1972

Utah Power & Light Company v. David Frank Patterson and Pearl Patterson, His Wife, Case No. F. David Patterson and Marie Patterson, His Wife, Lewis B. Patterson and Ramona Patterson, His Wife, Jack D. Patterson and Joan Patterson, His Wife : Brief of Respondent

Utah Supreme Court

In The Supreme Court of the State of Utah

UTAH POWER & LIGHT COMPANY,
a corporation,

Plaintiff-Respondent,

vs.

DAVID FRANK PATTERSON and
PEARL PATTERSON, his wife;
F. DAVID PATTERSON and
MARIE PATTERSON, his wife;
LEWIS B. PATTERSON and
RAMONA PATTERSON, his wife;
JACK B. PATTERSON and
JOAN PATTERSON, his wife,

Defendants-Appellants.

Case No. 12968

APPEAL FROM ORDER AND JUD
OF THE SECOND DISTRICT C
OF DAVIS COUNTY, STATE O
HONORABLE RONALD O. HYDE

BRIEF OF RESPONDE

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TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	1
DISPOSITION IN LOWER COURT	1
RELIEF SOUGHT ON APPEAL	2
STATEMENT OF FACTS	2
ARGUMENT	9
POINT I. THE TRIAL COURT PROPERLY DENIED APPELLANTS' MOTION TO STRIKE THE TESTIMONY OF RESPONDENT'S APPRAISER.	9
POINT II. AS THE JURY VERDICT, AS IT RELATED TO THE "DIX" PARCEL, WAS WITHIN THE RANGE OF COMPETENT TESTIMONY PRESENTED AT TRIAL, APPELLANTS' MOTION FOR A NEW TRIAL SHOULD BE DENIED.	15
CONCLUSION	17

CASES CITED

Arnovitz v. Tella, 27 Utah 2d 261, 495 P.2d 310 (1972)	17

TABLE OF CONTENTS—Continued

Page

Board of Education of Salt Lake City v. Bothwell and Swaner Co., 16 Utah 2d 341, 400 P.2d 568 (1965) 12

Brereton v. Dixon, 20 Utah 2d 64, 433 P.2d 3 (1967) 11

City of Bonner Springs v. Coleman, 206 Kan. 689, 481 P.2d 950 (1971) 12

Dolan v. Mitchell, 502 P.2d 72 (Colo. 1972) 12

Ewell and Son, Inc. v. Salt Lake City Corporation, 27 Utah 2d 188, 493 P.2d 1283 (1972) 16

Gordon v. Provo City, 15 Utah 2d 387, 391 P.2d 430 (1964) 17

Moser v. Zions Co-Op Mercantile Inst., et al., 114 Utah 58, 197 P.2d 136 (1948) 16

Pollesche v. Transamerican Insurance Co., 27 Utah 2d 430, 497 P.2d 236 (1972) 16

State Road Commission v. Silliman, 22 Utah 2d 33, 448 P.2d 347 (1968) 15

Universal Investment Co. v. Carpets, Inc., 16 Utah 2d 336, 400 P.2d 564 (1965) 17

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BRIEF OF RESPONDENT

STATEMENT OF THE CASE

Appellants landowners appeal from a decision of the Second District Court of Davis County refusing to strike the testimony of respondent condemnor's appraiser and seek a new trial on the issues of severance damages.

DISPOSITION IN LOWER COURT

On March 17, 1970, the Honorable Edward Sheya entered a Memorandum Decision holding the 1913 Easement granted by appellants' predecessors-in-interest

to be valid and on May 5, 1970, entered Findings of Fact and Conclusions of Law confirming to respondent a 150 foot right-of-way over and across appellants' property and confirming in respondent the right to erect an additional transmission line by paying such amounts as were "specified or determinable" to the then landowners.

At trial on March 17, 1972, appellants moved to strike the testimony of respondent's appraiser, claiming such testimony was based upon an erroneous legal assumption. The trial court denied the motion. After the jury returned its verdict denying severance damages to the "Dix" Parcel, appellants moved for a new trial on the issue of severance damages or, in the alternative, for addittur of $13,000.00. This latter motion was denied, the court finding the verdict to be within the reasonable range of testimony presented at trial.

RELIEF SOUGHT ON APPEAL

Respondent submits that the trial court should be affirmed in all particulars and appellants' request for new trial be denied.

STATEMENT OF FACTS

On July 28, 1913, certain predecessors-in-interest of appellants entered into a series of four right-of-way agreements with the Utah Power Company, predecessor of respondent, granting the Power Company a 150 foot

easement for the construction, erection and maintenance of electric transmission lines. Each of the agreements provided that the Power Company could erect and maintain additional towers on the Easement by paying to the then landowner a stipulated amount at the time such tower or towers were erected.

The particular right-of-way agreement which is the subject of this litigation applied to a portion of appellants' property known as the "Dix" parcel and set forth the duties and obligations of the Power Company should it exercise the right to construct additional towers. The specific language, pertinent herein, is as follows:

> (The Power Company) agrees at all times hereafter, to save and keep (appellants' predecessors) and their heirs, harmless of and from all damages which they, or either of them, may suffer as a result of the exercise of the right, privilege and authority herein granted, and to pay all damages which (appellants' predecessors) or their heirs may suffer from the construction, erection, operation, maintenance or repair of, or damage or injury by any tower . . . lines placed on the premises above described under the right, privilege and authority granted. (R. 9, Ex. "A").

Respondent filed suit against appellants averring its intent to exercise the right given it in the July 28, 1913 agreement and tendered to appellants the requisite amount established in the easement agreement for the

erection of two towers on the "Dix" parcel; this tender was refused. (R. 4). The parties stipulated certain facts surrounding the creation of the easements (R. 30-34). On March 17, 1970, the Honorable Edward Sheya, sitting by invitation, issued a Memorandum Decision holding each of the easements legal, valid and binding upon the parties in all respects. (R. 29). On May 5, 1970, Judge Sheya entered Findings of Fact and Conclusions of Law providing in pertinent part:

> Findings of Fact para. 9. That the grantors in said Easements (Ex. "A" through "K", inclusive) intended to and did grant to plaintiff an expandable easement within the scope of the 150 foot right of way conveyed by which plaintiff was given a present right to construct one or more structures and the further right, upon making future additional payment in amounts specified, to construct such additional structures as it desired.
> Conclusions of Law para. 8. That upon payment of the appropriate additional amounts to defendants, as specified and/or determinable in the easements, a Decree shall be issued quieting plaintiff's title to said Easements and restraining defendants from interfering with plaintiffs exercise of its rights under said Easements. (R. 47)

On the morning of trial, the court and counsel met to discuss, among other things, the issues of law involved in Judge Sheya's interpretation of the "Dix" Easement. Judge Ronald O. Hyde ruled, "My interpretation

of the Dix Agreement is that the phrasing 'all damages' opens it up. It means, as stated, 'all damages'." (T., p. 7).[1] Counsel for respondent queried as to the Court's receiving evidence on the issue of severance damages and was advised that the court would do so on the "Dix" parcel. (T., pg. 7) Respondent's counsel objected to that ruling.

On direct examination of respondent's appraiser, Mr. Marcellus Palmer, counsel framed a question as to whether the erection of the second power transmission line, which was constructed in 1968, within the 150 foot easement created an additional burden on the remaining ground within the "Dix" parcel. Mr. Palmer testified:

> First of all as to the reasons, we have an easement here, and I have been advised by counsel that it is a legal and legitimate easement, and it provided certain uses, not use. As I understand it, it provides certain uses that would travel along with the real property in the easement from then on, and in my opinion the construction of a second power line within the bounds of the easement did not create anything new and different as to the remaining property, the supporting properties along the sides of the easement, because it was already provided in the easement. I see no additional uses

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[1]The portion of transcript containing testimony by Mr. Patterson and Mr. Barlow will be denominated "T,"; the transcript containing testimony of Mr. Palmer will be denominated "T2".

there that affects the marketability of the remaining property. (T2. p. 10-11).

On cross-examination, counsel for appellants engaged in the following dialogue with Mr. Palmer:

> Q. Now, if we assume further that in the easement that was drafted in 1913 there was a provision that the damages, if any, to this additional strip affected by the towers and the lines was to be determined in 1968 when the line was placed there, would you say then that there should be no damages assigned to that Dix field?
>
> A. I think so. I see no change in the physical facts. There was 150 feet easement that was taken, knowing and specifying within the writing of it that there would be lines built on it. There is nothing different here. It is just sort of carrying out what is anticipated. (T2. p. 21)

and further:

> Q. (By Mr. Fuller). All right. Now, if we take that assumption, Mr. Palmer, and assume that we had one tower line and an easement with nothing on it except that, and then we were to be paid for the damages for the additional towers and lines, that would constitute a severance situation; wouldn't it?
>
> A. Oh, yes, it sure would.
>
> Q. And that would affect not only the re-

mainder of the easement area but possibly could affect the adjoining land?

A. Yes, depending on how it was worded.

Q. Yes. Have you any opinion as to the amount of such severance damages under that condition, or have you had any opportunity to study it?

A. Well, I studied the whole property with that thing in mind, and I have given you my determination. (T2. p. 23)

Appellants subsequently called their appraiser, Mr. Haven J. Barlow, and elicited testimony indicating severance damages on the "Dix" parcel of $13,000. At the conclusion of Mr. Barlow's testimony, appellants' counsel moved to strike the testimony of respondent's appraiser alleging that such testimony was premised on a faulty and erroneous legal assumption. After hearing argument, the trial court denied the Motion. (T. p. 96).

At the conclusion of appellants' presentation, the court instructed the jury that the burden of proving value of the property being acquired by respondent and the burden of proving damages to the property that remain, if any, are burdens which the law placed upon appellants and that such burden must be established by a preponderance of the evidence. (R. 56). The court instructed specifically as to the "Dix" parcel:

With respect to the "Dix place", containing 80 acres of land, you are instructed that the

> Court has ruled as a matter of law that defendants are entitled to damages resulting from construction activities; and, in addition, defendants are also entitled to recover the damages, if any, to that piece of land resulting from the dimunition in its fair market value by reason of the erection of the towers and transmission lines across the tract. This ruling of the Court has been predicated upon the language of the 1913 easement which leaves open the additional element of damages to the "Dix Place" itself at such time as the additional towers and transmission lines should be installed. (R. 57).

The Court then instructed the jury regarding opinion evidence:

> You should consider such expert opinion and should weigh the reasons, if any, given for it. You are not bound, however, by such an opinion. Give it the weight to which you deem it entitled whether that be great or slight, and you may reject it if, in your judgment, the reasons given for it are unsound. (R. 63).

The jury returned special interrogatories and found no severance damage to the "Dix" parcel. (R. 74).

Appellants filed a Motion for New Trial, or in the Alternative, for an Additur, of $13,000.00. This Motion was briefed and argued; on June 7, 1972, Judge Hyde denied the Motion having found the verdict to have been within the reasonable range of testimony presented at trial. (R. 92).

ARGUMENT

POINT I

THE TRIAL COURT PROPERLY DENIED APPELLANTS' MOTION TO STRIKE THE TESTIMONY OF RESPONDENT'S APPRAISER.

Appellants contend that the testimony of respondent's appraiser, Mr. Marcellus Palmer, should have been stricken by the trial court because "it was based upon an erroneous legal assumption". (Appellants' Brief, page 12). A review of the record indicates, without doubt, the correctness of the trial court's refusal so to strike. Prior to trial, counsel and the Court discussed at some length the issues to be submitted to the trier of fact. One was the issue of severance damages—damages to the remaining ground caused by the construction of the public facility.

Respondent argued that the only damages to which appellants were entitled were on-premises damages occasioned by construction activities and specifically denied that there had been any loss or damage to appellants by reason of the imposition of the second power transmission line. (T., p. 3). Appellants contended the "Dix" parcel must be considered separately and that severance damages could be shown thereon. The Court ruled that it would hear severance damages as to the "Dix" parcel. Based upon this ruling, to which respon-

dent strenuously objected, the appraiser called by respondent was specifically asked his opinion as to whether there had been a severance damage in the form of an additional burden created by the construction of the second power transmission line in 1968 and, if he found such a burden, whether the fair market value of appellant's propery had been reduced thereby. Mr. Palmer categorically denied the existence of *any* severance damage:

> First of all as to the reasons, we have an easement here, and I have been advised by counsel that it is a legal and legitimate easement and it provided certain uses, not use. As I understand it, it provides certain uses that would travel along with the real property in that easement from then on, and in my opinion the construction of a second power line within the bounds of the easement did not create anything new and different as to the remaining property, the supporting properties along the sides of the easement, because it was already provided in the easement. I see no additional uses there that affects the marketability of the remaining property. (T2. p. 10-11)

On cross-examination counsel for appellants attempted to discredit Mr. Palmer's testimony and subjected him to a thorough and comprehensive examination concerning the bases of his opinion. Counsel obtained a statement from Mr. Palmer that under the facts of this case and considering the interpretation of the easement given by Judge Hyde, a potential sev-

erance situation did exist. Counsel then queried, "Have you any opinion as to the amount of such severance damage under that condition, or have you had any opportunity to study it? (T2. p. 23) Mr. Palmer responded, "Well, I studied the whole property with that thing in mind, and I have given you my determination". (T2. p. 23). Counsel for appellant next reviewed with Mr. Palmer the items of damages which appellants contended were proximately caused by the imposition of the second line but was unable to weaken Mr. Palmer's position that there had been no severance damage.

It is incredible that appellants attempt to argue that Mr. Palmer's testimony was based on an erroneous legal assumption when their counsel specfically framed a question to Mr. Palmer on all fours with the trial court's interpretation of the damage provision and was informed that, in the witness's opinion, there was no such damage. Appellants' argument leaves one to suspect that the real difficulty with Mr. Palmer's testimony from appellants' point of view is that his appraisal varied from appellants'. This is not a valid objection to competency of evidence. Whatever deficiencies or unsoundness which may have existed in this testimony do not go to its competency, but to its weight and credibility which was for the jury to pass upon. *Brereton v. Dixon,* 20 Utah 2d 64, 433 P.2d 3 (1967).

If appellants' counsel was of the opinion that Mr. Palmer had made a gross err or was so muddled in his thinking as to be unable to comprehend the issue of

severance damage to the "Dix" Parcel, the opportunity to develop this point was presented him on cross-examination. The fact that counsel chose not to do so speaks for itself. Counsel did not have one additional question in regard to Mr. Palmer's assumptions after the witness testified that he had fully considered the issue and could find no severance damages. As was pointed out by this Court in *Board of Education of Salt Lake City v. Bothwell and Swaner Co.*, 16 Utah 2d 341, 400 P.2d 568 (1965) it is the duty of the opponent to prove on cross-examination that the witness did not know what he was talking about. Counsel attempted to discredit Mr. Palmer's testimony but the trial court correctly held that the testimony and the basis therefor were before the jury and it was for the jury to make of them what it would. The factors utilized by an expert witness are always subject of proper cross-examination to test the witness's credibility. *City of Bonner Springs v. Coleman*, 206 Kan. 689, 481 P.2d 950 (1971); the basis for and the weight to be given an expert's opinion should be left for the advocates to challenge and for the jury to determine. *Dolan v. Mitchell*, 502 P.2d 72 (Colo. 1972)

After blandly ignoring the record, appellants attempt to buttress their flimsy argument by castegating both respondent's counsel and witness. This Court will not be swayed by such tactics and will look closely to determine which side, if either, committed any impropriety. Counsel for respondent asked his appraiser if the second transmission line created an additional bur-

den. (T2. p. 10), Appellant characterizes this question as being "in complete disregard of the prior ruling of the Court". (Appellants' Brief, p. 11), and further, "Counsel's attempt to circumvent the Court's ruling by speaking in terms of injury or burden instead of damage should not be countenanced by this Court". (Appellants' Brief, p. 12). It is clear that this question broached the issue of severance damages to elicit a response from the appraiser as to his expert opinion on this issue.

Respondent was properly given the opportunity to ask its witness if severance existed. This question was not in contravention of the court's ruling; it set the issue for the jury to determine. Appellants then attack the field investigation conducted by Mr. Palmer and characterize it as "a mere recitation of counsel's instructions". (Appellants' Brief, p. 12). Besides being an affront to both counsel and witness, this allegation disregards the record which shows that Mr. Palmer visited the site on three separate occasions (T2 Pg. 9). Mr. Palmer gave a comprehensive basis for his opinion on the severance issue. Mr. Barlow, appellants' appraiser, parroted the landowners position and was obviously felt by the jury to be not worthy of belief.

Appellants also allege that the trial court made a preliminary determination of the existence of severance damages. "Certainly the judge would not have ruled that damages could be recovered if he had not recognized an injury or additional burden." (Appellants'

Brief, pg. 11-12). This allegation is ridiculous. The trial court was always very careful to delineate this issue and advise the jury that it, the trier of fact, would make the determination as to whether appellants suffered any damages as a result of the activities of respondent. See Instruction No. 2: "The burden of proving damages to the property that remains, if any, are burdens which the law places on the defendant landowners". (R. 56). Instruction No. 3: "Defendants are also entitled to recover the damages, if any, to that piece of land resulting from the dimunition in its fair market value by reason of the erection of the tower and transmission lines across the tract". (R. 57). Instruction No. 10: "Except as such damages have been stipulated you shall make awards in such amounts, if any, as you shall determine under the evidence and the instructions given to you relative to the burden of proof". (R. 64). To eliminate any confusion on this point, the trial court gave an instruction specifically requested by respondent as Instruction No. 14:

> The fact that the court has instructed you concerning damages is not to be taken as any indication that the Court either believes or does not believe that defendant landowners are entitled to recover such damages. The instructions in reference to damages are given as a guide in case you find from a preponderance of the evidence that the defendant landowners are entitled to recover, as it is the Court's duty to state to you fully all the law applicable to this case, but should your determination be

> that there should be no recovery, then you will entirely disregard the instructions given you upon the matter of damages. (R. 68).

The testimony presented by Mr. Palmer was relevant and material to the issues to be determined by the trier of fact, Mr. Palmer gave his reasons for finding no severance damage on the "Dix" parcel. To suggest that this testimony should have been stricken would require this Court to find under the rationale of *State Road Commission v. Silliman,* 22 Utah 2d 33, 448 P.2d 347 (1968), that the testimony was based upon such "palpable ignorance of the subject matter as to indicate an abuse of discretion on the part of the trial judge in allowing the witness to express an opinion in the first place." No such fact exists! Respondent would submit that the trial court correctly and properly denied appellants' motion to strike the testimony of Mr. Palmer.

POINT II

AS THE JURY VERDICT, AS IT RELATED TO THE "DIX" PARCEL, WAS WITHIN THE RANGE OF COMPETENT TESTIMONY PRESENTED A TRIAL, APPELLANTS' MOTION FOR A NEW TRIAL SHOULD BE DENIED.

Trial in this matter consumed two full days and involved the calling of five witnesses — two of whom were experts on land valuations. Both appellants and

respondent had full opportunity to present their respective cases; the jury had ample opportunity to evaluate the testimony of each appraiser—they chose to believe Mr. Palmer and rendered their verdict and the trial court entered its judgment thereon. Appellants have wholly failed to show any substantial basis for upsetting them. This Court has oft held that all presumptions indulged in by it will favor the validity of both such verdict and judgment. *Ewell & Son, Inc. v. Salt Lake City Corporation,* 27 Utah 2d 188, 493 P.2d 1283 (1972).

The trial court ruled on the claims of error here presented by appellants. It held Mr. Palmer's testimony to be proper and not based upon any erroneous assumption (R. 105). It held that no new trial should be given because of insufficiency of the evidence. (R. 92). The granting or denial of a motion for new trial is discretionary with the trial court. This Court has recently reaffirmed its position with regard to overruling the lower court on this issue:

> If reasonable minds could have found as the jury did in this case, from the evidence before it, then we cannot say that the trial court abused its discretion in denying plaintiffs' Motion for a New Trial on grounds of insufficiency of the evidence to support the verdict. *Pollesche v. Transamerican Insurance Company,* 27 Utah 2d 430, 497 P.2d 236 (1972), citing *Moser v. Zions Co-op Mercantile Inst., et al.,* 114 Utah 58, 197 P.2d 136 (1948).

See also *Universal Investment v. Carpets, Inc.*, 16 Utah 2d 336, 440 P.2d 564 (1965), and *Gordon v. Provo City*, 15 Utah 2d 287, 391 P.2d 430 (1964).

The appraisers called by each side indicated areas of agreement and areas of basic disagreement. They agreed specifically on the value of the land taken by respondent; both held the fair market value of the property to be $2500 per acre. (Mr. Barlow at T, p. 74), (Mr. Palmer at T2 p. 8). They disagreed as to the effect of the second power line on the "Dix" parcel, Mr. Palmer finding no severance damages and Mr. Barlow determining $13,000 in severance damages. The jury believed Mr. Palmer.

Respondent would submit that there has been no showing of any error committed by the trial court, let alone the substantial and prejudicial error required to be shown before this Court will reverse; nor has there been any indication that unfairness or injustice has resulted to appellants. There is no reasonable likelihood of any different result than that returned by the jury and approved by the trial court if this cause were remanded. Appellants' Motion for a New Trial should be denied. *Arnovitz v. Tella*, 27 Utah 2d 261, 495 P.2d 310, (1972).

CONCLUSION

Appellants have wholly failed to show any error committed by the trial court or the trier of fact in this matter. The testimony of both appraisers was evaluated

by the jury and considered in their deliberations. There is no error upon which this Court could base a reversal of the trial court. Appellants' request for a new trial on the issue of damages should be denied.

Respectfully submitted,

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