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JUNE 8, 2018
STATE OF NORTH DAKOTA

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IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

Allen Lenertz	)	
Plaintiff, Appellant	)	
	)	Supreme Ct # 20180153
	)	
	)	Civ # 51-2015-CV-01874
vs.	)	
	)	
City of Minot N.D.	)	
Defendant, Appellee	)	

APPELLANT- ALLEN LENERTZ BRIEF

District Court of Ward County - North Central Judicial District
Hon Gary Lee, D.J. Presiding

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TABLE OF CONTENTS

AUTHORITIES

Cases: Par #

Other Jurisdictions authorities

Misc Authorities:

ISSUES

1. Did the lower court err by concluding that Lenertz suffered a temporary taking instead of a total taking or damaging of his property
2. Did the lower court improperly deny Plaintiff's expert witness testimony.
3. Did the Lower court improperly dismiss the case and cause of Allen Lenertz when the record contained admitted evidence on damages sustained by the Plaintiff that was not objected to by Defendant.
4. Did the lower court err in assessing costs against the landowner and in favor of the taking governmental entity.

STATEMENT OF CASE

1. Allen Lenertz has appealed the Judgment of Dismissal and the underlying Order of Dismissal, (of the case in favor of Defendant, City of Minot, N.D.), the Hon. Gary Lee D.J. presiding. This case pertains to inverse condemnation and the damaging of Lenertz's property on account of frequent inevitable flooding caused by a City of Minot Street and Storm Water project. In this appeal are issues pertaining to the wrongful exclusion of expert testimony on damages and the overlooking of evidence of the landowner on damages among other things.

STATEMENT OF FACTS

2. Allen Lenertz (Plaintiff- Appellant) brought an action and served it upon Defendant. It relates to the damaging of property of Allen Lenertz based upon the improvement of a Minot Street and Storm Water system. That improvement was in South West Minot, near the Wal- Mart. This property is outside of the City of Minot Souris River Flood zone.

3. Lenertz acquired the property many years ago. At the time his land was serviced by a gravel road,(vol 2 tr 4, 145) and over the street drainage. (Vol #2 tr 165,167 et seq) He constructed on the property 2 buildings and used

the land for his various businesses. (Vol #1 tr 106 et seq, 109) As a side note he also rented some building bays, to generate some additional money to help with the expenses. (Vol #1 tr 109 et seq)

4. Minot in 2013 decided to install a paved street and upgrade its storm Water system. This was in part adjacent to Lenertz land located at 33rd Ave SW and 4th St SW Minot.(Vol #1 tr 94 et seq). Minot by resolution stated a need for the road, (Vol #1 tr 48) and otherwise determined that the storm water system should be upgraded.(id) No issue is made regarding Minot decision for these improvements.

5. After designing and constructing the road and storm water system, Lenertz experienced significant over the land flooding that inundates his property.(Vol #1 Tr,64,70 112,117 Doc #27, 17-23 Vol #2 tr 87) On one of the flooding events -just after construction- over 4 inches of water accumulated on his land. (Vol #1 tr 117 dock # #27, 17-23) He also experienced water entering into his south building. On other occasions he likewise experienced significant water flooding onto his land. (Vol #1 tr 117-118, Vol 2 pg 199-200) After this suit commenced a thunderstorm dropped material amounts of water which lapped the sidewalk and ponded on the street on the adjoining land. (Vol #1 tr 118) Lenertz testified that he also witnessed in 2017 an additional flooding event. That also had material effect

on what was going to happen with his land subsequently. He testified that his land was never subject to flooding before the road and storm sewer were upgraded. (Vol #1 tr 57, 79 doc # 29 Vol #2 tr 18,37et seq,). As Lenertz expert engineer noted - it is not the amount of rainfall by itself that is the causative factor or concern. Rather it is the *intensity of the rain event*. (Vol #2 tr 153)

6. Testimony at the trial, on taking-damaging revealed that the road drainage & storm water system, were inadequate. This was supported by Minot's own expert engineer and the requirements set by city water management standards. Minot's attempt to remedy the problem for years has led to no fully effective resolution of the flooding problem as affects the Lenertz property. Minot's City Engineer, Lance Meyers stated that there was nothing that Lenertz could do to fix the flooding issue. (Vol #1 tr 76) This is logical as the cause and source of flooding was from adjacent properties and the city inadequately designed storm and road system to handle water events. Further there was nothing Lenertz could do to prevent water from coming onto his land. (Vol #2 tr 14-15)

7. The Court, preliminarily made a finding that flooding was inevitable. This was based upon attempted curative re-mediation actions of Minot in installing a Tide Flex gate, reconstructing a valley gutter on Lenertz's land and having

placed on *another's property* a berm -dike- barrier, to stop water from flowing onto Lenertz land (Vol 3 Tr 45 et seq). That berm-dike- barrier did not have associated with it any easement right letting it stay in perpetuity as a protective barrier for the Lenertz land. (Vol 1 tr 74) As the testimony developed the berm- dike- barrier, could be removed at will by the adjoining landowner. Judge Lee allowed testimony from the City Engineer showing that (1) no easement was secured,(2) the barrier or berm could be removed at will, (3) that if the adjoining land was to be developed it would have to address a retention pond system. (Vol 1 pg 74) The Court did not allow into evidence a filing showing that the City had otherwise allowed the adjoining land owner to use the property for other purposes,- without a detention pond being considered or constructed. (Vol 1 tr 90). However there was permitted testimony on the topic. This *detention pond* was what Minot contemplated being constructed by the adjoining land owner when the street and sewer project was designed.

8. Judge Lee concluded that preliminarily there was a taking or damaging -and- flooding would be inevitable. The uncontradicted evidence is that the water from adjoining lands now enters the Lenertz land by at least 3 different routes, that had not occurred before. (Vol 1 tr 109 et seq) i.e- (1) - from and across 4th Ave SW and over the driveway

and sidewalk at Lenertz property land; (2) backing up from the storm sewer during rain events and (3) from the immediate south upland property that is owned by another. (Note-again the berm -dike- barrier was placed upon that 3rd parties land without any easement having been secured. It was shown that the adjoining landowner to the south would not agree to an easement -for the placement of berm barrier- such that nothing definitive but only hypothetical was advanced by Minot as a solution for the improper and excessive water that flowed onto Lenertz land.

9. Lenertz testified that his property was damaged since the flooding could not be alleviated. (vol #2 tr 14-15). It was not marketable as who would buy a tract that would inevitably and frequently flood. The expert for Allen Lenertz made an offer of proof that the property was damaged in total. Judge Lee concluded that this testimony was not useful to the jury and barred it from being heard. He then dismissed the case in total.

10. Judge Lee noted the appraiser - Daniel Boris of the Appraisal Group was an expert. Again, as noted he concluded that his testimony was not helpful and useful. (Vol #3 pg 49-50) In these regards Judge Lee interjected his personal experiences with flooding into the decision making process. (vol #3 tr 36) His situation was irrelevant and not applicable to the instant case- as his flooding was

resolvable, but Lenertz's was not. Judge Lee felt there was not a total damaging of Lenertz's land. In Judge Lee view there must be a residual value to the land that had not been considered by the expert.(Vol 2 tr 220, Vol 3 Tr 35 50) In this regard Judge Lee overlooked what was said by selectively considering only parts of Boris' testimony. In addition he overlooked the law of North Dakota - and summarily dismissed the case and imposed costs upon the landowner. From this ruling this appeal takes place.

11. ISSUES

1. Did the lower court err by concluding that Lenertz suffered a temporary taking instead of a total taking or damaging of his property.
2. Did the lower court improperly deny Plaintiff's expert witness testimony.
3. Did the Lower court improperly dismiss the case and cause of Allen Lenertz when the record contained admitted evidence on damages sustained by Lenertz that was not objected to by Defendant.
4. Did the lower court err in assessing costs against the landowner and in favor of the taking governmental entity.

STANDARD OF REVIEW

12. The interpretation of a Court Rule, like the

interpretation of a Statute, is a question of law. They are subject to de novo review. Likewise the interpretation of a judgment is a question of law, fully reviewable on appeal. Hewson v. Hewson, 2006 ND 16, ¶ 8, 708 N.W.2d 889; Logan v. Bush, 2000 ND 203, ¶ 30, 621 N.W.2d 314. The standard of review on NDRCP Rule 50 - Directed Verdicts, is de novo- (Robinson v. Cavalry Portfolio Servs., LLC, 365 Fed. Appx. 104, US CA 2010, 108 Fair Empl. Prac. Cas. (BNA) 941- Oanes v Westgo Inc 476 NW2d 248,255 (ND 1991) - trial court must consider the evidence most favorably to the non moving party; Deichert v Fitch 434 NW2d 903, 905 (ND 1988)- a directed verdict is granted as a matter of law and is fully reviewable on appeal). Knoff v. American Crystal Sugar Co., 380 N.W.2d 313, ND 1986 holds that:

> "A motion for a directed verdict should not be granted unless the moving party is entitled to a judgment as a matter of law. In making its determination on the motion, the court must view the evidence in the light most favorable to the party against whom the motion is made. A mere scintilla of evidence in favor of the opposing party does not preclude the granting of the motion. The ultimate question is whether there is evidence upon which the jury could properly find a verdict for the party against whom the motion is made. A directed verdict is granted as a matter of law and is

fully reviewable on appeal. See, e.g., McCarney v. Knudsen, 342 N.W.2d 380, 382 (N.D. 1983).

Recognizing the foregoing, lower courts have been afforded deference on the admission and exclusion of witness and evidence- (subject to the abuse of discretion standard rules) by reason of the Rules of Evidence. That is not applicable by reason of NDCC 32-15-22, 32-15-33 and NDRCP Rule 81 - Table A. There it is noted that in special proceeding cases such as Eminent Domain matters- the courts must follow and apply the legislative mandate-not the Rules. Condemnation cases are deemed to be special proceedings. Further Art I Sect 16 N.D. Const mandates just compensation and the prerogatives that go with it, obviating application of the rules in the instant matter.

ANALYSIS

13. **I. The lower court erred by concluding that Lenertz suffered a temporary taking instead of a total taking or damaging of his property.** In the instant case Lenertz's land has been permanently invaded and damaged by water from adjoining tracts. This is on account of Minot's storm sewer and street improvement project. This damaging is frequent and continuing without remediation. That is shown by Minot's own expert.(Vol 1 Tr 94-96,99-101,102-103) It is a permanent taking/damaging. Nothing has been set forth

showing that this is only a temporary event. In fact the Court notes to the contrary. The lower court confused what a temporary taking is and equated it to being concluded or intermittent. (United States v Cress 213 US 316 (US 1917)- this is not a temporary flooding...,but a *permanent condition*, resulting from the (improvement)). See also 9 Nichols on Eminent Domain § G34.03 (2018)[3][b] Permanent Versus Temporary Takings ---A taking is temporary if it is rectified, or if it is abatable and preventable. In the case at bar the damaging was not rectified.

14. **II. the lower court improperly denied Plaintiff's expert witness testimony.**

15. The lower court after hearing an offer of proof said the following:

> ....**I think I mentioned this yesterday, on a prima** facie basis I think Mr Lenertz has established that an inverse condemnation may have occurred.... There was no flooding before the project, now there is. Its going to rain again. We all know that. It will probably rain 2 inches again. I mean its going to happen probably again, these torrential rains. I mean we have them once or twice a summer.... The design appears to have been defective. I think Mr.— from what I understand Mr Hruby's testimony or AE2S ...

that a review of the design believed that the design had some flaws.... And lastly, the remedial efforts themselves, the fact that you had to take remedial efforts supports the fact that there was a design flaw, and the remedial efforts appear not to be working.....

Now having made that as a determination, Mr Lenertz would be entitled to what's called just compensation... And the just compensation for a partial taking is the difference between the fair market value of the property after the taking. It's the diminution in value, which even Mr Boris agrees is the proper measure, the diminution in value.... Step number one: the expert must have specialized knowledge or skill in a specific area. I think Mr. Boris certainly has the requisite credentials. But the second step is; whether the testimony will assist the trier of fact. And in this case, I don't believe Mr Boris' testimony is of any assistance to the trier of fact. Mr Boris states that the property - a property that suffers only intermittent, temporary flooding, which has not affected its use, its not effected its occupancy, its not effected the income, that the property has no value. Hence, his diminution in value, he sates the property is worthless. This is

not of any assistance to the trier of fact... (Vol 3 tr 45 et seq)

16. Judge Lee's comments, on 'usefulness' mirrored NDROE Rule 702 and referenced his personal experience with flooding. (Vol 2 tr 220) Lenertz urges that the lower court committed reversible error.

17. NDROE rule 702 TESTIMONY BY EXPERT WITNESSES, provides that :

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.
>
> (Emphasis supplied)

18. According to Judge Lee the first requirement of the rule was met, but not the last. In arriving at the conclusion that the last factor was not met- Judge Lee relied upon his personal experience and views, (Vol 2 tr 220 Vol #3 35,50) and overlooked the law and the standard to be applied and what was testified. Here the lower Court confused 'usefulness' with 'weight and credibility', as the evidence was proper and should have been heard by the jury.

19. It is true that the admission or exclusion of a

witness is in the sound judgment of the court and will not be overturned absent an abuse of discretion. 4-702 Weinstein's Federal Evidence § 702.02 (2018)[4] - indicates that the "Trial Judge Has Broad Discretion to Admit or Exclude Expert Testimony". There it notes in part that the Abuse of Discretion is the only standard of review that may be applied to evidentiary rulings concerning expert testimony. The commentators then go on to state that:

> An appellate court may find an abuse of discretion in the context of an evidentiary ruling under the following circumstances:
>
> •When it "reaches a definite and firm conviction that the trial court committed a clear error of judgment."
>
> •When the trial court relied on "a clearly erroneous finding of fact, an errant conclusion of law, or an improper application of law to fact.
>
> •When no reasonable person would adopt the district court's view.
>
> •When the trial court's decision is manifestly erroneous.
>
> •When the trial court excludes admissible portions of the expert's testimony by ruling that the expert's testimony in its entirety is inadmissible.

20. In the federal context it has been said in United States v. Garvin, 565 F.2d 519, 522US CA 8th 1977, that:

> Whether expert testimony will be admitted depends on whether it "will assist the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702; Jenkins v. United States, 113 U.S. App. D.C. 300, 307 F.2d 637, 644 (1962). The admission or exclusion of expert testimony is in the sound discretion of the trial court. Salem v. United States Lines Co., 370 U.S. 31, 35, 8 L. Ed. 2d 313, 82 S. Ct. 1119 (1962); Soo Line R.R. v. Fruehauf Corp., 547 F.2d 1365, 1374 (8th Cir. 1977). However, exclusion of expert testimony can be the basis for reversal if it was manifestly erroneous and a clear abuse of discretion. Holmgren v. Massey-Ferguson, Inc., 516 F.2d 856 (8th Cir. 1975).

Garvin goes on to state that:

> In considering the admissibility of expert testimony it is important to keep in mind the matter in issue.

Further, it was error to exclude the evidence the party was entitled to have the jury consider on reasonable interpretations of the documentary language... (emphasis supplied)

21. In the instant case the lower Court ruling was by

'directed verdict'. As such this Court has *plenary power* on its review and is not merely limited to the abuse of discretion standard. Even if that standard is not applicable- the lower court made an improper application of the applicable law on the measurement of damages and how the evidence is to be be applied to the legal principles at bay. Here there was a manifest error.

22. The legislature has adopted NDCC 32-15-22- Assessment of damages. There it states that:

> 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 benefitted, 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 subsections2 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 supplied)

23. This enactment overrides the discretion that the lower court may have had by reason of NDROE 702. That is because NDCC 32-15-22 is the legislature's pronouncement on what may be heard. It is consistent with what the N.D. Const provides at Art I Sec 16- "...Compensation shall be

ascertained by the jury...” As is noted that provision is to be broadly construed.(Newman v Hjelle 133 NW2d 549, 555(ND 1965)- sole object in construing a constitutional provision is to give effect to its purpose: & State v General Insurance 179 NW2d 123,126 ND 1970: NDCC 1-02-01). It does not provide the Court with discretion and is in conflict with Rule 702. As has been noted the legislative mandate was effectuated by reason of the Constitution at Art I Sect 16. NDCC 1-02-03- Language - how construed- mandates the adoption of approved usage of language. “Must” is a mandatory word without qualification. Further as City of Fargo 490 NW2d 481,484 (ND 1992) recognizes, the court need give special deference to the rules set forth by legislature on the admissibility of evidence. (see also NDROE Rule 401) This is doubly important as a fundamental liberty interest is at stake.

24. This is an *inverse condemnation case*. The improvements that led to the flooding on Lenertz land were located off his property. In some regards flood waters came from other’s land because of the project’s design and construction. The measurement of damages is by reason of Subsection 3. There the Legislature has stated that the metric to be used is “*damage*” not “*value*”. Lenertz expert witness used that metric of “*damage*” in formulating his opinion. (Vol #3 tr 13 et seq, 29) This metric needs to

be used and discretion is taken away from the Court on account of the law and Art. I Sect 16 of the North Dakota Constitution. Our constitution provides in part that:

> Private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into court for the owner, unless the owner chooses to accept annual payments as may be provided for by law. ... (emphasis supplied)

25. Here the People noted that affected landowners are entitled to *just compensation*. The legislature adopted a statute that authorized and directed *the jury "must" make an assessment* of *just compensation*. Here the lower court misconstrued the law and superceded it by applying a Rule in an in-artful way.

26. It has been noted that our Eminent Domain law is a special procedure. See NDRCP Rule 81 Table A. The legislature further emphasized this by NDCC 32-15-33. That Act noted the Rules of Civil Procedure are applicable, except as directed by Chapter 32-15. At the time of the adoption of the predecessor act -i.e. Rev Code of 1943 32-1533 -the legislature referenced incorporation of 'all rules of practice' and not just those of 'civil procedure'. NDCC 32-1533 then stated:

> Except as otherwise provided in this chapter, the provisions of this code relative to civil actions are

applicable to and constitute the rules of practice in the proceedings mentioned in this chapter. (emphasis supplied)

In this regard that would include the 'Rules of Evidence-Witnesses', (then found at Title 31 Rev Code 1943) as they were included by the then NDCC 32-15-22. The jury is to make the decision and the trial court only had a limited role when it came to being the gate keeper. Northern Pacific V Morton County 131 NW2d 557,564 ND 1964). As such the current enactment needs to be construed consistent with the prior Rev Code 1943 enactment, as no change was intended (see King v Menz 75 NW2d 516,520 (ND 1956). This recognizes that only the 'code editors' made the adjustment and not the 'legislature'. Simply put nothing mandates from a procedural point of view a directed verdict (see supra). What is mandated is that the jury 'must' assess damages based upon sound judgment of damages sustained by Lenertz.

27. In Gissel v. Kenmare Twp., 512 N.W.2d 470 (N.D. 1994) this Court noted that an inverse condemnation case was at issue. It went on to state that the jury's role is limited to a determination of a landowner's damages. Following Hultberg v. Hjelle, 286 N.W.2d 448 (N.D. 1979);

It went on to hold that neither Rule 68, N.D.R.Civ.P., nor Section 24-07-29, N.D.C.C., is applicable to Gissels'

inverse condemnation action. Section 32-15-33, N.D.C.C., provides that "[e]xcept as otherwise provided in this chapter, the provisions of the North Dakota Rules of Civil Procedure are applicable to and constitute the rules of practice in " eminent domain proceedings under Chapter 32-15, N.D.C.C. See Northern Pacific Railway Co. v. Morton County, 131 N.W.2d 557 (N.D. 1964). However, Rule 81(a), N.D.R.Civ.P., excepts special statutory proceedings, including eminent domain proceedings under Chapter 32-15, N.D.C.C., from the rules of civil procedure insofar as the special statutory proceedings conflict with the rules. Here not only are the 'rules of civil procedure' excepted by law, but also 'rules on evidence- and witnesses' relating to 'damages' and 'directed verdicts' when it comes to the issue of damages. This is because the legislature has spoken on the topic with its adoption of Revised code of 1943,(that was carried forward to the Century Code without change by the legislature). Gissel breadth has been expanded to application of costs being assessed. (ND Dept of Transp v Schmitz 2018 ND 113, ___NW2d___) The same logic is applicable to what the role of the jury is, as the legislature mandated their duty. Again the legislature said the jury must assess the damages and took that power from the court. (supra)

28. Hultberg v. Hjelle, 286 N.W.2d 448 (N.D. 1979)

discusses on *straight condemnation* the methodology of before and after taking valuation. That would be consistent with NDCC 32-15-22 application for direct taking and severance damages. However other North Dakota cases make clear that is not necessarily the only methodology used on inverse condemnation. See King v Stark County 271 NW 771,774(ND 1937)- it is sufficient to warrant a recovery if there is some direct physical disturbance of a right, either public or private sw which the plaintiff enjoys in connection with his property and *which gives to it an additional value* and *that by reason of such disturbance he has sustained a special damage* with respect to his property...: Little v Burleigh County 82 NW2d 603,608-609(ND 1957)- Syllabus by the Court. " Paragraph 3 of NDRC 1943, 32-1522 provides, in effect, for 'consequential damages', arising from injuries to other property not actually taken, caused by the construction of the public improvement"...: United Power Ass'n v. Heley, 277 N.W.2d 262, 266-267 ND 1979 N.D- This court has held on a number of occasions that § 14, N.D. Const., (now § 16) and Subsection (3) of § 32-15-22, NDCC, provides for the award of consequential damages not only when property is taken for a public use, but also when it is damaged by a public use. Northern Pacific Railway Co. v. Morton County, 131 N.W.2d 557 (N.D. 1964); Donaldson v. City of Bismarck, 71

N.D. 592, 3 N.W.2d 808 (1942); King v. Stark County, 67 N.D. 260, 271 N.W. 771 (1937). The question of whether or not a landowner is entitled to consequential damages under § 14, N.D. Const., and § 32-15-22, NDCC, *is not limited, however, by a determination that the landowner's property has been damaged in terms of a decrease in market value, but also the damage must be a type which is compensable*. (emphasis supplied)

29. In North Dakota the scope and breadth of testimony on damages- on inverse condemnation- has not been limited or fully defined by judicial pronouncement. It need not be when the legislature consistent with the Constitution sets forth its breadth as being wide and extensive and said the jury must consider 'damages' due. In Kimbell Laundry v U.S 338 US 1, 5 (US 1948) it is noted that - the damage compensable under the 5th Amendment, is only that value which is capable of transfer from owner to owner. As such Daniel Boris used an allowed method of valuation in the constitutional and legislative sense. Here there is nothing that is capable of being transferred on account of the action of the government in permitting perpetual flooding. That is a fact question. Again where in the market place is there any evidence of paired sales on frequent and continual flooding?

30. 2A-6 Nichols on Eminent Domain § 6.02 (2017) at

[b] Consequential Damages May Be Compensable Under State Constitutional or Statutory Clauses Where Damages to Property Are Provided,- notes that:

> Consequential damages may be compensable when constitutional or statutory provision allows for compensation in the event a property is "damaged." In these cases, neither proof of negligence nor the existence of a governmentally created nuisance is usually required. In addition, neither physical invasion nor actual appropriation is required for such a claim, and there are cases which hold that the damage may arise out of either the construction or maintenance of the public improvement.....

See Lewis, Em. Dom. 3d ed. § 346, "courts have uniformly held that there is *liability* not only for property taken but also *for consequential damages to property arising from the acts of the authorities in constructing public works*. It is not necessary that there be a direct injury to the property itself in order to create this liability. *It is sufficient to warrant a recovery* if there be "some direct physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property, and which gives to it an additional value, and that by *reason of such disturbance he has sustained a special damage with respect to his property, in excess of that*

sustained by the public generally, . . ." (emphasis supplied)

31. While in some states the 'value' is determined by the reduction in value or diminishment in worth- North Dakota has not set that forth with iron clad rigidity. For example in Kraft v Malone 313 NW2d 758,762-736(ND 1981) our Supreme Court held that inverse condemnation can result in a full damage for the entire value of a parcel. There the City of Linton denied a building permit and this court held that inverse condemnation resulted in a taking of the whole. As such the metric employed by Allen Lenertz expert on damaging was consistent with the law of this state.

32. Assuming the *methodology of diminution in value* is to be used- that has been fully adhered to and testified by Lenertz's expert Daniel Boris. He ascribed no residual value on account of Minot's project. (vol 3 tr 27-29) His reason for doing so was on account of a lack of an adequate and lawful remediation plan as well as inevitable and continual flooding (id). In this case Minot's engineer- Lance Meyers- noted that Lenertz could do nothing to effectuate a remedy for the flooding. (vol # 1, Tr 76) Boris as an expert could project a repair value for the city infrastructure that caused the problem. He could do so while noting no repair has been effectuated based upon what he has seen. (See NDROE 703; Wanner v. Getter

Trucking, 466 N.W.2d 833, 837 ND 1991 - issue of lack of familiarity by expert on certain matters goes to the credibility of the opinion-giver, not the admissibility of the opinion)

33. Boris is not free to invent the comparables as Minot suggests- as that would result in his testimony being speculative. Nor is he to engineer the solution as Minot has not come up with one for the flooding that was caused by its off site activity.(See Hruby testimony) He as an appraiser can rely upon information and experience as he did to come up with the cost of off site remediation that is Minot's obligation to implement. (Vol #3 Tr 24) Experts have the right to rely upon such information and it is not objectionable. (NDROE Rule 703) As there are no similarly situated comparable sales showing a precise diminution in value- where land is flooded on an ongoing- near bi-yearly continuous basis as is Lenertz land, and no remediation occurred- Boris measured the property loss and damages appropriately. There was a complete damaging as he opined. One needs to ask the question who would buy a piece of property that would flood on a regular basis of nearly every second or third year? Photos depict that water is on this property regularly in the past. Since the project was effectuated, the land has been subject to near biblical type flooding that can't be remedied. (Photos 17-27 Dock

239 et seq) It is strange that the lower Court would want Boris to invent proof, rather than allowing the jury to consider how the marketplace views this situation. (Vol #3 tr 23, 24 et seq, 26,28-29). In this case the lower court stated that the landowner can still use the property (Vol 3 tr 47) The lower court goes on to state;

> And the just compensation for a partial taking is the difference between the fair market value of the property before the partial taking and the fair market value of the property after the taking. It's the diminution in value,(Vol 3 tr 47)

Further;

> The diminution in value is the fair market value before the property and the fair market value after the property. (id at 48)

In this regard the lower court overlooked completely what the legislature said on calculating the loss as noted within. See NDCC 32-15-22 (3)- if no part of property is taken the amount of the damages.

34. Boris felt that the bundle of rights including the ability to sell was frustrated. With flooding inevitable and with the need to disclose the condition that can't be fixed or cured, there was a complete damaging to the res. Again a lawful berm- dike- barrier could not be installed, so the property was subject to repeated flooding, resulting

in a total damage to the whole. This is Lenertz view. While the landowner may still be using the property-that is irrelevant. Further what is he to do? Abandon it in total letting the city pick it up for free. He is not using the rentals for anything other than supplemental income to pay expenses. (Vol #3 tr 17). He remains liable to his tenant to provide them with quiet enjoyment of the lands they let.(NDCC 47-16-08) He cannot do so, because of how Minot developed its project. Tenants may withdraw from occupancy on mere rain event, subjecting Lenertz to a breach of his covenants all because of Minot's designed and constructed improvement. As such his enjoyment of his bundle of rights is effectively harmed. His ability and right of sale and disposition of the land is lost by Minot's improvement and the next rainstorm. Those are inevitable. The Trial Court indicated the metric of fair market value is to be applied. That concept incorporates the willing buyer and willing seller approach, as that is how F.M.V. is arrived at. City of Hazelton v Daugherty 275 NW2d 624,627 (ND 1979). That standard eliminates consideration of rental income and landowner's special use of the property. Again this is an inverse condemnation case that considers by reason of NDCC 32-15-22(3) - *damages*. (Northern Pacific v Morton County 131 NW2d 557,564(ND 1964)) Boris' damage testimony may not be to the liking of the lower court, but

it is consistent with reasonable valuation methodology and the law.

35. In City of Hazelton v Daugherty 275 NW2d 624, 627,628 (ND 1979) this Court in considering straight condemnation noted that NDCC 32-15-22(1) is applied. It stated that the methodology for computing damages is generally *although not always* the willing buyer- willing seller standard. When it came to severance damages it stated that they are not susceptible to precise proof. Further the generally accepted method of determining severance is the diminution in value approach. In applying that consideration to the case at bar- both Al Lenertz and Dan Boris used acceptable methods of determining the 'damages' suffered. They started off with present value and discounted the remaining property value on account of the recurring and inevitable flooding issue that has not been resolved. That was within the prerogative of the expert witness and landowner. The lower court choice to ignore that evidence without justification.

36. In this case the lower court acted as a super juror in excess of the power granted to it. It was with the jury to decide "damages" based upon lawful metrics. What was shown was consistent with the damage that occurred and would continue to occur. It was in error as a matter of law, for the court to interject itself in the decision of just

compensation by using its personal experience and problems on past floods and fires that Judge Lee had. They involved *no* matters of recurrence, but were either acts of God and historic - once in a lifetime flooding events that were remediated. Judge Lee abused his power and right. Here the measure of the damage suffered was the whole. As Victory Park Apartments Inc v Axelson 367 NW2d 155 (ND 1985) noted:

> the weakness or non-existence of a basis for an expert's opinion goes to his credibility, and not necessarily to the admissibility of the opinion evidence. Dodds v. North Dakota State Highway Commissioner, 354 N.W.2d 165 (N.D. 1984); Feuerherm. v. Ertelt, 286 N.W.2d 509 (N.D. 1979). Credibility is a matter for the trier of fact (Dodds v. North Dakota State Highway Commissioner, supra--) and the jury was entitled to give Schlittenhardt's opinion testimony as much or as little weight as the jury felt it deserved.

See also United States v. 14.38 Acres of Land, 80 F.3d 1074, USCA 5th Cir 1996 -

> "..., the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system: "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."

.... In this case, the experts' inability to predict the extent of flooding to Coker's property as a result of future heavy rains does not render their testimony entirely speculative and therefore unreliable for purposes of admissibility.....That prospective buyers of the property would have an increased fear of flooding, thereby decreasing the market value of the property, is a matter that the factfinder may properly consider in assessing the diminution, if any, of the property's value." (emphasis supplied) As such exclusion of the experts view on the property damage was in error.

[Note: authorities such as Wild Rice River Estates v City of Fargo 2005 ND 193, 705 NW2d 850 are not applicable as this is not a 'regulatory taking' case. However Rippley v City of Lincoln 330 NW2d 505 (ND 1983) would authorize damages, - as substantially all future use has been affected materially. The ability to sell has been denied in the instant case because there is no fix to the cause of the flooding. As the Rippley court noted in following Justice Brennan position in San Diego Gas v City of San Diego 450 US 621 (US 1981) once a court establishes a taking - compensation must be paid.

37. **II The Lower court improperly dismiss the case and cause of Allen Lenertz when the record contained admitted**

evidence on damages sustained the plaintiff that was not objected to by Defendant

38. In the case at bar- Allan Lenertz testified on the damages he has sustained. He related that the property and buildings were assessed for tax purposes- true and fair value $ 697,000. (Vol 1 tr 116-; Vol 2 tr 54 et seq; Exhibits 34-35) Cross examination revealed an attempt by Lenertz to have the value lowered. That was without success. Lenertz as the owner using a proper metric of land valuation set forth what he felt the property was worth. That was without objection. Lenertz also testified as follows:

Q. In your view, is your property damaged by this event? This construction improvement and the subsequent water flowing on it?

A. Yes. (Vol #2 pg 14-15)

Lenertz also noted that he couldn't do anything to prevent the water from flooding his land. Nor could he do anything as that would lead to water backing upon the land of others. Here Lenertz measured the damages and its effect on him.

39. In Jim Hot Shot v Contin W. Insur 353 NW2d 279 (ND 1984) -this Court has recognized that an owner may testify as to the value of his property without qualification other than the fact of ownership See also NDJI 1604; NDJI 80.08

(1986). Accord: Kipp v. Lipp, 495 N.W.2d 56, (ND 1993).

40. Here there is no evidence to the contrary on the measure of the loss and damage sustained. What Allen Lenertz testified to is the true and fair value of the property as set forth by the city assessor. It was admitted into evidence, without objection (Vol 1 tr 112-115)

41. Lenertz view was that there was no adequate remediation.(Vol 2 Tr-14-15) He testified on value and his loss. He place a value on the tract. Orgel on valuation Under Eminent Domain Vol 1 Sec 38 notes various courts allow consideration of the value to the owner or something other than fair market value. This methodology may be used *when the jury finds that the property has no market value*. Here this is the situation on account of the perpetual flooding that the land will endure. In condemnation cases this Court has repeatedly stated the fact finder's determination of value of the property will be upheld on appeal if it falls within the range of the values presented in the evidence. See, e.g., City of Devils Lake v. Davis, 480 N.W.2d 720, 726 (N.D. 1992); Kraft v. Malone, 313 N.W.2d 758, 762 (N.D. 1981); Hultberg v. Hjelle, 286 N.W.2d 448, 452, 458 (N.D. 1979); State v. Livingston, 270 N.W.2d 556, 557 (N.D. 1978); Northern States Power Co. v. Effertz, 94 N.W.2d 288, 292 (N.D. 1958). Here there is a legitimate

mechanism employed to determine damages. It was not considered by the jury as the Court dismissed the case under NDRCP Rule 50.

42. Here this trial court said nothing about the testimony of the landowner that has been received into evidence and has not been challenged in any way by Minot. That evidence was proof before the jury on value and damages.

43. The argument of Minot's attorney is not evidence or proof. (State v. Clark, 2004 ND 85, 678 N.W.2d 765) With Minot having waived all right to present proof - the only evidence of 'Damages' is that of the landowner. (App pg 36, Dock # 160). The cumulative effect is that the jury should have considered Lenertz's view on his damages. This leads to the conclusion that the lower court's decision needs to be reversed.

44. **IV. The lower court erred in assessing costs against the landowner and in favor of the taking governmental entity**. The lower court assessed costs against Al Lenertz. Lenertz objected to those costs. NDCC 32-15-32 provides that:

> The court may in its discretion award to the defendant reasonable actual or statutory costs or both, which may include interest from the time of taking except interest on the amount of a deposit which is available

> for withdrawal without prejudice to right of appeal, costs on appeal, and reasonable attorney's fees for all judicial proceedings. If the defendant appeals and does not prevail, the costs on appeal may be taxed against the defendant. In all cases when a new trial has been granted upon the application of the defendant and the defendant has failed upon such trial to obtain greater compensation than was allowed the defendant upon the first trial, the costs of such new trial shall be taxed against the defendant.

In the instant case the lower court dismissed Lenertz claim with prejudice without hearing the evidence in total. The court now infers (without specific reliance upon NDRCP Rule 54) that it may tax costs regardless of the legislative pronouncement to the contrary. It has been stated that NDCC 32-15-32 supercedes in eminent domain NDRCP Rule 54 when it comes to 'costs'. This is because the legislature has chosen to limit when and to whom costs are awarded in this special proceeding. Had the legislature wanted taking authority winners to recover costs it would have so provided. Gissel v Kenmare 512 N.W.2d 470, 475-476 (N.D. 1994) recognized that the generalized cost-shifting provisions of N.D.R.Civ.P. 68(a) do not apply to an inverse condemnation action under N.D.C.C. Chapter 32-15. This court has reaffirmed this principle in City of Jamestown

v. Leevers Supermarkets, 552 N.W.2d 365 at Par VI (N.D. 1996). Accord: N.D. Dep't of Transportation v. Schmitz, 2018 ND 11,__ NW2d __& N.D. Dep't of Transportation v. Rosie Glow, LLC, 2018 ND 123,[¶23] ___ NW2d ___. The lower court ignores this established principle of law. It is axiomatic that the lower court is to follow the law - and not strive to be the legislature and judge at the same time. The law does not allow costs to be assessed against the landowner, but only against the taking entity. The lower court erred in taxing costs against Lenertz.

CONCLUSION

45. The lower court erred by dismissing the Complaint under NDRCP Rule 50. Judge Lee erred by saying that the damaging was temporary instead of being permanent. No evidence shows that the damaging was only a transitory event not to reoccur. In fact Judge Lee found otherwise. Here the lower court by dismissing the cause- failed to afford a jury trial and determination as requested on damages that were suffered. Costs need to be stricken as the law doesn't permit them to be assessed against Lenertz. Even if the lower court was correct on excluding the testimony of Lenertz's expert- Minot permitted Lenertz's testimony on damages into evidence. That was enough to get the matter to the jury. That justifies a reversal and remand. As Minot has waived the right to separately assess

damages it remains up to the jury to consider what Lenertz and his witnesses presented. The judgment needs to be reversed. A judgment of taking and damages needs to be entered in Allen Lenertz favor,- in an amount that the jury determines. Further the case needs to be remanded for the award of fees and costs to Lenertz.

Dated ths 8th day of June, 2018

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CERTIFICATE OF SERVICE

I undersigned herewith certify that I served a copy of the foregoing Appellant's Brief with Appellant's Appendix upon the following persons by email to wit:

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