

20050197

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

City of Grand Forks, North Dakota)
a North Dakota Municipal Corporation)

Plaintiff/Appellee,)

vs.)

Hendon/DDRC/BP, LLC a/k/a Hendon/
DDR/BP, LLC,)

Defendant/Appellant,)

and Metropolitan Life)
Insurance Company, Office Depot, Inc.,)
and Southtrust Bank, and any other)
persons unknown claiming any estate or)
interest in, or lien or encumbrance upon)
the property described in the Complaint,)

Defendants.)

Supreme Court Case No. 20050197
District Court Case No. 03-C-620

FILED
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STATE OF NORTH DAKOTA

APPEAL FROM ORDER DENYING APPELLANT'S MOTION FOR A NEW
TRIAL AND FROM THE JUDGMENT DATED APRIL 29, 2005
THE HONORABLE JUDGE JOEL D. MEDD

BRIEF OF APPELLANT HENDON/DDRC/BP, LLC

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STATEMENT OF ISSUES

- 1.** Did the District Court error in denying Hendon's Motion for a New Trial on the issue of damages because there was insufficient evidence to justify the verdict as the verdict was against the great weight of the evidence and was contrary to undisputed evidence?

- 2.** Is the verdict and resulting judgment in error because there is an insufficiency of evidence to justify the verdict and because the Judgment fails to award Hendon an adequate amount of severance damages for property not taken in accordance with the law?

STATEMENT OF THE CASE¹

3. This is an appeal from the Memorandum Decision and Order in the District Court, Grand Forks County, North Dakota dated March 23, 2005, denying Defendant Hendon's Motion for a New Trial and an appeal from the Judgment of the same Court dated April 29, 2005.

4. The action arises out of a complaint asserting an eminent domain quick-take proceeding dated May 19, 2005. (D-#2)(A-6) The complaint noted that the property involved in and affected by the taking was owned by Hendon/DDRC/BP, LLC, and that Office Depot, Inc., had a possessory interest in the property by virtue of a Memorandum of Lease duly recorded in the County Recorder's office, Grand Forks County, North Dakota. The District Court entered an Order June 10, 2003, ordering that the City of Grand Forks was entitled to take immediate fee possession to certain parts of the property and to have certain permanent easements and temporary construction easements. (D-#16)(A-14). Effective as of the date of the quick-take order Office Depot terminated its lease effective June 10, 2003. (D-#106)(A-37)

5. With leave of the Court, Hendon amended its Answer by pleading dated August 7, 2003 in which it added a cross-claim against Office Depot, Inc., in which Hendon disputed Office Depot's interpretation of the lease by which Office Depot asserted it had a right to terminate because of the taking. (D-#22)(A-21).

6. On October 5, 2004, Office Depot filed a Motion for Summary Judgment in which it asserted it validly terminated the lease and, therefore, no longer had any interest in the property nor the pending action.(D-#45) The Court in its Memorandum Decision dated December 8, 2004, found that upon examination of the lease

¹ D=Docket; A=Appendix; T=Transcript

agreement, it provided that if any portion of the “no change area” was taken by condemnation, Office Depot had the right to terminate the lease. The Court found that Office Depot validly terminated the lease agreement with Hendon in accordance with the terms and provisions of the lease agreement. (D-#58)(A-28).

7. The City then made a motion in limine to exclude “any evidence or testimony relating to the loss of the Office Depot tenancy....” (D-#61, Plaintiff’s brief in support of motion in limine, p.8) The court denied the motion stating “[t]he Court finds that evidence of the lease is relevant to the issue of the value of the property and taking by the City.” (D-#83)(A-33)

8. The case was subsequently tried and on January 14, 2005, the jury entered a verdict in which it found that Hendon suffered severance damages as defined in the Court’s instruction, proximately caused by the permanent taking, and as a result, Hendon suffered severance damages in the amount of \$61,350.00. (D-#117)(A-55).

9. On January 21, 2005, Hendon filed a Motion for a New Trial on the issue of damages. (D-#121)(A-56). On March 23, 2005, the Court entered a Memorandum Decision denying Hendon’s Motion for a New Trial. (D-#136)(A-59).

10. On April 29, 2005, Judgment was entered. The Judgment provided that the parties had stipulated to the fair market value of the property that was being taken to be in the amount of \$76,500.00 and, additionally, \$61,350.00 for severance damages pursuant to the jury verdict.(D-#138)(A-62). Notice of Entry of Judgment was served by mail on May 2, 2005. (D-#139)(A-64). Hendon filed its Notice of Appeal June 2, 2005. (D-#141)(A-62).

STATEMENT OF FACTS

11. On or about April 21, 2003, the City Council of the City of Grand Forks adopted a Resolution authorizing the utilization of quick-take, eminent domain proceedings for roadway improvements to South Columbia Road and 24th Avenue.

12. As part of this roadway project, the City condemned, through quick take proceedings, a portion of Hendon's property, described as Lot (1) and Lot (3), Block (1), of Columbia Mall 2nd Subdivision to the City of Grand Forks, North Dakota. Hendon's property was subject to a 10-year lease ("the Lease") entered into between Hendon, as Landlord, and Office Depot, Inc., as Lessee, on or about October 25, 1999. (D-105). A memorandum lease was recorded February 10, 2000, as Document No. 569507, in the Office of the County Recorder within and for Grand Forks County, North Dakota. (Complaint para. XI, A-9) While Office Depot ran a business on the leased premises for a few years, they ceased doing business at the subject premises approximately January 3, 2002. (T-p.318, 1.7) Office Depot nevertheless continued thereafter to make payments to Hendon under the terms of the Lease. (T-p.314, 1.6-11)

13. Section 10.2.1 of the Lease provides as follows as to the effect of any exercise of the power of eminent domain in acquiring a portion of the demised premises:

If, after the execution and before the termination of this Lease: (i) any portion of the Floor Area is taken by eminent domain or conveyed in lieu thereof; or (ii) any portion of the "No Change Area", both as shown on the Site Plan is taken by condemnation or conveyance in lieu thereof . . . Tenant shall have the right to terminate this lease. Such option to terminate shall be exercisable by Tenant giving written notice to Landlord within thirty (30) days after the date of possession of the Premises or other action specified hereinabove shall be taken by the acting governmental or quasi-governmental authority (the "Date of Taking"), which notice shall provide for a termination date (the

"Termination Date") not later than ninety (90) days after the Date of Taking, and Tenant shall pay rent up to the Date of Taking.

(D-105, Def.'s Exh. D-20, Lease, § 10.2.1.)(A-35)

14. After becoming aware of the pending condemnation action Office Depot, sent Hendon a letter on May 30, 2003, giving written notice that they would consider the Lease terminated upon the "Date of Taking" if the City's condemnation included any property within the "No Change Area." (D-#106, Def.'s exh. 21, A-37)

15. The Court entered a "Quick Take Order" on June 10, 2003, thereby establishing the "Date of Taking" for purposes of the Lease termination and the date for determination of severance damages. (D-16)(A-19)

16. The Court entered its Memorandum Decision and Order Granting Office Depot's Motion for Summary Judgment in which it found that the taking by the City took a portion of the "No Change Area" referred to in § 10.2.1 of the Lease, which permitted Office Depot to terminate the lease, and the termination of the Lease by Office Depot was valid. (D-#58)) (A-28).

17. The City's appraisal (D-86, Pl. exh.1) was completed January 4, 2003, approximately five months before the actual taking. The City's appraisers appraised only the value of the bare land (unimproved) as a whole, then less the land actually taken, and found the value of the taken bare land to be \$76,500.00. At that time, the City's appraisers were not aware of the condemnation termination clause in the lease. (Joan Johnson, T p.115, l. 25) The City's appraisers did not do an appraisal of Hendon's **entire property** (building and land) before and after the taking. As the City's appraiser never determined the market value of the **entire property** before the

taking and after the taking, the City's appraisal never addressed the issue of diminution in value of the **entire property** as a result of the taking. (Joan Johnson, T p. 177, l. 13; p. 179, l. 12) The City's appraiser merely concluded that there were no severance damages without using any of the three recognized appraisal approaches to determine value before and after the date of taking. Hendon's appraiser, Jeff Johnson, calculated the estimated just compensation for the taking to be \$690,000.00, of which \$616,107.00 was attributable to the decrease in market value of the part not taken as a result of the taking. (D-#110, Def exh. 25, page 1)(A-38) As the parties stipulated to the value of the taken part to be \$76,500.00, Jeffrey Johnson adjusted the severance damages to be \$613,500.00. (\$690,000.00 – \$76,500.00). (T p.437, l.18)

18. The jury rejected the city's position that there were no severance damages when it answered the verdict form and found that there, in fact, were severance damages. (D-#117)(A-55) As the City had taken the position that the loss of the lease could not be considered and, therefore, no severance damages had occurred, the City offered no evidence of the market value of the **entire property** before and after the taking. Accordingly, the only evidence that the jury had before it as to the market value of the entire property (not just the bare land), before the taking and the market value after the taking, was the testimony of Jeffrey Johnson. His appraisal report was received in evidence as defendant's exhibit 25.(D-110)(A-38) After comparing the market values obtained by using the comparable sales approach and the income capitalization approach, Jeffrey Johnson concluded that the income capitalization approach was the most appropriate approach and concluded that the difference in market value before taking and after taking was \$690,000.00. This figure included the

value of the property interests that were actually being taken. As stated above, the parties had stipulated that the value of the property taken was \$76,500.00. Jeffrey Johnson testified that after deducting the \$76,500.00 damages for the land taken, the amount of severance damages was **\$613,500.00**. The jury awarded **\$61,350.00**. This amount was exactly 1/10th of the amount of severance damages established by the uncontested evidence as provided by Jeffrey Johnson. Since there was no other evidence as to the amount of severance damages besides that offered by Jeffrey Johnson, the amount of severance damages reached by the jury was based on reasons other than evidence and the law as set forth in the jury instructions.

ARGUMENT

Standard of Review

19. The standard of review of a denial of a motion for a new trial as applied here is whether the trial court's denial of a motion for a new trial on the issue of damages was an abuse of discretion. However, "Appellate courts are much more reluctant to interfere with the action of a trial court granting a new trial than they are to interfere with the action of a trial court denying a new trial..." *Crosby v. Sande*, 180 N.W.2d 164, 168 (N.D. 1970)

Severance Damages-Loss of Lease

20. Section 32-15-22 N.D.C.C. states the law for assessment of damages in eminent domain takings. It provides:

§ 32-15-22. Assessment of damages The jury, or court, or referee, if a jury is waived, must hear such legal testimony as may be offered by any of the parties to the proceedings and thereupon must ascertain and assess:

1. The value of the property sought to be condemned and all improvements thereon pertaining to the realty and of each and every separate estate or interest therein. If it consists of different parcels, the value of each parcel and each estate and interest therein shall be separately assessed.

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.

3. If the property, though no part thereof is taken, will be damaged by the construction of the proposed improvement, the amount of such damages.

4. If the property is taken or damaged by the state or a public

corporation, separately, how much the portion not sought to be condemned and each estate or interest therein will be benefited, if at all, by the construction of the improvement proposed by the plaintiff, and if the benefit shall be equal to the damages assessed under subsections 2 and 3, the owner of the parcel shall be allowed no compensation except the value of the portion taken, but if the benefit shall be less than the damages so assessed the former shall be deducted from the latter and the remainder shall be the only damages allowed in addition to the value of the portion taken.

5. As far as practicable, compensation must be assessed separately for property actually taken and for damages to that which is not taken.

(Emphasis added)

21. The court instructed on severance damages as requested by the parties. Each requested NDJI-CIVIL No. 75.10:

SEVERANCE DAMAGES

22. Because only a portion of the landowner's tract is taken, you must determine the severance damages, if any, that will accrue to the portion not taken by reason of 1) its severance from the portion taken and 2) the construction of the improvement in the manner proposed by the taking authority. Severance damages are measured by the loss in market value of the property affected. (T-44)

23. In *City of Hazelton v. Daugherty*, 275 N.W.2d 624 (N.D. 1979) the Court stated:

There is no sole measure for determining severance damages as such damages are not susceptible to precise proof and can only be approximately shown by the opinion of witnesses having the requisite information. *Minnkota Power Cooperative v. Bacon*, 72 N.W.2d 880 (N.D. 1955); *Lineburg v. Sandven*, 74 N.D. 364, 21 N.W.2d 808 (1946). The generally accepted best measure of severance damages, however, is the diminution or depreciation of the market value of the property not condemned, which is the difference in the market value of the property not taken before and after the severance from the part taken. 29A C.J.S. *Eminent Domain* § 139. *Id.* at 628.

24. In *City of Jamestown v. Leever's Supermarkets*, 552 N.W.2d 365, 374, (N.D.1996) the Court noted :

... The amount of damages in an eminent domain action is a question of fact to be decided by the trier of fact. *City of Devils Lake v. Davis*, 480 N.W.2d 720, 725 (N.D. 1992). A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if there is no evidence to support it, or if the appellate court is left with a definite and firm conviction that a mistake has been made. *Sargent County Bank v. Wentworth*, [*375] 547N.W.2d 753, 758 (N.D. 1996). We ordinarily sustain an award of damages if it is within the range [**28] of the evidence presented to the trier of fact. *City of Hazelton v. Daughtery*, 275 N.W.2d 624, 627 (N.D. 1979).” *Id* at 374

New Trial When Verdict Against Weight of Evidence

25. A new trial may be granted when the amount of the verdict is against the weight of the evidence or is so excessive or inadequate as to be without support in the evidence. *Forster v. Dakota West Veterinary Clinic, Ltd.*, 2004 ND 207; 689 N.W.2d 366. P.22. North Dakota law allows a new trial to be granted where there is substantial conflict in the evidence if in its discretion the court finds that the evidence does not justify the verdict. *Crossen v. Rognlie*, 68 N.W.2d 113 (N.D. 1955).

26. N.D. R. Civ. P. 59 (b)(6) provides:

" The former verdict or other decision may be vacated and a new trial granted on the application of a party aggrieved for any of the following causes materially affecting the substantial rights of the party:

...

(6) Insufficiency of the evidence to justify the verdict or other decision, or that it is against law."

27. Where the grounds for a new trial are specified by statute, and the statute does not specify inadequate verdict but merely specifies “insufficiency of the evidence to justify the verdict,” the party complaining of the inadequacy may specify insufficiency of the evidence as grounds for the new trial. *58 Am Jur 2d, New Trial*, §411.

28. Rule 59(b) N.D.R.Civ.P., specifying grounds for a new trial, does not specifically include the ground of “inadequacy of damages,” but it is held that a new trial can be granted upon the ground of insufficiency of the evidence for the reason that the damages awarded by the jury are inadequate. *Maier v. Holzer*, 123 N.W.2d 29 (N.D. 1963). In *Maier* the district court granted a new trial to the plaintiff because of inadequacy of damages awarded in an automobile accident.

29. In *Maier* the Court quoted with approval an Ohio decision which stated:

In Ohio the rule prevails that a new trial may be granted where the final order, judgment or decree is not sustained by sufficient evidence. In *Poske v. Mergl*, 169 Ohio St. 70, 157 N.E.2d 344, the court, after stating that a motion for a new trial with reference to the weight of the evidence is addressed to the sound discretion of the trial court, says:

'It follows that, where there is a motion for a new trial upon the ground that the judgment is not sustained by sufficient evidence, a duty devolves upon the trial court to review the evidence adduced during the trial and to itself pass upon the credibility of the witnesses and the evidence in general. It is true that, in the first instance, it is the function [**9] of the jury to weigh the evidence, and the court may not usurp this function, but, when the court is considering a motion for a new trial upon the sufficiency of the evidence, it must then weigh the evidence. A court may not set aside a verdict upon the weight of the evidence upon a mere difference of opinion between the court and jury. * * * But, where a court finds a judgment on a verdict manifestly against the weight of the evidence, it is its duty to set it aside.' *Maier at 32*.

30. Furthermore, Rule 59(c)(2)(g) provides:

(g) Verdict vacated by court. The verdict of a jury also may be vacated and a new trial granted by the court in which the action is pending on its own motion without the application of either of the parties, when there has been such plain disregard by the jury of the instructions of the court or of the evidence in the case as to satisfy the court that the verdict was rendered under a misapprehension of the instructions or under the influence of passion or prejudice.

N.D.Civ.P. 59(c)(2)(g).

31. In *Olson v. Thompson* the County Commissioners of Pierce County, North Dakota, brought proceedings to obtain a right of way over a farmstead to build a public road. *Olson v. Thompson*, 74 N.W.2d 432 (N.D. 1956). The County Commissioners valued the land that the department planned to take as a right of way, and never valued the loss to the entire property before the taking or after the taking. *Id.* at 436, 437. There was no evidence offered by the County of the value of the property as a whole. *Id.* at 438. The jury returned a verdict for the exact amount that the County had appraised for the property taken. *Id.* at 436. The Supreme Court of North Dakota upheld the trial court's decision to grant a new trial. *Id.* at 440. The court held that land and buildings upon it constitute but one piece of property and benefits and damages from the taking are to be ascertained by ascertaining the affect upon the property as a whole. *Id.* at 438. The court stated, in part: "...Clearly, there is evidence, irrespective of the value of bare land plus the value of the improvements, to warrant more allowance for damages than was found by the jury. We have in the instant case very conflicting evidence on values." *Id.* at 439. It is the duty of the jury to determine not only the value of the land taken, but also whether the plaintiff suffered any detriment to his property by the taking, and return a verdict in an amount sufficient to compensate for that detriment. *Id.* at 439. The district court may grant a motion for a new trial where there is substantial conflict in the evidence if in its discretion it finds that the evidence does not justify the verdict. *Id.* at 440.

32. In *Karst v. Vickers*, 444 N.W.2d 698 (N.D. 1989) the court quoted N.D.Civ.P. Rule 59(g) and found a new trial to be required. It said:

"The verdict of a jury also may be vacated and a new trial granted . . . when there has been such plain disregard by the jury of the instructions of the court . . . as to satisfy the court that the verdict was rendered under a misapprehension of the instructions. . . ."

In denying the motion for a new trial, the trial court stated that it did "not believe" that the jury failed to follow the court's instructions. The court concluded that "the errors alleged" are "harmless errors, if errors at all."

The trial court's decision to grant or deny a new trial will not be overturned on appeal unless the court has abused its discretion. *Kerzmann v. Rohweder*, 321 N.W.2d 84 (N.D. 1982). A stronger showing is required to reverse the granting of a new trial than to reverse an order **[**6]** denying a motion for new trial. *Cook v. Stenslie*, 251 N.W.2d 393 (N.D. 1977). We conclude that the jury's misapplication of the court's instructions tainted the entire verdict in this case, thereby justifying a new trial. We also conclude, therefore, that the trial court abused its discretion in denying the plaintiffs' motion for a new trial. *Karst* at 700.

33. The generally accepted measure of severance damages is the diminution in market value of the property not condemned, which is the difference in the market value of the property before and after severance from the property taken. *Dutchuk v. Board of County Com'rs, Billings County*, 429 N.W.2d 21, 22 (N.D. 1988). In *Dutchuk* the county appealed. In *Dutchuk*, as in the instant case, the County simply denied the existence of severance damages and offered no "before" and "after" taking appraisals of the remaining property. Dutchuk's appraiser provided the court with a comparable sales approach for appraising the property and offered his opinion of the before-taking and after-taking value of the remaining property. The court awarded severance damages within the range of Dutchuk's appraiser's testimony.

City's Appraisers Failed to Appraise Property After the Taking

34. In the Hendon taking, the City's appraisers did not conduct any appraisal after the taking that examined the effect that the taking had on the market value of the non-

taken property. There was no appraisal of the non-taken property (including the building, not just land) by the City's appraisers before or after the taking.

35. A review of the transcript of the testimony of the City's appraisers is as follows.

Joan Johnson, the first City appraiser to testify, stated:

- She determined by December 20, 2002, that there was no severance damage to the property not taken. (T-p. 134, l. 10-25)

- She was never provided nor did she ask for a copy of the lease in the course of doing her appraisal. (T-p.91, l. 5-9)

- She admitted that in eminent domain one is to look at the value before and after the taking. (T.-p. 92, l. 24)

- She had never done a condemnation appraisal where the property had a lease that contained an escape clause in the event of condemnation.
(T-p. 118, l. 14-22)

- At the time she prepared the appraisal the taking had not yet occurred nor had Office Depot terminated the lease. (T-p. 19, l. 10-21)

- At the time she did the appraisal she was not aware of the clause in the lease that permitted the tenant to terminate if part of the designated property was taken by eminent domain. (T-p. 126, l. 25; p. 127, l. 1-4)

- Although she learned of the escape clause a month before trial she did not feel that she needed to make any changes in her appraisal. (T-p. 127, l. 25; p. 128, l. 2)
- In her data book, Exhibit P-1, at part 1 of 2, she states that she considered rental information. (T-p. 129, l. 14) but she testified that she considered that information not appropriate or necessary (T-p. 130, l. 5)
- In her appraisal she only used a sales comparison approach and treated the Hendon property as “unimproved property” and compared it to other unimproved land (T-p. 132, l. 8; p. 133, l. 1, 19)
- She did not use an income capitalization approach. (T-p. 133, l. 20)
- On December 20, 2002, before the taking and termination of the lease, she had concluded “since no damages from the acquisition are evident compensation becomes limited simply to the part taken whether in fee or by easement” (T-p. 134, l. 21)
- She concluded, “thus, the appraisal problem is limited to a land valuation task.” (T-p. 135, l. 1)

- Referring to her appraisal, page 33, second paragraph, she stated, “The income capitalization approach also is not appropriate to the appraisal problem. First, scheduled project taking will not result in loss of income to the remainder parcel.” (T-p. 135, l. 11)
- She admitted that the various authoritative publications utilized by appraisers contain various directives pertaining to the consideration of the existence of a lease on the appraised property. (T-p. 139, l. 7; through p. 146, l. 17)
- She acknowledged that one of the authoritative publications specifically covers “escape” and “kick-out clauses” and advises the appraiser that “this type of escape clause can affect rental values and market value”
(T-p.146, l. 2-17)
- When responding to a hypothetical question, she admitted that in finding comparable sales for a subject building that is leased, the appraiser should look for comparable buildings that had the spaced leased.
(T-p. 166, l.16- 25; p. 167, l. 1-8)
- She admits that to use the income capitalization approach, the existing lease would be considered. (T-p. 173, l. 17, 25; p. 174, l. 1, 25)

- She admitted that her appraisal did not consider the market value of the property but only the market value of the land. (T-p. 177, l. 11,23)
- She admitted that all of the comparable sales used in the City’s appraisal of the Hendon property involved unimproved land and not a single one of them had a building on them or a tenant. (T-p. 178, l. 1, 25)
- She admits that there is nothing in her appraisal from which the jury can determine the market value of the property before the taking and the market value after the taking. (T-p. 178, l. 18, 23)
- Her appraisal is based upon assumption. The assumption that the loss of the lease is a non-compensable item. (T-p. 179, l. 10, 17)
- She admits that to determine the market value an existing lease must be considered. (T-p. 181, l. 17-23)
- Admits that her appraisal valued only the land, not the whole property. (T-p. 182, l. 22-25)

36. In light of the above, it is important to note that the Court reminded the parties that in denying the City’s Motion In Limine it had found that “the loss of the lease is a relevant issue to the market value and that’s why it is at issue here....” (T-p. 204, l. 19-21). This holding is the law of the case.

37. Mr. David Campbell collaborated with Joan Johnson in doing the City's appraisal of the Hendon property. He testified to the following points concerning his appraisal:

- Mr. Campbell carries an MAI which indicates he has more experience in commercial appraisal work. Joan Johnson has a RM designation which means that such persons typically deal in residential property. (T-p.241, l. 19-25; p. 242, l. 1-6)
- He noted the manual *Appraisal of Real Estate, 12th Edition* (T-p. 242, l. 20) and acknowledges and gives special recognition to Jeffrey A. Johnson, MAI, for the contributions to the manual. (T-p. 244, l. 4)
- After going through the initial analysis of the project the appraisers determined that there would be no severance damages. The analysis did not include an examination of the lease. (T-p. 246, l. 6-10)
- He agreed that as far as severance damages are concerned, the jury has to look at the market value of the remaining property before and after the taking. (T-p. 247, l. 1-4)
- As of January 4, 2003, he had concluded that there was no severance damage and that this conclusion took place before the taking and lease termination had occurred. (T-p. 247, l. 9, 25)

- Everything in the City's appraisal report relies on things that have occurred prior to the date of the report. (T-p. 248, l. 8-11)
- Admits that the fact that the property may or may not have a lease on it is going to affect the value of the property. (T-p. 250, l. 23; p. 251, l. 1)
- Admitted that in determining market value he would consider the lease in any instance if it were available to him. (T-p. 250, l. 12-16)
- He admits that a lease has the potential for increasing the market value. (T-p. 253, l. 12-19)
- Admits that the various standards list all kinds of things that an appraiser is supposed to look for in a lease. (T-p. 254, l. 21-24)
- The City's appraisal determined the value of the property actually taken by using comparable sales of unimproved property. (T-p. 259, l. 1-8)
- Admitted that in appraisals of leased property, he would determine the market value of the remaining parcel before the taking and the market value after the taking. (T-p. 261, l. 6, 10)

- Admits that if he was trying to determine the before taking and after taking market value of a property, he would look for comparable sales of buildings carrying leases at market value. (T-p. 264, l. 15-25; p. 265, l. 8-13)
- He would take into consideration any differences in value between those building with leases and buildings without leases. (T-p. 267, l. 16-23)
- He noted that those that are occupied would bring a better return per square foot. (T-p. 268, l. 4)
- Admits that in doing the appraisal he would look to the characteristics of the lease on the subject property. (T-p. 269, l. 6-25)
- If he had used the income capitalization approach, he would have looked at the terms of the lease. (T-p. 271, l. 14-25)
- Admits that in appraising the same property after the taking but assuming a building with no tenants, he would use all three appraisal approaches. (T-p. 273, l. 15 through p. 274, l. 2)
- Admits that buildings that have tenants tend to sell for more per square foot than buildings without. (T-p. 278, l. 6-9)

- Admits that the presence of a lease could have an effect on market value and that it would be something that he would want to review and consider as additional information in the appraisal. (T-p. 278, l. 21; p. 279, l. 12)
- Acknowledged that the appraisal that he and Joan Johnson did for the City contained the statement “the nature of this particular appraisal problem infers that the appraisal objective may be accomplished without valuation of existing improvements.” (T-p. 280, l. 19; p. 281, l. 11)
- Admitted that he made no calculation to actually determine the value of the remaining property after the taking. (T-p. 282, l. 7 through p. 283, l. 3)
- Admitted that under the Uniform Appraisal Standards for Federal Land Acquisition, Section A-13f, an appraiser is to consider the rental history and that he would have reported the rental history in the appraisal just the same as sales history. (T-p. 299, l. 17 through; p. 301, l. 9)
- He admitted that reporting the lease in the appraisal is required.
(T-p. 302, l. 18)

38. Stuart Holmquist is the Senior Residential Property Manager who oversees various Hendon properties including the Grand Forks property. (T-p. 309, l. 1) He stated that Office Depot paid all of their rents due through June 10, 2003, the date of the taking. (T-p. 314, l. 6, 22) Office Depot actually operated their retail business

from about June, 2000, (T-p. 317, l. 21) and ceased retail operations January 3, 2003. (T-p. 318, l. 7).

Before and After Taking Value Established by Hendon

39. Hendon hired Mr. Jeffrey A. Johnson of Integra Realty Resources to appraise the property and determine the value of the property lost in the actual taking, as well as the severance damages sustained by the remaining property. (T-p. 336, l. 5). The salient points of his testimony are as follows:

- His office is located in Minneapolis. Integra Realty Resources has 55 offices nationally. (T-p. 336, l. 24)

- Integra is principally involved in commercial appraisals including regional malls. (T-p. 337, l. 8)

- His family moved to Grand Forks in 1957 and he graduated from UND in 1969. (T-p. 337, l. 21)

- He obtained a Master's degree in mathematics in 1972. (T-p. 338, l. 15)

- He began his appraisal profession in Fargo in 1978.
(T-p. 338, l. 24; p. 339, l. 1)

- His professional designation is MAI. (T-p. 334, l. 11)

- He is an approved instructor to teach classes for the Appraisal Institute.
(T-p. 342, l. 15)
- He is approved to teach the eminent domain seminar for the Appraisal Institute. (T-p. 343, l. 17)
- 95% of his appraisal work is in the condemnation or eminent domain area. (T-p. 345, l. 3)
- His work is divided about 50-50 between government agencies and individuals. (T-p. 345, l. 18)
- He worked in the writing of the *Appraisal of Real Estate, 12th Edition*, and received a national award for that work. (T-p. 346, l. 14)
- He also teaches at the University of Minnesota Law School.
(T-p. 348, l. 18)
- He has appraised the Kirkwood Plaza in Bismarck, West Acres in Fargo and numerous commercial properties in Grand Forks. (T-p. 349, l. 11, 25; p. 350, l. 1, 4) He also appraised Ridgewood, Southdale, Maplewood Mall and Mall of America in the Twin Cities region. (T-p. 616, l. 22)

- Mr. Johnson covered the process that he went through in doing the Hendon appraisal in great detail for the jury. (T-p. 358, l. 6 through p.422, l. 19)
- He concluded that there were no elements of severance damages related to any physical change in the property but if the lease was lost then he had to answer the question for himself, would there be a loss in the market value of this property for the loss of the lease? (T-p. 367, l. 6-10)
- At that point in his testimony he proceeded to analyze in detail his analysis of the effect of the loss of the lease on the market value of the remaining property. He stated that it is necessary for an appraiser to go through the appraisal approaches before one can make a determination as to whether or not there has been a reduction in market value. (T-p. 368, l. 3-12)
- The results of Mr. Johnson's appraisal are shown in his appraisal report, Defendant's Exhibit 25. (D-#110) (T-p. 369, l. 13)(A-38)
- He began a detailed explanation of the materials contained in the appraisal report. He explained how he used vacant land sales to determine the value of the property taken. (T-p. 390, l. 22)

- Mr. Johnson referred to appraising the taken land as the easy part of the appraisal, with the more complex part being the evaluation of the property before and after the taking. (T-p. 391, l. 9)
- He then covered how he utilized the applicable approaches in determining the before taking and after taking value of the property. (T-p. 391, l. 18 through p. 422, l. 19) He states in his opinion that the loss of market value or severance damages in this case would be \$616,107.00. Mr. Johnson then commented on the work that the City's appraisers did; he stated that as of the circumstances in January of 2003, before the taking on June 10, 2003, the appraisers did not know that the property would be affected by the taking. But after the day of taking the "kick-out" clause in the lease affected the property so at that point things changed from what was known in January of 2003. (T-p. 423, l. 21; p. 424, l. 1; p. 426, l. 16)
- He said that his appraisal was the only one that actually looked at the data to determine the value of the property before the taking on June 10, 2003, and the value of the property after June 10, 2003. (T-p. 426, l. 17, 22)
- At various points in cross-examination of Mr. Johnson, the City's attorney attempted to obscure the legal measurement of damages to severed property by posing a number of obviously inappropriate and misleading hypotheticals to Mr. Johnson, in which he talked about the landlord making repayments to

the tenant in the event of various events that might be stated in a lease. Mr. Johnson correctly pointed out that his calculation of severance damages had nothing to do with any requirement for the transfer of funds from the landlord to the tenant. His calculations dealt strictly with the effect of the condemnation on the property's market value.

(T-p. 499, l. 9 through p. 501, l. 14)

City's Rebuttal Witness Supports Hendon's Position that Lease Should be Considered

40. Over the objection of Hendon, the Court allowed the City to call Alan Hummel as a rebuttal witness. Mr. Hummel's testimony indicates that he is one of three appraisers in his appraisal firm which is located in Des Moines, Iowa, and that in the past he has had various contacts with Joan Johnson and David Campbell. Apparently, he was contacted just several days before trial. He was given a copy of Jeff Johnson's appraisal but not the City's appraisal. His testimony indicated:

- He has a Bachelor of Science degree with majors in psychology, political science and speech. (T-p. 538, l. 14)
- His firm name is Iowa Residential Appraisal Company. (T-p. 154, l. 8)
- He had not seen a copy of the City's appraisal. (T-p. 553, l. 25)
- He did not receive a copy of the City appraiser's data book. (T-p. 544, l. 4)

- He did not receive a copy of the North Dakota Century Code pertaining to damages that are allowable in condemnation actions. (T-p. 544, l. 21)
- He received a temporary North Dakota license on Monday of the week of the trial. (T-p. 547, l. 3)
- Mrs. David Campbell is the executive secretary of the State Licensing Board. (T-p. 542, l. 22)
- Hummel's professional designation is "SRA" which signifies experience testing and experience in evaluations of residential properties. (T-p. 550, l. 14-18)
- He admitted that the existence of a tenant in a piece of property would affect the value of the property. (T-p. 551, l. 19-25; p. 552, l. 1-7)
- He admitted that in doing an appraisal he would have to take any existing lease into consideration. (T-p. 560, l. 10-24)
- The largest commercial property he ever appraised was a 32-plex apartment building and as part of that appraisal he reviewed the lease. (T-p. 570, l. 7-18)

- He admitted that in appraising an apartment building, he would use the income capitalization approach, he would consider the occupancy and in looking for comparables he would try to find apartments with similar occupancy rates. (T-p. 571, l. 8-25; p. 572, l. 1)
- When asked about his commercial appraisals other than an apartment building, he said he could recall a warehouse of less than 20,000 square feet. (T-p. 572, l. 25)
- In the course of discussing that appraisal, he said that if there would have been a lease on the property he would have looked at it. (T-p. 574, l. 14)
- In further discussion he agreed that if a piece of property had a good lease, it would help the price and if it had a bad lease it would lower the price. (T-p. 575, l. 15-18)
- He has never appraised a piece of property which was under lease and in which the lease had a clause that dealt with condemnation. (T-p. 575, l. 19-25; p. 576, l. 1)
- He agreed that a lease with a “kick-out” clause might affect the market value. (T-p. 576, l. 7-23) He would take that factor into consideration in his appraisal. (T-p. 577, l. 1)

- He acknowledged the presence in the various appraisal manuals that advised the appraiser of the need to consider leases and escape clauses.

(T-p. 578, l. 15-25; p. 579, l. 1-25; p. 580, l. 1-17; p. 582, l. 17-23)

Summary

41. One indisputable fact comes through loud and clear in this case. That fact is that at the time Joan Johnson and David Campbell made their initial assessment as to what work would be required in conducting the appraisals of the various properties that were being taken by the City, which principally involved taking little strips of land, they were totally unaware of the terms of the lease and the “kick-out” clause in the event of condemnation. Being unaware of that condition affecting the Hendon property, they proceeded with the assumption that there was no severance damage to the remaining property and then set about making their bare land comparisons in order to establish a square foot value of the property being taken. They never did a “before” and “after” appraisal of the remaining property. Having been caught by their own inexperience in this most unique situation, they set about to formulate a legalistic argument involving real estate terminology, which in no manner trumps North Dakota law on the measure of damages. Although the City had plenty of time to correct the error of its appraisers, it placed its bet on being able to convince the jury that there were in fact no severance damages. The City’s final argument demonstrated a mighty attempt to replace the statutory measure of damages with the City’s ad hoc version of the law. The City’s efforts were to no avail on the issue of the existence of severance damages as the jury conclusively found that there were severance damages. However,

it is apparent that the City was able to divert the jury's focus from the instructions on the method of determining damages as it only found severance damages in the amount of \$61,350.00, exactly ten percent (10%) of the only evidence of the amount of severance damage which was in the amount of \$613,500.00.

42. In its Memorandum Decision denying Hendon's Motion for a New Trial (D-136)(A-59), the trial Court stated:

“...David Campbell and Joan Johnson, Hendon's (sic) expert witnesses, both testified that there were no severance damages as the result of the taking....”

43. While this quote may be technically correct, it ignores the fact that they based their initial conclusion on the fact that they didn't initially know the terms of the lease, and after they learned that severance damage was an issue they erroneously characterized the loss of the lease as consequential damage, (not a reduction in market value)(Joan Johnson, T.-p.206, 1.16-p.114, 1.11), and, therefore, they never determined the before and after taking market value of the property. They decided, as a matter of law, that Hendon wasn't entitled to severance damage. The Court clearly erroneously interpreted the testimony of the City's experts so as to create a “range” of damage.

44. The Trial Court's rulings in regard to Office Depot's Motion for Summary Judgment and the City's Motion in Limine, which held that the lease was relevant to the issue of severance damages, clearly established as the law of the case that the termination of the lease was relevant to the issue of severance damages. This is not a situation where the City's appraisers did a before and after taking appraisal and as a result of the appraisal found that the change in the before and after value of the

remaining property was an amount different than what Hendon's appraisers determined. Rather, they simply concluded that the owner (Hendon) was not entitled to severance damage as a matter of law and thus did not make a before and after appraisal.

45. The Trial Court further stated:

“...the range of the award for severance damages in this case is, therefore, from \$0 to \$613,500.00...”

46. The Trial Court has confused appraisers' opinions based on a misunderstanding of entitlement under the law and opinions of market value. There is a significant legal difference in the City's appraisers simply saying that Hendon is not entitled to severance damage as a result of the lease termination, and a statement saying that the termination of the lease did not reduce the market value of the property (which they did not say). In this respect, the trial Court's analysis is clearly erroneous as the only testimony as to the amount of severance damage came from Hendon's appraiser. He is the only appraiser that had established a market value for Hendon's remaining property before and after the taking. That testimony established a loss in market value of **\$613,500.00**. (It should be noted that this number differs slightly from Jeff Johnson's number of \$616,107.00 because the parties stipulated that the value of the taken property was \$76,500.00. See discussion at T-p.437, l. 12-24). The jury found that there were severance damages and returned a verdict of **\$61,350.00**. (Docket 117)(A-55) This was exactly 10% of the damage (\$613,500.00) established by uncontested evidence.

47. This verdict was clearly against the great weight of the evidence and contrary to the law as instructed to the jury. A new trial on the issue of damages is the proper

remedy. As stated above: "Where the evidence discloses that damages awarded by a jury are inadequate to a degree commensurate with substantial justice, the trial court may grant a new trial on the theory that the verdict was not justified by the evidence." *Maier v. Holzer*, 123 N.W.2d 29, 30 (N.D. 1963). And where a court finds a judgment on a verdict manifestly against the weight of the evidence, that court has a duty to set that verdict aside and order a new trial. *Cook v. Stenslie*, 251 N.W.2d 393, 395 (N.D. 1977) (citing *Maier*).

48. This jury was specifically instructed on the method of determining severance damages. Instruction C-75.10, Severance Damages, which stated, "...Severance damages are measured by the loss in **market value** of the property affected" (emphasis added). It is quite likely that the jury was seriously misled by the City's final argument in which the City argued to the jury that the jury could determine "damage" by going through a calculation of costs, expenses, and other miscellaneous numbers, none of which had any relation to "market value" before and after the taking. This clearly invited the jury to ignore the jury instructions.

49. The jury's verdict has established the city's liability for severance damages. A new trial is required to determine the correct amount of severance damage as provided by law.

CONCLUSION

50. There is an insufficiency of evidence to justify the verdict of the jury as to the amount of severance damage, and the verdict and decision of the jury are against the law. The verdict was against the great weight of evidence in that it was wholly insufficient given the substantial economic injuries suffered by Hendon and contrary

to the undisputed evidence. The amount of damages allowed shows that the jury clearly failed to follow the jury instructions regarding the value of Hendon's severed property before and after the taking. The verdict was rendered under a misapprehension of instructions and contrary to the only evidence submitted on the loss of market value of the property affected. We respectfully submit that the trial court's denial of the motion for a new trial was clearly erroneous and an abuse of discretion. Hendon is entitled to a new trial on the issue of severance damages.

Dated this 1st day of September, 2005

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