

1960

Weber Basin Water Conservancy District v. J. Bert Nelson and Myrtle G. Nelson et al : Brief of Appellants

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

FILED
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WEBER BASIN WATER CONSERV-
ANCY DISTRICT,

Plaintiff and Respondent,

vs.

J. BERT NELSON and MYRTLE G.
NELSON, et al.,

Defendants and Appellants.

Clerk, Supreme Court, Utah

Case No.
9256

BRIEF OF APPELLANTS

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Plaintiff and Respondent,

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STATEMENT OF FACTS

This case arises out of the enlargement of the Pineview Reservoir by respondent and the taking necessitated thereby of 10.3 acres of land from the appellants' farm. For some 25 years prior to the enlargement of the reservoir, appellants had operated a dairy farm located near Huntsville, Utah. Their farm consisted of 79 acres of land which appellants own and, as indicated by the conflicting evidence of the various wit-

nesses, between 2 and 7 acres of usable reservoir lands the use of which appellants obtained by a now expired 20-year lease of some 70 acres of land occupied by the original Pineview Reservoir (R. 104, 110, 170). All of these 70 acres of reservoir lands were inundated by water except the buffer areas lying above the high water mark and below the condemned area (R. 168). In addition, the appellants pastured their dry stock on a lease basis on lands owned by a neighbor (R. 41, 48).

Eight acres of the area condemned and the usable reservoir lands served as the pasture for appellants' dairy cows on the date in question. The remainder of the farm was level, irrigated land suitable for growing a variety of crops, including the principal crops of hay and grain needed to sustain the dairy livestock. This crop land area lay to the east of the condemned area on a rather level "bench" some 20 feet higher in elevation than the existing reservoir water level.

Located at the east end of the farm were various farm buildings, including a house, hay barn, milking parlor, livestock shed, potato cellar and machine shed. These buildings were arranged, used as, and met the requirements of a Grade "A" dairy operation, producing market milk for human consumption (R. 20-21).

The 10.3 acres of land acquired by the respondent is situated on the western end of the farm and includes all of the natural pasture on appellants' farm. It also has located on it a spring which is the only live source of water on appellants' property for the dairy animals, except the culinary water supplied to the residence and farm buildings. The culinary water supply, during the winter months, sometimes proved to

be unreliable and inadequate for the usage demanded by appellants' herd of dairy animals (R. 31).

In the acquisition of the 10.3 acres of land, respondent takes the spring and deprives appellants of any access to it (R. 29), thereby leaving appellants, as they view it, without a suitable place to water their livestock (R. 31). Prior to the enlargement of the reservoir, appellants maintained a dairy herd of approximately 25 milking cows and 20 dry stock (R. 21-22). With their pasture lands and spring taken away, it became impossible to carry on a dairy operation. It is conceded by both parties that the farm, as it now is, is not suitable for a dairy operation, and that the buildings peculiarly suited to the dairy operation have lost much, or all, of their value (R. 33, 34, 36, 62-66, 136-138). Respondent attributes this more to the loss of the leased lands than the loss of the land acquired by it (R. 138). However, appellants testified that if the 10.3 acres and the spring had not been taken from them, they would have been able to continue a 25-cow dairy operation on the land they owned by feeding additional supplemental feeds or by converting 5 acres of land to planted pasture and reducing the number of dry stock (R. 61, 114-115).

Upon motion of the respondent, the issue of the value of appellants' 10.3 acres of land and the damage to appellants' remaining property was submitted to the jury on special interrogatories as follows (R. 205):

"We the jury impanelled in the above entitled cause make awards as follows:

1. Just compensation for property taken:

A. Value of the 10.3 acres taken, to-

gether with spring water on lands
taken \$3,050.00

2. Just compensation for severance damage
to property not taken 1,847.00
Total just compensation awarded..... 4,897.00"

The interrogatories appear to be signed and read as follows:

- "1. What was the reasonable fair market value of the defendants' total property as of March 24, 1957 (the day before the taking of the 10.3 acres, assuming a purchaser and seller both did not know it was to be taken?)

Answer\$51,600.00"

There are eight signatures. All jurors signed.

- "2. What was the reasonable fair market value of the defendants' total property as of March 26, 1959 (the day after the taking of the 10.3 acres, assuming a purchaser and seller both knew the said property was taken?)

Answer\$46,203.00"

There are seven signatures.

- "3. What was the highest and best reasonable use of the property in question as a purchaser and seller would consider it before the taking of the said 10.3 acres? (Please write brief description.)
The description written: "Crop farm with a very limited number of live-stock."

Signed by all eight jurors.

- "4. What was the highest and best reason-

able use of the property in question as a purchaser and seller would consider it after the taking of the said 10.3 acres? (Please write brief description.)

The brief description written: "Crop farm."

Appellants, by timely motions, attempted to obtain a new trial, or in the alternative, a modification of the verdict to correspond with the evidence.

STATEMENT OF POINTS

I. THE JURY'S ANSWERS TO SPECIAL INTERROGATORIES ARE INCONSISTENT WITH EACH OTHER AND ARE INCONSISTENT WITH THE GENERAL VERDICT.

II. THE COURT ERRED IN PERMITTING RESPONDENT'S WITNESS WARNICK TO TESTIFY AS AN EXPERT CONCERNING ANIMAL CARRYING CAPACITY OF APPELLANTS' LANDS.

III. THE COURT ERRONEOUSLY AND PREJUDICIALLY INSTRUCTED THE JURY AS TO DAMAGES TO APPELLANTS' "DAIRY BUSINESS."

ARGUMENT

I.

THE JURY'S ANSWERS TO SPECIAL INTERROGATORIES ARE INCONSISTENT WITH EACH OTHER AND ARE INCONSISTENT WITH THE GENERAL VERDICT.

This matter is governed by the provisions of Rule 49 (b),

Utah Rules of Civil Procedure, wherein it is stated as follows:

“(b) *General Verdict Accompanied by Answer to Interrogatories.* . . . When the answers are consistent with each other but one or more is inconsistent with the general verdict, the court may direct the entry of judgment in accordance with the answers, notwithstanding the general verdict or may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, the court shall not direct the entry of judgment but may return the jury for further consideration of its answers and verdict or may order a new trial.”

It is the position of appellants that the answers to the interrogatories are inconsistent with each other and that one or more of them are also inconsistent with the general verdict, and that a new trial should be granted. However, it is possible to reconcile the inconsistent answers in such a manner as to provide a verdict which could be justified under the evidence, as will be explained later.

The verdict of the jury on June 12, 1958, awarded appellants damages as follows:

10.3 acres condemned	\$3,050.00
Severance damages	\$1,847.00
Total	\$4,897.00

In the answers to the interrogatories the jury stated that the fair market value of the farm before condemnation was \$51,600.00, and the fair market value after the taking was \$46,203.10. The difference of \$5,396.90, whereas the jury's

total award was \$4,897.00, clearly constitutes an inconsistency of the type contemplated by Rule 49 (b), and shows that the jury made no attempt to follow the measure of damages rule set out by the court in Instruction No. 9 (R. 194):

- “1. You shall determine in dollars the fair market value of the entire farm of the defendants, including the improvements, as of March 25, 1957.
2. You shall then determine the fair market value as of the same date of the farm of the defendants, including the improvements, after the taking of the said 10.3 acres of land.
3. The difference represents the total just compensation to be awarded to the defendants.
From the foregoing difference you shall then deduct the fair market value of the 10.3 acres of land taken. The remainder, if any, is the amount of severance damages to be awarded.”

An analysis of the answers also will point out that they are clearly inconsistent with each other. The answer to special interrogatory number 1 stating that the fair market value of the property was \$51,600.00 before the taking is the exact figure given by Mr. Werner Kiepe in his testimony (R. 135). The jury could not have possibly arrived at that figure by any other means. The answer to special interrogatory number 2 of \$46,203.10 as being the fair market value of the property after the taking is the precise figure given by Mr. Story as his value of the properties after the taking (R. 55). The jury could not have arrived at that precise figure by any means other than accepting Mr. Story's figure, particularly since Mr. Kiepe's "after" value was \$48,050.00—a higher amount (R.136) .

An analysis of the two foregoing figures, together with

the testimony of Mr. Kiepe and Mr. Story, points out the serious inconsistency in accepting those two figures. The discrepancy appears in the values placed upon the properties, both before and after the taking, by the two appraisers. For instance:

Value of Farm Buildings Per Kiepe:

Lounging shed	
(<i>Before and After Value</i>)	\$2,000.00
Hay barn, milk barn and milk house	
(<i>Before and After Value</i>)	\$1,100.00
Total.....	\$3,100.00

Value of Farm Buildings Per Story After Taking:

Lounging shed	\$1,152.00
Milk house	—
Milk barn	—
Hay barn	\$2,960.10
Total.....	\$4,112.10

It is quite obvious from the foregoing that the amounts arrived at by the jury as their answers to special interrogatories 1 and 2 show appellants' farm buildings as having more value *after* the taking than before. The figure given by Mr. Story as the *after* value of the farm exceeds Mr. Kiepe's value *after and before* the condemnation by \$1,012.10. This inconsistency would penalize the Nelsons unnecessarily and points out the folly of the jury's answer.

In addition to the foregoing inconsistency, the testimony of Mr. Story was that the entire group of farm buildings, including the residence and the buildings not listed above, had an *after* value of \$18,603.10. Mr. Kiepe placed a *before and after* value of \$16,000.00 on those buildings, making an additional variance of \$1,591.00 (R. 62-66, 136).

The only possible consistent approach which could be made in the form of entering a verdict in this case would be as follows:

Base difference between \$51,600.00, less \$46,203.10	\$5,396.90
Inconsistency in answers between after values of Story and Kiepe relative to build- ings used for milking purposes	\$1,012.10
Inconsistency on remaining farm buildings and residence per analysis of before and after figures of Story and Kiepe.....	\$1,591.00
Total.....	\$8,000.00

It would be a travesty on justice to permit the figure of \$51,600.00 as the *before* value of the property set out by Mr. Kiepe to stand against the *after* value of \$46,203.10 given by Mr. Story *when in fact the after value given by Mr. Story contains appraisal figures on certain farm buildings which considerably exceed the before or after value placed upon them by Mr. Kiepe!*

There do not seem to be any cases under the Utah Rules of Civil Procedure or the corresponding Federal Rules of Civil Procedure that would be of much assistance to the court, particularly since matters of this type must necessarily depend upon the peculiar factual situation of each case.

In 53 Am. Jur., Trial, Sec. 1082, it is stated:

“ . . . if findings are made which are contradictory as to material facts, such facts are left undetermined, and since it is not the province of the court, unless by consent, to determine them, *no judgment can be rendered.*”

In 39 Am. Jur., New Trial, Sec. 139, it is further stated:

“ . . . Likewise, where findings which constitute the foundation of a general verdict appear to be unjustified, a new trial will be ordered.”

Support for the foregoing statement is also found in a case note found at 56 A.L.R. 2d 1251:

“A new trial should be ordered where the general verdict is in plaintiff's favor, and the special findings of the jury, which are supported by the evidence, are inconsistent with one another, or consistent with one another but inconsistent with the general finding, though not destructive of the plaintiff's right of recovery.”

.

Under the evidence the special interrogatories are clearly inconsistent with each other, and the same are inconsistent with the general verdict rendered in the matter. Accordingly, although the special interrogatories can be reconciled for an \$8,000.00 verdict by stretching their construction, appellants submit that the only real course which the lower court had available was to grant a new trial.

II.

THE COURT ERRED IN PERMITTING RESPONDENT'S WITNESS WARNICK TO TESTIFY AS AN EXPERT CONCERNING ANIMAL CARRYING CAPACITY OF APPELLANTS' LANDS.

In attempting to qualify Francis M. Warnick as an expert witness to testify as to the carrying capacity of the 10.3

acres of land taken from appellants, the respondent was able to show only that Mr. Warnick was raised as a boy on a farm in Millard County, Utah; that it was an all-purpose farm having some livestock and devoted principally to the raising of alfalfa and grains; that the farm did not have any pasture land on it; and that since becoming a civil engineer, and particularly since 1942, Mr. Warnick had done work in planning irrigation developments and analyzing the economic effect of such developments upon farm lands (R. 165-166).

On cross-examination, Mr. Warnick admitted that, in fact, he had never made an investigation of appellants' 10.3 acres to determine its productivity or carrying capacity. This is amply clear from the following testimony:

"Q. What were you doing when you went into that red area to examine it?

A. The specific times that I have gone in there I have either been supervising survey groups who have been taking topogs of the area or visiting the areas specifically to identify general vegetative cover or to identify erosion problems.

Q. In other words you have never really gone into that area to make a study as such of the carrying capacity of livestock on it, have you?

A. No, I only know this from having identified the vegetative cover throughout the reservoir area and having some experience with valuation of carrying capacity of various kinds of pasture.

Q. Am I correct in this that the analysis you made of the carrying capacity was really a by-product or a side-line to the real purpose you were there?

A. That's correct." (R. 174-175).

In spite of this obvious lack of knowledge and experience concerning the pasturing of livestock, the witness was permitted to testify that in the 7 or 8 acres of the usable land obtained by appellants under the reservoir lease, the appellants could pasture 12 animals (R. 173) but that in approximately 8.3 acres of the land taken from the appellants *they could only pasture 2 or 3 animals* (R. 172)! The witness knew nothing about appellants' practice with respect to the pasturing of their animals and he did not even know how many animals they had been maintaining on their farm (R. 173-174).

Certainly, the testimony on this subject comes within the requirement that the witness answering the questions have specialized knowledge or experience to qualify him as an expert and permit his opinion to be received by the jury. The rule suggested in Section 559 of 2 Wigmore on Evidence, 3rd Edition, is that—

“No special experience shall be required unless the matter to be testified to is one upon which it would clearly be presumptuous, under the circumstances of the case, for a person of only ordinary experience to assume to trust his senses, for the purpose of his own action in the ordinary serious affairs of life.”

This rule, if applied to the subject matter of the testimony offered in this case, would clearly indicate that this is a subject upon which the ordinary individual would seek the advice of an experienced person if he were making a decision which depended upon the accurate determination of such a fact.

It is stated in 20 Am. Jur., Evidence, Sec. 783, that—

“To be competent to testify as an expert witness, one must have acquired such special knowledge of the

subject matter about which he is to testify, either by study of the recognized authorities or by practical experience, that he can give the jury assistance and guidance in solving a problem which the jury are not able to solve because their knowledge is inadequate.”

The possession of the required qualifications by a particular witness must be expressly shown by the party offering the witness (2 Wigmore on Evidence, 3rd Ed., Sec. 560). Also,

“When a witness is offered as an expert upon a matter in issue, his competency, with respect to special skill or experience, *is to be determined by the court as a question preliminary to the admission of his testimony.* There should be a finding by the court, in the absence of an admission or a waiver by the adverse party, that the witness is qualified; and since there is no presumption that a witness is competent to give an opinion, it is incumbent upon the party offering the witness to show that the latter possesses the necessary learning, knowledge, skill, or practical experience to enable him to give opinion testimony.” (20 Am. Jur., Evidence, Sec. 786). (*Italics added*).

Although the respondent failed to show that this particular witness was qualified either by study or by any recent experience or that he had even made an inspection of the property in question for the purpose of determining its carrying capacity, the court, when it ruled on appellants’ objection to the witness’s qualifications, in effect ignored its responsibility to either find the witness qualified or to exclude his testimony. This is amply shown by the testimony beginning at the bottom of Page 169 of the Record:

“Q. Now, based on your experience both as a civil engineer and on the farm, I’ll ask you whether you

have an opinion as to the carrying capacity of the area in green?

A. I do.

Q. And what is your opinion?

MR. FULLER: Now, we raise an objection at this point. There is no proper foundation shown for this witness to show the carrying capacity of livestock on this area.

THE COURT: The objection is overruled. The jury may give his opinion such weight as you think it is entitled."

Appellants submit that *it is not for the jury to determine* the degree to which a witness is qualified or unqualified to give an expert opinion. It is first for the court to rule on the qualifications and then, if the expert is qualified, the jury may consider his opinion, the reasons given for it and weigh such opinion with the other evidence in the case. The court in this case in effect told the jury:

"You judge the witness. If you think he is qualified as an expert you may accept his testimony; if you think he is not qualified as an expert you may disregard his testimony."

This results in extreme prejudice to the appellants for two reasons:

1. It implies to the jury that the witness is qualified and that they shall give weight to his testimony.
2. One of the crucial issues in this case was whether or not the appellants' farm could be operated as a dairy farm with the 10.3 acres of land condemned, but without the lease of the original reservoir lands.

The jury's answer to special interrogatory number 3 to the effect that the highest and best use of the farm before the taking was "crop farm with very limited number of livestock" leaves no doubt but that the testimony of Mr. Warnick on the subject of the carrying capacity of the 10.3 acres of land was accepted by the jury. It should further be noted that respondent requested the special interrogatories to be given the jury and that Warnick's testimony was undoubtedly planned in advance to support the answer to interrogatory number 3 which respondent hoped to elicit from the jury. This was the only cases in the series tried wherein special interrogatories of this type were submitted to the jury.

III.

THE COURT ERRONEOUSLY AND PREJUDICIALLY INSTRUCTED THE JURY AS TO DAMAGES TO APPELLANTS' "DAIRY BUSINESS."

The court instructed the jury (R. 195):

"No. 12.

You are instructed that for the purpose of determining the amount of just compensation to be awarded to the defendants, there is a distinction between damage to lands and improvements not taken, which result from the taking of a part of the defendants' property, and damage to the "dairy business" heretofore conducted by the defendants on their lands. Damage to the lands and improvements not taken constitutes severance damage for which compensation may be awarded, but no compensation can be awarded for damage to or

destruction of a "dairy business" regardless of who conducted it on the land. Severance damages are awarded only for loss of "market value" which could be expected in a sale. Therefore loss in "market value" is to be compensated for and may be reflected in part in the adaptability of the land and improvements for profitable use, but other losses to a profitable business is not compensatable."

The appellants excepted to the giving of instruction number 12, as follows (R. 203):

"Exception is taken to instruction number 12 and to the whole thereof for the reason that there is no evidence in this case submitted by the defendants or by the plaintiffs relating to the value of the properties as a "dairy business," as the term is intended to mean in the instruction, that in no case has there been any evidence offered relating to profits of the business or even to the productivity of the dairy business and that the giving of the instruction tends to mislead the jury relative to any severance damages that might be awarded for the remaining buildings on the property of the defendants."

Respondent also objected to the instruction (R. 202), thereby providing unanimous concurrence as to its impropriety:

"Plaintiff excepts to instruction number 12 and particularly to the last two sentences thereof which refer to market value but fail to specify market value. Because of its failure to specify the property that market value refers to, the instruction is confusing and prejudicial to the plaintiff."

Viewed in the light of the evidence presented to the jury, the instruction draws an unwarranted, unnecessary and improper distinction between the damage which results to appel-

lants' remaining lands and improvements as a result of the taking of the 10.3 acres and damage to "dairy business." It is, of course, true that a property owner is not entitled to be compensated in a case of this sort for any loss of future profits or reduction in future business. It is the contention of appellants, however, that by wording the instruction as it did, the court conveyed to the jury an impression that they were not to award appellants any sum of money to compensate for the reduction in value of the farm buildings that were used in the dairy operation.

Throughout the instructions given to the jury, the court repeatedly indicated that damages could be awarded for a reduction in value to "remaining lands and improvements." Then, in instruction number 12, the court removes from the consideration of the jury and from the broad definition of "lands and improvements" what it chose to call "the dairy business." Since there was absolutely no testimony introduced or claim made on the part of either appellants or respondents concerning any alleged value or depreciation in value of appellants' "business," loss of future profits or any claim for compensation to cover such items, a reasonable jury could logically conclude that the phrase "dairy business" referred to the dairy buildings. There was no evidence to indicate that it could mean anything else, and in attempting to follow the court's distinction between "lands and improvements not taken" and "dairy business" the jury, based on the evidence introduced at the trial, would have to conclude that the dairy buildings as a group constituted an item which could not be included in their award of damages.

The rule applicable to this situation is set out in 3 Am. Jur., Appeal and Error, Sec. 1124:

“The test of reversible error is whether or not the jury was misled so that they reached a different result than they would have reached but for the error, or whether there is a serious misdirection in the charge excluding from the consideration of the jury an issue properly in the case, or whether the instruction probably prejudicially affected the substantial rights of the complaining party. . . . *Instructions which tend to mislead the jury or which could have any influence thereon are ordinarily grounds for reversal.*” (Italics added.)

In view of the fact that there was no evidence concerning the value of a “dairy business” or of a claim for loss of profits or any other item related thereto, the attempt of the court to inject a distinction between “dairy business” and the damage to the remaining lands and improvements was totally uncalled for and certainly misled the jury to such a degree that they reached a result contrary to the result which would have been reached had the instruction not been given. The inadequacy of the severance award contained in the verdict clearly suggests that the jury did not consider the damages to appellants’ dairy buildings.

By their answer to special interrogatory number 4, the jury indicated that the remaining properties could be used only as a crop farm. Implied in this answer is the conclusion that the dairy buildings were severely reduced in value. In light of this, the inadequate severance award supports the appellants’ contention that the jury was misled by instruction number 12 and that one of the major issues of this case was thereby re-

moved from the jury's consideration, resulting in substantial prejudice to the appellants and justifying a new trial.

CONCLUSION

Appellants submit that the verdict and judgment entered in this matter should be reversed and set aside and a new trial ordered.

Respectfully submitted,

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