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STATE OF NORTH DAKOTA

STATE OF NORTH DAKOTA
IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

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

APPELLANT's- LENERTZ'S PETITION FOR REHEARING

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

Appeal from Judgement of Dismissal and Underlying Order of Dismissal

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1. OVERVIEW

2. Allan Lenertz appealed the Judgment of Dismissal and the underlying Order of Dismissal, the Hon. Gary Lee D.J. presiding. City of Minot has made its Appellee Response. This Court has issued its Mandate and Judgment, affirming in part the lower Court's ruling. Lenertz now Petition's for a Rehearing.

3. SUMMARY OF REASON FOR GRANTING PETITION

4. This Court's mandate has effectively eliminated a century of law on the assessment of damages in eminent domain. It has effectively, overruled a legislative enactment that indicates on inverse condemnation that the measure of loss is 'damages'. It also denied the landowner the right to value his land as has been done for a century. This Court also by its mandate has implicitly redefined what'Fair Market Value'is. Without reconsideration this mandate will lead to chaos in a wide range of litigation in this state.

5. ANALYSIS

6. This Court stated that Lenertz needed to consider the residual value of his land after flooding. It said that was

not done. In arriving at this conclusion this Court purportedly relied upon 4 *Nichols on Eminent Domain* 13.16[5] at 13-217 (2018)). The cases cited under *Nichols* related to a general principle on compensation in various states. *Nichol's* did not (at that section), specifically address any legislative enactment. North Dakota has spoken on how compensation should be determined. In NDCC 32-15-22. Assessment of damages- it states:

> 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. <u>If the property, though no part thereof is taken,</u>

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 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 supplied)

7. It has been noted repeatedly that the duty of the Court is to construe and interpret the law. The legislature makes it.

8. For the better part of a century this statute has been on the books and applied to a host of eminent domain cases. Subsection (3) has been applied to inverse condemnation

cases. Boehm v. Backes, 493 N.W.2d 671, N.D 1992; Little v. Burleigh County, 82 N.W.2d 603, N.D. 1957. Nothing in that law indicates that it is to be construed as a being the equivalent of 'Market Value'. See for example Kraft v. Malone, 313 N.W.2d 758, ND 1981. Nor that only 'Market value' is to be used.

9. Now this court abandons, without adequate explanation a legislative enactment that has followed for years. It does so in favor of a 'general rule' used in other states. In doing so, this Court has made the law- instead of following what the legislature stated. That is,- how we *measure loss in inverse condemnation*. This recognizes that a wide range in valuation methods is permissible. For example - this Court in its mandate relied upon City of Bristol v. Tilcon Minerals, Inc., 931 A.2d 237, 284 Conn. 55, Conn 2007. In doing so it overlooked that Tilcon stated at 248 that [N]o one method of valuation is controlling ....If the taking is partial, the usual measure of damages is the difference between the market value of the whole tract with its improvements before the taking and the market value of what remained of it thereafter. . . ." At no place in the instant case does the court consider the meaning of 'market value'. Nor the effect that the city improvement- and its inability to be cured- would have, on what a would be purchaser would consider in a sale

situation. This make the mandate flawed as a matter of law. Boris does consider a host of factors as well as the ability to market the property. (Tran- day 3 -page 29)

10. A century of case law supports the view that no one method of valuation exists. Litigants will now be in a turmoil on when state law is to be followed or ignored if this ruling is left intact. This is especially so when it comes to determining value of land in a host of situations.

11. In this matter this Court said that Lenertz could not measure and determine the loss his land suffered.(Mandate at 26) The trial court said nothing about Lenertz metric on assessing his loss. Again, its not 'Fair Market Value' that is to be used, but as the legislature said what 'damages' he suffered. Lenertz has valued the land as is his right as landowner. (Schultz v Schultz 2018 ND 259 ,920 NW2d 483) That case and its predecessors only noted that the trial court could determine credibility. It said nothing about being helpful to the fact finder or needing to use F.M.V. (Amsbaugh v. Amsbaugh, 2004 ND 11, 673 N.W.2d 601, Hoverson v. Hoverson, 2001 ND 124, 629 N.W.2d 573). Nothing in the trial court's ruling even considered or commented upon Lenertz testimony or his methodology. As such this court has embarked down a new road on owner- land valuation. It affects not just eminent domain. The result of this mandate is that it casts in doubt the ability of

any landowner or farmer to testify on the value of their land holdings in all kinds of cases. Why this radical change is needed is unknown and was not fully considered by this Court. Again all that the trial court determined was that the expert couldn't testify. That left the landowner free to put his value before the jury, for them to consider.

12. Certainty in the law and stare decisis should not be cast to the side without some significant reason. This court has done so.

13. The lower court felt that Boris' view was without credibility as in the lower court's view there must be some residual 'value' to the property. The trial court view was that the land was occupied and had some income to it such that it is wrong to state that there is no residual value.

14. That conclusion doesn't equate with 'fair market value'. This court has inferred that the metric to be applied is that of 'market value'. 'Fair Market value' has been defined to be:

> ... the price a buyer is willing to pay and the seller is willing to accept under circumstances that do not amount to coercion. Mike Golden, Inc., v. Tenneco Oil Co., 450 N.W.2d 716 (N.D. 1990).

If that is the definition used in this state the trial court (as did this court) overly emphasized residual matters such

as occupancy and rents and misconstrued the application of F.M.V., and assumed the role of being the fact finder. What was needed to be considered was who would buy a piece of property that repeatedly flooded without a cure or resolution of the problem. Not what marginal income it derived. Nothing in the Trial Court's ruling considered the definition or breadth of F.M.V. (Mandate at Par #4 pg 4 ,2nd paragraph). No witness testified that token elements of use or minimal income affect 'market value'. That was a guess by the lower court. Nor did any witness challenge the the claim,- that there was continual flooding- and- a material design defect. They led to a taking. Minot own expert sustains this position.(Hruby testimony)

15. There is no evidence shown by Minot that supports the argument that the taking or damaging was temporary. The court assumed that conclusion, based upon only hearing part of the case (Mandate at Par 13, pg 8) The Court focused upon occupancy of the land (before and after the flooding) along with some rents and possibly the intermittent nature of the waters coming on the land. That is overridden by what Minot's expert engineer (Hruby) stated. That there will be continual and repeated flooding. That makes the taking not transitory or temporary but a permanent happening. It is noted in 8 Nichols on Eminent Domain § G14E.04 (2018) that the governmental action defines what is

a taking and the amount of it. It has little to do with the landowners actions.

16. It is up to the jury to weigh the various factors that affect an expert's opinion. Not the trial court. In the instant case Boris considered the factors (including rents and occupancy) and felt they did not trump the overwhelming problem that the land had. Inevitable continual flooding. That was the prerogative of the expert and is consistent with the law. (Trial transcript day #3 pg 16, 17,18,22 et seq, 29; Boris depo pg 99- There Boris notes that a knowledgeable buyer would not acquire the land due to the fact that it will continue to flood. This is in spite of the fact that it has value of some type to the owner)

17. Here what the court focused on is the *utilitarian value* to the owner, and not *fair market value*- (what a willing buyer and willing seller would agree upon for a sale and purchase value). As such this court has confused what would be considered by knowledgeable parties to a sale. Would a knowledgeable buyer focus on continual flooding or some incidental rents? This is and has been a jury question, until this ruling.

18. Following this holding will lead to confusion down the road and an increase in litigation both at the trial and appeals level. The evidence in the instant case, is useful

and helpful to the fact finder. The law says 'damages' must be heard by the jury. The lower court had no right to take the assessment of damages from the jury as NDCC 32-15-22 states the jury decides.

19. While this court has noted that directed verdict ruling are reviewed de novo. (Mandate at Par 6 et al- (asking if there was sufficient evidence to get the issue to the jury)) by casting to the side and ignoring what state law states in preference to the law of other states- it arrived at a decision that needs to be reconsidered.

20. In the instant case this court recited Rule 702 NDROE. As noted the court misconstrued what 'fair market value' is, assuming that is to be the standard. That makes exclusion of the expert in error as Boris discussed the hypothetical sale.

21. **CONCLUSION**

22. It is requested that a rehearing be granted. This Court has misconstrued fair market value. It ignored State law when it came to how compensation was to be determined. The effect of this mandate if left standing will affect other cases in a detrimental way.

Dated this 28th day of February 2019

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CERTIFICATE OF SERVICE

I undersigned herewith certify that I served a copy of the foregoing Appellant's Petition for Rehearing with Appellants Addendum on Rehearing Petition upon the following persons by email to wit:

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Dated this 5 th day of March, 2019

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