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IN THE SUPREME COURT OF THE STATE OF UTAH

* * * * * * * * * * * *

HARRY THORSEN, Plaintiff and Appellant, vs. MARKAY JOHNSON, et al., Defendants and Respondents.	)	
GOOSEBERRY ESTATES, et al., Plaintiffs and Respondents, vs. HARRY THORSEN and DONALD GATES, Defendants and Appellants.	)	CASE NO. 18960

* *

BRIEF OF RESPONDENTS

* *

Appeal from the Judgment of the
Sixth Judicial District Court of Sevier County
Honorable Don V. Tibbs, District Judge

Ken Chamberlain
Olsen and Chamberlain
Attorneys for Respondents
76 South Main Street
Richfield, Utah 84701

Norman H. Jackson
Jackson, McIff & Mower
Attorneys for Appellant
151 North Main Street
Richfield, Utah 84701

FILED
NOV 1 1983
Clerk, Supreme Court, Utah

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* * * * * * * * * * * * * * * * * * * *

STATEMENT OF NATURE OF THE CASE

This is an action to recover damages for the willful trespass upon and intentional inflicting of damages to a mountain real estate subdivision being developed in the Fish Lake Mountain area of Sevier County, Utah.[1] The damage was done upon the pretext that an old, non-operating remnant of an ancient inactive "ditch" was still traceable.

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[1] In its bench ruling, the Court found that Defendant went on Plaintiffs' Property willfully "to make a massive, senseless, not purposeful ditch across their premises and for the purpose of injuring Plaintiffs" (Tr. 560).

DISPOSITION IN THE LOWER COURT

The Trial Court found that Harry Thorsen (hereinafter "Defendant") had "senselessly *** willfully" injured Plaintiffs' Property to their damage of $54,000.00.

RELIEF SOUGHT ON APPEAL

The Plaintiffs and respondents ask that the Trial Court's judgment be affirmed.

STATEMENT OF FACTS

Two cases, (the earlier No. 8461 *Thorsen v. Johnson, et. al.* and the second No. 8564 *Gooseberry Estates v. Thorsen et. al.*), were consolidated for trial. The substance of the joined litigation concerned the damage done by Defendant, Thorsen, to the subdivision of the Plaintiffs and in ruling upon the evidence the Trial Court designated the claimants in the second action (upon which the Trial Court's substantive judgment was based), as the Plaintiffs (R. 557). To allow cross reference of the Trial Judge's ruling and findings to the record, we will continue to designate the parties as the Trial Court did; i.e.: Gooseberry Estates, et al. as Plaintiffs and Harry Thorsen as Defendant.

No appeal was taken from No. 8461.

Subdivision Characteristics

Plaintiffs owned 94.47 acres (the "Property") fronted on the west, the longest dimension, by Gooseberry Creek (Exhibits 1 and 3). The Property's longest dimension was bisected laterally and almost equally between a forested side-hill (the East half) which overlooked an associated meadow (the West half) through which Gooseberry Creek flows (Exhibits 1, 6, 7, 33). The

Property's situation is convenient by paved highway to Salina, Utah, and intermediate in elevation between the valley floor and the summit of Fish Lake Mountain (Exhibits 8, 9, 33). Elevation gave it a pleasant (cooler) Summer atmosphere and the paved highway accorded it all-weather access for Winter activities (R. 316; Exhibit 33 location map). Forestation was sufficiently thick to obscure homes from roadway view accommodating a compliance with county zoning and subdivision regulations and the advantage of privacy (R. 259; Exhibit 8). Gooseberry Creek flows down the north slope of Fish Lake Mountain and in a northerly direction toward Salina Canyon (Exhibits 1, 33).

Defendant owns "several hundred" acres (R. 486; Exhibit 8) adjoining Plaintiffs on the north (and thus downstream on Gooseberry Creek) and he had unmitigated objection to modification of the environment or demographics on land adjacent to him (R. 476; Exhibit 8) objecting to "dogs running at large, children playing in the ditches, and etc. * * *" (Exhibit 8).

Plaintiffs' Property was otherwise attractive for a subdivision. It was inspected by a qualified, experienced appraiser (R. 311) who said that

> "The [type of subdivision] lots [that are desirable] are those lots that are wooded or that have privacy because of the wooded area and the fact that the trees were already there. You don't have to wait 6, 8, 10, or even more years for them to grow * * * and then the hill itself is the type of property that your better division * * * These lots command a higher value by far than do the lots down in the valleys * * * The view that you have up in the meadow, the hillside on the other side, and the view both south and north from the hillside is very good and very important * * * being up on the hill, that

> gives you a good view; the terrain in my opinion, at least, is a lovely terrain and the view from that hill is good and it makes it a more salable commodity (R. 316).

Culinary Water

The subdivision had, as an available appurtenance, potable culinary water, and the right to drill a well had been approved by the State Engineer to supply the entire subdivision (R. 316).

Without water, the value of any subdivision is markedly less (R. 316), and there were no other mountain subdivisions in Sevier County providing culinary water (R. 317).

Forest Landscape

The hillside was mapped for and divided into lots by registered engineers preliminary to the adoption of a subdivision plat (R. 54, 55). The subdivision not only contained lots all of which had the aesthetics of attractive trees and an overlook of the meadow (R. 268), but was also endowed with beneficial "natural sloping", for an appealing view as well as good drainage (R. 112).

Plaintiffs were given approval of the preliminary plan by the Sevier County Planning Commission after the hearing at which Defendant had vigorously protested (Exhibit 8) and the next day, following a field trip to the area, the Planning Commission recorded that:

> After viewing the site plan in the general area from the oiled road, the group walked across the open meadow to the east and up into the tree-covered hillside area proposed to be subdivided. They found the trees to be larger and thicker than on the lower side of the hill. The irrigation ditch was larger

than anticipated, but the lower bank much higher than anticipated (almost no chance of flooding lower ground from anything flowing into the ditch) [Exhibit 8; minutes of Planning Commission Meeting]

There was an adjacent paved (oiled) highway immediately west of the Property [Exhibit 8]. When the Zoning Commission chairman looked at the area and observed that it was "heavily wooded * * * There is enough trees in it that you wouldn't see your neighbor off * * * 200 feet away." (262-263). The Planning Commission "felt that an acre lot would satisfy the ordinance and conditions" as far as woods are concerned (R. 263).

Adaptability and Accessibility

The Zoning Administrator reemphasized that lots must not be smaller than one (1) acre in size in timbered area, and not less than five (5) acres in size in open area and the developers were given instructions "to proceed with the next phase of the approval process" (design plan) (Exhibit 9). The County observed in this approval the absence of open area development saying the Commission had "always been concerned [adversely] on mountain subdivisions about areas out in the open." (R. 259).

The Commission observed that the subdivision, lying at an intermediate point between Salina (10 to 11 miles of Salina City proper) and still in mountainous terrain, "in the winter would undoubtedly be used quite heavily for snowmobiles." (R. 261)

The Planning Commissioners all went from the paved road east to the subdivision, across an old wire gate and walked

across the Plaintiff's meadow and right straight up the hill (R. 264). They found the functioning (not the lower later-trenched remnant) irrigation ditch which was higher up on the hillside and around which Johnsons had planned their subdivision (R. 72). It had been a concern of the Planning Commission knowing of an irrigation ditch going through the subdivision. The Planning Commission went to operating ditch "that goes way back and around that holler and back out." (R. 266).

Ditches

Most importantly for purposes of this litigation, the entire Planning Commission (in the Fall of 1979, one year before Defendant trenched the old area) walked from west to east because they wanted to see the existing [presently functioning] irrigation ditch incorporated into the subdivision design plan. The Chairman of the Commission was asked whether or not they saw another or lower ditch [the one later dredged by Defendant]. The Commissioner answered:

> We walked across no ditch as such. You know I want to emphasize that this was over three years ago, but I know absolutely we walked across no ditch that water would run in when we traveled across there * * * and I don't remember even if there was an opening, I don't remember that * * * but when we went there, there was no ditch (R. 266)

Subdivision Approval

The Commissioner was asked what remained to be done for the completion of the proposed subdivision to bring it up to a developmental level so that it could be approved by the Zoning Administration (R. 266). In response, the Commissioner answered:

> They were to, given the opportunity, to proceed to get the transfer of water rights because this property had to have water for each lot and then there had to be a water right problems so the developers were to proceed with their desires, making a transfer of irrigation water with the State of Utah to get well rights to pump water out of the ground. They did drill a well in this general vicinity and it didn't turn out to be satisfactory so since they had made an effort to get water in a different location from another well, then they had to have sewage disposal approved by the State Health Department. So these three things was the water, the sewage part of it, and agree to go ahead with this road, were given the go ahead to proceed then with their preliminary design plans. The minutes will show that it was feasible that these things were done and the concept plan was approved and then at this meeting they were given the go ahead for the second plan. Now to the day, the second phase has not been completely presented.

The first well drilled did not produce high quality water so another change application was made which Thorsen protested. Delay ensued for a number of months until the State Engineer could act on the amended exchange application of surface water rights to The Property for underground potable (well-produced) water. The State Engineer approved this second change in 1980 (R. 142, 478).

Defendant's Willful Damage to Subdivision

In August 1980, Plaintiffs took some water drilling equipment across a culvert on Plaintiffs' own Property and at the north and lower end of their tract. The culvert was to allow water from a small spring on the lower (northern) end of the Plaintiffs' Property, and immediately adjacent to the Thorsen property, to flow down to the Thorsen (Defendant's) land (R. 2 in Case 8461). The heavy equipment required excavation which

collapsed the culvert; water backed up and fell into Gooseberry Creek and Defendant was not able to get the water through the culvert which, although on Plaintiffs' land, admittedly went through an established right-of-way allowing Thorsen to obtain water for the upper end of a small part of Defendant's land (R. 32). Thorsen filed suit for damages and an injunction. (R. 1-4, Case No. 8461). From these events Defendant knew that Plaintiffs were bringing in the drilling equipment for the purpose of relocating the well and that once the well was drilled there would be no further obstacle to development of the subdivision (R. 46). In the fall of 1980, probably during the deer season (R. 138), and immediately after Johnson drilled the water well under its State Engineer approved change application (R. 478) Defendant Thorsen hired Donald Gates to go through and dig an unnatural gorge through the forested part of the Plaintiffs' Property (R. 474). His purposes were to do the dredging surreptitiously. He did not take the question to the Board of Directors of Gooseberry Irrigation Company (R. 473) and did not talk to any one of those who owned the Gooseberry Estates Property [Plaintiffs] (R. 474).

Thorsen at the trial said that he opposed creation of a subdivision on the Johnson Property because:

> Well, this is cattle country and it's used for a pasture and it interfered with the irrigation ditches, * * * dogs and kids and everything roaming around there disturbing the cattle and livestock * * * above and next to my place and also above that was to pasture the cattle (R. 475-476).

He was asked if he was opposed to any kind of development at all in Gooseberry Canyon and he answered: "That's

right". Asked if he didn't want any development for residential purposes he answered:

> Gooseberry is strictly for pasture land for cattle.
>
> Q And you are determined to keep it that way; isn't that right?
>
> A That's right.
>
> Q And you would go any length to do that, is that right?
>
> A Not necessarily, no.
>
> Q Well, you would go to every length within your means to stop it wouldn't you?
>
> A That I had a right to, yeah.

He was asked:

> Q. Do you remember that an application was made to transfer five shares owned by the Johnsons to Gooseberry Irrigation for an exchange?"
>
> A. Yes.
>
> Q. And there were hearings held before the State Engineer, weren't there?
>
> A. Right.
>
> Q. And it was right after the State Engineer's hearing and his approval of that exchange that you did this backhoe work wasn't it?
>
> A. On the spring ditch.
>
> Q. And soon after that they built the water well in August of 1980 and then you engaged Donald Gates to go up and do the trenching, isn't that right?
>
> A. To clean up the lower "B" ditch, ya. (R. 478).

He said:

> I remembered taking him up there and told him where to start on the lower part and where he

could go on the upper part and told him and showed him where to go and I don't remember going back until the ditch was done, and then I went back and inspected the ditch and it was alright. (R. 479).

Q. And if you went up while he was working, you saw and approved what he was doing.

A. Right.

Q. You saw the size of the ditch that he was making.

A. Absolutely.

Q. And you saw the depth of the ditch he was making.

A. Absolutely.

Q. You sent him up there expressly to do this trenching on the Johnson Property, didn't you?

A. Yes.

Q. And you didn't give him any instructions at all to do work on your property anywhere?

A. Not on my property, no.

Q. And you didn't give him any instructions to do any work above the Johnson Property.

A. Oh no.

Q. So the only instructions you gave him was to go up and trench out the Johnson Property.

A. That is right. (R. 482).

Q. You started him right at the edge of the trench.

A. That's true. (R. 482, 483).

Q. The place you pointed out to him to start happens to be right at the edge of the trees don't it?

A. True.

Q. You did have him begin where the trees, where the dense trees commenced?

A. Yes. That's right. Where the trees commenced and that's where he started to dig. (R. 483).

Mr. Thorsen owned 354 acres adjoining the subdivision development and served by the same ditch system; however, he did no ditch excavation on, nor located so as to permit benefit to, his own land (R. 486).

The Trial Court made a bench ruling which expresses his findings as well as his conclusions, formulated after he had not only viewed the premises (R. 559, 560) but after he had also observed the demeanor of the parties.

These findings articulate the whole case and organize the facts according to the record from which those findings draw abundance of support.

The Trial Court made the following findings:

1. Plaintiffs and their professional engineers, in surveying the Property for the subdivision, encountered little if any residue of and absolutely no functioning ditch; if the ditch had been used it was infrequent before but not at all within the last fifteen years (R. 558).

2. Another (higher) ditch had been the main irrigation ditch for the company and the [irrigation] company maintained the system (R. 558).

3. Defendant hired the cleaning of the "ancient ditch" for other than a valid purpose and those other purposes were demonstrated by such observable things as:

- the ditch was massive - it was senseless - it was purposeless - the damage inflicted was shocking to

the Court - the land was rendered permanently useless (R. 559).

4. Defendant did not consult or obtain approval of the irrigation company (R. 560).

5. Defendant trenched the Property for the direct purpose of the injury to Plaintiffs (R. 560).

6. The ditch was not cleaned on Defendant's own property and then therefore in no way did the ditch [or the cleaning of it] have any value (R. 560).

7. The uncleaned part of the ditch had the carrying capacity of less than half a second foot of water (R. 560).

8. Nine lots were destroyed which had a value, in their present condition of $6,000.00 each (R. 560).

Those findings are based upon substantial and in most cases uncontradicted evidence particularly the amount of damage inflicted and the purposelessness and malicious intent of the Defendant in inflicting them.

The trench which Thorsen ordered, supervised, and paid for is portrayed in a number of exhibits. The trenching was characterized by witnesses (Esplin, R. 310) and by the Court, the Judge having viewed the premises (R. 559), as done on "an ancient ditch which had lost its integrity as an irrigation ditch" and for all practical purposes was not being used as an irrigation ditch for in excess of fifteen years (R. 558) the Trial Court finding that the Defendants, without knowledge of the Plaintiffs and without consulting them, willfully and intentionally went in and made a:

> massive, senseless, not purposeful ditch across their premises.

> The Court personally examined the ditch and felt that the effect of the cleaning of this ditch was it had become a trench and the Court finds it is a trench and the Court is shocked at the damage which was done to these premises.
>
> The Court has grave doubt whether these premises can ever be used for the purpose for which they were bought by the Plaintiffs. (R. 595).

The Court found that Thorsen did not consult the irrigation company and that Thorsen "was taking his own water under his own rights and the Court finds that he [Thorsen] did it this way for the direct purpose of injuring the Plaintiffs." (R. 560).[2]

Evidence of the waste committed by Defendant was established by photographic exhibits, by descriptive testimonies and with a view of the property by the Trial Judge (R. 99). Representative of this proof are four admitted exhibits attached as an Appendix to this Brief (pp. i - iv). Appendix i shows a section of a common ditch situated some distance upstream from the Property but through which all water must run before it could ever reach the subdivision (R. 75-77) and by "common ditch" was meant that what limited water it could convey includes even more than that which Defendants' property ever received through that ditch (R. 152, 155 -157). In other words, the photograph at Appendix i shows the restricted maximum amount of water that could pass or historically had passed through the ditch at a

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[2] Thorsen testified that any ditch in the Gooseberry area would be an Irrigation Company ditch (R. 453, 455, 464, 474).

point not only above Defendant's property but also above the Plaintiffs' point of diversion (R. 159, 196). Therefore, Appendix i shows a small lateral accommodating at one time the water of both Plaintiffs and Defendants. The Plaintiffs' water would be first diverted with the remaining, reduced balance as the water for which Defendant built the trench shown in Appendix ii, iii, and iv. The Trial Court found the capacity of Appendix i to be "less than half a second foot" (R. 560). Pages ii through iv of the Appendix portray typically, but not exhaustively of the record, destruction to terrain, trees, slope, and previously-unscarred appearance of the subdivision, but moreover illustrate a trench that could carry easily 100 times the water that could, (because of the Appendix i constriction) be channeled into it, and the Court so found.

The Trial Court found that if Defendant had any purpose at all it was "to have the luxury of an extra ditch which was senseless under the circumstances" and found that Thorsen "didn't clean this ditch on his own land and didn't clean the ditch in such a way that the ditch had any value." The Court found on the basis of expert testimony (R. 194 and 196) that less than one-half of a second foot could have gone over the ditch because the head of the ditch had such small dimensions and was limited in its capacity by a restricting culvert that the only water that could have gone through this ditch, which Defendant claims is an "alternate" route, could carry less than one (1%) per cent of the water which needed to be taken on a permanent basis through the existing upper ditch to which subdividers had already made an

accommodation (R. 73). Graphic illustrations of this finding are demonstrated by Exhibits 12, 14, 15 and 24D which show the untouched portion of the ditch, whereas Exhibits 16A- H show the massive proportions of the trenching in the same process of which over 400 well established and mature-age trees were destroyed (R. 290-295).

Damage Calculations

An appraiser for the Plaintiff testified about comparable tracts of land, one being a "conceptually approved" subdivision which was "very similar in nature" located in Sanpete County. This parallel property was a 55.47-acre tract engineered into 42 lots. With two of the lots retained by the seller the area which had been divided merely by platting, sold "wholesale" for $240,000.00 or "$6,000.00 per platted lot" (R. 319). When the lots were improved, a one-acre lot sold for $14,000.00 on a cash basis and another sold for $11,000.00 however prior to the completion of programmed improvements (R. 319, 320). The expert said that there would be more of a demand for lots "near Salina than east of Fairview". He testified that nine or ten of the lots in the Johnson subdivision were rendered totally unsalable (R. 320-321).

Using another measure of damages, the same expert said that it would cost $80,000.00 to fill in the trench, grade and re-seed it, and attempt a restorative tree-planting program; but this did not take into consideration the replacement of any trees or immediate reforestation of the area so that for years there would be no significant tree amenities and "nothing higher than the grass" (R. 321).

The same expert testified to a third manner of calculating damages by placing a value of $12,000.00 on each lot after it was improved, deducting $171,000.00 for aggregate on-site developmental costs, roughly $40,000.00 for sale expenses, and a projected net loss to the owners of in excess of $269,000.00 (R. 323-325).

One of the Plaintiffs and a Certified Public Accountant, William T. Gardner, testified that the total cost of completing the project was $171,125.00 (R. 119). He testified that he "adjusted each lot on an individual basis to what he felt the decrease in value would have been as a result the Thorsen excavation and arrived at a total for 15 damaged lots for a loss of $95,850.00."

Mr. Gardner testified that over 400 hundred trees were uprooted and destroyed (R. 290-315) and a florist of 20-years experience in shade, fruit and ornamental trees, and trees of all types, testified that although most of the trees were large and "there was no way you could replace a bigger tree and have them live" that the cost of replacing the larger trees would be $275.00 each (R. 293). Reclamation of forest character alone would have cost $110,000.00.

There was no purpose at all in beginning the trench where it was commenced except to eviscerate the forested sub-division (R. 90 lines 5 & 6, 92, 93; Exhibit 6).

ARGUMENT

General Statement

The Appellant's brief devotes eighteen pages to the thesis that Thorsen, the Defendant, had some rights in the vestigial remnant of an old ditch. Those "rights" are thin. Record pages 191, 197, 215-218, 240, 266, 301, 303 are references to testimony that the ditch was not perceptible to engineers who said they would have been looking for any ditch (R. 191), to the planning commission inspecting to see whether the higher ditch known to be in use would interfere with a subdivision (R. 266, 301, 303) and to examiners of an aerial photocopy (Exhibit 1). The Trial Court ruled from the bench:

> if there had been a ditch there and the Court rules that there was a ditch anciently there and the ditch had not been used frequently and had been used very infrequently and had been washed out in numerous places and lost integrity as an irrigation ditch * * * and was not being used as an irrigation ditch for in excess of 15 years * * * there was another ditch known as the Extension Ditch above and which, for all practical purposes, had become the main irrigation ditch of the Gooseberry system which the company maintained and which delivered the water to the Thorsen premises. (R. 558).

Even had there been an active, viable, existing ditch which Thorsen dredged, the outrageous abuse of an acknowledged easement will not be tolerated. An action for damages will lie on proof of abuse of an easement right. *Laden v. Atkenson,* 116 P.2d 881, 885 (Mont. 1941) citing *Holm v. Davis,* 41 Utah 200; 125 P. 403; 44 LRANS 89 (1912). The question of reasonable use of an easement is one of fact and reserved to the jury or the judge sitting without a jury to evaluate under relevant surrounding

circumstances, and its validity usually is one for the trier of facts to determine. *Cooper v. Sawyer*, 405 P.2d 394, 48 Haw. 394, 538. See also to same effect: *Shell Pipeline Corporation v. DeShazer*, 159 P.2d 464, 195 Okl. 347. The trench that eviscerated the subdivision was variously described by those who saw it as shocking as was the damage done to the premises (District Judge R. 559); one which had "torn up the ground and excavated extremely large rocks; denuded the property; just a heck of a big ditch for no reason unless they had an awful lot of water going through." (the appraiser, R. 310). It destroyed over 400 trees not counting the small ones. (one Plaintiff, R. 295).

Also on extensive testimony the the Court ruled there was no utility nor reason for the trench or "ditch" (R. 90-93, 208) causing him to observe that Thorsen made a "massive, senseless, not purposeful ditch" (R. 55) and that Thorsen retained the services of Donald Gates "for the purpose of cleaning this ancient ditch for purposes known only to himself (R. 559) and for the direct purpose of injuring the Plaintiffs." (R. 560). The Court found that the same ditch was not cleaned on Thorsen's own land leaving the entire ditch from head to bottom valueless (R. 560).

STATEMENT OF POINTS

POINT I

JOHNSONS ARE ENTITLED TO RECOVER DAMAGES AGAINST THORSEN IN ANY EVENT.

There is a principle of law that an easement is abandoned or that the claimant will be estopped to assert it if a proprietor of land in good faith constructs improvements or makes expenditures of money where actions of a claimant of an easement are inconsistent with its existence. The erection by the dominant owner of something incompatible with the exercise of the easement is evidence of abandonment. 25 Am. Jur. 508, 509, Easements and Licenses, §104.

The higher ditch carried all the water necessary to irrigate Thorsen's land for many years and that was the practice at all times since 1964 (R. 152-155).

Even by his own admission, Defendant Thorsen's land required several times the capacity of the old ditch even when it had been operated (R. 456). Thorsen's land was often delivered 10 cubic feet per second (R. 153, 154) and much more when high water was being delivered (R. 153). The maximum capacity of the usable part of the abandoned easement was 8/10ths or 9/10ths of a second foot (R. 155, 194). The Court found that it could have carried "less than half a second foot" (R. 560). Moreover, the Court found that "it had been washed out in numerous places and lost its integrity as an irrigation ditch and had not been used as an irrigation ditch in excess of 15 years." (R. 558).

Engineers (R. 191), the Planning Commission (R. 266, 301), and the Plaintiffs themselves (R. 240, 241) saw nothing other than the remnant of an old unuseable ditch. The latter, based upon this, designed and spent extensive amounts of money planning a subdivision (R. 145, 226, 269, 279).

Even if there were any rights in the old unused ditch, the trenching along either side of it and the atrocious expansion of it constituted a gross abuse, damages sustained under which are compensable by the Court. 25 Am. Jur. 2d, 524, Damages, §122; 28 C.J.S. 773, Easements, §93.

Thorsen had no continuing interest in any ditch across Johnson's land.

Thorsen's intentional damage to Johnson's Property was an abuse of any easement which may have existed.

POINT II

THE TRIAL COURT'S AWARD OF DAMAGES MUST BE UPHELD.

A. DAMAGES SUPPORTABLE UNDER ANY ONE OR MORE THEORIES WILL NOT BE DISTURBED ON APPEAL.

B. DAMAGES COULD HAVE BEEN AWARDED UNDER ANY ONE OF FOUR METHODS OF CALCULATION.

A. DAMAGES SUPPORTABLE UNDER ANY ONE OR MORE THEORIES WILL NOT BE DISTURBED ON APPEAL.

In *Limb vs. Federated Milk Producers*, 23 U.2d 222, 461 P.2d 290 (1969) this Court held that a judgment of the Trial Court will be affirmed if sustainable on any legal ground or theories apparent in the record.

In *Goodsell vs. Department of Business Regulation*, 523 P.2d 1230 (Utah 1974) this Court likewise held that under several theories presented to the Trial Court the Appellate Court will affirm any result which finds support in the record irrespective of the theory under which that ground or basis was argued (cited at 5 C.J.S., Appeal and Error, §1464(1).

Therefore, under any theory or method or calculating damages, the Plaintiffs are entitled to recover at the least the amount fixed by the Trial Court, which was the most modest of all awards possible.

B. DAMAGES COULD HAVE BEEN AWARDED UNDER ANY ONE OF FOUR METHODS OF CALCULATION.

As we will discuss in Point III we do not concede that Defendant is entitled to restrict Plaintiffs' recoverable damages to those which would be available in a condemnation case since Thorsen does not have authority to condemn. Nevertheless under well-established principles of measured condemnation damages there is abundant evidence in the record to establish the amount awarded by the Trial Court if this case were tried as a condemnation.

Plaintiffs' appraiser Esplin testified that after investigating the market and "tying this into the sale of another property" he found a comparable where the subdivision was not developed but "conceptually approved* * *very similar in nature * * *and not finally approved at the time of the sale." The proposed subdivision was sold wholesale (40 lots of a 42 proposal) with a sale price of $42,000.00 or $6,000.00 per platted lot. This price was before water was installed and without sewer

(R.319). Esplin testified to numerous lot sales without any subdivision improvements justifying a $12,000.00 value on each proposed lot in the Plaintiffs' property (R.320). He testified that 10 lots were "badly damaged" and had been decreased in value by $6,000.00 per lot (R.320) and said that restoration of the property if the Plaintiffs wished to continue development would be $80,000.00 in a condition where "there would be no trees* * * nothing higher than grass."

He testified that "there is* * * enough damage* * * that it may not be economically feasible to go ahead with it" (R.322).

The same witness testified to a "before and after value" of $80,000.00 damages which was admitted into evidence as Exhibit 33A (R.357).

Where property has different values so that it may be used for different purposes, all of such values should be taken into consideration, and the owner is entitled to recover the highest value. In establishing the market value of land, it does not necessarily follow that the landowner is limited to the value of the land for such purpose only; its market value for any purpose for which it could be sold in the open market must be considered * * *. 25 C.J.S., Damages, §88, p.973.

It is axiomatic that an owner can testify to the value of his own land or damages to it and certainly even in a condemnation case. 27 C.J.S., Eminent Domain, §281, p.74.

One of the owners and a CPA, Bill Gardner, testified that net damages were $95,850.00 (showing proportional losses to all of the lots) by adjusting the decreased value of 15 of the

total 33 lots (R.123-125). If the subdivision had been allowed to proceed the expected profit, after paying costs to complete all improvements and sales commissions, would have been $269,000.00 (R. 322-325).

Aesthetic value of trees is a measure of damages. *Kroulik vs. Knuppel*, 634 P.2d 1027 (Colo. App. 1981). Their loss was $110,000.00 (R. 293).

The Trial Court adopted the most modest of the several methods of assessment of damages.

While the Trial Court fixed the damages at the least of all the possible alternatives the evidence produced the authorities are that in the event of destruction of incidents to land by severance or destruction that valuation which will prove most beneficial to the injured party should be adopted for the reason that he is entitled to the benefit of his property intact. *Marrion vs. Anderson*, 36 Wash.2d 353, 218 P.2d 320,321 (1950).

In fixing damages the Trial Court is vested with broad disertion and the award will not be set aside unless it manifestly appears to be unjust, influenced by prejudice, or in disregard of pertinent details. *Clayton vs. Crossroads Equipment Company*, 655 P.2d 1125 (Utah 1982).

For reasons upon which we will elaborate in Point III the "willing-seller - willing-buyer" hypothesis is not present here, and even though we have justified the Trial Court's award of damages on traditional eminent domain barometers the best that Defendant can claim is that damages in this case are not susceptible of precise determination and a failure to prove an

exact dollar loss somehow weakens Plaintiffs' claim. This is not the law in Utah nor in any other jurisdiction.

In all cases involving economic loss through a destruction of an enterprise being commercially pursued the rule against recovery of uncertain damages is directed against uncertainty with respect to cause rather than to measure or extent and a responsible party cannot escape liability because of uncertainty in amount of the full damage. If some speculation must be indulged to project full damage the duty to prove damages is satisfied by evidence that provides a reasonable basis for their assessment. *Gould vs. Mountain States Telephone & Telegraph*, 6 U.2d 187, 309 P.2d 802, 805-806 (1957).

In *Security Development Company vs. Fedco, Inc.*, 23 U.2d 306, 462 P.2d 706, 709-710 (1960) this Court held:

> If a reasonable basis of calculation is afforded, it is sufficient although the result is only approximate* * * and only when there is a complete absence of probable facts to support the conclusion reached does a reversible error appear.

In *Winsness vs. M. J. Conoco Distributors, Inc.*, 593 P.2d 1303, this Court held that the evidence, although meager and imprecise, still would permit the common sense of the jury to place it in perspective for probable resolution of the damage issue (593 P.2d at 1309). Here the evidence is neither meager nor imprecise.

If the Plaintiff has produced the best evidence available and it is sufficient to afford a reasonable basis for estimating his loss, the Plaintiff will not be denied substantial recovery because the amount of damage is incapable of exact

ascertainment. *Brear vs. Klinker Sand & Gravel Company*, 374 P.2d 370, 60 Wash.2d 443 (1962).

In *Harris Cattle Company vs. Paradise Motors, Inc.*, 448 P.2d 866, 104 Ariz. 66 (1968) the Court held, where expert testimony was used to project future profits, that loss of profits from destruction of a business may be recovered if the amount of actual loss is rendered reasonably certain by competent proof; that proof of damages relaxes the requirement for precision.

In *Story Parchment Company vs. Peterson Parchment Paper Company*, 282 U.S. 555, 51 S. Ct. 248, 75 L.Ed. 544, the distinction is made between cases when the fact of damage is uncertain and those in which the amount is not fixed. The rule, still prevailing, is that once the fact of damages is established with certainty the rule is relaxed to allow the trier of fact to determine from the best evidence what the correct full measure of damages should be.

POINT III

THORSEN DOES NOT HAVE POWER TO CONDEMN JOHNSON'S PROPERTY.

The Defendant's theoretical "eminent domain" rule of damage is inapplicable for the over arching reason that Thorsen condemned Johnsons' property because he did not want it developed; arguing after the fact that rules of eminent domain restrict Plaintiffs and shield Defendants in narrowing the rules for awarding damages.

Constitutional and statutory eminent domain rights and correlative duties are an instrument of expediency to take property for an essential public or higher use irrespective of the willingness of an owner to sell. These laws create a fiction that an amount can be postulated with a willing buyer and a constructive willing seller and, through the use of comparables, presume that the owner not only would sell but would be willing to sell for prices synthesized from a collection of related or similar transactions.

Arguing rules of eminent domain in a case of intentional waste to real property is parallel to arguing statutory rules of multiple damages in a common law case of trespass to try title.

The law of eminent domain is singularly coercive and in some applications permissively confiscatory in depriving an owner of incidents he would enjoy if he were at liberty to enforce a higher price by exerting his own inflexibility. *United States vs. Miller*, 317 U.S. 369, 63 S.Ct. 276, 87 L.Ed. 336 (1942), is an example where value enhancement by reason of the project for which the condemnation is pursued was not compensable to the landowner.

Eminent domain precludes an owner from speculating upon his own property, from obtaining value for its adaptability to his own peculiar needs, and from accommodation to his reluctance to part with the land for present and future economic, tax, or like considerations (27 Am. Jur. p.69, Eminent Domain §279) and

destroys the admittedly lesser attitudes of sentimental attachment and pride of ownership.

Elements which possibly, though not probably, would affect values are similarly excluded in determining market value in eminent domain proceedings. *People vs. Oceanshore Railroad, Inc.*, 32 Cal.2d 406, 196 P.2d 576, ALR.2d 1179. In like manner future uses which are peculiar to the particular plans or projects of the present owner will not be shown or taken into consideration. *Arkansas State Highway Commission vs. Watkins*, 229 Ark. 27, 313 S.W.2d 86; *Maynard vs. Nemaha Valley Drainage District*, 94 Neb. 610, 143 N.W. 927.

The rigid eminent domain tests[3] of market value may not allow the property's value for a special purpose to be considered but its fair market value in view of all purposes for which it is naturally adapted may be. (27 Am. Jur. 2d p. 74, Eminent Domain, §281). Thus the Courts have sometimes excluded from damages in eminent domain proceedings values having peculiar merit to the owner himself.

This ought not to be the law in the case of an intentional commission of waste to real property because if so any person could compel another to alienate his property.

The rule applicable to an intentional, willful, malicious trespass ought to be that one applied in measuring damages for waste to real property.

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[3] By so asserting Plaintiffs do not in any way concede that the evidence does not rise to meet those tests.

In those cases the measure of damages is the diminished value of the land or estate, taken at its actual value if the waste was not willfully done, and at the highest probable or speculative value warranted by the evidence if the waste was willfully committed (93 C.J.S. p. 577, Waste, §18).

In any case where there are any fiduciary contacts between the perpetrator of waste on real property and its owner this rule should apply.

Here Harry Thorsen was secretary, director and an officer of Gooseberry Irrigation Company (R. 469); as such he owed a responsibility to all of the individuals who were irrigator-stockholders from the stream including the Plaintiffs. He also owed fiduciary duty to see that the rights-of-way for the streams flowing through another's property be managed in such a way as to commit the least amount of injury to the burdened estate.

Thorsen himself had individual but also representative rights in the Johnsons' land to the extent, and only to the extent, of the easement in the higher ditch. This ditch discharged 10 second feet of water onto Thorsen's land traditionally (R. 153, 154). Thorsen as secretary of the irrigation company had a fiduciary responsibility to the servient owners to see that this water did them the least amount of damage. That duty would have been achieved so long as the water remained in the higher ditch designed to accommodate that full flow and the rest of the land remained undisturbed.

When Thorsen maliciously commits injury to the property by what the Trial Court characterized as a senseless, meaningless, valueless trench, he has breached a common-sense if not a fiduciary responsibility and is in much the same condition as an individual in possession of property who commits willful and intentional waste thereon contemplated by the citation from Corpus Juris Secondum above.

We respectfully submit that the Trial Court grossly understated the amount of damages which the Plaintiffs should recover from the Defendant but in any event cannot be reversed for inexactness.

CONCLUSION

The Trial Court's award of damages based upon the lowest-yielding formula, in a case of clear, indisputable liability, should be affirmed.

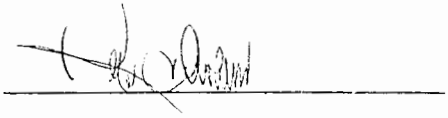
Respectfully submitted,

OLSEN AND CHAMBERLAIN

By _____
Ken Chamberlain

ACKNOWLEDGEMENT OF SERVICE

I hereby certify that two (2) copies of the foregoing Brief of Respondents were mailed to Mr. Norman H. Jackson, Attorney for Appellant, 151 North Main Street, Richfield, Utah (84701), by U.S. Regular Mail, Postage Prepaid, on this 31st day of October, 1983.



Appendix p. i [Exhibit 14; see Brief p. 13]
Illustrates carrying capacity of an approach section to area dredged by Defendant.

Appendix p. ii [Exhibit 16A]
Vertical cut; dumping on lower bank with dredged material; typical tree destruction.

Appendix iii [Exhibit 16D]
Typical destruction of trees; exposure of deep stratum of coarse rock.

Appendix iv [Exhibit 16H]
Typical cross-section: depth of dredging and breadth of disturbance and denudi