1983

Utah Department of Transportation v. John D'Ambrosio, Mable D'Ambrosio, His Wife, Joseph Cha And Marion Cha, His Wife : Brief of Appellants

IN THE SUPREME COURT OF THE STATE OF UTAH

UTAH DEPARTMENT OF TRANSPORTATION, Respondent, vs. JOHN D'AMBROSIO, MABLE D'AMBROSIO, his wife, JOSEPH CHA, and MARION CHA, his wife, Appellants.	:	SUPREME COURT NO. 19271

BRIEF OF APPELLANTS

APPEAL FROM A JUDGMENT OF THE DISTRICT COURT

OF CARBON COUNTY

HONORABLE BOYD BUNNELL, JUDGE

BRANT H. WALL, ESQ.
WALL & WALL, a.p.c.
Suite 800 Boston Building
Salt Lake City, Utah 84111

Attorney for Appellants

STEPHEN C. WARD, ESQ.
Assistant Attorney General
115 State Capitol
Salt Lake City, Utah 84114

Attorney for Respondent

TABLE OF CONTENTS

CASES CITED

TABLE OF CONTENTS (cont.)

STATUTES CITED

SECONDARY AUTHORITIES CITED

TABLE OF CONTENTS (cont.)

IN THE SUPREME COURT OF THE STATE OF UTAH

UTAH DEPARTMENT OF TRANSPORTATION,	
Respondent,	
vs.	SUPREME COURT NO. 19271
JOHN D'AMBROSIO, MABLE D'AMBROSIO, his wife, JOSEPH CHA and MARION CHA, his wife,	
Appellants.	

PRELIMINARY STATEMENT

The parties will be referred to as in the trial court, "T.R." refers to Transcript of Record, "R." refers to Record, and "Ex." refers to Exhibit.

NATURE OF THE CASE

This matter involves two eminent domain cases which were consolidated for trial and involving parcels of real property situate in Carbon County, State of Utah. The jurisdictional issues relative to the right of the Plaintiff to condemn were not contested, and the matters proceeded for trial based upon the statutory issue of just compensation.

DISPOSITION IN THE LOWER COURT

The matter came on for trial before the Court with a jury on the 5th day of April, 1983, before the Honorable Boyd Bunnell, District Court Judge, which trial was scheduled following a series

of hearings and rulings on various Motions.

Based upon prior rulings of the trial court, and the posture of the pleadings, the parties entered into a stipulation at the commencement of the trial to settle the issue of damages as to the value of the parcel "taken in fee", (Parcel 69:A), but reserved, as an issue on appeal, the Court's Orders and rulings which denied the defendant landowners to seek a determination of severance damages sustained by their respective remaining tracts by jury trial. (R. 61-64, 74-75, 107-108, 110-111, 126; T.R. 76-82).

Pursuant to said Stipulation, Judgment was entered for the value of the land taken, (R. 121-123), and the defendant landowners thereafter instituted this appeal.

RELIEF SOUGHT ON APPEAL

Appellants ask that the Orders and rulings of the trial court, denying them from asserting their claims for severance damages, be reversed and that the matter be remanded for jury trial on said issue.

STATEMENT OF FACTS

The Plaintiff, Utah Department of Transportation, instituted five (5) separate actions in the District Court of Carbon County, Utah, Civil Nos. 11211, 11212, 11213, 11214, and 11215, pertaining to various parcels of land located in the southeast quadrant of Price, Utah, and generally referred to as the "D'Ambrosio properties". (R. 1, 39-46; T.R. 3-7; Ex. 2).

The purpose of such actions was to acquire lands for the construction and maintenance of a new bypass highway facility

constructed in and near Price, Utah. (R. 1, 39-46; T.R. 3-7; Ex. D-1).

Common to each case was a small strip of land which constituted a private access and right-of-way leading to and from the respective parcels of the various defendant landowners to the public highway located northerly therefrom, and which was condemned by the Plaintiff as part of the lands being acquired for highway development. This particular parcel is identified throughout the various cases as "Parcel No. 028-2:69:A", and sometimes referred to as "Parcel 69:A", comprising approximately 0.10 acres, more or less. (R. 74-75; Ex. D-1).

By Order of the trial court, Civil Actions 11213 and 11214 were consolidated for trial, (R. 74-75), and it is these cases which are the subject of this appeal. The trial court ruled that the defendant landowners, John D'Ambrosio, Mable D'Ambrosio, his wife, Joseph Cha, and Marion Cha, his wife, were not, as a matter of law, entitled to assert a claim for severance damages to their respective private residential premises. (R. 61-64, 74-75, 107-108, 110-111; T.R. 55-57).

It is this ruling and Order that the Defendants object to and ask that this Court reverse same, and order a trial on the issue of severance damages.

The parcel of land which forms the focal point of this appeal, (Parcel 69:A), is but a part of a total tract which has historically been owned, used, and occupied by the "D'Ambrosio family" of Price, Utah, as a private right-of-way and access to their respective tracts of land. (R. 1-9, 36-46, 52-57, 65-69, 80-98; Ex. D-1)

It is generally undisputed and acknowledged, as evidenced by the pleadings, exhibits, and transcript, that John D'Ambrosio and Mable D'Ambrosio, husband and wife, own and occupy a small residential lot upon which they have constructed their family residence, located at the most southerly end of "Parcel 69:A", and contiguous to the easterly line of said parcel, and that said "Parcel 69:A" has been and does in fact constitute the sole established access from the public highway leading to their home fronting on said "Parcel 69:A". (R. 1-9, 36-46, 52-57, 65-66).

The Defendants Joseph Cha and Marion Cha are husband and wife, and own in fee simple a private residential lot adjacent to the north boundary of the residential lot owned and occupied by John D'Ambrosio and Mable D'Ambrosio, his wife, upon which there has been constructed their family residence, and which likewise fronts on and is contiguous to the east line of "Parcel 69:A", which parcel affords the sole and only established access leading from their home to the public highway located northerly therefrom.

Marion Cha and John D'Ambrosio are brother and sister, and with the exception of their spouses, the other named Defendants in Civil Actions, Nos. 11213 and 11214, are children of a deceased brother of the Defendants John D'Ambrosio and Marion Cha. The other named Defendants owned an additional residential tract contiguous to and immediately north of the Cha property, which likewise fronted upon "Parcel 69:A", although the northerly line of that parcel was contiguous to a county road running in an easterly direction. This particular parcel, however, was acquired by the Plaintiff in separate condemnation proceedings for highway construction and development.

The subject property (Parcel 69:A) had for more than 25 (twenty-five) years been utilized by the Defendants and the "D'Ambrosio family" as a right-of-way for ingress and egress to the parcels of land which each of the parties own. (R. 1-9, 36-46, 52-57, 65-69, 80-98)

Based upon an examination of the title thereto, the ownership of "Parcel 69:A" was, at the date of condemnation, vested in fee simple as follows: 88.92% undivided interest in John D'Ambrosio; 11.08% undivided interest or 2.77% each by Domenic D'Ambrosio, Paul D'Ambrosio, Sharon D'Ambrosio, and Frances D'Ambrosio; subject, however, to an easement and right-of-way in favor of all of the named Defendants for ingress and egress to their respective properties. (R. 80-98).

In Civil Actions, Nos. 11213 and 11214, the Plaintiff recognizes and alleges the Defendants are either "record owners" or "parties in interest" of "Parcel 69:A", (R. 80-98)

, and does not dispute the fact that the "Parcel 69:A" constituted the established method and source of ingress and egress to the resepctive parcels of land belonging to the Defendants over a long period of time. (R. 1-9, 23, 39-42)

Based upon a Motion for Summary Judgment filed by the Plaintiff, the Court, by Order on August 31, 1981, ruled that the Defendants, Joseph Cha and Marion Cha, his wife, and John D'Ambrosio and Mable D'Ambrosio, his wife, were not entitled to any compensation for severance damages to their respective residential properties owned in fee simple, as any such damages would be consequential in nature, and therefore, not subject to compensation. (R. 50-51, 74-75)

Upon further hearing and argument, the Court reaffirmed prior ruling by Order dated November 3, 1981, therein concluding and ordering that said Defendants were not entitled to seek severance damages, notwithstanding the fact that they owned fractional interests or established rights-of-way with the that the Court accepted factually the conditions of ownership asserted by the Defendants John D'Ambrosio and Mable D'Ambrosio (R. 107-108).

STATEMENT OF POINTS RELIED UPON

POINT I

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN RULING THE DEFENDANTS JOHN D'AMBROSIO, AND MABLE D'AMBROSIO, HIS WIFE, JOSEPH CHA AND MARION CHA, HIS WIFE, AS A MATTER OF LAW, ARE PRECLUDED FROM ASSERTING A CLAIM FOR SEVERANCE DAMAGES TO THEIR RESPECTIVE PRIVATELY OWNED RESIDENTIAL PROPERTIES.

ARGUMENT

The subject actions involve the condemnation and expropriation of a private and exclusive right-of-way owned and used in common by the Defendants, which constituted the established and exclusive access from their respective residences to the public highway located northerly therefrom. (R. 1-9; Ex. D-1)

The critical issues here presented are:

1. Does the taking of a private easement or right-of-way constitute a "taking" in the constitutional and statutory sense and,

2. Whether damages accrue to the portion of the property remaining after the portion condemned has been taken.

It is clear under the Eminent Domain statutes of this that a private easement or right-of-way, as well as, fee simple

land may be taken for a public use under appropriate circumstances. See: Title §78-34-2, U.C.A., (1953 as amended).

Title §78-34-10, U.C.A., (1953 as amended), provides, in part, that in determining the amount of compensation and damages to be awarded in an eminent domain proceeding, the Court or jury must weigh the legal evidence and 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. * * *"

On the issue of whether or not a private easement or right-of-way constitutes such an estate in property as to give rise to a claim for damages when taken in eminent domain proceedings, it has generally been recognized that such an estate in real estate does in fact constitute a "property interest" in the constitutional sense and must be compensated for when taken under the exercise of eminent domain.

In Nichols on Eminent Domain, Third Edition, Volume 2, Section 5.14, it is stated:

> "It is well settled that a private easement in real estate is property in the constitutional sense, and may be taken via exercise of the power of eminent domain. * * * An easement is an interest in land, and it is taken in the constitutional sense when the land over which it is exercised is taken; * * *"
>
> "When the servient tenement is the subject of a condemnation proceeding judicial in character it

> has been held that the owner of the dominant tenement is a necessary party. * * *"

See: STATE OF ARIZONA v. THELBERG, 350 P.2d 988, (Ariz. 19[illegible]; STATE OF ARIZONA v. WILSON, 420 P.2d 992, (Ariz. 1966); [illegible] BRINTON, 41 Idaho 317; 239 P. 738.

In the instant case, it is undisputed that the Defendants John D'Ambrosio and Mable D'Ambrosio not only utilized the subject "Parcel 69:A" as a right-of-way, but were in fact the owners in fee simple of 88.92%, subject, however, to the rights of the other Defendants as users thereof as an easement and right-of-way to their respective properties and that such right-of-way was private in nature. (R. 1-9, 80-98)

This Court has consistently held that owners of property which abutt an established public street and have an easement of access thereto are entitled to be compensated when such access is substantially impaired or destroyed through the exercise of eminent domain power. See: DOOLY BLOCK v. SALT LAKE RAPID TRANSIT CO., 9 Utah 31, 33 P. 229; STATE ROAD COMMISSION v. ROSELLE, 101 Utah 464; 120 P.2d 276; STATE ROAD COMMISSION v. HANSEN, 14 Utah 2d 383 P.2d 917; Nichols on Eminent Domain, Third Edition, Volume 4, Section 6.36.

In the case of City of Lewiston v. Brinton, supra, a similar fact situation was involved, and the Supreme Court of Idaho held:

> "Whether the rights of the easement owners were interfered with or impaired in any manner was a question of fact only determinable if they were parties, furthermore, under C. S. §7414, it must be determined whether damages accrue to the portion of the property remaining to the owner after the portion condemned has been taken. Appellant herein owned buildings adjacent to the proposed alley, and consequently, if the tenants

> were affected by the change in the thoroughfare, he would be affected, and, furthermore, those who claimed easements might be vitally affected by the changed use resulting from the establishment of the proposed alley. These easement claimants should therefore have been made parties. C. S. §7410. * * *" (Emphasis added)
>
> "* * *in view of C. S. §7414, the jury should have been instructed on damages which might accrue to the remaining portion of appellant's property not sought to be condemned. * * *" (Emphasis added)

It has generally been recognized that when property has been injuriously affected or has sustained a special or peculiar damage as a result of the exercise of the power of eminent domain, compensation is required especially where there has been some physical disturbance of a right which an owner of his parcel of land has enjoyed in connection with his property which gives it additional value. See: Nichols on Eminent Domain, Third Edition, Volume 2, Section 6.27 (3); BOARD OF EDUCATION OF LOGAN CITY SCHOOL DISTRICT v. CROFT, 13 Utah 2d 310, 373 P.2d 697; CUTLER v. CITY OF BOSTON, 86 N.E. 798; WEBSTER v. CITY OF LOWELL, 8 N.E. 54; STATE ex Rel. STATE HIGHWAY v. ZAHN, 633 S.W.2d 185; WILSON v. KANSAS CITY, 162 S.W.2d 803.

The ownership of "Parcel 69:A", and the ownership of the respective, individually owned residential tracts, bear a relationship to one another, which even though not in common ownership in the same quantity, nevertheless sustains the defendant landowners' claim to severance damages by reason of the taking of the easement servicing the individually owned properties.

It has generally been recognized by the weight of authority that severance damages are generally allowed where there is a unity of title between two tracts, even though the quantity or quality of the title or estate in the tracts differ. See: ex Rel. SYMMS v.

NELSON SAND AND GRAVEL, INC., 468 P.2d 306; CITY OF LOS ANGELES v. WOLFE, 491 P.2d 813; HEMMERLING v. TOMLEU, INC., 432 P.2d 887; Nichols on Eminent Domain, Third Edition, Volume 4, Section [illegible]

In the Symms case, supra, the Court noted:

> "* * * . . . . accordingly, we chose to follow the line of authority which allows severance damages where there is unity of title between two tracts, even though the quantity or quality of the title or estate in the two tracts differ. * * *"

In the case of BOXBERGER v. STATE HIGHWAY COMMISSION, [illegible] P.2d 920, (Colo. 1953), the State Highway Commission condemned private access, and in addressing the issue of severance damages to be awarded in that case, the Supreme Court of Colorado noted:

> "* * *It would seem difficult to establish the true or market value of access rights since they are not a commodity dealt in on a buying and selling market; however, the right of ingress and egress to and from a person's property adds or detracts from the property value and it would seem that the true value of such rights could only be found in the difference between the value of the land and its use for any and all kinds of purposes before the disturbance or destruction of such rights, and the value of the land minus any access or disturbed or inconvenient access to the highway. * * *"

Where the parcel actually condemned in this case constituted a private right-of-way which afforded the means of ingress and egress to the individually owned residential tracts, it is our contention that even though the landowners did not own or possess the entire fee simple estate in said right-of-way, it was, nevertheless, such an integral part of their respective tracts as to constitute each a separate and total unit. The test to be applied in determining whether or not there exists a single tract of land, seems to be the requirement that there be such a connection or relation of adaptation, convenience, and use as to make the

condemned tract reasonable and substantially necessary to the enjoyment of the remaining parcel or parcels. CITY OF STOCKTON v. MAPANGO, 31 P.2d 467.

In 29(A) C.J.S., Section 140, Page 591, it is there stated:

> "* * *There is no single rule or principle established for determining the unity of lands for the purpose of awarding damages in eminent domain cases. While, generally, there must be unity of title, contiguity of use, and unity of use, under certain circumstances, the presence of unities is not essential unless unity of use is given greatest emphasis, it has been called the controlling and determining factor. It has been said that in order to constitute a unity of property within the rule, there must be such a connection or relationship of adaptation, convenience, and actual and permanent use as to make the enjoyment of the parcel taken reasonably and substantially necessary to the enjoyment of the parcels left, in the most advantageous and profitable manner in the business for which they are used. * * *"

In the case of STATE OF UTAH, by and through its road commission, v. HOOPER, 469 P.2d 1019, 25 Utah 2d 249, a similar case was presented. In that action, the defendant landowner owned a strip of land 1630 ft. long by 33 ft. in width, upon which it had constructed a canal and service roadway. The condemning authority constructed a freeway over and across a portion of the strip of land aforesaid, and in so doing, effectively destroyed it for vehicular traffic.

In that case, as in the instant case, the trial court failed to award or recognize the existence of severance damages, and the Supreme Court held that such ruling of the trial court was reversible error and remanded the case for a determination on the amount of severance damages to be awarded.

Another case which we believe to be highly probative of the issue herein, is that of BABINEC v. STATE, 512 P.2d 563, (Alaska

1973). In that case, the ownership of the lands affected by the condemnation consisted of an ownership in fee simple, together with a leasehold interest, and the Supreme Court of Alaska, addressing itself to the issue of severance damages, stated:

> "(1,2) Turning first to the question of severance damages, a property owner is entitled to such damages if it is determined that the property taken is part of a larger parcel which has been adversely affected by the taking. The principal test utilized for defining the "larger parcel" for severance damage purposes is often referred to as the "three unities" theory. According to this doctrine, three factors are employed in ascertaining whether property in which the take occurs constitutes a single larger parcel. The factors are: physical contiguity between the several parcels, unity of ownership, and unity of use. Where the various units of property are physically contiguous with others, owned by the same party or parties, and used for the same purpose, the property is said to comprise one single parcel of land."
>
> "(3) While the "three unities" theory is helpful in ascertaining the "larger parcel" to be considered for severance damage controlling, we do not hold that the theory is controlling. If competent evidence is presented indicating that by reason of condemnation of a portion of his property, remaining property owned by the property owner is diminished in value, the issue of severance damages should be presented to the jury, regardless of whether slavish adherence to the "three unities" theory might lead to a contrary result. In the case at bar the parties had no substantial argument with reference to the entire 65-acre Babinec ownership constituting one "larger parcel" for the purpose of ascertaining severance damages. * * *)

CONCLUSION

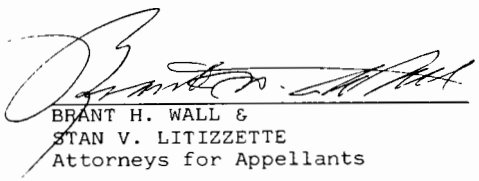
The two parcels of land here involved, constitute individual residential lots upon which the respective Defendants reside with each lot having, as an integral part thereof, an established private right-of-way and access extending northerly to the public highway system. It is this private access and right

way that has been condemned and taken in fee by the Plaintiff, and thereby gives rise to the claim and contention on the part of the said landowners that their remaining tracts have sustained severance damages.

We believe that the authorities cited above adequately sustain the defendant landowners claim that their respective, individual residential homes, together with the right-of-way extending to the highway system, constituted a single integral unit of property and that when the access of said property was taken and condemned for highway development, the remaining tracts sustained a diminution in value and that a jury question was presented relative to the amount of severance damages sustained by the respective landowners.

It is, therefore, their claim and contention that when the trial court concluded, as a matter of law, that severance damages could not be awarded under the circumstances here involved, such ruling deprived the respective landowners of the right to assert their claim to an award of just compensation and damages pursuant to constitutional and statutory rights.

RESPECTFULLY SUBMITTED:



BRANT H. WALL &
STAN V. LITIZZETTE
Attorneys for Appellants

I hereby certify that two copies of the foregoing Brie
Appellant were delivered to Stephen C. Ward, Assistant Attorne
General, 115 State Capitol, Salt Lake City, Utah 84114, this
day of August, 1984.