

No. 44305-8-II

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

KENNETH HAUGE,

Appellant,

vs.

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

Respondents.

FILED
COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY 
DEPUTY

BRIEF OF RESPONDENT CITY OF LACEY

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I. LACEY'S RESPONSE TO ASSIGNMENTS OF ERROR

Review of Hauge's Assignment of Error and Issues Pertaining to Assignment of Error leaves one with the conclusion that he assigns error to the trial court's alleged failure to address all of Hauge's summary judgment claims. However, in his Summary of Argument at 9 of his brief, he lists claims of "abuse" and "retaliation" which were not before the court.

Secondly, Hauge assigns error to the granting of summary judgment on the alleged basis that the trial court did not construe the facts in a light most favorable to the non-moving party. This court will review the same proof that was before the trial court and upon such review, should reach the same conclusion as the lower court.

II. SUPPLEMENTAL STATEMENT OF THE CASE

When Mr. Hauge filed this action in 2012, he did so with a complaint which alleged two causes of action. First was inverse condemnation and the second was that trees were acquired by the City outside of the right-of-way. The City filed its Motion to Dismiss pursuant to CR 12(b)(6) to be treated as a Motion for Summary Judgment due to the fact that there was submitted with the Motion a

large volume of materials. CP 18-24, 32-67. After receipt of the City's Motion, Counsel for Mr. Hauge filed an Amended Complaint which added a cause of action for severance damages. Therefore, at the time of the arguments on Summary Judgment, the matter before the Court from Mr. Hauge was a Complaint alleging inverse condemnation, loss of trees and severance damages. CP 150-157.

III. RECORD BEFORE THE COURT

This matter comes before this court upon the granting and denial of motions for summary judgment. Therefore, the ruling of the Court in *Wellbrock v. Assurance Co. of America*, 90 Wn. App. 234, 951 P.2d 367 (1998) review denied, 136 Wn.2d 1005, 966 P.2d 902 dictates the procedure to be followed. The Court stated at 239-240:

“An appellate court reviewing a summary judgment of dismissal order engages in the same inquiry as the trial court. *Hill v. J.C. Penney, Inc.*, 70 Wn. App. 225, 238, 852 P.2d 1111, review denied, 122 Wn.2d 1023 (1993); *Simpson Tacoma Kraft Co. v. Department of Ecology*, 119 Wn.2d 640, 646, 835 P.2d 1030 (1992). Summary judgment is granted only when no genuine issue of material fact exists and when the moving party is entitled to judgment as a matter of law. CR 57(c); *Ross v. Frank B. Hall & Co.*, 73 Wn. App. 630, 634, 870 P.2d 1007 (1994). All facts submitted and all reasonable inferences from those facts must be considered in the light most favorable to the nonmoving party and the motion should be granted only if, from all the evidence,

reasonable persons could reach but one conclusion.
Nationwide Mut. Fire Ins. Co. v. Watson, 120 Wn2d 178,
186, 840 P.2d 851 (1992); *Ross*, 73 Wn. App. At 634.”

In order to fulfill this role, this Court needs to know clearly what was before Judge Wm. Thomas McPhee when he rendered his decision granting the City’s Motion on Summary Judgment and Denying the Summary Judgment Motion of Mr. Hauge.

The status of the matter at the time the Summary Judgment Motion was addressed and granted by Judge McPhee was as follows:

The City of Lacey had previously acquired property from Mr. Hauge pursuant to an action in eminent domain. CP 4-10. While the action was pending trial, the parties finally reached a Settlement Agreement by which the City paid \$150,000 to Mr. Hauge in exchange for the acquisition of all rights described in the City’s Amended Order of Public Use and Necessity, the Stipulation of Settlement and Judgment (CP 148, 218) and Decree of Appropriation, all entered in the prior condemnation action. CP 222, 314-316, 322-324. All of these final documents had not only been approved as to form by counsel for Mr. Hauge but Mr. Hauge himself had signed all of the final documents for entry with the court.

The Stipulation of Settlement included language stating “The Respondent, KENNETH R. HAUGE, is the owner of that certain real property referred to as Parcel 8 and legally described in Article VII of the Amended Petition for Condemnation herein.” The Judgment then included language as follows “**ORDERED, ADJUDGED, and DECREED** that the Respondent, KENNETH R. HAUGE, is the record owner of that certain real property designated as Parcel 8 and described in Article VII of the Amended Petition for Condemnation. It is further

ORDERED, ADJUDGED, and DECREED that the amount set out in the stipulation filed herein is determined to be the just compensation for the taking by the Petitioners of ownership of said parcel of real property, including all costs or expenses described in Chapter 8.25 RCW and all interest due; it is further

.....

ORDERED, ADJUDGED, and DECREED that upon distribution to Kenneth R. Hauge of the settlement funds called for in said Stipulation by the Clerk of this Court, that a Decree of Appropriation may be entered appropriating the property described in said Stipulation herein to the Petitioner, THURSTON COUNTY;”

(Although the condemnation action was brought and conducted by the City of Lacey, Mr. Hauge's property was in Thurston County and therefore Thurston County had been joined as a party and the title needed to be vested in Thurston County rather than the City of Lacey).

Finally, the Decree of Appropriation contained the following language "ORDERED, ADJUDGED AND DECREED that the Petitioner, THURSTON COUNTY, is adjudged to be the owner of the property rights described and shown on Exhibit 1, attached hereto and the title thereto is hereby vested in the Petitioner, THURSTON COUNTY, free and clear of any interest of the Respondent, KENNETH R. HAUGE, and free and clear of all charges, interest, liens and encumbrances of any character specifically named or referred to in said Amended Petition and Judgment and at all times hereinafter to have, hold, own, use and possess the same; and the property and rights so acquired by the Petitioner are located in Thurston County, State of Washington;".

Given this information before the court, it was almost mandatory that the trial court grant the City's Motion for Summary Judgment.

This same information before the court mandated that the Motion for Summary Judgment by Hauge be denied. The claim for the taking of trees outside of the right-of-way had been resolved by the condemnation action, copies of which were before the court. Additionally, as part of its Motion for Summary Judgment, the City had attached extensive materials demonstrating that leading up to the condemnation action, the appraiser for each of the parties had separately identified the trees as separate items of damage. Further, while the condemnation action was still pending, Mr. Hauge decided to interfere with the construction of the project. This interference was such that the City was required to return to court to seek an Order restraining Hauge from such interference. That Motion was granted. Had the trees not been included in the condemnation action, the court would not have had authority to grant such a Motion. CP 32-67.

The same is true for the claim of severance damage. Again, the documents submitted by the City in Support of its Motion for Summary Judgment demonstrated that the appraiser for each of the parties separately evaluated severance damage. Since the test in the condemnation case would be the difference in value of the property

between the value before the taking and the value after, that item was considered in arriving at the settlement of the action. CP 32-67.

The claim for inverse condemnation was invalid on its own. Inverse condemnation only applies where a public body takes property without paying for the same. Here, the taking of property was accomplished by the formal condemnation action. See *Dickgeiser v. State*, 152 Wn.2d 299, 96 P.3d 957 (2004).

The Brief of Appellant Kenneth R. Hauge filed in this action makes an allegation at page 13 to the following effect “Because he did not base his claims for relief solely on the inverse condemnation action, the trial court and the City were on notice that he was also seeking relief for the City’s negligence and retaliation.” This statement was made in conjunction with the argument that the court did not fully consider the claims of Mr. Hauge when it refused to grant his Cross Motion for Summary Judgment. First, the statement is entirely inaccurate and cannot be supported. This statement that the City and the court were on notice that Mr. Hauge had claims different than that set forth in his Amended Complaint is stated for the first time in Mr. Hauge’s

Appellate Brief. Certainly, none of that setting was before Judge McPhee when he rendered his decision.

IV. ARGUMENT

As stated above, clearly the role of this Court is to address the Summary Judgment matter as though it were the trial court. When the court assumes this stance, it is clear that the Judgment Granting Summary Judgment and Denying the Summary Judgment Motion of Mr. Hauge, should be affirmed.

Respectfully submitted this 18th day of July, 2013.



Kenneth R. Ahlf, WSBA No. 0804
Attorney for Respondents

DECLARATION OF SERVICE

I, Karen Ellison, am now and at all times herein mentioned was a citizen of the United States and resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action and competent to be a witness therein.

I am employed with Kenneth R. Ahlf, attorney for Respondents. On the date indicated below, I caused the foregoing document entitled Brief of Respondent City of Lacey and this Proof of Service to be filed with the Court of Appeals of the State of Washington, Division II and a copy delivered to Emmelyn Hart, Talmadge/Fitzpatrick, Attorney for Appellant Hauge, 18010 Southcenter Parkway, Tukwila, WA 98188 by Legal Messenger Service.

DATED this 18th day of July, 2013.

Original: Court of Appeals
Division II
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