

No. 29702-1-III

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

TERRIE L. GUNDERSON
Appellant/Plaintiffs,

v.

CITY OF MILLWOOD WASHINGTON et al.
Defendant/Respondents

Brief of Appellants

Dustin Deissner
Washington State Bar No. 10784
VAN CAMP & DEISSNER
1707 W. Broadway
Spokane, WA 99201
(509) 326-6935
Attorney for Appellants

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ASSIGNMENTS OF ERROR

Assignment of Error No. 1:

The Court Below erred in granting summary judgment of dismissal to the Defendant CITY OF MILLWOOD.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue No. 1:

May a City be held liable for inverse condemnation where a construction project has the effect of putting a lessee in the construction area out of a business due to access or business interference issues?

Issue No. 2:

May a City be held liable for negligence resulting in business losses due to a construction project?

STATEMENT OF THE CASE:

FACTS

In February, 2009, TERRIE GUNDERSON agreed to purchase a business called Sun Beans, CP 145, 251-252, a combined a tanning salon and a drive-through espresso stand located on Argonne Road in the City of Millwood. CP 252. She soon entered into a lease of the premises. CP 145.

At the same time the City of Millwood was preparing to initiate a rebuilding project on Argonne Road, the principal arterial street that ran in front of the Sun Beans location. CP 145. Argonne was a heavily-traveled street which provided access from Interstate 90 and the Spokane Valley commercial areas to the northern residential suburbs. This project involved completely removing the existing road and replacing it with newer, better, stronger pavement and sidewalks. The project actually started 5/4/09. CP 146.

Once under way, the project caused significant restrictions in access to Ms. GUNDERSON's newly purchased business. CP 146. During the course of the summer there were at least 10 days when Argonne Road was totally blocked. CP 147. Most of the time after 5/4/09 there was no access to the Sun Beans property for northbound traffic on Argonne unless it took a long detour. CP 147. Access for southbound traffic was often interfered with by vehicles and materials left in the road or blocking the parking lot. CP 146-47.

Ms. GUNDERSON was a new business owner and never enjoyed the traffic or sales her predecessors enjoyed. CP 147. As a result she could not sustain the business and lost the business and the leasehold. Id.

TERRIE GUNDERSON was unaware of the pending construction when she agreed to purchase. CP 145. The landlord was also unaware until after GUNDERSON purchased the business, having learned of the project in May. CP 127.

PROCEDURE

Ms. GUNDERSON sued the CITY OF MILLWOOD, the lessors, the sellers and the construction contractors. Cp 1, 10, 44. She settled with the lessors and the contractors. A trial was held on her action against the sellers which basically resulted in no recovery to either party.

This appeal is from a summary judgment that was issued in favor of the CITY OF MILLWOOD. CP 310. A notice of appeal, CP 314, was filed after the other parties' claims were resolved.

ARGUMENT

1. Inverse Condemnation

The Washington State Constitution, art. 1, § 16 provides in pertinent part:

No private property shall be taken or damaged for public or private use without just compensation having been first made ...

A "taking" occurs when government conduct interferes with the

use and enjoyment of private property, with a subsequent decline in market value. *Martin v. Port of Seattle*, 64 Wash.2d 309, 320, 391 P.2d 540 (1964), cert. denied, 379 U.S. 989, 85 S.Ct. 701, 13 L.Ed.2d 610 (1965). "Inverse condemnation" is an action "to recover the value of property which has been appropriated in fact, but with no formal exercise of the power".

Id.

The basic elements are:

- (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

proceedings.

Fitzpatrick v. Okanogan County, 169 Wn.2d 598, 238 P.3d 1129 (2010).

The elements are easily established: GUNDERSON's

leasehold interest is private property; it was essentially destroyed by the actions of the CITY for the public use of road construction without condemnation or compensation.

If the CITY OF MILLWOOD had decided to simply condemn and close Argonne Road, then Ms. GUNDERSON would have been entitled to compensation due to loss of access. The general rules are found in *State v. Wineberg*, 74 Wn.2d 372, 375, 444 P.2d 787 (1968):

A review of prior decisions by this court establishes: (1) a property owner must abut directly upon the portion of the roadway being vacated in order to be awarded compensable damages per se; (2) where the closure and the owner's property are separated by an intersecting street, compensation is usually denied; and (3) where the closure occurs within the same block but not directly in front of the property, the owner must show physical impairment of his access different in kind from that of the general public (i.e., if the impairment is merely an added inconvenience that is common to all travelers it cannot form the basis for payment of compensation).

Here the closure was of the entire street directly in front of the business, but it was for a finite period of time. The CITY OF MILLWOOD therefore argues that inverse condemnation is not

applicable.

A. Temporary Condition

The CITY argues that *Lambier v. City of Kennewick*, 56 Wn.App. 275, 783 P.2d 596 (1989) holds that temporary situations, such as road construction, are not a taking: the governmental actions must either cause permanent injury, or be “chronic and unreasonable” See *Orion Corp. v. State*, 109 Wn.2d 621, 671, 747 P.2d 1062 (1987)(whether land-use regulations become so excessive as to constitute a taking). *Northern Pac. Ry. Co. v. Sunnyside Val. Irrigation Dist.*, 85 Wn.2d 920, 924, 540 P.2d 1387 (1975) explains:

The major decisions of this court considering the difficult distinction between a constitutional taking under article 1, section 16, and a mere tortious interference, are in agreement that a constitutional taking is a **permanent** (or recurring) invasion of private property. ... **Damage is permanent if the property may not be restored to its original condition.**

In this case TERRI GUNDERSON was driven out of business and lost her leasehold interest altogether: that is permanent.

An example is *Union Elevator & Warehouse Co., Inc. v. State ex rel. Dept. of Transp.*, 96 Wn.App. 288, 980 P.2d 779 (1999). There, road work eliminated *practical* access to a grain elevator during the crucial short harvest period.¹ Construing the phrase in RCW 47.52.080, “loss of adequate ingress to or egress,” to refer to the realistic usability of whatever access was provided, the court reversed a summary judgment.

B. Degree of Interference

GUNDERSON suffered much greater impairment of access than the general public. Cases do require showing more than mere inconvenience: the Plaintiff’s right of access must have been substantially impaired. *Keiffer v. King County*, 89 Wash.2d 369, 373, 374, 572 P.2d 408 (1977). The test is whether reasonable means of access are obstructed. *Capitol Hill Methodist Church v. City of Seattle*, 52 Wash.2d 359, 366, 324 P.2d 1113 (1958).

¹ The Court was dealing with statutes applying to limited access roads, RCW 47.52, which are directly inapplicable here.

Here a fact question exists whether GUNDERSON's property was in fact subject to disproportionate impact that basically prevented any meaningful access.

C. Public Use

Defendant's argument that GUNDERSON's property needed to be appropriated for public use is clearly incorrect. As demonstrated by the *Union Elevator & Warehouse, Keiffer* and *Capitol Hill Methodist Church* cases, impairment of access supports inverse condemnation. The CITY should not be permitted to put a business owner out of business, thereby taking her property, for a public use without compensating her.

Pande Cameron and Co. of Seattle, Inc. v. Central Puget Sound Regional Transit Authority, 610 F.Supp.2d 1288 (W.D.Wash. 2009) is inapplicable for several reasons. First, it is analyzing Federal law claims under § 1983. Second, it summarizes Washington law exactly as discussed above: that a

taking must be 'permanent.' Id. At 1301-02.² Again when a temporary project results in permanent injury, a taking occurs.

² "Washington law also divides takings from governmental torts based on the duration of the government's interference with the property right, holding that temporary interferences with a property right are not constitutional takings of property. See *Northern Pacific Railway Co. v. Sunnyside Valley Irrigation Dist.*, 85 Wash.2d 920, 924, 540 P.2d 1387 (Wash.1975) (" The major decisions of this court considering the difficult distinction between a constitutional taking under [the Washington state constitution's] article 1, section 16, and a mere tortious interference, are in agreement that a constitutional taking is a permanent (or recurring) invasion of private property."); *Miotke v. Spokane*, 101 Wash.2d 307, 334, 678 P.2d 803 (Wash.1984) (" While permanent or long-term pollution of a stream resulting from sewage disposal may constitute a taking, the rule is quite different where the pollution is temporary the results of the bypass were temporary only, and therefore do not constitute a constitutional taking."); *Wong Kee Jun v. Seattle*, 143 Wash. 479, 505, 255 P. 645 (Wash.1927) (" A mere temporary interference with a private property right in the progress of the work ... would probably be tortious only."); *Stern v. City of Spokane*, 73 Wash. 118, 121, 131 P. 476 (Wash.1913) (" If the testimony had shown a temporary obstruction incident to the repair of the street, no recovery would have been allowed."); *Olson*, 71 Wash.2d at 285, 428 P.2d 562 (" The present case falls into the category referred to in *Wong Kee Jun* ... as a ' mere temporary interference with a private property right [.]' "); *Songstad*, 2 Wash.App. at 682, 472 P.2d 574 (" [A]n inverse condemnation has not occurred unless the damage is contemplated by the plan of work or considered to be a necessary incident of the maintenance of the property for a public purpose. Moreover, the interference with the property must be of a permanent nature."). Indeed, the Washington Supreme Court has expressly held that "[t]emporary interference with a private property right, which is not continuous nor likely to be reoccurring, does not constitute condemnation without compensation." *Northern Pacific Railway Co.*, 85 Wash.2d at 924, 540 P.2d 1387. Damage is considered " permanent" if the property " may not be restored to its original condition." Id."

Finally, as a Federal decision, the Court's decision is not binding on this court as mandatory authority – particularly since it ignores pertinent authority above.

The CITY initiated the project and approved the plans that resulted in loss of the GUNDERSON leasehold. This is a taking.

2. Negligence

Plaintiff asserts the CITY was negligent, which requires showing duty, breach and injury. *Hartley v. State*, 103 Wash.2d 768, 777, 698 P.2d 77 (1985).

a. Notice

Although the City purported to give notice to all abutting landowners, Thomas Hix of landowner Black realty will testify that the City's notice packet did not reach his office until after construction began, far too late to give TERRI GUNDERSON reasonable notice of the pending project.

The CITY undertook to give notice but negligently failed

to communicate to the one party that would have had no interest in failing to pass the information on to Ms. GUNDERSON. The lessor didn't hear until May.

It is well established that a party who undertakes a duty – such as warning – and whose undertaking is relied on, must then perform the duty. *Brown v. MacPherson's, Inc.*, 86 Wash.2d 293, 298-300, 545 P.2d 13 (1975); also known as the “rescue doctrine,” *Chambers-Castanes v. King County*, 100 Wn.2d 275, 669 P.2d 451 (1983).

b. Supervision of Access

Although the CITY relied on RED DIAMOND to provide alternative access for Ms. GUNDERSON, the record is clear that access was not maintained in the specific location of her business. That is because RED DIAMOND staged its equipment there, frequently blocking access.

This resulted in a disproportionate impact on Ms. GUNDERSON's business. No other abutting business owner

had the degree of interference she had; and no other abutting business owner was as dependent upon drive through business as she was. Ms. GUNDERSON complained to the CITY Clerk but to no avail.

The CITY of MILLWOOD had a duty to maintain access to her property under 2 separate theories.

First, the CITY was clearly aware that the construction project was going to impede businesses and it undertook to provide a means to ameliorate the impact by providing alternative access. Having done so the CITY then had a duty to “follow through” on its undertaking. See ‘rescue doctrine’ authority above.

Second, under Millwood Municipal Code § 12.05.030, the City is

[R]esponsible for the establishment and adoption of procedures needed to implement this chapter, the administration and coordination of the enforcement of this chapter and all procedures relating to the use of rights-of-way. The director or designee is responsible for monitoring use of the rights-of-way by rights-of-way use

permittees.

Millwood Municipal Code §12.05.180 provides:

Whenever the director or designee determines that any condition on any right-of-way is in violation of, or any right-of-way is being used contrary to any provision of this chapter or procedures adopted hereunder or other applicable codes or standards, or without a right-of-way use permit, the director or designee may order the correction or discontinuance of such conditions or any activity causing such condition. ... Any object or thing which shall occupy any right-of-way without a permit is declared a nuisance.

Finally: Millwood Municipal Code § 2.05.330:

The director or designee and other employees charged with the enforcement and administration of this chapter, acting for the city in good faith and without malice in the discharge of their duties shall not thereby render themselves liable personally for any damages which may accrue to persons or property as a result of any act required or by reason of any act or omission in the discharge or such duties.

This section implies that, since it applies immunity only to individuals acting for the CITY, the CITY itself is not immune from a private right of action for violation of the ordinance.

The CITY then had a duty to take reasonable steps to

insure the access remained usable, and did nothing to so insure.

c. Public Duty Doctrine Exceptions

Under the public duty doctrine, no liability may be imposed for a public official's negligent conduct unless it is shown that "the duty breached was owed to the injured person as an individual and was not merely the breach of an obligation owed to the public in general" *J & B Dev. Co. v. King County*, 100 Wash.2d 299, 303, 669 P.2d 468 (1983). There are 4 exceptions: (1) legislative intent, (2) failure to enforce, (3) the rescue doctrine, and (4) a special relationship. *Cummins v. Lewis County*, 156 Wn.2d 844, 853 fn. 7, 133 P.3d 458 (2006).

The rescue doctrine exception applies because the CITY specifically undertook to provide access to the GUNDERSON and then failed to enforce the provision thereof.

The Special relationship doctrine also applies because the only place that had the problem here was the GUNDERSON business: it was the only business next to the construction

staging area where construction equipment was blocking the alternate access. The special relationship exception requires (1) a direct contact or privity between the public official and the injured plaintiff which sets the latter apart from the general public; (2) there are express assurances given by a public official, (3) giving rise to justifiable reliance on the part of the plaintiff. *Beal v. City of Seattle*, 134 Wash.2d 769, 785, 954 P.2d 237 (1998). GUNDERSON had direct contact with the CITY; the CITY gave express assurances that she and everyone else would have access; she relied on the CITY to enforce her access.

d. Injury

Ms. GUNDERSON'S testimony that she lost her business due to the reduced business caused by limited access, is sufficient to create a fact question.

Issues of Proximate Cause are generally for the trier of fact.

Brust v. Newton, 70 Wash.App. 286, 290, 852 P.2d 1092

(1993), review denied, 123 Wash.2d 1010, 869 P.2d 1085 (1994). The issue of proximate cause is a question of law if all inferences from the evidence are incapable of reasonable doubt. *City of Seattle v. Blume*, 134 Wash.2d 243, 252, 947 P.2d 223 (1997).

In this case there is evidence enough to show some injury; the amount of injury can be determined at trial. *Alpine Indus., Inc. v. Gohl*, 30 Wash.App. 750, 754, 637 P.2d 998, 645 P.2d 737 (1981). GUNDERSON is only required to prove damages with reasonable certainty. *Larsen v. Walton Plywood Co.*, 65 Wash.2d 1, 16, 390 P.2d 677, 65 Wash.2d 1, 396 P.2d 879 (1964). Her damages lie in two areas.

a. never would have purchased if known

The key element of damages here is the TERRIE GUNDERSON would not have purchased the business nor entered into a lease if she had known there was a major street renovation project pending. The CITY's failure to give notice to

BLACK resulted in her purchase.

b. future revenue

GUNDERSON had a new business and was deprived of opportunity to grow. Damages for lost profits are recoverable if they are proven with reasonable certainty. *Larsen v. Walton Plywood Co.*, 65 Wash.2d 1, 16, 390 P.2d 677 (1964). A plaintiff is not denied recovery merely because the precise amount of damage is incapable of exact ascertainment.

Jacqueline's Washington, Inc. v. Mercantile Stores Co., 80 Wash.2d 784, 789, 498 P.2d 870 (1972). The wrongdoer bears the risk of the uncertainty which its own wrong has created. *Id.*

Larsen held that a new business with no profit history should have the opportunity to present the best evidence available to show its lost profits, namely, the evidence that proves the plaintiff's damages with the greatest certainty. The reliability of such evidence is for the trier of fact to determine. *Eagle Group, Inc. v. Pullen*, 114 Wn.App. 409, 418, 58 P.3d

292 (2002).

3. Summary Judgment

This Court will review an order granting summary judgment de novo, taking all facts and inferences in the light most favorable to the nonmoving party. *Biggers v. City of Bainbridge Island*, 162 Wash.2d 683, 693, 169 P.3d 14 (2007).

Summary judgment is appropriate only if

[T]he pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. CR 56(c).

The moving party has the burden of showing that there is no genuine issue as to any material fact." *Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.*, 162 Wash.2d 59, 70, 170 P.3d 10 (2007).

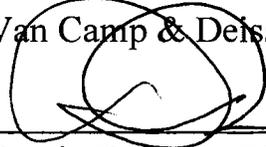
CONCLUSION

Here the facts are largely undisputed but the inferences from the facts, and the application of law to facts, is disputed.

This Court should reverse summary judgment and remand the matter to the court below for trial.

April 25, 2011

Van Camp & Deissner


Dustin Deissner WSB# 10784

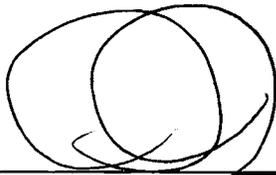
CERTIFICATE OF SERVICE

DUSTIN DEISSNER certifies upon penalty of perjury:

I have on this date served the foregoing document upon the following parties by the following means:

TO:	BY:
Michael McFarland Evens, Craven & Lackie PS 818 W. Riverside Ste. 250 Spokane WA 99201-0910	<input type="checkbox"/> US Mail 1 st Class Postage Prepaid <input checked="" type="checkbox"/> Delivery Service <input type="checkbox"/> Facsimile to: 624-2902 <input type="checkbox"/> Email <input type="checkbox"/> Hand Delivery

April 25, 2011



Dustin Deissner WSB# 10784