

1967

Duane P. Russell And Verlene Russell, His Wife, And John Dale Russell v. Hooper Irrigation Company, Et Al : Respondent's Brief

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IN THE SUPREME COURT OF THE STATE OF UTAH

DUANE P. RUSSELL and VER-
LENE RUSSELL, his wife, and
JOHN DALE RUSSELL,

Plaintiffs and Appellants,

vs.

HOOPER IRRIGATION COM-
PANY, et al,

Defendants and Respondents.

No.
10929

RESPONDENTS' BRIEF

Appeal from the Judgment of the Second Judicial District Court
for Weber County
Honorable Charles G. Cowley, Judge

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INDEX

	Page
NATURE OF THE CASE	1
STATEMENT OF FACTS	2
ARGUMENT	5
POINT I. ALL GENUINE ISSUES OF FACT BETWEEN THE RUSSELLS AND ALL OTHER LITIGANTS WERE CON- CLUDED IN THE CONDEMNATION LITI- GATION.	5
POINT II. THE REAL PARTIES IN IN- TEREST HAVE BEEN BEFORE THE LOWER COURT IN BOTH CASES.	12
POINT III. PUNITIVE DAMAGES ARE NOT RECOVERABLE IN A TRESPASS ACTION WHERE COMPENSATORY DAMAGES ARE NOT PRESENT.	13
CONCLUSION	15

AUTHORITIES CITED

22 Am. Jur. 2d, Par. 241 p. 329	14
Utah Code Annotated	
Section 73-1-6	4
Section 73-1-7	4

CASES CITED

Graham v. Street, 2 Utah 2d 144, 270 P. 2d 456 (1954)	14
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RESPONDENTS' BRIEF

NATURE OF THE CASE

The basic issue involved in this matter concerns the scope and coverage of a condemnation proceeding between basically these same parties under another lawsuit and whether, in addition to the condemnation action, the plaintiffs in this proceeding can maintain a separate trespass action against the condemnor. The District Court in and for the Second Judicial District,

Weber County, ruled that the prior condemnation proceeding concluded all damage matters between the parties, and granted summary judgment.

STATEMENT OF FACTS

The Hooper Irrigation Company is a mutual irrigation company engaged in distributing water to its stockholders in the western portions of Weber and Davis Counties in a rural area. The Company has its main canal and canal branches, and from each canal branch the different users in the various areas take water through separate ditches, referred to as laterals. The plaintiffs in this action were water users on one of the lateral ditches.

In an effort to better distribute water and to conserve water losses in its canals and lateral ditches the defendant Company undertook an extensive program of re-arranging the branch canals and laterals and, in so doing, converted the former dirt and sod ditches and canals into concrete-lined waterways.

The plaintiffs were water users and stockholders on a small lateral ditch which ran west from one of the Company's branch canals. They used the ditch along with two others in the area — Effie Hooper and Charles Pinkham. After considerable study and investigation the Company concluded that these three users should be placed into a larger ditch system with other users, thereby consolidating two ditches into one. In order to

effect this arrangement the new and enlarged ditch would be placed in the same location as that of the former ditch serving the three water users, and would extend westerly beyond their properties, and would then turn south in the direction of the properties of numerous other water users.

To assist this Court in visualizing the area involved, Exhibits C, D and G of Case No. 35984 (which was the condemnation action — incorporated into this case by reference and Order (R. 10)) show the general condition of the former lateral serving the three water users in the late fall of 1959 just before the time that the alleged trespass took place.

The subject lateral ditch was located along the north side of the properties of the three water users in the fenced portion of the county road. The Company secured permission from the Weber County Commissioners and from the first two water users along the route (i.e. Charles Pinkham and Effie Hooper) to flatten and level the old ditch and to remove the brush and trees along the route during the early part of December, 1959 (R. 7 g). Although the ditch was within the county road area, both Pinkham and Hooper owned to the center line of the highway.

This construction work and the manner of filling the ditch can best be illustrated by examining Exhibit F of Case No. 35984, which shows the filled-in ditch opposite the Effie Hooper property at the point where the Russell properties commence. However, as will be

pointed out in argument, the title of the Russells did not extend beyond their fence, and included no part of the ditch area within the county road.

As indicated by appellants the construction activities on the dirt ditch lateral serving the three involved water users commenced on or about December 7, 1959. At that time the dirt lateral ditch was not carrying any irrigation or stock water, inasmuch as all of the water had been turned out of the main canal system (R. 7 g). No use was being made of the lateral ditch for any purpose whatsoever at the time.

When it became evident that defendants Russell were going to object to the revised irrigation system the respondent Company stopped construction activities at a point at the west end of the Effie Hooper property — where the Russell properties commenced on the south side of the county road (see Exhibit F — Case No. 35984). Thereupon, on December 3, 1959, the Company, acting through its Board of Directors, adopted a resolution providing that eminent domain proceedings be commenced pursuant to Sections 73-1-6 and 73-1-7, Utah Code Annotated, 1953, to enlarge the existing dirt lateral ditch (see Exhibit A — Case No. 35984). On January 15, 1960, the respondent Company filed its Complaint in Case No. 35984 to acquire the easement right which defendants Russell had in the affected ditch lateral.

In subsequent court proceedings the action was tried to a jury, which assessed damages in favor of de-

fendants Russell against Hooper Irrigation Company in Civil No. 35984 in the total amount of \$260.00. That judgment has been duly satisfied of record, and these defendants contend that all items of damage due to the appellants Russell were provided for and determined in that proceeding.

ARGUMENT

POINT I

ALL GENUINE ISSUES OF FACT BETWEEN THE RUSSELLS AND ALL OTHER LITIGANTS WERE CONCLUDED IN THE CONDEMNATION LITIGATION.

Proceeding upon the long established premise that in summary judgment cases the facts must be viewed most favorably to the appellant, respondent will here point out that as a matter of fact and law there are no genuine issues left for determination which were not concluded in the condemnation proceeding. Under Rule 56 (c) it is well to note that the language specifies that summary judgment may be granted if the pleadings, admissions on file, affidavits and other matter show —

“ . . . That there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”

It can hardly be imagined that any type of litigation concludes every possible issue of fact; however, it is the position of respondent that there is no *genuine* issue as to any *material* fact which remains in this alleged trespass action.

The condemnation action was originally brought against the Russells since the respondent Company was affecting an easement right which the Russells had to convey water through the former ditch along the public street. However, when appellants state in their brief at page 6, pursuant to an Affidavit filed by Duane P. Russell, that there was a trespass "upon the land of the plaintiff . . .", such is not the case. Immediately prior to the commencement of condemnation proceedings and the securing of an Order of Occupancy in Case No. 35984, the respondent Company did apparently engage in a technical trespass upon an unused and dormant easement right of the Russells in the lands of others. Without attempting to get involved in a minute argument over the nature and degree of property rights, to farm folk in that area the easement right of the Russells in the ditch area owned by Effie Hooper and Charles Pinkham was not as evident as would have been the situation had there been a trespass upon land known to have been owned by the Russells. At any rate, the Russells originally contended that the trespass was on their fee land, but the proceedings in Case No. 35984 clearly established that no trespass actually occurred on their fee land. In the Pre-Trial Order in that action (R. 7 i) it was provided:

" . . . With respect to the ownership of the land upon which said ditch easement is located, it will be held that defendants Russell own no part of the fee upon which said ditch was located unless proof thereof is submitted to opposing counsel within thirty (30) days from the date hereof."

These appellants never furnished such information, the record is devoid of such proof, and the condemnation trial proceeded on the basis of the Russells owning an easement right only.

The only issue which thus presents itself before this Court is whether appellants Russell secured full compensation for the damage to their easement under the statutory provisions allowing joint use of irrigation facilities. The answer to this question must be found in the condemnation proceedings in Case No. 35984.

The Pre-Trial Order in the condemnation action (Civil No. 35984) required defendants Russell to furnish this respondent with an itemization of the damages claimed "*. . . arising out of and in connection with the taking of the property rights described in the complaint:*" In fact the very same foregoing words were stated by counsel for these appellants in the statement so furnished (R. 7 e). Further, in the furnished Statement of Claim for Damages the following items were included as damages:

2. Construction of large head gate
opposite Effie Hooper property\$450.00
3. Construction of large headgate 200
feet west of headgate previously
mentioned\$300.00

Although these appellants on page 9 of their brief state that they ". . . did not contain a counterclaim for the damage alleged in this suit . . . , " they did in fact

very definitely include two headgates in the county road area to the north of and opposite the 12 acres of land bordering the county road area. Actually, one of the main items at issue in the condemnation case was this very easement in the county roadway area. In answer to a special interrogatory submitted to the jury concerning this easement in Case No. 35984 (R. 7 d) the jury responded as follows:

2. Damage to the Russells' irrigation easement in the public street,
if any\$258.00

/S/ Allison W. Ogan
Foreman

These appellants are in the situation of attempting to take two shots at the same target. They overlook the basic test of market value in eminent domain cases which clearly establish that the measure of damages in a case of the type here involved is that of the difference in market value of the irrigation easement facility *before* and *after* the imposition of the new facility for irrigation purposes in place of the facility previously used by appellants. Under the "before" and "after" rule the various items affecting the difference in value are considered — such as headgates and diversion facilities — and the jury awards an amount which should reflect the total diminution in value, if any. Applying this rule specifically to the condemnation action heretofore tried and its relationship to this case, it should be clearly remembered that, as to any headgates in the county road area which may have been removed by this respond-

ent during the course of construction there were placed *substitute facilities* in place of those removed so as to accomplish substantially what the prior facilities were doing. It may well have been that the jury award of \$258.00 for damage to the appellants' irrigation easement in the public street in the condemnation proceeding might there have well been an unwarranted recovery. In any event, if a double recovery has not heretofore been had, there is no justification for giving appellants another shot at the very same alleged damage item.

So as to further assist this Court in arriving at a mental picture of the new facility which was created in the same location as the former dirt ditch lateral, an examination of Exhibits 2, J and H in Case No. 35984 should point out — as the jury verdict clearly indicates — the vastly improved facility made available to these appellants and the other water users in the vicinity.

Appellants' Complaint (R. 1-p. 3) in this matter alleges that respondent —

“ . . . placed heavy earth-moving machinery and equipment on the said lateral of the plaintiffs', filled a large portion of the lateral with earth, and removed and destroyed numerous concrete and steel headgates and other water-control facilities in said lateral; . . . ”

Since these were the alleged acts of trespass and damage — and since the only possible items of damage involving facilities having cost value were the headgates

and other water control facilities which were fully and adequately covered in the condemnation case, it is difficult to see where any other possible item of damage could be raised in this trespass proceeding. Certainly, when this problem arose in December of 1959, no use was being made of the facility. And there is no claim that the new facility was not in condition to adequately substitute for the old facility when the irrigation season commenced in the spring of 1960.

So that there will be no question that the condemnation proceeding adequately covered any and all damages to the irrigation easement, Instruction No. 2 (2) of the Court to the jury in Civil No. 35984 is here included:

“The amount of damages done, if any, to the defendants’ easement for irrigation water transfer in the public street in question. Such damages are the difference in the value of the irrigation easement before the taking by the Hooper Irrigation Company’s right to join in the use of the ditch and the value of such joint use of the easement to the defendant landowner’s holding lands, served by the ditch after the construction of the project. That is, such a sum as will justly compensate the defendants so they are no better or worse off, or no poorer or richer than they would have been if such a taking had not occurred.”

In sub-portion (1) of Instruction No. 2 the lower Court further elaborated on the easement in the street area and any construction damages, as follows:

“ . . . Evidence of damages done to the defendants' holdings during construction, may be considered in determining said value but are not binding or necessarily, or likely, to be the market price of such an easement, but the amount must be equal to or greater than the actual damage in the case to said land and improvements. The value of such an easement is defined as the price one who desired such an easement, but not obligated to buy it, would pay for the easement; and the value a person, who was not obligated to sell such an easement, would sell it for under the circumstances.”

It is very clear that the lower Court fully instructed the jury under the evidence as to the relationship between any construction damages to the easement and its “before” and “after” market value. As such the damages complained of by appellants in this trespass action have been completely and fully covered, and there is no issue of damages left for this matter to determine. Counsel for appellants, in a letter addressed to the Clerk of the Second District Court on May 11, 1961, wherein he made a suggestion that “. . . the two cases should be consolidated for trial . . .,” just about hit the nail on the head when he further indicated in his letter as follows:

“There are two cases involving substantially the same matter.”

See File No. 35984

As illustrative of the actual benefit the Russells will receive over years to come by using the new ditch system which will be Company maintained — as dis-

tinguished from their obligation to maintain a substantial portion of the old ditch lateral — Instruction No. 3, given by the lower Court in the condemnation action in Case No. 35984, is here included:

“You are instructed that under the law the plaintiff has the right to enter upon and enlarge an existing irrigation ditch which may be used by others for the purpose of conveying its own water with that of the defendants in an enlarged ditch. In this respect, the law provides that the plaintiff shall bear its proportionate burden of operational costs and upkeep, as well as the initial construction costs, of the enlarged ditch system. In this case, the plaintiff, Hooper Irrigation Company, has, in fact, paid the cost of the enlarged ditch system *and has further agreed to maintain such enlarged ditch system without any request for reimbursement from the Russells for the use of the enlarged ditch system which the Russells may make in the future.*”

(Italics added)

POINT II

THE REAL PARTIES IN INTEREST
HAVE BEEN BEFORE THE LOWER COURT
IN BOTH CASES.

In their brief the appellants raise the novel and interesting argument that only appellants and respondent, Hooper Irrigation Company, “. . . appear in both the condemnation case and the present case.” From this premise they argue that the other defendants in this case — not being parties to the condemnation suit —

should be kept before the Court in this alleged trespass action. However, as pointed out in their own brief and in the respective files, all of the remaining defendants are either water users farther down the new enlarged ditch system who hold stock in the Hooper Irrigation Company, or are some of the workmen and contractors employed and engaged by the Hooper Irrigation Company in the construction of the new ditch facility. The Hooper Irrigation Company is the real party in interest, and has always been the one charged with any liability for damages in both cases.

What appellants are attempting to state to the Court now is that they should be entitled to collect once from the Hooper Irrigation Company in the condemnation proceeding, and then to collect again from the other defendants, if necessary, in the trespass action. That the law allows but one recovery for a given wrong is so clear as to require no authority at this point. Having recovered for the damages to the irrigation easement (including as an element of damages the consideration of construction damages as provided for in the lower Court's Instruction to the Jury), appellants cannot recover again from defendants in this case who were not parties to the prior condemnation action.

POINT III

PUNITIVE DAMAGES ARE NOT RECOVERABLE IN A TRESPASS ACTION WHERE COMPENSATORY DAMAGES ARE NOT PRESENT.

Because appellant in its proposed trespass action claims the right to recover punitive damages, mention should be made at this point regarding the legal status of a punitive damage claim where there are no recoverable compensatory damages present. As to this matter the rule is very definite that there can be no basis for the recovery of punitive damages in the absence of compensatory damages. In 22 Am. Jur. 2d, Par. 241, at page 329, it is stated:

“Applying the rule that there is no cause of action for exemplary damages alone to a case where the complainant has attached his claim to a cause of action requiring allegation and proof of compensatory damages, failure to allege and to prove compensatory damages will prevent the complainant from sustaining or recovering an award of exemplary damages . . .”

In *Graham v. Street*, 2 Utah 2d 144, 270 P. 2d 456 (1954), this Court held error to exist in allowing \$5,000.00 as punitive damages. The case concerned an accounting for partnership profits and damages. On page 459 this Court said:

“Defendants next contend that the court erred in allowing \$5,000.00 punitive damages. We agree. As was the case with compensatory damages, there are no specific pleadings, only a general allegation of fraud in the amended complaint. Standing alone, the failure to set forth a specific pleading may not be fatal since the damages may follow as a conclusion of law from the allegation of fraud, 15 Am. Jur., Dam-

ages, Sec. 304; however, the general rule is that there can be no punitive damages without compensatory damages based on the tort . . .”

In their brief (Memorandum for Plaintiffs) filed in the lower Court objecting to the Motion For Summary Judgment (R. 11), appellants admitted the foregoing to be the law:

“With respect to the first point, we admit that punitive damages cannot be recovered without the recovery of compensatory damages; . . .”

CONCLUSION

It is the position of this respondent that Judge Cowley was fully warranted in granting summary judgment in favor of the respondents for the reason that no genuine issue of law or fact remained for consideration in this trespass action inasmuch as all items of damage were adequately covered in the companion condemnation action, and that there is no basis for any further relief in favor of appellants in this proceeding. Accordingly, the judgment of the lower Court should be affirmed.

Respectfully submitted,

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