

1960

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

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,

Clerk, Supreme Court, Utah

Plaintiff and Respondent,

vs.

Case No.
9256

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

Defendants and Appellants.

BRIEF OF RESPONDENT

E. J. SKEEN
NEIL R. OLMSTEAD
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WEBER BASIN WATER CONSERV-
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J. BERT NELSON AND MYRTLE G.
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Defendants and Appellants.

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BRIEF OF RESPONDENT

SUPPLEMENTAL STATEMENT OF FACTS

The appellant's statement of facts should be supplemented to point out that contrary to the impression given by the appellants' brief, only a small part of the 10.3 acres of land condemned was good pasture land, and the farm was not suited for a dairy operation at the time the action was filed. Certain important details regarding appraised values and the appellants' motion for judgment are also added.

There is a duplication of paging in the record. References to the transcript are designated (Tr.), and to the pleadings and other papers in the file are designated (R.).

The readers of the appellants' brief may get the idea that the plaintiff was taking the heart out of a good dairy farm. On page 4 it says, "the land taken includes all of the natural pasture on appellants' farm." It is stated on page 5 that, "prior to the enlargement of the reservoir, appellants maintained a herd of 25 milking cows and 20 dry stock." As a matter of fact most of the land taken was steep hillside.

The appellants' expert, Mr. Story, said that of the 10.3 acres of land, 2 acres were crop land on top of the bench, and one acre was sub-irrigated pasture. The remainder was "rolling hillside" with quaking aspen, choke cherry, grass, and a little sage brush (Tr. 70-72). Mr. Kiepe said the land consisted of three types, (1) land which had been under cultivation, (2) "steep drop-off type of land," and (3) good pasture (Tr. 131). He said that there were 2.8 acres of cultivated land and the rest he put in one class for purposes of valuation and described it as "steep hillside and irregular grazing land, and then those pockets where there was some sub-irrigated land" (Tr. 132-133).

The sub-irrigated pasture was estimated at 1 acre by Mr. Story, (Tr. 72) and at 1½ to 2 acres by Mr. Warnick. The good pasture with a high carrying capacity formerly used by the appellants, was leased land which was not involved in the suit. The lease expired in 1954, before the suit was filed. See Exhibit F. It consisted of a "buffer area," (the land above the original high water line of Pineview Reservoir and below

the area taken in this suit), and land in the bed of the original Pineview Reservoir. Mr. Warnick estimated the carrying capacity of the leased land at 12-15 cows (Tr. 170) and the carrying capacity of the 10.3 acres (excluding the 2 acres of cultivated land) at 2 to 3 cows (Tr. 171-172). The topographic map, plaintiff's Exhibit C, shows the steepness of the land taken (area in red) and the locations of the good feed.

Mr. Kiepe described the farm as not suited for a dairy operation before the taking. We quote:

A. Well, it was quite apparent to me, after talking to the owners, that they were making a very hard struggle out of trying to make a dairy farm out of the property which could no longer be very satisfactorily operated, particularly at the conclusion of the lease, the 20-year lease involving 76 acres down in the bottom. The struggle they had had to provide feed, green feed, it was obvious because they were feeding hay the year around, they were not turning the cattle back out at night in order to take advantage of green feed, they had leased out the ground and still hadn't been able to make it. They had taken about ten acres of their top bench land to make a pasture which cut short their feed in the matter of grain and hay and it was very obvious to me that this property, after their lease ended, they didn't lose it because it was at the end of their contract, after that contract was ended, that this property should no longer be considered as a suitable dairy operation. That was the end of it. So consequently, in my opinion, the dairy barns and the milk house and so forth were worthless except for a very nominal amount to this property or to a new purchaser. They would have a very nominal value because of the fact that it was not suitable as a dairy operation.

Q. Now, you are saying it was not suited as a dairy operation as of March 25, 1957?

A. That is correct.

Q. And after the termination of the lease?

A. Well, it was my opinion when I made the inspection in 1955, but this is my opinion as of these figures are as of March 1957.

Q. But you reached your conclusion with respect to its not being a good dairy unit as of 1955 when you were on the property examining it?

A. I did. (Tr. 138, 139).

The appellants and respondent each had expert testimony as to just compensation. The following is a tabulation of their testimony:

Werner Kiepe	
Land	\$3,040.00
Severance	500.00
	<hr/>
	\$3,540.00
	(Tr. 132, 133, 140)
Charles Story	
Land	\$ 3,862.50
Severance on remaining land	6,900.00
Severance on buildings	10,745.40
	<hr/>
Total	\$21,507.90
	(Tr. 55, 62-67)

The jury verdict was \$4,897.00. But the difference in the "before" and "after" values appearing in the answers to special interrogatories was \$5,396.90. There was obviously a conflict between the general verdict and the answers to the special interrogatories.

After the verdict was rendered, but before judgment the defendants filed the following document:

Motion for Entry of Judgment or For New Trial

Come now the above-named defendants, appearing by and through their attorney of record, Glen E. Fuller, and hereby move the court to enter judgment in the above-entitled action in accordance with the general verdict and the answers to special interrogatories submitted to the jury in said action in a manner consistent in amount with the evidence and the answers to the special interrogatories; or in the alternative, that the court order a new trial to be had. This motion is made pursuant to Rule 49 (b), Utah Rules of Civil Procedure, and is based upon the apparent fact that no judgment has been entered in said matter to this time.

It is requested that the clerk of the above-entitled court set the above motion for hearing before the Honorable John F. Wahlquist, District Judge, at 11:00 A.M. on Monday, May 18, 1959.

Dated this 30th day of April, 1959.

Glen E. Fuller
Glen E. Fuller
Attorney for Defendants
(R. 76)

After argument the trial court made a memorandum decision as follows:

The briefs submitted herein, together with my recall of the trial, have been considered. I apologize to the parties for the delay. I believed that I had disposed of the matter last June until receipt of Mr. Fuller's letter of 30 October 1959.

Judgment is to be entered for \$5,397.00. It is my belief that the apparent incorrectness in the verdict

and the interrogatory is in reality a mathematical error of 500 units (dollars; of course 90c is rounded off to one dollar.)

\$51,600.00

46,203.10

\$ 5,396.90

I do not believe it necessarily follows, or even reasonably follows, that the jury reached these figures in the way suggested by Mr. Fuller. There is a lot of give and take in a jury room. Discussions there stop at some figure and one may be accepted as just, by a juror even though his view is not identical to that of the witness who first suggested the figure. The verdict in this case is fairly within the evidence.

I assume the jury attempted to follow my instructions or the formula for fixing damages and erred in their mathematics.

Dated this 13th day of November 1959.

John F. Wahlquist
Judge
(R. 79)

Judgment was entered for \$5,397.00. The defendants thereafter filed a motion for a new trial, which was denied.

STATEMENT OF POINTS

1. The judgment was properly entered under Rule 49(b).
2. The appellants' motion for judgment based on the answers to special interrogatories was granted and the appellants are estopped from questioning the judgment on this appeal.

3. The trial court did not err in admitting witness War-nick's testimony.

4. The trial court did not err in giving instruction No. 12.

ARGUMENT

THE JUDGMENT WAS PROPERLY ENTERED UNDER RULE 49 (b).

This is a typical case for the application of Rule 49 (b) of the Rules of Civil Procedure. There is a conflict between the general verdict in the amount of \$4,897.00 and the answers to the special interrogatories, which by subtraction would make the verdict \$5,396.90. By the plain language of the rule the trial court had authority to direct the entry of judgment in accordance with the answers. The following part of the rule obviously applies.

“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.”

The appellants rely on the following sentence in the rule:

“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.”

This last quoted sentence is not applicable because the answers to the interrogatories are not “inconsistent with each

other.” There is nothing inconsistent between the answer that the value before taking was \$51,600.00, and the answer that the value after taking was \$46,203.10. The appellants assert over and over again that the answers are inconsistent with each other but fail to point out the inconsistency.

The appellants attempt to inject into the problem an analysis of the evidence and speculation as to why the jury arrived at \$51,600.00 and \$46,203.10. Such analysis and speculation are entirely out of order where, as here, the verdict and judgment is supported by competent evidence. *Weber Basin Water Conservancy District v. Skeen*, (Utah), 328 P.2d. 730. See also the case of *Cottrell v. Grand Union Tea Co.*, 5 Utah 2d 587, 299 P 2d. 622, where the rule is stated as follows:

“This case having been tried to a jury, they were the exclusive judges of the evidence and of the inferences to be drawn therefrom. It was not the privilege of the court to disagree with and overrule their action unless the evidence so unerringly pointed to a contrary conclusion that there existed no reasonable basis for the jury’s finding. This court has many times affirmed commitment to a policy of reluctance to interfere with findings of fact and verdicts rendered by juries, and has declared that it should be done only when the matter is so clear as to be free from doubt.”

To the same effect see *Jensen v. Denver and R. W. R. Co.*, 44 Utah 100, 138 P. 1185; *Heywood v. Denver and R. W. R. Co.*, 6 Utah 2d. 155, 307 P.2d 1045.

The jury’s answers to interrogatories must be accepted by the appellate court where it cannot say from reading the record that the answers are untrue.

Federal Life Ins. Co. v. Relias, 99 Ind. App. 115, 185 N.E. 319.

The appellate court has not the power or insight to analyze and speculate on the processes by which the jury arrived at their conclusions.

Hanna v. Central States Electric Co.,
210 Iowa 864, 232 N. W. 421
City Transportation Co. v. Vatsures,
278 S.W. 2d 373.

The answers to the special interrogatories are consistent with each other and the trial court, pursuant to Rule 49 (b) properly entered the judgment based on the answers.

THE APPELLANTS ARE ESTOPPED FROM QUESTIONING THE JUDGMENT.

The appellants filed the motion, quoted in full above, for the entry of judgment or for new trial. It is difficult to determine from a reading of the document just what the appellants sought as to the amount of the judgment to be entered. However, it appears from the following,

“Come now the above-named defendants — and hereby move the court to enter judgment—in accordance with the general verdict and the answers to the special interrogatories submitted to the jury in said action, in a manner consistent in amount with the evidence and the special interrogatories—.” (Emphasis added.)

that appellants by the motion sought to have the court enter judgment for at least the amount of \$5,396.10, which is the

difference between the value of the farm, before and after the taking, as reflected by the answers to the special interrogatories. The court entered the judgment for the increased amount. Although at the time of the argument of the motion, counsel for the appellants asserted that the judgment should have been \$8,000.00 based on his speculative analysis of the evidence, the court increased the award only about \$500.00. Nevertheless the increase was the court's ruling on the motion. See the court's memorandum decision above.

The following general rule is applicable:

"Since a party may appeal only from an involuntary adverse judgment, it is a well settled general rule declared in some states by express statutory provision, that a party is not aggrieved by a judgment, order, decree or ruling regularly rendered or made, on agreement or otherwise, with his express or implied consent, and therefore he cannot appeal or sue out a writ of error to review it . . . *Under this general rule, a party generally is estopped or waives right to appeal or bring error where a judgment, order or decree was entered on his motion . . .*" 4 C.J.S. see 213, pp. 629-631. (Emphasis added.)

The appellants cannot now question the judgment entered on their motion.

WITNESS WARNICK'S TESTIMONY WAS PROPERLY ADMITTED.

The appellants contend that Mr. Warnick was not qualified to testify as to the carrying capacity of the land taken for the grazing of cattle.

Mr. Warnick testified that he was raised on a farm in Millard County and remained on the farm until he was 22 years old; that it was an all-purpose farm. He said:

“We had about 10 to 15 dairy cows and a small flock of sheep and a few beef animals and a number of horses.” (Tr. 166).

In addition to his experience on the farm Mr. Warnick is a civil engineer with many years experience in planning irrigation developments and in making studies of farm lands.

Q. Now, Mr. Warnick, have you had other experience since you became a civil engineer with respect to analysis of farms and carrying capacities and so on?

A. Yes, sir; I've been in the planning of irrigation developments since 1942 in various locations throughout Colorado and Utah and have been responsible for economic analysis of farm developments, what they can produce and an economy of work connected with them. I have done work in Kamas and Heber Valley, Utah and Weber Basin, Utah and Gunnison, Colorado area in Colorado. (Tr. 166).

Mr. Warnick testified that he was familiar with the land involved in this suit, he described in detail the types of vegetation on the land, and when asked whether he had an opinion as to the animal carrying capacity of the land to be condemned he said, “I do” (Tr. 166-169).

The law is well settled that a skilled or expert witness is one possessing, with regard to a particular subject, knowledge or experience not acquired by the ordinary person. It has been held that although there is no exact standard for fixing the qualifications of such witness, ordinarily, if he has had

experience or training which would enable him to form a judgment of a probative value, he is qualified to testify.

32 C.J.S. pp. 94-96

The determination of the qualification of a witness to state his opinion is for the trial court.

Walkinhorst v. Kesler, 92 Utah 312, 67 P2d. 654

Whether or not the qualification of a witness to state his opinion is sufficiently established is a matter resting largely in the discretion of the trial court.

32 C.J.S. p. 99

Graham v. Ogden Union Ry. etc. Co.

79 Utah 1, 6 P 2d 465.

In re Hanson's Estate.

87 Utah 580, 52 P 2d 1103.

Ordinarily the ruling of the trial court will not be disturbed on appeal unless there is a clear showing of abuse. If the witness has some qualifications, he should be permitted to testify.

In the case of In Re Hanson's Estate, supra, this Court said:

"The matter of proper foundation or qualification of a witness to state a conclusion, an opinion or an impression, where the same is permissible in evidence, lies largely in the sound discretion of the trial court. Unless it appears that the evidence of underlying or 'sense' facts is so inadequate as would compel this court to say as a matter of law that the trial court had erred in permitting a conclusion to be stated, the permitting of such conclusion to be stated will not be disturbed."

In the case of *Wray v. Fairfield Amusement Co.*, 126 Conn. 221, 10A 2d 600, the court held that if any reasonable qualifications can be established for an expert witness, the objection goes to the weight rather than to the admissibility of the testimony.

It has been held that permitting testimony is not error if the witness has even slight qualifications.

Lutz v. Allegheny County, 327 Pa. 587,
195 A. 1

Davis v. Southern Surety Co.
302 Pa. 21, 153 A. 119

Delaware etc. Co. v. Starrs, 59 Pa. 36
Yorkshire Worsted Mills v. National Transit Co.
28 Del Co. 402

It is submitted that Mr. Warnick was qualified to testify and that the trial court properly ruled that the testimony was admissible.

It is argued by the appellants that the jury's answer to special interrogatory number 3 to the effect "that the highest and best use of the farm before 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." This argument is obviously unsound in view of the testimony of Mr. Kiepe and Mr. Story mentioned above as to the very limited area of good pasture, and the fact that the jury viewed the premises. The jury no doubt based its answers on all of the testimony in the record. We cannot assume otherwise.

JURY INSTRUCTION NO. 12 WAS CORRECT.

The appellants complain that instruction to the jury No. 12 was erroneous, misleading and prejudicial. The instruction properly and specifically pointed out that the appellants were entitled to damages for diminution in value of the remaining lands, and improvements. The same thought is expressed in instruction No. 5 as follows:

“2. The damages, if any, to the defendants’ remaining land and structures not taken, caused by the plaintiff by taking of the said 10.3 acres of land.”

See also instruction No. 8 (R. 54) which was given at the appellants’ request. This latter instruction specifically mentioned the claim of a dairy farm operation.

Upon analysis of instruction No. 12 is it clear that there is nothing therein which negatives in any manner the statement that the appellants were entitled to damages to the remaining land and buildings.

Instruction No. 12 was necessary to point out the distinction between damages to remaining land and improvements, on the one hand, and damage to a dairy business, as such, on the other. Mrs. Myrtle Nelson testified on direct examination that she and her husband had a dairy setup for Grade A milk, and that the farm had been operated for dairy purposes for 25 years (Tr. 21). Mr. Story based his testimony as to value on the land being suitable for, and theretofore used for a dairy business (Tr. 59).

The distinction made in instruction No. 12 is valid. The landowner is undoubtedly entitled to diminution in value

of remaining land and buildings caused by the taking but not for damages to the dairy business, "regardless of who conducted it on the land."

In *Just Compensation*, by Kaltenback, page 23, it is stated:

"A majority of the decisions deny the consideration of business damages in the absence of a specific statute authorizing their consideration."

Under familiar rules the instructions must be considered as a whole, and when so considered it is clear that the jury was properly instructed that damages to remaining land and buildings could be considered. The form of verdict set out a space for the insertion of an amount for "severance to property not taken" (R. 69).

The appellants argue that the "inadequate severance award supports the appellants' contention that the jury was misled by instruction No. 12." Mr. Kiepe testified that severance damages amounted to \$500.00. Mr. Story testified that they amounted to \$17,645.40. The jury award under item 2, "Just compensation for severance damage to property not taken," was \$1,847.00. The award was \$1,347.00 higher than Mr. Kiepe's estimate, and it is entirely speculative as to what items were not included by the jury. However, it is certain that the award was for "damage to property not taken." It was well within the evidence.

The testimony of Mr. Kiepe (Tr. 138, 139) is competent testimony that the appellants were out of the dairy business when their lease of the bottom pasture land expired. This was before the condemnation case was filed. The jury could have

limited the severance damages because of their belief that the expiration of the lease, and not the taking of the small acreage (1 to 2 acres) of good pasture reduced the values.

The appellants have failed to show either that the instruction was wrong, or if not, that it was prejudicial.

CONCLUSION

The judgment based on the answers to the special interrogatories is supported by competent evidence. Mr. Kiepe's testimony would have supported a verdict as low as \$3,540.00. It is not the province of this Court to speculate on how the jury arrived at the verdict and the judgment must be sustained as it was fairly within the evidence. The ruling of the trial court on the admissibility of Mr. Warwick's testimony was correct, and the jury was properly instructed on matters of law.

It is respectfully submitted that the judgment should be affirmed.

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