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Weber Basin Water Conservancy District v. Harold L. Ward et al : Brief of Respondent

Utah Supreme Court

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CASE NO. 8881

IN THE SUPREME COURT
of the
STATE OF UTAH

WEBER BASIN WATER CONSERVANCY
DISTRICT,

Plaintiff and Appellant,

vs.

HAROLD L. WARD, C. ARNOLD FERRIN
and LUCILLE N. FERRIN, his wife, LESLIE
OLSEN and JESSIE OLSEN, his wife, et al.,

Defendants and Respondents.

Respondent's Brief

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Defendants and Respondents.

WHAT ISSUES ARE INVOLVED IN THIS APPEAL?

Before entering into a general discussion of the matters set forth in appellant's brief, we deem it necessary to point out to this court the following facts:

This appeal presents some interesting and novel problems. Weber Basin Water Conservancy District (hereinafter referred to as District) filed an action in the District Court of Weber County, No. 32126, to condemn 66.8 acres of land, title to which was vested in defendants Ferrin and being purchased under contract by defendants Olsen. The tract so condemned

extended about one half the width of said farm. The State of Utah by and through its road commission (hereinafter called the State) also filed an action, No. 32213, wherein it sought to condemn 5.66 acres out of the remainder of said farm for roadways. These roadways begin near the Northwest corner of the 66.9 acre tract and extend some distance through the remainder of the Olsen farm where the road divides, one leading to the left across the remainder of the Olsen farm from which a highway to a small farming community know as Liberty and the other extending in a North-easterly direction to the town of Eden. (See defendant's Exhibit 1.) It is apparent, therefore, that neither action results in a complete severance of the Olsen farm but the combined actions result in a complete severance of the farms and cuts the portion of the farm not taken into three small irregular tracts. This presented a novel situation with respect to severance damages.

If the cases were tried separately each plaintiff could deny that its action resulted in a complete severance, thereby making it difficult for a jury to determine how much severance damage was caused by each separate condemnor. By reason of this novel situation, the parties entered into a written stipulation (See Page 37 Record in File No. 32213) the essence of which provided:

1. That the two cases be consolidated for trial and tried together.
2. That the following issues would be submitted to the jury:
 - A. That a jury would return a judgment

in favor of defendants jointly and against plaintiff District for the fair market value of the 66.88 acres so condemned by it.

- B. That the jury would return a judgment in favor of defendants jointly against the State for the fair market value of the 5.66 acres so condemned; and
- C. That the issue as to the amount of severance damages, if any, which defendants would be entitled to receive, be submitted to the jury and judgment entered against both plaintiffs for the total amount of severance damages, if any, jointly caused by the taking of the lands by the plaintiffs jointly.
- D. That the court may then apportion the severance damages, if any, between the two plaintiffs and enter judgment accordingly.

A jury was impanelled and the cause submitted to the jury under a special verdict in accordance with the stipulation. The jury returned the following special verdict:

- 1. \$33,400.00 against the District for the value of the 66.8 acres.
- 2. \$2,830.00 against the State for the value of the 5.66 acres.
- 3. \$23,109.00 severance damages against both plaintiffs.

The State of Utah apparently was satisfied with the verdict. It filed no motion for a new trial, nor did it

appeal to this court. Therefore, the judgment as against State became final March 7, 1958. Plaintiff District filed a motion for a new trial. This motion was overruled on March 31, 1958 and on April 29, 1958 (long after the judgment against State had become final) District filed a notice of appeal to this court. The notice of appeal says that plaintiff District appeals to the Supreme Court from that certain judgment in favor of defendants and against the plaintiff District. NOTE: The appeal is from the judgment against the plaintiff District and makes no reference to the joint judgment against both plaintiffs. It is of course axiomatic that one may appeal from only a part of a judgment. What then is the situation? Defendants have a final judgment against the State of Utah for \$2,830.00 (value of the land taken by it) and \$23,109.00 amount of the joint severance damages.

Assuming for the sake of argument that it is reversible error, an assumption, however, not shared by respondent, what would be the result? Would the judgment fixing severance damages stand as against the State of Utah? It seems to us that this result is inevitable because the judgment against State was final and unappealable so far as State is concerned before an appeal was taken by the District.

Furthermore, we contend, for the reasons heretofore set out, that plaintiffs have appealed only from that part of the judgment fixing the value of the 66.8 acres and that the notice of appeal did not refer in any manner to the joint judgment for severance damages. If we

are correct in our contention, then it must follow either :

1. The judgment for severance damages is final as against the State of Utah.
2. That by reason of the notice of appeal by District only to the judgment against District and that the only issue presented by this appeal is whether or not this appeal is limited in scope only to that part of the judgment fixing the value of the 66.8 acres.

The plaintiffs, by virtue of the stipulation, agreed that the jury might fix the amount of the severance damages and leave it to the court to apportion the same between the plaintiffs. Again assuming for the sake of this argument only, that this court should reverse the judgment for severance damages, then what would be the effect? Would it order a new trial in favor of District only and submit to the jury the amount of severance damages to be assessed against the District only, which would be in direct violation of the stipulation which was in the nature of a binding agreement that the jury might determine the amount of severance damages as against both plaintiffs. By doing so, the court would in effect set aside a valid and binding stipulation.

Respondent will now discuss the various points raised by appellant District in the order presented by appellant :

POINT 1. Appellant contends there is insufficient evidence to support the answer to Question Number One. This respondents emphatically dispute. Defendants produce two experts — Wilkinson and Welker in

addition to the testimony of defendant Olsen. They testified that in their opinion this 66.8 acre tract was worth \$600.00 per acre. Their evidence as well as the evidence of the plaintiff, as shown on the map, disclosed that the taking of this 66.8 acres of land took from this dairy farm the very heart of the farm. It comprised the choice meadow land most of which was sub-irrigated. The jury fixed its value at \$500.00 per acre. Hence, the verdict is \$100.00 per acre less than the value fixed by defendant's witnesses. Appellant asserts that Wilkinson's opinion was based largely upon unaccepted offers of sale. This assertion we emphatically dispute. An examination of Wilkinsons testimony reveals that he had appraised properties for more than sixteen years in Weber County. He then detailed what investigations he had made and he arrived at an opinion that the tract of land in question was worth \$600.00 per acre. It seems difficult to understand appellant's criticism, especially in view of the fact that his own experts, as well as the expert Capener (sic) arrived at their conclusions in exactly the same way as did Wilkinson. It is admitted by all sides that there had been very few sales in the vicinity of the land in question.

We think the comments and observations made by Mr. Chief Justice McDonough in the recent case of,

Weber Basin Water Conservancy District
vs. Skeen
328 P. 2nd 730

Reported in advance sheet of September 12, 1958, is a complete answer to appellant's contention. On Page Sixteen of his brief counsel, in referring to Wilkin-

son's testimony, says :

"He, Wilkinson, testified further that * * * there had been an increase in value because of the enlargement of Pine View Reservoir."

He fails, however, to point out where Wilkinson so testified. The only place where we can find a discussion of this matter in Wilkinson's cross examination starts on the bottom of Page Ninety-three of the record. Wilkinson was asked whether or not in his opinion farm lands have increased in value substantially from 1950 to 1956. His answer was "Yes".

Then he was asked, "What percentage have they increased?" and he answered:

"Well, I don't know."

Q. "You think they have increased and that is all you know about it?"

A. "That is right."

Q. "Do you think that the value of lands in Ogden Valley have increased because of the enlargement of Pine View Reservoir?"

A. "I think they have."

Q. "And when did that increase occur?"

A. "Well, I think it has been going on ever since they put the Pine View Dam in there from the beginning."

Q. You think the Ogden Valley lands have increased between 1950 and 1956?"

A. "Yes, Sir."

Q. "And you don't know how much?"

A. "No, I don't."

Nowhere does Wilkinson say that he thinks the lands

have increased twenty-five per cent due to the enlargement of the Pine View Dam.

Wilkinson also testified that due to the inflation real estate values have increased. We think this court can take judicial notice of that fact. It is true that witness Welkes was asked on cross examination if by reason of the growing scarcity of meadow land in the area due to the enlargement of Pine View Reservoir that fact had affected the value of land in the area, and he testified:

“I think tthat would have affected the value.”
and when further pressed he answered:

“Perhaps about one-fourth.”

We say, therefore, that the witness Wilkinson did not say that the value of this land had increased twenty-five per cent due to the enlargement of the reservoir and, therefore, there is ample evidence to sustain the verdict of the jury on the testimony of Wilkinson alone.

We shall reserve for further discussion the question as to whether or not increased value of land generally due to a condemnation proceeding is not recoverable in fixing the value of the owner's land.

WHAT IS THE MEASURE OF COMPENSATION TO BE ALLOWED THE OWNER OF LAND BEING CONDEMNED?

Appellant asserts that defendant's evidence disclosed that the value as testified to by defendant's witnesses, included enhanced value due to the raising of Pine View Dam. As heretofore noted, however, neither

the defendant Olsen nor his expert Wilkinson so testified. They fixed the value of the tract taken at \$600.00 per acre without reference to any increased value brought about by the enlargement of the dam. Hence, there is competent evidence in this record that the value was fixed as of the date of the taking without reference to any alleged enhanced value brought about by the raising of the dam. With respect to defendant's witness Welker, the only reference to this subject is as set forth on Page Eighteen of appellant's brief. On cross examination counsel asked this question:

Q. "Mr. Welker, in fixing this figure at \$600.00 per acre, did you take into consideration the growing scarcity of meadow land up in that area due to the enlargement of Pine View Reservoir?"

A. "I think that would have affected the value."

It is apparent that counsel directed his question to the scarcity of meadow land which is so necessary for dairy purposes and not to increased value brought about by the enlargement of the dam itself. If meadow land is unavailable, it might affect the value of the remaining land. Is there any valid reason why the owner of such land should not be compensated for its actual value due to the inability of prospective purchasers to obtain meadow land in the area in question? In this connection, it should be remembered that much of defendant's land being taken by the District will not be covered by the waters of the enlarged reservoir but it encompasses an area sought to be retained by the District abutting the reservoir, presumably for recreational

purposes. The question of what elements may or may not be included rests in utter confusion.

In reviewing the authorities, it is apparent that the courts have been influenced quite largely by the wording of their constitutional and statutory provision.

Article One, Section 22

Utah Constitution.

provides that private property shall not be taken or damaged for public use.

Section 78-34-10

U. C. A.

provides how compensation and damages shall be assessed, and

Section 78-34-11

U. C. A.

provides when the right shall be deemed to have accrued. Unlike some constitutional and statutory provisions, nothing is said about increased or diminishing values by reason of the construction of the improvement. This court is committed to the proposition that under our constitutional and statutory provisions the value of the land must be assessed as of the date of the issuance of summons and nothing is said as to how that value must be ascertained.

All of the testimony introduced by both plaintiff and defendants was directed to the sole question as to what was the value of this land on the day of the taking, without reference to whether there was any increased value due to the enlargement of the Pine View

Dam. The only difference between the evidence offered by the plaintiff and defendants was a difference in opinion as to its then market value.

There is a long annotation in 147 A. L. R. 65. A reading of this annotation discloses the utter confusion which exists. The original Pine View Dam was constructed in 1934. There is no evidence in this record when it was officially determined that the reservoir should be enlarged nor when it was determined that defendant's land should be taken, nor when surveys were made or filed, nor when the project was approved. We contend that plaintiff utterly failed to prove the essential pre-requisites to demonstrate whether or not the increase if not allowable was to take effect. If counsel claimed that there was such an increase in values, it seems to us in the light of the many decisions that it was incumbent upon him to introduce evidence establishing these many facts and to offer evidence consistent with this theory, none of which he attempted to do. We call particular attention to Note Four on Page 85 and Note Five on Page 88 of the annotations supra.

DID THE COURT ERR IN REFUSING TO ADMIT DEFENDANT OLSEN'S INCOME TAX RETURNS FOR THE YEARS 1951 to 1956?

Appellant says at Page 21 of his brief that it was the theory of the defendants that the highest and best use of their farm was for a dairy; that because of its location and the kind of land of which it was comprised, it was peculiarly adapted for that use. We agree with this statement and we might call attention to the fact that that was also the view and theory of plaintiff's

expert Kiepe. He testified on cross examination that before the taking he considered it a good dairy farm; that to operate a dairy farm you have to treat it as a unit; that the ideal dairy farm is one that produces feed sufficient to feed the dairy herd and also produces meadow lands for grazing and the production of hay and grain and that this farm had all of those virtues. (Tr. 221) In fact, we invite the court's attention to his entire testimony on cross examination from Pages 221 to 249. At Page 229 he was asked this question:

Q. "Now, of course, if the farm after the taking is incapable of producing enough feed for the dairy herd, does that fact interfere with the efficient operation of the dairy?"

A. "Yes."

He states further at Page 239:

"I am prepared to say that I don't think it is a full time operation any more and that any one who would use it for a dairy farm would have to greatly reduce his herd."

Summarizing the evidence produced by both sides, it sustained the following: The entire farm was contiguous; that it was capable of sustaining at least fifty head of registered Guernsey and ten to fifteen head of dry stock; that he had buildings, barns, milk sheds and other improvements capable of operating a dairy farm of the size and quality referred to and that it was an ideal dairy farm; that after the taking and the cutting up of the farm it could not support more than fifteen to twenty dairy cows at the most; that under

modern conditions the dairy business requires the operation of a herd of at least fifty head. It was also testified by defendants, and not denied by plaintiff, that lands of comparable kind could not be purchased in the vicinity of this farm.

Plaintiffs offered in evidence defendant's copy of his income tax returns for the years 1951 to 1956 to show what his losses and profits derived from his dairy operations were as reflected therein. The court sustained defendant's objection to the introduction of these tax returns. We contend that he court committed no error in so doing.

What plaintiff claimed he was trying to prove by the tax returns was whether or not there was a profit made in the operation of defendant's business. The tax returns for the years 1951 to 1954 related to combined operations of several separate business and farm operations conducted by defendant. It is recognized, of course, that profits for income tax purposes is vastly different from profits as that term is usually understood. Deductions are allowable for depreciation of improvements, farm buildings, etc. for bad debts, for interest paid. Defendant offered to furnish plaintiff a statement as to the amount of milk produced and sold, the amount of crops produced. (Tr. 46) but plaintiff did not want this information. He wanted to introduce the tax returns and nothing more. We contend the trial court was correct because:

- A. Evidence of profits derived from a business conducted on property is too speculative, uncertain and remote to be considered as a

basis for computing or ascertaining the market value of property in condemnation proceedings.

See,

7 ALR, 163

- B. The tax returns did not correctly reflect the amount of profits actually earned from the operation of this particular business.
- C. To have received the tax returns would have opened up a collateral proceeding which would have led to utter confusion.
- D. That if the court was in error, no prejudice resulted from this ruling.

Defendant had no objection to plaintiff inquiring as to how much hay, grain and pasturage was produced from the farm, nor the amount of milk produced and sold. This evidence would have given the jury complete information as to the productivity of the farm and of the resulting income derived from the sale of the milk, the only product which was sold. See,

Denver vs. Quick

113 P. 2nd, 999

134 A.L.R. 1120

It is our view that the operation involved was the conducting of a business on the land itself. All crops raised were fed to the dairy herd. None was sold. The milk produced was sold to the Weber Central Dairy. To operate a dairy requires as much skill, knowledge and efficiency as the conduct of a mercantile or manufacturing business. The trial judge observed, correctly we think, that admitting these income tax returns would convert this action into a tax accounting suit; that it would so confuse the issues that the jury would become

confused and bewildered. Considerable latitude on the question of admission or rejection of evidence is reposed in a trial judge and his rulings will not be overruled by the appellate court except for a clear abuse of discretion. Even though the court refused to permit the tax returns to be introduced, he did allow a great amount of latitude by way of cross examination. Note, for instance, the cross examination of the witness Felt, commencing on Page 144 where the following questions were asked:

Q. "Do you know whether it has made a profit in the last six years of operation?"

A. "All I can judge on is the production of his cattle. I know what they produced in pounds of butter fat average. They belong to the Cow Testing Association and that is open to anybody."

Q. "I understand."

A. "He had a very good herd. They produced better than 350 pounds."

Q. "I asked you if you knew whether he made a profit on his operation."

A. "I couldn't say as to that. He should have done with the amount of butter fat produced by his cows."

(This latter answer was stricken)

Q. "Do you know as a matter of fact whether or not Mr. Olsen has made a profit on that ground for the last five or six years in the operation of the dairy herd?"

A. "I don't know."

Q. "If I were to tell you I had information to the effect that he suffered a loss over a number of years, would you think I was telling you

the truth or would I be misleading you?"

A. "Well, I wouldn't know."

and again at Page 259 in the cross examination of defendant Olsen, the following questions were asked and the following answers made:

Q. "Now, Mr. Olsen, did you realize a net profit from the operation of your dairy farm in 1955?"

A. "I don't know."

Q. "I hand you your 1955 income tax return and I'll ask you to examine that and then answer the question."

The court sustained the defendant's objection to the admission of the income tax returns, then followed:

Q. "Do you know whether you operated the dairy at a profit from 1951 to 1956, inclusive?"

A. "No, sir."

Q. "You don't know?"

A. "No, sir."

Even if the court was in error in his ruling, which we deny, yet we cannot see how the plaintiff was prejudiced. By inference, this jury was told that the defendant made no profit. The question for the jury's determination was not whether he made a profit in the conduct of his business as reflected by his income tax returns but the real question at issue was what was the fair cash market value of the property as of the date of taking.

This court judicially knows, and the evidence also shows that Utah has experienced an unprecedented boom due to the inflation, as well as the transition from an agricultural to industrial status. Land values have risen

rapidly. Land values of today are not reflected in farm income but are based more on a speculative market. If farm lands are valued on the basis of crop production, the prices being paid today could never be justified.

DID THE COURT ERR IN REFUSING TO ADMIT EVIDENCE AS TO PRIOR AMOUNT OLSENS CONTRACTED TO PAY NEARLY SEVEN YEARS PRIOR TO THE TAKING?

We think the court was justified in its ruling and that no prejudice resulted from his ruling. As heretofore pointed out, the undisputed evidence discloses, and this court judicially knows, that due to the impact of inflation a dollar today is not worth more than fifty cents or perhaps less, and, in addition to this, Utah has experienced an unprecedented boom due to its transition from an agricultural to industrial state. Consequently, land values have risen rapidly and land values of today are not reflected in farm income but rather on a speculative market. Had we been passing through a stable economy there might be some basis for permitting evidence of the purchase price nearly seven years prior to be admitted, providing a proper foundation is laid for the admission of this evidence, although we doubt that even then, the trial court's refusal to admit such testimony would be an abuse of his discretion. However that may be, when we consider all of the facts, it is difficult for us to see how the purchase price paid or agreed to be paid nearly seven years prior can be of any aid to a jury in arriving at present market values. Even under normal conditions, evidence of this character might result in prejudice to

the defendant. If a purchaser seven years ago had the sagacity to purchase property at a bargain, even though made on an open market, still there is no reason why the condeannor should profit because of his bargain and the admission of this testimony could result in the jury being influenced largely by the amount paid rather than the market value as of the date of taking.

Counsel cites a recent work by,

Kaltenbach

See Page 24

It is to be noted that the author says that the introduction of this evidence is subject to two conditions; namely, that the sale must have been made within a reasonable time so that it has some bearing on the market value *and also that the sale must have been voluntary*. Appellant made an offer of proof, see Tr. 261. He also asked defendant Olsen the direct question as to what the contract price was. We submit that it was incumbent upon appellant, even though this evidence was admissible, to first lay a proper foundation to prove or offer to prove that the sale from Ferrins was a voluntary transaction between parties, each of whom was capable and desirous of protecting his own interest. No such foundation for the admission of this testimony was either laid or offered to be laid by appellant.

It is also to be noted that in the citation from,

Nichols (quoted by appellant)

At Page 23,

the author says:

“And no change in condition or market fluctuation in value has occurred since the sale.’

This seems to us to be a complete answer because all of the evidence offered by both sides reflected that there had been a fluctuation in values which had occurred since the date of the sale.

DID THE COURT ERR IN GIVING INSTRUCTION NUMBER SIX?

We contend that under the rulings of this court, that Instruction Number Six is a correct statement of the law with respect to when and under what circumstances severance damages may be allowed where, as in this case, the evidence by all experts was that defendants’ farm comprised one unit and that as a unit it was adaptable for and used as a dairy unit operation and that there were no comparable lands available which could be purchased to replace the lands actually taken. See,

Provo Water Users Association
vs. Carlson
103 Utah, 93
133 P. 2nd, 777
State vs. L. D. S. Church
247 P. 2nd, 269, and
264 P. 2nd, 281.

The court did not commit reversible error for failure to give plaintiffs’ requested Instruction Number Five. We think the court fully instructed the jury on all issues presented and that the jury fully understood the

meaning of severance damages. See Instruction Numbers 3, 5, 6, 7, 9 and 12.

CONCLUSION

It is respondent's contention that no reversible error was committed by the trial court; that the case was fairly presented by both sides and that the instructions view as a whole correctly and adequately instructed the jury as to the law of the case; that the special verdict of the jury is amply sustained by the evidence and that the same should be affirmed.

Respectfully submitted,

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