IN THE SUPREME COURT OF THE STATE OF NEVADA

PALM SPRINGS TRANSFER AND STORAGE, A NEVADA CORPORATION,
Appellant,
vs.
CITY OF RENO, A POLITICAL SUBDIVISION OF THE STATE OF NEVADA,
Respondent.

No. 51215

FILED

SEP 25 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal arising from a jury verdict in an action for a taking by inverse condemnation, nuisance, and trespass. Second Judicial District Court, Washoe County; Patrick Flanagan, Judge.

Appellant Palm Springs Transfer and Storage purchased 255 Bell Street, Reno (the Property), in 1997 for $985,000. In early 2003, as part of the Reno Transportation Rail Access Corridor (ReTRAC) Project, respondent City of Reno began constructing a "shoofly" next to the Property.[1] Concurrently, businesses began moving out of the Property, and Palm Springs Transfer had difficulty re-leasing the spaces. Palm Springs Transfer listed the Property for sale in 2002 for $995,000, and sold it in 2005 for $910,000. Palm Springs Transfer claimed that the

[1]The ReTRAC Project redirected the railroad tracks through downtown Reno into a trench. The shoofly was the temporary track that carried railroad train traffic around the ReTRAC Project during its construction. For the sake of ease, from this point forward we refer to the shoofly and the ReTRAC Project collectively as the "shoofly."

shoofly had caused the Property's value to depreciate and it sued the City for committing a taking, creating a nuisance, and committing trespass. After a jury trial, a verdict was returned for the City.

On appeal, Palm Springs Transfer claims that (1) there was a miscarriage of justice because three jury instructions were erroneous, and (2) it presented sufficient evidence to support its claims. For the following reasons, we disagree and, therefore, affirm the judgment of the district court. As the parties are familiar with the facts, we do not recount them except as necessary to the disposition.

DISCUSSION

The jury instructions were proper

Palm Springs Transfer argues that jury instruction numbers 28, 32, and 33 were erroneous and resulted in a miscarriage of justice. We look first to the standard of review for jury instructions, and then address each instruction in turn and conclude that they were all proper.[2]

Standard of review

Jury instructions must be "consistent with existing law." Beattie v. Thomas, 99 Nev. 579, 583, 668 P.2d 268, 271 (1983). Conversely, a jury instruction is erroneous if it tends to confuse or mislead the jury. Carver v. El-Sabawi, 121 Nev. 11, 14, 107 P.3d 1283, 1285 (2005). "However, a judgment will not be reversed by reason of an erroneous instruction, unless upon consideration of the entire case,

---

[2]Alternatively, Palm Springs Transfer claims that these three jury instructions amounted to a directed verdict. Because we conclude that the jury instructions were proper, we need not reach this issue.

including the evidence, it appears that such error has resulted in a miscarriage of justice." Id. It is the appellant's burden to prove that the erroneous jury instruction had a prejudicial effect. Truckee-Carson Irr. Dist. v. Wyatt, 84 Nev. 662, 667, 448 P.2d 46, 50 (1968). "Where [the appellant] may reasonably contend that, but for the error, a different result might have been reached, the burden of showing that prejudice resulted is met." Carver, 121 Nev. at 15, 107 P.3d at 1285.

Jury instruction number 28

Jury instruction number 28 stated that "[t]here must be a 'substantial impairment of the right of access' before a property owner can recover for damages under inverse condemnation." Palm Springs Transfer contends that this instruction was overly broad, misstated the law, and was misleading. Specifically, Palm Springs Transfer argues that jury instruction number 28 incorrectly asserted that its claim for inverse condemnation necessarily failed if the jury concluded that there was no "substantial impairment of access." We disagree.

"A taking can [occur] when the government regulates or physically appropriates an individual's private property." ASAP Storage, Inc. v. City of Sparks, 123 Nev. 639, 647, 173 P.3d 734, 740 (2007). "Physical appropriation exists when the government seizes or occupies private property or ousts owners from their private property." Id. To prove inverse condemnation by ouster, the claimant must show that the government substantially interfered with his right of access to his property. Id. at 648, 173 P.3d at 740; see Culley v. County of Elko, 101 Nev. 838, 840-41, 711 P.2d 864, 866 (1985).

In this case, Palm Springs Transfer suggests that the City's construction of the shoofly constituted a taking by inverse condemnation

because it physically appropriated the Property by ouster. Accordingly, jury instruction number 28 did not confuse or mislead the jury because it was an accurate recitation of the law: in order to prove physical appropriation by ouster, Palm Springs Transfer was required to prove that the City substantially interfered with its right of access to the Property. See ASAP Storage, 123 Nev. at 648, 173 P.3d at 740. Thus, Palm Springs Transfer's argument that jury instruction 28 was improper fails.

Jury instruction number 32

Jury instruction number 32 stated that "[a] property owner is not entitled to payment of just compensation for public construction projects that cause a decrease in business or value while the construction work is ongoing." Palm Springs Transfer argues that neither Nevadans for Property Rights v. Secretary of State, 122 Nev. 894, 141 P.3d 1235 (2006), nor Sloat v. Turner, 93 Nev. 263, 563 P.2d 86 (1977), provide legal support for this instruction. Palm Springs Transfer further argues that the instruction did not address the difference between a taking and a noncompensable damaging of property.[3] We conclude that the jury instruction is an accurate statement of the law.

Just compensation is awarded when a taking has occurred, but it is not awarded for mere damage. See Sloat, 93 Nev. at 268, 563 P.2d at 89. In Nevadans for Property Rights, this court discussed, in

---

[3]Palm Springs Transfer additionally argues that jury instruction number 32 is "nonsensical" because it implies that the City is required to pay just compensation for public construction projects. Because we conclude that the jury instruction was proper, this argument is without merit.

pertinent part, whether the Nevada Property Owners' Bill of Rights violated the single-subject requirement in NRS 295.009. 122 Nev. at 898, 141 P.3d at 1238. In finding that the initiative failed the single-subject requirement, this court stated that, "this provision would require payment of just compensation for, among other things, public construction projects that cause a decrease in business or value while the construction work is ongoing." Id. at 908, 141 P.3d at 1245. The court then stated that, to the extent that the initiative provided that "a decrease in business or value while construction work is ongoing . . . would require payment of just compensation," the initiative far exceeded the scope of what constituted eminent domain.[4] Id. at 908-09, 141 P.3d at 1245.

Jury instruction number 32 partially quotes Nevadans for Property Rights, 122 Nev. at 908, 141 P.3d at 1245. It is also supported by Sloat because, as explained in Nevadans for Property Rights, a decrease in property value caused by ongoing government construction does not constitute a taking. 122 Nev. at 908-09, 141 P.3d at 1245. Therefore, it necessarily follows that any damage arising from such an occurrence would be noncompensable. See Sloat, 93 Nev. at 268, 563 P.2d at 89. Accordingly, we conclude that jury instruction number 32 is an accurate statement of the law and Palm Spring Transfer's arguments to the contrary fail.

---

[4]Although this decision was not central to the holding in Nevadans for Property Rights, we reject Palm Springs Transfer's assertion that it was mere dicta. Moreover, as explained below, this jury instruction is also supported by Sloat.

Jury instruction number 33

Jury instruction number 33 stated: "[t]emporary injury resulting from actual construction of public improvements is generally noncompensable. Personal inconvenience, annoyance or discomfort in the use of property are not actionable types of injuries." Palm Springs Transfer argues that the instruction is unsupported by law because People v. Ayon, 352 P.2d 519 (Cal. 1960), provides the language for jury instruction number 33, and Palm Springs Transfer argues that Ayon was effectively overruled by First Lutheran Church v. Los Angeles County, 482 U.S. 304 (1987).[5] Further, Palm Springs Transfer argues that this instruction misstates the law because it is not confined to inverse condemnation and, therefore, the jury would have misunderstood it as applying to all of Palm Springs Transfer's claims.

As opposed to mere damage, temporary takings are compensable. First Lutheran, 482 U.S. at 318; Ayon, 352 P.2d at 525; Sloat, 93 Nev. at 268, 563 P.2d at 89. However, "[t]emporary injury resulting from actual construction of public improvements is generally noncompensable. Personal inconvenience, annoyance or discomfort in the

---

[5]Palm Springs Transfer additionally argues that the cases cited within Ayon—Heimann v. City of Los Angeles, 185 P.2d 597 (Cal. 1947), overruled on other grounds by County of Los Angeles v. Faus, 312 P.2d 680 (1957); Eachus v. Los Angeles Consolidated Electric Ry. Co., 37 P. 750 (Cal. 1894); and Beckham v. State, 149 P.2d 296 (Cal. Ct. App. 1944)—were overruled by First Lutheran and that they do not support jury instruction number 33. We have considered this argument and find it to be without merit as jury instruction number 33 is an accurate recitation of the law.

use of property are not actionable types of injuries." Ayon, 352 P.2d at 525.

Jury instruction number 33 is a direct quote from Ayon. See Ayon, 352 P.2d at 525. Although Ayon is a California case, we conclude that the jury instruction is an accurate statement of Nevada law as well. As stated in Sloat, "only actual physical injury to the property or some derogation of a right appurtenant to that property . . . is compensable." 93 Nev. at 268, 563 P.2d at 89. Thus, the statement in jury instruction number 33 that "[p]ersonal inconvenience, annoyance or discomfort in the use of property are not actionable types of injuries," is an accurate statement of the law. Sloat further supports the instruction's explanation that "[t]emporary injury resulting from actual construction of public improvements is generally noncompensable" because it stands for the proposition that not all injuries merit compensable damages. Id. Moreover, while Ayon was written before First Lutheran, Ayon does not conflict with the holding in First Lutheran. Rather, First Lutheran states that temporary takings are compensable, 482 U.S. at 318, while Ayon explains instances that do not constitute temporary takings. 352 P.2d at 525. For these reasons, we conclude that jury instruction number 33 was an accurate explanation of the law.

Further, while it is true that the jury instruction does not expressly state that it only applies to inverse condemnation, we determine that Palm Springs Transfer has not demonstrated that the instruction had a prejudicial effect. See Truckee-Carson Irr. Dist. v. Wyatt, 84 Nev. 662, 667, 448 P.2d 46, 50 (1968). As discussed in the following section, the evidence against Palm Springs Transfer was substantial and it has failed to show how the trial's outcome would have differed had jury instruction

number 33 stated that it only applied to the takings claim. Accordingly, we conclude that no miscarriage of justice occurred through the use of this jury instruction.

Sufficiency of the evidence

Palm Springs Transfer next argues that it presented sufficient evidence to support its claims of a taking, nuisance, and trespass. This is not the proper standard of review on appeal. Rather, on appeal we review the record to determine whether the jury's verdict was supported by substantial evidence. Mainor v. Nault, 120 Nev. 750, 773, 101 P.3d 308, 324 (2004). In reviewing sufficiency of the evidence claims, we assume "that '"the jury believed the evidence favorable to [the prevailing party] and made all reasonable inferences in [that party's] favor."'" Id. (alterations in original) (quoting Wohlers v. Bartgis, 114 Nev. 1249, 1261, 969 P.2d 949, 958 (1998) (quoting Bally's Employees' Credit Union v. Wallen, 105 Nev. 553, 555, 779 P.2d 956, 957 (1989))). Substantial evidence is evidence that "'a reasonable mind might accept as adequate to support a conclusion.'" Cook v. Sunrise Hospital & Medical Center, 124 Nev. ____, ____, 194 P.3d 1214, 1218 (2008) (quoting Yamaha Motor Co. v Arnoult, 114 Nev. 233, 238, 955 P.2d 661, 664 (1998)).

Having addressed Palm Springs Transfer's issues with respect to the jury instructions, we now discuss the evidence necessary to prove each of Palm Springs Transfer's claims and conclude that the City presented substantial evidence to support the jury's verdict against Palm Springs Transfer.

Taking

The Nevada Constitution provides that "[p]rivate property shall not be taken for public use without just compensation having been

first made, or secured." Nev. Const. art. 1, § 8. "Inverse condemnation is an 'action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency.'" State, Dep't of Transp. v. Cowan, 120 Nev. 851, 854, 103 P.3d 1, 3 (2004) (quoting Thornburg v. Port of Portland, 376 P.2d 100, 101 n.1 (Or. 1962)). "A taking can arise when the government regulates or physically appropriates an individual's private property." ASAP Storage, Inc. v. City of Sparks, 123 Nev. 639, 647, 173 P.3d 734, 740 (2007). "Physical appropriation exists when the government seizes or occupies private property or ousts owners from their private property." Id. "A physical appropriation by ouster occurs when the government substantially interferes with an owner's right of access to his or her property." Id. at 648, 173 P.3d at 740; see State ex rel. Dep't Hwys. v. Linnecke, 86 Nev. 257, 260, 468 P.2d 8, 9-10 (1970) (noting that a "[landowner] is not entitled to access to his land at all points in the boundary to it and the highway.") Mere damage to a property does not constitute a taking. See Sloat v. Turner, 93 Nev. 263, 268, 563 P.2d 86, 89 (1977).

We conclude that there was substantial evidence for a reasonable person to conclude that the shoofly did not constitute a taking of the Property. There is no evidence that the City appropriated the Property by ouster by substantially impairing Palm Springs Transfer's access to the Property. Rather, numerous witnesses testified that the shoofly did not interfere with their ability to use or access the Property, or park at the Property. Moreover, as stated in Linnecke, any temporary impairment of access is insufficient to constitute a taking. 86 Nev. at 260,

468 P.2d at 10. Additionally, contrary to Palm Springs Transfer's assertion that the Property was inundated with smoke, dust, dirt, fumes, noise, and vibration, witnesses testified that the shoofly did not create smoke, dust, fumes, noise, or vibration that substantially interfered with their ability to access or use the Property. Therefore, we conclude that the jury's finding that no taking occurred was supported by substantial evidence.

Nuisance

Pursuant to NRS 40.140(1)(a), a nuisance is "[a]nything which is injurious to health, or indecent and offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property."

Having reviewed the record, we conclude that, viewed in the light most favorable to the City, there was substantial evidence to support the jury's finding that the shoofly did not constitute a nuisance. As previously noted, witnesses testified that the shoofly did not cause fumes, dust, noise, or vibrations that interfered with their ability to use or access the Property or were injurious to their health. Further, witnesses cited reasons other than the shoofly that caused them to vacate the Property. Therefore, we conclude that there was substantial evidence to support the jury's finding that the shoofly was not a nuisance.

Trespass

Trespass is the "'wrongful interference with the right of exclusive possession of real property.'" Luce v. Marble, 127 P.3d 167, 177 (Idaho 2005) (quoting Moon v. North Idaho Farmers Ass'n, 96 P.3d 637, 642 (Idaho 2004)); see Lied v. County of Clark, 94 Nev. 275, 279, 579 P.2d 171, 173-74 (1978). To prove trespass, the claimant must show that the

defendant invaded the property. See Lied, 94 Nev. at 279, 579 P.2d at 173-74. To constitute trespass, the invasion must have been direct and tangible; indirect and intangible invasions give rise to nuisance. See City of Moses Lake v. U.S., 430 F. Supp. 2d 1164, 1184 n.18 (E.D. Wash. 2006). Finally, the invasion must result in damages. See Wallace v. Lewis County, 137 P.3d 101, 108 (Wash. Ct. App. 2006).

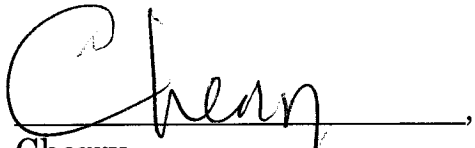
Assuming that the jury believed the City's evidence and made all reasonable inferences in the City's favor, we conclude that there is substantial evidence that supports the jury's finding that the City did not commit trespass upon the Property. There is no evidence that the City invaded or damaged the Property. Witnesses testified that the shoofly did not impact their ability to access the Property, which shows that the shoofly did not invade the Property's access points. Witnesses further testified that the shoofly did not interfere with their ability to park at the Property, demonstrating that the shoofly did not invade the Property's parking easement. Moreover, even if the shoofly sporadically interfered with the tenants' ability to park, Palm Springs Transfer did not have an exclusive right to the parking easement since it shared the parking easement with a high school. See Luce, 127 P.3d at 177. Further, contrary to Palm Springs Transfer's assertion, there was no evidence presented to support its contention that the Property was invaded by dust.[6] Additionally, there was no evidence that the shoofly invaded the Property by storing equipment there or that it physically damaged the

[6]To the extent that Palm Springs Transfer argues that the Property was trespassed by noise, vibrations, or fumes, the argument fails.

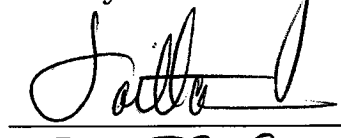
Property. Therefore, we conclude that there was substantial evidence to support the jury's verdict and its finding that the City did not trespass on the Property.

Therefore, for the reasons stated above, we

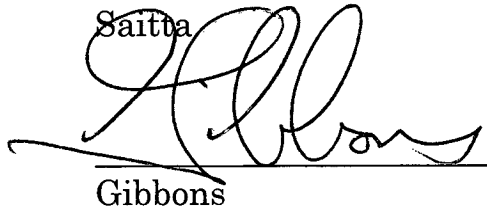
ORDER the judgment of the district court AFFIRMED.



_____, J.
Cherry



_____, J.
Saitta



_____, J.
Gibbons

cc: Hon. Patrick Flanagan, District Judge
Philip A. Olsen, Settlement Judge
Glade L. Hall
Reno City Attorney
Washoe District Court Clerk