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Weber Basin Water Conservancy District v. Lois A. Hislop et al : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

FILED

WEBER BASIN WATER CONSERVANCY

DISTRICT,

Plaintiff and Respondent,

vs.

LOIS A. HISLOP, et al.,

Defendant and Appellant.

JAN 10 1961

Supreme Court, Utah

Case No.

9317

RESPONDENT'S BRIEF

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IN THE SUPREME COURT of the STATE OF UTAH

WEBER BASIN WATER CONSERVANCY
DISTRICT, *Plaintiff and Respondent,*

vs.

LOIS A. HISLOP, et al.,
 Defendant and Appellant.

Case No.
9317

RESPONDENT'S BRIEF

SUPPLEMENTAL STATEMENT OF FACTS

This suit was filed by the Weber Basin Water Conservancy District, hereinafter referred to as the "District," to condemn certain lands and easements for the enlargement of the Pineview Reservoir. Included was a small tract of land belonging to the appellant which was farm or pasture land entirely unrelated to the property in the Town of Huntsville upon which "Jack's Shack" is located. This appeal does not involve the land which the District brought suit to condemn.

The appellant has by her counterclaim attempted to engraft upon the condemnation suit an action for damages allegedly caused by the relocation of a highway pursuant to a contract between the United States of America and the State Road Commission of Utah, dated June 30, 1955, which provides for the relocation of the part of the old highway, No. 39, from Ogden to Huntsville which would be affected by the enlargement of the Pineview Reservoir. The contract, marked Exhibit I, was received in evidence in this case. Paragraphs 5 and 6 provide:

“5. The Highway Department will relocate and reconstruct that portion of State Highways, Number 39, between Points A and B into the town of Huntsville, Utah, and Number 162, between Points G and F, into the town of Eden, Utah, respectively, together with a spur to connect with the Liberty highway from Number 162 beginning at Point H and running in a northerly direction for approximately 0.65 of a mile, all as shown in blue on the location map attached hereto and made a part hereof, marked Exhibit 1, or at such other locations as may be mutually agreed upon by the parties hereto. The total of the relocated State highways amounts to approximately 5.0 miles. The said Highway Department will also reconstruct and relocate pursuant to the authority granted the Highway Department by the County, that portion of the County's road system between the towns of Huntsville and Eden between Points B and C and between Points D and E shown in Green on said Exhibit 1 or at such other points as may be mutually agreed upon by the parties hereto, and comprising a total of approximately 1.7 miles. All relocated roads to be constructed by the Highway Department will include approaches and access roads for use by adjacent landowners and all

other appurtenances in connection with the relocations. The relocated portions of said highways and roads are hereinafter referred to as relocated highways. *The Highway Department will acquire all rights-of-way for the relocated highways except those to be acquired by the United States as provided in Article 8 hereof.* Contracts for such relocation and reconstruction work shall be awarded by the Highway Department to best bidders based on public invitation for bids. The Highway Department agrees that the relocated highways, including all bituminous surfacing, will be completed by April 1, 1957. The relocated highways will be constructed to a standard equal to the highways and roads before relocation, typical sections of which are shown on Exhibits 2 and 3 attached hereto and made a part hereof, and will be constructed in accordance with plans and specifications to be prepared by the Highway Department and approved by the United States. Should the Highway Department desire to construct the relocated highways or any of them to a standard superior to that described above, the additional cost of such superior construction shall be borne by the Highway Department. The Highway Department will, at its sole cost and expense, operate and maintain the relocated State highways and the County will at its sole cost and expense, operate and maintain the relocated County roads.

“6. The United States will pay to the Highway Department for the faithful performance of this contract, not to exceed the sum of Six Hundred and Fifty Thousand and no/100 Dollars (\$650,000.00) in appropriate installments as the work on the relocated highways progresses, based on monthly certified cost statements showing contractors earnings and administrative and general expenses directly related to the work.” (Emphasis added).

It will be noted that in paragraph 5 the Highway Department (State Road Commission of Utah) agrees to "acquire all rights-of-way for the relocated highways" (except between certain stations not involved here). The United States agreed to pay to the Highway Department, "for the faithful performance of this contract not to exceed the sum of Six Hundred and Fifty Thousand and no/100 Dollars (\$650,000.00) in appropriate installments . . ." See paragraph 6.

The District is not a party to the contract, and there is no evidence or stipulation that the District had anything whatever to do with the selection of the route of the new road or with its construction.

It is apparent from the pleadings, the stipulation of facts and the map attached to the stipulation that the relocation of the main road to Huntsville did not affect the appellant's access to the existing streets in Huntsville. They have not been changed. Ingress and egress, approach, and grade are not changed. There has been no physical change in the roads upon which appellant's property fronts.

STATEMENT OF POINTS

1. The District is not liable for damages caused by the road relocation.
2. The diverting of traffic is not compensable.

ARGUMENT

THE DISTRICT IS NOT LIABLE FOR DAMAGES
CAUSED BY THE ROAD RELOCATION.

The appellant is seeking to recover damages from the District which allegedly result, not from any action or taking by the District, but from the relocation of a road by the State Road Commission pursuant to a written contract, Exhibit I, between the United States and the State Road Commission. The District is not a party to the contract under which the road was relocated, did not choose the route, and had nothing whatever to do with the construction. Furthermore, the contract expressly provides that the State Road Commission shall acquire rights-of-way and that the United States shall pay not to exceed \$650,000.00 for the rights-of-way and road construction.

There is no casual connection insofar as the District is concerned between the condemnation by the District of land which would be inundated by the reservoir, and the relocation of a highway by the State Road Commission under a contract with the United States. These activities are separate and distinct. The District was obligated to acquire and pay for lands in the enlarged reservoir site, and the present condemnation case was filed to carry out that responsibility. The United States and the State Road Commission were obligated to accomplish the road relocation. Damages flowing from the taking of the reservoir site lands must be paid for by the District and damages resulting from the road relocation must be paid by the State Road Commission out of the \$650,000.00 provided for that purpose.

The appellant's theory is that because the Pineview Reservoir is being enlarged, the roads must be relocated and if the roads are relocated and damage results, this damage should be paid by the District because the Weber Basin Project

is being built for the District. If this line of reasoning were followed to its logical conclusions suit would lie against any beneficiary or group of beneficiaries of a public project. By the same sort of logic it could be well contended that the Weber Basin Project is largely for the benefit of the City of Ogden, therefore the City of Ogden should be liable for damage caused by the relocation of the road. The District had no more to do with the road relocation than the City. No cases have been cited by the appellant in support of her position on this point and indeed none could be.

The only case we have been able to find in which a landowner sought to recover damages from a party other than the one actually relocating the highway is *Cranley v. Boyd County and the Chesapeake and Ohio Railroad Co.*, 266 Ky. 569, 99 SW 2d 737. In that case the location of a highway was changed to avoid a railway grade crossing, and a landowner who conducted a business which had formerly been conveniently located for patronage but which could not thereafter be reached except by a circuitous route, sued both the County and the Railway Company. A directed verdict for the Railway Company was sustained as it did not construct the road. The road was constructed by the County.

In the instant case the road was relocated by the Road Commission and not by the District and therefore no action will lie against the District. It is submitted that the order denying the appellant's motion for a summary judgment should be sustained on this ground alone.

THE DIVERTING OF TRAFFIC IS NOT COMPENSABLE.

Both of the appellant's points stated on page 6 of her brief are based upon the assumption that a landowner has a property right in the flow of traffic on a highway adjacent to his place of business. It is argued that if the volume of traffic is diminished by reason of re-routing "occasioned solely by reason of the enlargement of a reservoir which submerges an existing highway," such loss of traffic flow is compensable because the re-routing is not a traffic regulation under the police power. In other words, the contention is that damages caused by road route changes made for reasons of safety and convenience are not compensable, but damages flowing from changes made for other reasons are compensable.

The attempted distinction although interesting from an academic standpoint has no application in this case. The vital weakness in the appellant's argument is that the facts show no damage to any property or property right.

Let us examine the nature and extent of the property rights incident to the ownership of land abutting on a public street. Whether a landowner owns the fee title to the street subject to the right of the public to travel it, or whether the title has passed to the state, county or city he has a right of access, light and air. The following excerpt from the opinion in the early case of *Dooley Block v. Salt Lake Rapid Transit Co.*, 9 Utah 31, 33 P. 229, quoted in the case of *State v. District Court*, 94 Utah 384, 78 P 2d 502, clearly defines such rights:

" . . . When land is settled upon and occupied as a town site, and lots are sold, the right of way over the streets in front of such lots is an appurtenance of necessity, and it requires no special grant in the deed. [Citing cases.] The rights of access, light, and air constitute

the principal values of such property, and it must be presumed that when lots are sold the grantees purchase them with a view to the advantages and benefits which attach to them because of these easements. The right of the grantee to their use is precisely the same as his right to the property itself. Such privileges are easements in fee,—incorporeal hereditaments,— and form a part of the estate in the lots. They attach at the time the land is platted and the lots are sold, and will remain a perpetual incumbrance upon the land burdened with them. * * * Equally in both cases the abutting owners are entitled to the use of the street as a means of access to their lots, and for light and air. If the fee is in the city, the rights of the abutter are in the nature of equitable easements in fee; if in the abutter, they are in their nature legal. In either case the abutters have the right to have the street kept open and not obstructed so as to interfere with their easements, and materially diminish the value of their property . . . ”

But the owner of land abutting on a highway has no property or other vested right in the flow of traffic on a street. In the case of *State v. Hoblitt*, 87 Mont. 403, 288 P. 181, the court said:

“The owner of land abutting on a highway established by the public has no property or other vested right in the continuance of it as a highway at public expense, and, at least in the absence of deprivation of ingress and egress, cannot claim damages for its mere discontinuance, although such discontinuance diverts traffic from his door and diminishes his trade and thus depreciates the value of his land. [Citing cases.]” To the same effect are *State ex-rel. Johnson v. Board of Com’rs of Deer Lodge County*, 19 Mont. 582, 49 P. 147, and *State v. Bradshaw Land & Livestock Co.*, 99 Mont. 95, 43 P.2d 674.

"The same principle was stated in *State Highway Commission v. Humphreys*, 58 S.W. 2d 144, 145, by the Texas Court of Civ. App. (1933) quoting from the Kansas case of *Heller v. Atchinson, T. & S. F. Ry Co.*, 28 Kan. 625, as follows: " 'The benefits which come and go from the changing currents of travel are not matters in respect to which any individual has any vested right against the judgment of the public authorities.' If the public authorities could never change a street or highway without paying all persons along such thoroughfares for their loss of business, the cost would be prohibitive. The highways primarily are for the benefit of the traveling public, and are only incidentally for the benefit of those who are engaged in business along its way. They build up their businesses knowing that new roads may be built that will largely take away the traveling public. This is a risk they must necessarily assume."

It logically follows, and it has been almost uniformly held that a highway relocation which changes the traffic volume passing a given business does not result in compensable injury.

Robinett v. Price, 74 Utah 512, 280 P. 736
Krebs v. State Road Com., 160 Md. 584, 154 A. 131
State v. Linzell, 163 Ohio St. 97, 126 N.E. 2d 53
Hempstead County v. Huddleston, 182 Ark. 276, 31 S.W. 2d 300

Richmond v. Hinton, 117 W. Va. 223, 185 S.E. 411
Kachele v. Bridgeport Hydraulic Co., 109 Conn. 151, 145 A. 756

See Note: 118 A.L.R. 921

In the case of *Kachele v. Bridgeport Hydraulic Co.*, *supra*, the court said:

“The action of the defendant of which the plaintiff complains has not resulted in the closing, obstruction or impairing—of this highway adjacent to his premises. Neither the grade, character nor serviceability of the street at this point has been affected. Access to, and egress from his land can be had as freely as ever. The sole ground upon which he rests his claim for recovery is that highway access has been rendered more inconvenient than it was, and a more circuitous route must be taken in approaching or leaving the property in one direction—Where highway changes—occasion a land-owner no other damage than to render access to his land more inconvenient than it formerly was, by reason of a circuitous route being required to be taken, he has no right of action.”

In the case of *Hempstead County v. Huddleston*, *supra*, the court stated the rule as follows:

“No person has a vested right in the maintenance of a public highway in any particular place, as the power is in the state to relocate the road at any time in the public interest. Therefore the change in the road did not constitute an element of damage in this case.”

If, as the cases cited hold, the appellant had no property right in the flow of traffic there was no compensable injury in this case. The old road still passes in front of the appellant's property. The grade is not changed. The right of access is not impaired. There can be no question but that the only change is in the flow of traffic.

If no property right was impaired by the highway change it is of no concern to the appellant whether the highway change was made to shorten the road, to avoid a dangerous curve or to skirt a new reservoir. The State or other condemnor had

the same right of condemnation to relocate the road to make possible the enlargement of the reservoir as it would have to relocate the road to avoid a dangerous curve. The public interest requires the change in both instances.

The fact that the words "or damaged" appear in the Constitution of Utah, Art. I, Sec. 22, does not strengthen the appellant's argument.

If no property right was taken or impaired the constitutional and statutory provisions have no application. Certainly if there is no property right in the flow of traffic there has been no impairment or taking of a property right.

The cases cited by the appellant on pages 14 and 15 of her brief are not in point because in each case there was a physical change which impaired the means of ingress and egress. In the case of *Denver Union Terminal Ry. Co. v. Glodt*, 67 Colo. 115, 186 P. 904, the court pointed out that as a result of closing certain streets the landowner was left only "an inadequate and dangerous way for egress on a street occupied by a viaduct." In the present case the street on which the appellant's property fronted was undisturbed for several blocks in each direction.

There is a line of cases holding that, if as the result of the relocation of a road, property abutting thereon is placed in a cul de sac there is impairment of ingress and egress causing compensable injury. *Bacich v. Board of Control*, 23 Cal. 2d 343, 128 P. 2d 181, 144 P. 2d 818. The cases hold, however, that this principle is inapplicable where the obstruction in the road or road change was beyond a street intersection. It is

apparent from an inspection of the map on page 20 of the appellant's brief that the cul de sac rule is not applicable here because there are two street intersections between the appellant's place of business and the point where the old road to Ogden is blocked by the reservoir enlargement.

The effect of applying the rule contended for by the appellant is pointed out in the case of *Richmond v. Hinton*, 117 W. Va. 223, 185 S.E. 411:

“ ‘ . . . The just compensation guaranteed by the Constitution must be confined within bounds. There must be a reasonable limit beyond which the guaranty is not applicable. Conceding that there is difficulty in determining just where the bounds should be laid down, it is evident that the difficulty is accentuated if remote and indirect damages are to be allowed. Where would the line be drawn? Conceivably a mercantile business would have fewer patrons, and an apartment house be rendered less desirable, and a dwelling less eligible because of the closing of a street two or three blocks away. A residence may be rendered less conveniently situated with respect to the metropolitan district of the city because a street is closed at a railroad crossing some distance away. Residential property may be rendered less desirable to some occupants thereof by there being located in the vicinity a school, a playground, or a municipal hospital. If damages could be recovered in such circumstances, crushing burdens would be imposed on the public treasury.”

CONCLUSION

It is clear that the appellant cannot prevail because the road was not relocated by the respondent, and because the diversion of traffic from property is not a compensable injury.

Respectfully submitted,

NEIL R. OLMSTEAD

E. J. SKEEN

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