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 : Brief of Appellant

Utah Supreme Court

Vernon B Romney; Attorney General; Donald S Coleman; Assistant Attorney General; Attorney for Appellant.
Brant H Wall; Attorney for Respondent.

IN THE SUPREME COURT OF THE STATE OF UTAH

UTAH STATE ROAD COMMISSION,

Plaintiff-Appellant,

-vs-

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

Defendants-Respondents.

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CASE NO. ~~21779~~4

BRIEF OF APPELLANT

APPEAL FROM THE JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT, IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE G. HAL TAYLOR, JUDGE, PRESIDING.

VERNON B. ROMNEY
Attorney General

DONALD S. COLEMAN
Assistant Attorney General
115 State Capitol
Salt Lake City, Utah 84114

Attorneys for Appellant

BRANT H. WALL
500 Judge Building
Salt Lake City, Utah 84111

Attorney for Respondents

IN THE SUPREME COURT OF THE STATE OF UTAH

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UTAH STATE ROAD COMMISSION,	:	
Plaintiff-Appellant,	:	CASE NO. 217794
-vs-	:	
CARLOS JOHNSON and RUTH L. JOHNSON, his wife; FIRST SECURITY BANK OF UTAH, N.A.; IDEAL NATIONAL LIFE INSURANCE COMPANY,	:	
Defendants-Respondents.	:	

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VERNON B. ROMNEY
Attorney General

DONALD S. COLEMAN
Assistant Attorney General
115 State Capitol
Salt Lake City, Utah 84114

Attorneys for Appellant

BRANT H. WALL
500 Judge Building
Salt Lake City, Utah 84111

Attorney for Respondents

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BRIEF OF APPELLANT

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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 bases its appeal on alleged errors committed by the trial court and the failure of the verdict to conform to the evidence.

DISPOSITION IN THE LOWER COURT

The issue of just compensation presented by this case was tried to a jury on June 17, 1975, before the Honorable G. Hal Taylor. The jury returned a verdict of just compensation in the sum of $95,000. The

plaintiff filed a Motion for New Trial which was heard on the 17th day of July, 1975. The trial court granted a new trial conditioned upon the defendants' failure to accept a $3,000 remittitur. The defendants accepted the $3,000 remittitur which precluded the plaintiff from having a new trial.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks a reversal of the Judgment entered in this case and requests that the matter be remanded to the District Court for a new trial.

STATEMENT OF FACTS

The plaintiff filed this action to acquire property held by the defendants for highway construction purposes. The subject property was located at the intersection of 80th West and 2400 South Street running West out of Salt Lake City. The property consisted of 0.528 acres and was improved with a commercial building, one-half of which was used as a cafe and the other one-half was used as a tavern. (Tr. 136-138)

The taking consisted of the entire tract owned by the defendants, therefore, there was no remaining land. The sole issue was the value of the property taken, severance damage was not an issue since there was no remainder.

The property owner testified that the property had a value to him of $125,000 and that he would not have

sold it for less. (Tr. 51, 52 and 56) Plaintiff's objection to this testimony and motion to strike it were refused. (Tr. 52, 56) Mr. Memory Cain, a real estate appraiser from Florida testified as to the value of the property for the defendants. (Tr. 62) Mr. Cain testified that the property was worth $90,100, using the income approach. (Tr. 84) Using the cost approach, Mr. Cain testified that the value was $92,000. (Tr. 88)

Mr. Zane Bergeson testified as an expert appraisal witness for the plaintiff. Mr. Bergeson utilized the market, cost and income approaches and testified that the value of the property taken was $59,000 under the income approach and $54,000 using the cost approach, (Tr. 170, 171) and Mr. Bergeson concluded after correlating the two that the fair market value of the property was $58,000. (Exhibit 16-P)

Mr. Bergeson used the market approach in formulating his opinion as to the value of the land. (Tr. 144, 145) Mr. Bergeson testified he used four sales to support his land values and gave details on cross-examination. (Tr. 177, 180)

The jury after having heard the evidence, returned a verdict of $95,000. (Tr. 223) The amount of the verdict was $37,000 over the estimate of plaintiff's expert witness and $3,000 over the highest estimate of the defendants' expert witness. Plaintiff filed a

Motion for New Trial which was heard by the District Court and was granted unless the defendants accepted a remittitur in the amount of $3,000. (R. 103, Tr. of Hearing for New Trial p. 2, 3)

ARGUMENT
POINT I

THE TRIAL COURT ERRED IN MAKING ITS GRANTING OF A NEW TRIAL CONDITIONED UPON PAYMENT OF $3,000 REMITTITUR.

Rule 59 of the Utah Rules of Civil Procedure provides:

> "(a) Grounds. Subject to the provisions of Rule 61, a new trial may be granted to all or any of the parties and on all or part of the issues, for any of the following causes; . . .
> (5) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice.
> (6) Insufficiency of the evidence to justify the verdict or other decision or that it is against law. . . ."

The rule above cited has no provision granting authority to the trial judge to change a verdict by granting either additur or remittitur. The plaintiff acknowledges the fact that the practice of allowing the trial court, in some cases, to alter jury verdicts by granting additur or remittitur has been judicially established. The party in a lawsuit against whom the remittitur or additur is levied has the choice of

either accepting the altered verdict or a new trial. The moving party is not afforded this opportunity.

The argument may be made that the moving party, in the instant case, the plaintiff is benefited by the alteration of the verdict and, therefore, has no basis for complaint. In the instant case, the verdict was reduced by $3,000 saving the plaintiff that amount. What this argument overlooks is that under the ruling of the trial court, the verdict is defective. In the instant case, the jury was either influenced by passion or prejudice or they did not understand the evidence as presented or did not follow the law as instructed. In any event, the plaintiff was not given the opportunity to have its case fairly heard.

The reduction of $3,000 changes the verdict to $92,000. What does this sum represent? It is not what the jury found as just compensation. From the record there is no indication that that sum represents what the trial court felt was just compensation. The verdict was reduced to conform to the highest testimony of the property owner's witness, Mr. Cain. (Tr. of Hearing on Motion for New Trial 1, 2)

The trial court relied upon the decision in the case of Utah State Road Commission v. The Steele Ranch, 533 P.2d 888 (1975) (Tr. of Hearing on Motion

for New Trial 2). In the Steele Ranch case the Supreme Court found the verdict not to be supported by the evidence and reduced it to the highest testimony of the landowner. It should be noted that the plaintiff in that case did not challenge the remittitur therein imposed. It appears that the trial court interpreted the Steele Ranch case to stand for the proposition that any infirmity in the verdict at trial can be cured by the granting of a remittitur or additur to the amount of the highest or lowest testimony.

One may well gleen such an interpretation from that case. The court therein cited frailties in the case, to wit, the insufficiency of the landowners' testimony to support the verdict and testimony as to severance damage on property not held in the name of the defendant being allowed. The court seemed to assume that a remittitur would cure the defects and that if the defendant accepted it the plaintiff had no right to a new trial. The concluding remarks in that opinion seem to support this view, the court stated:

> "In view of our disposition of this case on the grounds herein above indicated, it is unnecessary to consider the claimed impropriety in not allowing challenge to jurors." Steele Ranch.

This statement, along with the rest of the de-

cision seems to indicate that remittitur and additur can be used to avoid the granting of a new trial, even though there was a defect in the trial that would otherwise warrant a new trial. The plaintiff in this case has no alternative, he must accept the remittitur if the defendant does, even though he does not agree to it. This principle runs directly counter to the long established principles of due process and the fundamental right of all parties to have their case heard fairly by a jury.

The purpose and function of a trial was set forth by the court in the case of Chatelain v. Thackeray, 100 P.2d 191, 98 Utah 525 at 542 (1940) as follows:

> "The primary purpose of the trial of a case is to render justice between the litigants. To that end the court has the power to exercise reasonable control over its verdicts and when they fail to reflect such justice in accordance with the evidence and the law as embodied in the instructions, to set them aside, and order a retrial of the cause."

Plaintiff submits that "justice between the litigants" was not the result of the trial in the instant case because the verdict was not supported by the evidence. If the jury misunderstood the evidence or the law or they

were influenced by passion or prejudice the injustice resulting therefrom is not cured by a remittitur because the plaintiff has not had the opportunity to have the evidence presented weighed and considered fairly by a jury.

There is support in a prior case decided by the Utah Supreme Court for altering the amount of the verdict as an alternative to granting a new trial if both sides agreed to the change. In the case of Wellman v. Noble, 12 Utah 2d 350 at 351, 366 P.2d 701(1961) the court granted a new trial, unless both sides agreed to an addition of $3,000 to the general damage award and $3,500 to the special damage award. If there are grounds for a new trial this alternative is the only equitable way of altering the verdict. By making the adjustment contingent upon consent of both parties neither party can complain of not having an opportunity for a fair and impartial trial. Plaintiff submits that in the instant case both parties should be afforded the opportunity to accept or reject the alteration in the verdict and if either party fails to accept it, the new trial must be granted.

The cases that plaintiff discovered relating to additur and remittitur all presented the situation where the party questioning the ruling of the court was

the party having the option either to accept or reject the alteration in the verdict. Clearly in the situation of the defendants in the instant action, if he is dissatisfied with the remittitur, he may elect a new trial or question the court's ruling granting a new trial as being an abuse of discretion by filing an appeal.

The plaintiff is faced with the dilemma of agreeing with the court that a new trial should be granted, but that the alternative given to the defendant to accept remittitur is improper.

Plaintiff submits that the evidence failed to support the verdict and the only conclusion that can be reached is that the jury was either influenced by passion or prejudice or did not understand or wish to follow the evidence presented or the law as instructed. Plaintiff submits that the following brief review of portions of the evidence will clearly illustrate this position.

As pointed out earlier, the landowners' testimony was based upon what the property was worth to him (Tr. 56), which is clearly an improper basis for establishing value and also he admitted he had no background upon which to base his opinion (Tr. 56) and further, when asked what he based his $125,000 evaluation upon, the property owner responded:

> A. "Well, it is my life's work and it provided me a good living." (Tr. 51)

Q. "Would you have sold it for anything less than that?" (Tr. 52)

The plaintiff's objection was overruled at this point, but the impropriety of the basis for the owners' testimony is clear as set out in Point II of this brief, and such testimony should have been kept from the jury.

Mr. Cain, the defendants' appraiser, in his testimony repeatedly demonstrated lack of knowledge as to critical facts. In establishing a value on the land taken he did not have any comparable sales, but concluded, without support, that the land was worth $11,500 (for approximately one-half acre or $23,000 per acre)(Tr. 83). His land evaluation was based solely upon his "experience." (Tr. 93) He admitted that he had previously made an appraisal involving a similar type property east of the subject tract for $12,500 per acre. In his analysis of value using the income approach, Mr. Cain used what he termed comparable rental properties. (Tr. 95) When asked for information about those comparables he knew very little. He did not know the name of the tavern he used as a comparable located in Granger, Utah. (Tr. 95) He did not know whether or not there was a large advertising sign on this comparable property. (Tr. 96) He used the rental income from this property, but did not know when the lease was dated. (Tr. 96) He did not know how large the

building in Granger was. (Tr. 97) He did not recall whether or not there was a large awning over the entrance of this comparable property. (Tr. 97) He did not recall whether or not this comparable had a separate entrance to the basement. The comparable had a basement and the subject property did not, but no adjustment was made for that. Mr. Cain did not know the seating capacity of the Granger property. (Tr. 98) He repeatedly indicated that his answers were just guesses or "off-the-cuff" guesses or he did not recall. (Tr. 96-100) Mr. Cain made no attempt to determine the square foot value of the comparables. (Tr. 99) He testified that size did not matter and when asked:

> Q. "Mr. Cain, if you had a club that had a seating capacity of double or three times the seating capacity of another establishment, wouldn't that be a relevant factor in comparing the two?
>
> A. Not if you didn't fill it up. If one was half empty and one was full. I am looking at the income they produce, not the seating capacity or the square foot size of it or what the inside looks like versus what another one looks like." (Tr. 103)

What is even more revealing is he offered no testimony as to whether his comparables were only "half full" and the subject "full." In fact when asked:

Q. "Now, you indicated on your redirect examination that size doesn't matter if you have an empty place. It doesn't make any difference, a small full place is worth more than an empty large place."

A. "That's correct."

Q. " . . . Do you know how much income from customers and business Fogarty's had?"

A. "No, sir. I did not go into the books."

Q. "Do you know the income of the Putter Club?"

A. "No, sir. I didn't go into the books." (Tr. 110)

Plaintiff submits that Mr. Cain had no idea as to which places were "full" or "half full" and his analysis was, therefore, lacking critical data.

The other comparables used by Mr. Cain were fraught with similar frailties. (Tr. 100-106) With regard to the Ludlow Cafe, used by Mr. Cain as a comparable, he did not know the size of the building, the seating capacity, the age of the building or even what the building looked like. (Tr. 105)

Mr. Cain, in his testimony using the cost approach to value used a cost table called "Marshall Swift Evaluation Tables." (Tr. 110) The table he used was in the category of "Class C Average Restaurant." (Tr. 110) The cost under this table included air conditioning, (Tr. 111, 112) which

according to Mr. Cain, would allow for adequate air conditioning to the building. (Tr. 112) Mr. Cain added $675 for air conditioning to the cost table in Marshall Swift, even though the table already provided for such an item. (Tr. 111, 112)

A critical factor in the instant case was the economic life of the building located on the subject property. Mr. Cain testified that the economic life was 60 years. (Tr. 111) There seemed to be no basis for his determination of a 60 year economic life. The Marshall Swift Table used by Mr. Cain in the catagory of Class C average reflected a life on such a structure of 35 years. (Tr. 150) Mr. Cain's testimony contained no indication as to why he followed the Marshall Swift Tables in determining estimated costs of replacement, but ignored the estimated life expectancy of such structure.

Plaintiff's purpose in pointing out the frailties in the defendants' expert testimony is to demonstrate that the verdict rendered by the jury was not supported by the evidence and that it must have either been influenced by passion or prejudice based on the landowner's testimony relating to his lifes work and what it was worth to him or the jury misunderstood the evidence. In any event, plaintiff contends it was denied the right of having the evidence fairly weighed by an impartial jury.

The circumstances in the instant case should be treated as this court treated a similar situation in the case of State Road Commission v. Silliman, 22 Utah 2d 33, 448 P.2d 347 (1968). The Court in that case stated:

> "The instant case is a good illustration of the principle that the verdict cannot stand when it clearly shows that it was given either under the influence of passion or prejudice or under a lack of understanding of the law. . . ."
> State Road Commission v. Silliman, Supra at 37

The court in the Silliman case did not grant a remittitur but set the verdict aside and remanded the case for a new trial. State Road Commission v. Silliman, Supra at 37. In the Silliman case the trial judge remitted an amount to bring the severance damage award within the range of the testimony. State Road Commission v. Silliman, Supra at 36. Notwithstanding the reduction by the trial court, the Supreme Court granted a new trial because the verdict was not supported by the evidence. Plaintiff submits that the result in the instant case should be the same as that in the Silliman case, since the verdict is not supported by the evidence.

In another recent case decided by this court, an excessive jury verdict was reversed instead of merely granting a remittitur. In State Road Commission v. Roy Brown,

531 P.2d 1294 (1975), the jury awarded severance damages of $53,378 when the defendants' testifimony was only $45,111.51. The court could have reduced the verdict to conform to the evidence, but it did not. This case demonstrates that alteration of a verdict to conform to the evidence is not always a proper means of dealing with error committed at the trial court level. Plaintiff submits that remittitur in the instant case will not correct the error committed at the trial court level, nor will it represent an award of "just compensation."

POINT II

THE TRIAL COURT ERRED IN ALLOWING THE PROPERTY OWNER TO TESTIFY TO A VALUE FOUNDED ON IMPROPER BASIS.

The usual basis for determining "just compensation" in a condemnation case is the market value of the property taken. Market value has been defined as what a willing buyer would pay and a willing seller would accept for the property. Southern Pacific Co. v. Arthur, 10 Utah 2d 306 at 309, 352 P.2d 693 (1960). A more detailed definition is recited in Nichols on Eminent Domain as follows:

> "By 'fair market value' is meant the amount of money which a purchaser willing but not obliged to buy the property would pay to an owner willing but not obligated to sell it, taking

> into consideration all uses for which the land was suited and might reasonably be applied."
> Vol. 4 Nichols on Eminent Domain § 12.2[1] p. 12-62 to 12-71

The above cited authorities make it clear that the standard in determining market value is what a willing buyer would pay and a willing seller accept. It is obvious, based upon this standard, that testimony relating only to what a willing buyer would pay for property unsupported with what a willing seller would accept would be improper. Likewise, it would be improper to allow into evidence what a seller would sell property for without also establishing that a willing buyer would pay such a price. The short of it is that clearly the test is not what a seller says the property is worth to him. The U. S. Supreme Court addressing itself to this issue in a case involving Utah property stated:

> "The Constitution and statutes do not define the meaning of just compensation. But it has come to be recognized that just compensation is the value of the interest taken. <u>This is not the value to the owner for his particular purposes or to the condemnor</u> for some special use but a so-called 'market value.'"
> <u>United States v. Petty Motor Co.</u>, 327 U.S. 372 (1946)
> Emphasis added.

The Supreme Court of Washington dealt with the issue squarely in a case where a property owner had testified to value based upon improper criteria. The court in the case of State v. Larson, 338 P.2d 135 at 136 (Wash. 1959) stated:

> "An owner of property may testify as to its value (without qualifying as an expert), upon the assumption that he is particularly familiar with it and, because of his ownership, knows of the uses for which it is particularly adaptable, (citations omitted). However, when, as here, the owner has not used his intimate experience with and knowledge of the land's uses as a basis for determining its fair market value, but has obviously determined it upon the application of an improper formula, his opinion fails to meet the test and, therefore, has no probative value."

The court sustained a motion to strike the owner's testimony in the Larson case. The instant case presents a situation precisely the same as that in the Larson case. The property owner in the instant case responded to direct examination questions as follows; when asked the value of the property, his answer was:

> A. "A hundred twenty to a $125,000."
>
> 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." (Tr. 51, 52)

Later on cross-examination the property owner stated that he was not an appraiser and when asked if he knew anything about the valuation of property, he replied:

A. "I know what it (his property) is worth to me." (Tr. 56)

Then when asked:

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

A. "Yes." (Tr. 56)

The plaintiff made a motion to strike the owner's testimony because it was based upon improper foundation. This motion was denied. (Tr. 56)

In Arkansas the court reached the same conclusion as the court in the Larson case. In Arkansas State Highway Commission v. Darr, 246 Ark. 204, 437 S.W.2d 463 (1969), the court ruled that a landowner's testimony was not substantial evidence, since the basis upon which she made her evaluation was inadequate. The court in the Darr case found the verdict over the testimony of the owner's expert

witness but under the owner's was excessive and the case was remanded.

In Arkansas State Highway Commission v. Perryman, 247 Ark. 120, 444 S.W.2d 564 (1969), the owner gave testimony of what the condemned property was worth to him. The court stated:

> "His testimony cannot be considered substantial because compensation cannot be based on value to the owner." Arkansas State Highway Commission v. Perryman, Supra at 565.

In another Arkansas case the reviewing court found that the trial court had erred in failing to strike the testimony of a landowner where it was without sufficient basis and it was based on what the land was worth to him. Arkansas State Highway Commission v. Bowman, 253 Ark. 890, 490 S.W.2d 112 (1973).

Plaintiff submits that the above cited cases make it clear that the trial court committed error in refusing to strike the incompetent testimony of the owner. This failure resulted in opening the door for the jury to award damages based on clearly erroneous formulae, to wit: his life's income, what the property was worth to him and that he would not sell it for less.

Mention should be made of the case where the

Utah Supreme Court sustained a verdict in excess of the property owner's expert witnesses and awarded exactly the amount of his testimony. State Road Commission v. Dillree, 25 Utah 2d 184, 478 P.2d 507 (1970). The differences between the Dillree case and the instant case are obvious and substantial. The trial court in the instant case acknowledged the distinction with the following comment:

> ". . . in the Dillree case, the court recites that the owner had familiarity with the costs of construction and land values in the area. There was no such evidence in the case at bar, . . ."
> (Tr. of Hearing on Motion For New Trial p. 2)

The distinction made by the trial court is supported by the record heretofore cited and the plaintiff submits that, therefore, the Dillree case should not be controlling.

CONCLUSION

Plaintiff submits that the trial court in the instant case erred in refusing to strike the property owner's testimony was based on improper formulae in determining market value. The testimony was prejudicial and allowed the jury to speculate regarding damages for loss of the defendants' "life's work" and what property

was "worth to him."

Plaintiff submits that merely remitting the amount of the verdict over the defendants' expert testimony does not render the verdict fair and just to the plaintiff. The revised verdict does not represent a fair verdict of a jury based on competent evidence, since incompetent evidence was allowed for its consideration.

Plaintiff submits the only remedy for the defective proceedings is to reverse the decision and remand the matter for a new trial and plaintiff respectfully requests this court to do so.

Respectfully submitted,

VERNON B. ROMNEY
Attorney General

DONALD S. COLEMAN
Assistant Attorney General

Attorneys for Appellants