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Weber Basin Water Conservancy District v. Willard A. Skeen, John G. Braegger, Elsie L. Braegger, his wife, et al : Brief of Respondents John G. and Elsie L. Braegger

Utah Supreme Court

George M. Mason; Joseph C. Foley; Attorneys for Respondents;

In the
Supreme Court of the State of Utah

WEBER BASIN WATER CONSERVANCY DISTRICT,
Plaintiff and Appellant,

vs.

WILLARD A. SKEEN, JOHN G. BRAEGGER, ELSIE L. BRAEGGER, his wife, et al.,
Defendants and Respondents.

Case No.
8803

BRIEF OF RESPONDENTS JOHN G. AND ELSIE L. BRAEGGER

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ARROW PRESS, SALT LAKE

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STATEMENT OF FACTS

The statement of facts as related by appellant is sufficiently accurate that we can see no need to take issue as to those facts. We do not, of course, draw the same inferences nor the same conclusions from those facts. In connection with our argument under each of the points, we will need to refer for purpose of emphasis to some of the facts of this case. We shall refrain from mentioning them further here in order to avoid duplication.

STATEMENT OF POINTS

POINT I.

THE ENTIRE RECORD WILL NOT SUPPORT THE CONTENTIQN THAT EXCESSIVE DAMAGES WERE AWARDED BY THE JURY WHILE UNDER THE INFLUENCE OF PASSION OR PREJUDICE.

POINT II.

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ARGUMENT

POINT I.

THE ENTIRE RECORD WILL NOT SUPPORT THE CONTENTION THAT EXCESSIVE DAMAGES WERE AWARDED BY THE JURY WHILE UNDER THE INFLUENCE OF PASSION OR PREJUDICE.

The appellant has devoted pages 6 through 14 of his brief to quote questions asked by the jury and the answers of the trial court and of counsel. The excerpts are properly quoted but we do desire to add these additional statements.

On page 11 of appellant's brief, there is a quotation from page 187 of the record that concludes with the Court's statement: "I guess that's a fair statement." The record then continues (R. 187).

> "Mr. Skeen: I think so.
>
> "The Court: I thought I should make that explanation so that you will understand there's no secrets. This is the first case involving the Willard Basin, which is, as far as my experience is concerned, a pioneer first kind of case. We've had many State Road Commission cases. Several of them were taken to the Supreme Court, or at least one of them involving the Willard people when the highway was widened before the war down there, you recall. Well, I guess there's no harm as far as I've gone.
>
> "Mr Mason: I guess not.
>
> "The Court: I could pry the lid off and we'd all be quarreling here, but it's been so peaceful this morning, I don't want to get anything started here. Now, is one-thirty all right? Thank you very much. Usual admonition."

* * * *

On page 14 of appellant's brief, Juror Rich is quoted as saying, "Well, we need more evidence", and page 341 of the record continues by the Court taking a half-hour recess. Immediately, upon reconvening, the following statement is addressed to the jury by the Court (R. 341):

> "The Court: Mrs. Rich and gentlemen, with regard to the question asked before we recessed, the

only answer the court can give you is to refer you to the instruction which sets forth how to measure the damages, and that instruction, ladies and gentlemen, has been approved by not only the Supreme Court of our state but practically every state in the union in these kinds of cases. I make the further comment, we never try a lawsuit where the evidence is perfect. We have to try it on the evidence as presented. Now, for reasons deemed sufficient to the Court and satisfactory to the parties, this case will have to be decided on the evidence that you've heard. That's the rules of the game. It can't be any other way. So if you'll read the instructions over carefully. I don't claim credit for coining the phrases. We've got them out of the law books, and it's the best way to do it. It's the American system. It's the only way we can do it. Anybody have any further suggestions?

"Mr. Skeen: No.

"And counsel then proceed with their arguments to the jury."

"The right of a juror to ask questions of a witness during trial is clearly within the sound discretion of the trial court." *State* v. *Sheppard* (Ohio), 128 N. E. 2d 471.

In *State* v. *Anderson*, 108 Utah 130, 158 P. 2d 127, the Supreme Court of Utah stated:

"During the course of the trial the court asked the jury if it would like to ask some questions of a witness. Two members of the jury accepted this invitation. Appellants assign this invitation by the court to the jurors to ask questions as error. Appellants concede that it is not error for a court to grant permission to a juror who wishes to ask questions to clarify some material point in the evidence, but

> insist that it is error for the court to invite the jurors to ask such questions. Whether a juror will be permitted to ask questions of a witness is within the sound discretion of the trial court. * * * The fact that the trial court granted the jurors permission to ask questions of witnesses without any special request from them for this privilege does not, in our opinion, in and of itself constitute error. The determining factors as to whether error has been committed is the type of questions asked and allowed to be answered. If the questions asked are not germane to the issues involved or are such as would be clearly improper and therefore prejudicial to the rights of the defendants to a fair and impartial trial, the court's allowing them to be answered would be error. As stated in Jones' Commentaries on Evidence, 2nd Ed. Vol. 5, Page 4539, Sec. 2320: 'The privilege of examining witnesses is extended to jurors and may be exercised by them to draw out or clear up an uncertain point in the testimony. It has even been said that jurors should be encouraged to ask questions. They should not, however, be permitted to take the examination of witnesses out of the hands of counsel and to question witnesses at length, nor should they be permitted to interrupt the orderly conduct of the cause with unnecessary questions.' "

And the Court continued, after noting the substance of the questions asked by the jurors.

> "These questions might properly have been elicited on the direct examination of the witness and were such as would clarify material points in the testimony. The court, therefore, did not err in permitting these questions to be answered. By so holding, this court does not wish it to be understood that it approves the practice of a trial court inviting

> jurors to ask questions. This privilege should only be granted when in the sound discretion of the court *it appears that it will aid a juror in understanding some material issue involved in the case and ordinarily when some juror has indicated that he wishes such a point clarified.*" (Emphasis added.)

The action of the jury in the present case fully meets the language of the foregoing statement that we have italicized. It is certainly far less objectionable that a juror should request guidance from the court than to secure further evidence from the witness; and appellant makes no claim that the answers given to these questions by the Court were anything but proper.

We should note that at no time during the trial of this cause, either in the presence or in the absence of the jury, was any complaint made or any objection noted to these questions by the jury or the answers by the Court. It is not proper to raise such a question for the first time upon motion for a new trial and upon appeal. And we must further note that no point is made that the verdict of the jury was excessive.

We respectfully urge that the action of the jurors and of the trial court was entirely proper. The jurors sought information that the Court properly supplied. To now claim that these jurors did not follow the admonishments and instructions of the trial court strikes at the very foundation of the American system of trial by jury, and would, if upheld, permit any litigant who lost in the trial court to inferentially claim and contend that the jury did not obey and follow the admonishments and instructions of the trial court.

Appellant claims that excessive damages appear to have been given under the influence of passion or prejudice. We have demonstrated that no passion or prejudice is shown to have existed as far as the jury was concerned, and we very strenuously contend that there has been a complete failure by appellant to show that the damages awarded were excessive.

POINT II.

THERE IS COMPETENT EVIDENCE TO SUPPORT THE AWARD FOR SEVERANCE DAMAGE TO THE 36.79 ACRES OF LAND NOT TAKEN.

Appellant contends that the stipulation entered into and recited on page 20 of appellant's brief negatived respondent's right to severance damage for this specific parcel of land. We must, of course, take issue with him; and we believe that the answer is self-evident when this Court reviews the facts of the case. Respondents had a farming and livestock operation and the approximate 175 acres were used as a farm unit. To take 137 acres away and pay only the value of those acres would be manifestly unfair. There is of necessity a diminution in per acre value when a farm is reduced from a large acreage to a small acreage.

The stipulation recited in appellant's brief operated to substantially reduce the severance damage to the 36.79 acres not taken, and the jury certainly viewed it as such when they allowed only $1850.00 damages for this severance.

The trial court gave Instruction No. 10 (R. 33), which reads as follows:

> "The property sought to be condemned constitutes only a part of the land holdings of the defendants, all parts of which have been operated as a unit for farming and livestock operation purposes. You are instructed that you may include in the just compensation to be awarded the defendants, the damages, if any, which will accrue to the portion not sought to be condemned by reason of its severance from the portion sought to be condemned and the construction of the improvement in the manner proposed by the plaintiff. In arriving at such damages you *must* take into consideration the stipulation made in open court to the effect that the plaintiff will grant the defendants the right of possession as provided in the stipulation until May 1, 1958, and will construct for the benefit of the defendants a fence, a road and a ditch, and will provide a permanent right of way for the same to enable the defendants to utilize 36.79 acres of remaining land. The fence, road and ditch will be constructed before the defendants' use of the present such facilities will be disrupted in the construction of the Weber Basin Project Works. The items of damage to remaining property are to be separately stated in the verdict." (Italics added.)

This instruction correctly states the law and the appellant has not excepted to the giving of this instruction. We contend that this is a full answer to all matters contained under appellant's Point II.

POINT III.

ORAL INSTRUCTIONS WERE NOT GIVEN IN VIOLATION OF RULE 51 OF THE RULES OF CIVIL PROCEDURE AND ERROR CANNOT BE PREDICATED ON THE ADMONISHMENTS GIVEN THE JURY BY THE COURT.

We cannot agree with appellant that oral instructions were given to the jury in this cause. Appellant in his argument under this point refers to the portions of the record quoted on pages six through fourteen of its brief. It would appear proper to analyze each of the "instructions" of the trial court as there quoted and determine their effect.

On pages 6, 7 and the top half of page 8 of the brief of appellant the trial court is quoted in six instances all dealing with the question of benefit to the condemnor. In each instance, the trial court in answer to the question of the juror admonishes them that they may not consider benefit to the plaintiff condemnor in determining fair market value and advises the jury that the Court will determine the law. By way of emphasis, may we quote again a part of the statement of the Court as printed at page 7 of appellant's brief as follows:

> "If they (plaintiff) got some sand or gravel or something like that and it's worth a million dollars to them, it's none of your business, none of our business."

A part of Instruction No. 14, as actually given, reads as follows (R. 37):

> "The compensation to be paid to the defendants John G. Braegger and Elsie L. Braegger, his wife,

> cannot be measured by the value of the land to the Weber Basin Water Conservancy District, but it must be determined by the loss and damage to the said defendants. In other words, what the owner has lost is the measure, and not what the condemnor has gained."

It occurs to us that the wrong party is complaining about the so-called oral instructions. That both the oral statements of the trial court and the written instrctions contain a correct statement of the applicable law must be admitted. The oral statements were, however, entirely for the benefit of the plaintiff and it should not be heard to complain.

Continuing with an analysis of the questions and answers as set out in appellant's brief, the remainder of page 8 and all of pages 9, 10, 11 and 12, are devoted to questions and answers concerning income tax features of the award to be made to the defendants, the respondents here. A fair inference to be placed on the Court's answers is that he leaned over backwards to favor the plaintiff and to insure that no prejudice would result. That these statements were in the nature of admonishments to the jury is clear and the appellant could claim error only if the Court had refused to answer the jury's questions.

And finally pages 13 and 14 concern questions by the jury and answers by the court as to sand and gravel and as to use of the word "adaptable." As a preliminary to this discussion, reference should be made to the prior action of the trial court in granting the appellant's motion to strike certain of the witness Capener's testimony as to the value

of land based upon the quantity of sand, gravel and fill dirt in it (R. 138).

And, prior to the question asked by the juror as quoted on page 13 of appellant's brief, the trial court had instructed the jury by means of written instructions and Instruction No. 14 (R. 37) contained this language, inter alia, "and all the uses for which it is most suitable and for which it is adapted."

The granting of the motion to strike the evidence as to value based upon quantities of sand and gravel in place, the giving of Instruction No. 14 and the further statement of the trial court at page 341 of the record that has been fully quoted on page 3 of this brief, when considered together, were correct pronouncements and, under no stretch of the imagination, could they be said to be prejudicial to the appellant.

And, finally, we do not believe that an exception to these alleged oral instructions can properly be noted on date some three weeks after the final date of trial and the verdict of the jury. If appellant were to properly attack the trial court's answers to the jurors' questions, it must do so timely so as to give that court an opportunity to correct the objection voiced.

CONCLUSION

We respectfully urge that the points raised by appellant on this appeal are without merit, that the trial of this cause was fairly conducted and that the verdict of the jury and the judgment on that verdict should be upheld.

Respectfully submitted,

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