

1960

Salt Lake County Cottonwood Sanitary District et al v. Clements T. Toone and Elmina S. Toone : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT

of the

STATE OF UTAH

FILED

SEP 2 - 1960

SALT LAKE COUNTY COTTON-
WOOD SANITARY DISTRICT,
AN IMPROVEMENT DIS-
TRICT, in Salt Lake County, by
LAMONT B. GUNDERSEN,
EDWIN Q. CANNON, and
ABRAM BARKER, its Board
of Trustees

Plaintiff and Respondent,

vs.

CLEMENTS T. TOONE and
ELMINA S. TOONE, his wife,
Defendants and Appellants.

Clerk, Supreme Court, Utah

Case No. 9275

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Case No. 9275

This appeal is before this court for determining whether or not the replacement costs of water alleged to have been lost by reason of the plaintiff's construction and maintaining a sewer line across the defendants' property is the proper measure of damages in condemnation proceedings. (See Appellant's Brief, Page 2).

The trial court in granting a motion for sum-

mary judgment held that such was not a proper measure of damages and granted the motion for summary judgment when the defendants elected to stand on their allegations and theory of damages. (R. 44-45).

We are hereafter setting forth the facts necessary for the determination of this issue believing that the statement of facts of the appellant is in many respects immaterial.

STATEMENT OF FACTS

The plaintiff filed its action on July 16, 1957, for the condemnation of a right-of-way over the defendants' land, situate in Salt Lake County for the purpose of constructing and maintaining a pipe line for the transporation of sewerage. (R. 10-11).

Subsequently on December 19, 1957, plaintiff and the defendants entered into an agreement wherein the defendants conveyed to the plaintiff the right-of-way upon the payment of \$1,000, reserving however, the question as to whether or not the defendants would suffer damages "as a result of the loss of water supplied or furnished by two springs located on the defendants' property by construction of the said sewer line" (R. 20-21).

On October 2, 1958, the defendants filed an amended answer in which they asked damages in the sum of \$10,000, alleging a loss of water, and

loss “to his fish culture project.” Also, asking for another \$10,000, for loss of water for irrigation purposes and they wanted \$200, because of a grass fire (R. 22-24).

To this the plaintiff filed a motion for a more definite statement. The defendants in response to said motion, set out that their damages were due to an abandonment of a project with the United States Soil Conservation Service wherein they would have received \$210; that the grass fire occurred in the summer of 1958, the result of the lowering of the water table and they set out in detail replacement costs for restoring of the water allegedly lost and asked for damages in the sum of \$57,250.30 (R. 28-32).

Then on April 30, 1959, the defendants filed a second amended answer in which they referred to their response to plaintiff’s motion for a more definite statement and prayed for damages in the sum of \$57,250.30 (R. 33-34).

The defendants in their amended answers and response to motion for a more definite statement set out the replacement costs for the restoration of the alleged water loss. This included pumping water from the Big Cottonwood Creek which runs adjacent to the defendants’ property. They alleged among other things as follows:

“14. To restore Defendants to their

former position prior to Plaintiff's constructing its sewer line will require (A) constructing a clay retaining wall along the Southwest side of "Spring area and pond" and "Pond A," a distance of 300 feet; (B) Install pumps at outlet of "Pond C" and run six inch line to top of Defendants' property, shown on map as "Gordon Lane;" and another line to "Spring Area and Pond;" (C) To refill burned out area, cover with topsoil and reseed; and so far as Defendants can ascertain, there is no solution to the raising of the water table on the farm land. The U. S. SOIL CONSERVATION SERVICE has cancelled its contract and will not furnish the \$210, toward the project.

15. That the costs of installing retaining wall, fill in burned out area, install one pump to pump water to Gordon Lane and the other to pump water to "Spring area and pond" are as follows:

(A) To construct wall along southwest sides of "Spring area and pond" and "pond A" will require digging trench 300 feet long and four feet wide and ten feet deep, and hauling away same. Refilling said trench with clay to prevent seepage.

Best bid so far obtained:

Dig trench 300 ft. at

4.75 per foot 1,425.00

Refill trench with clay 575.00

Total.....	2,000.00	2,000.00
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(B) To fill in hole
burned out

Best bid so far obtained:

Haul in fill dirt	250.00	
New top soil	250.00	
Level, seed, fertilizer, labor, misc.	200.00	
	<hr/>	
Total.....	700.00	700.00

(C) To install pump,
power line, and
six inch line from
outlet of "Pond C"
to Gordon Lane

Best bid so far :

Install pump, power line,
six inch line to Gordon Lane:

Best bid so far: 2,612.34

Estimated life of equip-
ment 10 years.

Over fifty year period cost
of equipment 13,061.70 13,061.70

(D) To install pump and
six inch line from
outlet of "Pond C"
to "Spring area in
Pond"—
best bid so far

Pump complete 692.12

Pipe Line 960.00

Total..... 1,652.12

Ten year life of equip-
ment—over fifty year
period 8,260.60

(E) The above bids do
not include the
digging of trench nor
refill for pipe line,

they do include laying pipe.		
Best bid so far 750 feet of trench and refill at 1.00 per foot		
	750.00	750.00
(F) Cost of operating two 21½ H.P. motors per hour based on power cost of 2 cents per KW hour—3.6 cents per hour—86.4 per day 315.36 per year—50 year power cost		
		15,768.00
Total.....		<u>40,540.30</u>

“16. That so far as known to Defendants, there is no known way to raise water table on farm land, and as a result irrigation ditches, flumes, conduits, head gates must be installed; and where formerly hardly any time was required for irrigation, it is estimated that at least 150 hours per year at 2.00 per hour will be required to irrigate and maintain ditches, etc.

Estimated labor cost increase		
	300.00	
Estimate cost of ditches, dams, etc.		
	300.00	
Total.....	<u>600.00</u>	
Labor cost over fifty year period		
	15,000.00	
Replace dams, etc., every ten years		
	1,500.00	
	<u>16,500.00</u>	16,500.00

Added expense to Defendants for irrigation over fifty yrs. (R. 30-31)."

On September 21, 1959, a pre-trial hearing was held before the Honorable Ray Van Cott, Jr., District Judge and the defendants abandoned their claim of damages for the grass fire and the withdrawal of the government funds, limiting their damages to the replacement costs as set out in the pre-trial order:

- "1. That the defendants intended to use the land for fish culture for commercial purposes;
2. That as a part and adjunct to the culture of fish, he will accomplish an esthetic purpose;
3. The defendants further contend that the measure of their loss and damage is the cost of restoring the water." (R. 38-40).

Subsequently on October 28, 1959, plaintiff moved for Summary Judgment on the ground there was no genuine issue as to any material fact and that plaintiff was entitled to judgment as a matter of law. This motion was heard on November 15, 1959, by the Honorable A. H. Ellett, District Judge, who granted the plaintiff's motion for Summary Judgment and in the Findings of Fact, he held among other things as follows:

- "1. That the defendants have plead and demanded damages in the above entitled cause on the basis and claim that their measure of damage is the reasonable cost of replacing of

the water alleged to have been lost as a result of the installation of plaintiff's sewer line through and over the defendants' property.

And the court advised the defendants at the said hearing that the measure of damages and their allegations thereof and their claim of damages as set forth in the pre-trial order are contrary to law; that the court further advised the defendants that it would permit them to amend their pleadings and to allege proper damages, if any, and to offer proof thereof and to amend the pre-trial order accordingly; that the defendants, however, refused to amend their counterclaim stating to the court that they elected to stand on their allegation of damages as set forth in their second amended counterclaim and in the court's pretrial order, except that they desired to amend their second amended answer and counterclaim to provide that the damages as alleged were "the reasonable costs of replacing the water," which amendment the court allowed; and the said amendment was made by interlineation.

That the defendants also refused to offer or tender any proof of damages whatsoever except those alleged in their second amended answer and counterclaim, and as set forth in their reply to plaintiff's motion for a more definite statement, and their claim as modified and set forth in the court's pre-trial order." (R. 44-45).

The court entered its Finding of Facts and Conclusions of Law on January 14, 1960 (R. 45). The affidavits referred to by the appellants were filed on January 18, 1960. These affidavits were

filed apparently for the purpose of supporting defendants' theory of damages. (R. 46-54).

ARGUMENT

ANSWER TO APPELLANTS POINTS A AND C

On December 19, 1957, subsequent to the filing of a complaint for condemnation of a right-of-way for the purposes of laying and maintaining a sewer pipe line over the defendants' land, the plaintiff and the defendants entered into an agreement by which the plaintiff paid to the defendants the sum of \$1,000.00 for a right-of-way and in satisfaction of all claims, demands, and causes of action arising out of the laying and maintaining of the sewer line, including lowering of the water table, except that they reserve the question, "as to whether or not they (sic, defendants) had or will sustain any damage as a result of the loss of water supplied or furnished by two springs located on the defendants property by the said sewer line." (R. 20-21).

The appellants insisted at both the pre-trial and the hearing on the motion for summary judgment that they had sustained damages by virtue of the loss of water, and that their measure of damages was the cost of restoring the alleged lost water. This was also their claim in their pleadings, and they refused to allege or claim any other damages,

although they were advised by the court that they could do so. (R. 38-40, 44-45).

The appellants in their pleadings set out that the cost of installing a retaining wall to restore the alleged lost water and to fill in the burnt out area and to install a pump would be the sum of \$57,250.30. This included the cost of the installation of the pump, power line, pipe line, depreciation of the pipe line and pump and 50 years' power bill, including several other similar items. (R. 30-31).

The appellants claim that the water was to be restored so that they could in the future engage in a commercial fishing enterprise and for the future development of an estate. (R. 28-32, 39 appellants brief p. 4 & 5).

The Utah Statute, 78-34-10, UCA 1953, provides the manner in which damages shall be assessed in condemnation proceedings. It reads as follows:

“The court, jury or referee must hear such legal evidence as may be offered by any of the parties to the proceedings, and thereupon must ascertain and assess:

(1) The value of the property sought to be condemned and all improvements thereon appertaining to the realty, and of each and every separate estate or interest therein; and if it consists of different parcels, the value of each parcel and of each estate or interest therein shall be separately assessed.

(2) If the property sought to be condemned constitutes only a part of a larger parcel, the damages which will accrue to the portion not sought to be condemned by reason of its severance from the portion sought to be condemned and the construction of the improvement in the manner proposed by the plaintiff.

(3) If the property, though no part thereof is taken, will be damaged by the construction of the proposed improvement, the amount of such damages.”

In construing the above statute this court has held that where a right-of-way is taken by condemnation, the condemnee is entitled, in addition to the value of the property taken, damages to the remaining property affected by the taking and that the measure of damages for such an injury is the diminution in the value of the property. *State vs. Ward*, 189 Pac. 2nd 113; *Southern Pacific Co. vs. Arthur, et al*, 352 Pac. 2nd 693. Also see 18 Am. Jur., p. 878, Sec. 243.

As stated the measure of damages is the diminution in value of the property not taken and although replacement costs may be shown, this is considered (evidence) only in fixing the depreciation in the value of the land and in no event is such admissible unless the restoration costs accurately measure the decrease in the value of the land and it can not exceed the difference between the fair market value

of the tract immediately before the taking and after. The appellants made no claim in their pleadings or otherwise that the restoration costs accurately reflect the diminution in value, if any. In fact appellant Toone testified in his deposition that for residential purposes the property had not decreased in value, and that it was worth \$5,000 an acre before the alleged damage. (Tr. 42-43, 48-50, 66, 45-46—deposition pages). And as the property in question consists of a six acre tract (Tr. 7), its total value would have been \$30,000.00, or \$27,250.30 less than the appellants' claim of replacement costs of \$57,250.30. Assuming the land had no value after the alleged damage had occurred on the theory of diminution in value, the most a court could award would have been \$30,000. This was undoubtedly the reason the appellants elected to stand on their allegations and theory of damages. Thus, it is apparent that the restoration costs claimed does not accurately measure the decrease in the value of the land before and after the taking. The rule is well stated as follows:

“— Damages to remaining land that have been allowed include injuries from cutting the land into portions that are inconvenient in shape, or inconveniently separated by deep cuts or embankments; injuries from cutting off access to the nearest highway; injury to the necessary waters or water supply of the remaining land; injury caused by excess or polluted waters flowing upon such land, and resulting from the added use, and such other

direct damages as result to the remainder of the tract by reason of the situation in which it is left by the taking, and by reason of such improvements, additional fencing, etc., as may be rendered necessary by the taking. But these direct damages shall not exceed the difference between the fair market value of the tract immediately before the taking and the fair market value of the remainder immediately after the taking. Or, as frequently stated by the courts, these particular items of injury are not to be allowed as separate items of damage, but are merely to be considered in estimating the depreciation in the value of the land * * *” 18 Am. Jur. p. 906, Sec. 266.

This court in the case of the *State vs. Ward*, supra, applied the same rule, when it said:

“(5, 6) The restoration costs measure of damages is appropriate when such restoration costs accurately measure the decrease in the market value of the property damaged but not taken. In the present case the moving or changing of the foundation was not a necessity. It did not have to be moved on account of the highway. If, however, it were moved, then where would it be placed? Its location obviously would affect the value of the land theretofore used for farming, as it would displace part thereof. An effort to measure the effect of its removal simply by the cost of removal and its loss as a foundation as originally located does not truly reflect the depreciatory effect on the farm. The difference in market value of the farm before and after condemnation does truly reflect that loss, as presumably the difference will be

founded upon the various changes incident to the proximity of the highway.

A great disparity between the cost of restoration and the diminution in market value of defendants' farm is revealed by the testimony. Diminution in market value was estimated as in the neighborhood of \$1500, while restoration costs were calculated at \$6,650, the latter, however, were not assured losses that were bound to happen at any cost."

There is no merit to defendants' position that they should be awarded damages for future, unearned profits from a contemplated, but non-existent commercial fish enterprise. This is the rule even in the case of going concerns. 18 Am. Jur. p. 899, Sec. 259.

In view of the appellants claiming and maintaining at the pre-trial hearing and on the motion for summary judgment (R. 28-34, 38-40, 44-45) that their sole basis for damages was the restoration costs for the water alleged to have been lost electing to stand on their theory of damages and refusing to amend their pleadings or offer proof of any other measure of damages, although the trial court advised them that they could do so, the court had no alternative but to grant the plaintiff's motion for summary judgment as there remained no material fact in issue to be tried by the court. Rule 56, Utah Rules of Civil Procedure, *Abdulkadir vs. Western Pacific R. Co.*, 7 U 2d, 53, 318 Pac. 2d, 339.

ANSWER TO APPELLANTS POINT B

Appellants contention that they should have been awarded damages in the amount demanded is without merit. They made no motion for summary judgment and even had they made such a motion, there was no basis on which it could have been granted, the amount of damages had been placed in issue by the plaintiff's reply and the pre-trial order and there was no evidence before the court either by deposition, affidavit or otherwise, which could be the basis for such a judgment.

ANSWER TO APPELLANTS POINTS D, E & F

We believe that we have answered appellants contention that their measure of damages is the amount necessary to restore the water alleged to have been lost, loss of government funds, sealing of ponds from seepage, cost for irrigation because of the lowering of the water table, and loss from a fire, or in the alternate, that plaintiff be required to restore the alleged lost water. As we have pointed out the damages to be awarded for the remaining lands not taken in the condemnation proceedings of a right-of-way is the defference in value before the taking and after.

However, we again call the court's attention to the agreement between the parties (R. 20-21) which limited the damages, if any, to the loss of

water from two springs. This stipulation unquestionably takes care of the alleged claims for the lowering of the water table except as it directly occurred from the loss of water from the springs, if any, the loss of government funds, and the cost of sealing the ponds. As to the damages for a fire loss which occurred in 1958, subsequent to the installation of the sewer line, there can be no award. Damages are determined at the date of the service of summons. *Weber Basin Water Conservancy District vs. Ward, et al*, 347 Pac. 2d 862, 10 Utah 2d 29. Further, there is no causal connection between the installation of the plaintiff's sewer line and the subsequent fire. In any event, there was an intervening agency which would break the chain of causation.

The cases cited by the appellant are not in point. *Current Creek Irrigation vs. Orville Andrews, et al*, 344 Pac. 2d 528, 9 Utah 2d 324, *Hansen vs. Salt Lake City*, 205 Pac. 2d 255, and *Kano vs. Arcon Corporation*, 326 Pac. 2d, 719, 7 Utah 2d 431; are cases involving the rights of the appropriators of water and lay down no rule as to the measure of damages in condemnation proceedings.

CONCLUSION

The trial court did not err in granting the plaintiff's motion for summary judgment. The appellants having at both the pre-trial and at the hearing on the motion for summary judgment insisted that their measure of damages was the cost of restoring of the water alleged to have been lost. In both instances they elected to stand on their pleadings and their theory of damages although at the hearing on motion for summary judgment, the trial court advised them that they could amend their pleadings to allege a proper measure of damages, offer proof thereof and that the pre-trial order would be amended accordingly. Their pleadings, the pre-trial order and their election left no material issue of fact to be tried by the court and the motion for summary judgment was properly granted.

Respectfully submitted,

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