1971

State of Utah, By and Through Its Road Commission v. Betty Lesourd, A Woman, Alex, T. Davies and thelma Davies, His Wife, and Valley Bank & Trust Comp Any : Brief of Appellant

Utah Supreme Court

Robert S. Campbell, Jr., Stewart M. Hansen, Jr.Vernon B. Romney and Brant H. Wall; Attorney for Plaintiff-Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, by and through its ROAD COMMISSION

Plaintiff and Appellant,

vs.

BETTY LsSOURD, a woman, ALEX, T. DAVIES and THELMA DAVIES, his wife, and VALLEY BANK & TRUST COMPANY,

Defendants and Respondents.

Case No. 12471

BRIEF OF APPELLANT

Appeal from the Judgment of the District Court for Summit County, Utah Honorable Thornley K. Swan, Judge

VERNON B. ROMNEY,
Attorney General
State of Utah
By Brant H. Wall
Special Assistant Attorney General
Salt Lake City, Utah
Attorney for Plaintiff-Appellant

ROBERT S. CAMPBELL, JR.
STEWART M. HANSON, JR. and
GEORGE H. SEARLE
400 El Paso Gas Bldg.
Salt Lake City, Utah
Attorneys for Defendants-Respondents

TABLE OF CONTENTS

CASES CITED

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, by and through its ROAD COMMISSION

Plaintiff and Appellant,

vs.

BETTY LsSOURD, a woman, ALEX, T. DAVIES and THELMA DAVIES, his wife, and VALLEY BANK & TRUST COMPANY,

Defendants and Respondents.

Case No. 12471

BRIEF OF APPELLANT

PRELIMINARY STATEMENT

All italics are ours and are added for emphasis. The parties will be referred to as in the Trial Court. "R" refers to Record and "T.R." refers to Transcript of Record in original proceedings and "S.R." refers to Supplemental Record.

STATEMENT OF THE KIND OF CASE

This is an action in eminent domain, brought by the

State of Utah, by and through its Road Commission, to acquire certain land owned by the defendants for highway purposes. The matter was tried to the Trial Court on the issues of fair market value for the property taken by the State of Utah and the amount of damage, if any, to the remainder. The Court entered judgment for the defendant landowners in the sum of $65,990.00 predicated upon a judcial determination that the said defendants were, at the time of the institution of said action and the date of taking, the owners of 6.27 acres from which .42 acre was expropriated in fee. The plaintiff appealed from said Judgment and Decree in case #11866, and on July 23, 1970, this Court entered its Decision as reported in 24 Utah 2d 383, 472 P.2d 939. The Trial Court thereafter entered Amended Findings of Fact, Conclusions of Law and Decree, from which plaintiff takes this appeal.

DISPOSITION IN LOWER COURT

Civil action Nos. 3753 and 3736 in the District Court of Summit County, State of Utah, were consolidated for purposes of trial; and the Trial Court, predicated upon a determination that the defendant land owners, were at the date of taking, the owners of 6.27 acres of real property, entered Judgment in favor of the said defendant land owners in the sum of $65,990.00. The plaintiff appealed said Judgment to the Supreme Court of this State under case No. 11866, contending that the

Trial Court had erred in its determination of ownership of the property and had made an erroneous assessment of severance damages based upon land which the said defendant land owners did not own as of the date of taking. This Court by Decision of July 23, 1970, decreed that the defendant landowners were not the owners in fee of a portion of the property of land in their possession and reversed the case with directions to the trial judge to eliminate from his Findings and Judgment all severance damages awarded for the "non-owned land," and further directed that if the said trial judge could not eliminate such from his findings and judgment, that a new trial should be ordered. Thereafter, the trial judge, after argument of counsel and deliberation, entered a Memorandum Decision dated January 25, 1971, concluding that $5,800.00 was the amount awarded for severance damage to the "non-owned land," and after deducting the same from the total judgment of $65,990.00, directed that judgment be entered for the defendant landowners in the sum of $60,192.00 and, that Amended Findings of Fact, Conclusions of Law and Judgment be entered in accordance with said Decision.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks a reversal of the Amended Judgment based upon Amended Findings of Fact Nos. 3, 4, 6, 7, 8, 9, and 10 and Amended Conclusions of Law No. 3, and asks that a new trial be ordered, or, in the alterna-

tive, that the Court order entry of Judgment in favor of defendants based upon the evidence of plainiff's witness Gregory Austin.

STATEMENT OF FACTS

Insofar as relevant to the issues before this court, the plaintiff instituted two separate actions to expropriate lands for highway purposes near the intersection of U.S. highway 40 and highway U-248 in Summit County, Utah, as more fully set forth in the Complaints identified as Civil Nos. 3753 and 3736.

Defendants were the owners of 1.33 acres on the date of taking, i.e., September 12, 1967,, a portion of which comprising .37 acre was taken in fee for highway construction, leaving .96 acre remainder. (Amended Findings of Fact No. 2.)

On the date of taking, a business consisting of a garage, servic estation, cafe and small cabins was being conducted upon the 1.33 acres and adjoining "non-owned land." (T.R. 388, 508, 585, 586; S.R. 11; Def. Exhibit #31; T.R. 118, 120, 121, 122, Exhibit D-1.)

Preliminary to hearing the issues of damages and compensation, the Trial Court, after extensive testimony and evidence, ruled as a matter of law, that the defendants were the owners of 6.27 acres at the time of and prior to condemnation; that 5.85 acres remained after

taking, and that .42 acre had been expropriated. (T.R. 266, 267.)

Based upon said ruling, expert witnesses predicated their testimony of values and damages and produced evidence based upon such ruling. (T.R. 381, 419, 422, 499, 508, 515, 571, 578, 602, 604, Def. Exhibit 31.) (T.R. 631, 661, 666, 667.)

The defendant landowners produced three land valuation witnesses who testified extensively as to compensation for the taking and damages to the remainder, and the plaintiff produced one expert witness who testified on such issues. All witnesses utilized the before and after approach.

The significant testimony of each such witness is as follows:

Witnesses for defendant landowners:

I. Marcellus Palmer:

"Q. How many acres did this property comprise, which you appraised?

A. There's 6.27 acres." (T.R. 381.) * * *

Q. All right. Now, the reasonable market value you have put here as $25,000.00. Which property did you find was reasonably worth $25,000.00 out of this total area here, that you capitalized?

A. It was approximately a two acre tract, that takes

in the buildings and improvements." (T.R. 392, 393.)
* * *

"Q. You found then—you found that the, under your testimony, that the value of the land under the income approach was $44,215.00. Tell the Court how you arrived at that $44,215.00.

A. That was arrived at this way: taking the *two acres that is located underneath the improvements and facilities*, in my opinion that was worth $12,500.00 an acre. And that left a remainder of 4.27 acres, and in my opinion that was worth 45 hundred per acre. Making a total of $44,215.00." (T.R. 399.)

II. Jerome H. Mooney:

"Q. What is the value which you attribute to the land?

A. $54,000.00.

Q. And further on there you refer to two acres and four acres. To which property does the two acre reference refer?

A. *The two-plus acres is the property where the improvements are situated directly under the improvements.* The four-plus would be the remainder of the subject property.

Q. And what value did you ascribe to the two-acre parcel?

A. $13,000.00 per acre." (T.R. 508.)

On cross examination this witness further testified as follows:

"Q. You subscribe two acres of land, I believe, in your testimony, to the subject development. Did you survey this to determine the two acres, or how did you arrive at the two acres?

A. I computed it from the engineer's certificate.

Q. In what manner did you compute it?

A. By putting the subject property on top of the engineer's survey and measuring the part that was covered, and computing it mathematically.

Q. Now, what distance along the front did you utilize for the subject property?

A. I used a figure of about 650 feet.

Q. About 650 feet?

A. Of 650 feet.

Q. All right. What depth did you allocate to it?

A. 150 feet.

Q. And is that the area that you ascribed to the improvements?

A. Yes.

Q. And the subject development? And have you multiplied that out to see what acreage it gives you?

A. Yes.

Q. And what does it give you?

A. 97,500 feet." (T.R. 523, 524.)

III. Werner Keipe.

"Q. The next step, then, is to, under your, under Exhibit 31, is to take out from that $7,800.00 the income that is attributable to the land under the improvements; is that correct?

A. That's correct.

Q. Why do you want to do that in this capitalization approach?

A. The—it is necessary to set up depreciation or reserve for the recapture of capital in improvements. Land itself can be capitalized in perpetuity, but improvements have to be appraised as to having a physical economic life. And so we separate the two. And this is what I've done here.

Now, the value of $45,500.00 ascribed to land is for the land which is in the area of the development. It would be the area which is below the old road, the old road which runs along the upper side of the property. And I have capitalized that land at 8%. In other words, I feel that an investor is entitled to 8% net on the value of his land. * * *

Q. What part of—how did you arrive at that, Mr.

Keipe? Tell us what land you evaluated, at different rates.

A. *I divided the land into three parcels. I ascribed a value of $25,000.00 for this developed commercial area*; I ascribed a value of $2500.00 per acre for the adjoining land which lies immediately above it; and I ascribed a value of $1,000.00 an acre for this idle land over here, lying to the west." (T.R. 585, 586.)

On cross examination, this witness further testified as follows:

"Q. And do you think that the use of this property beyond the property line, and out in the highway, being used as a parking, would diminish what a buyer might pay for the property?

A. No.

Q. So that in your appraisal, you took into account, in arriving at your value, the fact that this land was available for parking. And I speak now of the land located out in the highway, in gray.

A. Well, only to the degree in which other cars are used in other locations on public streets. ***But this property has a lot of land. And the question of parking is not an important one, because of the vast amount of land which they have unused at the present time.***" (TR. 776).

The plaintiff called as an expert witness, Gregory Austin. This witness significantly based his testimony

upon the assumption that there was 1.33 acres of land which contributed to the commercial development and .42 acre had been expropriated for highway construction. He further testified that the remaining land which he referred to as the "back land" had the same before and after value. (T.R. 631, 632, 666, 667; Plaintiff's Exhibits 33 & 36).

The witness, Austin, further testified that the subject properties had a before value of $57,000.00 (rounded figure) and an after value of $22,500.00, resulting in a total award of $34,500.00 for the take and damage. (T.R. 632, 667, 685).

The witnesses testifying for the landowners with respect to damage and compensation utilized various combinations of approaches, and their respective testimonies in that regard may be summarized as follows:

The witness Marcellus Palmer, under the income approach, testified that the property in its before condition had a value of $89,671.00. (T.R. 399.) By his "cost replacement approach," he testified that the property in its before condition had a total value of $93,167.00. (T.R. 402).

The witness further testified that he placed primary emphasis upon the income approach and determined the fair market value of the property in its before condition to be $89,700.00. (T.R. 402), and that the total value of the land and improvements in the after con-

dition was $9,809.00 (T.R. 418, Defendants' Exhibit #24-A) thereby ascribing a difference between the before and after value of $79,900.00 as the amount to be awarded as compensation for the taking and severance damage (T.R. 422, 423).

The defendants called as their second expert witness Mr. Jerome H. Mooney, who testified that the fair market value of the subject property on the date of taking, in the before condition, was $92,349.00 (T.R. 512, Defendants' Exhibit #29).

The witness further testified that in his opinion the fair market value of the property in the after condition was $9,341.00 (T.R. 516), resulting in a total difference for take and severance of $83,008.00 (T.R. 521, Defendants' Exhibit #29).

The third expert witness called by the defendant landowners was Werner Keipe, who testified that in his opinion the fair market value of the subject properties in the before condition and as of the date of taking was the sum of $90,000.00 (T.R. 594, Defendants' Exhibit #31).

The witness further testified that the value of the subject properties in the after condition on the date of taking was the sum of $11,600.00 (T.R. 601, Defendants' Exhibit #31-A), giving a difference in the before and after value of $78,400.00. (T.R. 604, Defendants' Exhibit #31-B).

At the conclusion of the trial, the trial judge entered judgment in favor of the defendant landowners and against the plaintiff in the principal sum of $65,992.00, computed in the following manner:

(a) Fair market value of 6.27 acres before condemnation	$80,701.00
(b) Fair market value of remainder 5.85 acres after condemnation	$14,709.00
TOTAL DAMAGES	$65,992.00

Following the decision of this court in case no. 11866, the case was remanded to the trial judge with instructions to eliminate from his Findings and Judgment all severance damages awarded for the "non-owned land" if he could do so; otherwise, a new trial was ordered. (Findings of Fact and Conclusions of Law, dated April 1969, Decision in case no. 11866, Utah Supreme Court).

After additional argument of counsel, the trial court ordered the entry of Amended Findings of Fact, Conclusions of Law and Judgment, wherein the said trial court found as follows:

(a) Fair market value of the total tract of 1.33 acres in the before condition	$70,821.00
(b) Fair market value of the remaider .97 (sic. 96) acre remaining after condemnation	$10,629.00
TOTAL AWARD FOR DAMAGE	

AND TAKING $60,192.00

(Amended Findings of Fact, Conclusions of Law and Judgment, dated March 1971)

POINTS

POINT I: THE TRIAL COURT ERRED IN FINDING THAT SEVERANCE DAMAGES TO THE "NON-OWNED" LAND COULD BE ELIMINATED FROM THE FINDINGS AND JUDGMENT.

POINT II. THAT DEFENDANT LANDOWNERS HAVE FAILED TO SUSTAIN THE BURDEN OF PROOF RELATIVE TO COMPENSATION AND DAMAGES CAUSED BY THE TAKING.

ARGUMENT

POINT I: THE TRIAL COURT ERRED IN FINDING THAT SEVERANCE DAMAGES TO THE "NON-OWNED" LAND COULD BE ELIMINATED FROM THE FINDINGS AND JUDGMENT.

In view of the trial court's ruling that the defendant land owners were the owners of 6.27 acres of real prop-

erty in the before condition, the three expert witnesse
called by the defendants based their before and afte
values upon that particular ownership. Of great sig
nificance is the fact that each of the defendants' exper
witnesses concluded and testified that in their opinio
there was in excess of 1.33 acres of land devoted an
used for the commercial development located upon th
premises. In this regard, the witness, Keipe, testifie
that in his opinion 1.82 acres were devoted to the com
mercial development. The witness, Marcellus Palme
testified that in his opinion two acres were devoted t
the commercial development, and the witness, Jerom
H. Mooney, testified that in his opinion a little mor
than two acres were devoted to the commercial develop
ment. All of these assumptions were contrary to th
law announced by this court in its decision in case no
11866. The only witness who testified with respect t
the true acreage was the witness of the plaintiff, Mr
Gregory Austin, who utilized a total acreage of 1.3
as the basis for the commercial development. The re
spective significant testimonies referred to are set forth
in the Statement of Facts heretofore.

We are now confronted with the problem o
determining what credence can be given to the testi
mony of those witnesses who predicated their exper
opinion evidence, and testimony upon an erroneou
assumption of fact and law. It is the contention of th
plaintiff that such evidence and testimony must fall a
a matter of law, and by reason thereof, there is n

credible evidence of any probative value before the court upon (which) a Finding of Fact can be based to support the Judgment and award made by the trial court.

In the landmark case of *United States vs. Honolulu Plantation Company,* 182 Fed. 2d 172 (9th Circuit 1950), the Court there addressed itself to the matter of expert testimony based upon erroneous assumptions and noted:

> "Where unwarranted theories of law or assumptions of fact guide the expert and are used as a basis for value by the Court, the evaluation will be set aside and cause remanded for new Findings."

In the case of *State of Washington vs. United States,* 214 Fed. 2d 33 (9th Circuit 1954), there existed a discrepancy between the physical facts and the opinion of the expert witness. In that case, the Court observed that:

> "Opinion evidence is only as good as the facts upon which it is based. Opinion evidence in conflict with physical facts, United States vs. Hill, 8th Cir., 1933, 62 Fed. 2d 1022; United States vs. Thornburgh,8th Cir., 1940, 111 Fed. 2d 278, 280, is not substantial evidence and may be disregarded."
>
> "* * * Evidence contradicted by the physical facts is entitled to no credence." (Numerous authorities cited.)

Although the Washington case, supra, is dealing with a conflict between physical facts and expert opinions, we see no difference between that situation and one where there is a conflict between a principle of law and expert opinion. Thus, it would seem to us that if the expert opinion testimony is in direct conflict with a legal concept or principle, then and in that event the testimony would be entitled to no credence whatsoever under the authorities set forth.

A further case of significance is the case of 6816.5 acres of land, etc., *Rio Arriba Co., N. M. vs. United States,* 411 Fed. 2d 834 (10th Cir. 1969) which sets forth the following:

> "To have probative value, expert opinion must be 'founded upon substantial data, not mere conjecture, speculation or unwarranted assumption. It must have a rational foundation.' United States vs. Sowards, 370 Fed. 2d 87, 92 (10th Cir. 1966). Here the government experts relied on erroneous legal assumptions, made no attempt to specify the kind of benefit contemplated or to limit the amount of acreage to be benefited. Surely the entire 26,000 remaining acres will not be useful for lakeshore development and will not be benefited. Yet, the government experts did not explain the gross valuation or denominate the extent of the benefit in any way. Obviously, such 'speculative and remote possibilities cannot become a guide for the ascertainment of value in judicial ascertainment of the truth.' " (Authorities cited.)

In the case of United States vs. 102.93 acres

land, 154 Fed. Supp. 258 (United States District Court, New York, July 1957) the Court said:

> "* * * Opinion evidence is only as good as the facts upon which it is based. ' ' ' *Where unwarranted theories of law or assumptions of fact guide the experts and are used as a basis for value by the Court, the valuation will be set aside and the cause remanded for new Findings.*" (Authorities cited.) (Emphasis added.)

The Supreme Court of California in the case of *Metropolitan Water District vs. Adams,* 116 P.2d 7, quoting from the case of City of Stockton vs. Billingwood, 96 Cal. App. at Page 722, said:

> "The rule which requires the rejection of testimony evaluating remote, conjectural, speculative, and hypothetical uses and elements is of long standing."
>
> "* * * Where a witness testifying as to value, bases his opinion entirely upon incompetent and inadmissable matters, or shows that such matters are cheap elements in the calculations which lead to his conclusion, his testimony should be rejected. This applies with great force where the opinion is based upon pure speculation. * * *"

In the case of *State Highway Commission vs. Central Paving Co.,* 399 P.2d 1019, 240 Oregon 71, the Court in discussing the credibility of testimony based in part on an element improperly employed stated:

> "* * * However, if the estimate is based in part

> upon an element improperly employed, the estimate is not competent evidence and the State is entitled to inquire as to the value attributed to the improperly employed element for the purpose of reducing the estimate by that amount, or if it cannot be segregated, to insist that the witness's estimate be stricken. Therefore, the judgment must be reversed and the cause remanded for a new trial."

See also: *United States vs. Cooper* (5th Cir. 1960) 277 Fed. 2d 857; *International Paper Co. vs. United States*, 227 Fed. 2d 201 (5th Cir. 1955).

In the case of *United States vs. Smith*, 355 F.2d 807 (5th Cir. 1966), the trial court permitted a witness to utilize Option Agreements as comparable sales to support his testimony, which the Appellate Court held to be error; and in reversing the trial court and ordering a new trial, the court said:

> "* * * Without that testimony the amount of the verdict was much above the range of the competent evidence of the expert witnesses and of the comparable transactions which were in evidence. Under these circumstances it would be impossible to say that the jury did not base its verdict, at least in part, upon Williamson's incompetent testimony. It follows that the Government is entitled to a new trial at which the jury will have only competent evidence of market value before it."

Each of the expert witnesses of the defendant landowners predicated their testimony upon unwar-

ranted assumptions of fact and law, i.e., that there existed 6.27 acres of land in the original tract owned by the defendant landowners at the time of and prior to the taking, and that of said amount approximately two acres were devoted to the commercial development located upon the premises, when in truth and in fact the said defendant landowners were the owners of only 1.33 acres of land, and the subject improvements were located, by the testimony of the defendants' witnesses, not only upon the 1.33 acres of land but upon the adjoining "non-owned" properties. Considered in the light of the foregoing authorities, it seems patently clear to us that the assumptions made by these witnesses leave their testimony without any probative value or foundation in fact, and in any event, would not support a finding for Judgment in the amount found to be due as compensation for the taking and damages sustained.

If the testimony of the expert witnesses for the defendant landowners was in fact unworthy of belief and not entitled to stand as credible evidence or testimony, then and in that event there would be no basis to support the Findings of the trial court, save and except the testimony of the State's witness which sum was far less than the amount awarded by the Judgment of the trial court.

It seems patently clear that there is no way by which the court, under the present posture of the evidence and testimony, can now segregate the severance

damages from the "non-owned land." The entire testimony of the expert witnesses for the defendant landowners is so interwoven and founded upon a unit of 6.27 acres, and unwarranted assumptions of law and fact, that it defies any reasonable segregation of the non-owned land. Without the opportunity to examine the witnesses based upon the true ownership, it seems that the plaintiff would be severly prejudiced by any Judgment of the trial court, except a Judgment predicated solely upon the evidence and testimony elicited from the State's witness Gregory Austin, the only witness who utilized the true acreage of 1.33 acres and ascribed no difference to the non-owned land in the before and after condition.

POINT II. THAT DEFENDANT LANDOWNERS HAVE FAILED TO SUSTAIN THE BURDEN OF PROOF RELATIVE TO COMPENSATION AND DAMAGES CAUSED BY THE TAKING.

The rule of law is well established in this jurisdiction that in an action in eminent domain the landowner has the burden of proof to establish, by competent evidence, his right to compensation for taking and severance damages, if any. See: *Tanner vs. Provo Bench Canal and Irrigation Co.*, 40 Utah 105, 121 P. 584 (1911); *People vs. Thomas*, 239 P.2d 914 (Cal. 1952); *State of Idaho vs. Dunclick*, 286 P.2d 111

(1955); *State vs. Peterson,* 12 Utah 2d 317, 366 P.2d 76 (1961); *Utah Road Commission vs. Hanson,* 14 Utah 2d 305, 383 P.2d 917 (1963).

In the case of *United States of America vs. Sowards,* 370 Fed. 2d 87 (10th Cir. 1966), the Court said:

> "* * * The burden rests upon the owner to establish by competent evidence his right to substantial compensation." (Cases and authorities cited.) "Qualified and knowledgable witnesses may give their opinion or estimate of the value of the property taken, but to have probative value, that opinion or estimate must be founded upon substantial data, not mere conjecture, speculation, or *unwarranted assumption.* It must have a rational foundation." (Authorities cited.) (Emphasis added.)

Of similar import is the case of *United States vs. 765.56 acres of land,* 164 Fed. Supp. 942 (United States District Court of New York, July 1958) where the court said:

> "* * * It appears clear from his testimony that his appraisals and estimates of damage are largely, if not entirely, based upon unwarranted and unjustified theories of law and assumptions of fact and, as such must be completely rejected by the court." (Authorities cited.)
> "The burden of proof rested upon the owners and not upon the government to establish the damage sustained as a result of the easement taken, by a fair preponderance of the evidence, and upon opinion having a rational foundation." (Authorities cited.)

It is the position of the plaintiff that the testimony of the expert witnesses for the defendant landowners have predicated their entire testimony upon unwarranted assumptions of law and fact. Therefore, the entire testimony must fail and be totally rejected by the trial court. The landowners having failed to sustain the burden of proof, the only alternative is for the trial court to enter judgment for the defendant landowners predicated upon the testimony and evidence of the State's witness, or in the alternative, order a new trial based upon a reappraisal of the property founded upon the correct ownership of the properties involved in the subject actions.

In the Memorandum Decision of January 25, 1971, the trial court referred to the testimony of the State's appraiser, Gregory Austin, to support its finding that $5,800.00 was the amount awarded for severance damage to the "non-owned" land. The trial court further observed that said witness determined that the "non-owned" land was worth $2,000.00 per acre in both the before and after condition. Mr. Austin was the only witness to approach the appraisal of the subject property in this manner. The crux of the problem lies in the fact that there was no evidence or testimony to support the judgment of $60,192.00 without utilizing the testimony of expert witnesses for the defendants.

When we consider that the testimonies of these witnesses were founded on unwarranted assumptions

the burden of proof placed upon the defendants has not been met, and the sole credible testimony of any probative value is that of the State's witness.

CONCLUSION

In essence, it is the position of the plaintiff, that by virtue of the trial court's erroneous ruling with respect to the true ownership of the lands in question, the plaintiff and the court were thereby deprived of the opportunity, on cross examination, of determining and testing the reasoning, method and amount for severance damages attributed to any "non-owned" land in excess of 1.33 acres. It is significant to note that the expert witnesses for defendants based their testimony upon the erroneous assumption that at least 1.82 acres of the subject property devoted to a commercial development was owned by the defendants, and the greatest damage was assigned to the commercial area. It would be of great interest to know what these witnesses would have testified to had their testimony been confined to the true ownership of 1.33 acres. Each of them testified to the effect, that although only 1.82 acres or two acres of the subject property was devoted to the commercial development, nevertheless, the fact that the landowners had access to a remaining larger tract would, in their opinion, substantially lend itself to a development of the property into a larger operation. To what extent this may have influenced their overall appraisal can only

be the subject of pure speculation and conjecture at this time. However, in view of the trial court's erroneous ruling with respect to the ownership, there is no logical or feasible method by which the severance damages attributed by defendant's witnesses can now be allocated to the 1.33 acres of owned land and separated from the "non-owned" land.

It is the plaintiff's position that the burden of proof has not been sustained by defendants by reason of the unsupported and unfounded testimony of their expert witnesses. This being so, the trial court is then left with only one source of credible evidence for its consideration in a determination of the issues involved, i.e., the testimony of Gregory Austin, appraiser for the plaintiff. With this testimony being the sole credible evidence for the court to consider, we respectfully submit that there is no logical basis upon which the trial court could predicate an appropriate Finding of Fact and Judgment, save and except one based upon the testimony of said witness. Accordingly, we contend that the only judgment which could be entered by the trial court would have to be founded upon the testimony of such witness, or that a new trial be ordered.

Respectfully submitted,

VERNON B. ROMNEY
Attorney General

State of Utah

Attorney for Plaintiff-Appellant

By: Brant H. Wall

Special Assistant Attorney General

State Capitol Building
Salt Lake City, Utah

MAILING CERTIFICATE

I HEREBY CERTIFY that two (2) copies of the fore Brief of Appellant was mailed to Robert S. Campbell, Jr., at 400 El Paso Gas Building, Salt Lake City, Utah, Attorney for Defendants and Respondents, on the ..... day of July, 1971.

.....