

2001

Utah State Road Commission v. CARLOS
JOHNSON and RUTH L. JOHNSON, his wife;
FIRST SECURITY BANK OF UTAH, N.A.;
IDEAL NATIONAL LIFE INSURANCE
COMPANY : Petition for Rehearing

Utah Supreme Court

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1 JUN 1977

IN THE SUPREME COURT OF THE STATE OF UTAH
BYRON R. HARRIS UNIVERSITY
J. Reuben Clark Law School

UTAH STATE ROAD COMMISSION,)

Plaintiff-Appellant, (

v.)

CARLOS JOHNSON and RUTH L.)

JOHNSON, his wife; FIRST SECURITY)

BANK OF UTAH, N.A.; IDEAL)

NATIONAL LIFE INSURANCE COMPANY,)

Defendants-Respondents. (

CASE NO. 14225

RESPONDENTS' PETITION FOR REHEARING

RESPONDENTS' PETITION FOR REHEARING AND SUPPORTING BRIEF.

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FILED

JUL 6 - 1976

Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

UTAH STATE ROAD COMMISSION,)

Plaintiff-Appellant, (

v.)

CARLOS JOHNSON and RUTH L. JOHNSON, (
his wife; FIRST SECURITY BANK OF UTAH,
N. A.; IDEAL NATIONAL LIFE INSURANCE)
COMPANY, (

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BRIEF OF RESPONDENTS

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JOHNSON, his wife; FIRST SECURITY (

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NATIONAL LIFE INSURANCE COMPANY, (

Defendant-Respondents.

Case No. 14225

COME NOW the Respondents above named and respectfully
petition the above entitled Court for a rehearing in the above captioned
matter. This Petition is based upon the following grounds and reason:

1. The Supreme Court has erred in reversing the lower Court's
ruling by wrongfully ignoring the testimony given by Mr. Johnson on
direct examination, after he had qualified as an opinion witness in
accordance with prior decisions of this Court.

This Petition is based upon and supported by the following
authorities:

BRIEF OF RESPONDENTS

STATEMENT OF THE CASE

The plaintiff initiated the instant action against the defendants to acquire by eminent domain their property for road construction purposes. The case was tried before a jury with the Honorable G. Hal Taylor, presiding. Plaintiff appealed and alleged error by the trial court. The Supreme Court reversed the trial court after examination of the briefs of the parties and without oral argument.

RELIEF SOUGHT ON REHEARING

The defendants seek a reversal of this Court's prior ruling whereby the lower court's judgment was reversed and seeks to have the lower court's judgment re-instated and affirmed.

ARGUMENT

POINT I.

THE SUPREME COURT HAS ERRED IN REVERSING THE LOWER COURT'S RULING BY WRONGFULLY IGNORING THE TESTIMONY GIVEN BY MR. JOHNSON ON DIRECT EXAMINATION, AFTER HE HAD QUALIFIED AS AN OPINION WITNESS IN ACCORDANCE WITH PRIOR DECISIONS OF THIS COURT.

The crux of this Petition and for the reversal centers on two items of testimony given by the landowner at the time of trial. The primary point of contention by Appellants is the testimony given by Mr. Johnson on cross-examination as follows: (TR. 56)

"Q. Mr. Johnson, with regard to your estimate of the value of the property and of the improvements located on the property, you indicated that your estimate was based on your life's work. What do you mean by your life's work? Are you an appraiser, are you a real estate salesman?

A. No, I don't think I am a real estate salesman or an appraiser.

Q. Do you consider yourself knowledgeable as far as the valuation or appraisal of the property is concerned?

A. I know what it is worth to me.

Q. And is that what your testimony is based on, Mr. Johnson, is this what the subject property is worth to you?

A. Yes."

The Court, in the majority opinion, singled this testimony out and based the reversal solely upon this testimony. In doing so the Court erred by completely ignoring the other voluminous testimony of the witness which testimony qualifies for admissibility under the prior decisions of this Court, including Utah State Road Commission v. Steele Ranch, 533 P.2d 888, Ut., April, 1975.

(See also Salt Lake and U. R. P. Co. vs. Schramm, 56 Utah 53, 189 P. 90; State Road Commission vs. Dillree, 25 Utah 2d 184, 478 P.2d 507; State Road Commission vs. Sampson, Utah, May 13, 1976); State Highway Commission of Mont. vs. Peterson, 328 P.2d 617; State of New Mexico vs. Chavez, 80 N.M. 394, 456 P.2d 868; Provo Water Users Assn. vs. Carlson, 103 Utah 93, 133 P.2d 777).

After establishing the landowner's intimate knowledge of his property and thus qualifying him, as an opinion witness with extensive preliminary testimony, Mr. Johnson testified as follows:

"Q. (By Mr. Wall) Do you, Mr. Johnson, have an opinion of the fair market value of your property based on the testimony of all of the matters you have told the Court about as of March 1, 1974?

A. The full value?

Q. Yes, the entire value of the total package, the land and total improvements?

A. A hundred twenty to a \$125,000.00.

Q. What do you base that on?

A. Well, it is my life's work and it provided me a good living.

Q. Would you have sold it for anything less than that?

A. No."

As mentioned above the witness prefaced his above testimony with extensive preliminary testimony as revealed by approximately 47 pages of the transcript of record. (TR. 11-58). Mr. Johnson, 71 years of age, testified that the property had been built under his direction, and that he had owned and operated or actively participated in the operation of the business operated upon said premises for a period of approximately 20 years. (TR. 20-24). In addition, it was clearly established by the evidence and testimony that the property was unique in that it was the only piece of commercial property in the area, having predated the zoning ordinance and thus enjoying a "grandfather" zoning privilege. (TR. 59, 60, 73, 74). As a result of this unique feature none of the witnesses were able to find "comparable sales" in the immediate area of the subject property, which fact lends greater credibility to the personal, first-hand knowledge of the party responsible for the construction of the building and its operation in the area in question.

In view of this unique situation we submit that there is no sound, logical basis upon which such testimony can or should be discredited or ignored.

When one reviews the total transcript of the record it should be

obvious that the testimony of the landowner in the instant case furnishes a greater degree of probative value of its true market value than that of the so-called "expert witnesses" who had to rely in large measure upon "comparable sales" in the areas some distance from the subject property.

It is worthy to review the statement of this Court in the long recognized and highly regarded statement of law in the case of Salt Lake and U. R. P. Co. v. Schramm, 56 Utah 53, 189 P.90, at 92, wherein it is stated:

"If it is shown that the witness is competent to express an opinion as to values, no matter what the source of the qualifying information may be, he should be permitted to testify. The sources of the witnesses' information may vary according to the peculiar means or opportunity the witness has of forming an opinion and judging the premises. We do not think any good reason can be assigned why a person who has occupied and used the premises all her life, and has been interested and alert in making inquiry as to its value, may not be as well qualified to speak as the banker, lawyer, or real estate man, having more or less to do with the sales and transfers of real property. The means and extent of the knowledge of any witness may be gone into on cross-examination, and rebutted by the testimony of other competent witnesses, whose opinions may differ as to value. No rule can be formulated for determining the means by which a witness shall acquire the necessary knowledge to qualify him to speak that will apply in all cases. If, under all the circumstances, he was in a position to obtain knowledge and form a correct judgment as to values, whether or not by buying, selling, leasing, or using the property for purposes for which it is adaptable is immaterial, so long as the jury is given the benefit of the facts upon which the opinion of the witness is based. (Emphasis added).

Consistent with the Schramm case, supra., we believe that the language set forth in the dissenting opinion in the instant case, of Justice Maughn merits reiteration and consideration by this Court.

Justice Maughn stated as follows:

"In the instant action, defendant, Johnson, as owner of the property, was qualified to be an opinion witness. His statement concerning his evaluation must be placed within the context of his other testimony. He had explained the uses to which the property had been devoted and the rental he had derived therefrom. His statement on cross-examination that his evaluation was based on what it was worth to him must be related to all his other testimony. Considered in this light, his evaluation testimony cannot be deemed of such a nature as to be inappropriate proof or incompetent evidence as to the fact in issue."

This argument supports the position of the defendants in that two concepts presented on direct and cross-examination are not mutually exclusive. The cross and direct testimony must be looked at as a whole and the Court cannot ignore the competent and qualified testimony of the witness on direct examination.

CONCLUSION

In summary, the majority opinion has concluded that there was no substantial basis in the evidence to sustain the landowners' valuation

of his property. And in so finding the Court indulges in a fiction of isolating and focusing on an isolated question and answer illicit in cross-examination and thus totally disregarding an extensive, direct and re-direct examination on the issue of damages. In the recent case of Utah State Road Commission v. Sampson, (Utah, May 13, 1976), the landowner was permitted to testify concerning the value of his property which, as in the subject case, he had built, owned and operated for many years and in that case this Court stated that ". . . there is a substantial basis in the evidence to sustain the landowner's valuation of his property . . ." Although the Sampson case did not involve the question and answer as illicit in cross-examination in the instant case, this Court once again reaffirmed and acknowledged the right of the property owner to express his opinion of value and did not consider the same constituted error.

We recognize the existence of authority which holds that it is improper for a landowner, who is otherwise qualified to express an opinion on value, to predicate his opinion upon the premise of what the property is worth to him. However, we believe that the testimony in the instant case, when reviewed in its entirety and as a whole, refutes the conclusion that

that Mr. Johnson based his appraisal upon such a basis. On direct examination, following extensive background testimony, he rendered an opinion of value as set forth in the opinion of this Court. The re-direct examination of Mr. Johnson illicited the following significant testimony:

"Q. (By Mr. Wall) Mr. Johnson, counsel asked you if you were an expert, if you understood the concepts of appraising. You don't claim to be an expert, real estate appraiser, do you?

A. No.

Q. But you are the property owner; aren't you, or were?

A. Yes, sir.

Q. Do you think that over the 71 years you have lived you have acquired some knowledge of land value in Salt Lake County?

A. I do.

Q. Have you dwelled and relied upon that general knowledge and background in formulating your opinion of value?

A. That is right."

We must consider that we are not here dealing with a sophisticated appraiser, skilled in the use of words of art, but rather a laymen, who in effect told the trial court and jury, that based on a total lifetime of experience (71) years), and an intimate knowledge with the construction, use

and occupancy of the subject property he did, in truth and in fact, have an opinion of its fair market value. This Court should not be persuaded to become involved in a technical play on words to defeat and set aside a jury verdict abundantly supported by competent probative evidence.

In view of the foregoing authorities and argument we respectfully submit that this Court should reverse its prior ruling and reaffirm and reinstate a Judgment on the Verdict entered by the trial court.

Respectfully submitted,

Brant H. Wall
Attorney for Defendants.

I hereby certify that I delivered Two (2) copies
of the foregoing Respondents' Petition for Rehearing and
Supporting Brief to Vernon B. Romney, Attorney General,
and Donald B. Coleman, Assistant Attorney General, this
_____ day of July, 1976.

Brant H. Wall

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