

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

CLEAR CHANNEL OUTDOOR, INC., a )	
Delaware corporation, successor in )	No. 57326-8-1
interest to AK MEDIA WASHINGTON, )	
)	DIVISION ONE
Appellant, )	
)	UNPUBLISHED OPINION
v. )	
)	
SCHREM PARTNERSHIP, a )	
Washington partnership; and )	
JEFFREY OLIPHANT, an individual, )	
)	FILED: June 4, 2007
Respondents. )	

**GROSSE, J.** – Illegality is an affirmative defense to an action for breach of lease and where the party asserting that defense has met the threshold proof for such illegality summary judgment is appropriate. Here, Clear Channel Outdoor, Inc.'s (Clear Channel) failure to obtain the necessary permits to erect billboards rendered those billboards illegal. Additionally, that failure removed Clear Channel from any protection the Scenic Vistas Act might have afforded the company for legal nonconforming uses.

We affirm the trial court's summary judgment dismissal and its award of attorney fees and costs to Schrem Partnership.

**FACTS**

In 1986, billboards were erected by Clear Channel's predecessor, Ackerley Communications, Inc. (Ackerley), under a 15-year lease agreement with Schrem Partnership (Schrem). The 1986 lease provided that Ackerley

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would remove the billboards on 30 days' written notice from Schrem if the underlying property was sold. The property was listed for sale beginning at least as early as 1986.

Ackerley erected two billboards a few yards from 16th Avenue South and a block from State Routes 18, 99 and 161. Neither Ackerley nor its successor, Clear Channel, obtained permits from the Washington State Department of Transportation (WSDOT). Ackerley paid Schrem an annual rent of \$1,000 at the rate of \$250 per face of the billboards. The lease expired in 2001 but under the agreement continued in effect on a year-to-year basis.

On March 27, 2002, Ackerley entered into a second lease agreement with Schrem. Unlike the 1986 lease, the 2002 lease did not contain a clause permitting Schrem to dislodge Ackerley should the property be sold. Shortly after executing the lease, Ackerley assigned its rights under this lease to Clear Channel.

In the fall and winter of 2004-2005, Schrem sold the property to JLO Washington Enterprises, Inc., who then assigned its interest to FedWay Marketplace Investors, LLC. The city of Federal Way refused to issue any permits to develop the property until the billboards were removed.

On January 14, 2005, Schrem gave Clear Channel three days to remove the billboards and vacate the property. Schrem issued the three-day notice under RCW 59.12.030(5), which provides that a tenant is guilty of unlawful detainer if "he . . . carries on thereon any unlawful business or when he . . . erects, suffers, permits, or maintains

on or about the premises any nuisance, and remains in possession after the service . . . upon him . . . of three days' notice to quit."<sup>1</sup>

Clear Channel refused to vacate the property stating that the billboards were constructed with valid permits from the city and county and that they were lawfully maintained under the lease. However, during discovery, Schrem found that neither Clear Channel nor its predecessor Ackerley had obtained permits<sup>2</sup> for the erection or maintenance of the billboards as required under the Scenic Vistas Act (SVA).<sup>3</sup>

On March 9, 2005, Schrem removed the billboards. However, Clear Channel was invited to collect them. On March 16, 2005, Clear Channel sued Schrem for the damages it sustained as a result of the removal of its billboards, including loss of advertising income.

### **Trial Court Rulings**

Schrem moved for summary judgment on May 27, 2005, on the grounds that the billboard lease on which Clear Channel based its claim was illegal and unenforceable because of the Federal Way ban on all billboards within the city after February 28, 2000. The trial court initially denied Schrem's motion for summary judgment on the grounds asserted by Clear Channel that the billboards

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<sup>1</sup> RCW 59.12.030(5).

<sup>2</sup> The WSDOT confirmed that no permit was issued.

<sup>3</sup> RCW 47.42.120 provides in part:

Notwithstanding any other provisions of this chapter, no sign except a sign of type 1 or 2 or those type 3 signs that advertise activities conducted upon the properties where the signs are located, may be erected or maintained without a permit issued by the department.

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were a legal nonconforming use and the city was required to tender compensation under the SVA before anyone could require the signs to be removed.

When Schrem found during discovery that neither Clear Channel nor its predecessor Ackerley obtained permits from WSDOT as required by the SVA, it moved for partial summary judgment to dismiss Clear Channel's monetary claim for damages. The trial court granted the motion holding that the billboards were unlawful under the SVA and thus did not constitute a legal nonconforming use, rendering the lease void.

Schrem then moved for summary judgment on Clear Channel's remaining claim – that it had exclusive advertising rights on the property under the lease. The trial court dismissed Clear Channel's claims on the basis that the exclusive advertising rights applied only to the signs and the removal of the billboards also removed Clear Channel's right to prevent any on-site advertising on the property.

Finally, the trial court granted Schrem's motion for attorney fees and costs in the amount of \$71,549 for fees and costs in the amount of \$5,090.92. A judgment encompassing all of these rulings was entered on December 23, 2005. Clear Channel appeals.

## **ANALYSIS**

### **Billboards**

The billboards were subject to the Scenic Vistas Act, which provides in

pertinent part:

Notwithstanding any other provisions of this chapter, no sign except a sign of type 1 or 2 or those type 3 signs that advertise activities conducted upon the properties where the signs are located, may be erected or maintained without a permit issued by the department.<sup>[4]</sup>

Clear Channel did not obtain a permit for the billboards from WSDOT authorizing their erection.<sup>5</sup>

RCW 47.42.030 of the SVA provides:

Except as permitted under this chapter, no person shall erect or maintain a sign which is visible from the main traveled way of the interstate system, the primary system, or the scenic system.

The sign was visible from the interstate system. Failure to obtain the permit removed Clear Channel from any protection afforded by the SVA. Moreover, the SVA itself provides:

Any sign erected or maintained contrary to the provisions of this chapter or rules adopted hereunder that is designed to be viewed from the interstate system, the primary system, or the scenic system is a public nuisance.<sup>[6]</sup>

The billboards constituted a public nuisance. Thus, Clear Channel's lease was subject to the notice of unlawful detainer by Schrem.

Clear Channel maintains that no action could be brought against it because it was a legal nonconforming use and the SVA required compensation be paid before requiring removal of the signs. The SVA provides:

Except as otherwise provided in subsection (3) of this section, just

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<sup>4</sup> RCW 47.42.120.

<sup>5</sup> In addition, under WSDOT regulations, such sign permits must also be renewed annually. WAC 468-66-140(5).

<sup>6</sup> RCW 47.42.080(1).

compensation shall be paid upon the removal of any sign (pursuant to the provisions of chapter 47.42 RCW), lawfully erected under state law, which is visible from the main traveled way of the interstate system or the primary system.<sup>[7]</sup>

RCW 47.42.107 (1) provides:

Just compensation shall be paid upon the removal of any existing sign pursuant to the provisions of any resolution or ordinance of any county, city, or town of the state of Washington by such county, city, or town if:

....

(b) Such sign was erected subsequent to May 10, 1971 (the effective date of the Scenic Vistas Act of 1971), in compliance with existing state and local law.

Thus, in order to come under the umbrella of just compensation under the SVA, Clear Channel would have had to legally erect the signs and be "in compliance with existing state and local law."<sup>8</sup> Since the billboards were unlawful when erected in 1987 and were deemed to be a public nuisance until their removal in 2005, Clear Channel has no right to compensation for the billboards.

#### The Lease

Since the billboards were unpermitted and illegal under the SVA, the lease entered into in March 2002 (two years after the city of Federal Way banned billboards) was also illegal. In fact, the billboards were illegal ab initio when they were erected in 1987 under the 1986 lease. Clear Channel's argument that the billboards were a legal nonconforming lease must fail.

The provisions of the SVA are clear that compensation can only be due if

<sup>7</sup> RCW 47.42.102(1).

<sup>8</sup> RCW 47.42.107(1)(b).

the signs were erected "lawfully" and "in compliance with existing state law."<sup>9</sup> Because permits authorizing the erection of these signs were not requested or issued, the signs were not lawful. RCW 47.42.080(1) provides:

Any sign erected or maintained contrary to the provisions of this chapter or rules adopted hereunder that is designed to be viewed from the interstate system, the primary system, or the scenic system is a public nuisance. . . .

Thus, the billboards constituted a public nuisance until their removal in 2005. In fact, RCW 47.42.080(5) authorizes WSDOT to "remove any such sign without notice."

Since Federal Way banned billboards in 2000, the 2002 lease granting Clear Channel the right to operate billboards was illegal. The SVA provides in part that "[n]othing in this chapter shall be construed to permit a person to erect or maintain a sign that is otherwise prohibited by the . . . ordinance of any county, city, or town of the state of Washington."<sup>10</sup>

An agreement to violate a state statute or a municipal ordinance is an illegal contract.<sup>11</sup> It is well established in Washington that a court will not enforce a contract that is illegal or contrary to public policy.<sup>12</sup> The lease contravened Federal Way's proscription against billboards.<sup>13</sup> The prohibition of

<sup>9</sup> RCW 47.42.102(1) and .107(1)(b).

<sup>10</sup> RCW 47.42.048.

<sup>11</sup> Evans v. Luster, 84 Wn. App. 447, 450, 928 P.2d 455 (1996) (contract illegal where both parties evaded permit requirements even though one party was unjustly enriched).

<sup>12</sup> Hederman v. George, 35 Wn.2d 357, 361, 212 P.2d 841 (1949) ("Where a plaintiff, to make a case, must rely upon the illegal contract itself, he cannot recover.").

<sup>13</sup> FWCC §22-1600.

billboards has been recognized to be a valid public policy by the United States Supreme Court.<sup>14</sup>

Clear Channel cites Way v. Pac. Lumber & Timber Co.<sup>15</sup> as support for its proposition that the contract is enforceable and not void even if a permit could not have been obtained. Clear Channel's reliance upon Way is misplaced. The Way court held that a contract which violated a statutory regulation was not void unless made so by terms of the act.<sup>16</sup> **Here, Federal Way prohibited the erection of billboards within its city limits. The 2002 lease was void on its face since its main purpose contravened the language and policy of the sign code. An agreement that violates a state statute or a municipal ordinance is an illegal contract and void.**<sup>17</sup>

Clear Channel argues that even if we were to find the underlying basis of the lease to be illegal, the lease is not void. In support of this proposition, Clear Channel cites to Yakima Lodge No. 53, K.P. v. Schneider.<sup>18</sup> Yakima Lodge held that a landlord could not escape obligations under the lease because a portion of the leased premises was being used illegally. In holding that the lease itself was not void, the court stated, "because the use to which respondent might put the premises was unrestricted. It was only a particular use, which might be temporary in its duration that was penalized."<sup>19</sup> Here, the premises leased are

<sup>14</sup> Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 510, 101 S. Ct. 2882, 69 L. Ed. 2d 800 (1981).

<sup>15</sup> Way, 74 Wash. 332, 133 P. 595 (1913).

<sup>16</sup> Way, 74 Wash. at 333.

<sup>17</sup> Evans, 84 Wn. App. at 450.

<sup>18</sup> Yakima Lodge, 173 Wash. 639, 24 P.2d 103 (1933).

specifically for billboards and no other. Thus, **the entire lease is unenforceable.**

Exclusive Advertising Rights

Clear Channel argues that even if the billboards are held to be illegal, it was still entitled to be the exclusive advertising agent on the property. The language employed in the lease is as follows:

2. Premises. Landlord leases to Tenant, and Tenant leases from Landlord, that certain portion of the Property (the "Premises") described as existing signs located at northwest and southwest corners respectively.

3. Purpose. The purpose of this Lease is for Tenant to attach, install, construct, maintain and operate a structure (the "Structure") on the Premises and to operate painted, printed, illuminated and/or electrical signs on the Structure, and all other uses not inconsistent therewith. . . .

4. Tenant's Right to Enter and Use. For the duration of this Lease, Tenant has the non-exclusive right to enter onto the Property for the purpose of accessing the Premises, constructing any utilities desirable for the operation of the Structure, and to use the Structure for the purposes described in this Lease and any other purposes allowed or required by this Lease. Tenant shall have the exclusive right to use the Property for advertising and other print or graphic communication media, and the exclusive right to use the Property to provide telecommunications infrastructure. . . .

The lease clearly defines the premises to be the billboard structures. Thus, the exclusivity clause is only applicable to the signage. Our decision is supported by Brunswick-Balke-Collender Co. v. Seattle Brewing & Malting Co.<sup>20</sup> In the Brunswick case, one party attempted to enforce the lease after its purpose (a saloon) had been declared illegal. In holding the lease to be unenforceable, the

<sup>19</sup> Yakima Lodge, 173 Wash. at 643.

<sup>20</sup> Brunswick, 98 Wash. 12, 14, 167 P.58 (1917).

court noted:

It is apparent from a reading of these leases that the parties had one and one purpose only in mind, that the premises were let for saloon purposes and were to be occupied as a saloon. The covenants of the lease, when read as a whole, are clearly indicative of this purpose. The parties had no other use in mind, and covenanted with this use and no other in contemplation. Otherwise language means nothing.<sup>21</sup>

Here, the clear purpose of the lease was to permit Clear Channel to display advertising upon the billboards in exchange for monetary compensation.

#### Attorney Fees

Schrem is entitled to attorney fees even though the underlying lease providing for such fees is invalid. Washington courts have repeatedly enforced contractual prevailing party clauses where a contract has been held to be unenforceable or invalid. In Herzog Aluminum, Inc. v. General American Window Corp.,<sup>22</sup> the court held that even though no contract was formed, the prevailing party was entitled to fees and cost pursuant to RCW 4.84.330, which provides:

In any action on a contract or lease entered into after September 21, 1977, where such contract or lease specifically provides that attorney's fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party, whether he is the party specified in the contract or lease or not, shall be entitled to reasonable attorney's fees in addition to costs and necessary disbursements.

Any action was construed by the Herzog court to include actions which invalidated the contract. In so ruling, the court noted that had the other party

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<sup>21</sup> Brunswick, 98 Wash. at 14.

<sup>22</sup> Herzog, 39 Wn. App. 188, 197, 692 P.2d 867 (1984).

prevailed in its suit, it would also have been entitled to attorney fees and costs.<sup>23</sup>

The Supreme Court cited Herzog favorably in Mt. Hood Bev. Co. v. Constellation Brands.<sup>24</sup> The Mt. Hood court held that "defending against an action based on a statute by successfully arguing the statute is unconstitutional allows an award of attorney fees under that statute."<sup>25</sup> The trial court's award of attorney fees was appropriate.

We affirm the trial court's summary judgment dismissal of all of Clear Channel's claims and uphold the trial court's award of attorney fees. Additionally, Schrem is entitled to attorney fees on appeal under RCW 4.84.330 and RAP 18.1.

Grosse, J.

WE CONCUR:

Edenborn, J.

Cox, J.

<sup>23</sup> Herzog, 39 Wn. App. at 191.

<sup>24</sup> Mt. Hood, 149 Wn.2d 98, 63 P.3d 779 (2003).

<sup>25</sup> Mt. Hood, 149 Wn.2d at 122.