

No. 44305-8-II

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

KENNETH HAUGE,

Appellant,

v.

CITY OF LACEY, a municipal corporation, and
THURSTON COUNTY, a subdivision of Washington State,

Respondents.

REPLY BRIEF OF APPELLANT

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A. INTRODUCTION

The City of Lacey's response brief is remarkable only for its studied indifference to the actual record in this case, its lack of analysis, and its reliance on nothing more than the applicable standard of review to defend the trial court's decision to summarily dismiss Ken Hauge's complaint. The City concedes that summary judgment immunizing it from liability for Ken's claims was improper. Accordingly, this Court should reverse the trial court's dismissal order and remand Ken's case against the City for further proceedings on the merits. The Court should also award Ken his attorney fees and costs on appeal pursuant to RAP 18.9.

B. RESPONSE TO THE CITY'S SUPPLEMENTAL STATEMENT OF THE CASE AND RECORD BEFORE THE COURT¹

The City's supplemental statement of the case and record before the court amount to a largely irrelevant discourse because Ken's challenge to the trial court's summary judgment ruling requires this Court to view the facts in the light most favorable to him. Nonetheless, a few clarifications are warranted.

¹ As a threshold matter, it cannot have escaped this Court's notice that a number of the City's statements are not supported by citation to the record. Br. of Resp't at 1-7. The Court has no obligation to search the record for evidence supporting the City's assertions. *Cowiche Canyon Conserv. v. Bosley*, 118 Wn.2d 801, 819, 828 P.2d 549 (1992); *Mills v. Park*, 67 Wn.2d 717, 721, 409 P.2d 646 (1966).

The City first states that Ken's complaint alleged two causes of action.² Br. of Resp't at 1-2. Not so. While the complaint is not a model of clarity, it alleged that: (1) the City failed to construct a retaining wall on the right-of-way according to the manufacturer's specifications; (2) the City failed to install a sound barrier to mitigate traffic noise; (3) the City and its employees or agents behaved in a hostile or aggressive manner toward Ken and his mother; (4) the City failed to pay just compensation for taking additional property from Ken for public use; and (5) the City failed to pay just compensation for the removal of three trees located outside of the right-of-way but on Ken's property.³ CP 8-10. Ken's complaint thus provided the City and the trial court with sufficient notice of the nature of his arguments. This is all that was required.

The Court should not permit the City to use the lack of precision in Ken's complaint as a cudgel against his otherwise valid claims. Our Supreme Court has long held that "the complaint, and other relief-claiming pleadings need not state with precision all elements that give rise

² The City later claims that it was put on notice that Ken had claims different from those set forth in his amended complaint for the first time on appeal. Br. of Resp't at 7. The summary judgment record belies the City's claim. Ken plainly moved for summary judgment to establish the City's liability for his inverse condemnation claims and for what he characterized as his abuse and retaliation claims. CP 91-102, 204-05. That the City failed to respond to those claims does not mean that it did not have notice of them or that the trial court did not have them before him when he considered the parties' competing summary judgment motions.

³ Ken later amended the complaint to add a claim for severance damages. CP 156.

to a legal basis for recovery as long as fair notice of the nature of the action is provided.” *Berge v. Gorton*, 88 Wn.2d 756, 763, 567 P.2d 187, 191 (1977). As long as the complaint contains either direct allegations on every material point necessary to sustain a recovery on any legal theory, even though it may not be the theory suggested or intended by the pleader, or contain allegations from which an inference fairly may be drawn that evidence on these material points will be introduced at trial, the claim is recoverable. *Id.* Ken’s complaint met this standard.

While the City correctly notes that the parties settled the earlier condemnation action, it either intentionally misrepresents or clearly misunderstands the rights it acquired at the conclusion of that proceeding. Br. of Resp’t at 3-5. The City filed the condemnation action to acquire *a portion* of Ken’s property for its Carpenter Road improvement project (“project”). CP 7, 32, 203, 329-30. It did not seek to condemn or to acquire all of his property. *Id.* In fact, it refused to condemn the entire parcel despite Ken’s request that it do so. CP 148, 203.

The City’s presentation of the various documents used to settle the condemnation action deceptively excises critical portions of those documents to avoid the critical issue; namely, what the City acquired at the conclusion of the condemnation action. Br. of Resp’t at 4-5. For example, the City quotes language from the stipulation and the judgment

stating that Ken owns the real property described in the amended petition for condemnation.⁴ *Id.* at 4. But it avoids mentioning that the stipulation states it was appropriating “that certain right-of-way” measuring 4,058 sq. ft. CP 318. It also neglects to mention that the stipulation explicitly states “the fair market value *of the right-of-way* . . . is the sum of \$150,000.” *Id.* (Emphasis added.). As for the judgment, the City disregards language stating that it was appropriating the property “described in said Stipulation.” CP 315. As noted, the stipulation and the exhibits attached to it describe a *right-of-way measuring only 4,058 sq. ft.* CP 318, 320, 321.

The City acquired 4,058 sq. ft. of Ken’s property at the conclusion of the condemnation action and nothing more.⁵ Despite the limited nature of that appropriation, the City later took and damaged additional property belonging to Ken for which he was not compensated. CP 204-05. But it never initiated condemnation proceedings to formally acquire that property. Contrary to the City’s suggestion, the settlement documents do

⁴ The City quotes similar language from the decree of appropriation, but again misses the point. Br. of Resp’t at 5. The decree declares the City “the owner of the property rights described and shown on Exhibit 1, attached hereto[.]” CP 323. The City fails to appreciate that exhibit 1 describes only a 4,058 sq. ft. right-of-way over Ken’s property. CP 320.

⁵ That Ken may have approved of and signed the pleadings resolving the condemnation action, br. of resp’t at 3, does not negate the fact that the City drafted them and that they must be construed against the City as the drafter. *Berg v. Hudesman*, 115 Wn.2d 657, 677, 801 P.2d 222 (1990).

not exonerate it for the additional property it took and destroyed for the project beyond the acquired 4,058 sq. ft. right-of-way. By its plain terms, the stipulation permitted Ken to separately sue the City for any other road-related claims arising from the project. CP 218.

C. ARGUMENT IN SUPPORT OF REPLY

(1) Standard of Review

The City does not dispute the appropriate standard of review. Br. of Resp't at 2. It agrees with Ken that this Court reviews the trial court's summary judgment order *de novo* and that in doing so, the Court will consider the facts and all of the reasonable inferences to be drawn from them in the light most favorable to Ken and most strongly against the City. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

Considering the facts and all of the inferences in Ken's favor as it must, the Court is left to draw but one conclusion – the trial court erred by granting summary judgment to the City and dismissing Ken's complaint.

(2) The City Concedes the Trial Court Erred by Summarily Dismissing Ken's Complaint

Ken argued in his opening brief that the trial court erred by summarily dismissing his complaint because it did not resolve all of his claims on summary judgment. Br. of Appellant at 13-15. But even if the trial court considered all of his claims, *id.* at 15, the parties' competing

expert opinions presented fact questions ill-suited for summary judgment. *DiBlasi v. City of Seattle*, 136 Wn.2d 865, 879, 969 P.2d 10 (1998) (where two competent experts disagree, creating a genuine issue of material fact, summary judgment is inappropriate); *Burbo v. Harley C. Douglass, Inc.*, 125 Wn. App. 684, 106 P.3d 258, *review denied*, 155 Wn.2d 1026 (2005) (noting genuine issue of material fact existed, thereby precluding summary judgment, where both home buyer and builder offered conflicting expert opinion evidence).

Ken also argued that the trial court misunderstood the nature and scope of the stipulation and thus its impact on the parties' dispute. Br. of Appellant at 16-21. He recounted language from the stipulation specifically preserving his right to sue the City for any other road-related claims arising from the project and demonstrating that the City acquired a right-of-way over his property measuring only 4,058 sq. ft. *Id.*

Finally, Ken argued the trial court misapplied Washington's takings law. Br. of Appellant at 21-24. He pointed out that the trial court's error stemmed from its mistaken conclusion that the \$150,000 he received from the City was just compensation for all of the City's takings. While the City's \$150,000 payment may have covered its appropriation of the right-of-way, it did not extend to the subsequent takings. Where the City took and damaged property outside the boundaries of the acquired

right-of-way, it appropriated additional property from Ken for which it owed him just compensation. *See, e.g.,* WASHINGTON CONT. Art. I, § 6; *Dickgieser v. State*, 153 Wn.2d 530, 534-35, 105 P.3d 26 (2005).

The City does not substantively respond to any of Ken's arguments despite having had two opportunities to prepare a proper responsive brief.⁶ Br. of Resp't at 8. It devotes a meager two sentences on the last page of its eight-page brief to reiterating the standard of review, but fails to distinguish the authority Ken cited in his opening brief. *Id.* In fact, *it cites no authority* supporting the correctness of the trial court's decision. This Court may therefore assume that the City, after a diligent search, found none. *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962).

More to the point, the City *concedes* Ken's arguments by failing to respond to them. RAP 10.3(a)(5), (b) (respondent's brief must contain "argument in support of the issues presented for review, together with citations to legal authority"). *See also, American Leg. Post No. 32 v. City of Walla Walla*, 116 Wn.2d 1, 7, 802 P.2d 784 (1991) (noting a taxpayer conceded the constitutionality of a statute authorizing a tax by failing to advance any argument that the tax exceeded the statutorily authorized percentage); *State v. Ward*, 125 Wn. App. 138, 144, 104 P.3d 61 (2005)

⁶ The City's first two briefs were rejected for failing to conform to the Rules of Appellate Procedure.

(holding that the state conceded an inmate's arguments by failing to respond to them). Summary judgment immunizing the City from Ken's complaint was therefore improper here.

(3) This Court Should Sanction the City for its Nonresponsive Brief

The City's response brief is so nonresponsive as to constitute no response at all. The Court should therefore preclude the City from presenting oral argument on the merits and make its decision in this case based on the argument and the record before it. RAP 11.2(a); *Adams v. Dep't of Labor & Indus.*, 128 Wn.2d 224, 229, 905 P.2d 1220 (1995).

The Court should also sanction the City under RAP 18.9(a) for failing to comply with the rules.⁷ The City's inability to file a proper response brief that responds to Ken's opening brief leaves him in the unenviable position of having to guess at the City's arguments. Sanctions under RAP 18.9 are therefore appropriate. The City should pay Ken's attorney fees and costs on appeal.

D. CONCLUSION

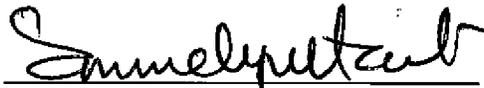
The City concedes that summary judgment on Ken's claims was inappropriate where it fails to respond to the arguments raised in Ken's opening brief or to cite to contrary authority. Ken therefore respectfully

⁷ This Court may award attorney fees on appeal to a party under RAP 18.1 if there is a basis in law, contract or equity to do so. Under RAP 18.9, a party may be awarded attorney fees on appeal if the other party fails to comply with the rules.

requests that this Court reverse the trial court, remand his claims for trial on the merits, and award him his attorney fees and costs on appeal pursuant to RAP 18.9.

DATED this 5th day of September, 2013.

Respectfully submitted,



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DECLARATION OF SERVICE

On said day below I emailed a courtesy copy and deposited in the U.S. Mail for service a true and accurate copy of the Reply Brief of Appellant in Court of Appeals Cause No. 44305-8-II to the following parties:

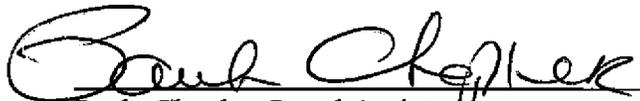
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: September 5, 2013, at Tukwila, Washington.



Paula Chapler, Legal Assistant
Talmadge/Fitzpatrick

TALMADGE FITZPATRICK LAW

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Transmittal Letter

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