

1963

Porcupine Reservoir Co. v. Lloyd W. Keller Corporation et al : Brief of Respondent

Utah Supreme Court

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APR 16 1964

IN THE SUPREME COURT OF THE STATE OF UTAH

PORCUPINE RESERVOIR COM-
PANY, a corporation,

Plaintiff and Respondent,

vs.

LEOYD W. KELLER CORPORA-
TION, a corporation; AVON LAND
AND LIVESTOCK COMPANY,
a corporation; H. A. SUMMERS,
and CELLA SUMMERS, his
wife; H. A. SUMMERS, JR., and
MRS. H. A. SUMMERS, JR., his
wife,
Defendants and Appellants.

FILED
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Clerk, Supreme Court, Utah

Case No.
9961

BRIEF OF RESPONDENT

Appeal from the Judgment of the
1st District Court for Cache County
Honorable Lewis Jones, Judge

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IN THE SUPREME COURT OF THE STATE OF UTAH

PORCUPINE RESERVOIR COM-
PANY, a corporation,
Plaintiff and Respondent,

vs.

LLOYD W. KELLER CORPORA-
TION, a corporation; AVON LAND
AND LIVESTOCK COMPANY,
a corporation; H. A. SUMMERS,
and CLELLA SUMMERS, his
wife; H. A. SUMMERS, JR., and
MRS. H. A. SUMMERS, JR., his
wife,
Defendants and Appellants.

Case No.
9961

BRIEF OF RESPONDENT

SUPPLEMENTAL STATEMENT OF FACTS

The record on appeal in this case consists of the court file containing the pleadings, notices, stipulations, jury instructions, verdict, judgment and minute orders, a transcript of the proceedings before trial, and certain Exhibits containing a tabulation of testimony

as to values and damages introduced on direct examination. The transcript of the testimony at the five-day trial is not before this Court. Only 14 out of 63 Exhibits which were received in evidence are included in the record.

The respondent specifically objects to the following statements in the appellants' Statement of Facts, "... The defendants, through their counsel, requested separate trials and said request was denied by the court" and "The testimony of all witnesses as to value and damages, by stipulation of counsel, was reduced to exhibits and received in evidence." There is no record to support these statements. There was much testimony as to value and damages adduced on both direct and cross-examination which does not appear on the exhibits.

The defendants filed a motion for a new trial. The motion was argued orally and written briefs were filed. The plaintiff filed the first brief directed to the points raised by the defendants and orally argued at the hearing.

"1. Whether each defendant was entitled to three peremptory challenges and if so whether failure to demand such additional challenges constituted a waiver.

2. Whether the verdict is sustained by the evidence.

3. Whether the Court can deny the motion for new trial upon the condition that the plaintiff pay the defendant an amount in excess of the verdict." (R. 97).

The trial court wrote a memorandum decision which provided that unless the plaintiff consented that the separate verdicts as to Keller and Avan be increased by \$664.00 and \$158.00 respectively, the motion for a new trial would be granted. (R. 104). The plaintiff consented. (R. 106). The motion was denied. (R. 109).

STATEMENT OF POINTS

I

The appellants did not object to one trial affecting the separate parcels and the court did not abuse its discretion in so conducting the trial.

II

The order denying the motion for a new trial must be affirmed because there is no evidence before this court showing an abuse of discretion.

III

Additur was proper and in granting Additur there was no abuse of discretion.

IV

The court did not err in suspending interest.

ARGUMENT

I

THE APPELLANTS DID NOT OBJECT TO ONE TRIAL AFFECTING SEPARATE PARCELS AND THE COURT DID NOT ABUSE ITS DISCRETION IN SO CONDUCTING THE TRIAL.

Although the appellants have included in the record on appeal a transcript of the proceedings at seven hearings before the trial there is nothing in the record which discloses any request for separate trials covering each separately owned parcel of land condemned.

No motion for separate trials was made. The only reference to the subject appears on page 120 of the transcript of proceedings before trial (R. 235, 236) as follows:

“THE COURT: Well, I understand, but as far as the jury is concerned, if there’s going to be any—if you’re concerned about the one half interest, we can ask them what Nuhn and Summers’ property is worth. Then after the verdict is in the court can cut it in half. Either way is all right.

MR. MANN: I wouldn’t want to try it that way, because it’s got to be on the record so it would equal what he’s asked for, an undivided one half.

THE COURT: It would be the same thing as to Mr. Keller. We’re trying them altogether now. No such thing as separate lawsuits. We

simply haven't got the time to try them separately.

MR. SKEEN: Well, Mr. Keller, of course, owns a hundred per cent.

THE COURT: That's right, but there will all be special questions to the jury.

MR. SKEEN: The case will be tried together.

THE COURT: With special questions to take care of each one."

It will be noted that after the trial court stated that the cases were going to be tried together no objection was made by appellants' attorney. There is no record of any objection which would make the order of the court reviewable on appeal. The complaint, the amended complaint and the second amended complaint describe all three parcels in separate ownership. The record of the proceedings before trial discloses just about all conceivable objections but there is nothing to indicate that the defendants in any of the seven hearings made any objections to the one case being filed covering all three parcels, or objected to any ruling on the subject. One case was filed and the trial court properly tried it as one case:

"The rule is well recognized that an objection must be made in the trial court to reserve a question for review in the appellate court." 4 C.J.S. p. 760.

See also *Pettingill v. Perkins*, 272 P.2d 185; 2 Utah 2d 266; *Drummond v. Union Pac. R. Co.*, 177 P. 2d 903, 111 Utah 289; *Huber v. Newman*, 145 P. 2d 780, 106

Utah 363; Geros v. Harries, 236 P. 220, 65 Utah 227, 39 A.L.R. 1297.

This rule applies to separate trials.

“Generally, objections cannot be made for the first time in the appellate court with respect to proceedings preliminary to the trial or hearing, such as the consolidation of actions . . . the grant or denial of a severance. . . ” 4 C.J.S. p. 848.

Shelton v. Barry, 66 NE 2d 697, 328 Ill. App. 497; McCormick v. Kopmann, 161 NE 2d 48.

The following well-settled rules are applicable:

“An appellate court will not disturb the exercise by the trial court of its discretion as to the course and conduct of a trial unless an abuse of discretion clearly appears.” 5A C.J.S. p. 86.

This rule applies to the discretion of the trial court with respect to the allowance of separate trials. 5A C.J.S. pp. 78, 79.

See also, Reynolds v. Pierce, (Tex.) 320 SW 2d 376; Nat'l Electric Supply Co. v. Mt. Diablo etc. School Dist., 9 Cal. R 864; 187 C.A. 2d 418.

There is no record whatever to support the appellants' contention that the trial court abused its discretion in conducting the trial as it did. The argument in the appellants' brief on this point, pp 3-6, contains no reference to the record, except to R. 236, which is the statement of the court quoted above, “We're trying them all together now . . . ”

There being no proof of objection in the trial court nor proof of abuse of discretion, the appellants must fail on this point.

II

THE ORDER DENYING A NEW TRIAL MUST BE AFFIRMED BECAUSE THERE IS NO EVIDENCE BEFORE THE COURT OF ABUSE OF DISCRETION.

The appellants filed a motion for a new trial upon the grounds of (1) irregularity in the proceedings, (2) inadequate damages and (3) insufficiency of the evidence to justify the verdict. The motion was argued orally and then each side submitted a written memorandum. (R. 92-96 and 97-103). The court then rendered a memorandum decision as follows:

"The order may be that unless the plaintiff, within ten days from today, consents that the separate verdicts as to Keller and Avon may be increased by \$664.00 and by \$158.00 respectively, the motion for a new trial may be granted. So, if the consent is filed the Clerk will make, compute, sign, and file an amended judgment. If the consent be not filed, then the new trial may be deemed granted and the case placed on the trial calendar.

"As to the merits of the motion, the court feels to follow the majority of the Supreme Court of Utah in the Boden case, wherein Mr. Justice Crockett, with the concurrence of Justices Wade

and McDonough, with the late Justice Worthen specially concurring, asserted and determined that trial courts have the inherent power to permit additur. This court has carefully read the dissenting opinion of Mr. Henry Henroid in that case and has only one further observation to make. Judge Henroid speaks of grossly inadequate verdicts, but the verdict in this case was not grossly inadequate but was only slightly inadequate. So, feeling that it has the inherent power to make the order, and holding that the jury in the First District must render verdicts not higher than the evidence justifies and not lower (in condemnation cases) than the lowest valuation placed by any witness on either side, the order may be in accordance with the language previously used." (R. 104).

The appellants are seeking the reversal of the order denying the motion for a new trial based upon a tabulation of the testimony of witnesses, lay and expert, who testified as to value. It is stated on page 8 of appellants' brief as follows:

"The defendants believe that when the jury returned a verdict contrary to the evidence and lower than the testimony of any witness, it was shown on the face of it that there was error in the form of influence of passion or prejudice, or of refusal of the jury to follow the court's instructions. In any event there was no evidence which would justify the verdict . . . "

The tabulation shows that in *each case the verdict was higher than* the testimony of one or more expert witness:

Keller Corporation

Witness Alden Adams—\$6080.00 — Verdict
\$6863.00

Summers

Witness Alden Adams—\$6825.00—Verdict
\$8559.00

Avon Land and Livestock Co.

Witness Alden Adams—\$4450.00; Palmer \$3285.00
—Verdict \$5252.00

During the five-day trial there was much evidence adduced on damages which does not appear on the tabulations including evidence on topography, vegetation, water holes, grazing practices and comparable sales. Also, the court and jury inspected the premises. The trial court and jury had the advantage of all this evidence.

The appellants point out that in the Keller and Avon cases the answer of the jury on severance was slightly less than the testimony of any witness. The reason for this might be apparent had all of the evidence been before the court. Several ranchers in the area testified on matters bearing on the question of severance. Neither the jury nor the trial court on motion for new trial was required to ignore the abundance of evidence which related to severance nor were they bound to consider only expert testimony. In the case of Weber Basin Water Conservancy District v. Nelson, 11 Utah 2d 253, 358 P. 2d 81, this court said:

“The jury was entitled to believe or disbelieve in part or in whole the testimony of the two appraisers.”

See also *United States v. 2049 Acres of Land*, 49 Fed. Supp. 20, at page 23:

“While a jury has no right arbitrarily to ignore or discredit the testimony of unimpeached witnesses *so far as they testify to facts*, and that a wilful disregard of such testimony will be ground for a new trial, no such obligation attaches to *witnesses who testify* merely to their opinions; the jury may deal with it as they please, giving it credence or not as their own experience or general knowledge of the subject may dictate. . . . The jury even if such testimony be uncontradicted, may exercise their independent judgment.” (Citing Supreme Court of the United States cases.) “The motion for new trial is overruled.”

In *Murray v. United States*, (U.S. Court of Appeals for the District of Columbia), 130 F. 2d 442, the appellate court considered a case in which the verdict was lower than the appraisal of any expert. We quote from the opinion:

“1. The ground on which it is argued that the verdict was inadequate is that one of the parcels (Murray’s) was valued by the jury at considerably less than its recent purchase price, and that both parcels were valued by the jury at \$4500, which was some \$900 less than the appraisal of any expert witness. But the jury were permitted to view the property and form an opinion of their own as to its value. They also considered evidence that similar unimproved property sold

for as little as \$500 an acre and as much as \$3,000 an acre. The area in question contains a little more than two acres, making the valuation of the jury approximately \$2,000 an acre.

"[1, 2] In the light of this additional evidence, they were not bound by the testimony of the experts. We have said more than once before that it is the province of the jury to weigh the evidence after seeing and hearing all the witnesses and viewing the premises, and when they reach a valuation from the evidence which the trial court confirms, it is not for us to say that it is so inadequate that the trial court abused its discretion in failing to grant a new trial. *Willis v. United States*, 69 App. D.C. 129, 99 F.2d 362; *Johnson & Wimsatt v. Hazen*, 69 App. D.C. 151, 99 F.2d 384. To the same effect are *Columbia Heights Realty Co. v. Rudolph*, 217 U.S. 547, 560, 30 S.Ct. 531, 54 L.Ed. 877, 19 Ann. Cas. 854, and *Barnes v. South Carolina P.S. Authority*, 120 F.2d 439."

It is clear that the contention that the verdict was so inadequate that it showed passion and prejudice in all three cases is not supported even by the small part of the evidence before this court.

Furthermore, where all the evidence is not before the appellate court every presumption will be indulged in favor of the judgment. The rule is stated as follows:

"Thus it is a general rule, where the evidence is not preserved in the record that every presumption will be indulged in favor of the judgment or award on questions of fact. . . . So in the absence of any contrary showing in the record, it will be

presumed that the commissioners or jurors possessed the necessary qualifications; that they were duly sworn; that they followed instructions and applied correct rules as to the damages, taking into account all proper items of damage and excluding those not authorized by the pleadings and evidence, that they acted in good faith according to their actual judgment; that they considered all competent evidence, and none other; and that they based their conclusion, in part at least, on an inspection of the premises, or on testimony of value alone, accordingly as they did or did not view the premises . . . ” 30 C.J.S. pp. 49, 50.

Other applicable rules are as follows:

“ . . . The verdict or findings in condemnation proceedings, although subject to appellate review, will not be disturbed unless clearly or manifestly erroneous. The questions of value and of damages are brought before the court on appeal from the award, but the court is reluctant to interfere with the award on such questions; it accords great weight and respect to the verdict or findings of the jury on these questions; it will not substitute its judgment, opinion, or conclusion for that of the jury, commissioners, or trial court as to the amount of damages to be awarded; it will not disturb the award because it seems to the appellate court or because such court thinks or is of the opinion, that the amount is inadequate, excessive, or extravagant, unless the amount is clearly, manifestly or obviously excessive or inadequate, or is grossly excessive or inadequate or is excessive or inadequate as to be unconscionable, or as to amount to a denial of justice, or carry with it the improbability of its

correctness, or indicate that the award was made on an erroneous principle or was the result of passion, prejudice, partiality, corruption, arbitrary action, or the like." 30 C.J.S. pp. 51, 52.

An excellent statement of the rule respecting the review of jury verdicts and orders denying motions for a new trial was made by this court in the case of *Reynolds v. W. W. Clyde & Co.*, 5 Utah 2d 151, 298 P.2d 530:

"There were but two eyewitnesses to the incident, the plaintiff and the defendant flagman. Their testimony was diametrically opposed, and there was more than ample evidence which, if believed by the jury, would support its verdict. We sustain such verdict as a matter of course, as many times we have said we must do. Only those verdict that appeal to be unsupported by any credible evidence that would justify them in the minds of reasonable men, do we disturb. That is the jury system . . . "

" . . . We consider and hold that the trial court did not err, as plaintiff contends, in denying the motion for a new trial, since, in cases where there is substantial evidence which, if believed, will support the jury's verdict, the court may exercise its discretion in sustaining the verdict, and we, having no discretion in such event, must sustain both."

In the instant case, there being no evidence before this court except the tabulation of expert testimony, it cannot be said that there was no evidence before the jury to sustain its verdict, nor can it be said that the trial court abused its discretion in denying the motion for a new trial.

III

ADDITUR WAS PROPER AND IN GRANTING ADDITUR THE TRIAL COURT DID NOT ABUSE ITS DISCRETION.

As indicated above we contend that this court must affirm, because of the failure of the appellants (1) to include in the record on appeal all of the evidence before the court and jury, (2) to show that there was no competent evidence to support the verdict, and (3) to prove that the trial court abused its discretion in denying motion for a new trial. We believe that this disposition must be made of the case whether or not additur was proper.

Any argument over additur would necessarily turn on the question of evidence to support the verdict and the court's order denying a new trial. The evidence is not before this court and the ruling of trial court must stand.

The trial court granted additur in two of the three cases requiring the plaintiff to pay Keller Corporation \$664.00 and requiring payment of \$158.00 to Avon Land and Livestock Co. In the Summers case there was no additur and there was no claim that the verdict was not supported by the tabulation of evidence before this court on appeal.

The appellants contend that additur cannot be granted in a condemnation case because there is no statutory provision for additur, and that granting

additur violated the appellants' right to have the issues of value and damages tried by a jury.

There is no special constitutional provision in Utah granting a right of trial by jury in condemnation cases. Article I, Section 22 of the Constitution of Utah provides:

“Private property shall not be taken or damaged for public use without just compensation.”

Nor is there a statutory right to a trial of the issues of compensation and damages in a condemnation case which is any different than the right to a trial by jury in any other kind of civil case. Section 78-34-10 provides for a trial of such cases by “the court, jury or referee.” Under Rule 38 of Rules of Civil Procedure, “any party may demand a trial of any issue triable of right by a jury by paying the statutory jury fee . . .”

Insofar as the right of trial by jury is concerned there is no distinction between a condemnation case and any other case, whether it be a statutory or a common law case. The appellants' entire argument that the court has no power or authority to grant additur in this case is based upon the assumption that under our Utah Constitution and statutes there is difference between the two types of cases. In discussing the right to a trial by jury the appellants say on pages 11 and 12 of their brief:

“ . . . That is to say, without a statutory enactment there would be no such action as eminent domain. Consequently, we have this query: If the jury's verdict is less than the testimony

of any witness, and the court so recognizes it, has the court the right in the State of Utah to say, the jury made a mistake in its verdict, but I have the right to substitute my theory of additur? Does the court, by such a theory, take away the defendants' right to trial by jury? Can it say, whether you like it or not, you'll now have a trial by the court? There is no case in the State of Utah exactly in point, certainly not the case of *Boden vs. Suhrmann*, 327 P. 2d 826, which involved a common law action and not a proceeding in eminent domain. There are, however, a great number of cases in other states which do have application . . . ”

There being no distinction in this regard between statutory and common law actions, the case of *Boden v. Suhrmann*, 8 Utah 2d 42, 327 P.2d 826, is controlling. This Court, after considering the same arguments as are made by the appellants in the instant case, held:

“ . . . There is implicit within the authority of the court to grant a new trial on the statutory ground of ‘excessive or inadequate damages * * *’ the power to order a new trial conditionally: that is, to order that a new trial be granted unless the party adversely affected by the order agrees to a remittitur or an additur of the damages to an amount within proper limits as viewed by the court. A motion for a new trial based on such grounds invokes the exercise of such prerogative of the trial court; and likewise of this court on appeal.”

In view of the fact that the trial court had authority to grant additur the only question remaining is whether the denial of the motion for a new trial upon the pay-

ments of \$158.00 in the Avon case and \$664.00 in the Keller case constituted an abuse of discretion. In the absence of the record of all of the evidence bearing on value and damages, the appellants have not shown and, indeed, cannot show that the verdicts in the two cases as increased by the court were "unsupported by credible evidence," within the rule of *Reynolds v. W. W. Clyde & Co.*, supra, or that there was abuse of discretion by trial judge who had all of the evidence before him when he ruled on the motion for a new trial.

IV

THE COURT DID NOT ERR IN SUSPENDING INTEREST.

The appellants contend that the trial court erred in suspending interest on the award as a condition to granting a continuance of the trial. The order complained of was made on stipulation of counsel and can not be assailed on appeal. On pages 239 and 240 of the Transcript of Proceedings before Trial appears the following:

"THE COURT: Now I will rule on the evidence, assuming that I'm still in the case as of that time, based on what authorities you dig out. So what do we do now? We continue the partition case, suspend—

MR. SKEEN: Suspend the interest.

MR. MANN: Let's have an understanding on the interest. The interest will be suspended, and

let's get it in the record, from March fifth to May first.

THE COURT: That's all right.

MR. SKEEN: Yes.

MR. MANN: Because that's the only difference that you can be out anything."

In the minute order for March 11, 1963, reproduced in the Record on page 119, appears the following:

"The above entitled matter came on for hearing on motions and further pre-trial this day. E. J. Skeen Esq., appears as counsel for the plaintiff and Walter Mann Esq. appearing as counsel for the defendants.

"Certain stipulations are made by counsel. It is stipulated that the matter be tried on May 1, 1963 at 10 o'clock A.M. Defendant agreeing to waive all interest accrued from March 4 to date of trial."

The trial was postponed pursuant to stipulation, the case was tried and if the appellants ever did have a right to complain, it was waived. Furthermore, there is no appeal from this order. See the notice of appeal. (R. 110).

CONCLUSIONS

Summers Property

Only two points relied upon by the appellants relate to this property, (1) the alleged refusal of the court to try the cases separately, and (2) the suspension of interest. The plaintiffs have no record showing a

motion or request for separate trials, or that an objection was made to the statement by the trial court that the cases would be tried together. With respect to Point (2) the record shows a stipulation by counsel for the suspension of interest. In view of the familiar rule that objections must be made in the trial court to reserve questions for review in the appellate court these two points are without merit.

Keller and Avon Properties

The contention that the verdicts were inadequate was considered by the trial court with all of the oral and documentary evidence before it. In the absence of the complete record this court must presume that the evidence supported the order denying the motion for a new trial. There being no proof of abuse of discretion the order must be affirmed.

Respectfully submitted,

E. J. SKEEN

Attorney for Respondent