1969

State of Utah, By and Through Its Road Commission v. Ivor D. Jones and Rua C. Jones, His Wife, and State Bank of Southern Utah : Brief of Appellants

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, by and through its ROAD COMMISSION,
Plaintiff and Appellant,
vs.
IVOR D. JONES and RUA C. JONES, his wife, and STATE BANK OF SOUTHERN UTAH,
Defendants and Respondents.

CASE No. 11801

BRIEF OF APPELLANT

AS APPEALED FROM THE JUDGMENT OF
FIFTH JUDICIAL DISTRICT COURT
IN AND FOR IRON COUNTY, UTAH
HONORABLE C. NELSON DAY, JUDGE

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NATURE OF THE CASE

The nature of this case is a review of a jury trial in the District Court of Iron County, Utah, pertaining to a condemnation of several small pieces of land in Iron County, State of Utah, for purposes of Interstate Highway 15. This particular land is located approximately five miles North and slightly East of Cedar City in Iron County, State of Utah, and is on a large gentle curve where the road turns from Northeast of North to Northeast toward Summit, Utah, as one proceeds northerly on said Interstate 15. Condemnation was allowed by the District Court of Iron County, Utah, and the matter was tried before an Iron County jury commencing 25 June, 1969, and terminating on 26 June, 1969. This particular case was unique from one standpoint: The jury consisted of eight women.

DISPOSITION IN LOWER COURT

As stated above, this was a jury trial by eight women, commencing 25 June, 1969, and terminating 26 June, 1969. The matter was finally submitted to the jury, and they were sent out of the courtroom at 4:24 p. m. on 26 June, 1969, and came in with a verdict at 6:42 the same evening. The verdict was as follows'

Market value of the property taken by the State (includes property taken in fee as well as for easements)	$3,121.30
Damages, if any, by reason of severance	10,801.00
Total Judgment	13,921.30

Thereafter, the Plaintiff filed a motion for judgment n.o.v. by and for the reason that it was quite apparent the damages awarded by the jury were the result of misunderstanding of the Court's instructions, and by and for the further reason that all evidence offered by the defendants was based upon a sale of lots out of a subdivision and the entire case of the defendants was improper; that for this reason the judgment should be reduced to the sum of $2400.00 which was the only qualified testimony given pertaining to damages.

Plaintiff also filed an alternate motion for remittiture asking for the remitting of all severance damages awarded by the jury in the above entitled matter, by and for the reason that it was most apparent that the jury did not understand the court's instructions and misapplied same, and that the severance damages as awarded by the jury were excessive, and that there was no acceptable evidence offered by the defendants for severance damages.

Plaintiff also made an alternate motion for a new trial for the same reasons.

These motions were argued to the Court by respective counsel for the parties in a law and motion day on 10 July 1969, same having been reset by court order from a later law and motion day originally scheduled for 17 July 1969.

The Honorable C. Nelson Day issued a Memorandum Decision and Order on Motion for Judgment N.O.V. or for New Trial after having taken the matter under advisement on the 24th day of July, 1969, which was duly filed thereafter by the Clerk of the District Court of Iron County, Utah. There are some very interesting findings in this memorandum decision which has been included in Designation of Record on Appeal of the Appellant as Item 16. These findings that are of special interest are as follows:

"4. The landowner, Ivor D. Jones, testified he valued all of his land on the southeast side of U. S. 91 at $1,500.00 per acre, including the 35.95 acres taken, and the severance damages to the 37.45 acres remaining at an average of $1.115.70 per acre or just over 74 per cent of his $1,500.00 per acre valuation.

"5. The defendants' expert witness, Mr. Marcellus Palmer valued all of defendants' land on the southeast side of U. S. 91 at $1,490.00 per acre, including that taken by the State, and the severance damages to the 37.45 acres remaining at an average of $1,104.58 per acre, also just over 74 per cent of his $1,490.00 per acre valuation.

"6. The only other witness as to valuation was the State's expert, Mr. Ken Esplin, who valued the defendants' land southeast of U. S. 91 at $55.00 per acre for that portion broken up and $28.00 per acre for the native brush land. He placed his severance damages at $27.50 and $14.00 per acre respectively or exactly 50 per cent on the remainder land.

"7. The jury, which consisted of eight women, returned a verdict of $3,121.30 for the property taken and $10,800 for severance damages. This was computed at $86.80 per acre for the 35.96 acres of property taken and $288.38 per acre as severance damages to the 37.45 acres of property remaining. The $288.38 per acre severance damages to the property is 332 plus per cent of the $86.80 per acre valuation of the property actually taken.

"11. The Court is of the opinion that the jury verdict was not based properly on the evidence of the case, and that the jury's award of severance damages in the amount they did, was grossly excessive.

"12. The plaintiff State of Utah is entitled (1) To an order of this Court reducing the total judgment herein to the sum of $8,000.00, or (2) in the event the defendants file objections thereto within 15 days of the date hereof, a new trial. If no objections by defendants are filed within 15 days from date hereof, the clerk is directed to enter the judgment for defendants on such

reduced amount. If objections are filed within such 15-day period, the jury verdict is to be set aside and the case set for retrial."

The defendants failed to file any objections under the situations set fourth, in Paragraph 12 of said memorandum decision, and plaintiff elected to appeal.

RELIEF SOUGHT ON APPEAL

Plaintiff-Appellant seeks to have the Supreme Court find that the defendants offered no acceptable evidence of value, and to render a judgment against the plaintiff pursuant to the testimony of Mr. Esplin the amount of $2400.

STATEMENT OF FACTS

Plaintiff-Appellant's Exhibit 1 which was not included in the designation of record on appear, due to size and inconvenience of transportation, was a large photographic map which included the entire project of the State Road Commission from North Cedar City to Summit in Iron County, Utah. Counsel now attempts to replace the photo map by a word picture. The defendant, Mr. Jones, had acquired approximately 1,000 acres of land, more or less, approximately six miles North Northeast of Cedar City, Utah, in Iron County, somewhat to the East of what is locally known as Webster's Hill where U. S. 91 turns and runs generally northeasterly toward Summit, Utah This property had been acquired approximately fifteen or twenty years, or more, before condemnation, and the property was already bisected by U. S. Highway 91 on the southern extremity thereof, and by a dirt road which left U. S. 91 at approximately the middle of the area where the Jones property went across 91; then due West through the Jones property to Enoch, Utah. Of the Jones land, 160 acres was South of this road and the remainder was North of this road. The property that is spoken of and described in the exhibits as being subdivided, is the area between the Enoch road and Highway 91. The large portion of the property is on the North of the Enoch road. In Mr. Jones' property acquirements in this particular area, corners of three pieces extended Southeast of 91. There was approximately one-fourth mile between

these pieces. The construction of Interstate 15 was on the Southeast of 91, with 91 being used for a frontage road on the northwest side. Interstate 15 also coming North from Cedar City made the curve to the right and headed for Summit in more or less a northeasterly direction, and took a portion of each of the three parcels that were on the southeast side of 91 before the Interstate was planned. The property was all zoned A-1, or Agricultural, under the County zoning area. The taking in the three parcels consisted of 34.35 acres actually taken, and easements of 1.61 acres. The date of taking was 18 October, 1967. On Parcel 9, the taking was 2.01 acres. However, approximately 8 acres were left between Interstate 15 and Highway 91 on the north side of Interstate 15, On Parcel 10, the taking, including the easements, was almost 13 acres, with a small parcel left South of Interstate 15 and another parcel left North of Interstate 15, and between it and Highway 91. The parcel between Interstate 15 and Highway 91 was narrower than on Parcel 9. Again, on Parcel 11, the actual taking was something over 20 acres, with in excess of 28 acres left South of Interstate 15, and nine and a fraction left between Interstate 15 and Highway 91 on the North of Interstate 15, again longer and narrower than the previous parcels. All parties testified that the land of Mr. Jones Northwest of Highway 91 was not affected by the construction of the Interstate. All lands South of Highway 91 and affected by the Interstate were zoned A-1, or Agricultural. A portion of the land North of Highway 91 and South of the Enoch road, consisting of approximately 100 acres being severed from the rest of the Jones land on the North by the Enoch road, had been subdivided and sales were taking place in that area. The area South of Highway 91, which included Parcel 11, had been planted into wheatgrass pactures. Those areas South of the Highway 91 which included Parcels 9 and 10, were in native brush, rocks and trees. Parcels 10 and 11 had been fenced. Parcel 9 had not been fenced. On the South of these parcels was public domain. An earthen tank had been made on the area including Parcel 11 to hold rain water for stockwatering which was generally not available otherwise unless stockwatering was accomplished by hauling water when these areas were pastured. The areas

from which Parcels 9, 10 and 11 were taken did not touch each other, and were severed from other property of the defendants by Highway 91. Prior to the construction, the defendants owned three distinct parcels of land South of Highway 91, each of which was affected by the construction of Interstate 15.

ARGUMENT

Point I

THE DEFENDANT FAILED TO PRODUCE ANY ACCEPTABLE EVIDENCE OF VALUE ON THE SUBJECT PROPERTY.

The trial court erred in allowing the defendants' testimony to be presented on a subdivision basis. The testimony of all defendants was quite clear that the property South of Highway 91 had not been subdivided at the time of the taking, and had been left out intentionally of any plans of subdivision that the defendants had initiated, and was left out at the election of the defendants. This may be found in the testimony of Ivor D. Jones, property owner, commencing in the transcript on Page 21, line 25, through Page 22, line 8. Plaintiff's objections to going forward on this basis were overruled, which may be found on Page 22, line 17, to Page 23, line 5, and again on Page 24, line 4, through page 27, line 19. All this was testified to by the property owner on Page 24 in the transcript from line 1 through line 12, and these were identical figures with those later used by Mr. Palmer and tied to the Village Green subdivision.

It became quite clear that the defendants were relying entirely on sales of lots out of subdivisions in a Voir Dire Examination commencing on Page 53, brought on by questions asked on Page 53, line 1, said item running to Page 63, line 14. On Page 61, at line 17, of the transcript, a motion for mistrial was made by counsel for plaintiff, which was overruled. On Page 62 at line 20, motion to strike all testimony relating to subdivision purchases was made, and along with overruling this motion, on Page 62, line 26, the Court acknowledged that the objections went to Mr. Palmer's entire line of testimony, and both the objections, the motion to strike and the mis-trial were overruled and denied, ending on Page

63 at line 6. Again on Page 63 at line 9, as a matter of record, a continuing objection to any testimony concerning these subdivisions was allowed so that it was not necessary to make an objection to each question. On line 13, the Court allowed the objection to become a matter of record. The acknowledgment of the Court and the understanding that the objections were to run to the entire line of testimony were reiterated, on Page 71, line 24, to Page 71, line 26 of the transcript.

A complete examination of the transcript of the defendants' entire testimony fails to reveal any other information upon which to base an opinion of the value of the property, than the sales out of the subdivision acros Highway 91 to the North. Under these conditions, Mr. Palmer came up with an opinion of value of $1,500.00 per acre which was identical with the opinion of value of Mr. Ivor D. Jones, and both admitted that this was $25.00 and $50.00 land for grazing land, and that there had been no attempt to put a subdivision on the South side of 91.

There is a whole line of cases that hold that even in city areas with subdivisions going up all around, unless the property has actually been subdividied, the measure of damages is to be based upon what the evidence shows was the value at the date of service of summons, and that a situation where value is placed on small parcels, not in the size of the actual parcel, is improper. In Redwood City Elemenatry School District vs McGregor, 276 P2d 78, a California case decided in 1954, it was held that a 12.33 acre parcel of improved land used for commercial production of flowers and various item in connection therewith, the jury was required to determine the value of the parcel not as if it had been divided into small parcels, but as it was used as a whole on the date of the taking, and any evidence as to what the owner might plan to do with the land could not be considered as enhancing its market value. This has been endorsed by the Utah Supreme Court in the case of State of Utah vs Tedesco, 4 Utah 2d 248, 291 P2d 1028. In this case, defendants testified as to value based upon the price at which it could be sold in small pieces if buyers could be found, and failure to grant plaintiff's motion to strike

defendants' expert testimony as to values was under the cirsumstance prejudicial, which prejudice was not overcome by the instructions given. This case holds that a condemnee is not entitled to realize a profit on his property and that it must go to the condemnor for its fair market value, as is, irrespective of any claimed value, based on an aggregate of values of individual lots in a subdivision which one hopes to sell at a future time to individuals rather than to an individual. This rule applies, whether the property is platted or not. The sale should be the sale as a single unit, regardless of whatever the state of completion of the subdivision may be, and a fair market value is the price that same will bring from a willing buyer buying the whole tract. The Utah State Supreme Court has long held that any anticipated profits which were contractial are therefore not recoverable and should not be allowed. In addition to the Tedesco case, this was held in State Road Commission vs Noble, 6 Utah 2d, 42, 305 P2d 495; Weber Basin vs Braegger, 8 Utah 2d 346, 334, P2d 758, and many others. Yet, although cases are legion that hold that the condemnee is not entitled to a profit and irrspective of any claimed value based on an aggregate of values of individual lots in a subdivision which one hopes to sell at a future time to many individuals rather than to one individual, at the same time over continuing objection, and motion for mis-trial, this was allowed in the case now being appealed, and no other evidence was offered whatsoever. Under these conditions, there is only one acceptable bit of evidence as to the value in the entire case, and that is the testimony of Mr. Esplin, commencing at Page 144, line 12, to Page 147, line 29, where he gave his valuations, where he got them, and came up with an opinion as to the fair market value of the damage done to the landowner of $2400. Under these conditions, there can be no question but that the trial court again erred on its failure to grant the motion of the plaintiff for judgment notwithstanding the verdict of $2400.

Pont II

THE JURY WAS ENTIRELY CONFUSED.

There is no question that the ladies of the jury were

confused. In all probability the undersigned was a party to the confusion. In Judge Day's Memorandum Decision and Order on Motion for Judgment N.O.V. or For New Trial, he makes a finding to this effect. This is finding No. 7. Regardless of how one approaches this problem, either from the standpoint of subdivision lots, grazing ground, or any other way to approach values on these properties, certainly on that portion of the land that was Southeast of Highway 91, through which the freeway went, regardless of what value we put on it, the man is harmed a greater amount per acre by entirely depriving him of his land than he is by leaving it in odd shapes and limiting the use. Yet, in Finding No. 7 of the trial Judge, on the motion for judgment n.o.v. there is a ~~ing in the trial judge, on the motion for judgment n.o.v.~~ find[ve]in which these items have been figured out. Three Thousand One Hundred and Twenty-one Dollars and Thirty Cents was the finding for the property taken. Ten Thousand Eight Hundred Dollars was the finding for severance damages. Yet, the odd thing is that the two acreages were almost identical in the totals. The 35.96 acres of propetry taken, including the easements, divided into $3,121.30 is $86.90 per acre. Yet, for approximately an acre and a half more land, of which the defendant still has the use, he was given damages of $10,-800.00 which computes out to $288.39 per acre. Regardless of how we approach this problem, severance should not be a greater amount per acre than the land actually taken. The action of the trial judge in reducing the judgment to $8,000.00 is based entirely upon a finding of confusion. The failure of the defendant to file an objection, as set forth in Finding No. 12, is an admission of the confusion. Certainly, if the defendants had been of the opinion that this testimony was correct and the jury was not confused, they would not consent to an almost $6,000.00 reduction in a jury verdict under these circumstances. The action of the trial court reduced the verdict from $13,921.30 to $8,000. Why should the defendants acquiese? This acquiescence alone is an acknowledgment of the confusion of the jury.

CONCLUSION

Under the circumstances of this matter, we can only

conclude that confusion prevailed; The jury speculated and came up with an unreasonable and wholly improper verdict, and that inasmuch as the only proper opinion of value was that of Mr. Esplin in the sum of $2400.00, the entire matter should be remanded to the trial court with orders to enter a judgment in favor of the defendants for $2400.00 and interest on the portions not paid at the time of obtaining the order of occupation in accordance with the statutory provisions applicable thereto.

Respectfully submitted,

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