

2001

# Gorgoza, Incorporated; James B. Conkling; Donna D. Conkling v. The State of Utah Road Commission: Brief of Respondent

Utah Supreme Court

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PREME COURT  
OF THE STATE OF UTAH

GORGOZA, INCORPORATED,  
a corporation; and JAMES  
B. CONKLING and DONNA D.  
CONKLING, his wife,

Plaintiffs-Appellants,

-vs-

STATE OF UTAH, by and through  
its ROAD COMMISSION,

Defendant-Respondent.

BRIGHAM YOUNG UNIVERSITY  
J. Reuben Clark Law School

Case No. 14351

BRIEF OF RESPONDENT

APPEAL FROM JUDGMENT OF THE THIRD  
JUDICIAL DISTRICT COURT OF SALT  
LAKE COUNTY, STATE OF UTAH  
HONORABLE ERNEST F. BALDWIN, JR., JUDGE

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APR 15 1976

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

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GORGOSA, INCORPORATED,	:	
a corporation; and JAMES	:	
B. CONKLING and DONNA D.	:	
CONKLING, his wife,	:	
 Plaintiffs and Appellants,	:	Case No. 14351
 -vs-	:	
 STATE OF UTAH, by and through	:	
its ROAD COMMISSION,	:	
 Defendant and Respondent.	:	

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BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

This is an action to recover damages for the claimed breach of an alleged contract which the defendant, Utah State Road Commission (now Department of Transportation) allegedly entered into with appellants and which is supposedly incorporated in the Order of Immediate Occupancy of June 7, 1971. Said Order of Immediate Occupancy was entered in a separate eminent domain proceeding wherein the State Road Commission condemned approximately eight acres of plaintiff's land for highway use. Plaintiffs also alleged that defendant, State Road Commission, created a defective, unsafe

and dangerous condition of a highway and other public improvements causing plaintiff injury.

#### DISPOSITION IN LOWER COURT

Plaintiff's Complaint was dismissed by an Order of the Third Judicial District Court, the Honorable Ernest F. Baldwin, Jr., Judge, granting defendant, State Road Commission's Motion for Summary Judgment. The Motion was granted on the grounds that no binding agreement or enforceable contract existed between the parties and that the State had not waived its immunity from suits of this kind. (R-133)

#### RELIEF SOUGHT ON APPEAL

The respondent seeks an affirmance of the trial court decision.

#### STATEMENT OF FACTS

Since appellant's Statement of Facts contains many self serving statements as well as inaccurate and non essential items, respondent does not accept said statement as proper and will, therefore, set forth its own as follows:

Immediately prior to June 7, 1971, an action to condemn approximately eight acres of land from appellants was initiated by respondent in the Third District Court for Summit County. Subsequent to the filing of the action appellant's counsel, Robert F. Orton, was asked to accept service by Leland D. Ford, Assistant Attorney General, to en-

able the State to advertise the project at an early date.

(R. 76)

A proposed Order of Immediate Occupancy was submitted to Mr. Orton by Mr. Ford for review. (R. 80-86)

Said proposed Order contained the standard routine language typical of other Orders of Immediate Occupancy. (R. 106)

Mr. Orton stated that he wanted some changes in the language of the proposed Order and submitted a proposed Order with the changes incorporated in it. The changes involved mainly an amplification of the recognized obligation of respondent to provide access during construction, a requirement to provide at least three openings in the right-of-way fence and a provision calculated to enjoin each of the parties from interfering with each other in their respective uses of their property. (See R. 87-93 for comparison with R. 80-86)

Since the proposed language was considered acceptable the proposed Order prepared by Mr. Orton was submitted to Judge Maurice Harding who signed it, thus making it the Order of the Court.

A contract for construction of the project was awarded to W. W. Clyde & Company by respondent on July 1, 1971. (R. 59). Construction commenced in August of 1971. By November 15, 1971, the right-of-way fence was constructed across ap-



pellant's frontage, three access openings had been left in the fence at the locations designated by appellant and a paved approach had been constructed from respondent's highway across the frontage road to appellant's property. Prior to the construction of the paved approach, access was afforded to appellant's property at all times from the highway. (R. 60)

During the Fall of 1971, the contractor began construction of a cattle guard located on the east edge of appellant's parking lot. Due to weather limitations in the Fall of 1971, this cattle guard was not completed that year and a temporary by pass was constructed. (R. 60)

Appellant contacted Governor Rampton and complained about problems with access on or about September 24, 1971. (R. 21) It is alleged by appellant that this was for "emergency aid." (Appellant's Statement of Facts, Page 5) It is a fact that no attempt was made by appellant or his counsel to contact counsel for respondent prior to this so called "emergency." On September 28, 1971, a meeting was held with Blaine J. Kay, Director of Transportation and other officials of the respondent, State Road Commission. (R. 21, 41-45)

Subsequent to the September 28, 1971, meeting an access was constructed to appellant's "middle entrance" as requested. (R. 48) This did not satisfy appellant apparent-

ly and subsequent to another Complaint by appellant, Conkling to Mr. Kay on November 2, 1971, (R. 50) Mr. Kay directed on November 10, 1971, that the access be paved. (R. 51) This was accomplished November 15, 1971. (R. 60)

Gorgoza elected not to open for its winter operation in 1971. (R. 52) In the summer of 1972, the "frontage road" in front of appellant's property was completed and paved and approaches constructed through the right-of-way line to appellant's parking lot. (R. 60-61)

Appellants alleged that liability insurance was cancelled on November 11, 1971, since they were not ready for inspection due to the access problem. (R. 22) This is disputed and respondent's allege that access was only one of many problems leading to cancellation of liability insurance coverage, none of which were the fault of respondent. (R. 61) The fact is that the access problem, if indeed it ever was a problem, was corrected November 15, 1971.

No notice was ever received from appellant subsequent to November 15, 1971, concerning an intention or desire to re-open the resort by respondent and it remains closed to this date.

A letter dated July 21, 1972, (R. 21-23) was sent by appellant's counsel, Robert F. Orton, to respondent's attorney, Leland D. Ford, which alleged violation of the Order of Im-

mediate Occupancy. However, it was October 24, 1972, before an Order to Show Cause was issued concerning the alleged violation by respondent of the provisions of the Order of Immediate Occupancy. (R. 94, 95) Since the condemnation trial was imminent at that time and it was thought that a settlement could be reached of all outstanding issues, a stipulation was entered into on October 27th providing that the matter of damages for the alleged breach could be heard at a later date. (R. 96, 97)

Subsequently, on or about November 6, 1972, a stipulation was reached which partially settled the condemnation suit between the parties. (R. 78) Said stipulation provided, among other things for a reservation of any rights to claim additional compensation arising out of the alleged violation by respondent of the Order of Occupancy.

Appellants brought suit against respondent on February 8, 1974, in this matter. (R. 1)

The parties subsequent to discovery filed Motions for Summary Judgment on the issue of whether the Order of Occupancy on June 7, 1971, constituted a valid contractual obligation binding on the State of Utah. (R. 119-120; 128-129)

The Honorable Ernest F. Baldwin, Jr., after adopting the parties stipulated facts granted the respondent, State

Road Commission's Motion for Summary Judgment. The court further dismissed plaintiff's entire Complaint, including the negligence count with prejudice and plaintiff has now appealed.

#### ARGUMENT

##### POINT I

THE COURTS RULING WHICH DISMISSED PLAINTIFF'S COMPLAINT IS CORRECT AND SHOULD BE SUSTAINED.

Each of the parties submitted Motions for Summary Judgment prior to trial based on the question of whether a contract existed between the parties arising out of the Order of Immediate Occupancy of June 7, 1971, and events leading to its entry. The court ruled on this point in favor of respondent, Road Commission, and ordered Judgment of Dismissal against appellants. Respondent submits this Judgment is correct and that same should be sustained.

A. THE COURT'S FINDING THAT THE ATTORNEY GENERAL DOES NOT HAVE THE RIGHT TO BIND THE STATE ROAD COMMISSION TO AN AGREEMENT NOT OTHERWISE BINDING IS CORRECT.

Appellants theory that the negotiating of the terms of the Order of Occupancy of June 7, 1971, created a binding contract, the breach of which gives rise to an action for damages was rejected by the court below. The main reason for the re-

jection of this theory was the holding of the court in the case of State Road Commission v. Bates, 20 U.2d 175, 435 P.2d 417. This case was an action by the State to condemn land for a highway. The landowners had prior to the action conveyed property to the State by deed and alleged that an agent of the State Road Commission promised them that the State would get water to their remaining land since the non-access fence on the right-of-way line cut off their remaining land from the stream where stock could water previously. The State denied the allegation but the court arranged for defendants to repay the money and litigate that issue. They, in fact, did not do so, but the court in commenting about this stated the following:

" . . .

Counsel for the landowners cite as authority for the validity of the claimed promise the first sentence in Section 254, Public Officers, as found in 43 Am.Jur. 71, but neglected to cite other parts in the section. So far as material here, that section reads:

When power or jurisdiction is delegated to any public officer over a subject matter, and its exercise is confided to his discretion, the acts done in the exercise of the authority are, in general,

binding and valid as to the subject matter. The only questions which can arise between an individual and the public or any person denying their validity, are power in the officer and fraud in the party.  
\* \* \* An officer can, however, bind his government only by acts which come within the just exercise of his official powers and within the scope of his authority, unless the government held out the officer as having authority to do the acts. An unauthorized act or declaration of an officer does not estop the government from insisting on its invalidity.  
(emphasis supplied) . . ."

The logical extension of the appellant's argument would be to say that any Order of Immediate Occupancy creates a "contract" and a breach would give rise to a cause of action notwithstanding governmental immunity. For instance assume that the language of the Order of Immediate Occupancy were decided upon between the landowner or his counsel on one hand and the judge on the other, while the condemning agency representative remained silent. Does this create a contract? If so, who is bound by it? A logical extension of plaintiff's theory would say that a contract is created. The absurdity of plaintiff's argument is obvious and should be rejected. Respondent submits that the most obvious reason for concluding that there is not an agreement

is that no matter how much negotiating is done over the language to be submitted to a court for a proposed Order, the court can and frequently does change the language and the final result is a "court order," not an agreement.

To constitute an agreement to fit appellant's theory the respondent supposedly received a benefit of such proportion that it became consideration for an agreement which would not otherwise exist. What was this "benefit?" Supposedly it was the lack of necessity to serve the defendants with process and the resultant ability to proceed with awarding a contract. It is submitted this hardly is a benefit. The contract could have been let with a provision restricting the contractor from working on appellant's property until it was obtained at a later time, so there was little, if any, benefit. The statute allows service on the clerk of the court where the defendants are non-residents also. To say this is sufficient to create a contract with the resulting burden which appellant urges is really difficult, if not down right impossible to accept.

Most contracts are formed because the parties intended to form a contract. There must be present the essentials of a contract such as consideration, mutuality, etc. It is usually for the mutual benefit of the parties. An analysis of the instant case reveals no apparent intention on the part of re-

spondent to "form a contract" and little mutuality. Counsel for the State requested appellant's counsel to accept service, a request which is not uncommon. Appellant's counsel requested modification in the language of the proposed Order of Immediate Occupancy, again not an uncommon request. Assume that the request of respondent's counsel or of appellant's counsel, either one, occurred without the other, would there be an agreement? Does the fact that these independent requests were coincidental constitute an agreement? Respondent submits that the real question is what did the parties intend? Counsel for appellant may have intended this to be a "contract," but such was not the intent of respondent's counsel. Nothing of the sort was discussed at the time and since respondent's counsel cannot intentionally bind the State without authorization, it is inconceivable that he can unintentionally bind the State as would have to be the case in this instance.

B. GOVERNMENTAL IMMUNITY CANNOT BE WAIVED BY  
THE ATTORNEY GENERAL DIRECTLY OR INDIRECTLY  
WITHOUT LEGISLATIVE AUTHORITY.

This court has recently stated that only the legislature can waive sovereign immunity. The case of Bailey Service & Supply Corp. v. State Road Commission, (1975) 533 P.2d 882, wherein the court states the following in commenting on the abortive attempt of the State Road Commission to waive sovereign immunity in that case:



" . . .  
Early in the proceedings the  
State Road Commission entered  
into a stipulation with the  
plaintiff which purported to  
waive governmental immunity.  
The stipulation was disavowed,  
and the State defended on the  
ground that the State was im-  
mune from suit. Only the legis-  
lature can waive sovereign im-  
munity and the Road Commission's  
attempt to do so was without  
legal effect. . . ."  
(emphasis supplied)

If by the simple act of stipulating to alternative language in a proposed Order of Immediate Occupancy an attorney for the Road Commission (now Department of Transportation) can create a contract binding on that agency which has the effect of waiving the cloak of sovereign immunity, then it means an agent can do something the parent agency cannot do. Add to that the fact the agent did not seek or obtain any permission to create a contract and it becomes obvious that it is even more difficult to accept appellant's theory that a contract was created.

The Governmental Immunity Act found in Title 63, Chapter 30, Utah Code Annotated, 1953, and specifically Section 63-30-4, makes the act exclusive as to waiver, that section reads in part as follows:

" . . . wherein immunity from  
suit is waived by this act,  
consent to be sued is granted.  
. . . ."

This court has stated in the case of Hansen v. Barlow, 23 Utah 2d 47, 456 P.2d 177 (1969), the following proposition:

" . . . the Attorney General, in the absence of express legislative restriction to the contrary, may exercise all such power and authority as the public interest may from time to time require. In short, the Attorney General's powers are as broad as the common law unless restricted or modified by statute. . . ."

But for the pre-emption of waiver powers which the legislature obviously intended when they passed the governmental immunity act, supra, the Attorney General under common-law powers could presumably have waived governmental immunity. It logically follows that since the Attorney General cannot directly waive governmental immunity, a waiver cannot be effected indirectly either.

C. THE ROAD COMMISSION (DEPARTMENT OF TRANSPORTATION)  
HAS NOT RATIFIED THE ALLEGED AGREEMENT BY ITS  
ACTIONS.

Appellant argues that respondent, State Road Commission, has "adopted and ratified" the alleged agreement of the parties entered into on June 7, 1971, when the Order of Occupancy was issued by the court.

Respondent denies most vigorously that its actions in response to the Order of Immediate Occupancy amount to a ratifica-

tion of an alleged agreement between the parties. The Order of Immediate Occupancy required the respondent to provide "reasonable access." (R. 5) Respondent's actions were nothing more than an attempt to comply faithfully with the Order of the Court and to require its contractor to comply as well. This is standard practice since those within the Department realize the legal consequence of a denial of access.

The respondent understands the consequences of a failure to comply with the provisions of an Order of Immediate Occupancy. The fact that the taking of or denial of access can result in the payment of substantial damages is reason enough to justify all of respondent, Road Commission's, actions in this case.

Assuming, for the sake of argument, that an agreement was reached between counsel for the parties, and assuming that this was an unauthorized act by an agent of the State in line with the Bates case, supra, and further assuming that ratification of this agreement is not (1) required to obtain occupancy of the property and (2) removes a protection against liability otherwise afforded, is it reasonable to assume that the respondent would act to ratify this so called agreement? The answer has to be an emphatic, No! On the other hand, would it be reasonable to expect the respondent, Road Commission, to react as it did in order to comply with a court order? The answer is obviously, yes.

Respondent submits that the actions it took should be viewed in the light of what is reasonable.

One further comment should be made concerning the word "agreement." Appellant argues that the "agreement" of the parties was admitted in the answer filed by the defendant, State Road Commission. The agreement was as to language in a proposed order to be submitted to the court for review and approval. It is submitted that one can agree without making a "contract." The dictionary defines the word agreement as follows:

"(1)a. The act or fact of agreeing; b. harmony of opinion, action or character: concord; (2)a. an arrangement as to a course of action; b. compact, treaty; (3)a. a contract duly executed and legally binding; b. the language or instrument embodying such a contract." (Webster's Seventh New Collegiate Dictionary)

The parties obviously attach a different meaning to the word "agreement." Appellant construes it as a legally binding contract. The respondent construes it as "an arrangement as to a course of action," to wit, the proposal of language to a court for the creation of and issuance of a court order.

## POINT II

THE STIPULATION OF THE PARTIES AS TO THE LANGUAGE IN A PROPOSED ORDER OF OCCUPANCY DOES NOT CREATE A "CONTRACT" AND IN ANY EVENT, CONSIDERATION IS INADEQUATE.

A. THE TERMS OF AN ORDER OF IMMEDIATE OCCUPANCY  
ARE ULTIMATELY DECIDED BY THE COURT.

Plaintiff's contention is that there is a contract existing between the parties to provide "reasonable access" to plaintiff's property during the course of construction, which is supported by the consideration of plaintiffs agreeing to proceed with the Order of Occupancy without the necessity of serving all the parties personally, in return for the State's agreement to incorporate the suggested language of plaintiff which deals with the question of access. Defendant's position is that there cannot be any "contract" for a number of reasons:

Section 78-34-9 Utah Code Annotated, 1953, states in part:

" . . . Upon the filing of a petition for immediate occupancy the court shall fix the time within which, and the terms upon which, the parties in possession shall be required to surrender possession to the plaintiff.  
 . . . "

Nowhere in the statutes dealing with eminent domain, is there a legal requirement imposed upon a condemning authority to provide access. However, the legal affect of denying access is that the condemning authority must pay damage for the diminished value occasioned by the denial of access.

It has been the custom of the Road Commission to seek an Order "pendente lite" authorizing the Road Commission to enter into possession of the property while the question of damages and/or the value of the taking is reserved for a later proceeding. It has become somewhat customary for courts to grant these orders of occupancy routinely upon the request of the Road Commission and they are seldom contested. The State has a set proposed Order containing standard language previously used and approved by many state courts which is routinely submitted to a court for entry which provides, among other things, for reasonable access. On numerous occasions, when there are special problems or when counsel for defendant landowners request changes, or the court in some instances on its own volition elects to, these orders are changed as far as the language is concerned in various ways. In the case which forms the basis for this suit, a request was made by defendant's counsel of plaintiff's counsel to accept service so that the court could proceed with an immediate hearing, obtain an Order of Occupancy and advertise the project for bid. The routine Order prepared by the State was submitted to plaintiff's counsel for review. Plaintiff's counsel thereupon submitted the Order incorporating the changes which the plaintiff desired. Defendant's counsel reviewed the language contained in the proposed Order prepared by plaintiff's counsel

and approved the entry of said Order upon stipulation, and the court then made it an Order. Defendant does not consider that anything was "given up" as far as the language of the Order of Occupancy is concerned. The Court simply chose to adopt as its Order the agreed language submitted by the parties which amplifies the language already proposed by counsel for the State.

B. THERE WAS INSUFFICIENT CONSIDERATION IN THE  
ALLEGED AGREEMENT OF JUNE 7, 1971, TO BIND  
THE STATE IN ANY EVENT.

The Court found that,

" . . . There was insufficient consideration in the alleged agreement incorporated within the Order of Occupancy of June 7, 1971, to bind the State and thus, constitute a contract, in any event." (R. 131)

The consideration which supposedly supports the agreement between the parties is the acceptance of service in the eminent domain action by counsel for appellants without the necessity of serving the appellants, in return for the alleged concession of the respondent in agreeing to modified language in the Order of Immediate Occupancy.

This "consideration" is illusory for at least three reasons as follows: (1) Neither parties' acts constituted a legal detriment of sufficient proportion to be considered as

the equivalent of a legal consideration. The respondent, State Road Commission, agreed to modified language in a proposed court order not significantly different from that proposed originally. (Compare R. 4-6 with R. 24-26). The appellant allegedly gave up the right to be served with process and allegedly waived objections to the proposed location of the new highway. (R. 76). The fact is that counsel for respondent requested that counsel for appellant accept service of process to enable the hearing on the Order of Immediate Occupancy to proceed. Appellants were never requested to "give up the right to contest the location of the highway" as appellants assert in their brief. (P. 11) This assertion is absolutely untrue and was never the subject of discussion between counsel for the parties. The acceptance of service and a stipulation to permit an Order of Immediate Occupancy to be entered does not waive any rights to contest the location of the highway. It is true that when the appellant later withdrew the money deposited with the clerk pursuant to statute, the appellant then waived all rights to contest the location of the highway and was only entitled to seek compensation for the taking and resulting damages. This, however, is due to the fact that the law so provides, (78-34-9) Utah Code Annotated, 1953, and not because appellant was requested to abandon a legal right. (2) If appellant's assertion is correct, to wit, that



it "gave up certain rights," then the consideration only runs one way since respondent has never asserted or considered that it "gave up anything" in the events leading up to the entry of the Order. (3) How much benefit, if any, did respondent receive? The answer is, virtually nothing; the respondent was excused from having to serve process on defendants residing outside the State. The law, however, in Section 78-34-9, would have allowed the State to serve notice on the clerk of the court and proceed with a hearing after the minimum notice period. Realistically, it is submitted that this is hardly adequate consideration for an agreement with the legal consequences which appellant asserts.

### POINT III

IF A CONTRACT WAS "CREATED" BY THE ORDER, IT IS INCOMPLETE AND APPELLANT'S RELIEF WOULD BE LIMITED AND MAY HAVE BEEN WAIVED.

A. THE ORDER OF IMMEDIATE OCCUPANCY IS INCOMPLETE REGARDING RELIEF FOR VIOLATION OF THE ORDER AND THE AWARD OF MONEY DAMAGES URGED BY APPELLANT IS NOT PROPER.

Assuming for purpose of argument, that a contract was "created" on June 7, 1971, by the events surrounding the entry of the Order of Immediate Occupancy, then the contract is the Order itself.

The Order or "contract" does not provide for an award of money damages in the event it is not complied with by its terms.

The Order of Occupancy, itself, provides for injunctive relief and this is all the relief that plaintiff is entitled to. The court may award damages under a contempt proceeding. Section 78-32-11, Utah Code Annotated 1953, reads as follows:

"If an actual loss or injury to a party in an action or special proceeding, prejudicial to his rights therein, is caused by the contempt, the court, in addition to the fine or imprisonment imposed for the contempt or in place thereof, may order the person proceeded against to pay the party aggrieved a sum of money sufficient to indemnify him and to satisfy his costs and expenses; which order and the acceptance of money under it is a bar to an action by the aggrieved party for such loss and injury."

It would appear from the foregoing Section that the court would be the one to make inquiry as to whether or not there was a contempt within the purview of the Order of Occupancy and if so, award damages if it so determined, however, it would appear that this proceeding would be improper before a jury.

The Order of Immediate Occupancy is further deficient as a "contract" in that no time limits are set regarding when actions must be completed.

B. APPELLANT'S RELIEF, IF ANY, WAS INJUNCTIVE IN NATURE AND WAS WAIVED BY FAILURE TO INSIST ON ENFORCEMENT AT THE TIME OF THE ALLEGED INJURY.

Assuming further for the sake of argument that in addition to the formation of a contract by the events of June 7, 1971, the respondent breached the contract, then pursuant to the terms of the agreement the relief was injunctive in nature.

In analyzing this problem the question arises, when did the breach occur if it, in fact, occurred? The answer is, sometime after August of 1971, when construction commenced and July of 1972, when the frontage road was completed? (R. 60) Since appellant elected to seek relief from this "alleged breach" by contacting the Governor and the Director of the then Department of Highways, rather than seeking injunctive relief as the "agreement" (alleged) provided, they waived any possible right they had for injunctive relief. It is true that an injunction was sought in October of 1972, when appellant filed an Order to Show Cause. (R.94, 95) By stipulation the parties agreed that the allegations raised therein could be heard independently at a future time. (R. 96, 97) This is not an admission by respondent that any rights, in fact, existed.

Respondent submits that the failure of appellant to request injunctive relief at the time of the alleged breach

is in effect a waiver of any right to the protection or relief afforded by a finding of contempt by a court. A subsequent determination by the court that the Order of Immediate Occupancy was breached at a previous time does not entitle the court to award appellant damages when the appropriate relief at the time of the injury would have been to issue an Order to respondent requiring compliance with the previously issued Order of Immediate Occupancy. Only the continued non-compliance of respondent to the court's specific directive would give rise to an award of money damages.

The appellant alleges it was damaged on November 11, 1971, when its insurance was canceled allegedly because of access problems. (R. 22) The fact that nothing was done until October, 1972, when the Order to Show Cause was filed, raises serious question as to the truth or validity of appellant's allegations regarding damages. The fact is the appellant should be estopped from asserting any claim for injunctive relief simply because of this unreasonable delay in enforcing its alleged rights and without a right to secure injunctive relief, damages obviously cannot be awarded.

It is stated in 42 Am. Jur.2d 1108, Section 307 under the title "injunctions" as follows:

" . . . It has been held, however, that after the need for injunctive relief has ceased, the court cannot retain, for the assessment of damages, an action to enjoin the continuance of trespasses and to abate a nuisance causing substantial dam-

age, where the defendant would not be liable for such damages in an action at law." (Citing *Hennessey v. Boston*, 26 Mass. 559, 164 N.E. 470 62 A.L.R. 780)

It is submitted that the same rule should apply in this case and that the appellant should not be permitted to recover damages under an injunctive action filed after the work is completed when the law would not permit him to recover in an action at law.

C. RESPONDENT IS NOT LIABLE TO APPELLANT IN ANY EVENT SINCE UNDER PRINCIPLES OF EMINENT DOMAIN LAW TEMPORARY IMPAIRMENT OF ACCESS IS NOT COMPENSIBLE.

In the eminent domain proceeding involving these parties, the respondent acknowledges the obligation it had to provide appellant with "reasonable access." It is, however, unrealistic to assume that with the amount of construction required that there would not be periods of time when the access would be impaired or somewhat temporary in nature. Respondent and its contractor made every reasonable effort to maintain the access particularly in the early months of the project prior to the time appellant closed its restaurant facility and elected not to open its winter operation. (R. 52) (The restaurant closed when the contractor terminated its operations in the Fall of 1971.)

The law recognizes the fact that some temporary injury may result, but that it is generally not compensable, for in-

stance, the California Supreme Court in the case of People v. Ayon, 352 P.2d 519 (California 1960), stated the general rule regarding this issue and some of the policy reasons for the rule:

"Temporary injury resulting from actual construction of public improvements is generally non compensable. Personal inconvenience, annoyance or discomfort in the use of property are not actionable types of injuries. It would unduly hinder and delay or even prevent the construction of public improvements to hold compensable every item of inconvenience or interference attendant upon the ownership of private real property because of the presence of machinery, materials and supplies necessary for the public work which have been placed on streets adjacent to the improvement."  
(Page 525)

It should be noted that in the Ayon case there was a taking of a portion of defendant's property and the defendants were attempting to recover additional damages as a result of inconvenience during construction.

Other cases which have generally reached the same conclusion are the following:

Commonwealth Department of Highways v. Ray, 392 S.W.2d 665 (Ky. 1965)

Rymkevitch v. State, 249 N.Y.S. 2d 514 (Court of Claims 1964)

Frankline Gas Company v. O'Brien, 171 N.E.2d 45 (Ill. 1961), wherein the court stated the following:

". . . defendant's witnesses conceded that the interference is tempor-

ary and, this being so, would not have the effect of permanently depreciating the value of the land not taken. It has long been settled that temporary consequential interference with the use of property occasioned by the construction of a public improvement is not a proper element of damage."

Other cases are:

Liebarger v. State Department of Roads, 128 N.W.2d 132 (Neb. 1964)

Masheter v. Yate, 224 N.E.2d 540 (Ohio 1967)

In effect, plaintiff is seeking to recover damages under his "contract theory" when the law would otherwise deny him recovery. Most of the cases which have been decided in this area recognize that often there are very real and substantial damages and Nichols on Eminent Domain states the following:

"This rule is hard to defend on principle. But the impossibility of constructing a subway or sewer or laying a water pipe in the streets of the business section of a city without in some degree interfering with access to abutting property, and the consequent danger of a multiplicity of suits from the determination of which it might be impossible as a practical matter to exclude mere damage to business, have led the courts to reject claims of this character as a matter of public necessity."  
(2-a Nichols Eminent Domain Section 6.4442(2) revised 3rd Edition 1975)

POINT IV

THE COURT CORRECTLY DISMISSED PLAINTIFF'S COMPLAINT  
AS TO OTHER MATTERS.

A. RESPONDENT'S WRONGFUL ACTS, IF ANY, DO NOT  
CONSTITUTE A WAIVER OF IMMUNITY UNDER THE  
SECTION OF THE ACT WHICH DEALS WITH UNSAFE  
OR DANGEROUS HIGHWAYS.

Appellant's second count in its Complaint alleged  
that respondent, Road Commission, created a "defective, un-  
safe and dangerous condition of a highway, structure and other  
public improvemt" all to the plaintiff's damage, it relies on  
Section 63-30-8, and language therein as authority for the  
non-application of governmental immunity.

Respondent submits that the court correctly dismissed  
this count along with the contractual theory urged by appel-  
lant. Respondent submits that the record has several refer-  
ences in it to inadequate "commercial access" according to  
appellants. (R. 48 - R. 50). Even respondent's Director,  
Blaine J. Kay, recognized this problem and directed corrective  
action on November 10, 1971. (R. 51) This corrective action  
was completed on November 15, 1971. (R. 60) Appellants do  
not spell out what the "defective, unsafe or dangerous con-  
dition" is which the State has allegedly created.

In any event, at the time appellant originated the Order  
to Show Cause against respondent for alleged failure to comply



with the Order of Immediate Occupancy, the access was completed and obviously complied with the Order of Immediate Occupancy. If appellant means the lack of deceleration lanes, left turn storage lane and other things relating to the highway itself which he requested, it is respectfully submitted that appellant knew when he wrote his letters of March 23, 1971, (R. 36-38) and May 29, 1971, (R. 39, 40) what would be constructed and how traffic would be handled and that these requests could not be accommodated. The record reveals that while there may have been temporary problems during the construction of the frontage road prior to its use as a detour, there is no showing that the completed frontage road, or accesses to appellant's property were "defective, unsafe or a dangerous condition."

Furthermore, if the damage which appellant allegedly sustained is due to impairment of access, this is not compensable. (See statement from People v. Ayon, Supra, Page 24.)

It is respectfully submitted that if there are damages as a result of the access questions, they originate from allegedly inadequate access for a commercial enterprise which is reliant on convenience. They are not the result of a "defective, unsafe or dangerous condition." If the condition ever, in fact, did exist, it was the result of a temporary condition which was unavoidable and which was adequately corrected on November 15, 1971. This temporary situation was one not unique to appellant, but was suffered by other prop-

erty owners in the vicinity. The courts have held as a general rule that damage suffered by a property owner must be special and unique to him and not a damage or inconvenience suffered by all residents in the area. In the case of Liebarger v. State Department of Roads, 128 N.W.2d 132 (Neb. 1964), the court stated:

"In the present cause the plaintiffs seek to recover for the temporary presence of road working machinery and rubble which is to take place after condemnation the land of the State and which arises during the construction of the improvement only. The locality in which this highway is to go is shown by plats and aerial photographs herein to be in the thickly populated urban area. The temporary inconvenience complained of is one common to all residents and occupants of the vicinity. Evidence of such elements of damages borne in common by the neighborhood should not be admitted upon retrial."  
(Emphasis added)

Another court has summed up the law on this point in the case of Masheter v. Yake, 224 N.E.2d 540 at 543 (Ohio 1967), wherein the court states the following:

"Unless unduly prolonged, mere elements of annoyance, noise, inconvenience and interference of temporary duration during the construction of an improvement and common to the public are not recoverable as

damages in an appropriation action. (Citations omitted) Not being permanent in nature they do not last beyond the completion of the improvement, have no effect on the market value of the property before the improvement, and have no effect upon the market value of the residue thereafter, which market values provide the outside limits of recovery."

As this court well knows, loss of business profits are not compensable in an eminent domain proceeding. Likewise certain items of damage are not compensable in a condemnation case. The court in Kentucky had the following comment in the case of Commonwealth Department of Highways v. Ray, 392 S.W.2d 666 (Ky. 1965):

" . . .  
To reach the heart of the problem, we can catalogue items of damage to which the landowner is not entitled. The interference with the owner's resulting from the reasonable construction operations, is not a compensable item." (Emphasis added)

Appellant was paid in excess of \$211,000, in the condemnation action. (R. 61) This included compensation for land, improvements and damages. He now is seeking a way around governmental immunity to recover damages in areas which he could not recover for under eminent domain, to wit, "interference from reasonable construction operations," "temporary impairment of

access" and "loss of business profits." This is so evident on its fact that the court quite properly dismissed this count of plaintiff's Complaint.

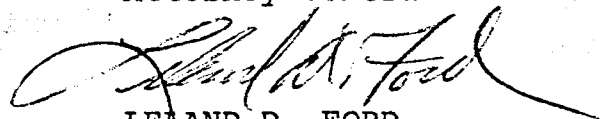
#### CONCLUSION

It is respectfully submitted that the decision of the trial court to grant respondent's Motion to Dismiss was and is correct. The respondent, State Road Commission, is not bound by unauthorized acts of its employees or agents. The State's sovereign immunity is waived in certain defined instances pursuant to the act of the legislature, and the Attorney General cannot waive this protection. It cannot be waived other than by the provisions of the act. The respondent did not act to waive sovereign immunity and no request was made by its attorney to waive the act or to obtain permission to bind the respondent to an agreement or "contract." It is further submitted that an agreement between counsel as to the language of a proposed Order to be submitted to the court for review and for incorporation in an Order of the court does not create a "contract." It is also respectfully submitted that if the actions of respondent's counsel did create a contract, then the consideration is inadequate to support the so called contract. Finally, it is submitted that the access which existed and which now exists across appellant's property is adequate and at no time

could be construed as a "dangerous or defective" condition within the meaning and intent of the governmental immunity act sufficient to remove the protection of sovereign immunity. For all the foregoing reasons, it is respectfully submitted that the decision of the trial court should be affirmed.

Respectfully submitted,

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