2008

Utah Department of Transportation v. Admiral Beverage Corporation : Reply Brief

Utah Court of Appeals

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Oct. 23. 2008
9:30am

IN THE UTAH COURT OF APPEALS

UTAH DEPARTMENT OF
TRANSPORTATION,

Plaintiff/Appellee,

vs.

ADMIRAL BEVERAGE
CORPORATION,

Defendant/Appellant.

Appeal No. 20080027-CA

ORAL ARGUMENT REQUESTED

REPLY BRIEF OF APPELLANT ADMIRAL BEVERAGE CORPORATION

INTERLOCUTORY APPEAL FROM DECEMBER 27, 2007 MINUTE ENTRY
THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY, STATE OF UTAH
THE HONORABLE ROBERT P. FAUST
TRIAL COURT CASE NOS. 970905361 AND 970905368 (CONSOLIDATED)

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RESPONSE TO APPELLEE'S STATEMENT OF FACTS

The opening brief of Appellant Admiral Beverage Corporation ("Admiral") sets forth the facts that are relevant to this appeal. None of these facts are disputed by Appellee. The brief of Appellee Utah Department of Transportation ("UDOT") sets out its own statement of facts. Without waiving its other objections, Admiral specifically takes issue with the following factual statements in UDOT's brief.

1. The statement at the bottom of page 1 that "Defendant's property abuts 500 West, a street owned by Salt Lake City," is without support in the record. The land condemned by UDOT for the access road and storm drain was taken by UDOT, not by Salt Lake City. Moreover, there is no evidence that title taken and paid for by UDOT has been transferred to the City, which has had no involvement in the taking of the property that formerly constituted the access road upon which the traffic lane is now located or the property taken from Admiral upon which the access road is now located.

2. The statement at page 3 that as to "Determinative Statutes and Rules" "[t]here are no such provisions" is a significant omission in that it highlights UDOT's failure at any point in its brief to refer to Code Section 78-34-10. That section was approved and applied by the Utah Supreme Court in the case of Ivers v. Utah Dept. of Transp., 2007 UT 19, 154 P.2d 802 ("Ivers"), to facts almost identical to the facts in this case.

3. The statement is made at the bottom of page 3 and top of page 4 that "Admiral Beverage filed a motion in limine asking the court to allow several types of severance

damage evidence, including that caused by loss of visibility and loss of view." In fact, Admiral's motion asked the court to "admit evidence of all factors that affect fair market value." R. 168.

4. The statement at the top of page 4 that "the court concluded that no claim for loss of visibility from a freeway existed" is inaccurate. The court's unduly broad and inclusive ruling actually stated:

> . . . damages resulting from the construction of the elevated ramp just outside the token parcels, as well as damages from the reconfiguration of the freeway as part of the reconstruction project are not compensable as severance damages under Utah law.
>
> * * *
>
> Admiral's Motion in Limine to Admit Evidence of All Factors that Affect Fair Market Value is DENIED. R. 500-01.

This ruling, in fact, eliminated all claims including not only those related to "visibility" but also claims, for example, related to view from the property and to loss of access, air, light and view, and losses due to noise, dust, etc. These claims are clearly permitted under Ivers and other Utah cases.

5. The statement in the first full paragraph on page 6 that "none [of the taken property] was used for the remodeled I-15" is false and misleading. Rather, the referenced language states "no part of the rebuilt freeway itself is located on that property." R. 494 (emphasis added). As noted in Admiral's opening brief at p. 11, n. 1, it is undisputed that

the taking of Admiral's property was necessary and essential for the I-15 project of which it became an integral part. R. 673, 678-84.

ARGUMENT

I. The Rules Claimed to be Applicable to Abutting Property do not Override or Modify the Provisions of Code Section 78-34-10 as Approved and Applied in the Ivers Case.

UDOT mistakenly relied upon its theory as to the rights of an owner of property adjacent to, but that does not touch, the I-15 travel lanes. UDOT seeks by this theory to circumvent and avoid the specific holding of Ivers v. Utah Department of Transportation, 2007 UT 19, 154 P.3d 802, and the clear terms of Utah Code Section 78-34-10, which is cited and approved in Ivers. Neither Ivers nor Section 78-34-10 (never referred to or explained by UDOT) are conditioned upon or subject to any of the alleged rules regarding abutter's rights of adjacent property owners.

In the Ivers case, the Utah Supreme Court noted the following facts that mirror exactly the facts of the present case:

> 1. "No portion of the raised highway, its footings, or foundation was constructed on the condemned land; rather the condemned land was used for the creation of the frontage road and for improvements to Shepherd Lane;"
>
> 2. That "the elevation of the highway has obstructed both the view to the east from Arby's land and the visibility of Arby's property from the highway;"
>
> 3. That "the condemned land was used for construction of . . . the frontage road;"
>
> 4. That "the land was condemned as part of UDOT's plan to raise the highway and was therefore condemned as part of a single project;" and

5. That "the permanent loss of view and visibility, diminished the market value of the remaining land." Id. at 804.

The court then, as pointed out in Admiral's opening brief, ruled that under the provisions of Section 78-34-10(2), Ivers was entitled to severance damages for loss of view. The court held that Section 78-34-10(2), which provides for severance damages means what it says and provides severance damages for loss of view under facts such as those in the Ivers case and the present case.[1] The Ivers decision is directly contrary to Judge Roth's earlier ruling denying loss of view and all other intangible damages.

UDOT's attempt to distinguish the Ivers case from the facts this case is simply untenable. In both cases, the taken land was used for the construction of a frontage road. After the construction was complete, in both cases, the frontage road was located between the new highway structure and the remaining property. Moreover, UDOT's effort to apply the rules governing physical access rights to public roads to the present facts is unsupported by any of the cases cited in its brief.

The case of Utah State Road Commission v. Miya, 526 P.2d 926 (Utah 1974), ("Miya") cited by UDOT at page 8, actually gives strong support to Admiral's position and is consistent with Ivers as well. In that case, the state condemned defendant's property for

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[1] The intent of the legislature that compensation be provided for non-adjacent property damaged by construction of highway improvements is made clear in Section 78-34-10(3), which allows evidence of severance damages where:

> "(3) If the property, though no part thereof is taken, will be damaged by the improvement, the amount of such damages."

construction of a railroad overpass. As a result, residential building lots that adjoined a street located between the highway overpass and the remainder property were rendered less valuable because "a willing purchaser will not pay as much for a residential lot facing an overpass; the viaduct obstructs the view and interferes with one's privacy." Id. at 928. The Court noted that:

> A property owner has no right to a free and unrestricted flow of traffic past his premises, and any improvement or interference with this flow does not entitle the owner to compensation . . . However, where police power is exercised as an incidental result of the exercise of eminent domain, just compensation is due if the market value of the property has been diminished.

Id.

The Utah Supreme Court reaffirmed this basic rule in Ivers:

> With respect to lost view, severance damages are appropriate under Utah Code Section 78-34-10 where a portion of property is condemned by the state and the condemnation of that land *causes* damage to the noncondemned portion of land. Damage to the noncondemned portion of land is "caused" by the severance in two situations: (1) when the view-impairing structure is built on the condemned land, or (2) when the view impairing structure is built on land other than the condemned land, but the condemned land is used as part of a single project and that use is *essential* to completion of the project. The raised highway, which blocks the view from Arby's land, was not built on Arby's land. However, whether the land taken from Arby's was essential to the highway project is a factual matter not yet resolved.

Ivers, 2007 UT 19, ¶ 26.

The contention by UDOT at pages 8 and 9 that "the rights of access, light and air . . . create no greater right than the right to physical access" and "impose no greater burden on the public right of way than the servitude necessary to provide the right of access," is made

without support or explanation. That Admiral's bundle of rights is much broader than simple access cannot seriously be denied. Similarly without any support is the statement at page 9 that "[t]he right does not pass onto the public right of way or cross to the other side.... That right does not extend across the adjacent roadway to burden private or public property on the other side of the public street." To the contrary, the provisions of Utah Code Ann. § 78-34-10(2) and (3) and Ivers provide otherwise.

Neither the cases cited by UDOT dealing with physical access, nor those from other states dealing with their general rules regarding offending adjacent structures apply in this case, such as to override the provisions of Sections 78-34-10(2) and (3). Nor can Section 72-1-102(11) be read to render Section 78-34-10 meaningless. Neither those cases nor 72-1-102(11) even make reference to Section 78-34-10. UDOT refuses to acknowledge, or ever refer to, Section 78-34-10 or discuss its application here.

The essential and controlling facts in the present case are the following: (1) the property taken from Admiral was essential to and incorporated into the I-15 reconstruction, and (2) the structure obstructing the view and visibility was built "in the manner proposed by plaintiff." Ivers, 2007 UT 19, ¶ 18.

Judge Roth's decision, referred to by UDOT, hinged in large part on the fact that the elevated freeway was built six inches from the condemned parcel. Judge Roth noted:

> [I]t is certainly possible that the court's decision would have been significantly different if the offending elevated freeway ramp had been built six inches within, rather than six inches outside, the condemned parcel 109. In this

> regard, Admiral has advanced an argument that has special appeal given the harsh result the difference a matter of inches may produce.
>
> * * *
>
> This approach recognizes that the actual reduction in value of the remainder from the improvement, as a practical matter, may be no different when it is located just within or just outside the taken parcel.

R. 501 n.2.

UDOT's position in this case is that Admiral should have no severance damages attributable to UDOT. This position is made notwithstanding the uncontested and undeniable fact that construction of the freeway ramp within six inches of the severed property has caused a very significant and undeniable loss of fair market value in direct violation of Article 1, Section 22 of the Utah Constitution. Fair market value is the standard by which such damages should be determined in Utah.

II. The Ruling in Harvey Relied Upon by Judge Roth to Exclude All Severance Damages was Overruled in Ivers.

Judge Roth's decision, which was adopted by Judge Faust, addressed, then excluded, all severance damage claims raised by Admiral in this case. First, Judge Roth stated that "Utah cases have been consistent in holding that severance damages are limited to those covered by the taking itself or attributable to construction on the taken property." R. 499. Judge Roth then quoted the following language from State v. Harvey Real Estate, 2002 UT 107, 57 P.3d 1088:

> Section 78-34-10 gives a landowner the right to present evidence of damages caused by the construction of the improvements made on the severed property.

> It does not give the landowner the right to present evidence of damages caused by other facts of the construction project. (Emphasis added.)

R. 500 (quoting Harvey, 2002 UT 107, ¶ 10) (emphasis added). Judge Roth went on to conclude that:

> [D]amages resulting from construction of the elevated ramp just outside the taken parcels, as well as damages from the reconfiguration of the freeway as part of the reconstruction project are not compensable as severance damages under Utah law. This appears to include evidence related to all of "the components of severance damages" that were "taken into account" by Admiral's expert appraisers and enumerated at paragraph 7 of the Affidavit of Robert A. Steele and paragraph 7 of the Affidavit of John C. Brown (Exhibits A and B, respectively, to Admiral's Memorandum in Support), except for "loss of parking."

R. 500-01.

These direct quotations from Judge Roth's decision demonstrate beyond question, contrary to UDOT's argument, that Judge Roth's ruling, even if valid when originally entered, is no longer applicable to the facts of the present case. The rule that the offending improvement must be placed on the taken property, as announced in Harvey and adopted by Judge Roth, was overruled in Ivers. Thus, the issue is whether or not Judge Faust applied the law as set forth in Ivers and Section 78-34-10, rather than the law that was set out in Harvey, five years previously. It is simply a matter of applying the current, applicable law.

Both the Utah Supreme Court and this Court have in case after case affirmed the mandate in Article 1, Section 22 of the Utah Constitution: "Private property shall not be taken or damaged for public use without just compensation." Moreover, Utah courts have uniformly held that such compensation must be measured by the difference in "fair market

value" before and after the taking. See, e.g., State v. Cooperative Sec. Corp. of Church of Jesus Christ of Latter Day Saints, 247 P.2d 269, 271 (Utah 1952); Casket Barn v. State, 786 P.2d 770, 772-73 (Utah Ct. App. 1990). Furthermore, Utah courts have recognized that:

> In making the [severance damages] appraisal it is not only permissible, but necessary to consider all of the facts and circumstances that a prudent and willing buyer and seller, with knowledge of the facts, would take into account in arriving at market value.

State Road Comm'n v. Rohan, 487 P.2d 857, 859 (Utah 1971); Southern Pacific Co. v. Arthur, 352 P.2d 693, 695 (Utah 1960).

In the present case it is undisputed that the property taken was essential to the project and that construction of the elevated travel lane caused a substantial loss of fair market value to the part not taken. Nor can it be disputed that fair market value before and after the take was appraised based upon the fair market value actually paid by Admiral for the properties just before the take and the loss of fair market value caused by the elevated freeway in the manner proposed by UDOT. All of these values were established by means of universally accepted practices in the appraisal industry.

Unless Admiral can be compensated for "all of the facts and circumstances that a prudent and willing buyer and seller, with knowledge of the facts, would take into account in arriving at market value," the constitutional right of Admiral to just compensation is, to a very real and significant degree, illusionary. Moreover, the substantial values thus

excluded will accrue to the state without payment for the same to Admiral. Such a result violates the requirement that just compensation be paid.[2]

CONCLUSION

Judge Faust's Minute Entry and Judge Roth's prior decision, which was adopted by Judge Faust, are both contrary to the Utah Supreme Court's holding in Ivers. Moreover, Judge Roth's decision excluding all severance damages, including damages for loss of view, light, air, aesthetics and the like, is clearly overridden by the Utah Supreme Court's ruling in Ivers and violates the mandate of Article 1, Section 22, requiring the payment of "just compensation" for property interests taken by the State.

DATED this 17th day of September, 2008.

SNOW, CHRISTENSEN & MARTINEAU

By _____
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[2]Judge Roth's decision, which was adopted by Judge Faust, not only erroneously excludes damages for loss of view but all other severance damages except for loss of parking. R. 498. At most, however, Ivers limited damages to visibility without having given any consideration to State Road Comm'n v. Rohan, 487 P.2d 857 (Utah 1971).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 17 day of September, 2008, I caused a true and correct copy of the foregoing **REPLY BRIEF OF APPELLANT ADMIRAL BEVERAGE CORPORATION** to be mailed to the following:

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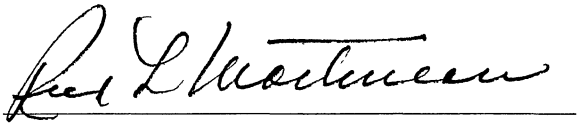

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