOR, AND THE SPECIAL PURPOSES FOR WHICH THE DEFENDANT WAS USING THEM, BASED ON IMPROPER VALUES AND VALUES OUTSIDE THE AREA WHERE THE PROPERTY WAS LOCATED WERE NOT PROPER FACTORS IN DETERMINING MARKET VALUE AND SHOULD NOT HAVE BEEN ALLOWED INTO EVIDENCE.

A condemnation must be based upon the fair market value of the property taken, which in this case should have been the value only of defendant's certified water rights in locus and defendant is not entitled to a profit, which allowing this case to stand would be.

29 A C.J.S Eminent Domain § 136(8) states:

"It is not proper to attempt to arrive at value by adding elements of value together, or after awarding full compensation for the property taken, then to allow additional compensation for those things which give it value."

This Court agrees with this position, see State of Utah v. Tedesco, 4 U.2d 31, 286 P.2d 785, and State of Utah v. Tedesco, 4 U.2d 248, 291 P.2d 1028.

The defendant may argue that such is not proper and cite Sigurd City v. State, 142 P.2d 154, and Whitmore v. Utah Fuel, 42 U. 470, 131 P. 907 as grounds for admission of inherent values evidence, but neither case is applicable here.

In the Sigurd case, the City condemned the irreplaceable spring water used for irrigation on the land of several ranchers leaving the land worth considerably less than it was before. The City did not condemn the land and the Court allowed evidence in concerning the inherent value of the whole. Its conclusions are not applicable to this case. In the case at bar the defendant was fully compensated for and agreed upon the market value of the land, buildings and all water diversion and other facilities located on the property. Only the right by which defendant removed the water from underground was to be valued. Defendant admitted and stipulated that the water rights in question had no value after the taking (R 186, 187). If they had no value after how could they have any value before the take. The value should be the same before and after and defendant should not be allowed to have it both ways.

In the Whitmore case, there was no market established for the water of the defendant in a condemnation case, because the water was so scarce in the area that no one would sell their rights. (The opposite of the case at bar, water so plentiful

no one will buy.) In this case the Court allowed pecuniary damages measured by the different uses to which he had applied it. This case is also inapplicable to the case at bar.

In order to justify departing the the usual use of market value, the condemnee must show that it is impossible to value the property without dispensing with the general rule, see State v. American, 82 S.D. 231, 144 N.W.2d 25, 32 (1966).

In the case at bar, the value the defendant placed upon the use of water and the purposes for which the defendant was using them is not market value and should not have been allowed into evidence by the Court so as to confuse the jury. This was done in error. A related case on this point is Redevelopment Agency of Salt Lake City v. Barusha, (August 1974) 526 P.2d 47, wherein the Utah Court stated as follows:

"The trial court did not err in its ruling market value is not a multiple, for the value in use of property for a particular purpose is not market value but merely a factor in determining such value. It is generally improper to express an opinion of value in use in terms of so much money. There is a clear distinction between value and use and market value; a given piece of land (in this case the certified water rights) has only one market value and not a certain value for one purpose and different market value for another purpose." (Emphasis added)

In the case at bar, the entire basis for the defendant's case and his presentation to the jury was the use of the water and the cost to reproduce it, but defendant's values were not based on the water's value in the aquifer basin where the defendant's property was located, which value was zero, but rather, it was based on remote valuations in three other areas

of the state. It was error for the Court to allow the introduction of defendant's use valuations and the remote and improper comparable sales evidence.

POINT V

IT WAS ERROR FOR THE TRIAL COURT TO ALLOW COMPARABLE SALES FROM HEBER VALLEY, CORRINNE AND WEBER COUNTY, ALL OF WHICH WERE OUTSIDE THE AQUIFER BASIN IN WHICH THE DEFENDANT'S PROPERTY WAS LOCATED.

The test of whether comparable sales should be allowed in evidence is set forth in the case of State v. Larkin, 27 U.2d 295, 495 P.2d 817 (1972), which quoted with approval the case of State v. Wood, 22 U.2d 317, 452 P.2d 872.

"Whether evidence of the value of other property should be admitted depends upon whether they are sufficiently similar in character, location and other factors which would influence value that they meet the test of 'reasonable comparability' so they can reasonably be regarded as having probative value as to the worth of the property in question. Because of the responsibility of the trial judge as the authority in charge of the trial he is allowed considerable latitude as to his judgment upon the matter and his ruling should not be distrusted unless it appears he was clearly in error and that this redounded to the prejudice of the complaining party."

In this case, the Court justified the lower court's exclusion of comparable sales in Tremonton and Brigham City, although the condemnation action was in Box Elder County on grounds that the sales from these two areas was too remote as to distance and type of area. This rule should have been applied in the case at bar.

The water sales from Heber City, Corrinne and Weber County were too far distant as to type and area (underground

water readily available in the defendant's area was not in the others), they were not sufficiently similar in character (spring water), location or other factors and offered no reasonable comparability to the property sought to be valued in this case. Additionally the Court's allowance of a determination of value to be placed on the sale of water in these remote areas as opposed to the value of an underground water right in the defendant's plentiful water basin was error and prejudiced plaintiff's case.

The fact that there were no sales of water or water rights in the aquifer basin where the defendant's property was located was amply explained by the plaintiff's three witnesses, that is that there had been no sales of water. Plaintiff's witnesses testified such rights had no value because anyone could obtain a right to drill for water in the area and remove as much as they deemed expedient, with only the cost of drilling, which defendant in this case had been paid for, and therefore no one would purchase such water or water rights in the area.

#### POINT VI

#### IT WAS ERROR FOR THE COURT TO ALLOW AN INSTRUCTION ON SPECIALTY PROPERTY

The Court, over plaintiff's objection and exception, allowed defendant's instruction No. 4 (R 94), the Court's No. 15 (R 118) to be given in error. Plaintiff contends this was error for the reasons stated in Point II and IV hereof.

## CONCLUSION

The Court erred in reversing itself and allowing defendant to provide allegations concerning the use and inherent valuation of the water to defendants, and also in allowing value to be placed on water used as opposed to strictly the value of certified water rights without diversion facilities in the area where the property was condemned. The Court erred in allowing the defendant to introduce evidence concerning inherent values and comparable sales of water and water rights in other areas not associated with the aquifer basin in which the defendant's property was located. The Court erred in refusing to strike the testimony of defendant's expert witness concerning the inherent and comparable sales values of defendant's water based on such information. Therefore, the judgment on the verdict in the lower court should either be reversed and this Court find that the value of the defendant's water rights were zero, the defendant having received full market value, or at the most \$500.00, or that the verdict be set aside and the plaintiff-appellant be granted a new trial.

Respectfully submitted,

ROGER F. CUTLER  
City Attorney

RAY L. MONTGOMERY  
Assistant City Attorney  
Attorneys for Plaintiff-Appellant  
101 City & County Building  
Salt Lake City, Utah 84111