2010

Department of Transportation v. James Ivers, Katherine G Havas and P and Food Services: Reply Brief

Utah Supreme Court

Donald J. Winder; John W. Holt; Winder and Counsel, P.C.; Attorneys for Defendants/Appellants.
Brent A. Burnett; Mark L. Shurtleff; Attorney General\'s Office; Attorneys for Plaintiff/Appellee.
James Ivers, Defendant
Katherine G Havas, Defendant
P and F Food Services, Defendant
Utah Department of Transportation, Plaintiff

IN THE UTAH SUPREME COURT

JAMES IVERS; KATHERINE G. HAVAS; and P and F FOOD SERVICES (Tenant), Defendants/Appellants, vs. UTAH DEPARTMENT OF TRANSPORTATION, Plaintiff/Appellee.	Supreme Court Case No. 20100511

APPELLANTS' REPLY BRIEF

BRENT A. BURNETT #4003
MARK L. SHURTLEFF #4666
ATTORNEY GENERAL'S OFFICE
160 East 300 South, Fifth Floor
PO Box 140858
Salt Lake City, Utah 84114-0858

Attorneys for Plaintiff/Appellee

DONALD J. WINDER #3519
JOHN W. HOLT #5720
WINDER & COUNSEL, P.C.
460 South 400 East
Salt Lake City, Utah 84111

Attorneys for Defendants/Appellants

IN THE UTAH SUPREME COURT

JAMES IVERS; KATHERINE G. HAVAS; and P and F FOOD SERVICES (Tenant), Defendants/Appellants, vs. UTAH DEPARTMENT OF TRANSPORTATION, Plaintiff/Appellee.	Supreme Court Case No. 20100511

APPELLANTS' REPLY BRIEF

BRENT A, BURNETT #4003
MARK L. SHURTLEFF #4666
ATTORNEY GENERAL'S OFFICE
160 East 300 South, Fifth Floor
PO Box 140858
Salt Lake City, Utah 84114-0858

Attorneys for Plaintiff/Appellee

DONALD J. WINDER #3519
JOHN W. HOLT #5720
WINDER & COUNSEL, P.C.
460 South 400 East
Salt Lake City, Utah 84111

Attorneys for Defendants/Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

INTRODUCTION

Arby's has a constitutional right to just compensation for the government's taking of its real property. Despite its rights, Arby's has been continually denied severance damages. Because *Utah Dept. of Transp. v. Admiral Beverage Corp.*, 275 P.3d 208 (Utah 2011) ("*Admiral Beverage*") overturned the prior ruling in this case and determined *Ivers I* was wrongly decided, the jury verdict in this case should be reversed and remanded so that Arby's can seek its remedy under the appropriate standards as set forth in *Admiral Beverage*.

RESPONSE TO UDOT'S STATEMENT OF FACTS

UDOT has not contested any of the fact statements Arby's set forth in support of this appeal.

ARBY'S STATEMENT OF ADDITIONAL FACTS

Arby's sets forth the following additional facts in support of its appeal.

1. On or about March 13, 2003, UDOT filed its Motion in Limine. R. at 42-67. UDOT's Motion in Limine sought to preclude Arby's from having any experts testify on Arby's behalf at trial about severance damages. *Id.* at 44.

2. On or about March 31, 2003, Arby's filed its Memorandum in Opposition to UDOT's Motion in Limine and in Support of its Motion for Partial Summary Judgment. R. at 71-124.

3. On or about May 22, 2003, the district court entered its Order granting UDOT's Motion in Limine and denying Arby's Motion for Partial Summary Judgment.

R. at 150-161. The district court's Order precluded Arby's from seeking any severance damages.

4. So that Arby's could commence an appeal, the district court certified its Order as final on November 10, 2003. R. at 196-97.

5. After the Order was certified as final, Arby's filed its first Notice of Appeal on December 1, 2003. R. at 212-13.

6. On April 29, 2004, the Utah Court of Appeals issued a Memorandum Decision holding the district court's Order was not final and appealable. R. at 220-27.

7. On February 17, 2005, the parties filed their Stipulation for Judgment. R. at 238-42. A copy of the Stipulation for Judgment is attached hereto for convenience as Addendum A.

8. Pursuant to the Stipulation for Judgment, which allowed UDOT to condemn the property it needed from Arby's for the subject construction project, the sum of $104,500.00 was paid, including UDOT's initial deposit of $48,250.00 and an additional sum of $56,250.00. *Id.* at 239.

9. Paragraph 8 of the Stipulation for Judgment states as follows:

> Defendants, by entering into this stipulation, do not intend to waive, and expressly reserve, the right to appeal issues raised in the May 22, 2004 ruling issued by Judge Allphin in connection with UDOT's Motion in Limini [sic] and Defendants' Motion for Partial Summary Judgment.

10. Pursuant to the Stipulation for Judgment, the Final Order of Condemnation was entered on March 2, 2005. R. at 247-50.

11. On March 8, 2005, Arby's filed a new Notice of Appeal. R. at 252-53.

12. The Utah Court of Appeals affirmed the district court's May 22, 2003 Order preventing Arby's from pursuing its claim for severance damages. The court of appeal's opinion is set forth at *Utah Dept. of Transp. v. Ivers*, 128 P.3d 74 (Utah Ct. App. 2005).

13. Arby's petitioned the Utah Supreme Court for a writ of certiorari. Arby's Petition was granted.

14. Upon granting certiorari, this Court limited the issues for review as follows:

> Whether article I, section 22 of the Utah Constitution permits claims for compensation, and Utah Code Ann. § 78-34-10 permits presentation of evidence of damages, arising from an alleged easement for view or visibility, where the damages to the alleged easement are caused by construction beyond the boundaries of the landowner's property.

A copy of the Supreme Court's April 5, 2006 Order is attached hereto for convenience as Addendum B.

SUMMARY OF ARBY'S REPLY

UDOT's Brief fails to oppose Arby's primary argument concerning the impact *Admiral Beverage* has on this appeal. In fact, UDOT concedes *Admiral Beverage* impacts this appeal by stating that because *Ivers I* has been partially overruled, Arby's is now entitled to appropriate damages, if any, for *loss of visibility*. While admitting the impact of *Ivers I's* reversal, UDOT's position that the issue of visibility can be segregated from the severance damages analysis remains contrary to the *Admiral Beverage's* holding. In *Admiral Beverage*, this Court called *Ivers I's* approach of attempting to segregate and apportion market value based upon artificial distinctions between

protectable and non-protectable property rights inconsistent with the law and unworkable. *Admiral Beverage, Corp* 275 P.3d at 208, 211 & 214 (Utah 2011).

In a further attempt to deny Arby's from recovering severance damages, UDOT relies primarily upon an argument that Arby's has already been compensated for its severance damages except for those damages attributed to loss of visibility. This argument conveniently ignores the history of this case and does not accurately reflect the record, including the express language of the Stipulation for Judgment under which Arby's reserved all of its rights as impacted by the district court's denial of severance damages.

UDOT has failed to acknowledge Arby's claims that the jury instructions given in this case were confusing and inconsistent because of their attempt to reflect the holding of *Ivers I*. Arby's has pointed out the problematic instructions and described their inconsistencies and the confusion they caused. UDOT has not rebutted this analysis.

Finally, UDOT's appraiser, based upon the authority of *Ivers I*, testified there was no value for loss of view. Arby's submits the expert relied upon inappropriate material to render such an opinion, while at the same time acknowledging Arby's sustained at least a partial loss of view. In any event, the expert's conclusion is invalid under *Admiral Beverage* because he attempted to isolate and value the impact of one factor rather than testify about the decrease in fair market value of the remnant property caused by the taking.

ARGUMENT

POINT 1

UDOT FAILS TO CONTEST *ADMIRAL BEVERAGE'S* IMPACT ON THIS APPEAL

Arby's primary argument for reversal is that while this appeal was pending, this Court decided *Admiral Beverage*. Through *Admiral Beverage,* this Court reversed the prior ruling in this very case (*Ivers I*), which was the law upon which this matter was tried before a jury in the district court during April 2010. Arby's contends the reversal of *Ivers I* during the pendency of this case justifies a reversal of the verdict, which was based upon jury instructions and testimony from expert witnesses reflecting the wrongfully-decided *Ivers I* appeal.

Rather than providing any authority that the *Admiral Beverage* ruling should not result in a reversal, UDOT acknowledges that "given the partial overruling of *Ivers I*, the defendants are now also entitled to an award of appropriate damages, if any, suffered by their loss of visibility." Appellee's Brief at p. 10. However, UDOT's suggestion that Arby's is only entitled to a claim for loss of visibility harkens back to *Ivers I's* mistaken approach of segregating and apportioning market value based upon artificial distinctions between protectable and non-protectable property rights, which has now been reversed. This Court described the method of isolating and valuing factors separately as "too restrictive" and "unworkable in practice." *Admiral Beverage*, 275 P.3d at 211 & 214. According to this Court, *Ivers I* was "an aberration" contrary to a long line of precedent concerning how severance damages are to be measured. *Id.* at 214.

Arby's is entitled to seek an award of its severance damages under the ruling in *Admiral Beverage*.

POINT 2

ARBY'S DID NOT WAIVE ANY CLAIM FOR SEVERANCE DAMAGES

UDOT relies heavily upon its argument that the parties reached a settlement in 2005 that compensated Arby's for its severance damages, except for loss of visibility. This argument ignores history and is not an accurate representation of the record in this case. Therefore, UDOT's argument should be disregarded.

As has been well-documented in the prior appeals, *Ivers I* arose from the district court's May 22, 2003 Order, granting UDOT's Motion in Limine to preclude Arby's from putting on evidence of severance damages. R. at 150-161. The district court's ruling was based upon the causation analysis set forth in *State v. Harvey Real Estate*, 57 P.3d 1088 (Utah 2002), which UDOT relied upon in its attempt to convince the district court that Arby's should not be allowed to put on any evidence of severance damages.

Prior to the district court's ruling, Arby's had filed an answer asserting affirmative defenses based upon its right to severance damages. R. at 23-26. Additionally, in response to UDOT's Motion in Limine, Arby's filed a Motion for Partial Judgment distinguishing the *Harvey Real Estate* case and reasserting its right to severance damages generally by showing that the subject construction project, which required the condemnation of a portion of Arby's property, impacted numerous elements relevant to property value including access, traffic flows, view and visibility, zoning compliance, etc.

R. at 68-87. Arby's Motion also reiterated that a nexus between the taking and the construction project was established. R. at 71-87 and 136-143. However, the district court disagreed.

With the district court's ruling that there was no causal nexus, Arby's was precluded from pursuing its claim for severance damages. Therefore, Arby's sought to have the ruling certified as final so that it could appeal. The district court certified the ruling and Arby's filed its Notice of Appeal. However, the Utah Court of Appeals issued a Memorandum Decision that the district court's Order was not final and appealable. Following that ruling, the parties executed a Stipulation for Judgment, allowing UDOT to condemn the portion of Arby's property it needed for the construction project. Based upon the Stipulation for Judgment, the district court entered its Final Order of Condemnation. R. at 247-251. This allowed Arby's to appeal a final order and seek to have the district court's ruling precluding severance damages reversed. The Utah Court of Appeals eventually heard Arby's appeal and, relying heavily upon *Harvey Real Estate*, upheld the district court's Order granting UDOT's Motion in Limine.

UDOT's Opposition Brief in the present appeal fails to acknowledge that the Stipulation for Judgment was entered into so that UDOT could acquire the property it needed for its expansion and elevation of Highway 89 and so that Arby's could file its appeal. Pursuant to the Stipulation for Judgment, the parties did not agree that amounts UDOT paid to Arby's were compensation for severance damages except for loss of view and visibility. "Just compensation" was paid with respect to the parcel sought to be

acquired pursuant to the Complaint. *See* Addendum A hereto. The language of the Stipulation for Judgment, which is ignored in the Brief of Appellee, expressly reserved Arby's rights to seek severances damages following the district court's ruling, setting up Arby's appeal:

> Defendants, by entering into this stipulation, do not intend to waive, and expressly reserve, the right to appeal issues raised in the May 22, 2004 ruling issued by Judge Allphin in connection with UDOT's Motion in Limini [sic] and Defendants' Motion for Summary Judgment.

After the Utah Court of Appeals upheld the district court's ruling on the Motion in Limine, Arby's petitioned this Court for writ of certiorari. The Court granted Arby's Petition on a very limited basis. In this Court's Order of April 5, 2006, the issue was limited as follows:

> Whether article I, Section 22 of the Utah Constitution permits claims for compensation, and Utah Code Ann. § 78-34-10 permits presentation of evidence of damages arising from an alleged easement for view or visibility, where damages to the alleged easement are caused by construction beyond, the boundaries of the landowner's property.

Addendum B hereto.

Because of the narrow scope of this Court's April 5, 2006 Order, *Ivers I* turned into a case about isolating and valuing loss of view and visibility rather than whether the district court and the court of appeals had decided correctly regarding causation.[1] As this

---

[1] *Admiral Beverage* did not reverse the portion of *Ivers I* concerning causation. Severance damages are appropriate "when land is condemned as part of a single project – even if the view-impairing structure itself is built on property other than that which was condemned – if the use of the condemned property is essential to completion of the project as a whole." 275 P.3d at 213 (quoting *Ivers I,* 154 P.3d 802, 807 (Utah 2007)).

Court acknowledged in *Admiral Beverage*, *Ivers I* was wrongly decided and was inconsistent with years of precedent concerning how fair market value of real property is to be assessed. *Admiral Beverage*, 275 P.3d at 216.

UDOT now criticizes Arby's for never attempting to attack the Stipulation for Judgment because of its alleged limitation upon Arby's rights. This criticism makes no sense when it is understood the Stipulation for Judgment was entered long before the appellate courts turned Arby's severance damages claim into a futile exercise of segregating and attempting to value specific factors such as view and visibility. Additionally, as described hereinabove, the language of the Stipulation for Judgment expressly reserves all of Arby's rights to challenge the district court's Order foreclosing Arby's severance damages claim under *Harvey Real Estate*.[2] In light of the express language of the Stipulation for Judgement, UDOT cannot argue Arby's waived its rights.

Based upon the foregoing, UDOT cannot ignore the procedural history of this case, rely upon selective portions of the Stipulation of Judgment taken out of context, and

[2] UDOT inaccurately quotes footnote 2 in the *Ivers I* opinion. That footnote does not say Arby's was compensated for all severance damages other than view and visibility. The Utah Supreme Court's decision to limit its review in *Ivers I* to whether view and visibility were compensable came long after the Stipulation for Judgment, which reserved generally Arby's severance damages claim.

argue Arby's should not be allowed to pursue severance damages under the law as set forth in *Admiral Beverage.*[3]

POINT 3

UDOT HAS NOT REBUTTED ARBY'S CLAIMS CONCERNING JURY INSTRUCTIONS

Without analysis, UDOT claims Arby's has failed to show that taken as a whole, the jury instructions did not fairly instruct the jury. This is not correct.

Arby's Opening Brief identifies seven substantive jury instructions having to do with loss of view and valuation. Point 2 of Arby's Opening Brief describes how the jury instructions were confusing and inconsistent. Moreover, in light of the *Admiral Beverage* ruling, the instructions were wrong. UDOT has done nothing to refute Arby's analysis other than to disagree with it and claim that under *Jensen v. Intermountain Power Agency,* 977 P.2d 474 (Utah 1999), the jury instructions made sense if taken as a whole. UDOT's Brief specifically addresses none of the jury instructions pointed out by Arby's.

The only instruction UDOT addresses specifically is Jury Instruction No. 48 having to do with the compensation it previously paid to Arby's. However, UDOT's representation of that jury instruction is inaccurate. Jury Instruction No. 48 *did not* inform the jury that Arby's had already been compensated for severance damages except for loss of view. Rather, it informed the jury that the "parties have reached agreement on

---

[3]For the sake of argument, even if part of the compensation UDOT paid to Arby's for the taking was a partial payment of severance damages, any concern regarding double recovery could be managed by the district court by crediting the damages award by the amount UDOT allegedly paid for severance damage. It would be contrary to *Admiral Beverage* to remand this case for a trial concerning loss of visibility.

the fair market value of the property taken for the highway construction" and, consistent with the law as set forth in *Ivers I*, that the purpose of trial was to establish whether further damages should be awarded for the value of loss of view. R. at 814. Because of *Ivers I*, Arby's was not permitted to seek severance damages under the traditional analysis as reiterated in *Admiral Beverage*. Therefore, the jury instructions in this case could only reference severance damages based upon loss of view and they were entirely confusing in instructing the jury on how the valuation was to occur.[4]

POINT 4

UDOT'S EXPERT SHOULD NOT HAVE BEEN PERMITTED TO OPINE ARBY'S SUFFERED NO DAMAGES AS A RESULT OF LOSS OF VIEW

Trial in this matter essentially boiled down to the proverbial battle of the experts. The trial was limited to the amount of damages resulting from loss of view. UDOT's witness was Philip Cook, an appraiser. Mr. Cook testified at trial that Arby's suffered absolutely no damage as a result of the loss of view from the property. *See* Philip Cook's trial testimony at pp. 41 and 45 (excerpts of Mr. Cook's testimony are attached hereto as Addendum C). Mr. Cook conceded there was at least a partial view impairment (*id.* at p. 46), but he would not even allow room for an award of nominal damages. Mr. Cook also

[4] UDOT attacks Arby's for not objecting to the jury instructions at trial, and argues that without objecting, Arby's cannot claim on appeal that they were improper. This argument must be rejected. The jury instructions were based upon this Court's decision in *Ivers I* and its mandate. Attempting to challenge the instructions and seeking to have the district court give instructions based upon something other than *Ivers I* would have been futile. *See State v. Rothlisberger,* 95 P. 3d 1193, 1202 (Utah Ct. App. 2004) (parties are not required to make futile objections to preserve a future claim).

testified his appraisal was governed by his understanding of this Court's ruling in *Ivers I*. *Id.* at 207. He acknowledged the difficultly in attempting to isolate loss of view for purposes of conducting an appraisal. *Id.* at 211.[5] Arby's suggests Mr. Cook's opinion that Arby's sustained no damages only confirms the un-workability of the *Ivers I* analysis for measuring severance damages.

Clearly, if Mr. Cook had been precluded from relying upon hearsay and mostly anecdotal evidence, UDOT would have had no evidence to support its claim that Arby's suffered no damage, despite its admitted loss of view. The basis for Mr. Cook's opinions should have been rejected in advance of trial by the district court. Mr. Cook admittedly took information from owners of irrelevant commercial properties that their customers had never complained about a loss of view, then extrapolated from that information that loss of view causes no damage to properties like the one at issue in this case. Such hearsay evidence from non-experts should not have been permitted to supported Mr. Cook's otherwise empty opinion that Arby's sustained not one cent of damages for loss of view.

[5] Arby's expert, Gary Free, also characterized the task of attempting to isolate loss of view as "an impossible concept" and "not in the real world." *See* Gary Free's trial testimony at pp. 34 and 59 (excerpts of Gary Free's trial testimony are attached hereto as Addendum D).

CONCLUSION

Based upon the foregoing, the Court should grant Arby's appeal.

DATED this 30th day of August, 2012.

WINDER & COUNSEL, P.C.

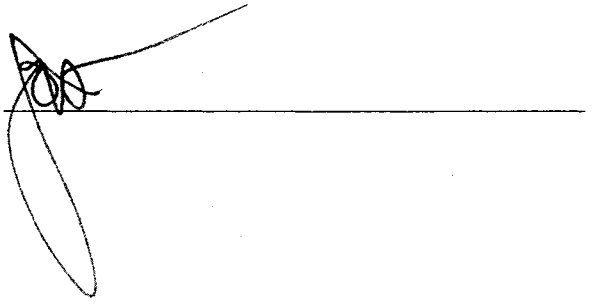
Donald J. Winder
John W. Holt
Attorneys for Defendants/Appellants

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of August 2012, I caused a true and correct copy of the foregoing document to be served on the following:

BRENT A, BURNETT
MARK L. SHURTLEFF
ATTORNEY GENERAL'S OFFICE
160 East 300 South, Fifth Floor
PO Box 140858
Salt Lake City, Utah 84114-0858

(x) U.S. Mail, Postage Prepaid
( ) Hand Delivered
( ) Overnight Mail
( ) Facsimile
( ) Email



Form 17. Certificate of Compliance With Rule 24(f)(1)

Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Utah R. App. P.24(f)(1) because:

☒ this brief contains 3,313 words, excluding the parts of the brief exempted by Utah R. App. P.24(f)(1)(B), or

☐ this brief uses a monospaced typeface and contains [*state the number of*] lines of text, excluding the parts of the brief exempted by Utah R. App. P.24(f)(1)(B).

2. This brief complies with the typeface requirements of Utah R. App. P.27(b) because:

☒ this brief has been prepared in a proportionally spaced typeface using _____ Microsoft Office Word 2007 in 13 pt. Times New Roman, or

☐ this brief has been prepared in a monospaced typeface using [*state name and version of word processing program*] *with [state name of characters per inch and name of type style].*

Attorney's or Party's Name

Dated: 8/30/12

ADDENDUM

ADDENDUM A

STEPHEN C. WARD (#3384)
Assistant Attorney General
MARK L. SHURTLEFF (#4666)
Attorney General
Attorneys for Plaintiff
160 East 300 South, 5th Floor
PO Box 140857
Salt Lake City, Utah 84114-0857
Telephone: (801) 366-0353

IN THE SECOND JUDICIAL DISTRICT COURT IN AND FOR

DAVIS COUNTY STATE OF UTAH

UTAH DEPARTMENT OF TRANSPORTATION, Plaintiff, vs. JAMES IVERS; KATHERINE G. HAVAS, P and F FOOD SERVICES (Tenant); and ZIONS CREDIT CORPORATION, Defendants.	**STIPULATION FOR JUDGMENT** Civil No. 020700665 Judge Michael Allphin

The parties in the matter above-entitled, the Plaintiff Utah Department of Transportation ("UDOT") through its attorney, Stephen C. Ward, Assistant Attorney General, and the Defendants, James Ivers, Katherine G. Havas, P and F Food Services through their attorney Donald J. Winder (Zions Credit Corporation did not file an answer, and its name will not appear as a payee on the final settlement check), and with respect to the issues in this case now pending before the Court, agree and stipulate as follows:

1. UDOT has heretofore filed its Complaint to acquire, by eminent domain, the property and property interest of these Defendants located in Davis County, State of Utah, said property being more particularly described in said Complaint here on file as Parcel Nos. 269:A and 269:E.

2. UDOT has the right to condemn and acquire the property and property interest of these Defendants in said parcel for a public use.

3. The use to which the condemned premises herein is to be placed by UDOT is public in nature and the court previously entered an order of immediate occupancy.

4. Just compensation is due from UDOT to these Defendants for the acquisition of their interest in the property condemned by UDOT herein and for such damages to other property as may be recoverable under law by virtue of the acquisition as defined in the Complaint.

5. Just compensation for the interest of these Defendants in the condemned premises is the sum of $104,500, and of that sum, UDOT has previously paid these Defendants the amount of $48,250.

6. The Court may enter its Judgment in favor of these Defendants and against the Plaintiff for the sum of $104,500 less the deposit of $48,250 heretofore paid to these Defendants, for an unpaid balance of $56,250, which is the total amount remaining.

7. Upon payment to these Defendants of the foregoing amount, it is further stipulated and agreed that UDOT will be entitled to a Satisfaction of Judgment and that the Court shall enter a Judgment and Final Order of Condemnation vesting in UDOT the fee simple interest of Defendants in and to the property more particularly described in the Complaint here on file as

Parcel No. 269:A and easement interests upon Defendants' remaining property identified as Parcel No. 269:E.

8. Defendants, by entering into this stipulation, do not intend to waive, and expressly reserve, the right to appeal issues raised in the May 22, 2003 ruling issued by Judge Allphin in connection with UDOT's Motion in Limini and Defendants' Motion for Partial Summary Judgment.

9. Based upon this stipulation and the trial court's May 22, 2003 ruling, no triable issues remain in this matter.

10. The parties have agreed this Stipulation is contingent upon the Defendants being allowed a sign advertising their business on both the north and south off-ramps. The parties agree that such a sign can be installed.

11. The parties agree that a Final Order will be issued in this case and will be recorded. The foregoing will not affect Defendants' right to appeal Judge Allphin's May 22, 2003 ruling.

DATED this 16 day of February, 2005.

MARK L. SHURTLEFF
Attorney General

STEPHEN C. WARD
Assistant Attorney General
Attorneys for Plaintiff

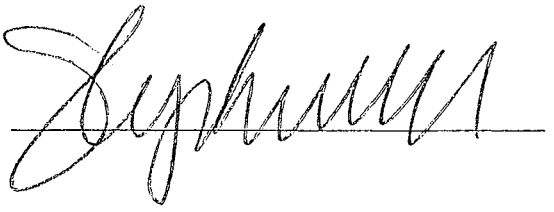
DATED this 16th day of February, 2005.

DONALD J. WINDER
WINDER & HASLAM, P.C.
Attorneys for James Ivers, Katherine G. Havas and P&F Food Services

CERTIFICATE OF SERVICE

I hereby certify that on the 10 day of January, 2005, a true and correct copy of the foregoing document was sent via U.S. Mail, postage prepaid, to the following:

Donald J. Winder
John W. Holt
WINDER & HASLAM, P.C.
175 West 200 South, #4000
Salt Lake City, Utah 84101



ADDENDUM B

IN THE SUPREME COURT OF THE STATE OF UTAH
--ooOoo--

James Ivers, Katherine G. Havas,
and P ad F Food Services,

Petitioners,

v.

Case No. 20060061-SC
20050246-CA

Utah Department of Tranportation,

Respondent.

ORDER

This matter is before the court upon a Petition for Writ of Certiorari, filed on January 20, 2006.

IT IS HEREBY ORDERED pursuant to Rule 45 Utah Rules of Appellate Procedure, the Petition for Writ of Certiorari is granted only as to the following issue:

Whether article I, section 22 of the Utah Constitution permits claims for compensation, and Utah Code Ann. § 78-34-10 permits presentation of evidence of damages, arising from an alleged easement for view or visibility, where the damages to the alleged easement are caused by construction beyond the boundaries of the landowner's property.

A briefing schedule will be established hereafter. Pursuant to rule 2, the court suspends the provision of rule 26(a) that permits the parties to stipulate to an extension of time to submit their briefs on the merits. The parties shall not be permitted to stipulate to an extension. Additionally, absent extraordinary circumstances, no extensions will be granted by motion. The parties shall comply with the briefing schedule upon its issuance.

For The Court:

Date April 5, 2006

Christine M. Durham
Chief Justice

ADDENDUM C

IN THE SECOND JUDICIAL DISTRICT COURT
OF DAVIS COUNTY, STATE OF UTAH

ORIGINAL

UTAH DEPARTMENT OF TRANSPORTATION, Plaintiff, vs. JAMES IVERS, Defendant.	Case No. 020700665

Trial Testimony of Phillip Cook
Electronically Recorded on
April 15, 2010

BEFORE: THE HONORABLE MICHAEL G. ALLPHIN
Second District Court Judge

APPEARANCES

For the State:

Randy S. Hunter
Mark E. Burns
ASSISTANT ATTORNEYS GENERAL
160 East 300 South
Fifth Floor
Salt Lake City, Utah 84111
Telephone: (801)366-0953

For the Defendant:

Donald J. Winder
John W. Holt
WINDER LAW FIRM
175 West 200 South
Suite 4000
Salt Lake City, Utah 84111
Telephone: (801)322-2222

Transcribed by: Wendy Haws, CCT

1771 South California Avenue
Provo, Utah 84606
Telephone: (801) 377-2927

Q. Why is this data collection process so important to an MAI appraiser?

A. You know, appraisers are paid for their opinions, but their opinions are only as good as the data on which they base their opinion. We have a standards obligation, an ethical obligation to provide appraisal work in a non --

Q. Want to pull the microphone back towards --

A. -- in a non-misleading way, and to prove our -- prove our opinions. Not just to pull something out of the air, but to actually prove our opinions. Even though there's a lot of anecdotal evidence clearly suggesting that view out is not something these fast food operators particularly care about, we need to go to the market to confirm that.

Q. So you didn't rely on this anecdotal evidence in forming your opinions?

A. Well, I certainly considered it, but it wasn't my sole reliance.

Q. Okay, so what's the bottom line from your case studies?

A. That I cannot is -- I cannot find in the marketplace where this changed the subject's situation, specifically related to view, disregarding visibility, disregarding accessibility, disregarding construction nuisance, which I can't take into account, according to the Supreme Court, that just this view impairment has no impact on market value.

A. I did.

Q. You obtained anecdotal evidence --

A. Yes.

Q. -- from market participants; and based upon that effort, that research, what was your conclusion?

A. I couldn't isolate or prove or identify any value, loss or value diminution related to this partial view impairment out to the east, or this fast food restaurant property.

MR. HUNTER: Thank you. Your Honor, might I approach for a moment?

THE COURT: Please.

(Discussion at the bench off the record)

Q. BY MR. HUNTER: So just to conclude, it is your professional opinion that the view out from the Arby's restaurant has no monetary value?

A. Correct.

Q. Thank you. If you can stay, because we're going to need to review some of these, if that's okay?

A. I guess so.

Q. I don't know how you got that set up. All right, thank you. Thank you.

CROSS EXAMINATION

BY MR. WINDER:

Q. Good morning, Mr. Cook.

A. Good morning, Mr. Winder.

Q. I'd like to start with those things, and there are quite a few, with which I think we can agree. Let's start with the view. There's no question here, but the view has been impaired from the Arby's restaurant?

A. I would say there's a partial view impairment from the Arby's restaurant.

Q. So there is a view impairment, yes?

A. Yes.

Q. All right.

A. A partial view impairment.

Q. You won't give me view impairment, but you'll give me partial?

A. Well, I believe that's what it -- what the case is. In other words, there's no change in most directions, and there's not a complete blockage of view to the east. So I would call it a partial view impairment.

Q. Now, you're -- you're aware that the view to the travel lanes of U.S. 89 has been lost?

A. Yes.

Q. That the view of the East frontage road has been lost?

A. Yes.

Q. The view of the Smith's shopping center has been lost?

A. Yes.

Q. The lower foothills of the Wasatch view has been lost?

A. Yes.

Q Is it--

MR. HUNTER: Your Honor, here's a copy of the--the slides.

Q (By Mr. Hunter) As an appraiser, do you have to analyze legal issues as you're undertaking an assignment?

A I do; of course, from an appraiser's perspective, not an attorney's perspective, but yes.

Q Okay. And are these legal issues relevant in an eminent domain action?

A Very much so.

Q And can you explain why?

A Well, the rules for appraising in the eminent domain context have come about because of the Constitution and because of statute that states have enacted to--to make sure that property owners are adequately protected. And also by case law so that, for example, this--this case, Arby's case has been before the Supreme Court a couple of times on certain rulings and so those legal rulings form the basis on which an appraisal needs to be completed in this case.

Q Okay. And what, as an appraiser, do you understand to be the legal principles to be applied in--in your assignment today?

A As you know, I'm sure by now, Arby's is located next to the U.S. Highway 89 and Shepherd Lane intersection. And--

THE COURT: Mr. Cook, can I interrupt you just a

so losing that traffic by some act of the transportation department is not something that they can claim--

Q Okay. And--and I don't need you to--

A --a damage for.

Q --to get into the reasoning of the Court here.

A Okay.

Q Just--excuse me--your understanding of your--of the difficulty of your assignment.

A So, the difficulty is, I've got to factor out any value loss that may--may have resulted from the loss of visibility. That's--that's the point.

Q And how about, were there other legal issues that you had to struggle with--

A Yes.

Q --in this case?

A Yes.

Q And what were those?

A The other was accessibility. It used to be that you could turn left right at the intersection, you'd pull up to the light right at the intersection of Shepherd Lane and turn left if you were going northbound or turn right if you were going southbound and--and go into the shopping center of which Arby's is a part. With the--

Q So, a driver on a sudden impulse could just say, I'm going to turn here and go in and get an Arby's?

ADDENDUM D

ORIGINAL

IN THE SECOND JUDICIAL DISTRICT COURT

DAVIS COUNTY, STATE OF UTAH

-oOo-

UTAH DEPARTMENT OF TRANSPORTATION, Plaintiff,	)	Case No. 020700665
vs.	)	DAY TWO OF TRIAL
ZIONS CREDIT CORPORATION, JAMES IVERS, KATHERINE G. HAVAS, P AND F FOOD SERVICES, Defendants.	)	

-oOo-

BE IT REMEMBERED that on the 14th day of April, 2010, commencing at the hour of 9:02 a.m., the above-entitled matter came on for hearing before the HONORABLE MICHAEL ALLPHIN, sitting as Judge in the above-named Court for the purpose of this cause, and that the following proceedings were had.

-oOo-

A You asked this morning?

Q No.

A Oh.

Q That--yesterday afternoon.

A Oh, yes.

Q That--that's why you're here?

A Yes, uh huh (affirmative).

Q And--and Mr. Free, is it your opinion the 155,000 represents the loss in market value due to the loss of view out at the Arby's?

A No. The loss of view out is just almost impossible, if you just say the view out, only, that's--that's an impossible concept, it doesn't exist. If--how do you--

Q But if--if you--and I--I would agree with you.

A Yeah.

Q But if we measure--if we measure the loss of view by the following formula, that the loss of view is to be measured by the affect, the obstruction of view the elevated highway has upon the fair market value of the remainder of the property, if--if we put that whole package together, then is that your opinion as to the loss of the Arby's?

A Yes.

Q Okay. Thank you.

MR. WINDER: I have no further questions.

THE COURT: Mr. Hunter?

A Well, I've been asked many times to look at a residential view and--and there is a damaged residential view. I've never been asked--so, this is new territory, I think, we're talking about here in this Court, as far as I know--I've never been asked to--to examine just a view out only of a--a--because people buy homes for a view out. They don't buy retail for a view out. So, we're all--

Q Yeah.

A --we're all here and struggling in this courtroom--

Q A fast food restaurant could care less about the view out; right?

A I wouldn't say care less, but it's--it's almost impossible, it's not in the real world that you can separate it out. So, I struggle with the scope of this, I almost didn't want to take the assignment, because I'm saying, well, I can't separate view out very easily; in fact, I've never seen anybody be able to really, absolutely--how do you do that? Because a view is an interactive thing, normally, for a--for a business location. So, the safety and security, all the things that go out also are reciprocal.

So, yeah, I don't--I think this case that you gave me applies to residence, it's difficult to apply to an--an Arby's.

Q Yeah.

A But I--I can see your point, and yeah.