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State of Utah et al v. Hyrum A. Danielson et al : Brief of Appellant

Utah Supreme Court

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In the Supreme Court of the State of Utah

STATE OF UTAH, by and through
its ROAD COMMISSION, D. H.
Whittenburg, Chairman, and Layton
Maxfield and H. J. Corleissen, mem-
bers of the STATE ROAD COM-
MISSION,

Plaintiff and Appellant,

vs.

HYRUM A. DANIELSON and OLIV-
IA B. DANIELSON, his wife; and
C. ELLSWORTH HANSEN and
FLORENCE HANSEN, his wife,

Defendants and Respondents.

Civil No. 7752

BRIEF OF APPELLANT
FILED

JAN 7 1952

Clerk, Supreme Court, Utah

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FLORENCE HANSEN, his wife,

Defendants and Respondents.

Civil No. 7752

BRIEF OF APPELLANT

STATEMENT OF FACTS

The State of Utah, by and through the State Road Com-
mission, instituted this proceeding under the constitution and
statutes of the State of Utah, to condemn certain portions

of defendants' properties in Salt Lake County near 6200 South and Highland Drive Streets deemed necessary for the improvement of State Route No. 152. The property rights of the defendants which were deemed necessary to be taken for the completion of the state highway improvement project are set forth in paragraph III of the complaint (R. 2) which embodies the Resolution duly and regularly passed and adopted by the State Road Commission.

After a hearing in the manner prescribed by law, the State of Utah was granted an Order of Immediate Occupancy (R. 16, 17) permitting it to take immediate possession of the properties of the defendants in order to do such work thereon as was necessary to accomplish the purpose for which said properties were sought to be condemned.

Prior to the time the cases were actually tried for the purpose, primarily, of determining the amount of just compensation to which each of the defendants was entitled as guaranteed by Article I Section 22 of the Utah Constitution, the defendants C. Ellsworth Hansen and Florence Hansen made a written Motion for an Order of the Court that the claims against the defendants be severed and proceeded with separately (R. 27). Although this Motion was never formally ruled upon the plaintiff likewise made a written Demand that the cases be set for separate jury trials (R. 33). Nevertheless, over the objection of plaintiff (R. 35) the two cases were consolidated for purposes of trial. Both parties did agree however that the cases could be tried by the Court rather than by a jury.

At the trial it was stipulated that the public interest and

necessity did not require the acquisition of all the property of the defendants Hyrum A. Danielson and Olivia B. Danielson embodied in plaintiff's complaint (R. 161). The Findings of Fact and Conclusions of Law and Judgment of the Court with reference to the condemnation of the property of Hyrum A. Danielson and Olivia B. Danielson were rendered in accordance with the aforesaid stipulation (R. 300-305).

This appeal is brought to review the Rulings, Orders and Judgment of the District Court which it is respectfully submitted were contrary to law and prejudicial to the substantial rights of the State of Utah (R. 302, 307).

STATEMENT OF POINTS

I

THE COURT ERRED IN CONSOLIDATING THE CASES FOR PURPOSES OF TRIAL.

II

THE COURT ERRED IN ALLOWING INTEREST AT THE RATE OF 8% FROM THE DATE OF THE ORDER OF IMMEDIATE OCCUPANCY UNTIL THE DATE OF ENTRY OF JUDGMENT.

III

THE JUDGMENT AS TO VALUE IS NOT SUBSTANTIATED BY THE EVIDENCE.

IV

THE AMOUNT OF THE JUDGMENT IS EXCESSIVE AND CONTRARY TO LAW BECAUSE BASED UPON ERRONEOUS RULINGS INDICATING BIAS AND PREJUDICE.

ARGUMENT

POINT I

THE COURT ERRED IN CONSOLIDATING THE CASES FOR PURPOSES OF TRIAL.

Plaintiff recognizes that Rule 42 of the Utah Rules of Civil Procedure authorizes a consolidation of cases for trial purposes whenever they involve a common question of law or fact. The only common question of law or fact in these cases however is that they are both condemnation cases instituted by the State of Utah. All other issues of law and fact, including the necessity for the taking and the amount of compensation to which each of the defendants would be entitled, have nothing whatever in common. It is uniformly recognized that each piece of real property is unique. The defendants themselves are in a poor position to now claim that the two cases involved common issues of law and fact because the defendants Danielsons challenged the necessity for taking a portion of their property (R. 48-51, 131-144) as to which the proceedings were later abandoned by stipulation of the parties (R. 161) and the defendants Hansens moved the Court for an order severing the cases (R. 27) thus ex-

pressly recognizing that there were few if any common issues of law and fact. While the Court does have considerable discretion in consolidating cases for trial purposes whenever there are common issues of law and fact, and whenever the convenience of the parties would be best subserved thereby, it is respectfully submitted that it was just as erroneous and prejudicial to consolidate these cases for trial purposes as it would be two different assault and battery cases involving the same plaintiff and different defendants.

POINT II

THE COURT ERRED IN ALLOWING INTEREST AT THE RATE OF 8% FROM THE DATE OF THE ORDER OF IMMEDIATE OCCUPANCY UNTIL THE DATE OF ENTRY OF JUDGMENT.

On numerous occasions this Honorable Court has recognized that in condemnation cases the party whose property is taken is entitled to interest on the award only from the date of entry or occupation of the premises by the condemnor. So far as we have been able to determine the only ruling by this Court as to the rate of interest allowable was in the case of Oregon Short Line R. Co. v. Jones, 29 U. 147, 80 Pac. 732, where the question as to the rate of interest was not in dispute. In that case the interest question which was involved was as to whether the defendant was entitled to interest from the date of the service of the summons. The Court ruled that the defendant was entitled to interest at the rate of 8% from the date of entry or occupation of the property

only and not from the date of the service of the summons. At the time that case was decided the legal rate of interest was 8%. See Section 1241, Revised Statutes of Utah 1898. Today the legal rate of interest is 6%. See Section 44-0-1, Utah Code Annotated 1943.

Under the Constitution and Eminent Domain statutes of this state there is no provision which specifies the rate of interest to which a person is entitled from the date his property is taken to the date of the determination of the award. After the determination of the award the statutes dealing with the rate of interest allow interest on the award or judgment at the rate of 8%. See Section 44-0-4 Utah Code Annotated, 1943. While some constitutional or statutory provisions expressly prescribe the rate of interest to which a person is entitled from the date his property is taken in eminent domain proceedings until the date of the award, in the absence of such provisions it is generally recognized that he is entitled to either the "going rate of interest" or the "legal rate." In the case of *Simms v. Dillon*, W. Va., 193 S. E. 331, 113 A.L.R. 787, involving constitutional and statutory provisions similar to those of this state which do not expressly authorize the payment of interest during the interim between the taking of the land and the actual payment of compensation, the Supreme Court of West Virginia had this to say about the constitutionality of such statutes and also the rate of interest allowed during such period:

" * * * under the authority of the foregoing opinions and cases, chapter 122 of the 1937 Acts of the Legislature of West Virginia is not unconstitutional because it does not expressly provide for the payment of in-

terest during the interim between the taking of the land and the actual payment of compensation. Under the authority of these cases, it is not necessary to so provide in the statute setting up the eminent domain procedure, but such right to interest is implied, and it will become the duty of the court entering the final award to provide for the payment of interest at the *legal rate* during the time between the taking and the final payment of the money due. (Emphasis added.)

Also in the case of *In re Bronx River Parkway in City of New York*, 20 N.Y.S. 2d 53, 259 App. Div. 552, affirmed 284 N.Y. 48, 29 N.E. 2d 465, the court had the following to say about the rate of interest allowed during the time between the taking and the final payment of the money in eminent domain cases:

"The right to just compensation is, of course, the controlling factor. No statute may interfere with or prejudice that right. On April 25, 1938, when title vested herein, the property owner's right to just compensation, including proper interest, became a vested property right. The statutes of this State recognize that right and provided interest should be added to an award for the property taken. Administrative Code, Sec. B15-28.0; Section 296 of the Tax Law; General Business Law Section 370. The statutory rate of interest is not controlling if some other rate is required to meet the constitutional requirement for just compensation. *Prima facie, however, the legal rate would be a proper rate.*" (Emphasis added.)

See also *State by State Road Commission v. Painter*, 120 W. Va. 486, 199 S.E. 373 and *U. S. v. A Certain Tract or Parcel of Land in Chatham County*, 57 F. Supp. 30. As noted, at the present time the legal rate of interest is 6%, which is the

maximum the court should have allowed in these cases from the Order of Immediate Occupancy until the entry of the Judgment. See Section 44-0-1 Utah Code Annotated 1943.

POINT III

THE JUDGMENT AS TO VALUE IS NOT SUBSTANTIATED BY THE EVIDENCE.

The only evidence submitted by the defendants as to the value of their properties was that of Mr. C. Francis Solomon, Jr. His determination of value however was made as of June 20, 1951, almost a year subsequent to the date of the service of the Summons upon the defendants which is the date our statutes require the determination of value to be made. See Section 104-61-12 Utah Code Annotated, 1943, (now Section 104-34-11 of the Judicial Code.) The examination of Mr. Solomon adduced the following testimony:

Q. Mr. Solomon, in computing these figures for damages to property of Mr. Danielson and Mr. Hansen, as of what dates did you take values?
(Objections—discussion).

A. The date of values I have taken as of *June 20, 1951 on values of property.* (Emphasis added.)

The record shows too that during the interim between July 14, 1950 and June 20, 1951 it was a period of rising real estate prices. The Summons was served upon the defendants on July 14, 1950 (R. 7, 8) which under our statutes is the date for the determination of value. Because the appraisal

of Mr. Solomon was not made in accordance with the law of this state the plaintiff moved that his testimony be stricken from the record, which motion was erroneously denied by the Court (R. 198 and 293). The only other evidence which was introduced by the defendants as to the value of their property was the testimony of Mrs. Danielson as to the value of the fruit trees upon her property separate and apart from the value of the land itself (R. 156-163). The authorities uniformly recognize that this may not be done. See Nichols on Eminent Domain, Vol. 4, page 240. The remaining evidence in the record as to the value of defendants' properties is the evidence which was introduced by the plaintiff and which shows a much smaller value than the amount of the award which was made by the Court. The award made by the Court was even in excess of the highest values testified to by Mr. Solomon.

Even assuming that the testimony of Mr. Solomon was admissible and should not be stricken from the record, the trial court in awarding damages to the defendants' Danielsons, exceeded the maximum amount testified to by him. The damage allowed by the Court to the Danielsons for loss of use for business was \$1990 (R. 299) whereas his testimony limited this damage to \$1740 (R. 92). The damage allowed by the Court for the land taken was \$647 (R. 299), whereas his testimony limited this damage to \$520 (R. 93). The damage allowed by the Court for the cost of fill was \$580 (R. 299) whereas his testimony limited this damage to \$562 (R. 93). Mr. Solomon testified that there was a total damage of \$3,167 exclusive of pipe needed to connect with the water main (R. 94). In this figure he included the sum of \$350 for the loss of a wall (R. 94) which, by stipulation of the

parties (R. 161), was not taken and which was specifically excluded from the legal description of the land condemned by the state in the Judgment which was rendered (R. 300-305). If the sum of \$350, the value of the wall on the property of the defendants Danielsons which was not taken, is excluded from the total damages testified to by Mr. Solomon, the resulting damage is \$2,817, which is the maximum the court could have awarded the Danielsons, exclusive of the cost of installing needed additional pipe to connect with the water main. The evidence which is in the record, however, does not in any way justify or support the award which was made for the taking of Danielson's property.

POINT IV

THE AMOUNT OF THE JUDGMENT IS EXCESSIVE AND CONTRARY TO LAW BECAUSE BASED UPON ERRONEOUS RULINGS INDICATING BIAS AND PREJUDICE.

During the course of the trial the court made numerous rulings over the objection of plaintiff which it is respectfully submitted prejudiced the substantial rights of the plaintiff.

Over the strenuous objection of plaintiff the Court permitted the defendants to introduce evidence as to the value of the trees upon the land sought to be taken separate and apart from the value of the land itself (R. 156-163). The general rule recognized by all the authorities is that such growths cannot be separately evaluated independently of the value of the land. See *United States v. Meyer*, 113 F (2d) 387,

cert. den. 311 U. S. 706, 85 L. Ed. 459, 61 S. Ct. 174; Long Distance Tel., etc. Co. v. Schmidt, 157 Ala. 391, 47 So. 731; Farmers' Reservoir etc. Co. v. Cooper, 54 Colo 402, 130 Pac. 1004; Forest Reserve District v. Caraher, 209 Ill. 11, 132 N.E. 211; Case v. State Highway Comm., 156 Kan. 163, 131 P 2d 696; Louisville etc R. Co. v. Asher, 10 Ky. L. 1021; Mississippi State Highway Commission v. Hillman, 198 So. 565; Manda v. Delaware etc. R. Co., 89 N.J.L. 327, 98 Atl. 467; Ribak v. State, 38 N.Y.S. 2d 869; Indiana Sav. etc. Co. v. Pa. R. Co. 229 Pa. 484, 78 Atl. 1039; Fort Worth R. Co. v. Gilmore, 2 S.W. 2d 543. After the Court had erroneously admitted the testimony of Mrs. Danielson as to the value of the trees upon her property, it then arbitrarily refused to permit plaintiff to introduce any testimony as to the value of these trees which plaintiff attempted to do in rebuttal merely for the purpose of showing how ridiculously high defendants' figures actually were (R. 271-274).

The defendants Danielsons also introduced evidence that they were damaged because the newly improved road required them to pay for the cost of installing additional pipe to make the water connections to which they were previously entitled. As part of their testimony both Mr. and Mrs. Danielson designated the exact locations where they wanted the connections made (R. 152 and 195, 196). It was also stipulated by the parties that the reasonable cost for installing pipe of the type required was \$1.50 per running foot (R. 186). In spite of the fact that the evidence revealed the third connection desired by the Danielsons could have been made just as readily to the main on the North as to the main on the East (R. 286, 287) and thus would not require the laying of any more pipe

for that connection than was required before the highway was improved, the Court granted damages for laying a total of 129 feet of pipe rather than for a total of 58 feet of pipe which would have been proper under the circumstances.

In connection with the examination of Mr. Solomon, defendants' expert on value, the Court, over plaintiff's objection, permitted counsel for the defendants to question him on numerous details as to the basis upon which his appraisals were made, which line of questioning is not permitted on direct examination but is limited to cross-examination for the purpose of testing the weight and credibility to which such testimony is entitled. Apparently it was on the basis of this improper direct examination that the Court formed its opinion that the examination of the properties by the expert witnesses for the plaintiff were "somewhat superficial" and that the examination made by defendants' expert witness was "critical, exhaustive, and detailed" (R. 299). An examination of the record, however, reveals that the expert witnesses for the plaintiff made detailed and exhaustive examinations of the properties both before and after the highway had been improved while the expert for the defendants had not even viewed the properties until after the project was completed and then he made his determination of value almost a whole year subsequent to the date the statute requires that it should be made in a condemnation case.

,The record shows also that the Court, over the objection of the plaintiff, permitted the defendants, as part of their main case in establishing the value of their properties, to introduce into evidence the sales price of a piece of land

involved in an isolated real estate transaction and in which the party admitted that he considered he secured an extra good deal but which had no bearing whatsoever on the value of defendants' properties (R. 67-70).

CONCLUSION

On the basis of the evidence in the record, and in view of the settled law on the matter, it is respectfully submitted that prejudicial error was committed in the trial of these cases which errors are reflected in the Rulings and Orders of the Court and the Judgment rendered at the conclusion of the trial. The cases should therefore be reversed and remanded for new trials in accordance with the directions of this Honorable Court.

Respectfully submitted,

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