1965

State of Utah, By and Through Its Road Commission v. Neuman C. Petty and Irev A G. Petty, His Wife : Brief of Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, by and through its ROAD COMMISSION,
Plaintiff-Appellant,

vs.

NEUMAN C. PETTY and IREVA G. PETTY, his wife,
Defendants-Respondents.

Case No. 10354

BRIEF OF APPELLANT

Interlocutory Appeal from an Order of the 3rd District Court for Salt Lake County Hon. Marcellus K. Snow, Judge

PHIL L. HANSEN
Attorney General
Attorney for Appellant

ROBERT M. McRAE
516 Boston Building
Salt Lake City, Utah
Attorney for Respondents

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STATEMENT OF THE KIND OF CASE

The State of Utah, by and through its Road Commission, has appealed to the Supreme Court of the State of Utah by virtue of leave to take an interlocutory appeal from a decision of the Honorable Marcellus K. Snow, Judge, of the Third Judicial District Court, Salt Lake County, requiring the appellant to answer interrogatories submitted by the respondents Neuman C.

Petty and Ireva G. Petty, and awarding the respondents the sum of $75 attorney's fees.

DISPOSITION IN LOWER COURT

The appellant filed its complaint to condemn certain property for the purposes of acquiring controlled-access facilities and public highways on January 24, 1964. An order of occupancy was granted on January 31, 1964. Various defendants were named to the condemnation action. The only parties with which this appeal is concerned are the defendants Neuman C. Petty and Ireva G. Petty, his wife. The parties filed an answer to the appellant's complaint on August 19, 1964. On December 24, 1964, the respondents served a demand for interrogatories upon the appellant. Answers to those interrogatories were filed on March 1, 1965. On March 2, 1965, respondents filed objections to the answers to interrogatories and a motion for attorney's fees. On March 29, 1965, the court below entered an order, granting respondents attorney's fees and ordering that the appellant more fully answer the interrogatories asked by the respondents. An interlocutory appeal was granted on the 29th day of June, 1965.

RELIEF SOUGHT ON APPEAL

The appellant seeks reversal of the trial court's order compelling appellant to answer the interrogatories posed by the respondents and awarding the respondents attorney's fees.

STATEMENT OF FACTS

The appellant submits the following statement of facts. In the instant action, appellant sought to acquire property, in which respondents claimed an interest, for highway purposes (R. 1 through 10). The answer filed by the respondents left in issue only the value of their interest to Parcel No. 181:13 described in appellant's complaint (R. 19).

On December 24, 1964, the respondents served interrogatories on appellant. The relevant interrogatories on contest in this appeal request the following information:

> "1. Please set forth the names and addresses of the witnesses plaintiff intends to call at the time of trial in the above captioned case."
>
> "3. Please set forth what you contend to be the fair value of the taken property and in connection with answering this question, please give the following values:
>
> a. The value of the land itself.
>
> b. The value of improvements, to wit: the building.
>
> c. The value of underground improvements to wit: septic tank, water line and gas line.
>
> d. Value of razed building as a whole when connected to the metal shed which remains.
>
> e. Damage to property as the same was effected by reformation of the street and frontage taken being irregular in shape and no longer accessible, if any."

"4. What does plaintiff contend to be the highest and best use of the property which was condemned as of the time of service of summons."

On March 1, 1965, the appellant filed answers to the interrogatories.[1] The appellant's answers to Interrogatories 3 and 4 claimed that the information sought was privileged and that appellant had no opinion outside of its expert witnesses as to the highest and best use of respondents' property.

Objections to the answers to the interrogatories were filed by respondents (R. 32). The objection to the answer to Interrogatory No. 1 was that the addresses of plaintiff's witnesses were not stated. The objection to the answer to Interrogatory No. 4 was that it was not answered. The objection to the answer to Interrogatory No. 3 was that the information sought was not privileged and that appellant had not timely objected to the interrogatory. Further, respondents sought an award of attorney's fees for having to bring the motion to compel answers.

On March 29, 1965, the Honorable Marcellus K. Snow ordered appellants to answer respondent's interrogatories and awarded respondents the sum of $75 for attorney's fees. It is submitted that this order was erroneous.

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[1] The original condemnation action was filed by Attorney General A. Pratt Kesler. During the period between the time the demand for interrogatories was served and the time the answers were filed, Attorney General Phil L. Hansen assumed office.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN ORDERING APPELLANT TO ANSWER RESPONDENTS' INTERROGATORIES WITH GREATER PARTICULARITY.

It is submitted that each of the interrogatories posed by the respondents, which are relevant to this appeal, were improper and objectionable. Interrogatory No. 1 asked the appellant to set forth the names and addresses of all witnesses "plaintiff intends to call at the time of trial * * *." It is well settled that such a question is completely improper.

Interrogatories, under Rule 33 of the Utah Rules of Civil Procedure, are merely a written means of inquiring into matter in the possession of another party. They are subject to the same limitations as questions in the taking of a deposition. In *Moore's Federal Practice*, Paragraph 26.19 [4], it is stated:

> "Relative to the second purpose mentioned in subhead [1] *supra,* whether a party may be required at a proper time to state the names and addresses of witnesses then known and which he proposed to introduce at trial, the weight of reported authority is that a party is not required so to do."

In *Cogdill v. Tennessee Valley Authority* (E.D., Tenn. 1947), 7 F.R.D. 411, such a question was held objectionable and the court stated:

> " * * * If it asks then to commit themselves in advance to use certain designated witnesses, all of them and none other, that would call for an act of dangerous imprudence, and it would not be fair to impose such a handicap."

Thus, the overwhelming weight of precedent supports a conclusion that Interrogatory No. 1 posed by the respondents is improper. *Fidelis Fisheries, Ltd. v. Thorden,* 12 F.R.D. 179 (S.D., New York 1952); *Truck Drivers and Helpers Local v. Grosshans and Peterson, Inc.,* 209 F.Supp. 161 (D.C., Kan. 1962); Moore, supra, 26.19[4], pages 1247-1250.

It is further submitted that in spite of the fact that Interrogatory No. 1 was objectionable, appellant did substantially answer the question. In the answer served by the appellant, three individuals were named and it was indicated that all were residents of Salt Lake City. This is undoubtedly sufficient information for the respondents' needs.

Interrogatory No. 3 requested that the appellant supply the respondents with certain figures which the appellant contended to be the fair market value of the property taken. It is submitted that this question is objectionable as calling for information in violation of Rule 30(b), Utah Rules of Civil Procedure, in that it calls for the opinion of appellant's experts and the work product of appellant's counsel. Rule 30(b), Utah Rules of Civil Procedure, provides:

> " * * * The court shall not order the production or inspection of any writing obtained or

prepared by the adverse party, his attorney, surety, indemnitor, or agent, in anticipation of litigation or in preparation for trial unless satisfied that denial of production or inspection will unfairly prejudice the party seeking the production or inspection in preparing his claim or defense or will cause him undue hardship or injustice. The court shall not order the production or inspection of any part of the writing that reflects an attorney's mental impressions, conclusions. opinions, or legal theories, or, except as provided in Rule 35, the conclusions of an expert."

Rule 33, Utah Rules of Civil Procedure, provides:

"* * * The provisions of Rule 30(b) are applicable for the protection of the party from whom answers to interrogatories are sought under this rule."

The information sought in the interrogatories obviously asked for appraisals made by appellant's appraisers submitted in appraisal reports to appellant's counsel. Consequently, to the extent that this information is sought by interrogatories, it is objectionable.

In *Mower v. McCarthy,* 122 Utah 1, 245 P.2d 224 (1952), this court, as to the limitation on Rule 35, stated:

"This provision deals only with subjective matters, not with evidence of what the objective facts, that is occurrences, conditions and circumstances, are, but with conclusions from or of other evidence of such fact or facts which have personal coloring. It forbids discovery of any part of a writing which reflects an attorney's

> mental impressions, conclusions, opinions or legal theories, sometimes called the work product of an attorney, and the conclusions of an expert. It prohibits discovery absolutely of all such matters and to that effect is clear, positive and without exception. So the trial court erred in holding that this prohibition does not apply to expert opinion where a denial would cause prejudice, hardship or injustice."

This case is clear precedent against requiring appellant to answer respondents' Interrogatory No. 3.

The respondents' request in the instant case asks for not only matters which involve communications from experts employed by the appellant for the litigation but information in the possession of counsel. Rule 30(b), Utah Rules of Civil Procedure, was drawn specifically to protect such information from disclosure in the absence of a showing of "prejudice." *Mower v. McCarthy,* supra. The Utah rule was drawn to be more protective than the Federal rule. See Compiler's Note, Rule 30(b), Utah Rules of Civil Procedure, Utah Annotated, 1953, Vol. 9, page 559-560.

In *Hickman v. Taylor,* 329 U.S. 495 (1947), the United States Supreme Court ruled that disclosure of witnesses' statements obtained for litigation and held by counsel need not be disclosed. At least three reports were obtained in the instant case as can be seen from appellant's answers to Interrogatories 1 and 2. Interrogatory No. 3 asks for various values and, of necessity, would require an analysis of the three reports.

Obviously, this is an inquiry into the "work product" of appellant's counsel.

Further, since respondent seeks matters of evidence, in effect, from appellant's experts, communicated to appellant's counsel, inquiry is sought into the lawyer-client relationship. In *Rust v. Roberts,* 171 Cal. App. 2d 772, 341 P.2d 46 (Cal. 1959), interrogatories were sought from the State of California in a condemnation proceeding. The values of the lands condemned were requested, which information was the subject of reports from expert appraisers hired by the State. In holding inquiry was improper, the court observed:

> "Interrogatories 6 to 10 deal with appraisals of the property which have been made by the State, request the names and addresses of the appraisers, and the contents of the appraisers' reports. It appears by affidavits presented to the trial court that the attorneys for the State requested the State to employ appraisers to go upon the property to investigate its nature and uses, to appraise its value, and to report. It also appears that these things were done and that the State communicated the matters reported and delivered the reports to its attorneys in confidence. The State has claimed that these matters are privileged under the attorney-client privilege declared by statute. The claim is good."

In *City of Chicago v. Harrison-Halstead Building Corp.,* 11 Ill. 2d 431, 143 N.E..2d 40 (1957), information concerning the appraised value of land in a condemnation proceeding was sought. In holding the

appellant not entitled to the information, the court ruled:

> "Irrespective of the holding in the Stanczak case, the defendant was not entitled to the information sought by the discovery proceedings. The undisputed evidence is that the appraisals were made by the two witnesses as experts in the real estate field at the request of counsel for plaintiff for his use in the trial. This being true, the evidence was privileged and need not be disclosed either at time discovery is sought or at the trial."

Further, many courts have ruled that it is inherently unfair to allow a party without expense to obtain the information held by another. *United States v. Certain Acres of Land,* 18 F.R.D. 98 (D.C., Ga. 1955); *Moore's Federal Practice,* Para. 26.24; Friedenthal, *Discovery and Use of an Adverse Party's Expert Information,* 14 Stanford Law Review 455, 479 (1962). It is apparent, therefore, that respondents' questions, to the extent they seek privileged information and information received from experts, are improper.

Interrogatory No. 4 requests the position of appellant as to the highest and best use of the respondents' property. This question is equally improper. Not only does it seek information privileged under Rule 30(b), Utah Rules of Civil Procedure, but it goes beyond the scope of Rule 33, Utah Rules of Civil Procedure, and seeks information that is beyond inquiry into facts and seeks appellant's legal theories. In *Rust v. Roberts,* supra, the California court answered a similar request:

"Interrogatories 13 through 19 request that the State inform petitioners what use it contends is the highest and best use of the land and as to the facts upon which such contention is based. Such matters are not relevant to the issue of value, being merely arguments and theories that the State may advance through its witnesses on value. Indeed, the State may well want to use a witness with whose theories as to use of the property the State does not agree. The State's contentions cannot be put in evidence even though its expert witnesses will, in all probability, when testifying on value, testify also as to what is the highest and best use of the property. They will probably also testify as to the various uses to which the property can be put. But the State's contentions pro or con upon the subject matter of the interrogatories are not proper subjects of discovery. * * * Evidence may be given by either party as to the uses to which the property may be put and answers to the interrogatories would neither confine petitioners in the scope of their proof nor prevent the State's witnesses from testifying as to a use which in their opinion is the highest and best use of the property. We see no useful purpose to be served by these interrogatories."

Payer, Hewitt & Co. v. Bellanca Corp., 26 F.R.D. 219 (D.C., Del. 1960), it was observed:

"* * * It is well settled that opinions and legal conclusions may not be required by interrogatories."

See *Moore's Federal Practice*, Paragraph 33.17, to the same effect as respects requests for legal contentions.

Further, it is submitted that appellant is not precluded from raising its contentions because of a failure to object to the interrogatories when they were served. Rule 33, Utah Rules of Civil Procedure, provides:

> " * * * Within 10 days after service of interrogatories a party may serve written objections thereto together with a notice of hearing the objections at the earliest practicable time. Answers to interrogatories to which objection is made shall be deferred until the objections are determined."

The rule is written in permissive terms, which would indicate that objections ought to be raised within 10 days, but that it is not necessarily fatal. *Moore*, supra, 33.27, notes:

> "In addition to the provision for objections to interrogatories, which has always been in the Rule, Rule 33 now contains a provision that 'The provisions of Rule 30(b) are applicable for the protection of the party from whom answers to interrogatories are sought under this rule.' The Advisory Committee's Note to the 1946 amendment indicates that this sentence was inserted, not to limit the scope of discovery under Rule 33 but in an attempt to remove some of the limitations which some courts had placed on the use of interrogatories. Even before the amendment, the courts had wide discretion in dealing with objections to interrogatories. The amendment, however, makes it clear that any of the orders mentioned in Rule 30(b) may, when appropriate, be made as to interrogatories under Rule 33."

It would seem from Moore's statement that the concept of privilege and work product under Rule 30(b) is in addition to the objections that might otherwise be raised and that if an answer would be objectionable under Rule 30(b), the failure to object within 10 days would not necessarily preclude proper objection. Indeed, if the failure to object within 10 days were to be deemed an absolute waiver, an effective means will, in many cases, be shown to circumvent the protections of the rule. At least two cases have recognized that the failure to object to propounded interrogatories within 10 days does not absolutely bar a party from challenging the request. In *Bohlin v. Brass Rail Inc.*, 20 F.R.D. 224 (S.D. N.Y. 1957), the court said that normally objections within the 10-day period would be required, but thereafter exceptions were noted. The court stated:

> "I am not prepared, however, to hold that the failure to file objections to interrogatories constitutes a waiver of either the privilege which plaintiff may have as to reports of his own physician or as to statements of witnesses which have been obtained by his counsel in the course of preparation for trial to which defendant would not be entitled under the rule of Hickman v. Taylor.
>
> "Plaintiff therefore will not be directed to comply with that portion of interrogatory 9 which requires her to supply the defendant with copies of reports and records of her own physicians, nor with the portion of interrogatory 17 which requires directly or by implication dis-

closure of statements of witnesses which were obtained by plaintiff's attorney in the course of preparation for trial and are his work product."

In *Baxter v. Vick*, 25 F.R.D. 229 (E.D., Pa. 1960), the court ruled that the permissive language of Rule 33 gives the person who must answer the alternative of answering or objecting. The court said that the failure to answer in 10 days would normally be a waiver, but acknowledged:

> "Although we have determined that defendant has waived its objections to the interrogatory, we would hesitate to enforce this waiver if we felt that it would cast an undue burden on defendant or otherwise would be contrary to the interests of justice. See *Cleminsaw v. Beech Aircraft Corp.*, supra, and *Bohlin v. Brass Rail, Inc.*, supra."

In the instant case, since the interrogatories call for privileged information, there can be no valid claim of waiver because of any failure to file objections within 10 days.

Finally, it should be noted that during the time for filing objections, there was a change of Attorneys General, and, thus, counsel responsible for the suit. Certainly, the people of Utah should not be prejudiced by their choice and a case for equity is apparent. In addition, to the extent Interrogatory No. 4 seeks legal conclusions, it wholly exceeds the scope of Rule 33 and should be disallowed.

It is submitted that this court should reverse.

POINT II

THE COURT ERRED IN AWARDING RESPONDENTS ATTORNEY'S FEES.

The trial court awarded respondents $75 attorney's fees for the respondents' obtaining the order compelling appellant to answer interrogatories. It is submitted that since in Point I of this brief it is shown that the appellant's refusal to answer as particularly as respondents would desire is justified, any award of attorney's fees was improper.

Even if it is determined that the respondents are entitled to have their interrogatories answered, they are still not entitled to attorney's fees. Rule 37, Utah Rules of Civil Procedure, provides:

> "Upon the refusal of a deponent to answer any interrogatory submitted under Rule 31 or upon the refusal of a party to answer any interrogatory submitted under Rule 33, the proponent of the question may on like notice make like application for such an order. If the motion is granted and if the court finds that the refusal was without substantial justification the court shall require the refusing party or deponent and the party or attorney advising the refusal or either of them to pay the examining party the amount of the reasonable expenses incurred in obtaining the order, including reasonable attorney's fees."

It is submitted, however, that this rule may not be applied to the State of Utah. The State has not consented to the burden of being required to pay at-

torney's fees or costs. Indeed, Rule 54(d)(1), Utah Rules of Civil Procedure, recognizes this, for it provides:

> " * * * Costs against the state of Utah, its officers and agencies shall be imposed only to the extent permitted by law."

No law has allowed the imposition of costs or attorney's fees in this case.

This court has consistently ruled that the State was immune from suit where it has not consented. *Springville Banking Co. v. Burton,* 10 U.2d 100, 349 P.2d 157 (1960); *Fairclough v. Salt Lake County,* 10 U.2d 417, 354 P.2d 105 (1960); *State v. Tedesco,* 4 U.2d 31, 286 P.2d 785 (1955); *State Road Commission v. Parker,* 13 U.2d 65, 368 P.2d 585 (1962). It is submitted that to the extent the court below awarded attorney's fees, it imposed a monetary judgment against the State of Utah without its consent. Certainly, by Rule 37, Utah Rules of Civil Procedure, this court did not purport to waive the State's immunity by allowing attorney's fees to be imposed. To do so would go beyond the rule-making power of the court and enter the realm of substantive legislation and, consequently, be unconstitutional, since Article VI, Section 1, Constitution of Utah, vests the legislative power in the Legislature and Article V, Section 1, provides for the separation of powers between the branches of State government. Further, the Constitution of Utah, Article VII, Section 13, gives the Board of Examiners the power to consider claims against the State of Utah, thus im-

pliedly raising sovereign immunity to a constitutional doctrine. In *State Road Commission v. Parker*, 13 U.2d 65, 368 P.2d 585 (1962), it was stated:

> " * * * any drainage of taxpayers' funds by abolition of the doctrine, is the subject of legislative attention in our tri-partite system of government,—not the courts."

Since the Legislature has not seen fit to allow recovery of attorney's fees against the State in this case, Rule 37, Utah Rules of Civil Procedure should not be so construed.

CONCLUSION

The instant case presents an attempt by the respondents to obtain privileged information and the work product of appellant's counsel and experts. The precedent is clear that such an attempt is not proper under Rule 33, Utah Rules of Civil Procedure. The disclosure of such information would be detrimental and harsh to the appellant's position.

The respondents' award of attorney's fees cannot stand in the face of the illegality of the requests for answers to interrogatories and the doctrine of sovereign immunity. To so allow would open a Pandora's Box of constitutional issues.

This court should reverse.

Respectfully submitted,

PHIL L. HANSEN
Attorney General
Attorney for Appellant

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