

2005

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

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JAMES IVERS; KATHERINE G.
HAVAS; and P and F FOOD SERVICES,

Defendants/Appellants,

vs.

UTAH DEPARTMENT OF
TRANSPORTATION,

Plaintiff/Appellee.

BRIEF OF APPELLANTS

Court of Appeals Case No.

20050246-CA

Appeal from the Second Judicial District Court
In and for Davis County, State of Utah

Judge Michael Allphin
Civil No. 020700665

Oral Argument Requested

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STATEMENT OF RELATED CASES

Appellants previously attempted to appeal the trial court's ruling precluding them from pursuing claims for severance damages. *See* Utah Court of Appeals case no. 20031016CA. That appeal was dismissed upon the court's *sua sponte* motion for summary disposition. The court ruled the order from which appellants appealed was not an order eligible for certification under Rule 54(b), UTAH R. CIV. P.

STATEMENT OF JURISDICTION

The Utah Supreme Court has jurisdiction in this matter pursuant to UTAH CODE ANN. §78-2-2 (3)(j). The Utah Supreme Court has transferred this appeal to the Utah Court of Appeals pursuant to UTAH CODE ANN. §78-2-2(4). The Utah Court of Appeals has jurisdiction pursuant to UTAH CODE ANN. §78-2a-3(2)(j).

IDENTIFICATION OF THE PARTIES

Appellants are James Ivers, Katherine G. Havas, and P and F Food Services, referred to herein collectively as "Arby's." Appellee is Utah Department of Transportation, referred to herein as "UDOT."

STATEMENT OF ISSUES PRESENTED FOR REVIEW

- Can Arby's be precluded from seeking severance damages based upon the reduction in value of its commercial property resulting from the loss of reasonable access to its remaining property by reason of UDOT's construction project to which Arby's condemned property has been dedicated?
- Can Arby's be precluded from seeking severance damages based upon the reduction in value of its commercial property resulting from the obstruction of view

(infringement upon appurtenant property rights of light, air and view)¹ by reason of UDOT's construction project to which Arby's condemned property has been dedicated?

STANDARD OF REVIEW

The appellate court reviews the district court's summary judgment ruling for correctness, granting no deference to the trial court's legal conclusions. *See Woodbury Amsource, Inc. v. Salt Lake County*, 73 P.3d 362, 364 (Utah 2003), *Kouris v. Utah Highway Patrol*, 70 P.3d 72 (Utah 2003); *Smith v. Smith*, 793 P.2d 407 (Utah App. 1990).

DETERMINATIVE CONSTITUTIONAL PROVISIONS AND STATUTES

- Fifth Amendment, United States Constitution: "[N]or shall private property be taken for public use, without just compensation."
- Article I, §22, Utah Constitution: "Private property shall not be taken or damaged for public use without just compensation."
- UTAH CODE ANN. §78-34-10:

The court, jury or referee must hear such legal evidence as may be offered by any of the parties to the proceedings, and thereupon must ascertain and assess:

* * * * *

(2) if the property sought to be condemned constitutes only a part of a larger parcel, the damages which will accrue to the portion not sought to be condemned by reason of its severance from the portion sought to be condemned and the construction of the improvement in the manner proposed by the plaintiff;

¹ Arby's contends in this case that the loss of view from its property and the loss of visibility of the property are both compensable. The trial court's ruling did not distinguish between these two aspects of visibility.

(3) if the property, though no part is taken, will be damaged by the construction of the proposed improvement, the amount of such damages;

(4) separately, how much the portion not sought to be condemned . . . will be benefited, if at all, by the construction of the improvement proposed by the plaintiff....

STATEMENT OF THE CASE

I. Nature of the Case

Prior to UDOT's construction project, Arby's had operated a restaurant for many years on the northwest corner of a busy intersection located at U.S. 89 and Shepard Lane in a commercial area of Farmington, Utah. This case involves Arby's claims for severance damages suffered in connection with a partial taking of Arby's property for incorporation into UDOT's construction project. UDOT's construction project has cut off reasonable access to Arby's remaining commercial property and has also eliminated the property's view and visibility due to the fact UDOT's project was built well above grade. The trial court, in a ruling dated May 22, 2003, denied Arby's motion for partial summary judgment and granted UDOT's motion in limine on the issue of severance damages. Arby's contends the trial court erred in its application of the law, and Arby's should be permitted to seek severance damages in this matter. A jury should consider whether the value of Arby's remaining commercial property has been decreased because of UDOT's construction project, which necessarily incorporated the parcel UDOT took from Arby's.

II. Course of Proceedings

Arby's filed a motion for summary judgment and UDOT filed a motion in limine on the issue of whether Arby's could seek to recover severance damages in this case. The trial court determined Arby's cannot seek to recover severance damages for loss of access or loss of view. That ruling was certified by the trial court under Rule 54(b), UTAH R. CIV. P., and Arby's filed a notice of appeal. This court, upon a *sua sponte* motion to dismiss, dismissed the appeal on the basis the trial court's order, at that stage of the proceedings, was not eligible for certification. Thereafter, the parties resolved certain limited issues and stipulated to a final judgment, dated February 22, 2005, opening the door for Arby's to finally pursue this appeal on the remaining issues concerning severance damages.

III. Disposition in Trial Court

A final judgment was entered by the trial court on February 22, 2005, pursuant to stipulation by the parties.

STATEMENT OF FACTS

The trial court entered its May 22, 2003 ruling based upon the following undisputed facts:²

1. The subject Arby's property is commercial real estate currently used for operation of an Arby's fast food restaurant. Ruling on Plaintiff's Motion in Limine and

² For convenience, a copy of the court's May 22, 2003 ruling is included as the addendum to this brief.

on Defendants' Motion for Partial Summary Judgment ("Ruling"), Record at p. 152, paragraph 3 (the record on appeal is referred to herein as "R").

2. The Arby's property is located on the northwest corner of what was previously a traditional intersection located at U.S. 89 and Shepard Lane in Farmington, Utah. Defendants' Memorandum in Opposition to Plaintiff's Motion in Limine and in Support of Defendants' Motion for Partial Summary Judgment ("Arby's Opp. Memo."), R. at p. 72.

3. The total size of Arby's small commercial site is .416 acres. Arby's Opp. Memo., R. at p. 76, paragraph 1.

4. UDOT condemned a .048 acre portion of Arby's property in fee. UDOT's Acreage Summary, R. at p. 11.

5. The express purpose of UDOT's taking of Arby's real property was "for the widening of an expressway State Route 89" Condemnation Resolution, R. at p. 6.

6. The portion of Arby's property UDOT condemned was used for construction of the grade-separated configuration at U.S. 89/Shepard Lane. *See, generally*, diagrams attached to UDOT's Memorandum in Support of Motion in Limine ("UDOT's Mot. Lim."), R. at pp. 55-61. Specifically, the 0.048 acres of Arby's condemned land was used to construct a one-way frontage road immediately parallel to the newly expanded and elevated U.S. 89. Ruling, R. at p. 152, paragraph 4.

7. As a result of UDOT's construction project, the intersection at U.S. 89/Shepard Lane has been eliminated. U.S. 89, immediately east of Arby's property, has been elevated so that traffic traveling east-west on Shepard Lane can now travel under

U.S. 89. *Id.* at p. 151, paragraph 1. Arby's contends the newly elevated U.S. 89 expressway obstructs the property's view to the east. Additionally, Arby's property and signage cannot be seen as a result of the now-constructed, elevated U.S. 89. Arby's Memo. Opp., R. at p. 79, paragraph 10.

8. Direct access to Arby's property from U.S. 89 has been cut off as a result of the construction project. Access exists at points that are one-half mile away from Arby's property and will be circuitous. Access to Arby's property from Shepard Lane is unchanged. Ruling, R. at p. 152, paragraph 5.

9. A preliminary traffic study conducted for Arby's by Horrocks Engineers prior to UDOT's construction predicted the new U.S. 89/Shepard Lane configuration would reduce traffic and adversely impact the Arby's property. At the time of the traffic study, seventy percent of Arby's traffic came from northbound and southbound U.S. 89. Horrocks Engineers opined there would be a total loss of about 40% of Arby's daily trip traffic after the elevated U.S. 89 was completed. Horrocks Engineers Preliminary Traffic Study ("Traffic Study"), R. at pp. 116-118.

SUMMARY OF THE ARGUMENT

This case involves a partial taking of Arby's property and the resulting severance damages. Arby's is entitled, under fundamental constitutional principles and the express provisions of Utah's condemnation statutes, to put on all of its evidence of severance damages resulting from the condemnation and the construction of improvements on the condemned portion of Arby's property. The case of *State of Utah v. Harvey Real Estate*, 57 P.3d 1088 (Utah 2002), upon which the trial court relied in ruling that Arby's cannot

put on evidence of severance damages, is clearly distinguishable and leaves many unanswered questions that do not address issues in the present case. The analysis of how the value of Arby's remaining property is impacted should include change in access and loss of visibility resulting from UDOT's construction of the improvement. The trial court erred in ruling Arby's cannot present evidence of such severance damages at trial.

ARGUMENT

POINT 1.

SEVERANCE DAMAGES ARE RECOVERABLE PURSUANT TO CONSTITUTION AND STATUTE

The Fifth Amendment to the Constitution of the United States of America expressly provides private property may not be taken for public use without just compensation. Similarly, Article I, §22 of Utah's constitution states: "Private property shall not be taken or damaged for public use without just compensation." Severance damages are part of the constitutional requirement of just compensation. "Just compensation" means the "full and perfect equivalent in money of the property taken. The owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken." *United States v. Miller*, 63 S. Ct. 276, 279-80 (1942).

In connection with the government's condemnation of private property, UTAH CODE ANN. §78-34-10(2) requires the trier of fact to hear legal evidence to ascertain and assess:

[I]f the property to be condemned constitutes only part of a larger parcel, the damages which will accrue to the portion not sought to be condemned by reason of its severance from

the portion sought to be condemned and the construction of the improvement in the manner proposed by the plaintiff³

In the present matter, part of Arby's property was taken to make the elimination of the U.S. 89/Shepard Lane intersection possible. The property taken by UDOT has been used in UDOT's construction project in such a way to allow U.S. 89 to be elevated over Shepard Lane and eliminate the intersection at that location. If not for U.S. 89's elevation over Shepard Lane, there would have been absolutely no need for UDOT to take Arby's property. In fact, UDOT has admitted the construction of a frontage road on Arby's property was "necessary to UDOT's proposed restructuring of Highway 89." UDOT's Mot. Lim., R. at p. 44. The damage caused to the balance of Arby's property is causally related to the construction of improvements upon, and UDOT's use of, the property taken from Arby's.

The end result of eliminating the intersection and elevating U.S. 89 clearly reduces the value of Arby's commercial property. The property is no longer accessible from the new, elevated U.S. 89 and there is no reasonable access to Arby's property via the new frontage road system that is part of UDOT's construction project. Additionally, the

³ The Utah statute also states that even in cases where property is not taken, the trier of fact *must* hear evidence of whether the property is being damaged, and the amount of such damage. UTAH CODE ANN. §78-34-10(3).

It is also interesting to note a condemning authority, in an effort to reduce the amount of compensation paid for a taking, has the ability to introduce evidence of how the portion of property not taken is benefited by the proposed improvement. Utah's condemnation statutes should be applied fairly. If UDOT has the right to put on evidence showing how property is benefited by an improvement, Arby's should have the right to show how the property is damaged by UDOT's improvement.

eastern view from Arby's remaining property is blocked and the view of the restaurant and its signage is obstructed because of the newly elevated U.S. 89 expressway. These factors certainly reduce the fair market value of the remaining commercial property and Arby's should be allowed to put on evidence of severance damages.

POINT 2.

THE *HARVEY REAL ESTATE* CASE IS
DISTINGUISHABLE FROM THE PRESENT MATTER

UDOT and the trial court have relied heavily in this case upon the Utah Supreme Court decision in *State of Utah v. Harvey Real Estate*, 57 P.3d 1088 (Utah 2002). This is apparently because the facts of *Harvey Real Estate* also involved the U.S. 89 expansion in Davis County, although the precise location is north of the commercial area surrounding the U.S. 89/Shepard Lane intersection involved in the present matter. *Harvey Real Estate* also involved the issue of an intersection closure and direct access from the undeveloped property to U.S. 89 being eliminated and substituted with a frontage road system. *Harvey Real Estate* and the present matter were also presided over by the same trial court judge, Michael Allphin.

The trial court's application of *Harvey Real Estate* to the present matter is inconsistent with the basis principle that each case should be decided upon its own set of facts. See *Tasters Ltd., Inc. v. Department of Employment Security*, 863 P.2d 12, 19 (UT App. 1993) ("It is elementary that each case should be decided on its own particular set of facts."). What the trial court and UDOT have failed to realize in this case is that there are significant distinctions between *Harvey Real Estate* and the present matter that should not

be disregarded merely because of a few basic similarities between the two cases. The important issues that make the present case peculiar are not addressed in *Harvey Real Estate*. For one example, *Harvey Real Estate* did not involve an elevated construction project that blocks a commercial property's view and ability to be seen. However, the issue of appurtenant property rights does exist in the present matter.⁴

The basic distinctions between the present matter and *Harvey Real Estate* can be summarized as follows:

HARVEY REAL ESTATE	ARBY'S
Involved undeveloped property with little or no commercial value.	Involves a small pad of existing developed commercial property.
Total acreage: 160 acres.	Total acreage: .418 acres.
Amount of acreage taken: 1.36 acres (less than 1% of the total).	Amount of acreage taken: .048 acres (11% of the total).
Property was vacant.	Property contains a twelve-year old Arby's restaurant.
Property not located in a commercial area.	Property located in commercial area.
The case did not involve a grade elevation of U.S. 89. There was no issue regarding loss of view, light and air.	U.S. 89 has been elevated above grade immediately east of Arby's property so that Shepard Lane can be routed under U.S. 89. The eastern view from Arby's remaining property has been blocked.
Involved closing Old Mountain Road's access to U.S. 89, which was essentially a closure of an old frontage road.	Involves the elimination of a traditional four-way intersection, controlled by semaphores.

⁴ The issues of visibility are discussed in Point 4 below.

Large tract of land with only 85 feet of property abutting Old Mountain Road, which was closed.	Small commercial pad located on the north west corner of the intersection eliminated by UDOT.
No impact to value of remaining vacant property.	The taking threatens the viability of Arby's commercial property interest.

See Reply Memorandum in Support of Defendants' Motion for Summary Judgment ("Arby's Reply"), R. at p. 188.

The comparison above clearly shows there are significant differences between the two cases, which justify careful consideration. For example, UDOT has downplayed, and the trial court has disregarded, the commercial vs. non-commercial property distinction between this case and *Harvey Real Estate*. However, even in a case relied upon in the trial court's ruling, the court held the fact property is located in a busy commercial area enters into a determination whether impairment of the right of access is substantial. See *People v. Becker*, 69 Cal. Rptr. 110, 114 (4th Dist. 1968).

POINT 3.

ARBY'S SHOULD BE ALLOWED TO SEEK SEVERANCE DAMAGES FOR LOSS OF ACCESS

With respect to the issue of loss of reasonable access negatively impacting the value of Arby's remaining property, the trial court essentially adopted UDOT's request to impose a universal rule, derived from *Harvey Real Estate*, that whenever property is taken to construct a frontage road on U.S. 89, the frontage road should be found to constitute reasonable access to the remainder of the condemnee's property. Such a rule is certainly convenient for a condemning authority's purposes but should not be accepted as a matter

of routine. As illustrated in Point 2 above, each condemnation case involves different property presenting varying facts. Just because the court rejected severance damages in *Harvey Real Estate* does not mean a blanket rule now exists to deny compensation in every other case involving the construction of a frontage road in connection with the U.S. 89 project in Davis County.

With respect to the loss of access issue in this case, one of the fundamental problems with the trial court's analysis is its willingness to assume "reasonable access to Arby's" exists (*see* Ruling, R. at p. 155), even after the intersection was closed and U.S. 89 was rebuilt to by-pass Arby's property. The question of reasonableness is a quintessential factual question. *See County of Anoka v. Esmailzadeh*, 498 N.W.2d 58, 61 (Minn. App. 1993) (what constitutes reasonable access depends upon nature of property, therefore, the existence of reasonable access is a question of fact). The court's finding of reasonableness of access at such a premature stage in the present matter was based purely upon the fact reasonable access had been found to exist in the distinguishable *Harvey Real Estate* case.

Based upon the particular facts and circumstances of the present case, the access to the Arby's property post-construction is not reasonable. In fact, consistent with the traffic study conducted prior to UDOT's construction⁵, if allowed to do so, Arby's would put on evidence at trial showing that since construction, the amount of business it conducts has decreased dramatically, indicating a loss of access. Arby's contends this is tied directly to

⁵ *See* Traffic Study, R. at pp. 116-118.

the new condition where traffic bypasses the Arby's property. Even in a case cited in the trial court's ruling, the court held the loss of business and traffic may be admissible to establish that property has been damaged. *See Filler v. City of Minot*, 281 N.W.2d 237, 243 (N.D. 1979). Arby's should be allowed to put on such evidence in this case.

The trial court also erred in its application of the causation analysis of *Harvey Real Estate*. The court focused upon language from *Harvey Real Estate* stating the claimant in that case could not show "any damage sustained by the closure of the intersection [had] been caused by the severance of its land." Ruling, R. at p. 154 (*citing Harvey Real Estate*, 57 P.3d at 1091). Contrary to the trial court's ruling, there is a sufficient causal connection between the *taking* of the Arby's property and *damage* to the remaining property due to loss of reasonable access. Arby's reiterates the only way for the U.S. 89/Shepard Lane intersection to be eliminated and for U.S. 89 to be expanded and elevated, was for UDOT to take the Arby's property for construction of a one-way frontage road. That frontage road, built upon property taken from Arby's, runs immediately parallel to the newly elevated U.S. 89 and abuts Arby's remaining property. In short, Arby's property has been incorporated into the precise improvement that has caused the loss of access. In the present case, it cannot be argued the taking of Arby's property was only "somewhat related. . . ." *Harvey Real Estate*, 57 P.3d at 1019. Arby's property was taken to have improvements constructed thereon that severely decrease the value of the remaining portion of the Arby's commercial property. As the Utah Supreme Court stated previously: "To suggest that any entity granted the right of eminent domain could design its project without regard to the effect that project would have on adjacent

land is to deny the very purpose of the compensation statutes. *Utah Dept. of Transp. v. Jones*, 694 P.2d 1031, 1034 (Utah 1984).

POINT 4.

ARBY'S SHOULD BE ALLOWED TO SEEK SEVERANCE
DAMAGES FOR LOSS OF APPURTENANT RIGHTS

As referenced in the trial court's ruling, Arby's claims the change in grade of U.S. 89 takes away its eastern view from its remaining property *and* the ability of the Arby's restaurant to be seen by potential customers. However, the trial court's ruling fails to make a distinction between these two aspects of loss of view. Both should be found compensable.⁶

A. Loss of View From Arby's Property.

Based upon *Utah State Road Comm'n. v. Miya*, 526 P.2d 926 (Utah 1974), even UDOT has acknowledged an exception to its argument concerning severance damages, where rights such as air, light and view appurtenant to the property are taken or significantly impacted by actions off the property. UDOT's Mot. Lim., R. at p. 50.

In *Miya*, real property, most of which was already subject to a government easement, was taken to construct a new viaduct and frontage road. The new viaduct obstructed the view from the condemnee's adjacent residential building lots. The Utah Supreme Court in *Miya* acknowledged "one of the rights appurtenant to abutting property is that of receiving light and air . . . and an abutting owner is entitled to compensation for

⁶ In *Branson v. Berea*, 293 N.E.2d 577, 583 (Ohio 1971), a case cited by the trial court in its ruling, the Ohio court held the right of view includes the right to be seen as well as the right to see.

infringement of his right to light and air by a structure in the highway. . . .” *Miya*, 526 P.2d at 929 (citation omitted). The court went on to hold “[a]n owner of land abutting on a street is also in possession of an easement in view, which constitutes a property right which may not be taken without just compensation.” *Id.*

With respect to its analysis and application of the *Miya* decision, the trial court in this matter acknowledged correctly “the damage caused by the obstruction of view need not fit into the ‘special and unique’ category . . . since an easement of view is a compensable, appurtenant property right in and of itself.” Ruling, R. at p. 157. However, despite Arby’s clear rights under the *Miya* decision, the trial court added an entirely new element that was not part of the analysis in *Miya*. The trial court ruled that because the specific portion of UDOT’s project creating the obstruction was not actually constructed directly upon the property taken from Arby’s, there could be no severance damages claim for loss of view. Ruling, R. at p. 158.

While *Miya* involved the taking of easement-burdened property, upon which the obstruction was built, there is no language in *Miya* requiring the obstruction be built upon property taken before an abutting property owner could seek compensation for loss of view. The *Miya* decision itself holds: “The rights of access, light, and air are easements appurtenant to the land of an abutting owner on a street; they constitute property rights forming part of the owner’s estate. These substantial property rights . . . may not be taken away or impaired without just compensation.” *Miya*, 526 P.2d at 928. With respect to the erection of a permanent structure within a public highway, the *Miya* court ruled that even if such an improvement diminishes the value of abutting property, there is no damage in

the constitutional sense “unless the structure violates some right appurtenant to the abutting property.” *Id.* at 929. The supreme court then pointed out “one of the rights appurtenant to *abutting property* is that of receiving light and air from the highway, and an abutting owner is entitled to compensation for infringement of his right to light and air by a structure in the highway, even if it is a proper highway use.” *Id.* (emphasis added).

Even if there were a requirement that the obstructing improvement be built upon property taken in order to recover for loss of view, Arby’s submits the court should reject UDOT’s narrow description of its improvement, which was adopted by the trial court. Although the elevated portion of the U.S. 89 improvement is not built directly upon property taken from Arby’s, the one-way frontage road that immediately parallels U.S. 89 and abuts Arby’s remaining property is a critical component of UDOT’s project and was built upon Arby’s condemned property. In other words, if the scope of UDOT’s project is viewed realistically, the construction on Arby’s property is part and parcel of the construction that obstructs visibility. UDOT should not be allowed to avoid paying Arby’s for compensable harm by unilaterally defining its construction project in such an unreasonably narrow manner.

B. Loss of Visibility of Arby’s Property.

The cases cited in the court’s ruling are primarily cases dealing with whether a property owner has a compensable right to be seen, as opposed to loss of view. For example, in *Filler v. Minot*, 281 N.W.2d 237 (N.D. 1979), the North Dakota court followed the cases where courts had ruled there is no compensable right to be seen from an abutting highway. *Id.* at 244. However, the trial court ignored the portion of that same

ruling where the court acknowledged it had allowed landowners compensation for loss of the right of view *from* their property. *Id.* In another case, *People v. Wasserman*, 50 Cal. Rptr. 95 (1st Dist. 1966), the court acknowledged the “well-settled” rule that the owner of real property abutting a public highway has an easement of reasonable view *of* his property *from* the highway and that impairment of that view infringes upon a valuable property right. *Id.* at 105. However, the court in *Wasserman* denied compensation because the improvement that obstructed the property’s ability to be seen was not built on property taken from the landowner. *Id.*⁷

While ignored or rejected by the trial court, there is also authority from other jurisdictions that the loss of visibility is compensable even when the improvement causing the obstruction is *not* built upon property taken from the landowner. In *United California Bank v. State of California*, 81 Cal. Rptr. 405 (2nd Dist. 1969), an inverse condemnation case, the court approved compensation for loss of exposure of commercial land due to construction of an underpass on land not owned by the commercial property owner. *See also Goycoolea v. City of Los Angeles*, 24 Cal. Rptr. 719, 724 (2nd Dist. 1962)

⁷ The trial court also relied upon the following cases for the same proposition that loss of visibility of property is compensable only when the obstruction is built on property taken from the landowner: *8,960 Square Feet v. State of Alaska*, 806 P.2d 843 (Alaska 1991) and *People v. Becker*, 69 Cal. Rptr. 110 (4th Dist. 1968).

In *People v. Riccardi*, 144 P.2d 799 (Cal 1944), a case not cited by the trial court, the California Supreme Court acknowledged the weight of authority is “in favor of the proposition that an abutting owner of property on a public highway has an easement of reasonable view *of* his property *from* the highway.” *Id.* at 806. *Riccardi* was a condemnation case where the appellate court affirmed judgment in favor of the property owners.

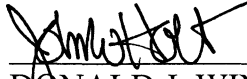
(an abutting land owner has an easement of light and air with respect to street in front of is land, and also has an easement of reasonable view of his property from the street or highway). The A.L.R. cited by the trial court in its ruling also discusses that in California, there is a split among the intermediate courts of appeal on the issue of whether loss of visibility resulting from an improvement of or on property not taken from the claimant property owner is compensable in a direct or indirect condemnation case. See Annotation, *Eminent Domain: Compensability of Loss of Visibility of Owner's Property*, 7 A.L.R. 5th 113 (1992), at Section 7. In short, even in cases where the obstruction does not occur on property taken from the property owner, there is authority supporting compensation for loss of the ability to be seen. At any rate, as argued hereinabove, Arby's contends the improvement built upon its condemned property is part and parcel of the improvement that now prevents the visibility of the Arby's restaurant and signage. The resulting loss of visibility, along with loss of view, should be found compensable in this case.

CONCLUSION

Arby's has important constitutional rights that are being denied because of the trial court's ruling on severance damages. Based upon the foregoing, the court should reverse the trial court's ruling and allow Arby's to pursue its severance damages claims based upon loss of reasonable access and loss of view.

Respectfully submitted this 16th day of May, 2005.

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CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of May, 2005, a true and correct copy of the foregoing Appellants' Brief was mailed, postage prepaid, to the following:

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ADDENDUM

IN THE SECOND DISTRICT COURT OF 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.

**RULING ON PLAINTIFF'S
MOTION IN LIMINE AND ON
DEFENDANTS' MOTION FOR
PARTIAL SUMMARY
JUDGMENT**

Case No. 020700665

Judge Michael Allphin

The above-entitled matter having come before the Court on Plaintiff's Motion in Limine and Defendants' Motion for Partial Summary Judgment; and the Court having reviewed the Motions; and the Objections thereto; and the Replies thereto; and the Court being fully advised in the premises enters the following findings of fact, and rules as follows.

BACKGROUND

The matter before the Court concerns a taking of private property by the Utah Department of Transportation to construct a new frontage road to U.S. Highway 89 near Farmington, Utah. Plaintiff filed a Complaint on December 20, 2002. Plaintiff's Motion in Limine was filed on March 14, 2003. Defendants' Memorandum in Opposition to the Plaintiff's Motion in Limine

and in Support of Defendants' Motion for Partial Summary Judgment was filed on April 1, 2003. Defendants' Motion for Partial Summary Judgment and Request for Oral Argument was also filed on April 1, 2003. Plaintiff's Response to Defendants' Motion for Partial Summary Judgment and Reply to the Defendants' Response to the Plaintiff's Motion in Limine was filed on April 14, 2003. Defendants' Reply Memorandum in support of Defendants' Motion for Partial Summary Judgment was filed on May 1, 2003. Notices to Submit for Decision and Requests for Oral Argument were filed by Plaintiff and Defendants on May 7 and May 9 respectively.

FINDINGS OF FACT

The Court finds the following facts relevant to the Court's Ruling:

1. The Utah Department of Transportation (UDOT) plans to eliminate the intersection of Shepard Lane and Highway 89 by elevating Highway 89 over Shepard Lane to decrease the number of accidents in the intersection..
2. UDOT seeks to condemn 0.048 acres of Defendants' property in fee and a temporary easement of 0.001 acres of Defendants' property.

3. The property is currently leased to P and F Food Services and is occupied by an Arby's fast food restaurant. The lease will likely terminate as a result of the taking of Defendants' land.
4. The 0.048 acres of condemned land will be used to construct a frontage road to U.S. Highway 89 and will not be elevated itself.
5. Direct access to Defendants' property from Highway 89 will be cut off as a result of the construction. Access from the highway will then exist at points that are one-half mile away from Defendants' property and will be circuitous. Access to Defendants' property from Shepard Lane will remain unchanged.
6. A Farmington City ordinance requires a landscaped strip not less than 10 feet in width to be maintained along property lines.

ANALYSIS

Plaintiff's Motion in Limine was to preclude evidence of severance damages or loss in market value to the Defendants' remaining property caused by the taking of the land described above and the highway reconstruction project. Defendants' Motion for Partial Summary Judgment was to secure an order allowing Defendants to present evidence of severance damages caused by the reconstruction of Highway 89. In regards to takings, U.C.A. 78-34-10 provides in part the following:

The court, jury or referee must hear such legal evidence as may be offered by any of the parties to the proceedings, and thereupon must ascertain and assess: (2) if the property sought to be condemned constitutes only a part of a larger parcel, the

damages which will accrue to the portion not sought to be condemned by reason of its severance from the portion sought to be condemned and the construction of the improvement in the manner proposed by the plaintiff.

The Utah Supreme Court has held that Section 78-34-10 gives a landowner the right to present evidence of damages caused by the severance alone or the construction of the improvement made on the severed property, but that it does not give the landowner the right to present evidence of damages caused by other facets of the construction project. State v. Harvey Real Estate, 57 P.3d 1088, 1090 (Utah 2002).

The Defendants support their Motion for Partial Summary Judgment and oppose Plaintiff's Motion in Limine by arguing that (1) reasonable access to defendants' property will be eliminated by the new construction, reducing the fair market value of the remaining property; (2) the change in grade of U.S. Highway 89, which takes away Arby's eastern view and ability to be viewed by potential customers, is compensable; (3) the inability to comply with city zoning ordinances will also impact the fair market value of the property; (4) and the lease agreement among the defendants may be terminated due to the impact of the condemnation. The Court agrees with Plaintiff that termination of the lease agreement between the Defendants during these proceedings does not bear on the issue of severance damages. The possible termination of the lease does not, of itself, affect the fair market value of Defendants' property or the ability of the property to produce rental income in the future. Defendants' other arguments are each discussed below.

1. Loss of Value from Diminished Access

Defendants contend that reasonable access to defendants' property will be eliminated by the new construction, thereby reducing the fair market value of the remaining property. Plaintiff

(UDOT) properly relies on State v. Harvey Real Estate to support its position against Defendants' argument. In that case, Harvey Real Estate owned approximately 160 acres of land that abutted Highway 89, a major transportation route, on its western border. Similarly, approximately 85 feet of the northern boundary of the property abutted Old Mountain Road, which intersected with Highway 89 directly adjacent to the property's northwest corner. The Harvey property had direct access to Old Mountain Road at its northwest corner along the approximately 85 feet of frontage. From 1947 until 1999, the Harvey property also had access to Highway 89 through a wide-gated agricultural entrance approximately 1,000 feet to the south of the intersection. In 1999, UDOT closed the intersection and determined to build a frontage road that completely separated the Harvey property from Highway 89, eliminating direct access to the property from the highway by condemning a portion of the Harvey property. UDOT filed a Motion in Limine to preclude Harvey from presenting evidence at trial that the closure of the intersection would substantially decrease the value of the remaining property. The Utah Supreme Court affirmed this Court's holding granting the motion because Harvey could not show that "any damage sustained by the closure of the intersection [had] been caused by the severance of its land." State v. Harvey Real Estate, 57 P.3d 1088, 1091. The court pointed out that Harvey was merely "seeking damages for devaluation of its property as a result of loss of access" to Highway 89 and that owners of neighboring properties may be similarly impacted by the closure of the intersection and would not be entitled to seek compensation. *Id.* at 1091. Other cases decided by the Utah Supreme Court have addressed the causal connection between the severance and the damage, see State v. Rozzelle, 120 P.2d 276, 277 (Utah 1941) (holding that the loss must "flow from either the taking of the strip of condemnee's land or from the nature of

the construction upon that strip"); Utah Dep't of Transp. v. D'Ambrosio, 743 P.2d 1220, 1222 (Utah 1987) (holding that "[s]everance damages are those caused by the taking of a portion of the parcel of property where the taking or the construction of the improvement *on that part* causes injury to that portion of the property not taken"), and a landowner's right of access to his property, *see Hampton v. State*, 445 P.2d 708, 710-711 (Utah 1968) (holding that the right of reasonable access does not include "any right in and to existing public traffic on the highway, or any right to have such traffic pass by one's abutting property").

Similar to Harvey, where the devaluation of property arose from loss of access to Highway 89, the loss of value Defendants claim will arise from the reconstruction project on the Highway 89/Shepard Lane intersection is a result of loss of the public's access to Arby's from Highway 89 and does not flow from either the taking of 0.048 acres of Defendants' property or from the nature of the construction on that part of property. Neighbors around Arby's whose property is not taken will suffer the same loss of access by the public to their businesses and will not be entitled to seek compensation. The public still has available routes that provide reasonable access to Arby's from Shepard Lane itself and also from exits from Highway 89 located one-half mile from Arby's. Because reasonable access to Arby's exists, Defendants cannot say the damage to their property resulting from decreased traffic was caused by the *severance* of their land and are therefore precluded from presenting evidence of devaluation of their property resulting from the diminished access to their property.

Defendants seek to distinguish Harvey from the present matter on the grounds that Defendants' property is used for commercial purposes and is located in a commercial area. However, Defendants' cite no cases supporting the distinction between commercial property and

other types of property. In fact, the court in State v. Rozzelle, 120 P.2d 276, 277 (Utah 1941) made no distinction with commercial property when it denied severance damages to the owner of a gasoline station for loss of business. Defendants also claim that the property taken from them is more integral to the reconstruction project and therefore the causal connection between the taking and the damage to the property is more direct. But Defendants seem to misconstrue the causal connection issue by focusing on the need for the taking rather than focusing on the actual cause of the damage, which was the loss of access to their property as explained above.

2. Loss of View from Highway

Article I, section 22 of the Utah Constitution provides that "[p]rivate property shall not be taken or damaged for public use without just compensation." Defendants allege that the change in grade of U.S. Highway 89, which takes away Arby's eastern view and the ability of potential customers to view Arby's property and signs, is compensable. When part of a parcel of land has been acquired by eminent domain, some jurisdictions have allowed the jury to consider evidence of reduced market value of the remaining land caused by an obstruction of view from the owner's property while other jurisdictions have precluded it and denied compensation for obstruction of view. See generally Michael A. Rosenhouse, Annotation, Eminent Domain: Compensability of Loss of View from Owner's Property--State Cases, 25 A.L.R. 4th 671 (1981). Those jurisdictions that have allowed compensation for obstruction of view have rested their decision on the theory that owners of property own an easement of view from their property that can only be taken with just compensation or on a showing that the fair market value of the property has decreased as a result of the taking. See Utah State Rd. Comm'n v. Miya, 526 P.2d 926, 929 (Utah 1974); Bramson v. Berea, 293 NE2d 577 (Ohio 1971).

In Miya, the Utah Supreme Court held that an easement of view is a property right that cannot be taken without just compensation even if the obstruction of view is caused by a proper highway use (some jurisdictions that recognize an easement of view nevertheless deny recovery when the view is obstructed by a proper highway use, 2A Nichols on Eminent Domain § 6.11[2], 6-180 (3d ed. 1997)). Miya, 526 P.2d at 929. The court in Miya also hints that "special and peculiar" injuries, apart from recognized property rights, suffered by landowners may be compensable. Id. Plaintiff argues that Defendants' loss of view does not fit under the category of "special and peculiar" injury and is therefore not compensable as severance damages. However, the damage caused by the obstruction of view need not fit into the "special and peculiar" category of Miya since an easement of view is a compensable, appurtenant property right in and of itself. See Id.

Miya is distinguishable, however, from the case at bar in that the loss of visibility in Miya arose from an elevated highway built within the existing right-of-way on the land taken from the condemnee. Because the loss of view in the case at bar arises from construction on property not taken from Defendants, although some property was taken from Defendants, this Court's view is that the loss in value to the property occasioned by the obstruction of view is not compensable. "Where the loss of visibility results from an improvement of or on land that was not taken from the claimant, such as on an abutting highway or on land taken from another, most courts have found loss of visibility not compensable." Tracy A. Bateman, Annotation, Eminent Domain: Compensability of Loss of Visibility of Owner's Property, 7 A.L.R. 5th 113 (1992); see also People ex rel. Dep't of Pub. Works v. Wasserman, 50 Cal. Rptr. 95 (1st Dist. 1966) (recognizing the settled rule of an easement of reasonable view, the court held that any impairment of the view

of the landowner's property was not a compensable item of severance damages since the improvement causing such loss of view was not located on the property taken from the landowners), People ex rel. Dep't of Pub. Works v. Becker, 69 Cal. Rptr. 110 (4th Dist. 1968) (refusing to grant severance damages when the obstruction of view was not caused by the improvement to the property taken), 8,960 Square Feet v. State, DOT & Public Facilities, 806 P.2d 843, 846 (1991 Alaska) (holding that "a property owner has no right to an unobstructed line of vision to his property from anywhere off of his property, absent an easement of some sort"); Filler v. Minot, 281 NW2d 237 (ND 1979) (holding that although landowners were allowed compensation for loss of right of view from their property, that principle did not extend to create a compensable right to be viewed from the abutting highway). Furthermore, the Supreme Court of Utah, in Harvey, held that Section 78-34-10 of Utah Code Annotated "gives a landowner the right to present evidence of damages caused by the construction of the improvement made *on the severed property*." Harvey, 57 P.3d at 1090 (emphasis added). The court's reasoning in Harvey that owners of neighboring properties to the condemnee, who would not be entitled to compensation, would be similarly impacted by the closure of the intersection is also relevant in considering the obstruction of view of Defendants' property. Defendants' neighbors will suffer the same loss of visibility to their own property as Defendants themselves. Because Defendants do not allege a loss of visibility of their property from construction done on land taken from them, they are precluded from introducing evidence of a decline in the market value of their property caused by loss of visibility.

3. Devaluation Resulting from Zoning Requirements

Defendants argue that the inability to comply with city zoning ordinances will also impact the fair market value of their property. An existing zoning ordinance is generally held to be a proper matter for consideration in a suit for the condemnation of property for the purpose of determining the actual market value of land in measuring damages. See State by Rd. Comm'n v. Jacobs, 397 P.2d 463 (Utah 1964); see also In re Old Riverhead Rd. CR 31 in Southhampton, Suffolk County, N.Y., 264 N.Y.S.2d 162 (N.Y. Spec. Term 1965) (awarding severance damages to a landowner in the amount required to bring the remaining land into conformance with zoning laws, the violation of which resulted from the government's taking of a portion of his property); People ex rel Dep't Pub. Works. v. Investors Diversified Servs., Inc., 68 Cal. Rptr. 663 (2d Dist. 1968) (holding that the total effect of the local zoning laws must be considered in arriving at the appropriate measure of compensation in an eminent domain action).

Defendants allege that the taking of their property in this case will adversely impact the fair market value of the property due to an ordinance of Farmington City that requires a ten-foot green space around parking and service areas. Such diminution in value caused by the necessitated reconstruction to bring the remaining property into conformance with the city ordinance subsequent to the taking is properly classified as severance damages, and evidence thereof should not be precluded in court.

RULING

Summary judgment is granted when there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Utah R. Civ. P. 56(c). The court

must examine the evidence in "a light most favorable to the party opposing summary judgment." Hunt v. Hunt, 785 P.2d 414, 415 (Utah 1990). Based on the foregoing analysis, Defendants' Motion for Partial Summary Judgment is granted only to the extent that evidence of severance damages resulting from any costs required to bring Defendants' property into conformance with local city ordinances, the nonconformance of which are caused by the taking of Defendants' property, will be properly admissible.

In accordance with the decision above on Defendants' Motion for Partial Summary Judgment, Plaintiff's Motion in Limine is granted in part and denied in part. The Motion in Limine is granted insofar that evidence tending to show a decline in the market value of Defendants' property caused by the redirection of traffic over Shepard Lane and any resulting loss in business arising from the same shall be precluded. Similarly, evidence of loss of visibility of Defendants' property caused by construction not on Defendants' property and that tends to reduce its market value shall be precluded. Plaintiff's Motion in Limine is denied insofar that evidence of severance damages arising from any costs required for conformance to city ordinances after the taking has occurred that are caused by the taking is admissible.

Dated May 22, 2003.

BY THE COURT:


MICHAEL ALLPHIN
DISTRICT COURT JUDGE

CERTIFICATE OF MAILING

I certify that I mailed a true and correct copy of the foregoing Ruling on May 29, 2003, postage prepaid, to the following:

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