

1955

State of Utah et al v. Burton F. Peek and Charles D. Wiman : Supplementary Statement by Respondents

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, by and through its
ENGINEERING COMMISSION, D. H.
Whittenburg, Chairman, H. J. Cor-
leissen and Layton Maxfield,
Members of the ENGINEERING COM -
MISSION,

Appellant and Plaintiff,

vs.

BURTON F. PEEK and CHARLES D. WIMAN,
Trustees under the Will and of the
Estate of CHARLES H. DEERE, Deceased,

Respondents and Defendants.

SUPPLEMENTARY STATEMENT BY RESPONDENTS

C. C. PARSONS,
A. D. MOFFAT,
CALVIN A. BEHLE,
Attorneys for
Respondents.

KEITH E. TAYLOR,
Of Counsel.

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, by and through :
its ENGINEERING COMMISSION, :
D. H. Whittenburg, Chairman, :
H. J. Corleissen and Layton :
Maxfield, Members of the :
ENGINEERING COMMISSION, :

Case No. 8290.

Appellant and Plaintiff, :

vs. :

SUPPLEMENTARY STATEMENT
BY RESPONDENTS.

BURTON F. PEEK and CHARLES D. :
WIMAN, Trustees under the :
Will and of the Estate of :
CHARLES H. DEERE, Deceased, :

Respondents and Defendants. :

At the oral argument of this appeal this court indicated some concern about Instruction 17, set out in full in ~~respondents' brief~~ at page 16. Mr. Justice Crockett stated that the instruction seemed paradoxical in that it directed the jury to value the land condemned as of July 12, 1951, but forbade them to consider certain factors which expert witnesses for appellant considered in arriving at their opinions as to fair market value. We respectfully submit that the paradoxical nature of the instruction is superficial only; that the jury should not consider facts underlying an expert's opinion as evidence of value, but should rely upon them only to aid in determining the weight that should be given the opinion of the expert; and that through Instruction 20 the trial court properly instructed the jury as to the weight to be given witnesses' opinions of fair market value.

Assuming for purposes of discussion that items such as the ordinary expenses which would be involved if the condemnee were to sell his property may or should be considered by an expert in forming an opinion as to fair market value, it is

respectfully submitted that instruction 17 was properly given. The court charged the jury that "In determining the fair market value of the property taken *** you are not to take into consideration any speculative increase or decrease in values that may occur, or have occurred in the future; nor any consideration of future tax or sale commission that might be paid for future sales; nor any future special improvements that might be installed; *** nor possible future expenses that defendants be saved by selling now; nor any interest the defendants might be saved or be entitled to receive; *** You are confined to the fair market value as of July 12, 1951."

Again, assuming that appellants' experts from an appraiser's professional viewpoint correctly considered ordinary costs of sale and other speculative future expenses in reaching their opinions of market value, the trial court properly directed the jury not to consider testimony concerning such hypothetical expenses as evidence of fair market value. The law is well settled that the party offering an expert is at liberty to reinforce his judgment by showing the grounds on which it is based, but facts so stated do not become independent evidence to establish the fact of inquiry. Thornton v. Birmingham, 250 Ala. 651, 35 So.2d 545, 7 A.L.R.2d 773; Harris v. Schuylkill River E.S.R. Co., 141 Pa. 242, 21 A. 590; Neilson & wife v. Chicago, M. & N.W. Ry. Co., 58 Wis. 516, 17 N.W. 310; Sanitary District of Chicago v. Langhram et al., 160 Ill. 362, 43 N.E. 359; 32 C.J.S. 219, § 521; Rogers on Expert Testimony, 3d Ed., § 298, page 734. Their sole function is to strengthen the testimony of the witness. Nielson & Wife v. Chicago, M. & N.W. Ry. Co., supra.

Following are brief quotations from several authorities discussing the problem:

Thornton v. Birmingham, 250 Ala. 651, 35 So.2d 545.
7 A.L.R.2d 773, cited in appellants' brief at page 34:
(Headnote 12)

Like rationale answers assignment of error 30 challenging the trial court's ruling in sustaining objection to the question propounded to the defendant, to wit: "Q. Are you familiar with the cost of laying these streets in November, 1945, such as would be required in a subdivision of this particular piece of property?" The objection specifically pointed out that at this stage of the interrogation the inquiry was out of order; that as a predicate therefor the witness would first have to be qualified to and give an opinion of the market value of the property. The question sought to elicit from a proposed expert witness an element which conduced to his opinion of value without first showing that he had an opinion. As noted in 32 CJS, Evidence, § 521, page 219, (Headnote 13) the party offering an expert is at liberty to reinforce his judgment by showing the grounds on which it is based, but facts so stated do not become independent evidence to establish the fact of inquiry. *** (Emphasis added.)

Harris v. Schuylkill River E.S.R. Co., 141 Pa., 242,
21 A. 590:

*** In estimating the value of the lot before the taking, its possible and probable uses are important elements, and may be shown by the opinions of experts. But the details of improvements, the cost, probable rent afterwards, etc., require knowledge of the subject to insure the proper weight to be given, and the inferences to be drawn from them. Hence they are not admissible as independent facts for the jury, and the appellant's offers in that regard, as, e.g., to prove the cost of bulk-heading this lot to make a wharf of it, were properly excluded. But such details ought to enter into the view of the expert in forming his judgment, and whether they have done so is a legitimate subject of cross-examination. *** (Emphasis added.)

516, 17 N.W. 310:

1. It is settled that the rule by which the damages to plaintiffs' land adjoining the defendant's railway is to be determined, is the depreciation of the market value of such land caused by the construction and operating of the railway through their farm, less any special benefits which may thereby accrue to the plaintiffs. Also that witnesses may, after stating the amount of the depreciation, testify as to the elements or items which make up that amount. In other words, they may state their grounds or reasons for fixing the damages at the specific sum named by them. The admissibility of testimony of the character last mentioned was first asserted in this state in *Snyder v. Railroad Co.* 25 Wis. 60, under the qualifications and restrictions stated in the opinion written by the present chief justice. One of these qualifications is that if such testimony has been received, the same should not be submitted to the jury as a basis for their assessment of damages. *** This is not distinction without difference; it is a practical and important one. The witnesses who are permitted to state the grounds of their judgment are subject to cross-examination and their ~~judgment to criticism; there is some safety in~~ permitting them to speculate on the causes of depreciation. But to admit evidence of remote and conjectural sources of injury for the jury to consider and assess damages upon, without restraint or scrutiny, would be going outside of all safe rule and plunging into the abyss of wild and supposititious damages. We think that *Snyder's Case* went fully as far as it is safe to go,--further, perhaps, than they go elsewhere, (*Presbury v. Railroad Co.* 103 Mass. 1; *S. & E.R. Co. v. Hummell*, 27 Pa.St. 99;)--and we are not disposed to go beyond it. Witnesses may testify to depreciation and be permitted to state the grounds of their opinion, as in *Snyder's Case*; but evidence of remote and conjectural causes of depreciation should not be submitted to the jury as a basis for their assessment of damages." Page 610. See S.C. 41 Wis. 541.

It will be observed that such testimony cannot properly go to the jury as the basis for an assessment of damages, but only as aiding the jury to determine the weight they ought to give to the direct testimony of depreciated value. Its sole function is to strengthen the testimony of the witnesses on that subject. Ordinarily such testimony is inadmissible on behalf of the party who produces the witness. It is the function of a cross-examination thus to test the grounds and value of the testimony. *** (Emphasis added.)

The party offering an expert is at liberty to reinforce his judgment, even before any attempt is made to discredit or impeach it, by showing the grounds on which it is based, provided such facts are relevant and admissible for the purpose; but facts so stated do not become evidence in the case. (Emphasis added.)

Thus the opinions of the experts, not the underlying facts upon which they are based, comprise the competent evidence for consideration by the jury in determining fair market value. As was admitted on page 45 of appellants' brief, Mr. Kiepe was permitted to state his opinion as to value, together with all underlying facts upon which the opinion was based. Likewise, appellants' other two experts, Solomon and Ashton, gave their own opinions as to value, together with supporting facts. (R. 418 et seq.)

Through Instruction No. 20, set forth in full below, the court instructed the jury as to the proper methods in weighing and considering said opinions.

Instruction No. 20 (R.91).

The opinion of a witness as to the market value of property may be good or bad, depending on how well qualified the witness may be to express such an opinion. You are not bound to accept the opinion of any witness as to the market value of any parcel of defendants' property, but must determine the facts for yourselves in accordance with the evidence introduced. In so doing it is your province to weigh the testimony of each witness who has expressed such an opinion with reference to all the circumstances surrounding not only the property itself, but the familiarity of the witness with such property; and then you are to determine from all such circumstances how well qualified the witness may be to express a true opinion of its market value. You may, in your discretion, reject the testimony of any witness who has expressed such an opinion, if it appears to your satisfaction that the opinion is not based upon such a thorough knowledge of all the facts and circumstances relating to the property itself as to enable him to express a true opinion as to its fair market value on July 12, 1951.

CONCLUSION.

It is respectfully submitted that Instruction 17 was entirely proper.

Further, that examination of the record will disclose, contrary to appellants' argument, that well within the limits of the trial court's sound discretion, all pertinent evidence as to the value of the property condemned was placed before the jury for its consideration, under instructions which properly guided the jury in its deliberations.

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Copy of the foregoing Supplementary Statement by Respondents received by E. R. Callister, Attorney General, and by Robert B. Porter, Assistant Attorney General, attorneys for Appellant, this ____ day of November, 1955.

Attorneys for Appellant.