

1968

State Of Utah, By And Through Its Road
Commission v. Jack C. Jensen And Merea W.
Jensen, His Wife, And Intermountain Holding
Company : Brief of Appellants

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, by and through
its ROAD COMMISSION,

Plaintiff-Respondent,

vs.

JACK C. JENSEN and MEREAW.
JENSEN, his wife, and INTER-
MOUNTAIN HOLDING COM-
PANY,

Defendants-Appellants.

Case No.
11387

BRIEF OF APPELLANTS

Appeal from a Judgment on a Verdict, the
Honorable Leonard Elton Presiding

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JENSEN, his wife, and INTER-
MOUNTAIN HOLDING COM-
PANY,

Defendants-Appellants.

BRIEF OF APPELLANTS

NATURE OF THE CASE

This matter arises out of a condemnation suit brought by the State of Utah, by and through its Road Commission, to condemn a right of way belonging to defendants located in the County of Salt Lake, State of Utah, for interstate highway purposes.

DISPOSITION OF THE CASE BY LOWER COURT

This is an appeal from an order granting respondent a new trial following the first trial in this matter, and from a judgment rendered for appellants and against respondent in the second trial of the above matter.

RELIEF SOUGHT ON APPEAL

Appellants seek a reversal of the trial court's order granting to respondent a new trial, and request that the verdict entered by the jury in the first trial be reinstated; or in the alternative, that the jury's verdict in the first trial be reduced to the amount determined by the first trial court in its remittiture order made and entered in the above matter; or further, in the alternative, granting to appellants a new trial based upon the second trial court's error in accepting a verdict from a jury which had improperly deliberated.

STATEMENT OF FACTS

The State of Utah, by and through its Road Commission, commenced an action to condemn a 20 foot right-of-way opening to the defendant-appellants' property, which right-of-way was located on the northeast side of Parleys Canyon near its mouth, in Salt Lake

County, Utah. The property owned by the defendants to which the right-of-way was appurtenant is commonly known as the Century Placer, a tract of land originally located and patented under the mining laws of the United States relating to placer claims, the original tract of land consisting of 80 acres.

In 1955 the State of Utah negotiated with defendants' predecessor in interest, the American Smelting & Refining Co., and as a result of the negotiations a written contract was entered into between the parties whereby the American Smelting & Refining Co. gave up all of its right of access of Highway U. S. 40, which adjoined the property in question on the south, and in consideration the State granted to American Smelting & Refining Co. a 20 foot right-of-way to Highway U.S. 40 and agreed to construct an approach to this 20 foot access opening. The location of this right-of-way was designated on the ground by a particular engineer's stake description. The State of Utah paid to American Smelting & Refining Co. a sum of money for approximately 7 acres of land transferred from the Century Placer to it for expansion purposes of Highway U.S. 40, and for the giving up of the right of ingress and egress to Highway U.S. 40 except through the 20 foot right-of-way opening, the only existing access to the entire tract of land. (R-37)

In 1961 the defendants Jack C. Jensen and Merea W. Jensen acquired the property from a successor in interest to American Smelting & Refining Co., con-

sisting of 73.2 acres. The defendants Jensen subsequently conveyed one-half interest in the property to the defendant Intermountain Holding Company, which is a partnership consisting of Mr. Raymond C. Bowers, his wife and children. (R-150) in 1961 (R-164). In 1962 Mr. Jensen requested the State of Utah to construct the approach road to the 20 foot access opening, which the State of Utah declined to do on the grounds that: (1) the cost of the construction would be too expensive in that the access opening was not where the parties had thought it was, and it was impracticable to construct the access opening at that point; and (2) the State of Utah did not wish to enhance the value of the defendants' property in that it would be necessary to condemn the access opening when Interstate 80 came down Parleys Canyon several years hence. (R-33, 34)

On May 18, 1964, the State of Utah commenced the above action (R-5) and sought an order of immediate occupancy, the order of immediate occupancy being granted to the plaintiff on the 25th day of May, 1964. (R-152)

Subsequently the defendants commenced an independent action against the State of Utah for breach of contract for its failure to construct the approach road to the 20 foot right-of-way access, and this matter was settled by stipulation of the parties, whereby the State of Utah paid to the defendants the approximate sum of \$8,000.00. (R-51)

On the 13th day of September, 1967, the condemnation suit was tried to a court sitting with jury, the Honorable Joseph G. Jeppson presiding. Following five days of trial, during which time the jury had an opportunity to visit the subject land, the jury returned a verdict in favor of the defendants in the sum of \$16,251.00 (R-94) and judgment on the verdict was entered on September 29, 1967 (R-115). The evidence adduced at the trial in the above matter showed that the subject property was landlocked by reason of the State's taking of the 20 foot access opening (R-51) there being no other legal right-of-way to defendants' property. The evidence adduced at the trial showed the damages to defendants' property by reason of the taking of the sole access to the property at between \$58,400.00 as the highest figure (R-170), \$25,300.00 as the lowest damage figure of defendants' witnesses (R-328), and \$0.0 as the lowest figure (R-428, 449) of any witness. Needless to say the \$0.0 figure was testified to by the plaintiff's experts, and the other figures testified to by defendants' experts.

At the conclusion of the trial, the trial court upon motion filed by plaintiff's counsel entered a conditional order of remittiture specifying that if defendants would accept the sum of \$12,001.00 in lieu of the \$16,251.00 found by the jury, the court would not enter an order of new trial, the court basing its order upon excessive damages and bias and prejudice as alleged by plaintiff's counsel. (R-124, 125; R-130)

The defendants accepted the remittance and agreed to take the \$12,001.00 provided that the plaintiff would not appeal the case. (R-142) The defendants based their qualified acceptance of the remittance on the basis that they did not want to be in a position of accepting a remittance to \$12,001.00 and then have the State appeal the case, and if the jury verdict was sustained then claim that the defendants would only be entitled to the amount of the remittance, thereby having nothing to lose on appeal and everything to gain.

In spite of the defendants' willingness to accept the remittance, the court entered an order granting a new trial to the plaintiff. (R-130)

The defendants filed a petition for intermediate appeal to the Supreme Court of Utah in this matter, but the court declined to accept the appeal (Case No. 11123, Supreme Court of Utah).

Upon second trial of this matter, a jury verdict was rendered in favor of the defendants and against the plaintiff for \$3,000.00 (R-132, 133) At the time that the jury was polled by the defendants, one juror stated that he had not reached a decision as he had not been afforded ample time for deliberation. One other juror disagreed with the majority of six, and the remaining six were unanimous that \$3,000.00 was the amount of damages suffered by the defendants from the taking of the only right-of-way to defendants' land by the State. Subsequently, a notice of appeal was filed by defendants. (R-138)

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN GRANTING A MOTION FOR NEW TRIAL BASED UPON THE GROUNDS OF EXCESSIVE DAMAGES.

The court entered an order on the 14th day of November, 1967, which stated:

“The verdict of \$16,251.00 is excessive and not justified for want of sufficient evidence and appears to be given under the influence of passion and prejudice.” (R-125)

The record amply substantiates that the damages to the property taken was between \$58,400.00 down to \$0.0.

Mr. Jensen, one of the named defendants who qualified as an expert in real estate matters, in addition to being a property owner and therefore qualified to testify as to the value of his property, testified:

“Q. Do you have an opinion as to what your land was fairly worth on May 18, 1964, with access?

A. It would be \$1,000.00 an acre, \$73,000.00.

Q. Do you have an opinion as to what your land is worth without access as of May 18, 1964?

A. Maybe \$200.00 an acre. It would have to be purchased by my neighbor. I only have one.”
(R-170)

Mr. Raymond C. Bowers, likewise one of the property owners, qualified as an expert also in real estate, testified:

“Q. You based on your experience, and your observation over the years in the business you have been in, do you have an opinion as to the value of the acreage—total acreage, with access, as of May 18, 1964?

A. I think \$1,000.00 an acre figure is a reasonable figure.” (R-242)

When Mr. Bowers was asked what the property was worth after the taking, he answered:

“Q. Now, as of the same date, May 18, again 1964, do you have an opinion as to the value of the land assuming you had no access to the land?

A. Hasn't got much value.

Q. Can you give this to us in dollar amount?

A. I haven't any opinion on it. I think it would be considerably less than \$1,000.00 an acre with no access.” (R-243)

An independent appraiser, Mr. Sterling Webber, testified as to the value of the land:

“Q. Mr. Webber, I think I asked you to state the difference in dollars in the two.

A. The difference would be approximately \$25,300.00.

Q. \$25,300.00 between then—the difference if the property was with access of 20 feet and without?

A. That is correct.”

Another witness, Mr. Scott Taggart, was called to testify, who likewise qualified as an expert and who owned the adjoining property to the defendants, and when asked what the value of the property was replied:

"THE WITNESS: The property that would be comparable as of that time, my guess is that it would have been worth in May of 1964 something in the vicinity of \$400.00 to \$500.00 an acre * * * .

Q. Now this value you place in 1964, assumes there was access to the property, does it not?

A. That is right.

Q. Now if there were no access to the property as of that date, would it be worth the same amount?

MR PLATIS: Objection. No foundation has been laid.

The Court overruled.

MR. McCARTHY: You may answer.

A. It would not be worth the same amount. You could not get to it.

Q. Would it be worth more or less?

A. Less.

Q. Do you have an opinion as to how much worth, with no access?

A. If you could get no access it would be virtually worthless."

The court's order in granting plaintiff a new trial based upon sufficiency of evidence as to the amount

of damages is not substantiated by the record. It is submitted that the trial court erred and abused its discretion in granting the motion for new trial. *Weber Basin Water Conservancy District v. Skeen, et al*, 8 U.2d 79, 328 P.2d 730.

POINT II

THE TRIAL COURT ERRED IN GRANTING A MOTION FOR NEW TRIAL BASED UPON THE GROUNDS OF PASSION AND PREJUDICE OF THE JURY.

The Court granted its order granting to plaintiff a new trial on the ground that the jury's verdict was given under "the influence of passion and prejudice".

It is respectfully submitted that the court did not have grounds to order a new trial as there was no showing of any passion or prejudice whatsoever. The affidavit of plaintiff's counsel (R-117, 118) does not set forth the alleged facts constituting passion and prejudice. The plaintiff, through its counsel, does however in its Motion for Judgment Notwithstanding The Verdict (R-119) state that the verdict appears to be given under the influence of passion and prejudice in that the verdict is excessive, but does not set forth any grounds other than the excessiveness of verdict to predicate his statement that there was passion and prejudice on behalf of the jury. As stated above, the record amply supports a judgment of between \$58,400.00 and \$0.0. The

court's order of December 13, 1967, likewise does not set forth the basis upon which the court granted a new trial. As set forth in *Saltas v. Affleck*, 99 U. 381, 105 P.2d 176:

“In order to eliminate speculation as to the basis of the exercise of judicial discretion in granting new trials, the record should show the reasons and make it clear the court is not invading the province of the jury. The trial court should indicate wherein there was a plain disregard by the jury of the instructions of the court or the evidence or what constituted bias or prejudice on the part of the jury. If no reasons need be given the province of the jury may be invaded at will. With no indication as to the basis for exercise of the power vested in the court to grant new trials the appeal tribunal would be left to analyze the matter from the evidence, the record, and the instructions. It would be required to search out possible reasons for agreeing or disagreeing with the trial court in the exercise of a judicial discretion must be based upon some facts notwithstanding great latitude is accorded the trial court in such matter.” (Citing cases)

The Supreme Court of Utah, in the case of *Wellman v. Noble*, 12 U.2d 350, 336 P.2d 701, stated:

“The appellate court should overrule the trial court's denial of a new trial involving a jury verdict only when upon a survey of all the evidence and the reasonable inferences to be drawn therefrom and when viewed in the light most favorable to the jury verdict, the amount of the award cannot be justified from the evidence on

any reasonable basis. Of course, if the trial court's order granting a new trial is expressly made on a misconception of the law, we should correct such misconception by reversing such an order granting a new trial."

As shown above, the trial court expressly limited itself to the grounds upon which it was granting a new trial, that is passion and prejudice of the jury and excessive verdict. This is somewhat analogous to the situation which arose in the case of *Bowden v. Denver & Rio Grande Western Railroad Co.*, 3 U.2d 444, 286 P.2d 240, wherein the Supreme Court pointed out that where the trial court limited its basis for granting a motion for a new trial, the Supreme Court would only consider those bases upon which the trial court predicated its motion.

The court in this case stated:

"We reaffirm our commitment that 'the right of jury trial * * * is * * * a right so fundamental and sacred to the citizen * * * (that it) should be jealously guarded by the courts.' " (Citing Authority)

"But once having been granted such right and a verdict rendered, it should not be regarded lightly nor overturned without good and sufficient reason; nor should a judgment be disturbed merely because of an error. Only when there is error both substantial and prejudicial, and when there is a reasonable likelihood that the result would have been different without it, should error be regarded as sufficient to upset a judgment or grant a new trial."

The plaintiff did not amplify its motion for new trial based upon excessive damages or upon passion and prejudice with any affidavit, as was the case in *State v. Christensen*, 13 U.2d 224, 371 P.2d 552, so that the appellate court now is faced with the problem of trying to surmise exactly just what passion and prejudice plaintiff was addressing to the court as the basis for a motion for new trial, and just what exactly the court based its surmise that there was passion and prejudice in granting such a motion. *Saltas v. Affleck, supra*. This is a usurpation of the constitutional right to trial by jury and the right to have the jury fix the damages in condemnation cases, the usurpation occurring when apparently the trial court felt that \$16,251.00 was excessive but that \$12,001.00 was not excessive, as evidenced by the remittiture order of the trial court. With the wide variance between the damages as shown by the defendants and those shown by the plaintiff, it is hard for this writer to justify the court's position that \$12,001.00 was justified but \$16,251.00 was not justified, under the evidence as adduced at the trial.

The Supreme Court of Utah passed upon a like situation in the case of *Weber Basin Water Conservancy District v. Willard A. Skeen, et al, supra*, wherein the facts of the case showed that there had been testimony that the value of the land ran from: plaintiff's experts at \$45,000.00, to defendants' experts at \$80,000.00. The jury returned a verdict of \$66,850.00. The Supreme Court said:

“The jury had the benefit of opinions from three qualified experts as to the value of the land. Although these opinions vary considerably, it is within a prerogative of the jury to believe whom it chooses, and it chose to believe defendant’s expert rather than plaintiff’s. On cross examination of two experts called by plaintiff, some doubt was cast as to the thoroughness of their inspection of the land, and this may well have affected the jury’s consideration of their lower evaluations.

When a jury verdict is supported by competent evidence, as was here the case, it is generally left unaltered by this court. In this case the alleged passion and prejudice which could alter this rule has not been demonstrated. Despite plaintiff’s attempt to show the jury’s hostile attitude, it remains that the award was within the estimate of value given by one of the expert witnesses, and being thus supported by competent evidence is entitled to the recognition and affirmance of this court. The fact that the jury chose to render its verdict in harmony with the highest of available evaluations is not in itself cause for reversal.”

The defendants concede that the trial court has the prerogative and authority to grant a new trial, where there is excessive or inadequate damages, or conditionally order a new trial if an additure or remittiture is not accepted by either party. *Bodon v. Suhrmann*, 8 U.2d 42, 327 P.2d 826; *Crellin v. Thomas*, 122 U. 122, 247 P.2d 264. It is to be noted, however, that where there is adequate evidence to support the verdict rendered, the court may not substitute its judgment for

that of the jury and order a new trial conditioned upon acceptance of the additure or remittiture. As the court pointed out in the *Bodon* case:

“We affirm the responsibility of this court to be indulgent towards the verdict of the jury, and not to disturb it so long as it is within the bounds of reason in accordance with the principles set forth in the companion case of *Schneider v. Suhrmann*; and also that it is primarily the prerogative and the duty of the trial court to pass upon the adequacy of the verdict and to order any necessary modification thereof. Nevertheless, when the verdict is outside the limits of any reasonable appraisal of damages as shown by the evidence, it should not be permitted to stand, and if the trial court fails to rectify it we are obliged to make the correction on appeal.”

To the same effect see: *Ruff v. Association for World Travel Exchange*, 1 P.2d 249, 351 P.2d 623. The Supreme Court previously has pointed out that:

“We have held that mere excessiveness of the verdict is not necessarily the standard for determining prejudice, although it might be.”

Stamp v. Union Pacific Railroad Co., 5 U.2d 397, 303 P.2d 279. This case goes on to say:

“Not every verdict that appears to be excessive will warrant a new trial or a reduction in the award, but the consideration which the court owes to a jury cannot be permitted to blind our eyes where the award can be accounted for only by the presence of passion or prejudice.”

Such is not the instant case. As pointed out previously the award of damages was completely within the testimony adduced by the experts for the plaintiff.

In the case of *Pauly v. McCarthy*, 109 U. 431, 184 P.2d 123, the Supreme Court of Utah said:

“But mere excessiveness of a verdict, without more, does not *necessarily* show that the verdict was arrived at by passion or prejudice. (Citing authority) It is true that the verdict might be grossly excessive and disproportionate to the injury that we could say from that fact alone that as a matter of law the verdict must have been arrived at by passion or prejudice. But the facts must be such that the excess can be determined as a matter of law, or the verdict must be so excessive as to be shocking to one’s conscience and to clearly indicate passion, prejudice or corruption of part of the jury.” (Citing authority) (Emphasis the court’s)

“The verdict here was admittedly liberal. But the mere fact that it was more than another jury, or more than this court, might have given, or even more than the evidence justified, does not conclusively show that it was a result of passion, prejudice or corruption of part of the jury.”

To the same effect see: *Duffy v. Union Pacific Railroad Co.*, 118 U. 82, 218 P.2d 1080.

It is elemental that the trial court has no discretion to grant a new trial absent a showing of one of the grounds specified in Rule 59 of the Utah Rules of Civil Procedure. *Tangaro v. Marrero*, 13 U.2d 290, 373 P.2d

390. In the instant case there is no showing whatsoever of any passion or prejudice or excessiveness of the jury's verdict, and therefore the court abused its discretion in granting a new trial and for that matter in ordering a remittiture.

The Supreme Court of Utah pointed out in *Paul v. Kirkendall*, 1 U.2d 1, 261 P.2d 670, that:

"It is not enough, under this rule (Rule 59 (a) (5)) nor under the code provision which is supplanted, merely to allege that the amount itself is excessive. The amount of the verdict is ordinarily a matter exclusively for the jury and on the ground of adequacy of the verdict alone, the court may not interfere with the jury's verdict unless it clearly appears that the award was rendered under misunderstanding or prejudice. If inadequacy or excessiveness of the verdict presents a situation that such inadequacy or excessiveness shows a disregard by the jury of the evidence or the instructions of the court as to the law applicable to the case as to satisfy the court that the verdict was rendered under such disregard or misapprehension of the evidence or influence of passion or prejudice, then the court may exercise its discretion in the interests of justice and grant a new trial. (citing authority) Therefore in reviewing the trial court's ruling denying defendant's motion for a new trial on the grounds of excessiveness of damages awarded by the jury's verdict, this court is limited to a determination of whether such a ruling was an abuse of discretion."

Plaintiff would now say that because its appraisers appraised the property at \$0.0 damage to defendants,

that this testimony should be taken to the exclusion of defendants' experts. As pointed out in the case of *State Road Commission v. Taggart*, 19 U.2d 247, 430 P.2d 167, it is up to the determination by the jury of the relative superiority of qualifications of the witnesses, including the expert witnesses. In the *Taggart* case, the severance damage was placed at nothing by one state appraiser, \$44,000.00 by another appraiser, as opposed to the defendants' experts who placed the damages at between \$178,000.00 and \$315,000.00. The court pointed out that the finding of the jury in respect to severance or consequential damages was within the range of the testimony and that therefore there was a reasonable basis upon which the jury could find the damages that they did find, and that therefore there was no abuse of discretion in not granting a new trial. This is the same situation as is now before the court in the present case, except that the exact opposite result was found by the jury, that is, the jury chose to believe the defendants' experts over the plaintiff's as was the reversal in the *Taggart* case.

For the trial court now to substitute its judgment for that of the jury is to usurp the jury's prerogative. In the old venerable case, *Jensen v. Denver & Rio Grande Railroad Co.*, 44 U. 100, 138 P. 1184, 1192, Justice Straup pointed out that:

"A court, vacating a verdict, and granting a new trial by merely setting up his opinion or judgment against that of the jury, but usurps

judicial power and prostitutes the constitutional trial by jury."

The court then pointed out that there are occasions where the trial court may grant a new trial where there has been "excessive damages appearing to have been given under the influence of passion or prejudice", however, the court points out:

"But before the court is justified to do that, it should be clearly made to appear that the jury totally mistook or disregarded the rules of law by which the damages were to be regulated or wholly misconceived or disregarded all the evidence, and by so doing committed gross and palatable error by rendering a verdict so enormous or outrageous or unjust as to be attributable to neither the charge nor the evidence, but only to passion or prejudice."

This case, while decided in 1914, has weathered the years and is still the law of Utah today, the concurring opinion of Justice Crockett in *Holmes v. Nelson*, 7 U.2d 435, 326 P.2d 722, notwithstanding.

POINT III

THE DEFENDANTS-APPELLANTS PRESERVED THEIR RIGHT TO APPEAL FROM THE COURT'S ORDER GRANTING A NEW TRIAL.

Under Rule 72(a), Utah Rules of Civil Procedure, an appeal may be taken to the Supreme Court only

from a final judgment. The authorities are long and unwavering that an order for a new trial is not an appealable order. *Habbeshaw v. Habbeshaw*, 17 U.2d 295, 409 P.2d 972. In the instant case, as a matter of preserving their right to appeal and also of seeking an intermediate appeal, the appellants followed the procedures as outlined in *Haslam v. Paulsen*, 15 U.2d 185, 389 P.2d 737, and *J. B. & R. E. Walker, Inc. v. Thayne*, 17 U.2d 120, 405 P.2d 343, and filed a petition for intermediate appeal with the Supreme Court and likewise preserved the claimed error in granting a motion for new trial.

The petition for interlocutory appeal was denied on January 17, 1968, by the Supreme Court of Utah. See File No. 11123, Supreme Court of the State of Utah.

The defendants-appellants are now entitled to raise before the Supreme Court the issue as to whether or not the trial court abused its discretion in granting a new trial to the plaintiff in this matter.

POINT IV

THE JURY, IN THE SECOND TRIAL, IMPROPERLY DELIBERATED AND THEREFORE APPELLANTS WERE ENTITLED TO A NEW TRIAL.

At the conclusion of the second trial, the jury returned from its deliberations and returned a verdict

of \$3,000.00 in favor of respondent and against appellants. Upon request of the respondent's counsel, the jury was polled and two jurors indicated that this was not their verdict. One juror, a Mr. Gates, stating: "I hadn't reached a decision yet". The other juror, a Mr. Stander, replied that it was not his verdict.

Appellants recognize that under Article I, Section 10, of the Constitution of Utah, in civil cases three-fourths of the jurors may find a verdict, however, it is submitted that the jurors must deliberate to reach that verdict. The instructions to the jury clearly pointed this out in instructoin 23, which was the standard jury instruction Section 1.7, Jury Instruction Forms, Utah, and jury instruction 24, which was the standard jury instruction Section 1.8. It is required that the jurors consult with one another and deliberate with the view of reaching an agreement. It is submitted that where the jurors do not take enough time for all of the jurors to reach a decision, be it against or for a verdict, there has been improper deliberations as in effect what the jurors are doing is each individual juror decides the matter himself. In the case of *Glover v. Berger*, (Wyo., 1953) 263 P.2d 498, the Wyoming court affirmed the trial court's rejection of an instruction which stated that the individual jurors should decide the matter themselves. The court said:

"It intimated in effect that each juryman should disregard the views of his fellows, no matter how reasonable or cojunt these were.

Seldom would a jury return a unanimous verdict of the views if a single jurymen were to control the verdict as the instruction No. 24 aforesaid intimated should be done."

It is submitted that so long as one of the jurymen has not reached a decision one way or the other, the jury still has not deliberated as is required by the jury instructions and the law of the State of Utah. Therefore the trial court erred in entering a judgment on the verdict of the jury, and should have entered an order for new trial for appellants.

Respectfully submitted,

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