1968

State Of Utah, By And Through Its Road Commission v. Lloyd Stanger And Edna Olson Stanger, His Wife : Brief of Respondent

IN THE SUPREME CO
OF THE STATE OF UT

STATE OF UTAH, by and through
its Road Commission,
Plaintiff and Respond

vs.

LLOYD STANGER and EDNA
OLSON STANGER, his wife,
Defendants and Appe

BRIEF OF RESP

Appeal from Judgm
Second District Court, W
Honorable John F. Wah

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506 Judge
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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, by and through its Road Commission,
Plaintiff and Respondent,
vs.
LLOYD STANGER and EDNA OLSON STANGER, his wife,
Defendants and Appellants.

Case No. 11028

BRIEF OF RESPONDENT

NATURE OF THE CASE

This is a highway condemnation case. The issues on appeal relate to whether or not the jury received proper instructions concerning severance damages.

DISPOSITION IN LOWER COURT

The parties stipulated to the value of the land taken. The only issue given to the jury was what amount, if any, should defendants receive as severance damage. The jury found that defendants' remaining land was not damaged. The Court signed a judgment on that verdict, and denied defendants' Motion for New Trial.

RELIEF SOUGHT ON APPEAL

The jury verdict should be affirmed.

STATEMENT OF FACTS

Respondent agrees with the Statement of Facts as set forth by appellants, except it wishes to have it fully noted that the street grade in front of appellants' property was not disturbed and the taking as evidenced by plaintiff's Exhibit "A" was in front of an unimproved portion of appellant's property which, in fact, was done for the benefit of appellants. Had this property not been taken and paid for by the state, presumably appellants would have been required to take their own property and construct what is in effect a frontage access road to the highway system.

ARGUMENT

POINT I.

IN EMINENT DOMAIN PROCEEDINGS, DAMAGES CAN OCCUR TO PROPERTY WHICH ARE COMPENSABLE AND NONCOMPENSABLE. IN THIS CASE THERE WERE NO DAMAGES OF EITHER KIND.

Throughout the trial of this case, the Trial Judge correctly informed the jury of situations where landowners could not recover damages to remaining properties in Eminent Domain proceedings because damage to the remainder was consequential and noncompensable (Tr. 41-44; 45-46; 63-64; 70; 81-82; 94). The Trial Judge was clearly correct in his statements to the jury regarding severance damages, both in comments during trial

and in Instruction No. 7, requiring that these damages not be entirely due to the project's presence in the general area; that the severance damages be connected with and caused by the severance of the defendants' land. It is the law that in Eminent Domain cases there may be noncompensable damages resulting to landowners. It is the jury's duty to separate noncompensable damages from compensable damages and allow only the constitutional, "just compensation" to the condemnee. As pointed out in *Springville Banking Company v. Burton,* 10 U. 2d 100, 349 P. 2d 157 (1960), there may be noncompensable damages upon the exercise of Eminent Domain, especially where there is no taking, or a tiny taking as in this case, 0.22 of an acre.

In *Utah Road Commission v. Hansen,* 14 U. 2d 305, 383 P. 2d 917 (1963), the Court stated the general rule that the severance damage the property owner was entitled to was the "difference in the value of the remaining tract before and after the taking." The Court held that it is not the burdensome obligation of the state to pay fair value of the property taken and also have to pay a resulting damage to the remainder because of a noncompensable item of damages such as the cost of removal of personal property.

In this case it was ultimately proper for the Trial Court to instruct the jury that it is possible for the same piece of land to suffer both compensable and noncompensable damages. The problem of separation was properly left to the jury, (Tr. 42.) There are various limitations upon compensation for depreciation in value of the re-

maining or abutting land of a road project that are generally recognized. One main limitation is pointed out in the case of *State v. District, Fourth Judicial District,* 94 U. 384, 78 P. 2d 502 (1937) at Page 510:

> "We believe that a line of demarcation should be drawn at the point of 'actionable damage.' The Constitution clearly does not require compensation for damages not recognized as actionable at common law but more a damaging of property 'to the actionable degree' the Constitution makers intended the landowner to have just compensation equally with the landowner whose property was physically taken."

It is submitted that the Utah Constitution and U.C.A. 78-34-10(3) do not change the basic requirement of certainty of damages, but merely entitles the landowner whose property was not physically taken to the same damages that would be certain to be suffered by the landowner whose property was taken. The Court should not accord to property owners whose property is not taken more rights to damages than a property owner whose property is taken would have. Both types of situations should be treated equally, and if a property owner whose property is not taken suffers a consequential damage which is noncompensable then the property owner who is lucky enough to have a sliver, 0.22 acre in the case at bar, of his property taken by the state should not be allowed to recover more damages than the property owner whose property is not taken. Uncertain consequential, nonproximate damages should not be allowed in either case.

It is basic that damages must be certain and ascer-

tainable. Speculative mere possibility of harm is to be excluded from compensation.

A furher important restriction upon recovery for depreciated value due to proximity of the project is the rule that the landowner must bear, without compensation such depreciation that results from inconvenience and other type damage common to the whole neighborhood. If such were not the law of the land, the burden of administration and cost upon the condemning authority would be prohibitive. Further, the burden of ascertaining damages and resulting benefits incurred by every individual in the neighborhood would be an impossible undertaking for the Courts, the expert witnesses and the juries. Each would have to become licensed clairvoyants.

All Courts have expressed reluctance to open the door to the flood of claims which would be common to everyone in the community. There is consistent tendency to allow redress only for those who have suffered real and substantial loss different than others in the area by reason of the public improvement. As stated at 170 ALR 722:

> ". . . just compensation does not include diminution in the value of the remainder caused by the acquisition and use of adjoining lands of others for the same undertaking. This general rule is supported by all the cases in which it appeared possible to separate the damages caused to the remainder of the owner's tract by the use of the parcel taken from the damages caused by the similar use of adjoining land belonging to the other owners."

And the same reasoning, that noncompensable damages should be separated where possible, is upheld by California in *Rose v. State,* 19 Cal. 2d 713, 123 P. 2d 505 (1942) pp. 520-521:

> "In states such as California where the recovery of damages depends upon the infringement of some right which the owner of the land possesses in connection with his property decisions have clearly indicated that, *although the measure of damages is generally the diminution in market value, the evidence relied upon to establish such diminution must be based upon the depreciation flowing from the actionable injury which is the basis for the right to recover damages.* Thus, in *People v. Gianni,* 130 Cal. App. 584, 20 P. 2d 87, a small portion of land was taken for public highway purposes. It was contended on behalf of the landowner that because a small portion of land had been taken and because he was entitled to recovery for that injury, the damages to his remaining land should be based upon the total depreciation in the value of his remaining property even though that depreciation was caused primarily by an admittedly noncompensable element of damage, that is, diversion of traffic. The court said, however that while diminution in market value was ordinarily the test of damage to real property, the damages must be limited to those which accrue *by reason* (italics theirs) of the legal injury for which compensation was due. In a similar case, it was held that evidence as to the damage caused by a diversion of traffic by reason of highway construction was properly stricken from the record because the diminution in value resulting therefrom was not caused by any injury for which the landowner was entitled to recover damages. *City of Stockton v. Marengo,* 137 Cal. App. 760 764, 31 P. 2d 467. *It will be noted that*

this result was reached in California where a taking of property was involved. (Emphasis added.)

"A similar conclusion must also be reached where damage alone is involved. Many courts have indicated that the diminution of value in such cases cannot be based upon elements of damage for which the landowner is not entitled to recover. *Greer v. City of Texarkana,* 201 Ark. 1041, 147 S.W. 2d 1004; *City of Chicago v. Spoor,* 190 Ill. 340, 60 N.E. 540; *Cafden Interstate Ry. Co. v. Smiley,* 84 S.W. 523 27 Ky. Law Rep. 134; *Harrison v. Louisiana Highway Comm.,* 191 La. 839, 186 So. 354."

In the railroad nuisance case of *Stockdale, et al v. Rio Grande Western Ry. Co., et al,* 77 P. 849, 28 Utah 201 (1904), page 853, this Court stated:

"We do not wish to be understood as holding that every inconvenience that an individual may be subject to in the possession and enjoyment of his property because of the construction and operation of a railroad or other public utility in the vicinity of his premises entitles him to damages or injunctive relief. *The rule is well settled that no recovery can be had for losses and inconveniences which are suffered in common with the general public."* (Emphasis added)

The same reasoning is well explained at 22 *ALR* 148:

"In *Austin v. Augusta Terminal R. Co.,* 108 G. 671 L.R.A. 755, 34 S.E. 852 (1899), it was held that,

". . . in the clause of the Georgia Constitution providing that 'private property shall not be taken or damaged for public purposes without just or adequate compensation being first paid, the word damaged is used in its usual sense as

> a law term and does not change the substantive law of damages or create a cause of action wherein none previously existed; nor does it abrogate the principal expressed in the phrase "damnum abseque injuria.' . . . Thereafter what is damage by one is damage by all; and, likewise, what is damnum absque injuria to one is so to all. If one landowner diminishes the market value of his neighbor's house by cutting off light and air therefrom, he is not required to make good the depreciation. He had a right to build a wall, and legally speaking, he has not damaged his neighbor. So, too, if a city should erect a public building, or a railroad put up a warehouse, and cut off the same easement of light and air, neither would they be liable, for they had the same right to build, and neither had they damaged the adjoining lot owner."

In *State Highway Commission v. Silva,* 71 N.M. 350, 378 P. 2d 595 (1962), the old highway was left in place, in effect as a frontage road and barricade at a point beyond Silva's property. The Court citing other jurisdictions held that if there remains reasonable access to the main highway system; and, though remaining access may be more circuitous, his injury is the same in kind even though greater in degree, as that suffered by the general public and is damnum absque injuria. That is the precise circumstance in the case at bar.

Under the Utah Constitution, a person whose property has *suffered special damage different in any substantive degree* than others for the public use has the same rights and is given the remedies for the protection of his property from the injury as would be accorded him if his property was actually taken by a private party, but

such damage must be *actionable, direct and substantial.* This notion is set forth in *Springville Banking Company v. Burton,* 10 Utah 2d 100, 349 P. 2d 157 (1960), where an abutting landowner was not allowed to recover for damages because of traffic dividing islands

Appellants here would have us believe that because this Court defined the word "damages" in *Board of Education v. Croft,* 13 Utah 2d 310, 373 P. 2d 697 (1962), under 78-34-10(3), it meant to say that noncompensable damages could never co-exist with severance damages. That merely because a landowner is fortunate enough to have a sliver of his parcel of land physically taken by the condemning authority, that he is entitled to collect damages that would be noncompensable to all other landowners suffering a similar reduction in value though there was no physical taking. But the very fact that this Court disallowed $1,000.00 consequential damages given by the jury in its special verdict in *Croft,* stating that such damages were included in the award for severance damages, demonstrates that the Court recognized that it is logical that the same piece of land may suffer both recoverable and nonrecoverable damages. In the *Croft* case, when a part of the total parcel was taken, as in this case, and the consequential damages were properly separated by the jury it was held that the landwner could not recover for consequential damages though a part of his land was actually taken.

It would be rank discrimination to allow one landowner to recover damages that another could not recover, just because he was lucky enough to have a small part

of his land actually taken. Such allowance would be contrary to the intent manifested by the Constitution. Interrogatory number 3 of the special verdict "how much, if any, of the above are noncompensatory incidental damages," was properly put to the jury. Of course, the answer was zero, because the verdict of the jury was that the evidence did not support *any loss* in value due to the severance of the land taken (Instruction No. 8), compensable or otherwise.

If appellants' argument is accepted, there would not only be unjust discrimination and unjust compensation paid, contrary to all constitutional concepts, but public authorities would be required to pay more damages than a private infringing owner would be required to pay under the circumstance of a similar nature. That is, the private owner would not be liable for damages consequential in nature, whereas the tax paying public would be required to pay for any and all ordinarily noncompensable damages.

As has been pointed out, the jury verdict form asked for *"all loss in value"* because of the severance of the land and the construction of the project. Instruction number 9 stated that references to the word "damages" had reference to "just compensation." Instruction number 10 states that; ". . . if the public takes lands directly involved in a project and uses it to bring about construction of a nature that destroys value, then severance damages may well be present." Instruction number 14 on just compensation states: "In other words, *all* of the factors and elements affecting value of prop-

erty which well-informed buyers and sellers would consider can be considered by you in arriving at your decision." (Emphasis added) It should be noted that the State's expert witness, Memory H. Cain, Jr., was asked questions concerning damage to the remainder, such as privacy, cracks, access and distance to the fill, (Tr. 68-69.) He also explained why he felt there had been no damage (Tr. 68-70) and it was the jury's right to believe him. The Trial Judge asked counsel for suggestions to relate to the jury on the difference between noncompensatory and compensatory damages, (Tr. 98) and appellants cannot now object to an improper or unclear distinguishment, if indeed there is any confusion.

If such instructions are considered as a whole, as the jury was instructed along with testimony that there were no severance damage at all (Tr. 68), it is submitted that there is no confusion, and the issue of severance damages was properly and fairly submitted to the jury.

Despite appellants' contentions, there is no basis to assume that the reason Mr. Cain, the state's appraiser, found no severance damage, was because he was using the Court's definition of what constituted severance damage. Appraisers can and do differ widely in their opinions. Mr. Cain was asked in his opinion if there was any severance damage. He answered no, and gave good reasons why he felt there had been no damage. He felt that there was better access, better privacy and the same snow removal and garbage pick up. He also said that some other homes in the area similarly situated had suffered no damage either, (Tr. 68-78). The Court had not yet mentioned Slim Olsen's case or the Se Rancho Motel.

If all of the instructions and testimony be taken as a whole, bearing in mind the fact that appellants had the burden of proof, it is logical, proper and simple to see that the jury believed the state and not the landowner. There is no basis to assume that the verdict form is incorrect or confusing. Interrogatory number 1 asked for the loss in value, not the confusing word "damage", in the remaining land *and improvements* (emphasis added) because of the severance "and the construction of the project as designed." Taken with the other two interrogatories asking for a separation of "severance damages" and noncompensatory incidental damages, not the confusing word "consequential," any reasonable person would at once understand that the first interrogatory asked for all damages caused by the entire project, if any there was. The form is as correct and clear as is the verdict of the jury. The verdict should be upheld — to do otherwise would be to invade the province of the jury.

POINT II.

THE DOCTRINE OF SOVEREIGN IMMUNITY IS APPLICABLE IN EMINENT DOMAIN CASES IN THAT THERE IS NO CONSENT TO BE SUED FOR NONCOMPENSABLE DAMAGES.

The Trial Court was most certainly not confused concerning the application of the Doctrine of Sovereign Immunity. At no point in the trial was the doctrine advocated or instructions given on it. Furthermore the verdict form makes no reference to the doctrine. Reference by appellants to the doctrine is a mere shallow to confuse the issues.

Inferences by appellants taken to mean that the Trial Court improperly applied the Symes case and that sovereign immunity controlled this case is not borne out by the Court's comments to the jury or instructions to the jury. The Judge's comment that the mere fact that appellants were in Court does not expand the scope of severance damages, (Tr. 12), was made in chambers and never reached the jury's ears. Never was the appellants' right to be in Court or their rights to damages suffered, if any, challenged. All of the Court's comments *Symes, Fairclough* and *Hansen* were merely directed as an aid in assessing the type and amount of damages, if any.

Appellants cite *State Road Commission v. Fourth District Court,* 94 Utah 384, 78 P. 2d 502 (1937), as overturning the doctrine of sovereign immunity when there is no physical land taking. This Court in that case explained that the consent of the state to be sued is not ordinarily implied and that "the line of demarcation should be drawn at the point of 'actionable damage,' page 510.

All of the cases cited by appellants show that the sovereign, under the constitution and the statute, has only consented to be sued in cases where there are damages actionable under common law definitions of damages and just compensation. There can be no implied consent to suit for damages that are unjust or noncompensable. In the case of *Dooly Block v. Salt Lake Rapid Transit Co.,* 9 Utah 31, 33 P. 229 (1893), this Court recognized that the abutting property owner could recover for an

established right of easement because "he had rights not shared by the public at large, special and peculiar to himself." The Court allowed recovery for damages that were special and unique and distinguishable from those sustained by other properties in the neighborhood, the logical inference being that the sovereign only consents to be sued for special, actionable damages. Therefore, it can't be contended that the last sentence of Instruction number 7 concerning noncompensable damages that are not special or unique was prejudicial.

The attempted definition of "highway purposes" in *U.C.A.* 27-12-96 cited by the appellants at Page 28 of their brief, implies sovereign consent to be sued in all cases where rights of access, air, light and view are incidentally interferred with. Such an interpretation would loose a flood gate of suits from landowners and abutters who would be looking for treasure trove and windfalls. The case of *Utah Road Commission v. Hansen,* 14 Utah 2d 305, 383 P. 2d 917 (1963), recognizes the public necessity of reasonable limitations on damages in condemnation proceedings. The Court recognized an easement as a property right that would be compensable only if it were *substantially* interferred with, or if the owner were not left with some *reasonable* means of access to the highways as instruction number 10 states. This view is set forth at 26 *Am. Jur.,* section 200, Eminent Domain:

> "Indeed, it has been held that a *substantial* or material impairment of or interference with an abutting owner's right of *reasonable* access, by the public authorities, is a taking of his property, even though he is not totally deprived of all

access. But the right of the abutting property owner is subject to the rights of the public to use the street for highway purposes. Inasmuch as the rights of the abutter are subordinate to the rights of the public, there is no taking of private property where streets are used *and improved* for the purpose of a highway." (Emphasis added)

Also 26 *Am. Jur.* 242:

"It is not always easy to determine what constitutes special or peculiar damage for which the private owner may maintain an action for the vacation or discontinuance of a street or highway. No general rule has been laid down which can readily be applied to every case. It is not enough that the vacation results merely in some inconvenience to his access, or compels a more circuitous route of access, or a diversion of travel in front of the premises, and a consequent diminution of value. To sustain the right of a claimant to compensation, it must appear that the loss results from the depreciation in value of his land because of the change in the street, and his loss must be direct and proximate, and so obvious and substantial as to admit calculation."

The jury in this case could and did find that there were no damages of any kind to the remaining tract of land. The jury found that appellants were left with reasonable access, light, air, and view as was testified to at the trial by Mr. Cain. The verdict is clear that the jury found no damages, compensable or otherwise, as it is exceedingly apparent they believed the testimony of the state — not the landowner.

Jury Instructions number 7, 10 and 14 properly presented the law of Utah concerning consequential dam-

ages. Instruction number 7 concerned the reduction in value as severance damage, qualified by the fact that damages due to project's presence in the general area must be related to the taking.

This view is upheld by the Utah cases cited, especially the *Fourth District* case requiring "actionable damages," and also in 26 *Am. Jur.*, section 201 *"Under Constitutional Provisions Requiring Compensation Where Propery Is Damaged."*

> "In some jurisdictions it appears to be the rule that the change in the constitution, providing for compensation where private property is damaged for a public use, effected no material change in the right of abutting owners to compensation; there must be a taking of property after the amendment, the same as before (common law physical taking)
>
> ". . . it would seem that the abutter is entitld to compensation whenever the public use inflicts damage on adjoining property. The only practical test is whether or not the market value (the before and after rule) of the property is diminished by the use, such diminution in value being *different from that suffered by the community at large; there can be no allowance for personal inconvenience and discomfort, nor is a mere sentimental disturbance an element of injury for which recovery may be had."* (Emphasis added)

In Instruction number 14 the jury was instructed that just compensation included, ". . . all of the factors and elements affecting value of property which well-informed buyers and sellers would consider," including its topography. Surely this is not a misuse of the doc-

trine of sovereign immunity. On the contrary, the jury was instructed to compensate the respondents for all of the compensable elements of damages that the sovereign had consented to. Again, the jury could have found damages to the severed tract, had they thought it damaged, though noncompensable. They found none, which is really the essence of this case.

It does not require extensive analysis to understand that if this Court were to hold that the sovereign had consented to be sued for all damages, even those that are not actionable, special, proximate or direct, it would not only be against precedent but ridiculously costly to the sovereign and other condemning authorities.

CONCLUSION

The jury considered all of the testimony. They tested the credibility of the witnesses with a view of the property. They received clear and intelligent instructions and returned a verdict of no money damage to the remainder compensable or otherwise. Full academic discussions could have been justified if the jury had found money damages, but not compensable under the Court's instructions. In this case, the properly impaneled and well-informed jury should be sustained.

Respectfully submitted,

George E. Bridwell