1968

State of Utah, by and Through Its Road Commission v. Estate of B. J. Silliman, Deceased, Kenneth Silliman, Executor : Brief of Appellant

In The Supreme Court of the State of Utah

STATE OF UTAH, by and through its ROAD COMMISSION,

Plaintiff-Appellant,

-vs-

ESTATE OF B. J. SILLIMAN, Deceased, KENNETH SILLIMAN, Executor,

Defendant-Respondent.

Case No. 11,301

BRIEF OF APPELLANT

Appeal from the Judgment of the Seventh District Court for Emery County
Honorable Henry Ruggeri, Judge

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STATEMENT OF THE NATURE OF CASE

This is an action brought by the appellant under and pursuant to the laws of eminent domain to acquire the property of respondent for public highway utilization.

DISPOSITION IN LOWER COURT

Trial was held on the 28th and 29th day of March and the 5th day of April, 1968, before the Honorable Henry Ruggeri, Judge of the Seventh Judicial District in and for Emery County, State of Utah. Judgment of the court upon the general ver-

dict returned by the jury of eight was entered against the appellant and in favor of the respondent in the sum of $21,320. Appellant filed a Motion for New Trial in which the trial judge ordered a remittitur of $2,536 or a new trial. The respondent accepted the remittitur and a new trial was denied by the trial court. The appellant thereupon prosecuted this appeal.

RELIEF SOUGHT ON APPEAL

The appellant seeks a reversal of the judgment and a new trial.

STATEMENT OF FACTS

Respondent's property which constitutes the subject of the instant case is located west of the Green River city limits, in Emery County, Utah. The subject property affected consists of approximately 633.70 acres. The subject property is vacant land and unimproved, and is sparsely covered with greasewood on rolling, rought terrain, broken up with deep gullies and washes. At the time of acquisition, there was a dumpyard located on the subject property. The subject property has access to U. S. Highway 50 and 6 and the Denver and Rio Grande Western Railroad right of way. The highway crosses the right of way by way of an underpass which is located approximately 2½ miles from the city of Green River. (Ex. P-1). The area acquired by the appellant consists of 212.15 acres. In addition to the area taken in fee, the appellant acquired

a channel change easement in the amount of 7.1 acres and identified as Parcel No. 3:E. The remaining land consisted of 390.21 acres of which 130.48 acres were located north of the proposed improvement and 259.73 acres south of the proposed improvement. (Ex. P-1). The land sought for public highway utilization is identified as Parcel Nos. 3:A, 3:S, 6B, 6:A, 8:A, 8B and 8G and is part of the continuation of the east-west interstate freeway I-70. The proposed improvement to be located on the subject property acquired is for an interchange with access limitations. The interchange provides for an on and off ramp to and from Green River, Utah. U. S. Highway 50 and 6 north of the Denver and Rio Grande Western Railroad easement will remain the same with no limitation on access. After the acquisition by the State, the subject property will have no access to the south portion of the remaining property from U. S. Highway 50 and 6. Access is acquired through a county road located southeast of the interchange. (Ex. P-7).

Matters relating to the power of the appellant to condemn, public use and necessity of the highway project and the acquisition of respondent's properties therefor, and location of the facilities in a manner consonant with the greatest public good and least private injury were admitted by respondent, and the case was thereupon tried as to the issues of evaluation of the property to be expropriated, and damages, if any, by reason of severance, less benefit accruing, if any, by reason of construction of the highway. The date of taking was July 9,

1966. The respondent's witnesses were Kenneth N. Silliman, J. W. Hammond, Carl J. Leavitt. The State called two expert witnesses, Memory Cain and Alden S. Adams. The specific evaluation estimates of the witnesses were, respectively, as follows:

a. Silliman

1. Land taken	$53,169.20
2. Severance damage to remaining property	$12,487.50
3. Total opinion	$65,656.70

b. Hammond

1. Land taken	$41,747.20
2. Severance damage to remaining property	$12,487.50
3. Total opinion	$54,234.70

c. Leavitt

1. Land taken	$41,747.20
2. Severance damage to remaining property	$12,487.50
3. Total opinion	$54,234.70

d. Cain

1. Land taken	$ 6,296.50
2. Severance damage to remaining property	NONE
3. Total opinion	$ 6,296.50

e. Adams

1. Land taken	$ 4,277.80
2. Severance damage to remaining property	$ 1,685.00
3. Total opinion	$ 5,962.80

The jury returned its general verdict in the following amount:

a. Market value of property taken by the State	$ 6,296.50
b. Damages, if any, by reason of severance	$15,023.50
c. Less benefit accruing, if any, by reason of construction of the highway	NONE
d. Add net severance	$15,023.50
e. Total judgment	$21,320.00

On motion of appellant for a new trial, the trial court found that the total amount awarded for severance damages was not justified by the evidence and was excessive and reduced the amount to $12,-487.50. From the judgment entered, the appellant prosecuted this appeal.

ARGUMENT

POINT I

THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR A NEW TRIAL.

The trial court abused its discretion in refusing to grant a new trial. The refusal was conditioned on respondent's accepting a remittitur in an amount equal to the highest estimate of severance damages testified to by any witness. The trial court in denying the new trial found that the verdict for sever-

ance damages was excessive and not justified by the evidence.

A study of the record indicates that the jury award for severance damages was unusually large: (1) The amount of $15,023.50 for severance damages was $2,536.00 over the highest testimony of any expert witness; (2) The value of the land taken as found by the jury was considerably less than would support their finding as to the diminution in value of the remaining land; (3) A large portion of the severance figure in the amount of $8,280.00 was based on one element, i.e., complete loss of access (Tr. 35, 67) in which the appellant proved was not a fact, in that access was available to the remaining land (Tr. 188, 195) (Ex. P-7) and a portion of the remaining land was landlocked prior to the acquisition by the state (Tr. 52-53). A review of the record shows that the jury either misunderstood the facts or was influenced with passion and prejudice.

The Utah Supreme Court has reversed a trial court on facts similar to the instant case. In **Porcupine Reservoir Co. v. Lloyd W. Keller Corp.,** 15 Utah 2d 318, 392 P.2d 620 (1964), the trial court denied defendant's motion for a new trial on the condition that plaintiff accept additurs to the jury's award of severance damages. This court stated on p. 320:

> Granting or denying a new trial is largely in the discretion of the trial court. Here the trial court clearly indicated that in his opinion the jury verdict was less than the smallest amount which the jury could reasonably award under the evidence by

> granting an additur to two defendants. A careful study of the record before us, (some parts of the evidence is not before us) indicates that the jury verdicts were unusually small, suggesting passion or prejudice or a misunderstanding of the law or facts presented. Under these circumstances we conclude that the interest of justice requires that this proceeding be remanded for a new trial as to all defendants.

It is true that in **Weber Basin Water Conservancy District v. Braegger,** 8 Utah 2d 346, 334 P.2d 758 (1959), this court reduced a judgment by jury when the remittitur represented a figure derived and identified from the record. On the contrary, in the instant case, there is nothing in the records to indicate what the excess over the amount of the highest testimony on severance damages represented.

POINT II

THE TRIAL COURT ERRED IN ALLOWING THE JURY TO CONSIDER THE IMPROPER ARGUMENT OF RESPONDENT'S CLOSING STATEMENT IN EXPRESSING AN INCORRECT MEASURE OF DAMAGES.

During the course of the trial, respondent's witness, Mr. J. W. Hammond, testified to the market data approach along with the income approach in determining the market value of the subject property (Tr. 68). Over appellant's objections, respondent's attorney, in his closing statement, was permitted to argue to the jury that the amount of the income approach should be added to the value already determined by the market data approach

(Tr. 234). Mr. Hammond testified as follows:

> Q. So then if we were to assume that there was a portion of ground that had an income of $30 per month and that $30 was, that the property had an income of $30 per month, then would this fact increase the appraised value that you would place on that property?
>
> A. Yes.
>
> Q. By how much?
>
> A. Of course, depending on where it was, if it were in the blue, I have already appraised it for more than that (Tr. 68).

On cross examination, Mr. Hammond explained further the income approach:

> Q. All right. So that is $3,000 for the total operation; right?
>
> A. $3,000 for the, for whatever acreage was involved, yes. (Tr. 76).

And further:

> Q. The more acrease you had in it, the less per acre?
>
> A. The less per acre it would be, yes sir.
>
> Q. Right. So as far as you know, it could be $10 per acre?
>
> A. As far as I know, it could be, if that was the area involved. (Tr. 77).

This court has recently stated that appraisers commonly use three approaches to values. **State v. Bingham Gas & Oil Company,** ... .Utah 2d....., 440 P.2d 260 (1968). In **The Appraisal of Real Estate,** The

American Institute of Real Estate Appraisers, 63-64, (4th ed. 1964), it is stated:

> In the majority of his assignments, the appraiser utilized all three approaches. On occasion, he may believe the value indication from one approach will be more significant than from the other two, yet he will use all three as a check against each and to test his own judgment.

But in no case does the appraiser add all the amounts derived from the three approaches together as the attorney attempted to do in his argument to the jury and in which the jury, because the trial court so allowed, was free to so consider. The law is well stated in 30 C.J.S. **Eminent Domain,** § 286 (3) (1965):

> Subject to such reasonable limitations as may be imposed by the trial court, counsel for litigants in a jury trial of a condemnation proceeding have the right to argue the issues raised by the evidence and the pleadings; but a duty rests on the trial judge to supervise the scope of such argument and to limit it to the evidence and to the argument of opposing counsel, and on argument which is not based on the evidence, or states an incorrect measure of damages, or is contrary to the instructions on the question, is improper.

In **Adair v. N. W. Electric Power Cooperative, Inc.,** (Mo. App. 1959) 329 S.W.2d 33, the court held that argument of counsel in prescribing a measure of damages other than the difference between the value before and after the taking was prejudicial error. In his argument counsel for the property own-

er asked the jury to consider one dollar a day for 30 years for the easement sought by the condemning party. The court stated on p. 38:

> The ultimate objective is to hold trials that are fair. The proper and legal rule for measuring damages in this type of case has been judicially declared many times. The trial court instructed the jury accordingly. The evidence was confined within such limitations. Then this argument broke through and over and outside of legal and proper barriers and adversary objections were denied and overruled. The argument as made was not based upon any evidence. It suggested an illegal, improper and incorrect measure of damages and was definitely contrary to the court's instructions. We believe and hold it was improper, unjustified and when considered in the light of the court's refusal to sustain the objections thereto, amounted to prejudicial and reversible error.

POINT III

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO STRIKE:

A. THE OPINION OF RESPONDENT'S WITNESS, MR. KENNETH SILLIMAN, ON THE GROUNDS THAT HIS VALUE OF THE LAND TAKEN AND SEVERANCE DAMAGES WAS MORE THAN THE TOTAL BEFORE VALUE.

B. THE OPINION OF RESPONDENT'S WITNESS, MR. CARL J. LEAVITT, ON THE GROUNDS THAT HE DID NOT VALUE THE PROPERTY AT ITS FAIR MARKET VALUE NOR AS OF THE DATE OF TAKING.

C. THE OPINION OF RESPONDENT'S WITNESS, MR. J. W. HAMMOND, ON THE GROUNDS THAT HE RECOGNIZED SPECIAL BENEFITS BUT DID NOT DEDUCT SAME FROM HIS SEVERANCE DAMAGES.

Respondent's witnesses were familiar with land values and were allowed to so testify. Although the limited experience of a witness goes to the weight of his testimony, **Provo River Water Users' Ass'n. v. Carlson.** 103 Utah 93, 133 P.2d 777 (1943), it is appellant's contention that an expert's opinion based on an improper approach can not be of benefit to a jury and should not be considered by them in determining the amount of damages.

Generally, the law is stated in 5 Nichols, Eminent Domain, § 18.42(1), (3rd ed. 1962), at 248-9, as follows:

> While consideration of certain speculative possibilities is not fatal (citing case) an opinion based on purely speculative use (citing cases) or on an erroneous standard of value (citing cases) will be rejected. The same rule of exclusion applies also to legally non-cognizable elements of damage. This is an implicit exception to the willing seller—willing buyer concept of market value. Though it is true that such participants in a voluntary sale may give consideration to elements which unquestionably have a depreciating effect upon value, if an element is **damnum absque injurea** no consideration may be given thereto. As one court said: (citing case) "Opinions of witnesses based upon supposed elements of damage which were not recognized by law as proper to be considered in condemnation proceedings should have been excluded. Only such opinions as are based on evidence of lawful elements of damages can be of benefit to a jury in the assessment of the amount of damage."

With the above announced rule in mind, appellant made objections to the testimony of respond-

ent's three value witnesses. The objections will be taken up separately as follows:

A. On cross examination, Mr. Kenneth Silliman, respondent's first value witness was asked for a before value.

> **Q. I want to know if you have an opinion as to the total amount; yes.**
>
> **A. I did, prior to the taking by the state, yes.**
>
> **Q. And what was that opinion?**
>
> **A. I—approximately $50,000. (Tr. 42).**

The above testimony took place on the first day of trial and without the benefit of compiling 15 separate items of value to which Mr. Silliman testified to. It is noted that a total before and after value was never testified to on direct examination by Mr. Silliman. Without calculating the areas and their values themselves, the jury or the court were not aware of Mr. Silliman's values for the land taken and severance damages.

This court has stated that the measure of compensation when part of a tract is taken is the difference between the fair market value of the whole tract before the taking and the fair market value of what remains after the taking. **Salt Lake County Cottonwood Sanitary District v. Toone,** 11 Utah 2d 232, 357 P.2d 486 (1960); **State v. Ward,** 112 Utah 452, 189 P.2d 113 (1948); **State v. Cooperative Security Corporation,** 122 Utah 134, 247 P.2d 269 (1952). It has to be conceded that the sum of all its parts can not ex-

ceed the whole. The opinion of Mr. Silliman led the jury to believe that although the entire subject property was valued at $50,000 immediately prior to the take, the value of part of the tract and severance damages would be $65,656.70. From his testimony, it is evident that his opinion contained legally non-cognizable elements of damage. Assuming that there was 100% damage to the remaining land, the most the jury should have been allowed to consider in their deliberation was $50,000.

B. Respondent's expert witness, Mr. Carl J. Leavitt, did not value the subject property as of the date of taking and did not appraise the subject property at its fair market value. It is well settled in this state that the measure of damages is just compensation and just compensation is the market value of the property taken. **Southern Pacific Company v. Arthur,** 10 Utah 2d 306, 352 P.2d 693 (1960). Market value is defined as the amount of money which a purchaser willing, but not obliged to buy the property, would pay to an owner, willing but not obliged to sell it. **Southern Pacific Company v. Arthur,** 10 Utah 2d 306, 352 P.2d 693 (1960); **State v. Noble,** 6 Utah 2d 40, 305 P.2d 495 (1957), Mr. Leavitt was asked to define fair market value:

> A. Well, fair market value. The market is so unstable now, who knows what the fair market value is. Let me put it that way to you.
>
> Q. Is that your answer?
>
> A. That is my answer. (Tr. 101).

The basis of his opinion was brought out as follows:

> Q. And what you are saying then as to these values you placed on the subject property is what a willing buyer who purchased the property—
>
> A. If there were a willing buyer and a willing seller why you would have a, you would have a good transaction. I have an opinion on the property of my own that whether it is of any value to you or not but—and to my way of thinking on placing a valuation on it people that hold property for 25 to 30 years certainly have some idea of some time expecting a value out of it. And if it is indicative that there is coming one they don't like to be forced. **(Tr. 97).**
>
> * * *
>
> Q. But when you say they have been forced to give up their property, what you are telling us then is the state ought to pay more for the property than it would, than a willing buyer would pay?
>
> A. When I say forced, I mean it from this standpoint, that who is to say that it might not be worth ten times that ten years from now.
>
> Q. Well, I think that is why you are on the stand, Mr. Hammond, or Mr. Leavitt.
>
> A. The point I am getting at is being forced at a point now rather than a later date when it might be more valuable. (Tr. 98).

It is obvious that Mr. Leavitt did not use a willing buyer-willing seller concept in his appraisal of the subject property, nor did he appraise the subject property at the date of the taking by the appellant. It is clear in Mr. Leavitt's testimony that he valued the subject property with an element of future speculative value. By statute it is provided in Utah Code Ann. § 78-34-11 (1953):

> For the purpose of assessing compensation and damages, the right thereto shall be deemed to have accrued at the date of the service of summons, and its actual value at that date shall be the measure of compensation for all property to be actually taken, and the basis of damages to property not actually taken, but injuriously affected, in all cases where such damages are allowed, as provided in the next preceding section. . . .

By Mr. Leavitt's own admission, he did not assess compensation at the date of taking:

> Q. You have arrived at a conclusion as to the value of the land—
>
> A. We looked at the map and we arrived at that conclusion that Mr. Hammond gave you. Yes, sir.
>
> Q. And did you relate that value at that time to any date when the property was acquired by the state?
>
> A. Well, probably not. I didn't. I don't look at it from that standpoint. It is what it is worth now, not yesterday. (Tr. 99).

It is conceded that an expert can take into account potential development in the area, **Weber Basin Water Conservancy District v. Ward,** 10 Utah 2d 29, 347 P.2d 862 (1959), but nowhere does any jurisdiction allow just compensation to be assessed on the theory expressed by Mr. Leavitt.

C. Besides the issues of value of land taken and severance damages to the remaining land, the issue of benefits was tried. The state's expert witness, Mr. Memory Cain, testified that any severance damages to the remaining tract was offset by the

benefit derived from the highway improvement. (Tr. 122). Before the acquisition, the property which received the benefit was grazing land. (Tr. 119-120). After the acquisition, the highest and best use of the same property became commercial. (Tr. 122).

By statute, Utah Code Ann. § 78-34-10 (1953) benefits may be set off from damages to the remaining land. In **Salt Lake & U.R. Co. v. Butterfield,** 46 Utah 431, 150 Pac. 931 (1915) the court restricted the application of the statute by limiting the type of benefits which could be deducted. The benefit in the instant case was not one which merely increased the traffic flow but enhanced the market value immediately by improving its adaptability for a higher and better use. **Petkus v. State Highway Commission,** 24 Wis.2d 643, 130 N.W.2d 253 (1964).

Respondent's expert witness, Mr. J. W. Hammond, admitted that there was a benefit to the remaining land but did not offset the benefits from the severance damage. (Tr. 88-9).

POINT IV

THE CUMULATIVE EFFECT OF THE ERRORS ASSIGNED IS PREJUDICIAL TO THE APPELLANT'S CASE AND REQUIRES A REVERSAL OF THE JUDGMENT.

Assuming that standing alone each of the errors assigned were harmless, the cumulative effect of the errors substantially prejudiced the interest of appellant and materially caused the rendition of an erroneous judgment. It has been held that errors

occurring in a trial when considered together disclose that the party did not have a fair trial, a reversal of the judgment is proper. **State v. Bloomfield Tractor Sales, Inc.,** (Mo. App. 1964), 381 S.W.2d 20; **State v. Parkey,** (Tex. Civ. App. 1956) 295 S.W.2d 457. In the latter case the court stated at p. 462:

> **There may be some doubt as to whether each of the four errors above discussed was of such prejudicial effect in and of itself as to constitute reversible error. But we are constrained to hold that the cumulative effect of such errors was undoubtedly such as to require a reversal of the judgment appealed from.**

CONCLUSION

A discussion of the points in this brief and a review of the record clearly indicates that the errors assigned, taken together or alone, require a reversal of the judgment.

It is respectfully submitted that the trial court abused its discretion in denying appellant's motion for a new trial and that respondent's argument to the jury that income from the property could be considered by them as a separate item of damage was prejudicial error. Appellant urges that the measure of damages is a matter not to be argued to the jury, but that the trial court should limit the measure of damages according to the law. The same rule should have been applied to the witnesses testifying to value. Once a witness has shown that he is familiar with the land value in the area of the acquisition,

the fact that he has limited qualifications or experience goes to the weight rather than to its admissibility. In this regard, appellant makes no issue. But when expressing his opinion, the witness must follow and apply legal standards and acceptable basic principales of real property evaluation. If the witness in arriving at his value conclusions, has incorrectly used a wrong approach to value, or included non-compensable elements of damages, or penalized the condemning agency for forcing the acquisition, or created a windfall in favor of the property owner, the opinion should not be considered by the jury at all in assessing compensation.

In view of the testimony of the witnesses and the rulings of the trial court, it is unlikely that the jury, in their deliberation and in arriving at an excess verdict, had before them a correct measure of damages to guide them.

Respectfully submitted,

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