

1979

The Board of Education of South Sanpete School District v. Don K. Barton et al : Brief of Plaintiff-Respondent

Utah Supreme Court

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Arthur H. Nielsen; Clark R. Nielsen; Paul R. Frischknecht; Attorneys for Defendant-Appellant;
Dan S. Bushnell; Attorneys for Plaintiff-Respondent;

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IN THE SUPREME COURT OF THE STATE OF UTAH

THE BOARD OF EDUCATION OF)	
SOUTH SANPETE SCHOOL DISTRICT,)	
)	
Plaintiff-Respondent,)	
)	
v.)	Civil No. 15946
)	
DON K. BARTON, et al.,)	
)	
Defendant-Appellant.)	

BRIEF OF PLAINTIFF-RESPONDENT

APPEAL FROM THE SIXTH JUDICIAL DISTRICT COURT OF
SANPETE COUNTY, HONORABLE DON V. TIBBS, JUDGE

Dan S. Bushnell
Bruce Findlay
KIRTON & McCONKIE
330 South 300 East
Salt Lake City, Utah 84111

Attorneys for Plaintiff-Respondent

Arthur H. Nielsen
Clark R. Nielsen
NIELSEN, HENRIOD, GOTTFREDSON & PECK
410 Newhouse Building
Salt Lake City, Utah 84111

Paul R. Frischknecht
50 North Main
Manti, Utah 84642

Attorneys for Defendant-Appellant

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BRIEF OF PLAINTIFF-RESPONDENT

NATURE OF THE CASE

Plaintiff sued to condemn lands and water of defendant.

DISPOSITION OF CASE BY LOWER COURT

The court determined that the plaintiff did not have power to condemn water rights; after a jury trial, the court authorized plaintiff to take the lands it sought from defendant for the total sum of \$40,000 just compensation determined by the jury.

RELIEF ON APPEAL

Plaintiff seeks an order affirming the judgment of the trial court.

STATEMENT OF FACTS

Plaintiff-respondent will follow the convention adopted by defendant-appellant of referring to the record, transcript and exhibits as (R), (Tr.), and (Ex.), respectively.

Plaintiff sought to obtain 24.49 acres in Manti City, owned by defendants, for the construction of a high school. In October, 1977, the plaintiff Board of Education adopted a resolution authorizing the acquisition of the property by eminent domain, and after some unfruitful negotiations this action was filed October 25, 1979.

Plaintiff sought also to obtain water; the court ruled that plaintiff did not have power to condemn water, and this led to a jury verdict less than the amount alleged in the complaint as the value of defendant's property. It is the usual practice in Manti, when selling land, to sell corresponding shares of the local irrigation company, representing water rights (Tr. 134, Ex. 16,17). The issue regarding water rights was made explicit in the pretrial order (R. 55-56, paragraphs 1, 2.3, 2.4). At the time of trial, the court ruled that the Board did not have the power of eminent domain with respect to the water rights mentioned in the pretrial order (R. 77). There arose a sharp dispute among the experts about the value of the water, the plaintiff's experts holding that without water, \$1,000 per acre should be deducted from the value of the land as calculated from comparable sales with water (Tr. 201), while the defendant's expert held that no adjustment should be made to the value for the lack of water (Tr. 111). The jury verdict was phrased as follows:

We the jurors impaneled in the above entitled case find the issues in favor of the land-

owners and against the plaintiff and assess damages as follows:

Value of the land and improvements without water, taken by the School Board -- \$40,000.00. (R. 65)

The court entered judgment on the verdict and this appeal followed.

I

THE JURY VERDICT PROPERLY GRANTED THE RELIEF TO WHICH PLAINTIFF WAS ENTITLED, NOTWITHSTANDING THE VALUE OF THE SUBJECT PROPERTY ALLEGED IN THE COMPLAINT

Defendant complained in his statement of facts that the jury verdict was less than the amount alleged in the complaint as the value of the subject property. This was explained by Mr. Austin, one of plaintiff's appraisers, as a result of the inclusion of the value of water in the value of land. The distinction between the value of water and the value of land was later made clear in the pretrial order, and when the court ruled that the water was not subject to eminent domain, a considerable amount of the value of the property was lost. Utah Rules of Civil Procedures 54(c)(1) provides:

Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

Furthermore, if the allegation of the complaint was in any sense evidence, it was up to the parties to introduce it before the jury, which was not done. Therefore, the

determination of the jury that the value of the land alone was \$40,000 was not erroneous.

II

THE COURT PROPERLY ALLOWED PLAINTIFF TO REBUT EVIDENCE OF A MIXED GIFT-SALE AS A SALE OF COMPARABLE PROPERTY

Defendant introduced evidence of a real estate transaction which he now contends led to error. The problems with this evidence began when the defendant's expert witness, Marcellus Palmer, mentioned a sale by Grant Cox to the LDS Church of one acre for \$10,000 as a sale of property comparable to the subject property. On cross-examination, it developed that this sale had not been concluded and that it involved more than one acre; Mr. Cox also was to give adjoining property to the Church. The following testimony was given.

Q. (Mr. Bushnell) Were you advised that Mr. Cox, in selling that property to the Church, likewise gave a donation of additional property for tax purposes in that same immediate tract?

A: I don't know that I could say that. I knew his reasoning for doing it. I understood there was to be a gift involved.

Q. Of adjoining property?

A. I'm sure it would be adjoining property.

Q. For which no consideration would be given?

A. A gift would indicate that, alright. (Tr. 122)

Later, the court stated that the gift-sale by Grant Cox was not relevant. Then plaintiff requested permission to put on

Wilbur Cox, the local stake president, to rebut the testimony of Palmer about the transaction. Wilbur Cox testified that the transaction was not completed and that it involved the purchase by the Church of a part of five acres and a gift from Grant Cox to the Church of the remainder of the five acres. No objection to any specific part of the testimony of Wilbur Cox was interposed by defendant, although defendant objected to calling him as a witness. (Tr. 285-87)

Defendant cross-examined Wilbur Cox at length, eliciting from him testimony about remarks of Grant Cox which might be hearsay but to which plaintiff did not object (Tr. 289 lines 7-11) that others were present in these conversations besides Grant Cox, and that as far as the witness knew, the matter was still in negotiation between Grant Cox's attorney, Arthur Nielsen, and the Church Real Estate Department. At the conclusion of Wilbur Cox's testimony, plaintiff moved for admonition to the jury to disregard the testimony of Wilbur Cox, which was denied, the court explaining out of the hearing of the jury as follows:

[I]t's already before the jury and such a motion would be confusing to the jury and . . . expert testimony has heretofore been given and it has not been used as a comparable sale and, on this basis the court denies the motion. (Tr. 297-298)

Defendant complains in his brief that the court erred in several respects in treating the Cox gift-sale. The following reasoning establishes that the court did not

err with respect to this transaction: (1) Defendant raised
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the issue of the Cox gift-sale; (2) the Cox gift-sale was not a sale of comparable property; (3) the court did not improperly prevent defendant from presenting evidence in his case-in-chief to support the comparability of the Cox gift-sale; (4) the court did not improperly interfere with the cross-examination of Mr. Cloward with respect to the Cox gift-sale; (5) the court did not abuse its discretion in allowing Wilbur Cox to testify; and (6) the court did not improperly fail to require Grant Cox to testify, nor did the court preclude erroneously the rebuttal of Wilbur Cox's testimony about the intent or motive of another.

2.1 Defendant raised the issue of the Cox gift-sale.

The defendant's expert, Mr. Palmer, referred to the Cox gift-sale as a comparable sale which supported his appraisal during his direct examination by defendant's counsel. His testimony represented the transaction as a sale of one acre for \$10,000. All the argument about this transaction and whether the trial court handled it properly should be understood in this light, that is, that defendant presented misleading evidence to the effect that a certain property had sold at a fair market price of \$10,000 per acre, when actually the transaction included a large gift, the price per acre of the property bought was fixed arbitrarily, and the infirmities of the transaction as a sale of comparable property were known to plaintiff's counsel and his expert witness in advance.

2.2 The Cox gift-sale was not a sale of comparable property

One of the prerequisites of a comparable sale is that it be a sale and not some other type of transaction, such as a gift, a judicial foreclosure, or a sale under compulsion of the power of eminent domain. In Sanitary Dist. v. Boening, 267 Ill. 118, 107 N.E. 810 (1915), evidence of a sale of comparable land was refused, because:

(1) Part of the consideration for one of such sales was given in exchange for the owner's agreement to assist the purchaser in building a switch track, and (2) the other sale consisted of two blocks of land sold together, the purchaser agreeing to divide arbitrarily the price between the two blocks. (118 ALR 891)

The Cox transaction has the same defects; i.e., that there is additional consideration for the \$10,000 besides the one or two acres which were nominally purchased for that price, in the property which was given to the Church from adjoining land; and (2) the allocation of \$10,000 purchase price to the one or two acres to be purchased was apparently arbitrary and not based on any reasoning which could be used to demonstrate the value of the land. It could be inferred that the Cox land was worth anything from \$2,000 per acre to \$10,000 per acre if it were to be immediately developed (as opposed to the speculative development of the defendant's land). This indefiniteness rendered the Cox transaction irrelevant, because it did not tend to prove or disprove any material fact bearing upon value, as required by Utah Rules

of Evidence 1(2). This indefiniteness also would have led to improper speculation by the jury.

There was expert testimony that one acre was not comparable as a matter of size, which further impaired the usefulness of the Cox transaction. (Tr. 270)

Stating the issue in simpler terms, the Cox transaction was not a sale. There is no authority in Utah law for comparing the consideration which changed hands in a gift-sale of lands for purposes of establishing just consideration for similar lands. To be comparable, the transaction must be a sale. 7 Nichols on Eminent Domain, § 8.05(2) at 8-16.19

A further weakness of the Cox gift-sale transaction was that it had not been completed at the time of the trial herein. It was apparently more in the nature of an unexercised option; money had been placed in escrow, and the seller had assured the buyer that the land would remain available (Tr. 295 lines 9-10) but the seller required assurances that a church building would indeed be placed on the site (Tr. 290 lines 2-4) and the transaction was still in negotiation (Tr. 295 lines 24-30). The sales price in an option contract is not admissible as evidence of the value of comparable land. City of Wichita v. Jennings, 199 Kan. 621, 433 P.2d 351 (1967). Nor is evidence admissible of an offer which has not been accepted. 7 Nichols on Eminent Domain, § 8.05(2)(b)(i) at 8-16.3.

Thus, the court properly held the Cox gift-sale irrelevant and inadmissible as evidence of the value of comparable property. The defendant's expert, Mr. Palmer, had already referred to it in support of his appraisal, however, before all the details of the transaction were before the court, and the evidence was thus before the jury. We shall have more to say on this subject in later paragraphs.

2.3 The Court did not improperly prevent defendant from presenting evidence in his case-in-chief supporting the comparability of the Cox gift-sale.

At a certain point in the presentation of the defendant's case-in-chief, the court limited the number of comparables which the defendant might introduce.

THE COURT: Is there any need of going into those others, the other twenty-two?

MR. FRISCHKNECHT: If he were allowed to say, your Honor, he tried to say that there were a couple of others that he feels are applicable.

THE COURT: Do you want to bring two more in?

MR. FRISCHKNECHT: That's correct.

THE COURT: All right. I'll limit you to two more. (Tr. 91)

The defendant then produced evidence of a sale in Fairview, Utah, and of the Cox gift-sale. Palmer testified as follows about the Cox transaction:

Q. (Mr. Frischknecht) Do you feel, Mr. Palmer, that with regard to the size of the location

and the other factors that that sale for one acre for ten thousand dollars is comparable?

- A. (Mr. Palmer) Well, it's got some elements of comparability in that it's right close to and adjacent the subject property. That makes it more comparable than going some distance away. I think it's pertinent. It's one that needs to be considered.

. . . .

- Q. Mr. Palmer, in this area or with this relationship to the City of Manti and the subject property, are you familiar or did you find other sales in that area?

- A. Yes. I found and looked at other sales in the area, north and east and west of Manti.

- Q. Did you consider those other sales?

- A. Yes, I sure did.

- Q. In your opinion, Mr. Palmer, are those sales comparable to the subject property?

MR. BUSHNELL: If the Court please I object to that. I thought we were going into two and now we're going into whole groups in a generalized approach. I think this is improper and beyond the scope that he said he would go to.

MR. FRISCHKNECHT: Your Honor--

MR. BUSHNELL: If he said he used them or didn't use them, we've got to go into the question of trying to disqualify them and show the dissimilarities which is just too far afield. (Tr. 100-102) (emphasis added)

The foregoing recital of the evidence clearly sustains the conclusion that the Court's order was to restrain defendant from discussing comparables other than the Fairview property and the Cox gift-sale, rather than to interfere with testimony about the comparability of the Cox transaction, as defendant complains in his brief. Thus it

is not accurate to state that the defendant was "unable to go into the matter fully during his case-in-chief."

Defendant's brief at 5.

2.4 The Court did not improperly interfere with the cross-examination of Mr. Cloward with respect to the Cox gift-sale.

Defendant asked Joseph Cloward, one of plaintiff's appraisers, several questions about the Cox gift-sale on cross-examination. Cloward stated that he didn't think the transaction was comparable because of the gift involved. Defendant asked him if he knew when the gift had been made. Cloward said he didn't know, and then plaintiff objected to the line of questions on the grounds that Cloward had testified that he had not used the Cox transaction as a comparable and that he knew nothing about it except what he had heard in court. The following ensued:

THE COURT: What do you claim, Counsel? Is this relevant? You're posing things to him that he has no knowledge of. The only thing he knows is what he's heard since he's been here and he said he didn't consider it and wouldn't consider it based on what he's heard since he's been here. Now, I don't see where it's relevant from that point on. I don't want to limit you but that's how I feel about it.

MR. FRISCHKNECHT: Well, your Honor, they have testified that there's some notion of a contribution here and I think I asked the question, that's true, and he started into it and I'd like to find out what he knows, your Honor.

THE COURT: But you asked him if he knows and he said he didn't know. Well, if you don't know, just say you don't know, Mr. Cloward, and then we'll go on to the next question.

Q. Do you know, Mr. Cloward, when the property was sold to the Church that we have been referring to?

A. The only knowledge I have was the sale to the Church that has been stated here today.

Q. Did you hear Mr. Palmer testify that in approximately March of this year that transaction occurred?

. . . .

A. I couldn't testify to all that I've heard today.

Q. Would it surprise you, Mr. Cloward, if I were to tell you that that contribution made to the Church was made three or four years ago and has nothing to do with this transaction?

A. As I stated before, I didn't know that. I didn't consider the sale and haven't considered it, and I probably wouldn't have considered it.

Q. You haven't considered it? (Tr. 269-70)

At this point the court broke in with the remark cited by defendant in his brief to the effect that the Cox gift-sale was not relevant and instructing defendant to leave his line of questioning. Then defendant, abandoning his line of questioning about the time of the Cox gift-sale, asked the following question:

Q. (By Mr. Frischknecht) The acreage of one acre, according to your testimony, is not comparable because of the size; is that correct?

A. I wouldn't consider it to be. (Tr. 270)

It is thus clear from the record that this question pertained also to the Cox gift-sale, but it did not pertain to the line of questioning stopped by the judge about the witness's knowledge of the timing of the sale.

We have already argued at length in part 2.2 of the brief that the court properly held the Cox gift-sale transaction to be irrelevant as a comparable sale. It appears from the above excerpt from the record that the court's ruling during the cross-examination of Cloward pertained only to a repetitive and argumentative line of questions posed to Mr. Cloward (see McCormick on Evidence, § 7 [2d Ed. 1972]) and that the judge was well within his discretionary powers in directing defendant to another line of questions. Further, it appears that defendant was permitted to continue with questions about the Cox transaction. Thus it is not accurate to say that "Appellant was precluded by the Court" from cross-examining the Board's appraiser about the Cox gift-sale. (Defendant's brief at 3)

2.5 The Court acted within his powers in allowing Wilbur Cox to testify about the Cox gift-sale.

There are several reasons why the court acted properly in allowing defendant to call Wilbur Cox to testify about the Cox gift-sale. (1) His testimony was proper rebuttal; it was necessary because defendant had raised the Cox gift-sale as an issue in the jury's mind. (2) As a rebuttal witness, he was not subject to the requirement that his identity be disclosed to defendant prior to trial. (3) There was reasonable cause in the record, apart from the personal knowledge of the judge, to support plaintiff's motion to allow Wilbur Cox to testify. (4) Defendant waived any objection he may have had to Wilbur Cox's testimony by

his cross-examination. (5) There was no improper emphasis placed on Wilbur Cox's standing in the community. (Tr. 287) (6) Defendant cannot now complain about the content of Wilbur Cox's testimony, because he did not object to it. (Tr. 287-97)

At the end of the first day of trial, plaintiff told the court that it had one rebuttal witness left. (Tr. 281) On the second day of trial, plaintiff informed the court that the witness would be Wilbur Cox, who would testify about the Cox gift-sale. Objection was made by defendant's counsel, who conceded that rebuttal witnesses were not subject to the requirement in the pretrial order of disclosure prior to trial. Defendant's attorney stated:

. . . plus the fact that the Court made a Pretrial Order on the basis that there should be no witnesses called except those that were named in the Pretrial Order except for rebuttal . . . (Tr. 283)

Proper rebuttal evidence is that "which tends to answer or explain" the adversary's evidence. Soliz v. Ammerman, 16 Utah 2d 11, 395 P.2d 25, 26 (1964). On direct examination by plaintiff, Wilbur Cox said his name, his residence, that he was retired, that he had recently been a stake president, that he had been involved in obtaining a site for a church building, that five acres were involved, that some was to be purchased and some obtained by gift from Grant Cox, that the transaction had not been completed, and that the price of \$10,000 had been allocated to part of the acreage involved at Grant Cox's request. When asked whether

the structure of the transaction "had to do with tax considerations," the witness testified: "I'm not sure of that." (Tr. 287-88)

On redirect examination, Wilbur Cox testified that his interest had merely been to get the five-acre tract for a reasonable price.

Q: (Mr. Bushnell) So far as the Church is concerned, when you were in that official capacity, did it really matter to you how the money was allocated so long as you got the five acres for a reasonable amount?

A: No, sir. (Tr. 297)

When compared with the testimony of Marcellus Palmer, that the transaction was a sale of one acre for \$10,000, which included a gift of adjoining property (Tr. 101, 122), it is clear that the testimony of Wilbur Cox explained the defendant's evidence within the rule of Soliz v. Ammerman, supra, that it was proper rebuttal, and that therefore Wilbur Cox was not a witness whose disclosure prior to trial was required by the pretrial order.

Furthermore, the record before the jury was incomplete and misleading prior to the testimony of Wilbur Cox, because it was not clear how many acres were involved in the gift-sale. This reason was given by the trial court as justification for allowing Wilbur Cox to testify, in response to the objection by defendants to the court's mention of its personal knowledge of the circumstances. The Court said:

I feel that counsel for the landowner had knowledge prior to these proceedings that

this was not a comparable sale in that it covered five acres and the one acre was sold for ten thousand dollars, and I feel that evidence to clear up this matter should be heard by the jury and that is the basis for this ruling. (Tr. 285-86) (emphasis added)

The defendant had presented evidence of a comparable sale which proved to be irrelevant. Defendant claims, in effect, that once the comparable was held irrelevant, plaintiff could not rebut it or explain it. A similar claim was made in Jenson v. S. H. Kress & Co., 49 P.2d 958 (Utah (1935)). The plaintiff was asked in rebuttal whether she had said to another witness, Peterson, that she had "crowded against the glass and evidently broke it?" This was objected to as improper rebuttal. The court pointed out, however, that Peterson had been erroneously required to answer an earlier question and in his answer had testified that plaintiff had admitted breaking the glass. The Court said:

The difficulty was that the first error above mentioned opened the way for what followed; but the door having been opened, and Peterson therefore having necessarily testified as to what was in effect an admission, the plaintiff must be permitted to rebut it. (49 P.2d at 962).

Thus the testimony of Wilbur Cox was properly allowed to explain to the jury the circumstances surrounding the Cox gift-sale, even though that transaction could not be used as a comparable sale.

In cross-examining Wilbur Cox, defendant rehearsed the Cox gift-sale transaction thoroughly and in considerably greater detail than on direct examination, pursuing

questions not raised on direct examination, such as hearsay conversations (Tr. 289) about the terms of the agreement, a description of the documents involved, the identity of persons privy to the negotiations, whether the witness considered the land to be actually worth \$10,000 per acre (Tr. 294 lines 9-18), and so forth. It is written in 5A CJS Appeal and Error § 1735 at 1032 (1958) that:

Error in admitting evidence which has been presented by or on behalf of one party is cured where practically the same evidence or evidence having essentially the same probative effect is afterward . . . elicited on cross-examination. . . .

2.6 The court did not improperly fail to require Grant Cox to testify, nor did the court restrain defendant from rebutting Wilbur Cox's testimony.

Defendant states in his brief that the court permitted Wilbur Cox to testify about Grant Cox's religious and tax motives "without even requiring that Mr. Grant Cox testify as to his motives," (defendant's brief at 5). The defendant complains further that the court prohibited him "from rebutting the testimony of Mr. Wilbur Cox." (Id.) The record shows, however, that Wilbur Cox did not testify about Grant Cox's tax motives (Tr. 288) and that testimony about religious motive was elicited by defendant on cross-examination (e.g. Tr. 293).

The court did deny a continuance requested by defendant who claimed that Grant Cox was out of town, that

Grant Cox was the only witness who could rebut Wilbur Cox's

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testimony, that defendant anticipated what Wilbur Cox's testimony would be, and that there was nothing in the record which supported the judge's remark that the contract involved in the Cox gift-sale could be produced in court. (Tr. 283-84)

Utah Rules of Civil Procedure 40(b) provides:

If the motion [for continuance] is made upon the ground of the absence of evidence, such motion shall also set forth the materiality of the evidence expected to be obtained and shall show that due diligence has been used to procure it. The court may also require the party seeking the continuance to state, upon affidavit or under oath, the evidence he expects to obtain. . . .

The defendant did not state what material evidence he hoped to obtain from Grant Cox. Although the record did not show at the time of the judge's ruling that there were documents which might be obtained bearing upon the issue, the defendant subsequently elicited testimony from Wilbur Cox that there were documents in escrow in Manti Bank bearing on the transaction (Tr. 289,295).

Nowhere does defendant say, either now or at trial, that the testimony of Wilbur Cox is not truthful; nowhere does he say that the testimony of Grant Cox would correct errors in the testimony of Wilbur Cox. Instead he insists that it "colored" the jury's view of the case. This falls woefully short of a showing of prejudicial error; an attack upon a judgment and verdict must show an error which is substantial and prejudicial, in the sense that there is a reasonable likelihood that in its absence, the result would

have been different. Simpson v. General Motors Corp., 24 Utah 2d 301, 470 P.2d 399 (1970). Defendant has shown neither error nor prejudice, and his attack should fail.

III

THE COURT PROPERLY PREVENTED OGDEN FROM TESTIFYING ABOUT HIS EMPLOYMENT

The end of the first day of trial defendant called Dee Ogden as a witness. Plaintiff approached the bench and represented to the judge, out of hearing of the jury, that Mr. Ogden had been retained by the plaintiff School District as an appraisal witness and had been paid a fee for his appraisal, but that the School Board had chosen not to call him as a witness at the trial. Therefore, the plaintiff moved the court for an order:

To prevent Mr. Ogden from, in any way, testifying or the defendant landowner from asking the witness that his appraisal was made for the School Board, or that Mr. Ogden was paid a fee. . . . (Tr. 279)

The court further explained his ruling as follows:

The motion is granted and it looks to me like it would not be proper and I think I would be committing prejudicial error to allow this to go in. You can call him for an appraisal but not to give testimony that he was employed by the School District or make any reference to the School District's paying him so you may get his appraisal, but that's the limit of it, Mr. Ogden. (Tr. 271,280)

The employment of Dee Ogden by the school district was irrelevant and immaterial to the issues of the case. The defendant proposed to put Dee Ogden on as an appraiser; the

issue to which his testimony would have been relevant was
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the fair market value of defendant's property. It made no difference to the fair market value of the property whether the District had employed Ogden. Utah Rules of Evidence, 1(2). A party may have consulted with many experts prior to trial; what defendant proposes to do is to find the expert in that group consulted by plaintiff whose testimony will be most to defendant's liking, and then introduce the testimony, claiming in the hearing of the jury that the witness is really plaintiff's, but plaintiff has tried to conceal the evidence from the jury. Plaintiff may have quite legitimate reasons for not using the expert, e.g. doubts about his competence, but will have difficulty persuading the jury of them. Under these circumstances, the question of a witness's prior employment is a prejudicial, collateral matter and thus the trial court's ruling can be sustained simply because the proposed evidence was not relevant.

Defendant suggests that Ogden's credibility was in issue. It would have been, had Ogden been called to the stand, but defendant never called him. Furthermore, even if Ogden had been called as a witness, the court had power to stop defendant from introducing evidence about his prior employment on the grounds that the evidence went to his credibility.

Under the common law, it would not have been possible for defendant to call Dee Ogden and then impeach him by showing his bias by evidence of his employment by a

party. McCormick on Evidence, § 40 N.96 (2d Edition, 1972).

Part of the rationale for this common law rule was that:

The party, by calling the witness to testify, vouches for his trustworthiness. McCormick, supra, § 38.

In Utah the rule against impeaching one's own witness has been modified by Utah Rules of Evidence, 20 and 45, which provide as follows, in pertinent part:

Subject to Rules 21 and 22, for the purpose of impairing or supporting the credibility of the witness, any party, including the party calling him may examine him and introduce extrinsic evidence concerning any statement or conduct by him and any other matter relevant upon the issues of credibility. (Utah Rules of Evidence 20).

This broad abrogation of the common law rule is somewhat modified by Utah Rules of Evidence 45(b) which states:

Except as in these rules otherwise provided, the judge may in his discretion exclude evidence if he finds that its probative value is substantially outweighed by the risk that its admission will . . . (d) create substantial danger of undue prejudice or of confusing the issues or of misleading the jury. . . .

To determine whether the judge properly exercised the discretion conferred on him by Rule 45, we should examine the record to see whether any arguments were made to him by the defendant at the time he made his ruling which would clearly support the contention that he acted erroneously. There were no compelling considerations mentioned by defendant in his argument to the trial judge. (Tr. 279,280)

Furthermore, the record does not support the claim of defendant that Ogden would have given an in-between

appraisal. The record is devoid of any evidence or representation as to what the appraisal of Ogden would have been. Assuming that Ogden would have given an appraisal higher than that of the other witnesses called by plaintiff, the evidence offered by Ogden presented a double edged sword to the defendant. If Ogden was called as an expert and his relationship to the district was not disclosed, his evidence could simply discount that of Marcellus Palmer who gave his opinion that the property was worth \$6,600 an acre, or that of the owner, who stated in his opinion the property was worth \$8,000 an acre. On the other hand, if the opinion was in the middle ground and it were revealed to the jury that Ogden was in fact an employee of the plaintiff and that his appraisal was higher than that of plaintiff's other appraisers, then the jury might be confused as to whose witness Ogden was and conclude that the plaintiff contended that the value of the property was that given in Ogden's appraisal. It is submitted that this latter state of facts was what the defendant sought to bring about by calling Ogden as a witness.

In any event, the question of Ogden's being an employee of the plaintiff Board could not have added clarity to this situation but would have only confused the jury. By calling Ogden as an expert, the defendant would then have vouched for his credibility and should not have been in a position to need evidence about his credibility, not even to establish the partiality of plaintiff. It is presumed in

lawsuits that the parties are not impartial. Indeed, at common law the parties were disqualified from testifying because of their natural bias. The adversary relationship of parties is still a fundamental assumption of our legal system. Thus, the prior employment of Ogden was irrelevant and prejudicial and the court should affirm the trial court's order excluding it.

IV

THE TRIAL COURT PROPERLY EXCLUDED THE APEX SALE

Defendant's expert witness offered to give evidence of a "full city block sold . . . By Apex Hatchery". (Tr. 70) Plaintiff offered to prove that the sale had been under threat of condemnation, and the court decided to hear the proof outside the hearing of the jury. (Tr. 72) The superintendent of the plaintiff School District, Ronald E. Everett, then testified that he had negotiated with Morgan Dyreng for the purchase of some lands of Manti-Apex Hatchery Co. which the School District had selected for the construction of an elementary school. During the course of the negotiations, Mr. Everett told Mr. Dyreng that it was the policy of the School District to negotiate the purchase, if possible, and then, if necessary, to acquire the property by condemnation. Mr. Everett testified as follows:

Q. (Mr. Bushnell) Was there any question about condemnation?

A. (Mr. Everett) Yes, there was.

Q. Tell us about it.

A. Well, on the second meeting with Mr. Dyreng, it was necessary for us to explain to him the policy of the Board that if peaceful negotiations were not complete, that we would condemn the property for the use . . . (Tr. 75)

On cross examination, defendant's counsel elicited that the School District had paid \$25,000 less for the Apex property than the appraisal (Tr. 77), and that Mr. Dyreng had requested some time to consider the matter further after Mr. Everett had mentioned the possibility of condemnation. Then, after a few days, Mr. Dyreng accepted an offer from the School District. (Tr. 79) Upon hearing this evidence the court ruled that the Apex sale was not admissible.

Defendant conceded in his argument that there were chicken coops on the Apex property (Tr. 83) which distinguished it from the defendant's land. The defendant testified in cross-examination, after volunteering that the Manti-Apex property had sold for \$7,000 an acre, that--

Q. (Mr. Bushnell) That had many, many improvements on it, didn't it?

A. (Mr. Barton) There's some old worn out chicken coops there, that they don't use any more.

Q. It had improvements on it. It wasn't vacant agricultural land, was it?

A. The land had been vacated because the coops that were on it were not in use. (Tr. 179)

Plaintiff believes that the court did not err with regard to evidence of the Apex sale, for the following reasons. (1) There is no basis in the record for the

conclusion that the court improperly refused to hear the testimony of Morgan Dyreng regarding the sale. (2) The Apex sale was under threat of condemnation, and therefore evidence of it was properly excluded. (3) Sale of improved property is not comparable for purposes of valuing unimproved property. The Apex sale involved a city block on which were constructed chicken coops, while most of defendant's land was vacant and only a "little section" of defendant's land had improvements on it. (Tr. 39, 102, Ex. 18 slide 3, Ex. 14, 21) And although defendant's land lay within the city limits, it had not been platted into blocks. Thus it was within the discretion of the judge to exclude evidence of the Apex transaction.

4.1 The Court did not improperly refuse to hear the testimony of Morgan Dyreng

After Ronald E. Everett testified that the Apex sale had been under threat of condemnation, defendant argued that Morgan Dyreng should be called as a witness, stating--

MR. FRISCHKNECHT: I think if justice is done, [Mr. Dyreng] ought to be here . . . so we can see what he says about condemnation but, Your Honor, in lieu of that, as another alternative if you don't see fit to allow us to bring Mr. Dyreng in here tomorrow, then I would say that what Mr. Everett says is that they talked to him about condemnation and they say they'll go back to the Board and talk about it, and make up a resolution I think what . . . Mr. Everett says is enough to show that Mr. Dyreng looked at the situation and said, "Either I sell to them or I'm in a condemnation action." The only way we're going to know that is to have him here, Your Honor, and I would request that we be allowed to bring Mr. Dyreng in and have him respond

to it and, if not, I don't think
they've met the burden . . . (Tr. 81-82)
(Emphasis added)

Twice in the foregoing argument defendant's attorney offered the court an alternative to his request to produce Morgan Dyreng, in effect inviting the court to rule on the issue without hearing Dyreng. The defendant should not now be able to predicate error on the court's ruling without Dyreng's testimony. See, Meier v. Christensen, 15 Utah 2d 182, 389 P.2d 734 (1964)("The court's comments on the evidence were invited by plaintiff's attorney with no objection thereto whatever. So we cannot reverse this case on that account." 389 P.2d at 735)

Nowhere does the record show that the court explicitly ruled that Morgan Dyreng could not be called as a witness, as proposed by defendant. We are left to speculate what the court would have done if the defendant had called Morgan Dyreng as a witness to rehabilitate the Apex sale as a comparable. To save a question for review, it must be presented to the trial court and a ruling invoked thereon. Lovato v. Hicks, 74 N.M. 733, 398 P.2d 59 (1965). Defendant had a duty to pursue whether Dyreng could be called as a witness and obtain an order that he could not be before he can base a claim of error on the trial court's action, especially in the light of defendant's arguments in the alternative, inviting the court to rule without Dyreng's testimony. Lilenquist v. Utah State Nat. Bank, 100 P.2d 185, 190 (1940)("No ruling on [exemplary damages] was made

by the trial court, hence the question is not before us.") Where evidence is proposed and objected to and the court postpones ruling on its admissibility, and the proponent of the evidence fails to thereafter press his demand for a ruling on its admissibility, the evidence is deemed abandoned by its proponent. McElwain v. Schuckert, 13 Ariz. App. 468, 477 P.2d 754, 756 (1970).

Nor does the record show that defendant made known the substance of the testimony he expected from Morgan Dyreng sufficiently to raise an inference of error under Utah Rules of Evidence 5, which provides--

A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence unless (a) it appears of record that the proponent of the evidence either made known the substance of the evidence in a form and by a method approved by the judge, or indicated the substance of the expected evidence by questions indicating the desired answers . . . (emphasis added)

In particular, defendant did not offer proof that Dyreng would contradict Everett in any particular, or that Dyreng would rebut the inference that the threat of condemnation had been communicated to him by Everett. In Downey State Bank v. Major-Blakeney Corp., 578 P.2d 1286 (Utah 1978), the intervenor Ringwood argued that he had improperly been prevented from showing that a certain lien was void. The court said:

Ringwood, however, made no proffer of what the excluded testimony would have demonstrated. A judgment will not be reversed for an alleged error in the

exclusion of evidence unless it appears in the record that the error was prejudicial. Ringwood's failure to make a proffer of proof as to what his evidence would show precludes him from asserting on appeal that the exclusion was error. (578 P.2d at 1288 (emphasis added))

Like Ringwood, the defendant herein failed to offer proof of what Dyreng would testify, and therefore defendant should not be able to claim error from the episode.

Utah Rules of Evidence 5, quoted above, sets out a procedure which must be followed to place the trial court in error with respect to the exclusion of evidence. The purpose of the procedure is to give the court an opportunity to correct his error during the trial. Plaintiff submits that the defendant has not shown a basis in the record for his claim of error with respect to the Apex sale.

4.2 The Apex sale was under threat of condemnation, and therefore evidence of it was not admissible.

In State v. Christensen, 13 Utah 2d 224, 371 P.2d 552 (1962), the State appealed from an award in a condemnation case in part on the ground that the judge had required a witness to answer a question about severance damages relating to another tract which had been acquired by the state. The court said--

A sale of land to the State for highway purposes, by agreement of the parties, to avoid a condemnation suit is a forced sale and therefore is not admissible in evidence to show the value of other similar property being condemned. (371 P.2d at 556) (emphasis added)

In the case at bar the defendant complains that he should have been permitted to use the Apex sale, and that the Apex sale was merely characterized as one entered into to avoid a condemnation suit. The court below held, however, that--

It's the court's opinion that the sale would be in contemplation of condemnation. The court will not allow the testimony regarding that sale. (Tr. 85)

This decision of the trial court should not be disturbed unless clearly erroneous. See, State v. Wood, 22 Utah 2d 317, 452 P.2d 872 (1969); State v. Larkin, 27 Utah 2d 295, 495 P.2d 817 (1972). Plaintiff respectfully submits that the record supports the action of the trial court.

4.3 A sale of improved property is not comparable for purposes of valuing unimproved lands

It is established by the record that all but a small piece of the defendant's property was unimproved, while there were improvements on the Apex property. In 7 Nichols on Eminent Domain, § 8.05[2] at 8-16.8 that--

It is the generally accepted rule that evidence of the sale price of the improved property cannot be admitted to prove the value of unimproved property.

This rule was explained in Annot., 85 A.L.R.2d 110, 139 (1962), as follows:

[In Re Housing Authority of Newark, 126 N.J.L. 60, 17 A.2d 812 (1941), the court excluded evidence of some improved lands in a suit to condemn an unimproved tract and] held that the trial judge properly ruled that as a matter of discretion that the evidence was inadmissible, since to go into arithmetical computations of value of neighboring land as distinct from buildings, for purposes of comparison of value by taking the sale price

of another tract consisting of land and buildings as a subtrahend, and requiring the jury to ascertain from probably conflicting testimony the value of such buildings and deduce the value of such other land by subtracting the value of the buildings from the total sale price would introduce issues not fairly relevant to the inquiry. The court continued that the general rule was that for sales of neighboring or adjoining land to be comparable as indices of value of land taken there should be a substantial similarity of conditions. (emphasis added)

That the question of valuing the improvements on the Apex property would have produced conflicting evidence is apparent from the testimony of defendant Barton, when on cross-examination he volunteered the Apex sale as a basis for his opinion of the value of the subject property. (Tr. 179)

Defendant complains that the plaintiff improperly cross-examined him at this point, because the court had earlier ruled that the Apex sale was inadmissible. Defendant is in no position to complain, however, because the record clearly shows that the Apex sale was first mentioned by him in response to the question whether he knew of any sales which would justify his opinion that his property was worth \$8,000.00 per acre. (Tr. 178) Defendant did not object to the line of questions asked him at that time and therefore plaintiff believes that there is no error.

A further problem inherent in the Apex sale is that the defendant's property is a tract of 24.49 acres, without streets and with little or no access to existing

water hookups, while the Apex property is a developed city block. Platted or subdivided land is not admissible to prove the value of unplatted acreage. State by Dept. of Highways v. Schrenkendgust, 551 P.2d 1019 (Mont. 1976).

Thus, plaintiff believes that the court properly prevented the jury from considering the Apex sale because the Apex land was improved, both with buildings and as a platted city block with streets and services.

CONCLUSION

Plaintiff has argued in the preceding pages that the trial court did not err in any of the matters mentioned in defendant's brief. Plaintiff does not believe that there was any prejudice resulting to defendant, in a legal sense, from these matters; it is incumbent upon defendant to show (1) error, and (2) prejudice, that is that the verdict would have been different had the alleged error not occurred or had been cured.

With respect to the admissibility of evidence of comparable sales, this court has said--

Whether the other sale meets that test is for the trial court to determine; and he is allowed considerable latitude of discretion; and his ruling will not be disturbed on appeal unless it appears clearly that he was in error.

This case falls within the framework of the fundamental principle: that what the parties are entitled to is a fair opportunity to present their respective cases to a court and jury for determination. When this has been accomplished, all presumptions favor the verity of the verdict and the judgment; and

this includes all aspects of the conduct of the proceedings, and rulings of the court. The burden is upon the appellant. . . to show not only that there was error, but that it was substantial and prejudicial in that he was in some manner deprived of such full and fair presentation and consideration of the disputed issues. Redevelopment Agency of Salt Lake City v. Mitsui Investment, Inc., 522 P.2d 1370, 1374 (Utah 1974) (emphasis added)

The court was well within its discretionary powers, in the view of plaintiff, to exclude both the Cox gift-sale and the Apex sale from the case. Furthermore, because there are no clear inferences of valuation arising from either of these transactions upon the record, it is not apparent that had they been fully brought before the jury, that the jury could properly have reached a different verdict. Both transactions would certainly have raised collateral issues, as to the apportionment of value between sale and gift in the Cox gift-sale, and as to the apportionment of value between improvements of land in the Apex sale, which would have been confusing for the jury.

Therefore plaintiff respectfully urges the court to sustain the judgment.

Respectfully submitted,


Bruce Findlay

Dan S. Bushnell
KIRTON & McCONKIE
Plaintiff-Respondent's Attorneys
330 South Third East
Salt Lake City, Utah 84111
Telephone: 521-3680

Served two copies of the foregoing brief by mail
this 5th day of June, 1979, upon defendant's attorneys, at
the following address:

Arthur M. Nielsen
Clark R. Nielsen
NIELSEN, HENRIOD, GOTTFREDSON & PECK
410 Newhouse Building
Salt Lake City, Utah 84111

Bruce Findlay