

No. 34604-4

**IN THE COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON**

SANDRA M. GALVIS, a divorced woman, and ALEXANDER
MONCADA, a single man, d/b/a LE POPULAR CHASE & CARRY
MARKET, LLC; JAMES R. MASEWICZ and VIRGINIA F.
MASEWICZ, husband and wife; and ASH RESOURCES, LLC,

Respondents/Cross-Appellants,

vs.

STATE OF WASHINGTON, DEPARTMENT OF TRANSPORTATION,

Appellant/Cross-Respondent.

REPLY BRIEF OF CROSS-APPELLANTS
MASEWICZ AND ASH

SINNITT & SINNITT INC PS
C. Joseph Sinnitt, WSBA 6284
Of Attorneys for Respondent/Cross-
Appellants Masewicz and Ash

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Respondents/Cross-Appellants James R. Masewicz, Virginia F. Masewicz, and Ash Resources, LLC hereby submit their Reply Brief of Cross-Appellants:

I. THE STATE MISCONSTRUES *KEIFFER*.

This State argues that *Keiffer v. King County*, 89 Wn.2d 369, 572 P.2d 408 (1977), is distinguishable and does not require that just compensation be paid to the Masewiczes and Ashes for loss of their access rights. The State misconstrues *Keiffer*, which is directly on point and binding precedent.

Keiffer owned commercial property in King County and used the public right of way in front of his premises as an extension of and adjacent to parking areas for his customers. *Id.* at 411 (Dolliver, J. dissenting). King County sought to widen 98th Avenue Northeast in the Juanita/Kirkland area. *Id.* at 409. Keiffer's frontage was 280 feet. *Id.* The Washington Supreme Court noted:

Before the improvements, respondents had access to their property at all points along their frontage and parking for approximately 18 cars was available on respondents' property in front of their buildings. Subsequent to the improvements, respondents' access was limited to two curb cuts approximately 32 feet long located near each end of the frontage. The placement of the curbing and location of these cuts restricted the use of the strip of property in front of respondents' buildings to either a driveway or parking area with a usable capacity of from two to at most five cars.

Id.

The Court noted that the right of access of an abutting property owner to a public right of way is a property right which, if taken or damaged for a public use, requires compensation under Article 1, Section 16 of the Washington State Constitution. *Id.* The Court went on to hold that the issue of whether compensation must be paid in a particular case is best resolved through a two-step process. *Id.* The first is to determine if the government action in questions has actually interfered with the right of access as that property interest has been defined by Washington law. *Id.* 409-10. The Court concluded that King County's actions were a clear restriction of the respondents' access to and from 98th Avenue. *Id.* at 410.

The next question is whether liability is present. *Id.* The Court noted that cases relied upon by the County recognized that compensation must be paid where all direct access is not limited if substantial impairment of access is shown. *Id.* Total elimination of access is not necessary to create liability. *Id.* The Court concluded, "The trial court's findings to the effect that the degree of impairment demonstrated in this case was sufficient to create liability are supported by substantial evidence and will not be disturbed on appeal." *Id.* at 410-11.

Here, the Masewicz property and the State's taking of the Masewicz's access rights are virtually identical to *Keiffer*. Parking in

front of the Masewicz property is *both* on the Masewicz property as well as on the State right of way. The State's proposed taking will dramatically restrict access to the Masewicz property from Pacific Avenue. It is not necessary that the State totally eliminate access to create liability on the State's part. There is no question that the degree of impairment by the State is sufficient to create liability.

The State's arguments that *Keiffer* does not apply here are not well taken.

II. THE STATE WOULD HAVE ITS AGENCIES DETERMINE CITIZENS' CONSTITUTIONAL RIGHTS.

In so many words, the State argues that because it is permitted to regulate access rights through its police powers, its agencies (rather than the courts) should be permitted to determine when and if just compensation must be paid to land owners affected by its exercise of police powers. Appellant's Reply Brief at 34. However, the State's argument flies in the face of the Washington State Constitution and has been rejected by the Washington Supreme Court:

The County argues that a municipal corporation does not take private property in violation of article 1, section 16 (amendment 9) of the Washington constitution when it regulates, but does not eliminate, access to abutting property. In support of this proposition it urges the County has the authority and responsibility to regulate and control traffic flow by virtue of its inherent police power and that a traffic regulation permitting direct access and providing for

safe flow of traffic does not constitute a taking or damaging for which compensation must be paid. **The fact that the police power of the state is exercised does not, however, grant the County unchallengeable authority to restrict access without compensation.**

Keiffer, 89 Wn.2d at 409 (emphasis added).

Here, like the County in *Keiffer*, the State wishes to take the Masewicz's and Ashes' access rights without paying just compensation. Under HAWA and relevant administrative regulations, the fox is named guardian of the hen house. Not surprisingly, having DOT determine whether there has been "substantial impairment" of access has not provided protection for the Masewicz's and Ashes' property rights. To the contrary, the agency has determined that the Masewicz's and Ashes will be left with reasonable access, in spite of the State's acknowledgement that access will be substantially impaired.

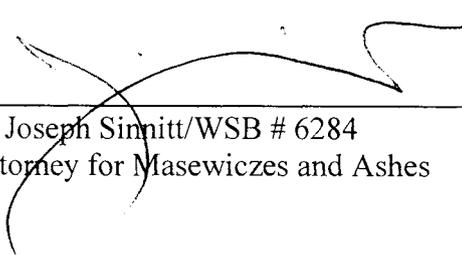
The Masewicz's and Ashes now look to this Court for protection of their access rights. Those rights are being threatened through the State's use of HAWA, which unconstitutionally transfers access rights from private property owners to the State. The Masewicz's and Ashes respectfully request that the Court uphold Judge Thompson's orders and reverse Judge Warwick's order.

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Respectfully submitted this 20 day of December, 2006.

SINNITT & SINNITT, INC., P.S.



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Attorney for Masewicz and Ashes

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**SUPERIOR COURT OF WASHINGTON
FOR PIERCE COUNTY**

SANDRA M GALVIS, a divorced woman,))
& ALEXANDER MONCADA, a single))
man, d/b/a LE POPULAR CASH &))
CARRY MARKET, L.L.C.; JAMES R))
MASEWICZ & VIRGINIA F MASEWICZ))
husband & wife, ASH RESOURCES,))
L.L.C.,))

Plaintiffs,)

v.)

STATE OF WASHINGTON,))
DEPARTMENT OF TRANSPORTATION,))

Defendant.)

NO. 04 2 06841 5

DECLARATION OF SERVICE

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BY *[Signature]* REFFITY

Renee Sowers states and declares as follows:

I am a citizen of the United States of America, over 18 years of age and am competent to testify to the matters set forth herein. On December 20 2006 I sent for service a copy of the Reply Brief of Cross-Appellants Masewicz and Ash to Court of Appeals Division II, and this Declaration of Service via ABC Legal Messenger to the following:

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED December 20, 2006, at Tacoma, Washington.

By: 
Renee Sowers