



IN THE COURT OF APPEALS OF IOWA

JULIAN A. SIME and)
VELMA L. SIME,)

Appellants,)

Filed May 20, 1977

vs.)

IOWA STATE HIGHWAY)
COMMISSION,)

113
2-58436

Appellee.)

Appeal from Franklin District Court - John F. Stone, Judge.

Plaintiff landowners appeal trial court ruling their appearance and pursuit of damages in condemnation proceeding constituted an election of remedies which precluded any subsequent cause of action for breach of alleged oral contract. - Reversed and remanded for further proceedings.

James E. Coonley II, of Coonley & Coonley, of Hampton, for Appellants.

Richard C. Turner, Attorney General, Asher E. Schroeder, Special Assistant Attorney General, and John P. Whitesell of the Whitesell Law Firm, of Iowa Falls, for Appellee.

Heard by Allbee, C.J., and Donielson, Snell, Oxberger and Carter, JJ.

PER CURIAM

Defendant Highway Commission prevailed in the trial court upon the theory that plaintiff Simes' pursuit of damages in the condemnation proceeding was an election of remedies. The Simes contend the alleged contract with the Highway Commission to replace top soil in the "borrow pit area" subject to a temporary easement was breached in November 1975 with the return of the borrow pit without top soil. Such a breach occurred long after the filing of the condemnation award of May 9, 1973; therefore, the Simes urge there could have been no such election. Accordingly, they seek a hearing on the merits.

This case is controlled by *Jones v. Iowa State Highway Commission*, 185 N.W.2d 746, 750 (Iowa 1971). In *Jones* the court stated unequivocally that "the issue in a condemnation appeal is confined to damages awardable for the property or the rights therein taken as of that time." A condemnation appeal is necessarily limited to an evaluation of the taking which has occurred at the time of hearing. *Jones* recognized a plaintiff's right to redress for subsequent deprivations by a separate action in tort, contract, or other appropriate proceeding. 185 N.W.2d at 750.

Under *Jones*, the Highway Commission's claim that the Simes' participation in condemnation proceedings constituted an election of remedies is without merit. The trial court's ruling that the Simes have made such an election of remedies is reversed.

We intimate no opinion on the other issues raised by the defendant in his motion to adjudicate law points, as the matter should be determined by the trial court in the first instance.

Reversed and remanded for further proceedings.