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# State Of Utah, By And Through Its Road Commission v. Thomas P. Williams And Jo Ann H. Williams, His Wife : Brief of Respondent

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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.

THOMAS P. WILLIAMS and JO ANN H. WILLIAMS, his wife,
Defendants and Appellants.

Case No. 11388

## BRIEF OF RESPONDENT

### NATURE OF THE CASE

Respondent, State of Utah, by and through its Road Commission, initiated a condemnation action to acquire a fee simple interest in certain properties owned by the appellant and located at approximately Cherry Lane and Unitah Junction, Davis County, Utah. The aquisition consisted of .10 acres from a total of .43 acres. The portion within the take was in a rectangular shape approximately 37 feet in width and 114.64 feet in length and was located on the west side of appellant's property.

The sole issue presented by this appeal is the compensability of certain damages allegedly sustained by appellants.

## DISPOSITION IN LOWER COURT

The matter was heard by the Honorable Parley E. Norseth, sitting without a jury. The court rendered a judgment in favor of appellant and against respondent in the amount of $750.00 for the .10 acre involved in the take and $3,200 for severance damages to the remainder, for a total judgment of $3,950.00.

Trial counsel for respondent, as distinguished from counsel for respondent on this appeal, filed an objection to defendants' findings of fact and conclusions of law (R.26.) However, no record of the disposition of respondent's objection exists.

## RELIEF ON APPEAL

Respondent submits that the judgment of the lower court should be affirmed.

## STATEMENT OF FACTS

Respondent agrees with the statement of facts as set forth in appellants' brief with the following modifications. Because of the lack of a transcript of the trial proceedings, appellant's reference to the testimony of respondent's independent fee appraiser, Memory Cain, is based solely on the affidavit of counsel for appellant. However, respondent submits that by the certification of the issue presented to this court on appeal, appellants have conceded the fact that the damages for which appellants were denied compensation were not special, unique or peculiar to appellants' property, but were, rather, the type of damage sustained by the public in general.

Respondent would also disagree with appellants' statement that the issue presented by this appeal was resolved in the case of *Board of Education of Logan City v. Croft,* 13 U.2d 310, 373 P.2d 697 (1962).

## ARGUMENT

It must first be recognized and conceded that not all potential elements of damage are compensable. The production of evidence of an alleged damage is not proof that such damage is an item entitling an aggrieved landowner to compensation. The determination of the existence of a compensable severance damage as against a noncompensable consequential damage must be made by the trial court as a matter of law. The instant case presents the issue of what criteria must be utilized in determining whether an alleged aggrieance is properly includable within an award for severance damage.

The framework within which condemnation cases are tried is not blanket authority on which the landowner may predicate any conceivable damage. As stated in *State of Arizona v. Wilson, et al,* 4 Ariz.App. 420, 420 P.2d 992, 998 (1966):

> . . . we do not believe that our Supreme Court has intended the "before" versus "after" test to be used in such manner as to include noncompensable damage within the award to property owners in condemnation actions.

Also, in *People v. Ricciardi,* 144 P.29 779 (1944), the Supreme Court of California stated at 144 P.2d 802, "not every depreciation in the value of property not taken can be made the basis of an award for damages."

The distinction between compensable severance damages and noncompensable consequential damages is predicated on a test or requirement that contains two separate, but conjunctive, considerations. Although the test has been enunciated in many jurisdictions, it has sustained only minor modifications in the terminology involved and not basic discrepancies in the foundation, logic or reason of the test.

The first consideration in determining the element of compensability is that the damage to the remaining property must be a direct result and causily connected to the diminution in value of the remaining property by virtue of the loss of the area included with the take.

This court has recognized this requirement in *State by State Road Commission v. Rozzelle,* 101 U. 464, 120 P.2d 276 (1941), wherein it is stated at 120 P.2d 278:

> To the extent that the present taking or construction so violates condemnees rights, he is entitled to recover; *but be the loss what it may it must have a causal connection with the taking of the property or construction thereon.* (Emphasis added.)

Also, this court has recently stated in *State of Utah, by and through its Road Commission, v. Stanger,* 21 U.2d 185, 442 P.2d 941 (1968):

> . . . that severance damages were those suffered by a devaluation of the owner's property not taken, the sausa causa causans of which was the actual taking of a part of a unit of property, the whole of which he previously owned. (442 P.2d 942).

The existence of this first requirements is recognized by appellant on page 17 of appellants' brief.

The second consideration is that the damage resulting to the remaining property must be such as to be special, unique and peculiar to that property and not sustained by the public in general.

In *Department of Public Works and Building v. Hubbard*, 363 Ill. 99, 1 N.E.2d 383 (1936), the Supreme Court of Illinois stated at 1 N.S.2d 385:

> To entitle a claimant in a condemnation proceeding to compensation for lands not taken, he must prove by competent evidence that there has been some direct physical disturbance of a right, either public or private, which he enjoys in connection with his property, and that by reason of such disturbance *he has sustained a special damage with respect to his property in excess of that sustained by the public generally*. (Emphasis added.)

See also *Illinois-Iowa Power Co. v. Guest*, 370 Ill. 160, 18 N.E.2d 193 (1938).

In *State of New Mexico v. Silva*, 71 N.Mex. 350 378 P.2d 595 (1962), the Supreme Court of New Mexico stated at 378 P.2d 596:

> Courts are agreed that only one whose damage, occasioned by highway improvement, is special and direct as distinguished from remote and consequential, and which differs in kind from that of the general public, suffers a compensable injury.

The State of Wyoming has also followed this principal in *Sheridan Drive-In Theater, Inc. v. State of Wyoming*, 384 P.2d 579 (1963), and *State Highway Commissioner of Wyoming v. Newton*, 395 P.2d 606 (1964).

In *City of Los Angeles v. Geiger*, 210 P.2d 717 (1949), the California District Court of Appeal, Second District, stated at 210 P.2d 723:

> While the recovery of damages is not limited to instances of actual invasion of the land itself, yet damages can be justified only by evidence of direct physical disturbances of an existing right, either public or private, which the owner possesses in connection with his property and which gives an additional value to it and by evidence that through such disturbance he has sustained a special damage with respect to his property or to a right appurtenant thereto different from or in excess of that suffered by the public in general.

In *Muse v. Mississippi State Highway Commission*, 103 So.2d 839 (1958), the Supreme Court of Mississippi stated that severance damages should be computed without considering, ". . . general benefits or injuries resulting from the use to which the land taken is to be put, and are shared by the general public." (At 103 So.2d 849).

The basic distinction between compensable severance damage and noncompensable consequential damage may thus be stated as follows: Damages to a remaining property which are directly and causily connected to the taking or the construction activities thereon and which are special, unique and peculiar and not sustained by the public in general may be considered compensable. Those damages to the remaining property which are not causily connected to the take or are not special, unique or peculiar from those suffered by the public in general are not compensable.

By certification of the issue presented by this appeal, appellants concede that the damages not allowed by the trial court were not of a special, unique and peculiar nature, but were, rather, of the type and nature sustained by the public in general. Also, appellants do not challenge the trial court findings in this regard. Rather, appellants insist findings that the requirement of special, unique and peculiar damage does not exist.

The necessity of the conjunctive application of the two requirements may be illustrated. To comply with the criteria of compensable severance damage as set forth in State of Utah, by and through its Road Commission v. Stanger, supra, the damages to the remainder must be directly caused and connected to the take. However, if the damage to the by the public in general, it may not be said to be direct by the publici n general, it may not be said to be the direct result of the take.

In the instant case, appellants concede that the damage which was not allowed by the trial court was not of the special nature. How can it then be said to be the causa-causa causans of which was the actual physical appropriation of the take.

Damages of the type complained of by appellants accur nothwithstanding the physical appropriation of lack thereof. The existence of this type of damage is not dependent on or related to the take. Rather, it affects those who suffer no loss of property as well as those whose sustain a partial loss. When thus sustained by all, the public in general, the damage may not be said to be the direct result of the take.

If a damage is of such a nature as to exist irrespective of the take or the absence thereof, then such damage must be considered noncompensable consequential damage.

In an effort to render the alleged damages compensable, appellants have attempted to distinguish the rule regarding compensation between cases involving severance damage to a remaining portion, part of which is taken, and damages sustained by a landowner although no property is taken. This distinction is evidently predicated on the language of Utah Code Ann. § 78-34-10(2) and (3) (1953). However, this statute is a definition of what constitutes just compensation as set forth under Utah Const. art. I § 22, and must be so interpreted and construed.

A review of the historical interpretation given to the words "taken" and "damages" as used in Utah Const. are. I § 22 reveals that this court has considered the constitutional rights of compensation to be equal whether or not a physical appropriation of a landowner's property has occurred.

In other words, the issue of compensable damages in a situation involving a partial take and a situation involving no physical appropriation of property remain the same. *Stockdale v. Rio Grande Railroad,* 28 U. 207, 77 P. 849 (1904), and *Twenty-Second Corporation v. Oregon Shortline Railroad,* 36 U. 238, 103 P. 243 (1909).

This court in *State by State Road Commission v. District Court, Fourth Judicial District,* 94 U. 384, 778 P.2d 502 (1937), stated at 78 P.2d 510:

The constitution clearly does not require compen-

> sation for damages not recognized as actionable at common law, but for 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 was thus developed that the situation involving a partial take and damages to the remainder and damage to property no part of which was taken in condemnation required equal treatment under the constitutional requirement of just compensation.

The equality that exists between the two types of situations is complete except for a procedural distinction required by the application of the doctrine of sovereign immunity. *Springville Banking Co. v. Burton,* 10 U.2d 100, 349 P.2d 157 (1960). As stated in *Hampton v. State of Utah, by and through its Road Commission, et al,* 21 U.2d 342, 445 P.2d 708 (1968), at 21 U.2d 344.

> It should be observed that this court has developed a procedural distinction between a "taking" and "damage," where the landowner has been denied recovery in a situation involving the liability of a highway authority for consequential damages.

Although the doctrine of sovereign immunity necessitated a procedural distinction between partial take cases and cases involving damage to property no part of which was appropriated, the considerations as to the compensability of damages remained the same. In *Springville Banking Co. v. Burton, supra,* Certain consequential damages were considered to be noncompensable. This court refused to employ

the extraordinary writ of mandamus because of the issue of sovereign immunity. However, this court further stated at 10 U.2d 102:

> In this area of the freeway, citizens must yield to the common weal albeit injury to their property may result. We espouse the notion that if the sovereign exercises its police power, reasonably and for the good of all the people, when constructing highways, consequential damages such as those alleged here, are not compensable.

The noncompensability of the consequential damages involved was clearly stated notwithstanding the application of the doctrine of sovereign immunity.

Appellants have failed to recognize this court's position in *Provo River Water Users Association v. Carlson,* 103 U 93, 133 P.2d 777 (1943), wherein this court stated at 133 P.2d 779:

> All of the cases in this court, which we have been able to find, *have predicated b o t h severance damages and damages to lands not taken, on some physical injury to land not condemned.* . . . (Emphasis added.)

This court specifically and consistently has refused to recognize a distinction predicated on the appropriation or failure of appropriation of a landowner's property. To now do so would be to do violence to precedent and contrary to the recognized constitutional intention to place landowners on an equal parity in determining damages nothwithstanding the partial taking or lack thereof of a landowner's property.

Appellants place strong reliance on the case of *Board of Education of Logan City School District v. Croft,* 13 U.2d 310, 373 P.2d 697 (1962). However, respondent submits that that case is distinguishable on its facts from the problem presented in the instant case and further, that the dicta contained in the *Croft* case is not sufficient to overrule the precedent and reasoning that has evolved since the enactment of the Utah State Constitution.

## CONCLUSION

Appellants have conceded that the alleged severance damages not allowed by the trial court was not of such a nature as to be special, unique and peculiar to the remaining property owned by appellant, or that the damage was in excess of that sustained by the public in general. Based on the rule that damages, to be compensable, must be causily connected to the take and also be a special, unique and peculair nature not sustained by the public in general, the ruling of the trial court was manifestly correct.

The great weight of authority recognizes a casual connection requirement of a special, unqiue and peculiar damage in order to render the alleged damages compensable. To distinguish between a situation involving a partial take and a situation involving damage although no property is physically appropriated, is a failure to recognize the precedent of establishing the landowners in both situations on an equal parity. The determination of the compensability of damages in both situations is the same and the only difference between the two is a procedural distinction necessitated by and through the application of the doctrine of sovereign immunity. To allow otherwise would be to dis-

criminate against the landowner whose property was no physically appropriated but who, in fact, sustained th same damages as the landowner who suffered a partial tak ing of his property. In Utah, this court has failed to recog nize such a disparity.

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