SUPREME COURT NO. 90120-1
COURT OF APPEALS NO. 70397-8-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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10 NORTH WASHINGTON AVENUE, LLC, a Washington limited liability company,

Petitioner,

vs.

CITY OF RICHLAND, a municipal corporation,

Respondent

ON APPEAL FROM THE SUPERIOR COURT OF STATE OF WASHINGTON FOR BENTON COUNTY

The Honorable Bruce Spanner, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

10 North Washington Avenue, LLC ("10 NWA"), Petitioner and Appellant herein, requests that this Court accept review of the Court of Appeals decision filed on December 9, 2013, terminating review designated in Part B of this Petition pursuant to RAP13.3(a)(1) and RAP 13.4.

B. COURT OF APPEALS DECISION

10 North Washington Avenue, LLC ("10 NWA") seeks review of the unpublished Court of Appeals decision entered on December 9, 2013, a copy of which is attached as an appendix.

C. ISSUE PRESENTED FOR REVIEW

The Court of Appeals affirmed dismissal of 10 NWA's condemnation claim on the ground that deprivation of property sustained by 10 NWA was temporary. A recent decision of the U.S. Supreme Court undermines prior law that a "taking" must be permanent to trigger constitutional protection.

This Court has held that decisions of the U.S. Supreme Court interpreting the Takings Clause of the U.S. Constitution "set a minimum floor of protection, below which state law may not go." Orion Corp. v. State, 109 Wn.2d 621, 652, 747 P.2d 1062, 1079 (1987). Last term, the U.S. Supreme Court held that a temporary interference with private

property may give rise to a compensable taking under the Fifth Amendment to the U.S. Constitution. Arkansas Game & Fish Commission v. United States, __ U.S. __, 133 S. Ct. 511, 518-522, 184 L. Ed. 2d 417 (2012).

Washington courts, however, adhere to a contrary rule that an interference with private property must be permanent in duration in order to affect a taking under Article I, Section 16 of the Washington State Constitution. Applying that rule, Division I of the Court of Appeals dismissed 10 NWA's inverse condemnation claim as a matter of law and without regard to the claim's merits. The issue presented is:

> Whether the Washington rule requiring that an interference with private property be permanent to constitute a taking falls below the protections guaranteed by the federal Takings Clause and thus by Article I, Section 16 of the Washington State Constitution.

D. STATEMENT OF THE CASE

Respondent City effectively deprived 10 NWA of rail service to 10 NWA's property located on City's Horn Rapids Spur track. 10 NWA purchased that property from the City for the specific disclosed purpose of constructing a rail transload facility. After 10 NWA constructed that facility, City terminated its agreement with the rail carrier which City knew serviced that property for 10 NWA. City refused to allow that

carrier to operate on the City track accessing the subject property unless that carrier relinquished its rights to oppose the City's construction of a crossing over the carrier's track at a remote location. By this conduct, City deprived 10 NWA of its intended use of and access to the property it purchased from the City. The trial Court and the Court of Appeals excused this behavior by concluding that the taking was not permanent and thus did not violate the Washington Constitution. This Court should grant review.

In a 2008, 10 NWA purchased a 33-acre tract of land from the Respondent City. This land is located on and can only be accessed by rail from, the Horn Rapids Spur industrial track owned by the City. In the contract to purchase this property, 10 NWA disclosed its intended use of the property as a rail facility and that rail service would be provided to this property by 10 NWA's sister company, Tri-City Railroad Company, LLC (TCRY). City required that TCRY submit a Rail Management Plan which was approved by the City as a condition of sale.

At the time of the sale, TCRY was able to access the facility over the Horn Rapids Spur under a Temporary Service Agreement (Agreement) with the City in place since 2001.

The Agreement contemplated being replaced by a permanent track use agreement, to be negotiated in good faith. In 2010, the City

terminated the Agreement.

The City was aware that because 10 NWA relied on TCRY for rail service to the property, termination of the Agreement would place additional pressure on TCRY to relinquish TCRY's rights to contest construction of a crossing at Center Parkway on the TCRY line. That line, which is not part of the City's Horn Rapids Spur, is owned by the Port of Benton and leased to TCRY. The City's application to the Washington State Utilities Commission to construct an at-grade crossing at that location had been denied in 2007.

TCRY refused a new agreement proposed by the City which required that TCRY not contest construction of a crossing over its line at Center Parkway. TCRY refused to acquiesce to this surrender of its rights. The City's action thus deprived 10 NWA of its rail service provider.

As a result, 10 NWA's facility was cut off from rail service and 10 NWA sustained substantial financial losses because it was deprived of the business opportunity for which it purchased the subject property from the City. In addition, the value of that property without rail service was substantially diminished. 10 NWA brought suit against the City asserting (among others) claims for Inverse Condemnation and Regulatory Taking.

City moved for summary judgment as to all claims. The Superior Court granted the motion without issuing Findings of Fact or Conclusions

of Law, and denied a subsequent Motion for Reconsideration.

The Court of Appeals affirmed the decision of the Superior Court and denied 10 NWA's Motion for Reconsideration which was grounded on the same arguments supporting this Petition addressing the conclusion of the Court of Appeals that there had been no compensable taking of 10 NWA's property because the deprivation of use was "temporary."

E. ARGUMENT

THIS COURT SHOULD GRANT REVIEW TO DECIDE WHETHER, AS THE COURT OF APPEALS HELD, A TAKING MUST BE "PERMANENT" TO BE A VIOLATION OF ART. I, SECTION 16 OF THE WASHINGTON CONSTITUTION.

This Petition presents a significant question of law under the Constitution of the State of Washington as a direct result of a decision of the U.S. Supreme Court regarding the Constitution of the United States. As a result, it merits review. RAP 13.4(b)(3).

As the sole basis for affirming summary judgment dismissing 10 NWA's inverse condemnation claim, the Court of Appeals concluded that 10 NWA failed to establish a "taking" under the Washington Constitution, Art. I, Section 16 by termination of the temporary service agreement which denied access by rail to 10 NWA's property. The Court concluded:

> Here, NWA fails to establish that there was a "taking." Even if the City interfered with NWA's use of its property when it terminated TCRY's temporary service agreement, this interference is not permanent or recurring. TCRY may enter into another service agreement with the City, which would restore NWA's use of its property. Further, NWA could seek rail service from a different railroad company. (Decision, p. 10)

In support of that conclusion, the Court relied on prior Washington cases requiring that interference or invasion must be permanent to constitute a "taking":

> "There must be an invasion [or interference] that is permanent or recurring, or an invasion [or interference] that involves 'a chronic and unreasonable pattern of behavior by the government.'" The invasion or interference is "permanent if the property may not be restored to its original condition." (Decision, pp. 9-10; footnotes omitted)

The Court cited Gaines v. Pierce County, 66 Wn. App. 715, 725, 834 P.2d 631, 637 (1992) quoting from Orion Corp. v. State, 109 Wn.2d 621, 671, 747 P.2d 1062, 1088 (1987)).

In Orion, the Washington Supreme Court noted, "It is well recognized, however, that the federal constitution sets a minimum floor of

protection, below which state law may not go. See, e.g., *Michigan v. Long*, 463 U.S. 1032, 103 S. Ct. 3469, 77 L.Ed.2d 1201 (1983)." Orion, 109 Wn.2d at 652, 747 P.2d at 1079.

Indeed, this Court has held that Article I, section 16 "is significantly different from its United States constitutional counterpart, and in some ways provides greater protection. See, e.g., *Mfr'd Hous. Cmtys. of Wash. v. State*, 142 Wash.2d 347, 356 n. 7, 13 P.3d 183 (2000)." Eggleston v. Pierce Cnty., 148 Wn.2d 760, 766, 64 P.3d 618, 622 (2003).

Therefore, Washington law clearly mandates that, at minimum, where an interference with property constitutes a taking under the Fifth Amendment to the U.S. Constitution, that interference constitutes a taking under Article I, Section 16, of the Washington Constitution.

In affirming the trial court in its Decision here, the Court relied on "temporary interference" cases and applied a standard which has been overruled by the U.S. Supreme Court in Arkansas Game, 133 S. Ct. 511. In that case, by unanimous decision, the Supreme Court rejected the distinction between permanent and temporary appropriations, concluding that there was "no solid grounding in precedent for setting [temporary] flooding apart from other government intrusions on property." Arkansas Game, 133 S. Ct. at 521-522.

Accordingly, the Supreme Court held that "government–induced flooding of limited duration may be compensable" and reversed a Court of Appeals decision that had dismissed a takings claim because it alleged only a temporary (7-year) interference with private property. *Id.* at 522. The Court thus held that a temporary physical invasion can affect a taking requiring payment of just compensation.

The Arkansas Game Court reaffirmed the rule that when "the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner." *Id.* at 518. Thus, the Court explained that takings liability can attach to any temporary government action, even action taken outside the property, that gives rise to "a direct and immediate interference with the enjoyment and use of the land." *Id.* at 519 (quoting United States v. Causby, 328 U.S. 256, 266 (1946)). In a footnote, the Court also explained that the prospect that land can be reclaimed and restored after a physical invasion "does not disqualify the landowner from receipt of just compensation for a taking." Arkansas Game at 523, n.2 (citing United States v. Dickinson, 331 U.S. 745, 751, 67 S.Ct. 1382, 91 L.Ed. 1789 (1947).

In deciding that the 10 NWA's inverse condemnation failed because it had not demonstrated a "permanent interference" with its property, the Court relied on Washington cases whose rule no longer

conforms to the minimum standard defining what constitutes a taking under the Fifth Amendment of the United States Constitution, which this Court has held to be the minimum protection afforded to its citizens under Article I, Section 16, of the Washington Constitution.

Thus, the Court of Appeals' finding that the interference was temporary is not sufficient, after Arkansas Game, to dismiss a takings claim under the U.S. Constitution. This Court should grant review to determine that a finding of temporary interference is not sufficient, after Arkansas Game, to dismiss a takings claim under the Washington Constitution.

F. CONCLUSION

In light of clear Washington precedent stating that a "taking" under the Fifth Amendment establishes a "taking" under Article I, Section 16 of the Washington Constitution, this Court should grant review and reverse the decision of the Court of Appeals affirming summary judgment and remand the inverse condemnation claim for trial.

DATED this 25th day of March 2014.

MINNICK • HAYNER, P.S.

By: _____

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

10 NORTH WASHINGTON AVENUE, LLC, a Washington limited liability company, Appellant, v. CITY OF RICHLAND, a municipal corporation, Respondent.	No. 70397-8-I DIVISION ONE UNPUBLISHED FILED: December 9, 2013

Cox, J. — 10 North Washington Avenue, LLC (NWA) appeals the summary dismissal of its tortious interference and inverse condemnation claims against the City of Richland. Because NWA fails to establish that there are any genuine issues of material fact for trial, we affirm.

Randolph Peterson and his three sons own NWA. NWA owns property and provides administrative services to companies owned by the Peterson family. The Peterson family also owns a majority of Tri-City Railroad Company LLC (TCRY), which is not a party to this action. TCRY operates a short line railroad in Benton County.

In 2001, TCRY entered into a temporary service agreement with the City. This agreement permitted TCRY to operate on the Horn Rapids Spur, an industrial track. By its terms, the agreement could be "terminated upon ten (10) days written notice by either party." It also stated, by its terms, that the City and TCRY would "negotiate on a good faith basis to agree on an Industrial Track Agreement . . . to replace this [temporary service agreement]."

In 2008, NWA purchased 33 acres in the Horn Rapids Industrial Park for the purpose of building "transloading" and biofuel production facilities. "Transloading" means moving commodities between rail and truck. When NWA bought the property, it intended that TCRY would provide rail service to these future facilities.

NWA allegedly signed a letter of intent with Gen-X Energy Group in 2009. It appears that this letter provides for these two parties to jointly develop and construct a biofuel production facility on NWA's property and to have TCRY provide the necessary rail service.

In 2010, the City gave TCRY notice under the temporary service agreement that it intended to terminate the agreement. The City also presented a new track use agreement that required TCRY to relinquish its rights to use "Richland Junction" in exchange for continued use of the Horn Rapids Spur. Richland Junction is located outside the Horn Rapids Industrial Park. It appears that the City wanted to construct an at-grade crossing at Richland Junction.

The temporary service agreement terminated. TCRY refused to enter into the proposed new track use agreement offered by the City. Consequently, TCRY

can no longer use the Horn Rapids Spur unless it operates on the track as an agent of another railroad company.

NWA commenced this action asserting (1) inverse condemnation, (2) regulatory taking, (3) breach of contract, and (4) tortious interference. Notably, TCRY is not a party to this action.

The City moved for summary judgment on all claims, which the trial court granted. The court also denied NWA's motion for reconsideration.

NWA appeals.

TORTIOUS INTERFERENCE

The first of the only two claims on appeal is the tortious interference claim. The other is the takings claim, which we address later in this opinion.

NWA argues that the trial court erred when it summarily dismissed its tortious interference claim. We hold that NWA fails to establish any genuine issue of material fact. Thus, all other facts are immaterial for summary judgment purposes.

This court reviews summary judgment orders de novo and engages in the same inquiry as the trial court.[1] Summary judgment is appropriate when there is no genuine issue of material fact, and the moving party is entitled to summary judgment as a matter of law.[2]

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[1] Cornish Coll. of the Arts v. 1000 Va. Ltd. P'ship, 158 Wn. App. 203, 216, 242 P.3d 1 (2010).

[2] CR 56(c).

A defendant may move for summary judgment by showing that "'there is an absence of evidence to support the [plaintiff's] case.'"[3] If the defendant shows an absence of evidence, the burden then shifts to the plaintiff to set forth specific facts showing a genuine issue of material fact for trial.[4] While this court construes all evidence and reasonable inferences in the light most favorable to the nonmoving party, if the plaintiff "'fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial,'" summary judgment is proper.[5]

For a tortious interference with a business expectancy claim, a plaintiff must prove five elements:

> "(1) the existence of a valid contractual relationship or business expectancy; (2) that defendants had knowledge of that relationship; (3) an intentional interference inducing or causing a breach or termination of the relationship or expectancy; (4) that defendants interfered for an improper purpose or used improper means; and (5) resultant damage."[6]

A complete failure of proof concerning any of these elements necessarily renders all other facts immaterial for summary judgment purposes.[7]

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[3] Young v. Key Pharm., Inc., 112 Wn.2d 216, 225 n.1, 770 P.2d 182 (1989).

[4] Id. at 225.

[5] Id. (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)).

[6] Moore v. Commercial Aircraft Interiors, LLC, 168 Wn. App. 502, 508-09, 278 P.3d 197, review denied, 175 Wn. 2d 1027 (2012) (quoting Leingang v. Pierce County Med. Bureau, Inc., 131 Wn.2d 133, 157, 930 P.2d 288 (1997)).

[7] Boyce v. West, 71 Wn. App. 657, 665, 862 P.2d 592 (1993).

Improper Purpose or Means

NWA argues that the City's termination of the service agreement was for an improper purpose. It argues that this interference was improper for three reasons: "(1) the interference was wrongfully motivated, and conducted in bad faith; (2) the bad-faith interference led to bad-faith negotiations in violation of the 2001 [temporary service agreement]; and (3) [t]he City's requirement that TCRY relinquish its rights to Richland Junction was arbitrary and capricious, and therefore wrongful." We disagree with all three of these reasons.

As an initial matter, the City argues that NWA is precluded from arguing the second and third reasons because it did not preserve them below. We agree in part.

"When reviewing a grant of summary judgment, we consider solely the issues and evidence the parties called to the trial court's attention on motion for summary judgment."[8] But "'new issues may be raised for the first time in a motion for reconsideration, thereby preserving them for review, where . . . they are not dependent upon new facts and are closely related to and part of the original theory.'"[9]

Here, NWA did not discuss the second and third reason in its response to the City's motion for summary judgment. But in its motion for reconsideration,

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[8] Schreiner Farms, Inc. v. Am. Tower, Inc., 173 Wn. App. 154, 158, 293 P.3d 407 (2013) (citing RAP 9.12).

[9] Id. (quoting Nail v. Consol. Res. Health Care Fund I, 155 Wn. App. 227, 232, 229 P.3d 885 (2010)).

NWA briefly referenced the second reason.[10] Thus, we address that second reason.

As for the third reason, NWA concedes in its reply brief before this court that it did not use the words "arbitrary and capricious" in its motion for reconsideration. Further, the cases NWA cites to support the third reason does not appear in its motion for reconsideration.[11] For these reasons, we do not consider the third reason.

As noted above, for the fourth element of a tortious interference claim, a plaintiff must prove that the defendant interfered for an improper purpose or used improper means.[12]

"Interference is for an improper purpose if it is wrongful by some measure beyond the interference itself, such as a statute, regulation, recognized rule of common law, or an established standard of trade or profession."[13] But exercising one's legal interests in good faith is not an improper interference.[14]

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[10] Clerk's Papers at 636 ("That the intentional interference was for an improper purpose and by an improper means is also amply demonstrated by the recitation regarding Richland's breach of its duty of good faith to Plaintiff above.").

[11] Compare Brief of Appellant at 23-24 (citing Pleas v. City of Seattle, 112 Wn.2d 794, 774 P.2d 1158 (1989); Landmark Dev., Inc. v. City of Roy, 138 Wn.2d 561, 980 P.2d 1234 (1999)), with Clerk's Papers at 621-37.

[12] Moore, 168 Wn. App. at 509.

[13] Newton Ins. Agency & Brokerage, Inc. v. Caledonian Ins. Grp., Inc., 114 Wn. App. 151, 158, 52 P.3d 30 (2002).

[14] Leingang, 131 Wn.2d at 157.

The only case that NWA cites to support its assertion that the City's interference was for an improper purpose is Cherberg v. Peoples National Bank of Washington.[15] There, a tenant sued a landlord after the landlord told the tenant that it would not repair a wall despite its duty to repair structural components.[16] In its action, the tenant asserted that the landlord breached the duty to repair in the lease and that the landlord intentionally interfered with its business expectancies.[17]

The supreme court explained, "An examination of the testimony presented at trial when considered in a light most favorable to [the tenant], indicates a number of facts from which an inference of a bad faith motive for breach might be drawn."[18] It held that the landlord's "intentional and outrageous action in breaching [the lease] interfered with the business relationship that the [tenants] had with their customers."[19]

Here, like Cherberg, NWA points to a contract. It contends that the City acted with an improper purpose when it terminated the temporary service agreement. But, unlike Cherberg, this contract was between the City and TCRY, an entity that is not a party to this lawsuit. Thus, whether there was any breach

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[15] Brief of Appellant at 18-20 (citing Cherberg v. Peoples Nat'l Bank of Wash., 88 Wn.2d 595, 564 P.2d 1137 (1977)).

[16] Cherberg, 88 Wn.2d at 598-99.

[17] Id. at 599.

[18] Id. at 606.

[19] Houser v. City of Redmond, 91 Wn.2d 36, 41, 586 P.2d 482 (1978) (discussing the holding in Cherberg, 88 Wn.2d 595).

of this contract is not at issue in this case. Because the decision in Cherberg was based on the conclusion that the landlord breached a duty under the lease, that case is not helpful for establishing that the City interfered for an improper purpose in this case.

Further, other than Cherberg, NWA does not point to any other "measure beyond the interference itself" to show that termination of the temporary service agreement was "wrongful."[20] NWA argues that "the City was aware that the termination of the [temporary service agreement] placed pressure on 10 NWA as well as TCRY, and that the railroad access was required for 10 NWA to utilize the property for the purposes for which it had been purchased and its improvements constructed." But NWA does not point to a "statute, regulation, recognized rule of common law, or an established standard of trade or profession" to establish that this "pressure tactic" was wrongful.[21]

Because NWA fails to establish a genuine issue of material fact for this necessary element of a tortious interference claim, any factual issues for the other elements are not material for summary judgment purposes.[22] Dismissal of this claim was proper.

INVERSE CONDEMNATION

NWA next argues that the trial court erred when it summarily dismissed its inverse condemnation claim. Specifically, NWA argues that it established that

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[20] Newton Ins. Agency, 114 Wn. App. at 158.

[21] Id.

[22] Boyce, 71 Wn. App. at 665.

there was a "taking" because the City's termination of the temporary service agreement "injured 10 NWA by decreasing the volume of cars that the property would be handling." We disagree.

The Washington Constitution provides that "[n]o private property shall be taken or damaged for public or private use without just compensation having been first made . . . ."[23] A party alleging inverse condemnation must establish "'(1) a taking or damaging (2) of private property (3) for public use (4) without just compensation being paid (5) by a governmental entity that has not instituted formal [condemnation] proceedings.'"[24]

"A 'taking' occurs when government invades or interferes with the use and enjoyment of property, and its market value declines as a result."[25] But the interference must be more than "'a mere tortious interference.'"[26] "There must be an invasion [or interference] that is permanent or recurring, or an invasion [or interference] that involves 'a chronic and unreasonable pattern of behavior by the government.'"[27] The invasion or interference is "permanent if the property may

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[23] CONST. art. I, § 16.

[24] Fitzpatrick v. Okanogan County, 169 Wn.2d 598, 605-06, 238 P.3d 1129 (2010) (quoting Dickgieser v. State, 153 Wn.2d 530, 535, 105 P.3d 26 (2005)).

[25] Gaines v. Pierce County, 66 Wn. App. 715, 725, 834 P.2d 631 (1992).

[26] Id. (quoting N. Pac. Ry. Co. v. Sunnyside Valley Irrigation Dist., 85 Wn.2d 920, 924, 540 P.2d 1387 (1975)).

[27] Id. at 725-26 (citations omitted) (quoting Orion Corp. v. State, 109 Wn.2d 621, 671, 747 P.2d 1062 (1987)).

not be restored to its original condition."[28]

Here, NWA fails to establish that there was a "taking." Even if the City interfered with NWA's use of its property when it terminated TCRY's temporary service agreement, this interference is not permanent or recurring. TCRY may enter into another service agreement with the City, which would restore NWA's use of its property. Further, NWA could seek rail service from a different railroad company.

In sum, there is no showing of a taking. Summary dismissal of this claim was also proper.

We affirm the summary judgment order.

Cox, J.

WE CONCUR:

Leach, C.J.

Becker, J.

[28] N. Pac. Ry. Co., 85 Wn.2d at 924.