1967

Rulon Brereton v. Ralph Dixon : Appellant's Brief

In the Supreme Court of the State of Utah

RULON BRERETON,

Plaintiff,

vs.

RALPH DIXON,

Defendant.

NO. 10,687

APPELLANT'S BRIEF

Appeal from the District Court of Utah County,
State of Utah
Hon. Maurice Harding, Judge

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CASES AND AUTHORITIES

In the Supreme Court of the State of Utah

RULON BRERETON,

Plaintiff,

vs.

RALPH DIXON,

Defendant.

CASE NO. 10,637

APPELLANT'S BRIEF

NATURE OF CASE

This is an action in negligence for claimed damages to part of a three acre orchard by reason of a grass fire caused by the escape of a rubbish fire built by defendant in connection with construction work.

DISPOSITION OF CASE IN LOWER COURT

The trial court entered judgment on the verdict in favor of plaintiff in the amount of $5,700.00.

NATURE OF RELIEF SOUGHT ON APPEAL

Defendant-appellant seeks a new trial solely upon the question of damages, on the theory that the trial court im-

properly admitted evidence and improperly instructed the jury on the question of damages.

STATEMENT OF FACTS

Paintiff-respondent is the owner of a three acre fruit farm adjacent to his home in north Provo (R. 132, 145-6). In March, 1963, defendant was engaged in construction of a fire station for Provo City Corporation on property near the plaintiff's orchard (R. 112). In order to construct the fire station, defendant was required to destroy an old building on the City's property. In connection with such demolition, defendant and his agents undertook to burn the tar paper and refuse from the old building (R. 113). These materials were burned intermittently during the day of March 22, 1963, and the morning of March 23, 1963. At around noon of March 23, a wind came up from the south, the fire escaped to dry grass north of the fire station and spread northward through intervening land and into plaintiff's orchard before it could be brought under control (R. 277-289).

The orchard consisted of alternate pear and peach trees, approximately twenty rows of trees each (R. 159). The grass fire went along part of six rows and a part of the seventh (R. 159). There is conflict in plaintiff's own evidence as to the extent of damage, if any, to the trees. If this were the only question, this appeal would not have been taken.

Plaintiff Rulon Brereton is an employee at U. S. Steel Corporation. The orchard is a three-acre family operated side-line with plaintiff (R. 145-6).

The jury by its verdict found that the fire was caused

at least in part by negligence of the defendant and his agents, and defendant does not attack this finding. By this appeal, defendant seeks review only of the theory upon which the trial court admitted evidence and submitted the case to the jury on the issue of damages.

It is remembered that the grass fire did not destroy the orchard. It went through about one acre, covering six and part of a seventh row, part of a twenty row orchard (R. 159). There is a conflict of evidence as to the extent of damage to the trees in the burned area, such conflict showing even in plaintiff's evidence (R. 133, 142, 159-164, 314, 324-330).

The errors claimed by defendant are that the trial court, over objection, admitted evidence of the value of each tree, independent of the land or the orchard as a whole, and gave an instruction, No. 21, (R. 44) stating in part:

> ". . . In determining the plaintiff's damages, if any, you may consider the reasonable value of the growing trees upon the premises at the time of their destruction; in other words, you should award such a sum as will fairly and reasonably compensate the owner for being deprived of the trees for their intended use; in this regard you should consider what they were worth on the premises in their growing state at the time of injury or destruction."

The trial court refused to give defendant's requested instruction No. 12 (R. 81) and No. 17 (R. 68), patterned upon **Jury Instruction Forms, Utah,** 90.1, 90.40 and 90.44, which we take to be the proper measure of damages in this jurisdiction.

The theory of damages thus submitted is, we believe, error requiring reversal.

ARGUMENT

POINT I

THE TRIAL COURT ERRONEOUSLY AND OVER OBJECTION ADMITTED EVIDENCE AS TO THE VALUE OF TREES INDEPENDENT OF THE LAND OR ORCHARD.

We take the proper rule of law as to damages to be as stated in A.L.I. "Restatement of the Law of Torts," § 929:

> "Where a person is entitled to a judgment for harm to land resulting from a past invasion and not amounting to a total destruction in value, the damages include compensation for
>
> (a) at the plaintiff's election
>
> (i) the difference between the value of the land before the harm and the value after the harm or cost of restoration which has been or may be reasonably incurred, or
>
> (ii) if a separable portion of the land has been damaged the loss of its value, and
>
> (b) the loss of use of the land, and
>
> (c) discomfort and annoyance, in an action brought by the occupant."

We believe this State is committed to that rule. **Park v. Moorman Mfg. Co.,** 121 Ut. 339, 241 P. 2d 914, and **Jury Instruction Forms, Utah,** No. 90.40.

There is some confusion in the cases on the application of the rule as respect growing crops and trees. The Supreme Court of Utah has ruled on the question of growing crops in the case of **Cleary v. Shand,** 48 Utah 640, 161 Pac. 453. We have found no Utah cases touching upon the rule as applied to trees, timber and the like.

We believe the distinction to be clearly stated in comment on clause (a)(ii), A.L.I. "Rstatement of the Law of Torts", § 929, from which we quote:

> "The value of a growing crop at the time of injury or destruction is the value of the yield which at that time would reasonably have been anticipated, less the prospective cost of further cultivation and marketing and a deduction for such hazards as hail and flood. With reference to many things, however, such as hedges, wells, fruit trees, and immature timber trees, it is impracticable to establish a separate value and the owners loss can only be measured by the diminution in the exchange value of the land or in its value to the owner." (Emphasis added)

This rule was applied in the case of **Cities Service Gas Co. v. Christen,** (Okla.) 340 P.2d 929, on the destruction of pecan trees, in the case of **Lawson v. Helmich,** (Wash.) 146 P. 2d 537, on the cutting of apple trees, and in the case of **Hill v. Morrison,** (Calif.) 263 Pac. 573, on the injury to fruit trees by cattle.

We quote from **Hill v. Morrison,** supra:

> "This worth, of course, related to the added worth of the ground with the trees, over the worth of the ground without the trees, was a proper method of determining the damages. (Cases cited) Since the method used considered the value of the trees as fruit producers,

it follows that an added sum for the crop itself would have been counting the damage twice and hence the allegation in the complaint referring to fruit as an added damage is pure surplusage".

We believe the rule to be well stated in **Annotation,** "Measure of Damages for Destruction of or Injury to Trees and Shrubbery," 69 ALR 2d 1335, page 1365:

> "In a great majority of cases the Courts have held that proper measure of damages for the destruction of or injury to fruit, nut, or other productive trees is the difference in value of the land upon which the trees stood just before and just after the injury or destruction."

We take the liberty of quoting from a case cited at the trial in support of his position by plaintiff, **Ratkins v. Mountain Home Coop. Irr. Co.,** 33 Idaho 623, 197 Pac. 247:

> "The measure of damages for the destruction of trees for want of water is what such trees were worth on the premises in their growing state at the time of their destruction, and in determining that question there may be taken into consideration the difference in value of the land immediately before the trees were planted and the value of the land after the trees were planted, which increase in value results by reason of the value of the trees in a growing condition."

Over defendant's objection, plaintiff was permitted to answer the question: "Mr. Brereton, do you have, based upon your experience and the fact that you own the orchard, do you have a judgment as to the value of a pear tree, one single pear tree, that was damaged in your orchard, or destroyed in your orchard?" (R. 150-152). Plain-

tiff was allowed to place before the jury a claimed value of $200.00 for each pear tree and $150.00 for each peach tree. This did not include the land on which the tree stood (R. 191-2).

On cross examination it was developed that he arrived at these figures by a calculated profit in the future, not based upon his actual past earnings from the orchard, of which he had little admitted, and records of none (R. 70 ff). The trial court then ordered Mr. Brereton's testimony stricken (R. 195) but thereafter showed a misconception of the measure of damages by remarking to counsel, before the jury: "You likely have here several experts who know what a tree of this age and type is worth. Why don't you just call them and ask them?" (Emphasis added) (R. 197).

Plaintiff's counsel then did that, and over objection Mr. Vern Stratton was allowed to testify to the same value per tree (R. 201-202). Counsel was then compelled by cross examination to develop the bases used for these values:

"Q (By Mr. Sorensen) Would you give us a break down on how you arrive at that $200.00 figure? How do you arrive at each of these figures, please?

"A I would be glad to. If we could break it down to say one tree on a one tree basis—

"Q —You gave the answer. I want you to explain how you arrived at it.

"A All right. It will take 10 years to replace that tree to the productivity that it was at the time that it was destroyed. During those 10 years that it will take to replace the tree, those trees — let's take a pear

tree first: that pear tree will produce approximately 10 bushels of pears each year. Selling the pears as this orchard would have done, he would sell them for from $2.75 to $3.00 a bushel. It will cost him $.75 to $1.00 a bushel to grow, to spray, and to harvest, and in the pursuit of taking care of this fruit, leaving a net profit of approximately $2.00 a bushel, which times 10 is $20.00 per year times 10 is $200.00.

"Q And you are assuming that the tree would produce every year?

"A Weather permitting.

"Q You are assuming that there are no complete wipe-outs frost-wise?

"A We very seldom have complete destruction.

"Q You are assuming not a major slump in the market price, aren't you?

"A I am assuming that it doesn't increase, which I think it is.

"Q And you are assuming a constant labor supply at a fixed price, are you not?

"A I don't think the labor will be any problem on a small orchard.

"Q You are assuming that the labor supply costs would remain constant, are you not?

"A I am assuming that the costs will remain as constant as of the price he received for it. If the costs increase, then also will his gross profit increase, because he will receive more for his fruit.

"Q And what about taxes?

"A This is one of the costs.

"Q And you are assuming that that will remain constant?

"A No. I say, as they increase so will his profit increase, because he will get more out of his fruit."

We respectfully submit that this is the very evil discussed in 25 C.J.S. 615, "Damages," §85c:

"It is also competent, in addition to showing the value of a farm before and after the injury to the trees, to offer testimony as to the income from the orchard for several years prior to the injury, but evidence of the amount of fruit trees of like nature would produce in a seasonable year and the market value thereof has been condemned as too uncertain."

Another witness, Mr. Clarence D. Ashton, a friend and relative of plaintiff, was allowed, over objection, to testify to the life expectancy of a pear tree (R. 213). Again, over objection, he was allowed to testify to the value of a tree as a tree and independent of the land (R. 220-224), and defendant could give no bases of any substance as to how he arrived at these values (R. 224-230).

Though it dealt with the question of damage to growing annual crops, and not trees, the case of **Cleary v. Shand,** 161 Pac. 453, 48 Utah 640, contains the best statement possible of the basis for our claim of error. In that case Justice Straup stated:

". . . The vice of such questions is not only to permit the witness to invade the province of the jury, but also that he, in answering them, may adopt a rule, or consider an element of damage, beyond the legal measure. . . . We do not take kindly to the views expressed by some courts that, if the witness, in fixing

the amount of damage in such case, adopts or considers an element beyond the legal measure, the matter may be taken care of on cross-examination. The competency of direct testimony should not be made to depend upon the ability or skill of the cross-examiner to weed out the improper from the proper elements considered by the witness. It is weight, but not competency, of evidence which may thus be tested."

We believe no competent evidence as to the measure of damages was presented. Plaintiff had no record of profitable operation of the orchard before the fire (R. 171-174). Plaintiff offered no evidence touching directly or indirectly on the respective values of the orchard, as an orchard, before or after the fire, and when defendant questioned plaintiff on these values, he did not know (R. 292-305).

We respectfully submit that the trial court erred in admitting incompetent evidence on the measure of damages, and that this error could not be cured by cross-examination, without regard to the degree of competence of the cross-examiner.

POINT II

THE TRIAL COURT ERRONEOUSLY INSTRUCTED THE JURY ON THE QUESTION OF DAMAGES.

Defendant requested the court to give the following instructions on the measure of damages (R. 81; R. 68):

"DEFENDANT'S REQUESTED INSTRUCTION NO. 12.

"If you find the issues in favor of the plaintiff and against the defendant, it will be your duty to award the plaintiff such damages, if any, as you may find

from a preponderance of the evidence will fairly and adequately compensate him for any injury and damage he has sustained as a proximate result of the defendant's negligence complained of by him.

"In awarding such damages you should award him such sum as will reasonably compensate the plaintiff for damages to his property as a proximate result of injury by the plaintiff.

"That sum is equal to the fair market value of the property immediately before and immediately after the injury. If the property is capable of restoration to its fair market value as it existed immediately before the injury at an expense less than the difference in value, then the measure of damages is the expense of such restoration rather than such difference in value.

"The amount of damages thus assessed for all the foregoing must not exceed the sum of $20,000.00, the amount plaintiff prays for in his complaint." (R. 81)

"DEFENDANT'S REQUESTED INSTRUCTION NO. 17.

"The measure of value of the property is the fair market value at the time and place of the damage. This is defined as the price at which a person having something which he desires to sell but is not under compulsion to sell could and would sell the property to a person who desired to buy but was under no compulsion to buy." (R. 68)

These requested instructions are from **Jury Instruction Forms, Utah,** Nos. 90.1, 90.40, and 90.44. These, we believe, accurately state the law of this jurisdiction. They are founded on the case of **Park v. Moorman Mfg. Co.,** supra. The trial court refused these requests. Exception to

this refusal was taken (R. 270), and a motion for a new trial, denied by the court, was made thereon (R. 89).

Instead, the trial court gave only the following instruction on the measure of damages (R. 44):

"No. 20

"You are instructed that if you find the issues in favor of the plaintiff on his complaint and against the defendant, it will be your duty to award the plaintiff such damages, if any, as you find from a preponderance of the evidence will fairly and adequately compensate him for any damage he has sustained as a proximate result of the defendant's negligence.

"In determining the plaintiff's damages, if any, you may consider the reasonable value of the growing trees upon the premises at the time of their destruction; in other words, you should award such a sum as will fairly and reasonably compensate the owner for being deprived of the trees for their intended use; in this regard you should consider what they were worth on the premises in their growing state at the time of injury or destruction.

"The amount of damages thus assessed must not exceed the sum of $20,000.00, the amount the plaintiff prays for in his complaint."

We believe this instruction, when applied to the inadmissible evidence presented to the jury as discussed under Point I of this brief, constitutes prejudicial error. Our authority for and reasoning supporting this position are the same as for Point I.

Under this instruction, the jury was directed to consider what the owner claimed to have invested in the trees, uncertain as it was, hypothetical evidence as to what a peach tree and pear tree might produce, speculative as this

may be, and bald unsupported testimony that such tree was worth so many dollars, all independent of the land, vagaries of weather and market, and without regard to actual production of that particular orchard, a subject vague indeed to the plaintiff. This, we submit, was error warranting a new trial, wherein a proper basis of damages may be presented.

CONCLUSION

This case gives rise to an interesting proposition. According to the record—and we accept these figures—if pear trees are planted on twenty foot centers, one would have about 108 trees per acre. At $200.00 per pear tree, a ten year old orchard would be, on the evidence herein admitted and the theory submitted to the jury, worth $21,600.00 per acre, exclusive of the value of the land. Add to this a hundred peach trees interspersed in this orchard, with a value of $150.00 each, and the proposition becomes interesting indeed. Under the rulings of the trial court and the instructions given and refused, a jury might have awarded plaintiff $24,100.00 for one acre of orchard, and the plantiff keep the land! This should be of interest to the State Highway Department and other entities who exercise the power of eminent domain.

We respectfully assert that the evidence erroneously admitted and error in instructing the jury on damages resulted in a verdict punitive to the defendant rather than compensatory to the plaintiff, and that defendant should, therefore, be granted a new trial on the issue of damages.

Respectfully submitted,

DALLAS H. YOUNG, JR.