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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 Respondents

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 RESPONDENTS

ON APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF UTAH, IN AND FOR IRON COUNTY

HON. C. NELSON DAY, *Judge*

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STATEMENT OF KIND OF CASE

This case deals with a condemnation action wherein the plaintiff and appellant herein condemned portions of land owned by defendants, Ivor D. Jones and Rua C. Jones, his wife, in connection with the construction of Interstate Highway 15. The land is located between Cedar City, Utah, and Summit, Utah. The defendants did not protest the right of the State of Utah to condemn the property and sometime prior to the date of the trial the Court entered an order of immediate occupancy permitting the plaintiff and appellant to occupy the property. The trial was for the sole purpose of de-

termining the damages sustained to the defendants and respondents herein as a result of the taking.

STATEMENT OF FACTS

Respondents feel that it will be of considerable benefit to the Court to set forth herein a statement of facts pertinent to the issues. The respondents' statement is to provide facts in addition to those set forth in the appellant's statement as to the disposition in the Lower Court.

Plaintiff-appellant's statement of facts fail to disclose the defendants-respondents, Ivor D. Jones and Rua C. Jones, his wife, in connection with their son and business associates in Las Vegas, Nevada, had proceeded with the development of a subdivision on portions of the property owned by defendants-respondents. The subdivision, as originally planned, included the parcels of property identified in the plaintiff-appellant's statement of facts and also included the tracts of land which were severed by the construction of I-15.

U. S. Highway 91, which is the highway which has been in existence for many years and which was the highway serving the area from Cedar City north to Summit, Utah, bisected the property owned by defendants-respondents. The portion of the defendants-respondents' property which was contemplated as the area to be subdivided was situated in the area which was bi-

sected by U. S. Highway 91. This property was easily accessible from U. S. Highway 91.

Defendants-respondents, and their associates, had been substantially involved in the subdivision development for a considerable period before they were advised that Interstate Highway 15 would be bisecting their property. Preliminary plans had been made, engineering, surveys and reports as well as preliminary drawings of the subdivision had been completed. Defendants-respondents contacted the plaintiff-appellant as soon as they and their associates were aware that the Interstate Highway System may bisect their property. At the time of the initial contact with the official representatives of the plaintiff-appellant by defendants-respondents and their associates, there appeared to be no certain route established as to where the highway would bisect the subject property. To eliminate the confusion that the defendants-respondents knew would result from the new highway travelling through the proposed subdivision and the limitation on access rights in connection therewith, the defendants-respondents abandoned that portion of the subdivision situated at or near the route which was determined to be the most probable route of Interstate I-15. All that portion of the proposed subdivision situated south and east of the existing Highway 91 was abandoned and the plans progressed on schedule with the remaining portion of the subdivision situated north and west of Highway 91.

At the time the Court entered the order of immediate occupancy, the subdivision of the defendants-respondents and their associates known as "Village Green Farms" had progressed to the point where the subdivision plats had been approved by the County Commissioners and the interested parties had proceeded with sales of subdivision lots.

It should also be clarified that substantially all of the defendants-respondents', Ivor D. Jones and Rua C. Jones', property in the parcel owned by them in the area between Cedar City and Summit, Utah, is flat grazing land except those portions of property contemplated in the original subdivision which are situated up near the low hills which parallel the highway. The property planned for the original subdivision on the east and south side of the old highway (this is the property subsequently abandoned) has small rolling hills and a gradual slope upward with a view of the entire valley from almost any location on the property.

Plaintiff-appellant's statement of facts outlines the parcels specifically by number and acres and the effect of the condemnation on each.

ARGUMENT

POINT I

The trial court did not err in allowing the defendants' testimony respecting values of property. In fact,

the testimony as presented was not as characterized by appellant as "on a subdivision basis." The testimony of Ivor D. Jones (Tr. commencing p. 28) discloses that the property actually taken, as well as the property severed on the south and east of the highway, was to have been in the original subdivision. The testimony further shows that the subdivision which did in fact develop was adjacent to Highway 91 which was to become and later did become an access road or frontage road used in connection with the Interstate Highway System.

Mr. Ivor D. Jones testified that in his judgment the property had a value based upon its highest and best use at the time of taking of $1,500.00 per acre (Tr. 29).

The testimony of Marcellus Palmer (Tr. commencing page 49) outlined the methods of appraisal which were evaluated by him in connection with the subject property and discloses the type of appraisal or approach to the appraisal placed upon the property by this witness. The testimony of Mr. Palmer as to the method of or approach to the appraisal coincides with the judgment of the plaintiff-appellant's expert witness, Mr. Ken William Esplin. They both used what they defined to be the market-data method or approach to appraisal.

Contrary to the claim of plaintiff-appellant that the defendant failed to produce any acceptable evidence of value on the subject property, the testimony clearly established that both Mr. Ivor D. Jones and Mr. Mar-

cellus Palmer determined that the highest and best use of the property would be "rural homesite property" (Tr. 50).

Mr. Marcellus Palmer's testimony discloses that he was eminently qualified to appraise the subject property and that he was very familiar with the general area, having appraised properties in connection with livestock operations, farming operations, grazing operations, mountain and rural subdivision developments and rural homesite developments.

Mr. Palmer testified that he was aware of, examined and considered, the comparable sales of property in and about the Iron County and Southern Utah area. Based upon his examination of the subject property and his knowledge gained from his investigation respecting other properties in the area, he formulated a judgment that the highest and best use of the subject property at the time the condemnation action was commenced was for the development of homesites. The value established by Mr. Palmer, based upon its highest and best use for the property was $1,490.00 per acre for the acreage taken.

We believe that defendants-respondents' approach to establish the value they assessed to the subject property falls well within the outline of the Utah Supreme Court in the case of *State of Utah vs. Tedesco, 4 Utah 2d 248, 291 Pac. 2d 1028.* In the Tedesco case, the de-

fendant's expert witnesses had apparently "arrived at their determination as to the value of the property by taking the sales prices of comparable lots in the vicinity, assigning such values to the individual lots involved in that litigation, and adding them up, without considering any cost or expense incident to the sale of each of the lots at the time within which the lots might have been sold." In the instant case, the expert witness compared the value of the lots in the adjacent subdivision, which was the subdivision of which the subject property was to have originally been a part, deducted from the average price of said lots the cost of water, the cost of engineering, the cost of subdivision planning, development and filing, deducted therefrom the commission costs anticipating the sale of lots by a means whereby commissions would be required and thereafter, deducted an additional amount for other contingencies and profit. The remaining value was, in the judgment of the expert witness, the price that a reasonable buyer would be willing to pay for the subject property. The expert witness for the defendants did in fact deduct all such items as appeared to be objectionable to the Court in the *State vs. Tedesco* case.

Plaintiff-appellant argues that the value of the property should be based upon a single unit, regardless of whatever the state of completion of a subdivision may be, and a fair market value is the price that such property will bring from a willing buyer purchasing the whole

tract. The testimony of Mr. Palmer was clearly to this effect. Mr. Palmer established that, based upon his investigation of the entire area and after a determination of what sales to use as comparable sales, he made the necessary and appropriate adjustments to determine the value of the ground per acre and placed an aggregate value on the total acreage predicated upon the number of acres times the value per acre. Contrary to the claim of plaintiff-appellant that such an approach results in a realization of a profit on the property, the testimony clearly shows that the deductions were made to reduce the value to raw acreage, extracting therefrom the profit and all other costs incurred and reasonably assessed in increasing the comparable property to the market value it then enjoyed.

Mr. Esplin, the expert witness called by the plaintiff-appellant, testified that he disregarded any value whatsoever to the subdivision adjoining the subject property. He indicated that he determined that in his best judgment the highest and best use of the subject property was for grazing and for a livestock operation and no value whatsoever could be attributed to the subdivision adjacent thereto.

The case of *State of Utah, by and through its Road Commission v. Rulon S. Wood, (22 Utah 2d 317, 452 Pac. 872)* clearly establishes on page 873 thereof 'that the landowner is entitled to share in any general enhance-

ment which affects the land in the area up to the time of the taking." The Court in the Wood case refers to and reaffirms the position taken by the Utah Supreme Court in the case of *State, by and through its Road Commission v. Jacobs, 16 Utah 2d 167, 397 Pac. 2d 463,* wherein it was held that the owner is entitled to the evaluation of his property at the time it was taken on the basis of the highest and best use and that is "without limitation as to the use then actually made of it."

The State's witness, Mr. Esplin, failed to offer any explanation whatsoever as to the difference between the subject property and the property adjacent thereto in the subdivision. He testified that in his opinion the subject property had a value of $50.00 per acre and that its value was not increased by the fact that it was adjacent to a subdivision of lots of 1.25 acres each, selling for $2,150.00 to $2,250.00 per lot.

Mr. Palmer's testimony on behalf of the landowner, established that he had considered many facors in the surrounding area, including other comparable properties, properties purchased for subdivision purposes and properties purchased for other purposes. Based upon his investigation and evaluation of possible comparable sales, he established the foundation for his judgment as to the value of the property with the adjustments as hereinabove referred. Contrarywise, Mr. Esplin, the expert called to testify on behalf of the plaintiff, estab-

lished a value arbitrarily upon a judgment that the land in question had one use and one use only, that being for grazing and/or livestock operations, and disregarded any influence that the development or other use being made of surrounding properties. We feel that this is contrary to the intent of the *State v. Wood* and *State v. Jacobs* cases hereinbefore cited.

POINT II

That counsel for defendants-respondents does not agree with plaintiff-appellant's position that the ladies of the jury were confused. The evidence clearly established that there was indeed a substantial loss to the defendants-respondents. There is little doubt that the jury determined the value of the ground to be far in excess of the value placed upon the same by Mr. Esplin. The jury personally visited the property in the presence of the Judge and had an opportunity to view the subject properties for themselves and determined that the subject property being taken by the Interstate Highway and the property being severed from the remaining property and left in three small parcels to the south and east of the interstate highway with limited access, was in fact property that had a much higher and better use than most of the remaining acreage. This property was located on a sloping hillside with an excellent view of the entire valley. It was adjacent to the "Village Green Farm" subdivision which was in the process of develop-

ment at the time the jury visited the property. The evidence also clearly establishes that the actual property severed and left in the three small parcels on the south and east of the interstate highway was acreage which, because of its location and excellent view, was of even higher value per acre than the actual acreage taken by the highway.

It was equally clear that the small parcels of the subject property remaining on the south and east of the new Interstate Highway I-15 would have little or limited use. The only access to the small remaining parcels after the completion of the highway will be by travel through a livestock underpass some distance from the parcels and return by frontage road. The parcels were each isolated from the other and each too small to have any substantial value for the purpose that the property was intended prior to the taking. Every witness indicated that there would be a very substantial reduction in the value of the property on the east and south of I-15 which was cut off and separated from the balance by the new highway. The value the jury placed on the severance was well below the value of the same as indicated by Mr. Jones and Mr. Palmer and also compatable with the testimony of Mr. Esplin who indicated that the value would be reduced by fifty percent of the value of the property before the taking. The verdict of the jury as to the value of the severance loss was founded on a sound and reasonable interpretation by them of the evi-

dence before them.

The verdict of the jury is clear that it was the desire of the ladies acting as jurors in this cause to recognize and grant to the defendants-respondents a sum in the amount of $13,921.30 to compensate them for the total loss sustained to them as a result of the Interstate Highway 15 bisecting their property.

It is not a proper conclusion for the plaintiff-appellant to infer that because defendants-respondents did not object or protest the action of the trial court in reducing the judgment to $8,000.00 as an inference that the jury was confused or that the defendants-respondents acquiesced and agreed to the reduction.

A reading of the Trial Court's finding No. 12 will disclose that the Trial Court reduced the judgment from $13,921.30 to an arbitrary figure of $8,000.00. The finding further states that "in the event the defendants file objections thereto within fifteen days of the date hereof that a new trial will be granted." The finding goes on to state that "if no objections were filed, the Clerk is directed to enter judgment for defendants." The fact that defendants concluded that the additional cost of a trial with the high cost of expert fees, testimony, counsel fees and expenses would be sufficiently high to consume a major portion of the difference between the $13,921.30 and the $8,000.00 is certainly not sufficient to infer that the defendants-respondents acquiesced and agreed to the

reduction. This was simply a judgment made in the matter based upon the practicalities involved in any type of litigation.

The defendants-respondents assert that the action of the Trial Judge in reducing the judgment from the verdict awarded by the jury of $13,921.30 to $8,000.00 was in fact an error by the Trial Judge. However, based upon the wording of the Court's findings, the defendants-respondents were placed in the very awkward position of either agreeing to the amount even though not agreeing to the justification for the reduction, or having a new trial on the case with the expenses and costs attendant thereto.

The defendants-respondents assert that the error of the Lower Court should be rectified by a reinstatement of the original verdict of $13,921.30. The Courts in the State of Utah have upheld the right of a trial judge to overrule the verdict of a jury where the verdict is clearly unjust. However, the Supreme Court of the State of Utah has indicated on many occasions that the verdict of the jury should not be interfered with unless there appears some compelling reason why justice demands that it be done. In the case of *Campbell v. Safeway Stores, Inc., 15 Utah 2d 113, 388 Pac. 2d 409,* the Supreme Court of the State of Utah set aside an order granting judgment notwithstanding the verdict, with the following comments:

> "Due to their advantaged position in close proximity to the trial, the parties and the witnesses; and their practical knowledge of the affairs of life as a background against which to weigh the evidence, the assessment of damages is something peculiarly within the prerogative of the jury to determine, and the court is extremely reluctant to interfere with their judgment in this regard. From the plaintiff's point of view, their insistence that the award is inadequate to her needs and desires is understandable but we are obliged to look at the evidence and the reasonable inferences to be drawn therefrom in the light most favorable to the verdict. In doing so, we do not see it as so extremely beyond reason as to require that we upset it."

The Court in the Campbell case went on to state that:

> "Under our system it is contemplated that the right to trail by jury be assured. This is something more than a high-sounding phrase to be declaimed on patriotic occasions. It is the duty of courts to honor it in the observance. Whenever there is a genuine dispute as to the issues of the fact upon which the parties' rights depend, they are entitled to have them submitted to and settled by a jury. When the parties have had a full and fair opportunity to present their cause, and the jury has rendered its verdict, it should not be interfered with unless there appears some compelling reason why justice demands that it be done."

The parties in the instant case each fairly presented testimony respecting the damages resulting to the

defendants-respondents in connection with the highway condemnation proceedings to the jury empaneled in Iron County, Utah, for the determination of the facts in the instant case. A review of the testimony discloses that there was a genuine dispute as to the issues and the values. The parties and each of them were, therefore, entitled to have the case submitted to the jury and settled by the jury. The verdict of the jury rendered thereafter should not be interfered with. There appears no just or compelling reason that would demand such interference. Consequently, it is the position of the defendants-respondents that the Court erred in reducing the judgment.

The Supreme Court of the State of Utah has upheld the right of a District Court to order a remittiter or a new trial as was set forth herein. The Supreme Court of the State of Utah as particularly set forth in *Ruf v. Association of World Travel Exchange, 10 Utah 2d 249, 351 Pac. 2d 623,* has upheld the right of the Supreme Court to order a remittiter of all or part of a jury verdict; provided, however, the requirement of the Ruf case is that the award be "obviously above any reasonable appraisal in the damages suffered." In the instant case, the testimony of the defendants-respondents' witnesses would appear to have been received by the jury as more reasonable than the testimony and evidence presented by the plaintiff-appellant. Consequently, there is ample evidence before the Court for

the jury to base its verdict as determined herein in the amount of $13,921.30.

CONCLUSION

Defendants - respondents submit that the Trial Court's judgment reducing the verdict of the jury from $13,921.30 to $8,000.00 should be set aside and the verdict heretofore rendered by the jurors in this cause be reinstated, that judgment be entered on said verdict accordingly, with costs to these respondents; or, in the alternative, that the Court affirm the judgment of the lower Court as to the judgment of $8,000.00, with costs to respondents.

Respectfully submitted,

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