

No. 41017-6-II

DIVISION II, COURT OF APPEALS
OF THE STATE OF WASHINGTON

CARL R. HOGAN,

Appellant/Cross-Respondent

v.

BORDERS, INC.,

Respondent/Cross-Appellant

ON APPEAL FROM PIERCE COUNTY SUPERIOR COURT
(Hon. Thomas J. Felnagle)

**OPENING BRIEF OF RESPONDENT/CROSS-APPELLANT
BORDERS, INC.**

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I. INTRODUCTION

When the City of Puyallup decided to take portions of Appellant Hogan's shopping center, and significantly impair customer access to the stores in the center, there was no question that Respondent Borders would be gravely affected. Borders was (and still is) Hogan's most prominent tenant, and the anchor for the entire center. Hogan's own experts concluded that the City's taking—which could result in a decrease of customer traffic by as much as 40 per cent—will severely damage Borders' revenue and profitability, and cause the value of its leasehold interest to fall from the best to the worst in the entire shopping center.

Hogan asked Borders to help present its case during the underlying condemnation trial, and Borders readily agreed. After all, both parties understood that the greater the damage to Borders' leasehold interest, the greater the amount of lump-sum “just compensation” Hogan could recover from the City and ultimately share with Borders — or so Borders thought. With Borders' help and testimony at the condemnation trial, a jury awarded Hogan more than \$5 million. After interest and attorney fees were tacked on, Hogan walked away with more than \$6.5 million.

Under Washington law, a tenant is entitled to receive a portion of the landlord's condemnation award where the taking impairs the tenant's leasehold interest. But when it came time for Hogan to share a portion of

its multi-million dollar award with Borders, it refused. Pointing to a term in the parties' lease, Hogan claimed that Borders had agreed to waive its right to just compensation unless the taking resulted in termination of the lease. In a classic catch-22, Hogan argued that because the taking did not trigger the lease's termination provisions, Borders should get nothing.

After the trial court rejected Hogan's summary judgment motions on that issue, Hogan tried another strategy to deny Borders a fair share of the award. Contrary to the story it told in the condemnation trial, Hogan now claimed that the taking only slightly affected Borders' leasehold. The court rejected this ploy as well and, instead, accepted Borders' evidence that the taking would force Borders to relocate and sublease the space at a greatly diminished fair market value for decades to come. Based on that finding, and its discretion to equitably apportion the condemnation award, the court awarded Borders \$711,602 plus pre-judgment interest and fees.

The trial court's judgment should be affirmed. *First*, as the court properly concluded, the lease does not contain clear and express language manifesting Borders' intent to waive its right to just compensation, nor does it define Borders' exclusive rights in the event of a taking. *Second*, the court's finding regarding the decline in the value of Borders' leasehold was supported by substantial evidence and consistent with Washington law, as was its inclusion of Borders' options to renew for valuation

purposes. *Third*, and finally, the trial court did not abuse its discretion when it increased Borders' initial *pro rata* share of the condemnation award based on its careful consideration of the equities of the case.

The trial court erred in only one respect—which is the subject of Borders' limited cross-appeal. After judgment was entered, the trial court ruled that, by operation of RCW 8.28.040, Hogan's appeal automatically suspended the accrual of post-judgment interest. That statute, however, applies only to a pre-judgment appeal in condemnation cases where the owner continues to enjoy possession of the property during the appeal—not a post-judgment appeal of an apportionment award where the owner already relinquished possession of, and received just compensation for, the property. The court's erroneous application of RCW 8.28.040 must be reversed, and Borders' entitlement to post-judgment interest restored.

II. ASSIGNMENT OF ERROR ON CROSS-APPEAL

For its cross-appeal, Borders assigns error to the trial court's ruling that Borders is not entitled to post-judgment interest on the Judgment amount of \$918,129.18 during the pendency of this appeal. CP 845-46.

III. ISSUES PRESENTED

Issues Raised By Hogan's Appeal

1. Does Borders, as the lessee of condemned property, have a constitutional and statutory right to share in a condemnation award paid to

Hogan, the lessor, where the parties' lease does not contain a clear and express waiver or limitation of that right, nor any provision addressing Borders' right to compensation in the event the taking does not result in termination of the lease?

2. Was the trial court's finding that the taking damaged Borders' leasehold interest by \$7.00 per square foot over the term of Borders' lease, including renewal periods, for a total amount of \$355,801.10, supported by substantial evidence?

3. Did the trial court properly exercise its discretion when it doubled Borders' damages to \$711,602 as part of its duty to equitably apportion the underlying \$5,150,000 condemnation award?

4. Did the trial court correctly conclude that Borders was entitled to pre-judgment interest from the date of the taking until the date of the apportionment award as part of its "just compensation"?

Issue Raised By Borders' Cross-Appeal

1. Did the trial court err as a matter of law when it concluded that RCW 8.28.040 suspended the accrual of post-judgment interest during the pendency of Hogan's appeal?

IV. COUNTERSTATEMENT OF THE CASE

A. The Just Compensation Proceedings

This case began when the City of Puyallup (“the City”) filed a Petition in Eminent Domain to take a portion of the Willows Shopping Center (the “Shopping Center”) as part of a plan to drastically reconfigure the roadways surrounding the Shopping Center, including the intersection that served as the center’s main entrance and exit. CP 4-31; CP 182. Borders is the Shopping Center’s anchor tenant. CP 175 (Lent Decl., ¶ 2); CP 217. Hogan and Borders are parties to a Lease Agreement (the “Lease”). CP 93-161. The initial term of the Lease expires January 31, 2016, but contains options that allow Borders to unilaterally extend the term of the Lease for up to five five-year periods. CP 98-99.

The trial court bifurcated the condemnation proceedings into two stages. CP 39-52. In the first stage, a jury would decide the total amount of just compensation for the taking as a whole; in the second stage, the court would decide how to equitably apportion the award among Hogan and others, such as Borders, with an interest in the Shopping Center. *Id.*; *see* RCW 8.12.150. By stipulation between Hogan and the City, the trial court entered an Order of Immediate Possession and Use on July 11, 2007, which defined the date upon which the taking occurred for purposes of

determining just compensation. CP 53-61; *see* RCW 8.04.092. So far, however, the City has not begun work on its roadway project.

As trial approached, Hogan asked Borders to cooperate with it and its appraisers in assessing the damages caused to Borders' leasehold interest by the taking. CP 175-176 (Lent Decl., ¶ 2); RP (4/14/10) at 280-281. Because there was to be no apportionment by the jury, Hogan knew that Borders' damages would be reflected in the lump-sum award; the greater Borders' damages, the greater the award. CP 490 (p. 42) ("Borders is part of this condemnation. They have a leasehold interest. That value has to be valued as part of this condemnation."). Although Borders was concerned about the damage to its leasehold and wanted to come to some resolution with Hogan on the issue, Hogan asked Borders to wait until after the just compensation trial. Borders complied, and assisted Hogan in preparing and presenting the best damages case possible at trial. CP 175-176 (Lent Decl., ¶¶ 2-4); CP 229-230 (Lent Decl., ¶ 2).

The underlying just compensation stage was tried in May and June 2009. CP 67. At trial, Hogan claimed that the taking would damage the value of the Shopping Center by \$11.9 million. CP 186-187; CP 212-214. Only a portion of that, however, was related to physical expropriation of land; Hogan's experts concluded that most of the damage, approximately

\$9 million, was directly related to the taking's devastating impact on access to the Shopping Center. *Id.* As Hogan emphasized in its trial brief:

Borders Books came to the Willows Center eight years ago, attracted in large part by the superb access and visibility its building enjoys as customers approach the intersection at 39th and Meridian from the west and drive straight through the intersection at 39th and Meridian to Borders. ... [¶] After the taking, the superb customer access and visibility enjoyed by Borders will be greatly diminished.

CP 184; CP 190 (“this superb connection to Borders will be lost as drivers entering the Center will have to face the task of weaving their way to Borders”). Hogan’s own expert estimated that the traffic imbalance caused by the City’s taking would result in a reduction in traffic to the Shopping Center of between 27.5 and 41 percent. CP 185; CP 196.

Hogan also left no doubt what this likely reduction in patronage would mean to its tenants and, in particular, Borders:

Fewer vehicles coming to the Willows Center translates into fewer sales by retailers at the Center, and the reduction in sales directly – and negatively – impacts their bottom line. The decrease in revenue and profitability will force these retail tenants to do one of two things: they will either seek a reduction in the amount of rent they pay, or they will vacate their tenancies at the Willows Center and find less expensive space elsewhere.

Id. Hogan’s expert appraiser, Anthony Gibbons, who would also testify during the apportionment trial, was unequivocal that the taking would cause a precipitous decline in the value of Borders’ lease:

[W]hat I think’s going to happen is that the rental - - the rental value of Borders’ space declines because it was the

premier space in the center. Now its probably the - - got the worst situation, which is all the egress from the center going out past its front door. And this is very critical.

CP 356 (pp. 79-80). Hogan recognized that, once the City began the project, Borders would likely relocate. CP 186; CP 216. At Hogan's request, Borders' Director of Real Estate, Pamela Lent, testified on Hogan's behalf at trial, and echoed the devastating impact the taking would have on Borders' leasehold interest. CP 176 (Lent Decl., ¶ 4).

By verdict on June 10, 2009, the jury awarded Hogan a lump-sum of \$5,150,000. CP 67. The jury did not specify what portion of the award was attributable to physical expropriation versus impaired access. *Id.* On June 15, 2009, the trial court entered judgment, with prejudgment interest in the amount of \$638,959 dating back to the Order of Immediate Possession and Use, in the total amount of \$5,788,959. CP 68. The court subsequently awarded Hogan more than \$1 million in attorneys' fees and expert costs. CP 78; RCW 8.25.070. The City satisfied the total judgment amount of \$6,830,067 by payment to Hogan. CP 78-79.

B. The Apportionment Proceedings

After the jury's verdict, Borders filed a Notice of Claim to share in the just compensation award. CP 73-78. During the apportionment stage of proceedings, Hogan did an about-face. Notwithstanding the fact that Hogan had emphasized Borders' damages during the just compensation

trial—and that Borders had testified on Hogan’s behalf—Hogan first sought to deny Borders any portion of the award through repeated motions for summary judgment and, seeing that strategy fail, by minimizing the extent of Borders’ leasehold damages at trial.

1. Summary Judgment

Hogan moved for summary judgment, arguing that, under Article 22 of the Lease, Borders had waived its right to share in a condemnation award unless the taking resulted in termination of the Lease. CP 82-89. Hogan argued that because the taking did not trigger the Lease’s termination provisions, Borders had no right to share in the award whatsoever. *Id.*; CP 91 (Hogan Decl., ¶ 3). At a hearing, the trial court concluded that “it is not clear to me that this lease has set out the only possible mechanisms by which Borders can have a part of the award apportioned to them,” and denied Hogan’s motion. RP (2/19/10) at 23. The court invited Hogan to provide additional briefing to explain what, if anything, Borders would receive in the absence of termination. *Id.* at 24.

Hogan seized on the opportunity, and took another run at summary judgment. CP 232-242. Hogan largely repeated its earlier arguments, but added that Borders’ “sole remedy is a breach of contract claim arguing that Hogan has failed to meet his obligation of endeavoring to provide reasonable access.” CP 233. After another hearing, the trial court once

again denied Hogan’s motion for summary judgment, concluding that the “convoluted” nature of Article 22 made it impossible to determine if the parties’ intended to waive “the common law right for the lessee to share in the award if the value of their lease has been diminished.” RP (3/12/2010) at 15-16; CP 376-377. The court suggested that Hogan move for summary judgment on the contractual issue to narrow the case for trial. *Id.*

Not one to let an opportunity pass, Hogan moved for summary judgment a third time. CP 392-401. Hogan not only argued that it had satisfied its contractual duty, but regurgitated the same implicit waiver argument it had raised twice before. CP 397-400. At the third (and final) hearing on the matter, the trial court again rejected the argument:

It’s no clearer now, and I’ve looked at it countless number of times. And my analysis is still the same, that absent a clear limitation on the right to share, Borders ought to be able to share. ...[¶] This language is simply not clear to me at all. The better interpretation then seems to be that, consistent with the position Hogan took at the - - trial of this matter, that Borders is, or thought itself to be, damaged and that money ought to be given because the leasehold was diminished, that Borders ought to have a shot at sharing at - - in the - - in the award.

RP (4/2/10) at 23; CP 510-512. The court did, however, conclude that Borders had no breach of contract claim against Hogan (CP 513-516)—an order Borders has not appealed. The trial court asked the parties to return the next day to begin the bench trial on the apportionment issue.

2. The Apportionment Trial

Hogan's primary witness was its appraiser, Anthony Gibbons. Although he admitted that Borders' space had gone from the best in the Shopping Center to the worst, Gibbons testified that the value of Borders' lease declined by only \$1.50 per square foot over the term of the lease; he did not include Borders' renewal periods in his analysis. RP (4/13/10) at 117-118; 140-141; 165. He estimated that the total damage to Borders was \$210,000. *Id.* at 100-101. Comparing Borders' damages to Hogan's (which he again estimated to be \$11.9 million), he opined that Borders' pro rata share of the \$5,150,000 lump-sum award should be \$90,882. *Id.* at 147-148; 158. Gibbons' analysis was based on the assumption that, once the City began its project and Borders has to relocate, Hogan would voluntarily terminate the Lease; he did not consider the possibility that Borders would remain on the Lease, thereby incurring the substantial cost of re-tenanting the space itself. *Id.* at 135-136; 185-91; 208.

Borders' primary witness was its Director of Real Estate, Pamela Lent. Ms. Lent testified that the fair market value of Borders' leasehold would decline by \$7.00 per square foot. RP (4/14/10) at 252, 254-55. Ms. Lent testified, in contrast to Gibbons, that the value of Borders' leasehold had to take into account the substantial costs that Borders will be forced to absorb if it—and not Hogan—incur the substantial costs of subleasing the

space to a suitable new tenant. *Id.* at 247-255; 273-274; 287. Adopting Gibbons' own re-tenanting figure of \$2.277 million for this purpose, Ms. Lent calculated the damage to Borders' leasehold to be \$3,427,641 over the term of the Lease, including the renewal periods. *Id.* at 262-265.

The trial court did not adopt either party's damages calculation in full. The court accepted Borders' analysis that the fair market value of Borders' leasehold would decline by \$7.00 per square foot and, at the same time, it accepted Hogan's proposed discount rate and methodology for calculating Borders' pro rata share of the \$5,150,000 condemnation award. RP (4/20/10) at 402; CP 571-74 (Hogan Post-Trial Brief). The result yielded an initial value of \$355,801. CP 828-829 (CL ¶ 4). The trial court used its equitable discretion to double that figure to \$711,602. CP 829 (CL ¶ 6). The court added pre-judgment interest and attorneys' fees, and entered Judgment in the amount of \$918,129.18. CP 833-38. In later proceedings to fix the amount of Hogan's supersedeas cash deposit, the trial court ruled that post-judgment interest was suspended during the pendency of Hogan's appeal. CP 845-846.

Hogan appealed the trial court's summary judgment rulings, various aspects of the Findings of Fact and Conclusions of Law, and the Judgment. CP 847-67. Borders cross-appealed on the limited issue of

whether the accrual of post-judgment interest should be suspended during the pendency of Hogan's appeal. CP 872-877.

V. ARGUMENT

A. **The Trial Court Properly Denied Hogan's Motions For Summary Judgment Because The Parties' Lease Did Not Waive Borders' Right To Share In The Condemnation Award.**

A lessee is ordinarily entitled to share in a condemnation award paid to the lessor when a portion of its leasehold interest is taken in an eminent domain proceeding. *Spokane Sch. Dist. v. Parzybok*, 96 Wn.2d 95, 98, 633 P.2d 1324 (1981); *State v. Spencer*, 90 Wn.2d 415, 419-420, 583 P.2d 1201 (1978). The rule is subject to a narrow exception, however, where the lessee specifically agrees in the lease to waive its right to compensation. *State v. Trask*, 91 Wn. App. 253, 277, 957 P.2d 781 (1998) ("*Trask I*"); *State v. Farmers Union Grain Co.*, 80 Wn. App. 287, 293-94, 908 P.2d 386 (1996). Hogan moved the trial court three times to apply this exception, and three times the court rejected Hogan's interpretation of the Lease. RP (2/19/10) at 23-24; RP (3/12/10) at 16; RP (4/2/10) at 23; CP 376-78; CP 510-12. This Court should likewise conclude that Borders did not expressly agree to waive its fair share of the condemnation award.

1. **The Lease Does Not Clearly And Expressly Show That Borders Agreed To Waive Its Right To Compensation Where It Has Not (Or Cannot) Terminate The Lease.**

The interpretation of a lease is a question of law that this Court reviews *de novo*. *Duvall Highlands, L.L.C. v. Elwell*, 104 Wn. App. 763,

771 n. 18, 19 P.3d 1051 (2001). As the trial court recognized, while the Lease may be complex, it certainly isn't comprehensive. RP (2/19/10) at

10. Article 22(a) of the Lease provides in relevant part:

Demised Premises/Ingress and Egress. If (i) any portion of the demised premises is expropriated, or (ii) any point of ingress and egress to the public roadways ... is materially impaired by a public or quasi-public authority and if as a result there shall fail to exist at least one (1) point of ingress and egress between the Shopping Center and South Meridian Street, and at least one (1) point of ingress and egress between the Shopping Center and 37th Avenue Southeast, so as to render, in Tenant's sole reasonable opinion, the demised premises unsuitable for the operation of Tenant's business in the normal course, then Tenant shall have the option to terminate this Lease as of the earlier of (i) the date Tenant is deprived or denied use thereof, or (ii) the date the condemning authority requests early possession. The option shall be exercised by Tenant giving at least ten (10) days prior notice to Landlord of such election. During any expropriation or impairment, regardless of length of time ... or whether or not this Lease is terminated as a result of such expropriation or impairment, Landlord shall endeavor to provide a reasonable alternative to the impaired point of ingress and egress for the duration of any such expropriation or impairment.

CP 129. If Borders were able to terminate the Lease under Article 22(a), then Article 22(d) would define limits on its right to compensation and apportionment. CP 130. Critically, however, no aspect of Article 22 addresses compensation where the taking significantly damages Borders'

leasehold interest, yet does not result in termination of the Lease or abatement of rent.¹ That is the situation here.

Borders did not terminate the Lease and, according to Hogan, it cannot do so because Article 22(a)'s triggering events have not occurred. Hogan Br. at 19. Thus, as the trial court correctly recognized, Article 22(d)—which Hogan relies upon exclusively—does not apply. RP (4/2/10) at 14 (“since we don’t have termination, D’s really not applicable to our analysis, is it?”). By its title and plain terms, Article 22(d) applies only “[i]f this Lease is terminated pursuant to this Article 22.” CP 130. Indeed, read as a whole, it is clear that Article 22(d)—which relates to “improvements, alterations, or changes” or “land or buildings constructed, made or owned” by the lessee—contemplates the scenario where a taking forces the lessee to abandon the Lease and prematurely forfeit the value of its improvements and fixtures.² Its terms simply have no relevancy where,

¹ Subsection (b) addresses rent abatement in the case of physical expropriation, and Subsection (c) addresses situations where the taking affects available parking spaces. CP 129-130. Borders agrees with Hogan that neither provision is presently applicable.

² This provision appears to reflect the parties’ intent to *expand* a lessee’s common law right to share in a condemnation award where the taking gives one or both parties the option to terminate the lease. Under the traditional rule, where a party exercises an option to terminate, “no unexpired leasehold remains for which the lessee can claim compensation.” *State v. Sheets*, 48 Wn.2d 65, 68, 290 P.2d 974 (1956). Article 22(d) provides otherwise. In effect, then, Hogan would implausibly read a term *enlarging* Borders’ right to compensation in the event of termination as implicitly *eliminating* that right in the absence of termination.

as here, the lessee cannot terminate and remains fully bound to the terms of the Lease, despite damage to the value of the leasehold.

Even though no aspect of the Lease addresses Borders' right to share a condemnation award where there is no termination, Hogan argues that Article 22 should be interpreted as defining Borders' *exclusive* right to compensation in the event of a taking. Hogan Br. at 20. In short, Hogan argues that Article 22 manifests the parties' intent that—no matter how severe—if a taking does not result in the Lease's termination, then Borders implicitly waived its right to just compensation. Hogan's interpretation is contrary to law and common sense. "The law does not look with favor on clauses causing forfeiture of the lessee's interest on condemnation." 2 *Nichols on Eminent Domain*, § 5.02[6][f] (3d ed. 2006). Eminent domain clauses must be construed to avoid waiver, and will be found to extinguish a lessee's right to share in compensation only where the parties' intent is clearly and expressly stated. *Id.*; *Burkhart v. U.S.*, 227 F.2d 659, 662-63 (9th Cir. 1955) (applying Washington law).³

³ See also *Winn-Dixie Stores, Inc. v. Dept. of Trans.*, 839 So.2d 727, 729-30 (Fla. App. 2003); *Texaco Refining and Marketing, Inc., v. Crown Plaza Group*, 845 S.W.2d 340 (Tx. App. 1992); *Peter C. Reilly Trust v. Anthony Wayne Oil Corp.*, 574 N.E.2d 318, 320 (Ind. App. 1991); *Maxey v. Redevelopment Auth. of Racine*, 288 N.W.2d 794, 806-807 (Wisc. 1980); *Pennsylvania Ave. Dev. Corp. v. One Parcel of Land in D.C.*, 670 F.2d 289, 292 (D.C.Cir. 1981); also *Zitter, Validity, Construction, and Effect of Statute or Lease Provision Expressly Governing Rights and Compensation of Lessee Upon Condemnation of Leased Property*, 22 A.L.R. 5th 327 (1994) (collecting cases).

As the trial court recognized, there is no clear and express waiver here. *See* RP (4/2/10) at 23 (“absent a clear limitation on the right to share, Borders ought to be able to share”). Article 22 only sets forth the parties’ intent regarding apportionment in the limited instance where a taking results in termination of the Lease. It does not address, much less clearly waive, Borders’ right to share in a condemnation award in any other instance. Further, nothing in the Lease suggests the parties intended Article 22’s *limited* terms to constitute Borders’ *exclusive* rights, and that intent cannot be implied.⁴ Indeed, it would be unreasonable to interpret the Lease as manifesting Borders’ agreement, not only to get nothing by way of just compensation, but to have to continue paying Hogan full rent for the remainder of the lease term, where, as here, a taking significantly damages Borders’ leasehold without triggering Article 22(a)’s termination option. Borders would never agree to that, and didn’t. Put simply, if the parties intended Hogan to keep an entire condemnation award under these circumstances, they needed to say so explicitly—and they didn’t.

⁴ It is also important to note that the Lease contains an “entire agreement” clause. CP 147 (Article 39). This too undercuts Hogan’s interpretation because, as one court aptly noted: “The law on which we rely clearly grants a lessee the right to share in a condemnation award unless such right is expressly excluded or waived. If, as [the lessor] asserts, the parties’ entire agreement is expressed in the lease and since we find no exclusion or waiver of [the lessee’s] right to condemnation proceeds is contained therein, [the “entire agreement” clause] is consistent with our holding.” *Indiana Grocery Co., Inc. v. Crosby Prop. Co.*, 578 N.E.2d 780, 784 (Ind. App. 1991) (citations omitted).

2. Case Law From Washington And Other States Supports Borders' Interpretation Of The Lease.

The principle that a lessee waives its right to just compensation only if the lease contains language clearly and expressly manifesting that intent is reflected in the few Washington cases to consider the issue. In *Trask I*, this Court considered a lease that provided:

If more than twenty-five (25) percent of the Leased Premises ... shall be taken or appropriated by any public or quasi-public authority under the power of eminent domain, then the tenant shall have the right, at its option, to terminate this Lease upon (60) days written notice. In the event of any such taking or appropriation, the Landlord shall be entitled to any and all awards and/or settlements from such authority which relates to the compensation for raw land and the Tenant shall be entitled to any and all awards and/or settlements relating to the Tenant improvements. Neither party shall have any claim against the other for the value of any unexpired term of this Lease.

Trask I, 91 Wn. App. at 277. At the condemnation trial, the jury awarded the lessor a lump-sum for the property and, at the same time, apportioned part of the award to the lessee. When the lessee sought an award of attorneys' fees, the trial court refused on the grounds that the lessee was not a condemnee under the terms of the lease. This Court reversed.

The Court correctly recognized that the lessee was entitled to share in the condemnation award "unless the lessee agrees otherwise." *Id.* After examining the lease, the Court held that the lessee "did not agree to forego compensation for his leasehold interest," where, as here, the lessee did not

“exercise his option to terminate the lease ...” *Id.* at 278.⁵ In so holding, the Court implicitly rejected Hogan’s argument that a limited eminent domain clause must be construed as the exclusive source of a lessee’s right to compensation. In *Trask I*, like here, the lease contained a provision that addressed some, but not all, issues associated with a taking. In *Trask I*, like here, the clause did not address the lessee’s right to share in a condemnation award where there was no termination of the lease. And in *Trask I*, like here, the clause lacked clear and express language manifesting the lessee’s intent to waive its right to compensation in the absence of termination. *Trask I*’s reasoning applies with equal force here.

The lease language (and result) in *Trask I* can be compared to that considered in *Farmers Union*—a case heavily relied upon by Hogan. There, the eminent domain clause provided:

The award shall belong to and be paid to Lessor, except that Lessee shall receive from the award the value specifically allocated by the condemnor to the partial or total loss of the unexpired term of this Lease and for any loss of Lessee’s fixtures.

Farmers Union, 80 Wn. App. at 290. Because the award was made in a

⁵ The court also cited the provision entitling the lessee to keep any award specifically relating to tenant improvements as further evidence that the lessee did not agree to unconditionally forego a right to compensation. It is important to note, however, that this provision was not the source of the lessee’s recovery in *Trask I*; the jury did not make any specific award for tenant improvements, but rather allocated a portion of its lump-sum award to the lessee as compensation for damages to the value of his leasehold interest as a whole. *Trask I*, 91 Wn. App. at 261 & n. 6, 279-80 & n. 55.

lump-sum without anything “specifically allocated” to the lessee, the court held that the entire award “shall belong to” the lessor, consistent with eminent domain clause’s plain terms. *Id.* at 293-94. Unlike here, the clause in *Farmers Union* clearly and expressly waived the lessee’s right to share a condemnation award, subject to a single, clearly defined, exception that was not satisfied. No similar baseline waiver language exists in the Lease. If anything, then, *Farmers Union* supports the result below.

Finally, courts from other states have considered the effect of eminent domain clauses that, like Article 22, give the lessee an option to terminate, but do not address the lessee’s right to compensation if the option is not exercised. Those cases uniformly hold that, where the lessee does not terminate the lease, the lessee is entitled to its share of the award. *See Texaco Refining and Mktg., Inc., v. Crown Plaza Group*, 845 S.W.2d 340 (Tx. App. 1992); *Indiana Grocery Co., Inc. v. Crosby Prop. Co.*, 578 N.E.2d 780 (Ind. App. 1991); *Beaverton Urban Renewal Agency v. Konig*, 632 P.2d 1359 (Or. App. 1981). As one court reasoned:

We do not believe that a lessee reading paragraph 16 of the lease could be reasonably expected to conclude that, in the absence of one of the party’s exercising the option to terminate the lease prior to a condemnation proceeding, he has waived any right to share in the condemnation award. If that is what the parties intended, it would have been easy enough to say so expressly. ... [¶] Because there is no provision in the lease by the terms of which the lessee has agreed to forego participation in the condemnation award, we conclude that the lessee here is entitled to participate.

Konig, 632 P.2d at 1363. This reasoning rings even more true here, given Hogan's claim that Borders has no right to terminate at all. This Court should likewise find that Article 22's provisions for compensation in the event of termination do not constitute an implicit waiver of Borders' right to compensation in the absence of termination. The trial court's denial of Hogan's motions for summary judgment should be affirmed.

3. The Trial Court Properly Awarded Borders Attorneys' Fees For Defeating Hogan's Summary Judgment Motions; Borders Is Also Entitled To Fees On Appeal.

There is no *statutory* right to an award of attorneys' fees for the condemnee who prevails in an apportionment proceeding against another condemnee. *HTK Manag. LLC v. Roken Partners*, 139 Wn. App. 772, 782-83, 162 P.3d 1147 (2007); *Trask I*, 91 Wn. App. at 280. There may be, however, a *contractual* right to fees if, as part of an apportionment proceeding, a lessor and lessee litigate the applicability of a lease provision, and—as is the case here—the lease contains an attorneys' fees clause. *Farmers Union*, 80 Wn. App. at 295-96; CP 149-150 (Lease, Article 50). Accordingly, the trial court properly awarded Borders attorneys' fees and costs incurred opposing Hogan's motions for summary judgment (which were all predicated on Article 22 of the Lease) while, at the same time, refusing to award either party attorneys' fees incurred in the apportionment proceedings generally. CP 830 (CL ¶ 10).

If this Court affirms the trial court's denial of Hogan's motions for summary judgment (as it should), then it must also affirm the court's award of contractual attorneys' fees. Hogan concedes as much, and does not argue that there are grounds for reversal of the fee award absent reversal of the underlying summary judgment rulings. By the same token, if this Court affirms, Borders is entitled to that portion of its fees on appeal that can be reasonably attributed to the summary judgment issue. RAP 18.1(a); *Boules v. Gull Industries, Inc.*, 133 Wn. App. 85, 90, 134 P.3d 1195 (2006) (where fees are recoverable for some, but not all claims, the court of appeals will award "reasonable attorney fees and costs ... on appeal for that portion attributable" to those claims).

For the same reasons, even if this Court reverses the trial court's denial of summary judgment, the most Hogan can recover are those fees related to the summary judgment issue. To be sure, Hogan cannot recover fees and costs incurred "in defending against Borders' claim *in the apportionment trial*," as it suggests. Hogan Br. at 21 (emphasis added); *see HTK Manag.*, 139 Wn. App. at 782-83; *Trask I*, 91 Wn. App. at 280.⁶ Indeed, if the Court affirms the summary judgment ruling, but overturns

⁶ Hogan's position is inconsistent with the one it took in the trial court. In opposing Borders' request for an award of attorneys' fees below, Hogan argued that Borders could not recover fees unrelated to the summary judgment motions in the trial court or on appeal. CP 791; CP 820. Hogan does not, and cannot, provide any reason why that isn't also true if the tables are turned.

the results of the apportionment trial on other grounds, Hogan has no statutory or contractual basis for an attorneys' fee award at all. *Id.* This Court should simply affirm the trial court's judgment and attorneys' fees award, and award Borders' its related fees on appeal.

B. The Trial Court Properly Determined The Damages To Borders' Leasehold Interest As A Result Of The Taking.

As Hogan properly recognizes, the trial court's first task in the apportionment stage of the condemnation proceeding was to determine the "damage" sustained to the value of Borders' leasehold interest as a result of the City's taking. *Spencer*, 90 Wn.2d at 419-20. Only after that determination could the damage to the parties' respective interests be compared for purposes of apportioning the underlying lump-sum just compensation award. *Id.* at 421-422 & n. 2. Damages to Borders' leasehold interest are measured by the diminution of the fair market value of the Lease before and after the taking over the unexpired term of the Lease. *Id.*; 8A *Nichols on Eminent Domain*, § G30.04[4][a] (3d ed. 2006); Restatement (Second) Property, § 8.2(2)(b) (1977).

The trial court found that the taking damaged Borders' leasehold by \$7.00 per square foot through 2040 (the initial term of the Lease plus the renewal periods) for a net present value of \$1,400,000. CP 827-828 (FF ¶ 6; CL ¶ 2). The court then compared Borders' damages to Hogan's damages to calculate a ratio for purposes of initially apportioning the

jury's lump-sum award. CP 828-29 (CL ¶ 4). Using this methodology, the court found—prior to equitable adjustment—that Borders' pro rata share of the just compensation award was \$355,801. *Id.* Hogan does not challenge the court's methodology, but argues that (1) substantial evidence does not support the court's finding that Borders' leasehold was damaged by \$7.00 per square foot, and (2) it was improper to consider the Lease renewal periods for valuation purposes. Hogan is wrong on both counts.

1. The Trial Court's Finding That Borders' Leasehold Was Damaged By \$7.00 Per Square Foot Is Supported By Substantial Evidence.

“Substantial evidence” exists when there is sufficient evidence to persuade a fair-minded, rational person that a finding is true. *In re Estate of Jones*, 152 Wn.2d 1, 8, 93 P.3d 147 (2004). In determining whether this standard has been met, this Court must view the evidence in the light most favorable to Borders, and defer to the trial court on issues regarding witness credibility, conflicting testimony, and the persuasiveness of the evidence. *City of University Place v. McGuire*, 144 Wn.2d 640, 652, 30 P.3d 453 (2001); *Weyerhaeuser v. Tacoma-Pierce County Health Dep't*, 123 Wn. App. 59, 65, 96 P.3d 460 (2004). Here, the trial court was presented with competing expert testimony regarding the damage to Borders' leasehold. The court found Borders' analysis more persuasive,

and adopted it. While Hogan may believe that the trial court got it wrong, there was more than substantial evidence to support its finding.

Hogan's effort to frame the issue in terms of Hogan's two experts against Borders' one lay witness is misleading. To begin with, although Hogan called two appraisers to testify, only one—Anthony Gibbons—gave an opinion regarding the decline in the fair market value of Borders' leasehold. The other appraiser—Donald Palmer—conceded that he was asked to rely entirely on Gibbons' analysis, and that he performed no independent evaluation of his own. RP (4/13/10) at 88-89; CP 339 (expert disclosure: "We have been asked to assume the rent would be reduced \$1.50/SF due to the condemnation.")). The only original opinion Palmer offered was that the discount rate should be 12%—which is the rate the court ultimately used in its final methodology. CP 828 (CL ¶ 2).

Further, it was not expert against lay witness. Like Gibbons, the trial court accepted the testimony of Borders' witness—Pamela Lent—as expert opinion, and for good reason. RP (4/14/10) at 251-252.⁷ Ms. Lent had been a real estate professional for over 22 years, the last 15 as Borders' Director of Real Estate. RP (4/13/10) at 211-12. She was responsible for negotiating hundreds of leases and subleases for Borders

⁷ Hogan objected to Ms. Lent's opinion. RP (4/14/10) at 245-47; 251. The court overruled the objection. *Id.* at 251-52. Hogan assigns no error to the trial court's ruling regarding the admissibility of Ms. Lent's expert opinion.

around the country, and she personally negotiated the Lease and original site-plan with Hogan in 2000. *Id.* at 212-228. She based her opinion on her experience and knowledge of the marketplace, discussions with Borders' long-time local real estate brokers, Gibbons' own analysis and Borders' internal financial analysis. RP (4/14/10) at 244-45. Indeed, during the just compensation trial, Gibbons testified that Ms. Lent was one of the "experts" he consulted with when preparing his valuation. CP 493 (pp. 100-101). Of course, even if Ms. Lent testified solely in a lay capacity, the trial court was entitled to rely on her damages analysis. *State v. Larson*, 54 Wn.2d 86, 88, 338 P.2d 135 (1959) (condemnee may give lay opinion regarding damage to value of condemned property).⁸

At bottom, then, the court was asked to choose between competing expert testimony. Gibbons testified that the value of Borders' leasehold would decline by \$1.50 per square foot. RP (4/13/10) at 140-41. Ms. Lent testified that it would decline by \$7.00. RP (4/14/10) at 252, 254-55. Critically, the experts agreed on basic methodology: what is the difference between Borders' pre-taking rent of \$14.00 per square foot and the rent a

⁸ Hogan suggests that the trial court was required to credit Gibbons' testimony over Ms. Lent's because MAI appraisers are "prohibited from acting as advocates." Hogan Br. at 28. Nonsense. The MAI's standards for professional responsibility do not make one's analysis correct, nor do they prevent a court from acting as a fact finder when considering and weighing competing evidence. Indeed, MAI appraisers often testify on opposing sides of cases. *See In re Marriage of Sedlock*, 69 Wn. App. 484, 497-98, 849 P.2d 1243 (1993).

new tenant would pay post-taking? RP (4/13/10) at 140-41; RP (4/14/10) at 247-49.⁹ They differed, however, on one key variable: who would incur the approximately \$2.3 million it would cost to remodel the space prior to re-leasing? Gibbons' analysis was based on the assumption that, once the City began the project and Borders relocated, Hogan would voluntarily terminate ("take back") the Lease and incur all re-tenanting costs. *Id.* at 134-137. He did not consider whether Borders would stay on the Lease and sublease the space, thereby forcing Borders to absorb the \$2.3 million re-tenanting costs itself. *Id.* & at 173, 185-91, 208.

Ms. Lent, on the other hand, testified that the decline in the value of Borders' leasehold must take that probability into account. She based that testimony on her experience dealing with many similar "distressed" sites where, contrary to Gibbons' assumption, landlords had refused to "take back" the lease, forcing Borders to sublease the space at its own cost. RP (4/14/10) at 214-215; 251; 269-270. She testified that, once the City began the project, Borders would likely relocate, but there was no

⁹ Hogan argues that Ms. Lent's "net effective rent" approach is contrary to the law because it doesn't measure the decline in the value of the lease pre- and post-taking. Hogan Br. at 29. That is patently wrong. Ms. Lent explained that the term means the post-taking rent that a tenant would be willing to pay, including the rent a tenant would pay if it were forced to incur the costs of remodeling. RP (4/14/10) at 248-49. Gibbons' approach was exactly the same, but because he assumed Hogan—rather than Borders—would incur these costs, he didn't reduce the rental value of the lease to account for them. Likewise, Hogan's citation to cases dealing with lost profits or damage to goodwill is a red-herring. Hogan Br. at 30. Borders' damages valuation doesn't include these things.

assurance that Hogan would voluntarily terminate the Lease. *Id.* at 269-73; 290-93. Under the Lease, Hogan has an option to “take back” the property if Borders’ “goes dark,” but it has no obligation to do so. *Id.* at 291; Tr. Ex. 1 (Article 23(e)). When Borders leaves the Shopping Center, Hogan can simply keep Borders on the Lease, forcing Borders to continue paying rent for the remaining lease term. *Id.* Given that Hogan already reneged on its promise to amicably share the just compensation award, Borders had reason to doubt Hogan’s promise to take back the Lease.¹⁰

Under Ms. Lent’s analysis, the post-taking value of Borders’ leasehold must include the probability that Borders will sublease the space. RP (4/14/10) at 269-74; 291-93. When that occurs, the \$2.3 million re-tenanting costs must be reflected in the fair market value of the Lease. If Borders pays for the remodel, it will have to amortize the costs over the term of the Lease; if Borders does not, the subtenant will demand a commensurate reduction in rent. *Id.* at 247-255; 269-70. Either way, the value of Borders’ leasehold will decrease by \$7.00 per square foot. Ms. Lent also testified that her real estate brokers—whom she relies upon for purposes of rent valuation in the Seattle area, RP (4/13/10) at 213; 217—

¹⁰ Jeff Hogan testified that, if Borders decided to relocate, Hogan would terminate the lease. RP (4/14/10) at 343. On cross-examination, Borders asked if Hogan was prepared to sign a lease amendment to that effect, but the trial court cut the inquiry short. *Id.* at 348-50. Needless to say, no such amendment was ever executed. And, as the trial court presciently noted, “No offense to Mr. Hogan, but he can say one thing here and now and the events may lead him to a different conclusion later.” *Id.*

told her that they estimated the post-taking rent would be around \$5.00 to \$6.00 per square foot—even less than Ms. Lent calculated. *Id.* at 257.

In the end, the trial court adopted Hogan’s methodology (and its discount rate), but accepted Borders’ evidence that the post-taking value of the Lease must reflect the \$2.3 million re-tenanting costs because of the possibility that Borders—not Hogan—would incur those costs. CP 827-828 (FF ¶ 10; CL ¶¶ 2, 4 & 5); RP (4/20/10) at 402. While the court noted that Hogan put on contrary evidence, it did not find Borders’ damages to be “unrealistic” or without “credibility,” as Hogan suggests. Hogan Br. at 30. Indeed, as reflected in its final findings, the court found Borders’ evidence *more* realistic, *more* credible and *more* persuasive than Hogan’s. Those findings are supported by substantial evidence.

2. The Trial Court Properly Included The Lease Renewal Periods In Its Damages Calculation.

The trial court’s finding that Borders’ damages extend, not only through the initial term of the Lease, but also through the five five-year renewal periods, is also unassailable. It is well-established that a lessee’s option to renew a lease is a property interest subject to just compensation where a leasehold is taken by eminent domain. *See* Restatement (Second) Property, § 8.2, cmt. d (1977); 8A *Nichols on Eminent Domain*,

§ G30.07[6][a] (3d ed. 2006).¹¹ In a nearly analogous setting, the Washington Supreme Court held that a lessee’s option to purchase is compensable in a condemnation action. *Parzybok*, 96 Wn.2d at 104. Hogan provides no basis for departing from this rule here. Thus, inclusion of Borders’ renewal periods in the valuation of its leasehold interest was correct as a matter of law. No further analysis is required.

Hogan’s reliance on the doctrine of mitigation is unfounded. No Washington court has ever applied the doctrine in a condemnation case. As Hogan recognizes, while the court in *State v. Wandermere Co.*, 89 Wn. App. 369, 949 P.2d 392 (1997), noted that “[o]ther jurisdictions” have applied the concept in condemnation cases, it did not reach the issue itself; on the contrary, it found that a failure to instruct the jury on mitigation was not prejudicial error. *Id.* at 384. And, even in those few cases where the concept has been applied, it has been used to consider the “cost of cure” on fair market value—that is, how much would it cost an owner or buyer to ameliorate the damages caused by the taking. *See Fla. Dept. of Transp. v. Armadillo Partners, Inc.*, 849 So.2d 279, 285 (Fla.2003); *State v. Weiswasser*, 693 A.2d 864, 869 (N.J. 1997). It has never been applied in the context of a lessee’s option to renew. Indeed, if it did, then all of

¹¹ *See U.S. v. Petty Motor Co.*, 327 U.S. 372, 381 (1946); *Canterbury Realty Co. v. Ives*, 216 A.2d 426, 430 (Conn. 1966); *Land Clearance for Redevelop. Corp v. Doernhoefer*, 389 S.W.2d 780, 786-87 (Mo. 1965); *Ellis v. Dept. of Trans.*, 333 S.E.2d 6, 7-8 (Ga. App. 1985); *State v. Holmes*, 209 So.2d 780, 783 (La. App. 1968).

the cases holding that a lessee's option to renew must be valued as part of its just compensation were wrongly decided—for the lessee could always “mitigate” its damages by relinquishing the option. That is not the law.

Finally, Hogan's mitigation theory—even if it applied—fails on the facts. The issue on mitigation is “not whether the owner may be compelled” to do something, but what “a willing and reasonable buyer and seller ... would agree is the fair price of the property” in light of possible cures. *Weiswasser*, 693 A.2d at 871. Here, the facts are undisputed that a willing and reasonable buyer—*i.e.*, a new tenant or subtenant—would not lease the space without the options to renew. Ms. Lent testified:

Q. In your experience negotiating subleases on behalf of Borders, does the presence of renewal options in the main lease play a role in the sublease negotiations?

A. Yes, they do.

Q. What role do they play?

A. Well, typically a tenant is going to require - - we are after exactly what the landlord is after, because I am the sandwich guarantee position. So I am after the highest quality, best credit tenant I can find to take that space. In order to achieve that, just like Borders would require[,] most of those tenants I am after would require options, at least to the length of the term they commit to. ... [¶] Most tenants, and it depends on the credit of the tenant. It depends on a lot of factors. They would require a minimum of equal option term to rent term. ... The bigger the anchor gets ..., the more options they are able to negotiate, typically, and you have to have those options to be able to sublease, or market space, or have to be able to provide those, just like a landlord does.

RP (4/14/10) at 270-71. In short, the post-taking value of Borders' leasehold *depends* on the options to renew because, without them, no suitable subtenant would agree to lease the space. Hogan's argument that the options do not enhance the value of the leasehold is therefore contrary to the evidence; without the options, the post-taking value of the Borders' leasehold would evaporate. The trial court did not err when it included the renewal periods in calculating the fair market value of Borders' leasehold.

C. The Trial Court Did Not Abuse Its Discretion When Equitably Adjusting Borders' Share Of Just Compensation.

While Hogan argues that a trial court is not *required* to adjust a just compensation award (Hogan Br. at 37), Hogan does not—and cannot—dispute that a trial court has *equitable discretion* to do just that. *Spencer*, 90 Wn.2d at 419; *Pierce Co. v. King*, 47 Wn.2d 328, 333, 287 P.2d 316 (1955); *Pacific Nat. Bank of Seattle v. Bremerton Bridge Co.*, 2 Wn.2d 52, 60, 97 P.2d 162 (1939). This Court will review a trial court's orders fashioning equitable relief only for abuse of discretion. *Sorenson v. Pyeatt*, 158 Wn.2d 523, 531, 146 P.3d 1172 (2006); *In re Foreclosure of King County Liens*, 123 Wn.2d 197, 204, 867 P.2d 605 (1994). A trial court abuses its discretion only when its decision is manifestly unreasonable or based upon untenable grounds. *Havens v. C & D Plastics, Inc.*, 124 Wn.2d 158, 168, 876 P.2d 435 (1994). The trial court's

decision to equitably increase Borders' share of the just compensation award was neither manifestly unreasonable nor untenable.

Hogan argues that, if anything, the factors cited by the trial court in its findings and conclusions and oral ruling required the court to reduce Borders' share. Hogan Br. at 37-40. Not so. What they show is that the court carefully considered all factors and how they impacted Borders' leasehold before exercising its discretion. RP (4/20/10) at 402 ("The first major problem is what factors do you consider in equitably adjusting. The second major consideration is how do you attach value to the factors that you identify."). As the court properly determined, many factors showed that Borders' share of the jury's lump-sum award should be increased:

- The court first noted that Borders' pro rata share of \$355,801 was predicated on Hogan's assertion that the total damage from taking was \$11.9 million. *Id.* But as the court noted, "there is no way of knowing what the jury used in assessing damages, and for that reason, Hogan's [figure] may be built entirely on a house of cards." *Id.* Indeed, although Hogan asked for \$11.9 million at the just compensation trial, the jury only awarded \$5.150 million. CP 67. If Hogan's share of the award was less, as the jury's award suggests, then Borders' pro rata share would necessarily be greater.
- The court also recognized that, prior to the taking, "Borders has a really profitable business going," and "[w]hat Borders is entitled to is compensation for the loss of value." *Id.* at 403. Although future profits are not relevant for purposes of assessing just compensation damages, they can be considered for purposes of equitable apportionment. *Pierce County*, 47 Wn.2d at 334. The court thus recognized that, even when the value of the Lease is "projected over the life of the options," the pro rata share "understates Borders' loss." RP (4/20/10) at 403-404.

- The court then observed that Hogan, in particular, had changed its trial tactics and damages analysis for the apportionment trial. “[Y]ou have Hogan in phase one stressing the catastrophic results that are going to be worked on Borders by the taking. ... Hogan now disavows their phase one argument claiming that the damages to Borders may be as little [as] \$48,000.” *Id.* at 404. Because Hogan was anxious to stress Borders’ damages to get “the biggest pot possible,” even if it “distorted” the award, Borders’ significant contribution to phase one should be rewarded. *Id.* at 404-405.¹²

In short, for every factor Hogan says weighed in favor of decreasing Borders’ award, the trial court concluded that the same factor or another, more compelling, factor weighed in favor of an increase. The court—having presided over both stages of the proceedings—was in the best position to weigh the “unique variables” of the case. *Id.* at 402. As a matter of equity, its decision to increase Borders’ share was reasonable.

The trial court also provided a reasonable basis to support the final amount of its equitable adjustment.

- The court noted that the final award of \$711,602 was “roughly two times” the \$355,801 that Hogan’s methodology required if, as the court found, the value of Borders’ lease declined by \$7.00 per square foot over the extended term of the Lease. *Id.* at 405.
- At the same time, the court stated, the final \$711,602 figure was “roughly half” of Borders’ most modest damages case—which the

¹² Hogan’s counsel conceded this during closing argument. When asked by the court what would have happened if Hogan had told the jury in phase one that it believed Borders’ loss was only \$48,000 (Hogan’s final damages estimate in the apportionment phase), counsel replied: “[W]e don’t know what the jury would have done. Obviously, if they heard that you know, \$48,000 was all that Borders was going to get, they might have reduced [the] amount of the award.” RP (4/20/10) at 381-82.

court stated it “would most likely adopt if I was adopting one of Borders’ suggestions.” *Id.* at 405-406.¹³

- The court also noted that the final amount was “roughly equal to the average of: 23 percent (Borders’ square foot percent of all of the Willows Center) of \$2,300,000 (the amount Hogan believes should be apportioned); and 23 percent of \$5,100,000 (the amount Borders thinks should be apportioned).” *Id.* at 406; CL 830.
- Finally, the court observed that the final amount was “roughly proportionate to Hogan’s claimed damages in phase one [\$11.9 million], compared to the damages actually awarded by the jury [\$5.150 million]. *Id.* at 406; CL 830.

For purposes of equitable adjustment to Borders’ initial pro rata share of the just compensation award, there could be no mathematical precision, and the law didn’t require it. As Hogan’s counsel presciently informed the trial court: “That will not be a question of mathematical certainty, but it will be a question involving how to ... come to a fair and equitable price.” RP (4/12/10) at 54-55. Borders agrees, and that is what the court did.

To be sure, neither party was wholly satisfied. The \$711,602 figure was only a fraction of what Borders wanted to receive; by the same token, although more than Hogan wanted to share, in the end, Hogan was allowed to retain approximately \$4.5 million of the just compensation award. The trial court’s equitable adjustment was neither manifestly unreasonable nor untenable. It too should be affirmed.

¹³ Ms. Lent testified that Borders’ leasehold was damaged in excess of \$3 million by the taking. In its post-trial brief, Borders proposed, as an alternative, that the court award Borders 23% of the \$5,150,000 just compensation award, or about \$1.2 million—since Borders occupied roughly 23% of the Shopping Center. CP 541; CP 544.

D. The Trial Court Properly Awarded Borders Prejudgment Interest As Part Of Its Just Compensation.

Hogan acknowledges that if the trial court's apportionment award is affirmed, then the court properly awarded Borders \$88,304.13 as a pro rata share of the \$638,959 in prejudgment awarded to Hogan in the 2009 just compensation trial. Hogan Br. at 44. Hogan argues, however, that the court erred in awarding Borders another \$87,263.84 in prejudgment interest for the period running from June 10, 2009 (the date of judgment in the just compensation trial) through June 18, 2010 (the date the court ruled that Borders was entitled to prejudgment interest) on the grounds that Borders' claim was not liquidated prior to the court's final decision on apportionment. *Id.* This Court reviews a trial court's decision on prejudgment interest only for abuse of discretion. *Scoccolo Constr., Inc. v. City of Renton*, 158 Wn.2d 506, 519, 145 P.3d 371 (2006).

Hogan's reliance on the traditional liquidated vs. not liquidated distinction is inapposite. When a private property is taken for public use, "just compensation" requires that the property owner be put in the same position monetarily as he or she should have occupied had the property not been taken. *Sintra, Inc. v. City of Seattle*, 131 Wn.2d 640, 655, 935 P.2d 555 (1997). Where property is taken before compensation is paid, interest is necessary to compensate the property owner for the loss of the monetary value of the property. *Id.* at 656. "Interest in this context is not an award

of prejudgment interest on a liquidated sum in the traditional sense, but is a measure of the rate of return on the property owner's money had there been no delay in payment.” *Id.*; *Olympic Pipe Line Co. v. Thoeny*, 124 Wn. App. 381, 396-97, 101 P.3d 430 (2004). Interest runs from the time the condemnor takes possession or becomes entitled to possession of the property. *State v. Hallauer*, 28 Wn. App. 453, 457, 624 P.2d 736 (1981).

These principles apply here. Just as Hogan was awarded just compensation in the form of prejudgment interest from the date of the taking until the just compensation trial finally fixed the precise amount of his damages, so too is Borders. Indeed, the value of Hogan's damages as determined by the jury in the first trial was no more “liquidated” than the value of Borders' portion of the award as determined by the court in the second trial. Like Hogan's ownership interest, Borders' leasehold interest was immediately diminished on the date of the taking, thereby entitling Borders to interest on the award as a “measure of the rate of return on [its] money had there been no delay in payment.” *Sintra*, 131 Wn.2d at 656. Hogan cites no contrary authority, nor offers any reason to depart from the well-established rule that interest is merely a component of just compensation where, as here, the taking occurs before a judge or jury determines exactly how much compensation is actually due.

That Hogan, and not a condemnor, must pay prejudgment interest

at this stage of the proceedings does not change the analysis. Courts favor prejudgment interest on the premise that a party who retains money belonging to another should be charged interest. *Seattle-First Nat'l Bank v. Wash. Ins. Guar. Ass'n*, 94 Wn. App. 744, 760, 972 P.2d 1282 (1999). When the jury awarded Hogan \$5,150,000 in June 2009, a portion of that award belonged to Borders. RCW 8.12.150. Yet Hogan refused to recognize Borders' interest, refused to reserve any portion of the judgment for future payment to Borders, and filed (and lost) three motions for summary judgment trying to evade apportionment altogether. For more than a year, Hogan had unfettered use of Borders' share of the just compensation award. CP 77-79.¹⁴ An award of prejudgment interest was thus necessary, not only to make Borders whole, but also to prevent Hogan from unjustly benefiting from the use of money that belonged to Borders all along. The award of prejudgment interest should be affirmed.

E. The Trial Court Erred In Concluding That Borders Is Not Entitled To Post-Judgment Interest Pending Appeal.

The trial court's ruling regarding post-judgment interest, however, was wrong. As reflected in its Judgment, the trial court awarded Borders post-judgment interest at the statutory amount of 12% per annum on the

¹⁴ It is notable that, following the condemnation trial and the jury's lump-sum award, Hogan reserved \$936,835 in the court's registry to satisfy a subsequent apportionment award in KeyBank's separate apportionment action. CP 70-72. No amount was reserved for Borders.

total judgment amount (which included prejudgment interest, costs and fees) of \$918,129.18. CP 834. When Hogan sought to stay enforcement of the judgment by payment of supersedeas cash in the court's registry, the court ruled that, pursuant to RCW 8.28.040, "the running of interest shall be suspended, and such interest shall not accrue," during the pendency of an appeal. CP 846. On Borders' cross-appeal, this Court should reverse the trial court's erroneous interpretation of RCW 8.28.040 and hold that, regardless of Hogan's appeal, Borders is entitled to 12% interest on the underlying judgment amount until that amount is fully satisfied.

Neither the text nor the intent of RCW 8.28.040 compel suspension of post-judgment interest pending Hogan's appeal. The statute reads:

Whenever in any eminent domain proceeding, heretofore or hereafter instituted for the taking or damaging of private property, a verdict shall have been returned by the jury, or by the court if the case be tried without a jury, fixing the amount to be paid as compensation for the property so to be taken or damaged, such verdict shall bear interest at the maximum rate of interest permitted at that time under RCW 19.52.020 from the date of its entry to the date of payment thereof: PROVIDED, That the running of such interest shall be suspended, and such interest shall not accrue, for any period of time during which the entry of final judgment in such proceeding shall have been delayed solely by the pendency of an appeal taken in such proceeding.

RCW 8.28.040. On its face, the statute's proviso suspends *prejudgment* interest where an appeal results in a "delay" of "entry of final judgment." As this Court has held, the proviso does not apply where an appeal is

taken *after* final judgment. *State v. Trask*, 98 Wn. App. 690, 698 fn. 18, 990 P.2d 976 (2000) (“*Trask II*”) (“The proviso may toll prejudgment interest when an appeal is taken *before* judgment, *see, e.g.*, RAP 2.2(a)(4), but both appeals in this case were taken *after* judgment.”).¹⁵ Here, final judgment had already been entered—not once, but twice: once after the condemnation trial (CP 68-68), and again after the apportionment trial (CP 833-835). RCW 8.28.040 simply does not apply to post-judgment interest.

Even where RCW 8.28.040 applies, it only applies to suspend interest pending appeal of an underlying condemnation award, not a subsequent apportionment award. By its terms, the statute relates to condemnation actions where a jury or judge “fix[es] the amount to be paid as compensation for the property so to be taken or damaged.” The action between the condemnor and condemnee is the *only* proceeding that fixes “the amount to paid as compensation for the property to be taken.” An apportionment hearing does not fix compensation; its purpose is to allocate the award between interested parties. The distinction between compensation and allocation is clear in RCW 8.12.150, which governs condemnation actions by cities: the jury must first “ascertain the entire compensation or damage that should be paid for the property and the

¹⁵ A prejudgment appeal in a condemnation case is permitted as a matter of right. *See* RAP 2.2(a)(4) (appeal may be taken from “[a]n order of public use and necessity in a condemnation case.”).

entire interests of all the parties therein,” and only then does the court “require adverse claimants to interplead, so as to fully determine their rights and interests in the compensation so ascertained.” RCW 8.12.150.

Indeed, the entire purpose of RCW 8.28.040 is to protect the state (or, in this case, the City) from financial harm during an appeal where no taking has yet occurred—an interest not implicated in an apportionment action where the City has already taken possession, paid the condemnation award in full, and has no further stake in the outcome. In *State v. Lacey*, 84 Wn.2d 33, 524 P.2d 1351 (1974), the Supreme Court explained that RCW 8.28.040 was enacted when “there was no provision for the state to take possession of the property prior to judgment,” but that since that time, laws were enacted which incentivized property owners to give the state immediate possession prior to judgment. *Id.* at 37. The Court reasoned:

When legislative concern for property owners’ interest is considered, there is no conflict between the statutes. If limited to condemnation proceedings where the owner does surrender possession prior to trial and verdict, RCW 8.28.040 prevents financial harm to the state from a delay occasioned by appeal. The state is not required to pay interest while an appeal is pending and the owner continues in the beneficial use of his property.

Where the owner does not remain in possession, the application of RCW 8.28.040 would deprive the owner who agrees to surrender his land early of his only incentive to surrender possession, the right to interest on the value of the property surrendered.

Id. at 37-38. The court held that “[t]he interest suspension provisions of RCW 8.28.040 do not apply to the statutes enacted later in time [allowing immediate possession] when viewed as a matter of chronology or legislative intent.” *Id.* at 38 (citing *In re Anacortes*, 81 Wn.2d 166, 500 P.3d 546 (1972) (directing payment of interest from the date of immediate possession until the date of payment, despite intervening appeals)).

Lacey dispels any suggestion that RCW 8.28.040 suspends interest pending appeal in this action. *First*, the decision confirms that RCW 8.28.040 was intended to protect the public condemners from interest payments in condemnation actions, not private condemnees in later apportionment proceedings; the state’s interest evaporates once it accepts final judgment without appeal and pays the just compensation award—both of which occurred here. *Second*, the decision holds specifically that, even in a condemnation action where the state is a party, RCW 8.28.040 does not apply where appeal is taken *after* the condemnee surrenders possession—which also occurred here. Hogan surrendered immediate possession to the City in June 2007. CP 53-58. At that point, the value of the Shopping Center (and Borders’ interest therein) was damaged; application of the interest suspension provision of RCW 8.28.040 in such a case would improperly penalize Borders by denying it interest—and thus, its share of compensation—on the value of property already taken.

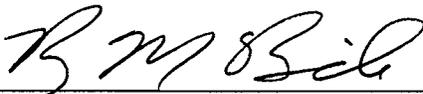
In sum, the interest suspension proviso of RCW 8.28.040 “is a special rule with limited applicability.” *Sintra, Inc. v. City of Seattle*, 96 Wn. App. 757, 762, 980 P.2d 796 (1999). It applies only to (i) pre-judgment appeals (ii) taken in underlying condemnation actions in which the state is an interested party, and (iii) where the property owner continues to enjoy full possession and use of the property during the pendency of the appeal. None of these conditions exist here. The trial court erred as a matter of law when it concluded that Borders’ entitlement to post-judgment interest is suspended during the pendency of Hogan’s appeal. Its ruling to the contrary must be reversed.

VI. CONCLUSION

For all the reasons set forth above, Borders requests this Court to affirm the Judgment below, and reverse the trial court’s ruling that accrual of post-judgment interest be suspended during the pendency of appeal.

RESPECTFULLY SUBMITTED this 18th day of February, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on February 18, 2011 I caused to be served a copy of the foregoing Opening Brief of Respondent/Cross-Appellant Borders, Inc. on the following person(s) in the manner indicated below at the following address(es):

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