1970

State of Utah, by and Through Its Road Commission v. Lewis R. Dillree And Retta R. Dillree, His Wife; And First National Bank : Respondent's Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, by and through its ROAD COMMISSION,
Plaintiff and Appellant,

vs.

LEWIS R. DILLREE and RETTA R. DILLREE, his wife; and FIRST NATIONAL BANK,
Defendants and Respondents.

Case No. 12030

RESPONDENTS' BRIEF

Appeal from the Judgment of the Fourth District Court for Summit County, Utah Honorable Joseph E. Nelson, Judge

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I hereby certify that I received two copies of Respondents' Brief this 4th day of August, 1970.

Sp. Asst. Atty. Gen.

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CASES CITED

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STATEMENT OF FACTS

Respondents agree with the statement of facts set forth in appellant's brief.

ARGUMENT

POINT I

THE JUDGMENT IS AMPLY SUPPORTED BY THE GREATER WEIGHT OF THE EVIDENCE.

An analysis of appellant's argument in this case makes it rather clear that its position is predicated on the assumption that testimony given by a property owner in a condemnation case is not competent evidence which can support a verdict. Although the position is not stated in so many words, it is amply clear from the statements taken from cases cited in appellant's brief that it only chooses to recognize the testimony of "experts" as having validity in support of any verdict in a condemnation action.

Appellant's position, condensed in simple terms, is that a property owner is graciously extended the opportunity of telling the jury what he thinks his property is worth and what amount, if any, his remaining properties not taken have depreciated in value, but that if in some case a jury should happen to accept the full testimony of value as given by a property owner the benign and gracious tolerance extended (by the grace of the condemnor, perhaps ?) should be immediately withdrawn and the property owner given to understand that his testimony really carries no weight at all.

Respondents do not subscribe to appellant's position that only "expert" testimony can support a verdict in a

condemnation action nor can they agree in this case that the testimony of the owner, Lewis R. Dillree was incompetent in any respect. This argument, together with the cases to be cited, will support respondents' position that Mr. Dillree's testimony was certainly adequate to support the verdict and that the testimony of a property owner, whether there be an additional "expert" witness or whether his testimony might exceed the values given by an expert, is recognized as valid under the law.

In the argument before the jury this writer called attention to the testimony of the three witnesses utilized by the respondents and pointed out to the jury that, of all of the witnesses who took the stand, the testimony of Lewis R. Dillree on the matter of values and damages probably was based upon the best foundation from the standpoint of experience and knowledge of values.

Mr. Dillree took the witness stand and testified that he had been a mink rancher for some 15 years, having run an average of between 1,500 to 1,600 mink each year (Tr. 18). He testified that he had purchased the subject property in 1959 (Tr. 19) and that he had remodeled or had initially built practically all of the structures on the property. In this respect it should be kept in mind that the condemnation proceeding against Mr. and Mrs. Dillree involved the acquisition of substantially all of their holdings in the Echo area and that the greater portion of the values involved were those of improvements located on the lands taken.

Mr. Dillree itemized each and every improvement taken, furnishing construction details, the age and history of each improvement (Tr. 19), and pointed out the details relating to yard improvements, utilities furnishing services to the properties and similar matters. He stated that, after acquiring the properties, he personally completely remodeled the home (Tr. 19) and that he had built the 8 large mink sheds at the rate of approximately one each year, commencing in 1960 and terminating construction of the last one in 1968 (Tr. 27-31).

Mr. Dillree in his testimony and on a separate chart (Exh. 7) valued each and every improvement, together with the land taken and the remaining lands damaged by the taking, in giving his total appraisal of $35,075.00.

This case does not present a situation where the property owners' appraisal is completely out of line with that of his expert witnesses. By comparison, Mr. Baum's total appraisal was $33,000.00, and that of Mr. Jensen was $33,436.00. It seems that the real complaint of the appellant in this matter is that the verdict should be reduced by $1,639.00, so that it would be no higher than that of the highest expert witness utilized by the respondents. However, it can clearly be seen that the real complaint of the respondent, in view of the relatively small additional amount which the jury awarded over and above the highest testimony given by Mr. Dillree's expert witnesses, is that the verdict of none of the witnesses for the respondents should stand. It is inconceivable that the appellant is only concerned with the

$1,639.00 difference between Mr. Jensen's valuation of $33,436.00 and Mr. Dillree's testimony of $35,075.00.

It would be well to look at Mr. Dillree's testimony, including his valuations and his experience to furnish valid testimony in the case. On direct examination Mr. Dillree made it very clear (Tr. 32-33) that he understood that the valuations were tied to the year 1968 and that his measure of values was tied to prices in the market place:

> Q. And we are also taking about a price in the market place that a buyer and seller would arrive at?
>
> A. Yes.
>
> Q. Have you attempted to so value the properties on that basis?
>
> A. I did.

Mr. Dillree valued his home, garage and other buildings separately. In valuing the 8 large mink sheds which constituted a substantial item in the total value picture, he pointed out that the oldest shed was 8 years old and that the last shed had been built but one year prior to the condemnation (Tr. 33-34). He explained that the sheds were in very good condition and that none of the structures had been abused or damaged in any way. He valued the mink sheds in their "as is" condition at $1.50 per square foot. To point out the correct appraisal standard that he utilized in valuing these sheds the following reference is made to the proceedings (Tr. 35-36):

Q. In using a figure of $1.50 per square foot on these mink sheds, as of 1968, does that represent what it would cost to replace the sheds as new sheds?

A. No sir.

MR. WALL: We object to that.

THE COURT: It is his estimate as to what it would cost, is that right?

MR. FULLER: I am asking his opinion if this is new cost.

THE COURT: I think I will let him answer.

A. No sir, it would not be new cost.

Mr. Dillree explained that he had built all of the mink sheds himself and that, after leaving Echo and moving to Morgan, he had built and replaced an equal amount of square feet of mink shed area within the past year prior to the trial (Tr. 35). Further, he pointed out that he was familiar with building costs in the area, having worked for many years for a Mr. Atkin in building mink sheds prior to building those of his own. Also, as previously pointed out (Tr. 19) he had remodeled his home himself.

Mr. Dillree further pointed out that he had had experience in buying real estate in the general area and was familiar with land values and that he had recently purchased real estate similar to the land taken in the proceedings. His valuation of the lands taken was based in part upon such experience (Tr. 37).

In giving his analysis of the two small tracts of land left on each side of the freeway he clearly indicated the reasons why each of those long and narrow pieces of land had practically no market value, citing the long and narrow condition of the pieces which were left, their lack of access to river water for pasturage purposes, and the fact that the piece on the east side of the freeway was sandwiched in between the freeway and the railroad (Tr. 39-40, 45).

It is submitted that his knowledge of land and improvement values in the area, particularly since he was familiar with the age and condition and construction costs of similar improvements—in addition to the improvements at issue—adequately qualify him better than any of the other experts who testified in the case. It is submitted that his testimony was certainly worthy of full belief, particularly since it was so nearly corroborated by his two expert witnesses.

Judge Nelson instructed the jury concerning Mr. Dillree's testimony according to the standard instruction generally given in condemnation cases throughout Utah (Tr. 243):

> Instruction No. 15
>
> In this matter one of the landowners, has been permitted and allowed to render his opinion as to the value of his property. Said owner has not qualified as an expert witness on evaluation or value nor has he rendered an opinion based on his professional education, knowledge and experience of market value, nor does he, in order to

testify, need be engaged in buying and selling real estate. Said landowner has been permitted to testify by reason of the fact that he is the owner of the property in question.

In considering the weight to be given to his testimony on value, you may consider his bias, personal involvement, experience and qualifications to testify on land value, as well as the reasons and basis for his opinion. You may give such opinion whatever weight, in light of the circumstances and evidence adduced, you may deem fit.

The foregoing instruction made it clear to the jury that it could weigh Mr. Dillree's testimony from several standards and that they could give it the weight they felt it deserved. Although juries seldom accept a landowner's testimony in total, the jury in this case felt inclined to believe Mr. Dillree's testimony as against that of the other witnesses. It is submitted that it had adequate grounds for so doing.

It should be noted that appellant took no exception whatsoever to the giving of the Instruction No. 15. However, in its brief it attacks the Instruction by a round-about approach.

It is often helpful in a case of this type to make an actual comparison of the appraisal of a property owner with that of the so-called "experts" utilized by the appellant. Appellant utilized two appraisers—Mr. Grant E. Nielsen, one of its staff appraisers who was on the regular payroll of the appellant, and Mr. Nate A. Smith, a Salt Lake City fee appraiser.

Mr. Nielsen took the witness stand, introduced numerous photographs of the various improvements and other portions of the properties, discussed comparable sales of lands and residences in the area, and went through the regular routine testimony of an expert witness—but he simply gave a composite total of all of the buildings constituting the improvements in the amount of $21,787.00 (Tr. 208), *without giving any value breakdown on the individual improvements.* Mr. Smith indulged in an even more unpardonable appraisal error in that he, after going through the same general appraisal approach, finally admitted that his determination of a 40% depreciated value which he assigned to the improvements was based upon *never having examined the interior of a single improvement.* On cross examination he testified:

> "Q. Now if I have put together the proper chronology of your appearances on this property, you never ever went inside those mink sheds, did you?
>
> No, Sir.
>
> Q. And you never ever went inside the home?
>
> A. No sir.
>
> Q. And you never ever went inside or through any of the other buildings?
>
> A. No sir, just around them." (Tr. 190)
>
> * * * * * *
>
> Q. You were simply working from statistics

or figures or that type of information, were you not?

A. Yes sir.

Q. So that when you used a depreciated figure of 40 percent to the home, and 40 percent to the mink sheds, you are not giving that as a result of your observation?

A. I was basing it on the economic life of the property, and the estimated remaining life.

Q. But not on your observation?

A. Not on observation. (Tr. 191)

Mr. Smith pointed out that he did not actually get his assignment to appraise the properties until February of 1969, some eleven months after the condemnation occurred (Tr. 154), and that by the time he went over the property all of the buildings had actually been destroyed!

Q. And you got the assignment in February of 1969?

A. Yes sir.

Q. And this was about a year, nearly a year after the taking?

A. Yes.

Q. And in February of 1969, is it not true that all of the buildings had been wiped off the property?

A. Yes, they were.

MR. FULLER: No further questions. (Tr. 192)

In addition to the foregoing type of testimony furnished to the jury, Mr. Nielsen and Mr. Smith took the position that the two small isolated and severed tracts of land on either side of the freeway sustained either none or very little damage in value. Both claimed there was no damage to the 2.66 acre strip of land located between the freeway and the railroad (Tr. 179, 208, 229). This testimony, which simply echoes the adamant stand of the Bureau of Public Roads, could only insult the intelligence of any jury having heard all of the testimony and realizing that the 2.66 acre tract of land was left as a narrow strip of land between the freeway and the railroad, being 130 feet wide on one end and 120 feet wide on the other end and having a total distance of 950 feet (see Trial Map). Further, as previously pointed out, irrigating this long narrow strip of land and considering its location, proximity to the freeway and the railroad, lack of access to water for livestock, and other disadvantages, rendered the property practically worthless. Similarly, the small tract on the westerly side of the freeway was approximately 75 feet wide at one end and 100 feet wide at the other end, and was approximately 430 feet long. It also had practically identical disadvantages. This writer submits that it is unbelievable that so-called "experts" could and would testify that both pieces had sustained no damages or minimum damages as occurred at this trial.

Plaintiff's assertion that the judgment is not supported by a preponderance of the evidence is premised upon a novel conception of the law to the effect that the

testimony of a landowner will not, as a matter of law, support a jury verdict. The novelty of such a contention becomes apparent when it is realized that plaintiff has not directly challenged the right of a landowner to give his opinion as to the damages suffered in a condemnation action nor has plaintiff attacked the qualifications of the landowner and the nature of his testimony.

Support of plaintiff's novel theory rests primarily with the California case of *People v. Hayward Building Materials Company*, 28 Cal. Rptr. 782 (1963). Plaintiff quotes from that case to the effect than an award less than the lowest value testified to by an expert witness is not supported by the evidence. In that case the jury awarded a figure between the state's two expert appraisers. The defendant argued that the testimony of the state's lowest witness should be disregarded for the reason that it was the product of an improper appraisal method. Therefore, the defendant reasoned, the jury verdict was below any testimony whatsoever. In deciding the case, the court assumed the validity, for purposes of argument, of defendant's contention that an award is without evidentiary support if less than the lowest value testified to by an expert witness. However, the court refused to strike the testimony of the state's lowest appraiser and thereby left standing a jury verdict in an amount between the values testified to by the state's two appraisers. In so doing the court never concerned itself with the validity of the defendant's concept of evidentiary support.

Of even greater significance is the fact that the *Hayward* case did not involve testimony by the landowner or any nonexpert. A careful reading of the case will disclose that the court did not intend any emphasis upon the word "expert," but merely inserted that word as an indication of the source of most opinion testimony on value. Likewise, with the two cases cited by that defendant, *People ex. rel., Dep't. of Public Works v. McCullough*, 100 Cal. App. 2d 101, 233 P. 2d 37 (Sic) (1950) and *Redevelopment Agency of City of Sacramento v. Modell*, 177 Cal. App. 2d 321, 2 Cal. Rptr. 245 (1960), no reference is made to testimony by landowners or nonexpert witnesses. One case involved a verdict above the testimony of any witness and the other case involved a verdict below the testimony of any witness.

The position of the California courts is laid out in the case of *San Francisco Bay Area Rapid Transit Dist. v. McKeegan*, 71 Cal. Rptr. 204 (1968). As a preface to its holding, that court discussed the distinction between the appellant's contention that the verdict was "against the law" and "excessive" and the weighing of conflicting evidence to determine the "insufficiency of the evidence." (In the instant case plaintiff's argument is cloaked in terms of "insufficiency of the evidence" but is actually an argument that a landowner's testimony will not support a verdict "as a matter of law.") In addressing itself to the question of whether the verdict could be supported as a matter of law, the court said on page 211:

> "In an action for condemnation, the owner is a competent witness as to the fair market value of his interest (citing authority). The lessees testified that the fair market value of their interest was $81,000.00. This testimony alone would preclude the appellate court from finding that the judgment was "against the law," even though the lessees' acknowledged inexperience in the car wash business reflected on his testimony and might well have been determinative on the question of the "insufficiency of the evidence."

Plaintiff's brief tends to create some confusion regarding the right of a landowner to testify concerning the value of his land in a condemnation action. This issue was recently before the New Mexico Supreme Court in the case of *State of New Mexico v. Chavez*, 80 N. M. 394, 456 P. 2d 868, 870 (1969). In adopting the rule permitting such testimony the court stated:

> "Appellant concedes that the prevailing rule permits an owner to testify concerning the value of his land both before and after a taking by condemnation (citing authority). It argues, however, that because the rule has been stated as one of practical necessity. * * * we should adopt the rule followed by a minority of jurisdictions which denies the right of an owner to testify concerning the value of his property taken or damaged by the sovereign through the use of eminent domain. * * *"

The right of an owner to testify concerning the value of his property taken and damaged in an action under the law of eminent domain was upheld by this Court in the case of *Salt Lake & U. R. Co. v. Schramm*,

56 Utah 53, 189 P. 90 (1920). More recently, this Court again affirmed the landowner's right to testify in the case of *Provo River Water User's Ass'n. v. Carlson*, 103 Utah 93, 133 P. 2d 777 (1943). Similarly, the Tenth Circuit Court of Appeals has upheld the right of a property owner to testify concerning the value of property which he occupies and operates. *Telluride Power Co. v. Williams*, 164 F. 2d 685 (10th Cir. 1947).

If a landowner is to be permitted to testify concerning the value of property taken and damaged, it would seem logical that such testimony would be efficacious, and to be efficacious, such testimony must be capable, as a matter of law, of supporting a jury verdict. Numerous cases can be found where the testimony of a landowner has supported a jury verdict.

In the case of *United States v. 3.698.63 Acres of Land, Burleigh, Emmons and Morton Counties, State of North Dakota*, 416 F. 2d 65, 66 (8th Cir. 1969), the court upheld jury verdicts which were in excess of the values placed upon land by the landowners' own appraisers. One defendant obtained an award of $137,500.00 after his expert witness testified to damages of only $128,000.00. Another defendant obtained an award of $34,500.00 as compared with his two experts' testimony of $32,500.00 and $31,450.00. In both instances two landowners had testified to figures in excess of the awards. One landowner had testified that he arrived at his figures on the basis of ". . . mostly the use of the land —what its worth to me. . . ." Another had based his testi-

mony, in part, upon offers from people who had heard of the Oahe Dam and were under a misconception as to what land would not be inundated. Nevertheless, the Eighth Circuit Court of Appeals held that, as a matter of law, it could not say that the owners' opinions on land value wholly lacked weight.

Likewise, in the case of *State of New Mexico v. Chavez*, 80 N. M. 394, 456 P. 2d 868 (1969), the owner's opinion on damages supported the jury verdict. There the testimony of the landowner's sole expert witness was stricken. The award of $25,000.00 was upheld on the basis of the $35,000.00 figure testified to by the landowner himself.

The plaintiff has cited the case of *Weber Basin Water Conservancy District v. Skeen*, 8 Utah 2d 79, 328 P. 2d 730 (1958), ostensibly to show that a litigant is bound by the lowest (or highest) testimony which it offers—especially if the corroborating testimony is given by a nonexpert. Still, the plaintiffs admit the soundness of the standard jury instruction which gives the jury the prerogative of believing one witness as against many, or of believing many witnesses as against one.

The plaintiff would like the *Skeen* case to say that an owner's testimony of damages in a condemnation case could *never* form the basis to support a jury's finding. However, the *Skeen* case merely held that there was an insufficiency of evidence on the issue of severance damages to support the jury verdict in that case. A close reading of the decision in that case and the briefs of both

litigants will disclose that the landowner merely testified that severance damage would result; no monetary figure was ever given as an assessment of severance damage. Appellant's brief states that there was no specific testimony as to severance damage. Respondent's brief merely takes issue with appellant's statement but fails to refer to any testimony whatsoever on damage to the remainder.

Contrary to the *Skeen* case, the owner in the instant case testified in detail as to the amount of his appraisal and as to the information upon which his values were based. Furthermore, the owner's qualifications, which have never been attacked by the plaintiff, were fully disclosed to the jury. A statement made by this Court in *Salt Lake & U. R. Co. v. Schramm*, 56 Utah 53, 189 Pac. 90, 92 (1920), on the qualifications of a landowner, is apropos here.

> "In cases like the one under consideration the qualification of witnesses to express an opinion as to market value necessarily is a question to be largely determined by the trial judge. If it is shown that the witness is competent to express an opinion as to values, no matter what the source of the qualifying information may be, he should be permitted to testify. The sources of the witnesses' information may vary according to the peculiar means or opportunity the witness has of forming an opinion and judging the premises. We do not think any good reason can be assigned why a person who has occupied and used the premises all her life, and has been interested and alert in making inquiry as to its value, may not be as well

qualified to speak as the banker, lawyer, or real estate man, having more or less to do with sales and transfers of real property. The means and extent of the knowledge of any witness may be gone into on cross-examination, and rebutted by the testimony of other competent witnesses, whose opinions may differ as to value. No rule can be formulated for determining the means by which a witness shall acquire the necessary knowledge to qualify him to speak that will apply in all cases. If, under all the circumstances, he was in a position to obtain knowledge and form a correct judgment as to values, whether or not by buying, selling, leasing, or using the property for purposes for which it is adaptable is immaterial, so long as the jury is given the benefit of the facts upon which the opinion of the witness is based (citing authority)."

POINT II

THE JURY WAS NOT INFLUENCED BY BIAS AND PREJUDICE.

The thrust of Appellant's argument claiming bias and prejudice on the part of the jury against it seems to be that it favored a "home town" resident (Tr. 10). However, the jurors selected to try the matter were complete strangers and lived entirely in the opposite, or south, end of the county:

> Jerry Marcellin, Park City, Utah; James H. Watson, Kamas, Utah; Mildred Bair, Park City, Utah; Paul A. Hamilton, Park City, Utah; Myrtle Pitt, Kamas, Utah; Donald Pace, Wan-

ship, Utah; Gary A. Kimball, Park City, Utah; Lawrence Burton, Oakley, Utah. (R. 107)

A simple reference to any Utah map will reveal that the juror residing at Wanship, being the closest point of residence of any juror to that of the respondents, was approximately 15 miles distant! This would hardly constitute a "home town" jury by any means.

Plaintiff cites the case of *Porcupine Reservior Co. v. Lloyd W. Keller Corporation*, 15 Utah 2d 318, 392 P. 2d 620 (1964), to support its position that the size of a jury verdict suggests passion or prejudice. In that case a new trial was ordered by this Court after the trial judge had conditioned his order granting a new trial upon the acceptance of an additur. The significant factor in that case is that the jury had awarded a sum for severance damages *less than that testified to by any witness.* To this Court it was obvious that such an award was the product of passion or prejudice or a *misunderstanding of the law or facts presented.*

Plaintiff could also cite the case of *State Road Comm'n. v. Silliman,* 22 U.2d 33, 448 P. 2d 347, where the jury verdict was set aside as being in *excess of that testified to by any witness* (including the landowner). This Court held the verdict was therefore excessive "as a matter of law." It noted that, otherwise, the verdict could not be set aside unless so excessive as to be shocking to one's conscience. The Silliman case, too, presented a factual situation entirely different from the case at issue.

CONCLUSION

Basic to a consideration of this matter is that appellant filed a Motion for New Trial and a Motion for Remittitur subsequent to the entry of the jury verdict. Judge Joseph E. Nelson denied both motions.

A trial judge having the long experience and knowledge possessed by Judge Nelson, having heard all of the evidence, and having observed the demeanor of the witnesses, is most certainly in a very advantageous position to make a proper ruling as to the *sufficiency of the evidence* - - the only real issue and a matter particularly within the province of the trial judge. The trial was exceptionally "clean" from the standpoint of litigated issues of law; consequently, since appellant's position is predicated upon matters which were peculiarly within the observance and knowledge of the trial judge, the refusal to grant a new trial and the further refusal to alter the amount of the verdict clearly shows that Judge Nelson felt Mr. Dillree's testimony to be very adequate in every way to support the verdict and that there was no exhibition of bias or prejudice on the part of the jury. Appellant in substance is asking this Court to overrule the factual findings and considerations of both the jury and the trial judge.

It is submitted that the Verdict and the Judgment on the Verdict should stand.

Respectfully submitted,

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