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DIVISION III
STATE OF WASHINGTON
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NO. 29702-1-3

STATE OF WASHINGTON
COURT OF APPEALS
DIVISION NO. III

TERRIE L. GUNDERSON,

Appellant

vs.

CITY OF MILLWOOD, et al.

Respondents

RESPONDENT'S RESPONSE BRIEF

Michael E. McFarland
Jerry P. Scharosch
Evans, Craven & Lackie, P.S.
818 W. Riverside, Suite 250
Spokane, WA 99201-0916
(509) 455-5200 phone
(509) 455-3632 fax
mmcfarland@ecl-law.com
Attorneys for Respondents

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I. INTRODUCTION

When a municipality undertakes desperately needed repairs to a roadway, minor disruption and inconvenience to local businesses is inevitable. But a municipality is not an insurer of every business remotely affected by the construction. To afflict a municipality with such an inequitable burden would paralyze local governments and prevent them from conducting these essential public improvements. Common sense must prevail.

The City of Millwood ("Millwood") repaired approximately one-half mile of Argonne Road during 2009. Millwood has a duty to maintain its streets in a safe condition, and was authorized by statute to conduct the necessary repairs. Despite the significant benefits flowing from this innocuous public improvement project, the Appellant ("Gunderson") sought to extract damages from Millwood based on an alleged loss of revenue during the time the repair work was underway. Gunderson's claims were, and remain, inconsistent with the law and offended the public policy which supports a municipality's obligation to conduct such necessary repairs. Gunderson asserted several causes of action against Millwood below. However, Gunderson only appeals the dismissal of her inverse condemnation and negligence claims. (Appellant's Opening Br.

at 1.) These claims have no basis in law or fact. The trial court properly dismissed each claim on summary judgment.

II. STATEMENT OF ISSUES

Issue No. 1: Whether the trial court properly granted Millwood's Motion for Summary Judgment, dismissing Gunderson's negligence claim.

Issue No. 2: Whether the trial court properly granted Millwood's Motion for Summary Judgment, dismissing Gunderson's inverse condemnation claim.

III. STATEMENT OF FACTS

In 2007 and 2008, Millwood conducted a thorough analysis concerning the desirability and feasibility of improvements and repairs to portions of Argonne Road within Millwood city limits. (Clerk's Papers "CP" 84, 321-322.) This public improvement plan was commonly referred to as the Argonne Road Improvement Project ("Project" or "Argonne Project"). (CP 85.) Millwood's analysis of the Project culminated in a final report entitled the Argonne Road Corridor Study Report ("Report"), which was presented to the city in January 2008. (CP 84.) Millwood's 2007 and 2008 official street plans included the Project. (CP 85.) As part of the information gathering process for the Report, Millwood officials and Millwood's professional consultants held several

public meetings beginning in 2007 to discuss the Project. (CP 85.) Millwood also publicized the Project through additional meetings and quarterly newsletters sent directly to local businesses and residents. (CP 85, 322.) Additionally, Millwood officials met with local business owners in September, October and November 2008 to discuss the Project. (CP 85.) The Project was scheduled to occur between May and August 2009. (CP 85.)

Millwood hired Welch Comer Engineers as the Project Engineer. (CP 85.) The scope of the Project included repaving and repair of Argonne Road between South Riverway and Grace Avenue, as well as the installation of a concrete intersection and concrete sidewalk. (CP 85, 321.) Construction on the Project commenced on May 4, 2009 and was considered substantially complete on August 21, 2009. (CP 322.) In planning the Project, the primary concern of Millwood was ensuring the safe completion of the Project with as little disruption to local businesses as possible. (CP 85.) Work on the Project was conducted between the hours of 7:00 p.m. and 5:30 a.m., Monday through Friday, to reduce disruption to local businesses, although occasional day work was necessary to expedite certain aspects of the Project. (CP 322.) During the Project, traffic on Argonne Road was restricted from four lanes to two lanes to maintain traffic flow to businesses and through Millwood. (CP

322, 364.) Closing Argonne Road completely and detouring vehicles through residential streets was never considered a viable option. (CP 322, 323.)

During both the design and construction phase of the Project, Welch Comer worked closely with Millwood and the Washington State Department of Transportation ("WSDOT") concerning construction staging and traffic control during construction in order to appropriately balance the competing considerations of safety and business/resident access throughout the Project. (CP 321, 322.) During this planning process, Welch Comer presented information to and sought guidance from Millwood staff and leadership, the general public, and WSDOT. (CP 322.) Much of this communication occurred during Millwood City Council meetings and workshops. (CP 322.) On behalf of Millwood, Welch Comer advertised the Project publicly in accordance with WSDOT standards. (CP 322.) Red Diamond Construction was awarded the Project. (CP 322.) During the construction phase, a representative from Welch Comer was on site to observe construction, communicate with the public, represent Millwood, and ensure the project was built in conformance with the plans and specifications. (CP 322.)

Gunderson's business ("Sun Beans") was located at 3117 N. Argonne Rd., along the construction route of the Project. (CP 47, 86.)

The actual time period during which construction was ongoing was approximately 109 days. (See CP 322.) Direct access to Sun Beans from Argonne Road was only obstructed approximately *half of one day* while repair and paving occurred at that specific point in the road. (CP 323; see CP 365.) Throughout the Project, the Sun Beans business had arranged an alternative access route via a railroad right-of-way located immediately north of the business location. (CP 323, 366.) However, according to Gunderson, at some point in time during the Project tenants from an apartment complex behind Sun Beans dug a trench across the right-of-way. (CP 147.) Additionally, all businesses located on the west side of Argonne Road, including Sun Beans, were also accessible from Marguerite Road (a street running parallel to Argonne Road) during all phases of the Project. (CP 365.) Aside from the one, limited half-day restriction due to paving, access via Argonne Road to the Sun Beans location was never completely obstructed throughout the entire 109 day duration of the Project. (CP 323.) At no time did Welch Comer or Millwood direct the contractor, Red Diamond Construction, or its subcontractors, to utilize the Sun Beans premises for parking or staging of construction equipment. (CP 323.) If the on-site Welch Comer representative had noticed this occurring, Red Diamond Construction would have been immediately notified to remove the equipment. (CP

323.) Millwood never intended to harm any businesses along Argonne Road by executing the Project. (CP 86.)

Gunderson filed her Complaint against Millwood on November 6, 2009. (CP 3.) Gunderson essentially claimed that Millwood's actions vis-à-vis the Project caused the revenue from her Sun Beans business to decline, which in turn allegedly caused the failure and closure of the business. (See CP 4-5.) Gunderson asserted the following causes of action against Millwood: negligence, gross negligence, intimidation, reckless infliction of emotional distress, inverse condemnation, and dereliction of duty. (CP 5.) Millwood moved for summary judgment on the basis that no genuine issues of material fact existed and that each of Gunderson's causes of action failed as a matter of law. (CP 360.) The trial court granted Millwood's motion and dismissed all of Gunderson's claims in an order dated November 4, 2010. (CP 310-312.) Gunderson now seeks review of the trial court's summary judgment dismissal of her inverse condemnation and negligence claims. (CP 314-319.)

IV. ARGUMENT

Appellate review of a summary judgment is *de novo*, and the court performs the same inquiry as the trial court. *Colorado Structures, Inc. v. Blue Mountain Plaza, LLC*, 159 Wn. App. 654, 661, 246 P.3d 835 (2011). Summary judgment is proper when there are no genuine issues of material

fact and the moving party is entitled to a judgment as a matter of law. CR 56(c). A material fact is one upon which the outcome of the litigation depends. *Barrie v. Hosts of Am.*, 94 Wn.2d 640, 642, 618 P.2d 96 (1980). To defeat summary judgment, the non-moving party cannot rely on speculation but must assert specific facts, as would be admissible in evidence, which sufficiently rebut the moving party's contentions and disclose the existence of a genuine issue as to a material fact. *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008); *Adams v. City of Spokane*, 136 Wn. App. 363, 365, 149 P.3d 420 (2006) (argumentative assertions, speculative statements, and conclusory allegations do not raise material fact issues that preclude a summary judgment).

Additionally, statements of ultimate facts, conclusions of fact, or conclusory statements of fact are insufficient to overcome a summary judgment motion. *Doty-Fielding v. Town of South Prairie*, 143 Wn. App. 559, 566, 178 P.3d 1054 (2008). Summary judgment should be granted only if, from all the evidence, reasonable persons could reach but one conclusion. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). Despite these bedrock summary judgment principles, Gunderson maintains that summary judgment was improper below. There are no *genuine* issues of *material* fact. A non-moving party in a summary

judgment is not entitled to have its affidavits considered at face value. *Seven Gables Corp. v. MGM/UA Entertainment Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986). To avoid a useless trial, summary judgment in favor of Millwood on all claims was proper. *Olympic Fish Products, Inc. v. Lloyd*, 93 Wn.2d 596, 602, 611 P.2d 737 (1980).

A. Negligence

An actionable negligence claim requires proof of the following elements: (1) the existence of a duty owed to the complaining party; (2) a breach of that duty; (3) injury; and (4) that the claimed breach was a proximate cause of the resulting injury. *Webstad v. Stortini*, 83 Wn. App. 857, 865, 924 P.2d 940 (1996). If any of these elements cannot be met as a matter of law, summary judgment for the defendant is proper. *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 553, 192 P.3d 886 (2008). The threshold determination in negligence actions is whether the defendant owed a duty of care to the plaintiff, and such determination is a question of law. *Webstad*, 83 Wn. App. at 865. In deciding whether a duty is owed, "the primary consideration is whether the conduct in question is unreasonably dangerous." *Keates v. City of Vancouver*, 73 Wn. App. 257, 266, 869 P.2d 88 (1994). A defendant owes no duty for conduct that is not unreasonably dangerous. *Id.* Conduct is unreasonably dangerous when the risks of harm outweigh the utility of the activity. *Id.* Whether a

defendant owes a duty to a plaintiff depends on mixed considerations of "logic, common sense, justice, policy, and precedent." *Segaline v. State, Dept. of Labor and Industries*, 144 Wn. App. 312, 328, 182 P.3d 480 (2008). Gunderson's negligence claim fails for two separate reasons: (1) the public duty doctrine protects Millwood's act of executing the Project; and (2) even if the Court disagrees with the public duty doctrine argument, Gunderson cannot establish the requisite elements of negligence.

1. The public duty doctrine shields Millwood from liability to Gunderson concerning the Project.

The "public duty doctrine" provides Millwood a defense against Gunderson's negligence claim. Under the public duty doctrine, the negligent performance of a governmental or discretionary police power duty enacted for the benefit of the public at large imposes no liability upon a municipality as to individual members of the public. *Dorsch v. City of Tacoma*, 92 Wn. App. 131, 134, 960 P.2d 489 (1988). "The public duty doctrine provides that regulatory statutes impose a duty on public officials which is owed to the public as a whole, and that such a statute does not impose any actionable duty ... to a particular individual." *Laymon v. Washington State Dept. of Natural Resources*, 99 Wn. App. 518, 529, 994 P.2d 232 (2000) (quoting *Honcoop v. State*, 111 Wn.2d 182, 188, 759 P.2d 1188 (1988)).

A municipality owes a duty to all persons to build and maintain its roadways in a condition that is reasonably safe for ordinary travel. *Keller v. City of Spokane*, 146 Wn.2d 237, 249, 44 P.3d 845 (2002). Under RCW 35.43.040, a city's legislative body may authorize the repair of streets within its jurisdiction. To effectuate the repair of city streets, a city may close a street for any period of time as it deems necessary. RCW 47.48.010.

Millwood has the absolute right to repair streets within its jurisdiction and to close streets to effectuate such repairs. RCW 35.43.040; RCW 47.48.010. Repairing streets is in the furtherance of a social interest of greater public import than Gunderson's individual interest in maintaining a consistent, unaffected revenue stream during the short period of the Project. The condition of roadways, if continually neglected by public officials, will eventually deteriorate to a level which becomes both unsafe and a nuisance to those who travel upon them. Millwood thoroughly considered the benefits and disadvantages of repairing Argonne Road. (CP 84-85.) Millwood's legislative decision to implement the Project served the public good. The Washington legislature expressly recognized the fundamental duty to adequately maintain roadways when it authorized local municipalities to repair and improve public roadways whenever "public interest or convenience may require...." RCW

35.43.040. Millwood's right to repair and improve Argonne Road outweighs Gunderson's limited interests.

Millwood also implemented specific steps to minimize the adverse effects of the Project on local businesses. (CP 320-324.) Millwood acknowledges that normal traffic flow along Argonne Rd. was slightly impeded during the Project. (CP 322-323.) This, however, is a natural consequence of road repair. It does not follow from the mere fact of interference, however, that such interference was improper. Traffic flow along Argonne Rd. was maintained throughout the Project. (CP 365.) Millwood had no intent to harm Gunderson or Sun Beams through the Project, and Gunderson cannot seriously claim that it did. (CP 86.) Any assertions to the contrary are pure speculation. Aside from the single half-day restriction due to paving, access via Argonne Road to the Sun Beams location was never completely obstructed throughout the entire duration of the Project. (CP 323, 365.) Additionally, alternative, continuous access to Sun Beams via a railroad right-of-way further mitigated any minor inconvenience caused by the Project. (CP 323, 366.) The foregoing illustrates that Millwood acted reasonably and in good faith throughout the Project.

Additionally, the Millwood City Council formally approved the improvement and repair of Argonne Road through its official street plans.

(CP 85.) This was a statutorily-authorized governmental function. RCW 35.43.040. Millwood's duty of repairing streets and maintaining them in good condition was owed to all its residents, and such improvements benefit the public at large. RCW 35.43.040 and RCW 47.48.010 cannot logically be interpreted to impose any duty upon Millwood for the sole benefit of Gunderson herself. Contrary to Gunderson's speculative assertions, Millwood acted reasonably with respect to the Project. Millwood notified its residents and local businesses well in advance of the Project's initiation. (CP 85, 322.) Millwood directed work on the Project to be completed as quickly as possible, and required that construction occur during off-peak periods to minimize the adverse effects on Millwood businesses and residents. (CP 322, 365.) Complete and direct access to Sun Beans was never denied, and alternate access to Sun Beans was continuous. (CP 323, 365-366.) The public duty doctrine prevents any negligence Gunderson ascribes to Millwood's performance of the Project from resulting in Millwood's liability.

Common sense also supports this conclusion. If Millwood owed each business owner along Argonne Road a separate, individual duty to not cause any disruption to their business throughout the Project, it would become an insurer of any and all lost revenue which may result from the exercise of its governmental duties. This would engender endless

litigation and would paralyze the normal functioning of government due to the constant fear of resulting damages. The Project was a governmental duty, owed to all Millwood residents, which benefited the entire public. *Taylor v. Stevens County*, 111 Wn.2d 159, 163, 759 P.2d 447 (1988) (a duty to all is a duty to no one). Thus, the public duty doctrine insulates Millwood from Gunderson's negligence claims. Gunderson, however, asserted, and continues to assert, that two exceptions to the public duty doctrine applied: the rescue exception and the special relationship exception.

(a) The rescue doctrine exception is inapplicable.

The rescue exception to the public duty doctrine applies where a governmental entity or its agent (1) undertakes a duty to aid or warn a person in danger; (2) fails to exercise reasonable care; and (3) offers to render aid and, as a result of the offer of aid, either the person to whom the aid is to be rendered, or another acting on that person's behalf, relies on this governmental offer and consequently refrains from acting on the victim's behalf. *Vergeson v. Kitsap County*, 145 Wn. App. 526, 539, 186 P.3d 1140 (2008).

Here, Gunderson cannot establish the elements of this exception. Although Gunderson claims Millwood "undertook to provide access" (CP 137) to the Sun Beans property, she cites no authority that normal

incidents of road construction or that the utilization of a portion of a broad alley during construction is a danger requiring rescue.¹ Second, Millwood did not "undertake" to provide access to Sun Beans – it simply maintained pre-existing access to Sun Beans via Argonne Rd., the alley adjacent to the Sun Beans premises, and Marguerite Road. (*See* CP 225, 323, 365-366.) If Millwood made any representations at all, it simply called attention to the access alternative to Argonne Road, namely the alley and Marguerite Road. Third, Gunderson can identify no assurances to aid or warn given by Millwood. The only statements Gunderson imputes to Millwood are that Millwood "promised to provide safe access" (CP 150), and a cryptic reference that she was told "the problems would be fixed." (CP 147.) The public had continuous safe access to Sun Beans throughout the Argonne Road Project. (CP 323, 365-366.) As a matter of law, Gunderson's statements do not amount to the "undertaking of a duty to aid or warn." Gunderson also fails to establish even a prima facie case that Millwood failed to exercise reasonable care regarding the Project. Thus, the rescue exception to the public duty doctrine is inapplicable. Even if a duty to aid or warn did arise regarding Millwood, any blockage of the alley or Argonne Road was due solely to entities other than Millwood, such as

¹ Moreover, Gunderson's claims fall well outside the ordinary definition of "rescue." *See Webster's Third New International Dictionary* (2002) (defining rescue as "to free from confinement, violence, danger or evil: liberate from actual restraint").

defendant Red Diamond Construction or non-party Welch Comer, the Project Engineer. In fact, Gunderson highlights one such culpable non-party in her declaration, stating that "tenants of the apartment building behind my business actually dug a trench across the alley." (CP 147.) There never existed any danger from which Gunderson required rescue, Millwood never undertook to "rescue" Gunderson, and Millwood exercised reasonable care throughout all aspects of the Project. Invocation of the rescue exception to the public duty doctrine is misplaced.

- (b) There existed no special relationship between Millwood and Gunderson.

The Washington Supreme Court recently articulated the "special relationship" exception to the public duty doctrine, stating --

The special relationship exception allows tort actions for negligent performance of public duties if the plaintiff can prove circumstances setting his or her relationship with the government apart from that of the general public. A special relationship imposing an actionable duty to perform arises between the plaintiff and a government entity when (1) there is a direct contact or privity between the public official and the injured plaintiff which sets the latter apart from the general public, and (2) there are express assurances given by a public official, which (3) gives rise to justifiable reliance on the part of the plaintiff.

Cummins v. Lewis County, 156 Wn.2d 844, 856, 133 P.3d 458 (2006) (internal citations and quotation marks omitted). The special relationship

exception is a "focusing tool" used to determine whether a local government is under a general duty to a nebulous public or whether that duty has focused on the claimant. *Babcock v. Mason County Fire Dist. No. 6*, 144 Wn.2d 774, 786, 30 P.3d 1261 (2001). The Washington Supreme Court has explained that a mere statement by a governmental entity will not engender a special relationship –

It is only where a direct inquiry is made by an individual and *incorrect* information is clearly set forth by the government, the government *intends* that it be relied upon and it is *relied upon by the individual to his detriment*, that the government may be bound. The plaintiff must seek an express assurance and the government must unequivocally give that assurance.

Babcock, 144 Wn.2d at 789 (internal citation and quotation marks omitted) (emphasis added). *See also Pierce v. Yakima County*, ___ Wn. App. ¶ 23, ___ P.3d ___ (Division III, May 12, 2011).

While Gunderson may have made contact with Millwood personnel, such contact did not set her apart from the general public. The only evidence presented by Gunderson is two statements she imputes to Millwood, referenced above. (CP 150) (alleged promise to provide safe access); (CP 147) (alleged statement that "the problems would be fixed.") Taking the facts in the light most favorable to Gunderson, she appears to have expressed a generalized dissatisfaction with the access to the Sun

Beans property to Millwood personnel. The assurances allegedly given in response are broad statements, which do not convey incorrect information. Indeed, the statement regarding safe access was correct –safe access to the Sun Beans property existed throughout the duration of the Project via Argonne Road, the alley, and Marguerite Road. (CP 322-323, 365-366.) The alleged statement that "problems would be fixed" is not detailed enough to engender a special relationship. Moreover, Gunderson has identified no detriment she suffered *flowing from her reliance* on Millwood's statements. Nor does Gunderson present any facts showing an express intent by Millwood that statements made would be relied upon. Any duty owed by Millwood was owed to the general public, not Gunderson. *Taylor v. Stevens County*, 111 Wn.2d 159, 163, 759 P.2d 447 (1988) (a duty to all is a duty to no one). No special relationship between Millwood and Gunderson existed.

2. Gunderson cannot establish the required elements of a negligence claim.

Even if the Court finds the special relationship or rescue doctrine apply, such a conclusion of law is not determinative of liability. *Osborn v. Mason County*, 157 Wn.2d 18, 28, 134 P.3d 197 (2006) (exceptions to the public duty doctrine merely indicate when a statutory or common law duty exists). Gunderson failed to present any genuine issues of material fact

concerning duty, breach, causation, and damages. Thus, her negligence claim fails as a matter of law.

(a) Duty

The threshold determination in negligence actions is whether the defendant owed a duty of care to the plaintiff. *Webstad*, 83 Wn. App. at 865. Setting aside the public duty doctrine, Gunderson cannot identify any specific duty Millwood owed *to her*. Millwood's Project was not unreasonably dangerous. *Keates*, 73 Wn. App. at 266 (a defendant owes no duty for conduct that is not unreasonably dangerous). That improving Argonne Road is not unreasonably dangerous is manifest. The utility of repairing streets is enormous because it not only decreases safety concerns but increases the public's respect and confidence in local government. Millwood legislatively determined Argonne Road needed repair, improvement, or both. The worthiness of Millwood's Project outweighs any temporary, speculative risks of harm to individual businesses such as Sun Beans. The Project was of short duration and conscious steps were taken to mitigate any inconvenience to Sun Beans or its customers. (CP 322-323, 365-367.) Because repairing Argonne Rd. was not unreasonably dangerous, Millwood owed Gunderson no duty of care. *Keates*, 73 Wn. App. 257. Rather, Millwood's duty inures to all its residents. *Keller v. City of Spokane*, 146 Wn.2d 237, 249, 44 P.3d 845 (2002) (municipalities

owe a duty to all persons to build and maintain its roadways in a condition that is reasonably safe for ordinary travel).

(b) Breach

Gunderson cannot establish *Millwood's breach* of any duty it may have owed. Millwood initiated the Argonne Road Project pursuant to statute. RCW 35.43.040 (a city's legislative body may authorize the repair of streets within its jurisdiction); RCW 47.48.010 (to effectuate the repair of city streets, a city may close a street for any period of time as it deems necessary). Gunderson conspicuously ignores the statutory authority granted Millwood by these statutes. Millwood also invested significant resources researching the Project to ensure any effect it had on businesses along Argonne Road would be minimized. (CP 84-85, 321-322.) Millwood's Project Engineer, Welch Comer, held weekly construction meetings at which any issues concerning local business access were addressed. (CP 366, 367.) And the bulk of the work occurred between 7:00 p.m. and 5:30 a.m. to minimize disruption caused by the Project. (CP 322, 365.)

Moreover, any denial of access to Sun Beans could only flow from the actions of non-parties – the nameless "tenants" Gunderson refers to in her declaration or the Project Engineer Welch Comer – or the primary contractor, defendant Red Diamond Construction. Additionally,

Gunderson has not provided any expert testimony establishing that Millwood's actions fell below a standard of care for public works projects similar to the Project. *State v. Montgomery*, 163 Wn.2d 577, 590, 183 P.3d 267 (2008) (expert testimony encompasses those subjects not within the understanding of the average person). Instead, Gunderson simply presumes that Millwood acted negligently. This is unwarranted. *Johnson v. Aluminum Precision Products, Inc.*, 135 Wn. App. 204, 208, 143 P.3d 876 (2006) (negligence is never presumed). Negligence is *conduct* which falls below a *standard* established by the law for the protection of others against unreasonable risk of harm. *Bodin v. City of Stanwood*, 79 Wn. App. 313, 318, 901 P.2d 1065 (1995). Gunderson cannot establish the element of breach in her negligence claim against Millwood. Thus, Gunderson cannot establish Millwood's liability for negligence.

(c) Causation

Causation between Millwood's Project and Gunderson's damages is absent as well. Legal cause is the second prong of proximate causation and is a question of law for the court. *McCoy v. Am. Suzuki Motor Corp.*, 136 Wn.2d 350, 359, 961 P.2d 952 (1998). Legal causation is a required element of proximate cause. *Minahan v. Western Washington Fair Ass'n*, 117 Wn. App. 881, 888, 73 P.3d 1019 (2003). Legal causation has been described by the Washington Supreme Court as follows:

Legal causation is a much more fluid concept [than cause in fact]. It is grounded in policy determinations as to how far the consequences of a defendant's acts should extend. The focus in legal causation analysis is on whether, as a matter of policy, the connection between the ultimate result and the act of the defendant is too remote or insubstantial to impose liability. This inquiry depends upon mixed considerations of logic, common sense, justice, policy, and precedent.

Kim v. Budget Rent A Car Systems, Inc., 143 Wn.2d 190, 204, 15 P.3d 1283 (2001) (internal quotation marks omitted).

Here, the connection between the ultimate result – the failure and closure of Sun Beans – and Millwood's actions in improving/repairing Argonne Road is too remote. As stated above, a local government has a duty to build and maintain its roadways in a condition that is reasonably safe for ordinary travel. *Keller*, 146 Wn.2d at 249. It follows, as a matter of public policy, that governments must be free to make such repairs and improvements without suffocating under the vexatious burden of the threat of litigation. Making municipalities insurers of every minute consequence stemming from road construction/repair would lead to absurd results. For example, should Millwood be responsible for the sale lost by the travelling businessperson who was kept from a business appointment due to delays on Argonne Rd. during the Project? Should Millwood be responsible for the employee who was late to work and was subsequently fired because he

or she was delayed temporarily by the Project? The answer to these scenarios is, of course, no. But by extending Gunderson's arguments to their logical extreme, these situations would present potential liability for Millwood. It is contrary to public policy, logic, common sense, and justice to inflict Millwood with liability for Gunderson's alleged losses.

Foreseeability also presents a significant flaw in the causation analysis because the result – Sun Beans's *actual closure* – is not within the "ambit of hazards" covered by Millwood's duty to maintain its roads in good repair. *Rikstad v. Holmberg*, 76 Wn.2d 265, 269, 456 P.2d 355 (1969). While a slight diminution in sales resulting from the Project may have been within the realm of foreseeability, the actual closure of a business resulting from the short construction Project falls completely outside the boundary of natural consequences. It must not be forgotten that the concept of negligence is grounded upon considerations of *reasonableness*. Millwood's Project was reasonable in scope, duration, and execution. Gunderson cannot establish legal causation; therefore, she cannot establish proximate cause.

Gunderson also failed to establish a genuine issue of material fact concerning cause in fact. "To establish cause in fact, a claimant must establish that the harm suffered would not have occurred but for an act or omission of the defendant. There must be a direct, unbroken sequence of

events that link the actions of the defendant and the injury to the plaintiff." *Joyce v. State, Dept. of Corrections*, 155 Wn.2d 306, 322, 119 P.3d 825 (2005). Cause in fact may be determined as a matter of law when reasonable minds cannot differ. *Daugert v. Pappas*, 104 Wn.2d 254, 257, 704 P.2d 600 (1985). Here, the failure of Sun Beans was not the direct result of Millwood's Argonne Project. Below, Gunderson made no effort to establish that but for Millwood's repair of Argonne Rd., Sun Beans would still be in business. She only put forth speculation and argued that her speculation be afforded conclusive weight. This is impermissible on summary judgment. *Doty-Fielding v. Town of South Prairie*, 143 Wn. App. 559, 566, 178 P.3d 1054 (2008) (statements of ultimate facts, conclusions of fact, or conclusory statements of fact are insufficient to overcome a summary judgment motion). Because proximate cause is lacking, Gunderson's negligence claim fails.

(d) Damages

Gunderson's assertion of damages is based on speculation. Gunderson's claim that she could not keep Sun Beans running during the Argonne Road Project is negated by her own deposition testimony. (CP 227.) Gunderson asserts that her loss of Sun Beans was caused by her inability to make her monthly lease payments, stating "I was unable to generate sufficient revenue to service the lease payments and eventually I

lost the business entirely." (CP 147.) A cursory reading of her deposition testimony, however, contradicts this assertion:

- Gunderson began operating Sun Beans on February 15, 2009. (CP 224.)
- Gunderson admits that she was evicted from Sun Beans in August 2009. (CP 231.)
- Gunderson made two payments under her Sun Beans lease, one in cash and one by check. (CP 228-230.)
- Gunderson was credited two payments at the beginning of her lease. (CP 226, 227.)
- Sean McMasters, one of the defendants in this matter and one of the sellers of Sun Beans to Gunderson, agreed to hold Sun Beans lease payments in abeyance during construction on the Argonne Road Project. (CP 227.)
- The Argonne Road Project ended in August 2009. (CP 322, 367.)

The inevitable conclusion which follows from these facts is that Gunderson was entirely free from the burden of lease payments during the duration of the Argonne Road Project. This conclusion eviscerates her claim that Millwood's actions resulted in her damages. Evidence of damages cannot rest on speculation or conjecture. *Clayton v. Wilson*, 168

Wn.2d 57, 72, 227 P.3d 278 (2010). Gunderson cannot establish the element of damages.

Gunderson's claim of negligence fails because she cannot establish the required elements of this cause of action. Summary judgment on this claim was properly granted by the trial court.

3. The Millwood Municipal Code is inapposite and does not create a private right of action.

Gunderson alleges that Millwood had a duty to maintain access to Sun Beans under certain provisions of the Millwood Municipal Code ("MMC"): §12.05.030; §12.05.180; and §12.05.330. (CP 136-137); *Appellant's Opening Br.* at 13-15. Citation to these provisions is misplaced.

Section 12.05 of the MMC governs the issuance of right-of-way use permits. (CP 233.) Nothing in §12.05 gives rise to a statutory cause of action. The opening section clearly states:

It is the specific intent of this chapter and any procedures adopted hereunder to place the obligation of complying with the requirements of this chapter upon the permittee, and **no provision is intended to impose any duty upon the city or any of its officers, employees, or agents. Nothing contained in this chapter or any procedures adopted hereunder is intended to be nor shall be construed to create or form the basis for liability on the part of the city,** or its officers, employees or agents, for any injury or damage resulting from the failure of the permittee to comply with the

provisions hereof, or by reason or in consequence of any act or omission in connection with the implementation or enforcement of this chapter or any procedures adopted hereunder by the city, its officers, employees or agents.

MMC §12.05.010. (CP 233.) Courts interpret municipal ordinances in the same manner as they interpret statutes. *Ford Motor Co. v. City of Seattle, Exec. Servs. Dep't*, 160 Wn.2d 32, 41, 156 P.3d 185 (2007). Courts interpret statutes to give effect to all language in the statute and to render no portion meaningless or superfluous. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). The language of MMC §12.05.010 is clear and unambiguous. Consequently, there is no "private right of action for violation" of §12.05 of the MMC, despite Gunderson's assertion to the contrary. (CP 137.) The Court should reject this argument.

4. Failure to give notice.

Gunderson also attempts to impose liability upon Millwood for allegedly failing to give notice of the Argonne Road Project to defendant Black Realty Management, Inc., which in turn allegedly led Gunderson to lease Sun Beans without sufficient knowledge. Gunderson cites no legal authority for this alleged duty to provide notice to Black Realty Management, Inc. *See Appellant's Opening Br.* at 17-18. Moreover, Millwood provided ample public notice of the Project to local businesses. The threshold determination in negligence actions is whether the

defendant owed a duty of care to the plaintiff, and such determination is a question of law. *Webstad v. Stortini*, 83 Wn. App. 857, 865, 924 P.2d 940 (1996). Because Gunderson can identify no duty Millwood owed to defendant Black Realty Management, Inc., the Court should reject this argument.

B. Inverse Condemnation

Like her negligence claim, Gunderson's claim of inverse condemnation fails as a matter of law because she cannot establish the requisite elements. A party alleging inverse condemnation must establish the following elements: (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. *Phillips v. King County*, 136 Wn.2d 946, 957, 968 P.2d 871 (1998). To constitute a taking, the intrusion must be "chronic and unreasonable," and not merely a temporary interference, unlikely to recur. *Lambier v. City of Kennewick*, 56 Wn.App. 275, 283, 783 P.2d 596 (1989).

Here, Gunderson cannot establish that a "taking" occurred. Any claimed "intrusion" by Millwood was not chronic. Road repair, by definition, is temporary in nature. Additional repairs on the same portion of Argonne Road will likely re-occur many years from now. Any imposition caused by the Project was brief and temporary. Millwood

never intended to establish a permanent construction presence at the Sun Beans location. The project lasted only a few months, and construction occurred during off-peak times. (CP 322.) Nor were Millwood's actions unreasonable. Access to Sun Beans via Argonne Road was never completely severed, except for half of one day, and Sun Beans customers had alternative access to the business location. (CP 322-323, 365-366.)

Even if Gunderson could establish a "taking," Millwood never received possession of any of Gunderson's property for public use. Millwood did not put any of Gunderson's personal property to public use, nor has Millwood permitted property allegedly taken to be used by members of the public. See 17 *Washington Practice*, Real Estate § 9.20 (2d ed.) (citing *In re City of Seattle (In re Westlake Project)*, 96 Wn.2d 616, 638 P.2d 549 (1981) as support for the proposition that in Washington "public use" means "use by the public" rather than use for a public purpose). Here, Millwood simply effectuated the repair of a small portion of Argonne Rd.; it did not appropriate any of Gunderson's property for public use. Moreover, the property interest Gunderson claims Millwood interfered with was her leasehold interest. *Appellant's Opening Br.* at 5-6. Millwood had/has no interest in appropriating Gunderson's leasehold interest for public use; without proof of this element, her inverse

condemnation claim fails as a matter of law because she cannot establish the required elements.

Public policy also supports the dismissal to Gunderson's inverse condemnation claim. Contrary to Gunderson's dismissive view of federal case law, *Pande Cameron and Co. of Seattle, Inc. v. Central Puget Sound Regional Transit Authority*, 610 F.Supp.2d 1288, 1305 (W.D. Wash. 2009) succinctly illustrates the irrational consequences which would inevitably result if Gunderson's claim was allowed:

To hold that the [Plaintiffs] have asserted a cognizable temporary “right of access” takings claim (arising out of a temporary, lawful public works construction project), would expand takings jurisprudence in the state of Washington beyond its current bounds. Moreover, the practical effect of such a holding would be to place all public construction projects which temporarily impair a property owner's access to his or her property in jeopardy of a constitutional takings claim. The law does not support this expansion.

Pande Cameron and Co. of Seattle, Inc., 610 F.Supp.2d at 1288 (analyzing a takings claim arising out of Seattle's light rail construction project). Millwood's position that it is not liable to Gunderson for inverse condemnation is strengthened by this sound public policy. Moreover, Millwood's involvement in the Project was too far removed to confer liability for construction impacts that allegedly occurred to Gunderson's property. Millwood's involvement regarding the Project was peripheral to

the actual construction. Common sense, logic, and public policy militate in favor of dismissal of Gunderson's inverse condemnation claim.

Gunderson's citation to *Union Elevator & Warehouse Co., Inc. v. State ex rel. Dept. of Transp.*, 96 Wn. App. 288, 980 P.2d 779 (1999) ("*Union Elevator*") is inapposite. First, *Union Elevator* was construing a specific statute, RCW 47.52.080, which is confined to "limited access facilities." See RCW 47.52.001 *et seq.* That is not the case here. Second, the plaintiffs in *Union Elevator* suffered a severe and permanent denial of reasonable access² as opposed to the generous access Gunderson enjoyed during the Project. See *Union Elevator*, 96 Wn. App. at 291. Third, the interference in *Union Elevator* was permanent – construction of cement barrier and cul-de-sac destroyed prior access to the plaintiff's property. *Union Elevator*, 96 Wn. App. at 291. Thus, Gunderson's attempt to analogize her situation to *Union Elevator* is inaccurate and misleading.

² "Because of the highway redesign, area farmers complained they were only able to access Union's East Lind facility by driving further north on SR 395 and exiting onto the reconfigured SR 21. They then had to negotiate a steep downhill grade (with their fully loaded grain trucks), slow to a near stop and then negotiate a 90 degree turn to the left onto another county road. The drivers then had to cross two sets of active, mainline Burlington Northern & Santa Fe Railway tracks, make another 90 degree turn to the left, followed by a 90 degree turn to the right. The trucks then had to proceed up a severe slope to the East Lind driveway. The sharp right turn into the East Lind driveway is obscured by a railroad track berm, which creates a blind turn. Additionally, this county road is etched with deep, narrow ditches along the shoulders on both sides. The road is not banked on either side of the corners so trucks are not able to stay in their own lane when making sharp turns." *Union Elevator*, 96 Wn. App. at 291.

Gunderson correctly cites *Northern Pac. Ry. Co. v. Sunnyside Val. Irrigation Dist.*, 85 Wn.2d 920, 540 P.2d 1387 (1975) for the proposition that a constitutional taking is a permanent (or recurring) *invasion* of private property. *Id.* at 924. However, the inconvenience caused by the Argonne Road Project was temporary, not permanent. The entire project lasted 109 days, and access to Sun Beans was never completely extinguished. (CP 322-323, 365-366.) Even accepting Gunderson's assertion that complete access was denied for 10 days (CP 147), this, by definition, does not constitute a permanent *invasion*. 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." *Id.* at 924 (emphasis added). Gunderson cannot overcome this fatal flaw in her inverse condemnation claim.

Gunderson also cites *Northern Pac. Ry. Co.* for the proposition that "damage is permanent if the property may not be restored to its original condition." *Id.* at 924. This statement, however, supports Millwood's position. Gunderson states in her declaration that "[t]he former owners [of Sun Beans] retook the business and are still operating it." (CP 147.) Contrary to Gunderson's unsubstantiated allegations of "permanent damage," Sun Beans has been restored to its original condition. It follows

that no permanent damage occurred. Even if a permanent invasion occurred, it was due to the operations of other defendants, non-parties, or both. Gunderson's own actions were also a cause of her loss of Sun Beans. (*See* Affidavit of Thomas P. Hix) (cataloging how Gunderson's repeated failures to make lease payments, even prior to the Project, eventually led to her eviction). (CP 129-133.) Additionally, Gunderson's assertion that her *damages* are permanent does not defeat the clear fact that any *interference* by Millwood in relation to the Project was temporary. Gunderson's inverse condemnation claim against Millwood fails as a matter of law.

Other Washington cases evaluating inverse condemnation claims have affirmed that a taking only occurs where the *interference* is permanent. *See Stern v. City of Spokane*, 73 Wn. 118, 131 P. 476 (1913) (discussing the permanent obstruction to access present in *Sweeney v. Seattle*, 57 Wn. 678, 107 P. 843 (1910) and noting that if the testimony in that case "had shown a temporary obstruction incident to the repair of the street, no recovery would have been allowed"); *Keiffer v. King County*, 89 Wn.2d 369, 572 P.2d 408 (1977) (compensable taking occurred where County widened road and erected curbs which permanently reduced both access to plaintiff's property and available parking spaces in front of plaintiff's building); *Northern Pac. Ry. Co. v. Sunnyside Val. Irrigation*

Dist., 85 Wn.2d 920, 540 P.2d 1387 (1975) (no compensable taking occurred where damage to plaintiff's railroad tracks was temporary and was subsequently repaired); *Lambier v. City of Kennewick*, 56 Wn. App. 275, 783 P.2d 596 (1989) (compensable taking occurred where city's design and construction of street caused a continuing intrusion of vehicles which failed to navigate the roadway onto plaintiff's property causing damage). These cases are all distinguishable from Gunderson's situation vis-à-vis the Argonne Project.

Concerning the right-of-way/alley north of Sun Beans in particular, the primary contractor for the Project, Red Diamond Construction, unequivocally affirms that its authorized use of the alley did not prevent access to the Sun Beans premises during the Project. (CP 366.) In fact, Red Diamond made improvements to the alley to facilitate access. (CP 366.) Because Millwood's primary contractor did not deprive anyone access to Sun Beans during the Project, it follows that Gunderson's claims against Millwood for the same conduct is likewise unavailing. Additionally, Gunderson did not own the alley she complains was obstructed. Rather, it was owned by Spokane County, who authorized Red Diamond to utilize a portion of the alley for its construction operations. (CP 366.) It strains credulity and common sense for Gunderson to assert that Sun Beans had some vested interest in the entire

alley for her own exclusive purposes, and that Red Diamond's use of the right-of-way therefore constituted a taking.

Finally, before the trial court Gunderson called attention to photographs allegedly taken during the Argonne Project, tacitly asserting that they conclusively establish *Millwood's* culpability. (CP 147; CP 154-218.) These pictures establish nothing. First, none of the photographs were authenticated, and were improperly submitted by Gunderson under ER 901 and CR 56(e) (facts set forth must be admissible). Second, none of the pictures contain a date or reference a particular location. Third, none of the pictures reveal the actual blocking of access routes to Sun Beans – they merely show the innocuous operation of construction equipment. Fourth, as the pictures are snapshots of a moment in time, Gunderson deceptively attempts to convey an air of permanence through them – the pictures could all have been taken on a single day. Most importantly, none of the pictures establish a blockage of access to Sun Beans as a matter of law, as access to Sun Beans was continuously provided through Argonne Road, the alley, or Marguerite Road. (CP 323, 365-366.) Summary judgment dismissal of Gunderson's inverse condemnation claim remains proper, even if the Court construes the allegations of Gunderson as material facts, because the only conclusion which follows from these facts is that no inverse condemnation occurred.

Van Noy v. State Farm Mut. Auto. Ins. Co., 142 Wn.2d 784, 790, 16 P.3d 574 (2001) (summary judgment is proper when reasonable minds could reach but one conclusion regarding the material facts).

V. CONCLUSION

Millwood's actions in repairing a small portion along Argonne Road were entirely appropriate. Millwood engaged in a statutorily-authorized activity and conducted the Project in good faith. Gunderson's claims of inverse condemnation and negligence lack merit because neither the law nor the facts support these theories. No genuine issues of material fact exist. Summary judgment was, and remains, proper. Millwood respectfully requests this Court AFFIRM the trial court.

RESPECTFULLY SUBMITTED this 24 day of May, 2011.

EVANS, CRAVEN & LACKIE, P.S.



MICHAEL E. McFARLAND, #23000
Attorneys for Respondents

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that I had hand-delivered a copy of the foregoing to the undersigned:

W. Russell Van Camp
Van Camp & Deissner
1707 W. Broadway Ave.
Spokane, WA 99201

Dated at Spokane, WA this 24 day of May, 2011.

A handwritten signature in cursive script that reads "Brooke Johnson".

Brooke Johnson
Legal Assistant to Michael McFarland