

1987

John Price, Price-Orem Investment Company v.
Rollins, Brown, and Gunnell, Inc., Carr F. Greer :
Brief of Appellant

Utah Court of Appeals

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Bryce D. Panzer; Snow, Christensen & Martineau; attorneys for respondent.

Jackson Howard, Leslie Slaugh; Howard, Lewis & Petersen; attorneys for appellant.

Recommended Citation

Brief of Appellant, *John Price, Price-Orem Investment Company v. Rollins, Brown, and Gunnell, Inc., Carr F. Greer*, No. 870550 (Utah Court of Appeals, 1987).

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IN THE COURT OF APPEALS

0. 870556 OF THE STATE OF UTAH

JOHN PRICE, for and on	:	
behalf of PRICE-OREM	:	
INVESTMENT COMPANY, a	:	
limited partnership,	:	
	:	
Plaintiff-	:	
Appellant,	:	Case No. 870550-CA
Respondent	:	
vs.	:	Category 14b
	:	
<u>ROLLINS, BROWN, & GUNNELL,</u>	:	
<u>INC.</u> , and CARR F. GREER,	:	
an individual,	:	
	:	
Defendants-	:	
Respondent.	:	
Appellant	:	

APPELLANT'S BRIEF

APPEAL FROM THE JUDGMENT ON JURY VERDICT ENTERED
BY THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY,
STATE OF UTAH, THE HON. BOYD L. PARK, PRESIDING

JACKSON HOWARD and
LESLIE W. SLAUGH, for:
HOWARD, LEWIS & PETERSEN
120 East 300 North
Provo, Utah 84601

ATTORNEYS FOR APPELLANT

BRYCE D. PANZER, for:
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, 11th Floor
P.O. Box 45000
Salt Lake City, Utah 84145

ATTORNEYS FOR RESPONDENT

RF

APR 1 5 1988

LIST OF PARTIES

The case caption includes the names of all persons which were still parties in this case at the time of trial.

The initial complaint also named the following persons as defendants: Ralph Rollins, Russell Brown, Robert Gunnell, and Harvey Call. (R. 1.) These defendants were represented by Jackson Howard, for Howard, Lewis & Petersen.

Plaintiff was represented in the initial filing of this action by Robert O. Baldwin, of Jardine, Baldwin & Brown, Salt Lake City. That firm withdrew on May 27, 1975. (R. 77.) Plaintiff was thereafter represented by Reed L. Martineau and George A. Hunt, of Worsley, Snow & Christensen, now Snow, Christensen & Martineau. (R. 79.) Plaintiffs were represented at trial by Bryce D. Panzer of the same firm.

TABLE OF CASES AND AUTHORITIES

Cases cited:

<u>Even Odds, Inc. v. Nielson</u> , 22 Utah 2d 49, 448 P.2d 709 (1968).	9
<u>Gear v. City of Phoenix</u> , 93 Ariz. 260, 379 P.2d 972 (1963).	8
<u>Hogland v. Klein</u> , 49 Wash. 2d 216, 298 P.2d 1099 (1956).	10
<u>Leishman v. Kamas Valley Lumber Co.</u> , 19 Utah 2d 150, 427 P.2d 747 (1967).	10
<u>Pacific Power & Light Co. v. Department of Revenue</u> , 7 Or. T. R. 203, 1977 W.L. 1615 (Or. Tax 1977).	12
<u>Price-Orem Investment Co. v. Rollins, Brown and Gunnell, Inc.</u> , 713 P.2d 55 (Utah 1986).	3
<u>Rex T. Fuhrman, Inc. v. Jarrell</u> , 21 Utah 2d 298, 445 P.2d 136 (1963).	10
<u>Rosen v. City of Milwaukee</u> , 72 Wis. 2d 653, 242 N.W.2d 681 (1976).	12
<u>Sawyers v. FMA Leasing Co.</u> , 772 P.2d 773 (Utah 1986).	10, 11

Other authorities cited:

22 Am. Jur. 2d <u>Damages</u> § 22 (1965).	10
22 Am. Jur. 2d <u>Damages</u> § 25 (1965).	11, 13
22 Am. Jur. 2d <u>Damages</u> § 132 (1965).	10

IN THE COURT OF APPEALS
OF THE STATE OF UTAH

JOHN PRICE, for and on	:	
behalf of PRICE-OREM	:	
INVESTMENT COMPANY, a	:	
limited partnership,	:	
	:	
Plaintiff-	:	
Appellant,	:	Case No. 870550-CA
Respondent	:	
vs.	:	Category 14b
	:	
<u>ROLLINS, BROWN, & GUNNELL,</u>	:	
<u>INC.,</u> and CARR F. GREER,	:	
an individual,	:	
	:	
Defendants-	:	
Respondent.	:	
Appellant	:	

APPELLANT'S BRIEF

JURISDICTION AND NATURE OF PROCEEDINGS BELOW

This is an appeal from a Judgment on Jury Verdict entered after a jury trial. The Utah Supreme Court had jurisdiction over this appeal pursuant to Utah Code Ann § 78-2-2(3)(i) (1987), and transferred the case to this Court pursuant to Utah Code Ann. § 78-2-2(4). This Court has jurisdiction pursuant to Utah Code Ann. § 78-2a-3(2)(h).

ISSUES PRESENTED

1. Did the trial court err in admitting into evidence an appraisal based on estimated income of a shopping center, where actual data concerning the income of the shopping center was available?

2. Did the trial court err in denying defendant's motion for a directed verdict or for judgment notwithstanding the verdict where the evidence established that construction of the retail space which plaintiff claimed was lost would have in any event been in violation of city ordinances because the shopping center had insufficient parking space?

RELEVANT ORDINANCES

A copy of the Orem City ordinance regarding parking is attached as Appendix "D".

STATEMENT OF THE CASE

A. Nature of the Case.

This is a tort action for damages alleged to have been negligently caused by defendant's¹ error in staking the location for a building owned by plaintiff.

B. Course of Proceedings and Disposition Below.

This action was filed on September 9, 1974 (R. 1.), and was initially tried before the Hon. Maurice Harding, sitting with a jury, on November 17-19, 1980. (R. 302-05.) The jury returned a verdict for plaintiff and assessed damages at \$30,000.00. (R.

¹Although the Amended Complaint names both Rollins, Brown & Gunnell, Inc., and Carr F. Greer as defendants (R. 88-90), Mr. Greer had passed away prior to the trial of this matter. (R. 1193.) No evidence was offered against Mr. Greer or his estate at trial, and it appears that he was implicitly "dismissed" from the lawsuit sometime prior to trial.

The term "defendant" as used herein shall accordingly refer only to Rollins, Brown & Gunnell, Inc.

252.) The defendant thereafter made a Motion for Judgment NOV of in the Alternative Motion for a Remittitur or a New Trial (R. 265), asserting that the damages were excessive because (1) the evidence demonstrated that the cost of repair at the time the error was discovered was only \$3,000.00, and (2) any additional retail space would have been in violation of Orem City parking ordinances. (R. 266-83.) The trial court held that the evidence was insufficient to justify the verdict, and further held that "there was no culpable negligence on the part of the engineers" (R. 350), and granted the motion for a new trial. (R. 306.)

The case was rescheduled for trial on March 1, 1983. (R. 381.) On the day of trial, the trial court, the Hon. David Sam, determined that John Price Associates, Inc., was a necessary and indispensable party to the action. (R. 373-74.) Upon plaintiff's election to not amend its complaint, the action was deemed dismissed (id.), and the plaintiff appealed. (R. 376.) The Utah Supreme Court reversed and remanded the case for trial. (R. 400.) Price-Orem Investment Co. v. Rollins, Brown and Gunnell, Inc., 713 P.2d 55 (Utah 1986).

The case was again brought to trial before the Hon. Boyd L. Park, sitting with a jury, on June 1-3, 1987. (R. 661-72.) The jury found both parties negligent, and attributed 40% of the negligence to plaintiff and 60% to defendant. The jury assessed damages of \$33,861.00, resulting in a net judgment to plaintiff of \$20,316.60 plus costs. (R. 765-67.)

The Judgment on Jury Verdict signed by the trial court fixed costs at \$894.20. (Id.) The plaintiff sought an award of pre-judgment interest (R. 703), which was denied by the trial court. (R. 763-64.) Defendant had previously filed a Motion to Tax Costs (R. 761), and subsequently filed an Amended Motion to Tax Costs. (R. 775.) Upon consideration of the Amended Motion, the trial court reduced the costs to \$297.30. A Ruling and Amendment to Judgment reflecting the reduced costs was entered on September 18, 1987. (R. 777.) Defendant filed its Notice of Appeal on October 1, 1987. (R. 782.) Plaintiff filed a Notice of Cross-Appeal on October 15, 1987. (R. 508.)

C. Statement of Facts.

Sometime during the first part of July, 1973, John Price Associates, Inc. ("JPA"), contracted with the defendant to have a survey done of the site of the Orem Plaza, a shopping center owned and developed by Price-Orem, Investment Company, a limited partnership. (R. 1323.) Agents of the defendant performed the survey in accordance with the terms of the contract. The first survey was accurate as of July 27, 1973. (See R. 1823.) After the first survey, the plaintiff acquired a second parcel which overlapped the first survey on the north. (R. 1323, 1731.) The original survey drawing was revised under date August 24, 1973, to include the newly acquired parcel. The corner stakes for the first survey were left in place.

In June, 1974, JPA again contracted with the defendant to stake the layout of the shopping center building. (R. 1314.)

The staking was performed by a crew led by Mr. Thurgood, who was then an employee of defendant. (R. 1399.) Mr. Thurgood used as a starting point a one-inch steel pin imbedded in the ground and which was marked by flagging and other stakes around it, including a stake labeled "N.W. Property Corner". (R. 1404-09, 1436.) Based on that starting point, Mr. Thurgood and his crew staked the building layout. The building layout as staked fit properly on top of fill material which had already been placed by JPA. (R. 1408-14, 1441.) JPA continued with construction of the building in accordance with the stakes placed by defendant.

Later events revealed that the stake used by Mr. Thurgood was not the corner intended to be used by the owner. (R. 1419-20.) It was, however, the northwest corner of the property originally surveyed. The corner that was intended to have been used, apparently because of the subsequent property acquisition, was about 30 feet to the north of the point used. As a result, the building was staked about thirty feet south of the location called for on the site plan. Defendant presented several proposals to plaintiff to correct the problem, which defendant estimated would cost approximately \$3,000.00. (R. 1760.) Plaintiff rejected the proposals (R. 1765), and determined to adjust for the error by shortening the shop space by 30 feet. (R. 1299.) Because the shop spaces as constructed were 70 feet deep, plaintiff claimed to have lost 2100 square feet of shop space by reason of the error.

Plaintiff's evidence concerning the value of the lost space was given by Ralph Wright, an appraiser, who testified concerning an appraisal he had performed prior to May 26, 1977. (R. 1485.) The appraisal was based on an assumption that the then-existing leases or similar leases would continue (R. 1483), and that the vacancy rate in the shopping center would be approximately 5%. (R. 1504.) Mr. Wright did not make any adjustments for the high number of vacancies existing in the shopping center at the time of trial. (R. 1529-40.) Mr. Wright, using an income approach to valuation, estimated that the present value of the lost income over 40 years was \$72,351.00. (Ex. 12.) He estimated that the cost of constructing the lost space would have been \$42,000.00 (R. 1515), yielding a net loss of \$30,351.00.

Plaintiff also claimed that it paid \$3,000.00 to redraw the plans for the shopping center (R. 1292), \$210.00 for some additional curb and gutter work (R. 1306; see also R. 1834), and \$300.00 for miscellaneous extra piping. (Id.)

Substantial competent evidence was presented concerning the amount of parking required for the complex. Both Mr. Brown, who was the Orem City Engineer in 1974 and who was familiar with the ordinances relating to shopping center construction, and Mr. Randall Deschamps, the planning director for Orem City during the relevant time period, testified that the shopping center as constructed did not have sufficient parking to comply with applicable Orem City ordinances. (R. 1646, 1773.)

SUMMARY OF ARGUMENT

Defendant presented uncontroverted evidence that plaintiff suffered no damage. The shopping center as built was in violation of Orem City ordinances regarding the minimum amount of parking space required. Construction of the additional 2100 square feet would have only compounded the violation, and would have been illegal. It was error to award any damages for plaintiff's inability to construct an illegal building.

Even if the plaintiff was entitled to an award of damages, plaintiff did not present any competent evidence of the damages actually suffered by plaintiff. The jury's award of damages was based predominately upon an appraisal performed in 1977, over ten years prior to the trial of this case. The appraisal had been based on estimates concerning vacancy rates which subsequent events proved erroneous, and in addition used estimates of the probable income from the shopping center even though information concerning the actual income history of the center was available. Such evidence is inherently speculative. Although such evidence may have been admissible if this case had been tried in 1977, it was irrelevant and inadmissible in 1987. Plaintiff did not present any competent evidence concerning damages, and defendant's motions for a directed verdict and for judgment notwithstanding the verdict should have been granted.

ARGUMENT

POINT I

THE PLAINTIFF SUFFERED NO DAMAGES.

Substantial competent evidence was presented at trial that the shopping center, as finally constructed, was in violation of Orem City Ordinances, in that it had too few parking spaces for the amount of retail and restaurant space. Although the plaintiff argued that it had been deprived of an additional 2100 square feet of floor space, construction of the additional space would have been illegal.

It is well established that an award of damages based on violation of the law is against public policy. There are numerous occasions in which courts have had an opportunity to deal with an illegal use. One such area is that of eminent domain. As stated by the Arizona Supreme Court in Gear v. City of Phoenix, 93 Ariz. 260, 379 P.2d 972 (1963), "the availability of land for a use which is prohibited by law cannot be considered in determining its value in eminent domain proceedings." 379 P.2d at 974 (citations omitted).

In this case, the ordinances of Orem City were established and the agents and employees of Orem City testified to their implementation. In tort, the plaintiff is prohibited from putting on evidence of damages which result from activities or situations prohibited by statutes or ordinances.

The plaintiff has attempted to prove damages by establishing the value of an imaginary 2100 square feet of retail space

which was not constructed and which, if constructed, would be a patent violation of the Orem City Ordinances. It is clear that the plaintiff in fact suffered no damage in the eyes of the law.

Plaintiff attempted to rebut the undisputed evidence of insufficient parking by arguing that had the extra space been constructed, and had plaintiff been aware of the insufficiency of the parking, plaintiff might have been able to make adjustments to come into compliance with the law. (E.g., R. 1712.) This argument is not persuasive. Plaintiff's evidence of damage was based on projected income from the use made of the shopping center at the time of the appraisal. It would be obviously unfair and illogical to allow plaintiff to claim that a hypothetical use of the property might have been lawful, but to claim damages based on an actual, illegal, use.

The undisputed evidence established, as a matter of law, that plaintiff suffered no damages. The trial court erred in failing to direct a verdict for defendant.

POINT II

IT WAS ERROR TO ADMIT EVIDENCE OF ESTIMATED LOSS WHEN EVIDENCE CONCERNING ACTUAL LOSS WAS AVAILABLE.

The desired objective in computing damages "is to evaluate any loss suffered by the most direct, practical and accurate method that can be employed." Even Odds, Inc. v. Nielson, 22 Utah 2d 49, 448 P.2d 709. 711 (1968). In compensating an injured party for damages to real property two basic rules have emerged: the (1) "diminution in value" rule (difference between

the value of property before and after an injury); and (2) "restoration" or "cost of repairs" rule (the cost of repairing realty to its original condition). 22 Am. Jur. 2d Damages § 132 (1965). See also Leishman v. Kamas Valley Lumber Co., 19 Utah 2d 150, 427 P.2d 747 (1967); Rex T. Fuhrman, Inc. v. Jarrell, 21 Utah 2d 298, 445 P.2d 136 (1963). The plaintiff had the burden of proving both measures of damages, and would be entitled to receive only the lesser amount. See Hogland v. Klein, 49 Wash. 2d 216, 298 P.2d 1099, 1102 (1956).

It is axiomatic that while damages need not be proved with exactitude, they must be proved with reasonable certainty. Sawyers v. FMA Leasing Co., 722 P.2d 773, 774 (Utah 1986). For example, in the Sawyers case where the plaintiff was seeking lost profits, the Court indicated that "[r]easonable certainty requires more than a mere estimate of net profits. In addition to proof of gross profits, there must generally be supporting evidence of overhead expenses, or other costs of producing income from which a net figure can be derived." Id. (citations omitted).

A necessary corollary to the rule that damages must be proved with reasonable certainty is the inverse rule that "recovery of damages will not be allowed when the trier of facts must rely upon evidence which leaves those damages uncertain or speculative." 22 Am. Jur. 2d Damages § 22 at page 40 (1965). Furthermore, the burden of proof is on the plaintiff to "produce a sufficient evidentiary basis to establish the fact of damages

and to permit the trier of fact to determine with reasonably certainty the amount of [damages]." Sawyers, 772 P.2d at 774.

Additionally, in order to recover, the plaintiff must have "produced the best evidence available . . . to afford a reasonable basis for estimating his loss." Id., § 25 at page 45. In coming up with an estimate, "[e]vents which occur after the wrong complained of may serve to render the damages sufficiently certain." Id., at page 46. Finally, to authorize recovery for more than nominal damages, "[t]he damages must be susceptible to ascertainment in some manner other than by mere speculation, conjecture, or surmise, and be referenced to some fairly definite standard, such as market value, established experience or direct inference from known circumstances." Id.

Application of these principles to the facts of the case at bar reveals that the evidence plaintiff presented failed to meet the fundamental requirements of admissible proof and was too speculative to support an award of damages.

The jury's award of \$33,381.00, appears to be the sum of (1) the estimated lost income from the 2100 square feet of lost space according to the testimony of Mr. Wright (\$72,351.00) (Ex. 12), less the estimated cost of construction of that 2100 square foot section (\$42,000.00) (R. 1515), (2) the plaintiff's undocumented testimony that it paid \$3,000.00 to an architect to redesign the building (R. 1292), (3) \$210.00 for certain curb and gutter work, and (4) \$300.00 for miscellaneous extra piping (R. 1306). Neither the total sum, nor each element thereof, was

proven with the reasonable certainty required by Utah law. Rather, each element was either speculation or a guess on the plaintiff's part or an undocumented expense. In short, not only did plaintiff fail to produce the best evidence available to afford a reasonable basis for estimating its loss, it failed to produce any evidence other than mere conjecture.

A review of the testimony of plaintiff's expert, Mr. Wright, reveals that speculative nature of plaintiff's damage evidence. Mr. Wright premised his opinions on conditions which existed in 1977 when he prepared his first report. Even assuming, arguendo, that his formula and methods for calculating plaintiff's damages were sound in 1977, one cannot conclude that they are sound today. Further, his opinion was based on a forecast of the future from 1977. Such a forecast cannot be used, even under an income approach to valuation, when at the date of trial there are 13 years of established experience. Wright's opinion was patently flawed and as such inadmissible. See Pacific Power & Light Co. v. Department of Revenue, 7 Or. T. R. 203, 1977 W.L. 1615, *9 (Or. Tax 1977) (estimate of operating income was improper where actual data was available); Rosen v. City of Milwaukee, 72 Wis. 2d 653, 242 N.W.2d 681 (1976).

At the time of the first trial, the plaintiff's shopping center was new, therefore, it had no rental history upon which to base an opinion of damages. Thus, it was perfectly reasonable to project damages into the future based upon the best market variables then available. In contrast, when making that

same estimate of damages today, one cannot rely upon the same unknowns which were relied upon thirteen years ago because many of the unknowns have become knowns. Plaintiff's evidence, as present by Mr. Wright, was flawed and speculative in today's world because it ignored "established experience or direct inference from known circumstances." 22 Am. Jr. 2d Damages § 25 at page 46 (1965).

By relying on evidence which, by virtue of time and experience, has been ejected from the category of "best evidence available to afford a reasonable basis for estimating it's loss", id., plaintiff failed to meet its burden of proof to produce a sufficient evidentiary basis to establish damages with reasonable certainty.

Plaintiff's evidence concerning the claim for the curb and gutter work and miscellaneous piping was similarly speculative. The only support for the jury's award was the following testimony:

A [by John Price] And the planting areas would be about .25 cents a square foot and then the you have got the curb and gutter basically would be \$3.50 a lineal foot and you have got some striping which would be about \$1.20 installed and then you have got the miscellaneous piping in there and that was about \$300.00 for that and then you got your overhead and few other just inhouse costs and then you just add them up and it comes up as I stated \$5600.00. But we can be accurate, you know, present that I am sorry that I didn't do that.

(R. 1306.)²

²Total values were extrapolated from this evidence by plaintiff's attorney in closing argument as follows:

Because plaintiff failed to present evidence which could establish with reasonable certainty plaintiff's alleged damages, plaintiff did not establish a prima facie case. Defendant's motion for a directed verdict and its subsequent motion for judgment notwithstanding the verdict should have been granted.

CONCLUSION

The uncontroverted evidence established that the additional space would have been illegal because there was insufficient parking. This case should be remanded with instructions to grant defendant's motion for judgment notwithstanding the verdict.

In the alternative, this case should be remanded for a new trial, with instructions that evidence of valuation based on

The first is that Mr. Price testified that the additional curb and gutter in this area cost him \$3.50 per lineal foot.

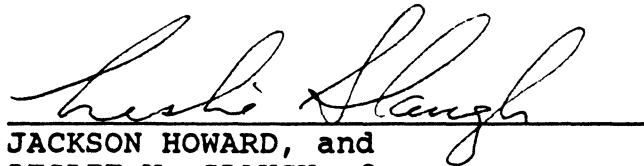
Mr. Smith testified that there were 60 additional lineal feet because of the addition of this area here. It is a simply multiplication problem there, \$3.50 per foot times 60 feet, \$210.00.

Secondly Mr. Price testified that it cost him an additional \$300.00 for some miscellaneous piping in this area. WE believe those are the sums that you should award as costs incurred in minimizing damages in addition to the architectural fees.

The undersigned counsel for defendant was not able to locate any evidentiary support for the assertion that 60 additional feet of curb and gutter was required.

estimated income must be excluded where evidence of actual income is available.

DATED this 11th day of April, 1988.

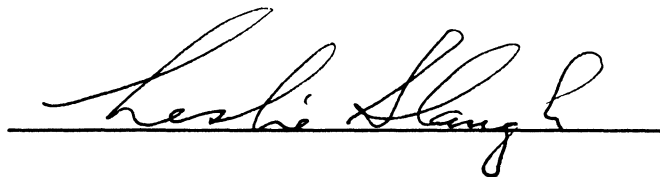
A handwritten signature in cursive script, appearing to read "Leslie Slauch", written over a horizontal line.

JACKSON HOWARD, and
LESLIE W. SLAUGH, for:
HOWARD, LEWIS & PETERSEN
Attorneys for Defendant-Appellant

MAILING CERTIFICATE

I hereby certify that four true and correct copies of the foregoing were mailed to the following, postage prepaid, this 11th day of April, 1988.

Bryce D. Panzer, Esq.
Snow, Christensen & Martineau
10 Exchange Place, 11th Floor
P.O. Box 45000
Salt Lake City, Utah 84145

A handwritten signature in cursive script, appearing to read "Leslie Slauch", written over a horizontal line.

APPENDIX "A"

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH, COUNTY
STATE OF UTAH

FILED
FOURTH JUDICIAL DISTRICT COURT
OF UTAH COUNTY STATE OF UTAH
1987 JUN -4 AM 10:32
WILLIAM F. JONES, CLERK
DEPUTY

PRICE-OREM INVESTMENT COMPANY, :
a limited partnership, :

Plaintiff, :

vs. :

ROLLINS, BROWN AND GUNNELL,
INC., :

Defendant. :

SPECIAL VERDICT

Civil No. 41,071

Please answer the following questions.

1. A. Was Rollins, Brown and Gunnell, Inc. negligent?

YES ☒ NO ☐

- B. Was the negligence, if any, of Rollins, Brown and Gunnell, Inc. a proximate cause of damages to the plaintiff?

YES ☒ NO ☐

2. A. Was Price-Orem Investment Company negligent?

YES ☒ NO ☐

- B. Was the negligence, if any, of Price-Orem Investment Company a proximate cause of damages to the plaintiff?

YES ☒ NO ☐

3. (If you answered both 1(b) and 2(b) "Yes," answer this question):

Considering all the negligence which proximately caused damages as 100%, what percentage of that negligence is attributable to:

A. Rollins, Brown and Gunnell, Inc.?

60 %

B. Price-Orem Investment Company?

40 %

TOTAL:

100%

4. What sum, if any, would fairly compensate Price-Orem Investment Company for its losses?

DATED this 3 day of June, 1987.

LESS 40%

= 60%

\$33,861⁰⁰
\$-13,544⁰⁰

20,317

Bill Denny
FOREPERSON

APPENDIX "B"

BRYCE D. PANZER
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Plaintiff
10 Exchange Place, Eleventh Floor
Post Office Box 45000
Salt Lake City, Utah 84145
Telephone: (801) 521-9000

FILED
1987 SEP -1 PM 2:51
WILLIAM F. H. CLARK
[Signature]

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY
STATE OF UTAH

PRICE-OREM INVESTMENT COMPANY,
a limited partnership,

Plaintiff,

JUDGMENT ON JURY VERDICT

vs.

ROLLINS, BROWN AND GUNNELL,
INC.,

Civil No. 41071

Judge Park

Defendant.

This action came on regularly for trial on June 1, 2, and 3, 1987, before the Honorable Boyd L. Park, District Judge, sitting with a jury, in Provo, Utah. Plaintiff Price-Orem Investment Company was represented by Bryce D. Panzer of the law firm of Snow, Christensen & Martineau. Defendant Rollins, Brown and Gunnell, Inc. was represented by Jackson Howard of the law firm of Howard, Lewis and Peterson. A jury of eight people was regularly impaneled and sworn to try the action. Witnesses on behalf of the parties were sworn and examined and documents and exhibits were admitted on behalf of the parties. After hearing the evidence and arguments of counsel, and after receiving the instructions

of the court, the jury retired to consider a special verdict and subsequently returned the special verdict into court with the following answers:

1. A. Was Rollins, Brown and Gunnell, Inc. negligent?

YES X NO

B. Was the negligence, if any, of Rollins, Brown and Gunnell, Inc. a proximate cause of damages to the plaintiff?

YES X NO

2. A. Was Price-Orem Investment Company negligent?

YES X NO

B. Was the negligence, if any, of Price-Orem Investment Company a proximate cause of damages to the plaintiff?

YES X NO

3. Considering all the negligence which proximately caused damages as 100%, what percentage of that negligence is attributable to:

A. Rollins, Brown and Gunnell, Inc.? 60%

B. Price-Orem Investment Company? 40%

TOTAL: 100%

4. What sum, if any, would fairly compensate Price-Orem Investment Company for its losses? \$33,861.00

The special verdict was dated June 3, 1987, and signed by the foreperson, William L. Gappmayer.


The Court having considered and denied defendant's motions for a directed verdict and for judgment N.O.V., and various other post-trial motions having been resolved,

WHEREFORE, by virtue of the law and the special verdict returned by the jury in the above action, it is hereby

ORDERED, ADJUDGED AND DECREED that plaintiff, Price-Orem Investment Company, be and hereby is rendered judgment against defendant, Rollins, Brown and Gunnell, Inc., in the amount of \$20,316.60, together with costs fixed at \$894.20; for a total judgment of \$21,210.80, together with post-judgment interest on the whole thereof at the rate of twelve percent (12%) per annum from and after June 4, 1987, until paid.

DATED this 1st day of September, 1987.

BY THE COURT:


Boyd L. Park
District Judge

APPROVED AS TO FORM:

SNOW, CHRISTENSEN & MARTINEAU

By Bryce D. Panzer
Bryce D. Panzer
Attorneys for Plaintiff

HOWARD, LEWIS & PETERSON

By _____
Jackson Howard
Attorneys for Defendant

AFFIDAVIT OF SERVICE

STATE OF UTAH)
 : ss
COUNTY OF SALT LAKE)

Sandra Westergard, being duly sworn, states that she is employed in the law offices of Snow, Christensen & Martineau, attorneys for Plaintiff

and that she served the attached Judgment on Jury Verdict

Civil No. 41071, upon the following parties by placing a true and correct copy thereof in an envelope addressed to:

Jackson Howard
Attorney for Defendant
120 East 300 North
Provo, Utah 84603

by depositing the same in the United States Mail, first-class mail, postage prepaid, on the 20th day of August, 1987.

SUBSCRIBED AND SWORN TO before me on this 20th day of August, 1987.



Sandra Westergard

James D. Hopkins
Notary Public
Residing at Salt Lake City, Utah

My Commission Expires:

8/30/87

APPENDIX "C"

FILED
1987 SEP 18 PM 5:00
CLERK OF COURT
BY  

IN THE FOURTH JUDICIAL DISTRICT COURT
STATE OF UTAH, UTAH COUNTY

PRICE-OREM INVESTMENT CO.,)	RULING AND AMENDMENT TO
Plaintiff,)	JUDGMENT
-vs-)	CASE NO. 41071
ROLLINS, BROWN & GUNNELL, INC.,)	BOYD L. PARK, JUDGE
Defendant.)	

This matter is before the Court on Defendant's Amended Motion to Tax Costs.

The Court having considered the motion determines that the cost of transcripts in the sum of \$614.90 are not proper costs to be awarded the plaintiff and the Order of the Court dated September 1, 1987 and the Judgment on Jury Verdict dated September 1, 1987 is hereby amended to read that plaintiff is granted judgment for costs fixed at \$297.30.

Dated this 17th day of September, 1987.

BY THE COURT:


BOYD L. PARK, JUDGE

cc: Bryce D. Panzer, Esq.
Jackson Howard, Esq.

APPENDIX "D"

ORDINANCE NO. 232

An Ordinance amending Section 29-3-10 of the Revised Ordinance of Orem City, Utah, 1959. Repealing any and all Ordinances in conflict and declaring an emergency.

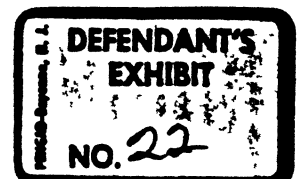
BE IT ORDAINED BY THE CITY COUNCIL OF OREM CITY, UTAH:

Section I. That Section 29-3-10-10-1 and Section 29-3-10-10-2 of the Revised Ordinances of Orem City, Utah, 1959, be amended to read as follows:

29-3-10-10-1 There shall be provided and maintained at time of erection of any main building or structure, off-street parking space with adequate provisions for ingress and egress by standard-sized automobiles as hereinafter set forth. Said parking space shall be located on the same lot as the building it is to serve.

Whenever existing main buildings are enlarged or increased in capacity, or are changed in use, additional off-street parking space shall be provided which will meet the requirements applying to such enlargement.

- A. One, two, three, four, and multiple dwellings. Two (2) off-street parking spaces shall be provided for each dwelling unit. (Amended by Ord. 132: July 15, 1968; amended by Ord. 150: Sept 2, 1969)
- B. Boarding houses, hotels, or rooming houses, "batching" apartments, and dwelling units occupied by three or more persons not related by blood or marriage. At least two (2) off-street parking spaces shall be provided for each two guests accommodated in such buildings, or two spaces for each room used for sleeping purposes, whichever is greater. (Amended by Ord. 132: July 15, 1968; Amended by Ord 150; Sept 2, 1969)
- C. Tourist homes and courts, motels, and motor hotels. One (1) space for each living or sleeping unit plus parking for all accessory uses as herein defined.
- D. Schools. One (1) off-street parking space shall be provided for each 3.5 seats in an auditorium plus two (2) off-street spaces shall be provided for each classroom or station.
- E. Clubs and dance halls. One (1) off-street space shall be provided for each 30 square feet of floor space in the main building. (Amended by Ord. 132: July 15, 1968)
- F. Churches, funeral homes, assembly buildings, sport arenas, parking space shall be provided for each three seats in the main assembly room. Where benches are used, 20 inches of bench space shall be considered as space for one seat. Where movable chairs are used, 7 square feet shall be considered as space for one seat. (Amended by Ord 132: july 15, 1968)
- G. Furniture and appliance stores, household equipment or furniture repair shops. One (1) space for each 600 square feet of gross leasable area.
- H. Retail stores, shops, etc., except as provided in No. "G" above. Five and one-half (5.5) off-street parking spaces for each 1000 square feet of floor space contained in the building exclusive of furnace and mechanical and utility rooms, enclosed walkways, malls, and restrooms.
- I. Bowling Alleys. Five (5) off-street parking spaces per alley shall be provided.



- J. Wholesale buildings or warehouses. .75 off-street parking spaces for each 2000 square feet of gross floor area, or .75 space for each person employed during the highest employment shift, whichever is greater.
- K. Medical or dental clinics. Six (6) spaces for each doctor's office.
- L. Banks, post offices, business and professional offices. Two (2) spaces plus one (1) space for each 300 square feet of floor area.
- M. Restaurants. One (1) space for each 2.5 seats or three (3) spaces per 100 square feet of floor area, whichever is greater.
- N. Drive-in restaurants. One (1) off-street parking space for each person employed during the highest employment shift.
- O. Miniature golf courses or golf driving ranges. One (1) off-street parking space shall be provided for each hole, station, or tee.
- P. Automobile or machinery sales and service garages. Two (2) spaces plus one (1) space for each 400 square feet of floor area.
- Q. Day-care centers for children. Four (4) spaces plus one (1) space per 500 square feet of floor area.
- R. Nursing homes. Four (4) off-street parking spaces plus one (1) space per each five (5) beds.
- S. Hospitals. Two (2) off-street parking spaces per bed.
- T. Manufacturing plants, research or testing laboratories, bottling plants. One (1) space for each person employed on the highest employment shift.

The number of parking spaces for uses not specified herein shall be determined by the Planning Commission, being guided where appropriate by the requirements set forth herein for uses of buildings which, in the opinion of the Zoning Administrator or Planning Commission, are similar to the use or building under consideration.

29-3-10-10-2 In any residential, agricultural, industrial, or C-1, H-1, or R & D-1 Zone, no private or public parking lot shall be located within the front setback which faces on a public street. In all zones, outside parking space shall be hard surfaced with bituminous material or cement. (Amended by Ord 102: July 15, 1968)

Section II. That all Ordinances or parts of Ordinances in conflict herewith are repealed.

Section III. Any person violating any of the provisions of this Ordinance shall be guilty of misdemeanor, and upon conviction thereof shall be punished by a fine in any sum not exceeding \$299.00, or by imprisonment for a period of thirty (30) days, or both fine and imprisonment. Each and every day such violation shall be continued shall be considered a separate offense.

Section IV. Because of impending development within Orem City, Utah, and more particularly within the land herein above described, an emergency exists.

In order to preserve the health, safety, convenience, and peace and general welfare of the City of Orem, and the inhabitants, thereof, this Ordinance shall take effect upon its passage and first publication in the Orem-Geneva Times, a newspaper of general circulation within the City.

PASSED BY THE CITY COUNCIL OF OREM CITY, UTAH, THIS 9th DAY OF October, 1973.