

IN THE SUPREME COURT

FOR THE STATE OF NORTH DAKOTA

Northern States Power Company, a Minnesota)	
corporation, by its Board of Directors,)	
)	
Plaintiff and Appellee,)	
)	Supreme Court No. 20190227
vs.)	
)	
Laverne Mikkelson a/k/a Laverne C. Mikkelson Sr,)	
Kandi Mikkelson a/k/a Kandi K. Mikkelson,)	Ward County District
)	Court No. 51-2017-CV-00812
Defendants and Appellants,)	
)	
)	
SRT Communications, Inc., A North Dakota)	
cooperative association; Verendrye Electric)	
Cooperative, Inc., a North Dakota cooperative)	
association; Brett Livingston; Lisa Livingston;)	
Jarrold Livingston; New Prairie Township; and)	
Ward County,)	
)	
Defendants.)	

APPEAL FROM THE JUDGMENT ENTERED JANUARY 22, 2019 (DOCUMENT NO. 109), PURSUANT TO THE FINDINGS OF FACT, CONCLUSION OF LAW, AND ORDER GRANTING PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT AND DIRECTING ENTRY OF JUDGMENT ENTERED JANUARY 16, 2019 (DOCUMENT NO. 107), AND THE ORDER DENYING DEFENDANTS’ MOTION TO AMEND ORDER AND JUDGMENT ENTERED MAY 30, 2019 (DOCUMENT NO. 156)

THE HONORABLE DOUGLAS L. MATTSON, PRESIDING

BRIEF OF APPELLANTS AND ADDENDUM

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LAVERNE MIKKELSON AND KANDI MIKKELSON

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[¶2] **I. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

Statement of the Issues

[¶3] Whether the District Court erred when it determined that LaVerne Mikkelson does not have an opinion regarding the impact of NSP’s easement taking on the market value of the Subject Property?

[¶4] Whether the District Court erred when it determined that LaVerne Mikkelson only offered a subjective valuation of the property’s value after installation of the new transmission line?

[¶5] Whether the District Court erred when it made its Findings of Fact, Conclusions of Law, and Order granting summary judgment in favor of NSP and directing entry of the Mikkelsons’ damages as \$10,620.00.

[¶6] Whether the District Court erred in denying Defendants’ Motion to Amend Judgment and Order when it determined the Mikkelsons did not present evidence to avoid summary judgment on the issue of just compensation?

[¶7] **II. STATEMENT OF THE CASE**

[¶8] Appellee Northern States Power Company (“NSP”) brought a condemnation action against appellants LaVerne and Kandi Mikkelson (“ the Mikkelsons”) to acquire an easement on the Mikkelsons’ real property. App. pg. 10-23. The Mikkelsons filed an Answer. App. pg. 24-28.

[¶9] On October 2, 2017, NSP moved for partial summary judgment on the issues of NSP’s right to acquire its proposed easement by eminent domain, and whether NSP had made a reasonable and diligent effort at negotiated, as required by NDCC 32-15-06. App.

pg. 5, Index No. 22. The Mikkelsons made their response. App. pg. 5, Index No. 31. On November 20, 2017, the Court made its Order Granting Partial Summary Judgment. App. pg. 6, Index No. 39.

[¶10] On November 16, 2018, NSP moved for summary judgment on the issue of the just compensation due and owing for the taking, as required by N.D.C.C. 32-15-6.1. App. pg. 7, Index No. 83. NSP argued that the Mikkelsons had not and could not present any competent admissible evidence in regards to the impact of the taking on fair market value, which would be the measure of damages owed to the Mikkelsons. NSP further argued that the only competent admissible evidence presented on this matter was the opinion of the appraiser engaged by NSP. The Mikkelsons made their reply. App. pg. 7, Index No. 93.

[¶11] On January 16, 2019, the District Court made its Findings of Fact, Conclusion of Law, and Order granting NSP's Motion for Summary Judgment. App. pg. 76-82. In its Findings of Fact, the Court found that the Mikkelsons had not and could not present any competent, admissible evidence contrary to the determination made by NSP's appraiser, and that the Mikkelsons were unable to meet their burden of proving damages. App. pg. 81, ¶¶ 12-13. The Court ordered that the just compensation due and owing to the Mikkelsons for the taking was \$10,620.00 and directed entry of judgment in that amount. App. pg. 83-84.

[¶12] On February 11, 2019, the Mikkelsons made a Motion to Amend Order and Judgment. App. pg. 8, Index No. 123. The Mikkelsons argued that they had offered competent and admissible evidence regarding the value of the taking, and requested that the Court vacate amend its Order, vacate its prior Judgment against the Mikkelsons, and enter an Order setting the matter for trial. NSP made its response to the Mikkelsons' Motion. App.

pg. 8, Index No. 143.

[¶13] Hearing on the Motion to Amend the Order and Judgment was held on May 29, 2019 before Judge Mattson L. Douglas. On May 30, 2019, the Court made its Order denying the Motion to Amend Order and Judgment. App. pg. 88-90.

[¶14] On August 9, 2019, the Mikkelsons timely filed their notice of appeal App. pg. 110-114.

[¶15] **III. STATEMENT OF THE FACTS**

[¶16] **Statement of the Facts**

[¶17] NSP is a corporation organized under the laws of the State of Minnesota. App pg. 10, Complaint ¶1. It is a subsidiary of Xcel Energy, Inc, which is also a Minnesota corporation. NSP operates in North Dakota as a public utility. App. pg. 11, Complaint, ¶ 10. In 2016 or earlier, NSP began planning to construct a new voltage transmission line in Ward County, North Dakota (“the Project”). App. pg. 11, Complaint, ¶ 11. In 2017, NSP began making offers to landowners to purchase easements along the path of the Project. App. pg. 85., Letter to Laverne Mikkelson and Kandi Mikkelson.

[¶18] The Mikkelsons are married individuals residing in Ward County. App. pg. 25, Answer, ¶ 4. The Mikkelsons are the fee owners of the following described real property:

Parcel 128

Government Lots 3, 4, and 5 and Southeast Quarter of the Northwest Quarter of Section 6, Township 154 North, Range 81 West of the Fifth Principal Meridian, Ward County, North Dakota.

Parcel 129

Government Lots 1 and 2, South Half of the Northeast Quarter LESS Outlot 1 in the Northeast Quarter, all in Section 6, Township 154 North, Range 81 West of the Fifth Principal Meridian, Ward County, North Dakota.

(the “Subject Property”) App. pg. 15, Exhibit A to Complaint.

[¶19] The Subject Property is in the path of the Project. App. pg.13, Complaint, ¶ 16.

NSP made several offers to the Mikkelsons to purchase an easement on the Subject Property.

The Mikkelsons did not reach an agreement with NSP. This action followed.

[¶20] On November 20, 2017, the District Court granted a Motion for Partial Summary Judgement, made by NSP, determining that NSP’s proposed taking was necessary, and that the only remaining issue was just compensation. App. pg. 6, Index No. 39.

[¶21] Following the close of discovery, NSP again moved for summary judgment, on the grounds that, in part, LaVerne Mikkelson had allegedly testified that he did not have an opinion regarding the impact of NSP’s easement taking on the market value of the Subject Property, and that he allegedly conceded that he is not qualified to render any such opinion. App. pg. 7, Index No. 83.

[¶22] However, LaVerne Mikkelson did provide testimony showing that he could offer an opinion regarding the impact of NSP’s easement. For example, in his deposition of September 14, 2018, Mikkelson gave the below answers relating to diminution in value, and his opinion on the impact of NSP’s taking to questions asked by NSP’s counsel regarding the fair market value of the Subject Property:

Q: Is it your belief, your opinion that acreage subject to a transmission line has no value whatsoever to a potential purchaser?

A: I don't believe it would. I mean you're saying zero. If I was dealing on it, that would be the first thing that I would, yeah, say, that that has no value to me because you don't own it.

Q: The land is free.

A: Yeah.

Q: It has no value whatsoever - -

A: And so - -

Q: Right?

A: Well you're going to go back to where I said earlier that this stuff doesn't have a zero value, but to me, no, it wouldn't have a value because I would want to pay for the other but I wouldn't want to pay for it.

App. pg. 62, Laverne Mikkelson Depo., 124:24 - 125:16.

[¶23] Mikkelson clarified with the following statements:

Q: And here if I hear you correctly, what you're saying now is you would start in a negotiation if you were buying a piece of land and you're talking with the seller, you would say I think that the land underneath that easement or encumbered by that easement is worth zero dollars and I'm not paying you for it; right?

A: That's where I'd start, yes.

App. pg. 62, Laverne Mikkelson Depo., 125:25 - 126:7.

[¶24] Additionally, Roger Cymbaluk, is an appraiser hired by the Mikkelsons to serve as an expert witness in this case. Cymbaluk testified that he would support LaVerne Mikkelson's conclusions as to the diminution in value. App. pg. 68-69, Disclosure of Expert Witness.

[¶25] Despite material facts in dispute as to the amount of damages in controversy, the District Court granted summary judgment in favor of NSP, and denied the Mikkelsons' subsequent motion to amend order and judgment.

[¶26] **IV. LAW AND ARGUMENT**

[¶ 27] **A. STANDARD OF REVIEW**

[¶ 28] **1. Standard of review of Motions for Summary judgment**

[¶ 29] The standard of review of a district court's decision to grant summary judgment is well established:

"[Summary judgment] is a procedural device for the prompt resolution of a controversy on the merits without a trial if there are no genuine issues of material fact or inferences that can reasonably be drawn from undisputed facts, or if the only issues to be resolved are questions of law. A party moving for summary judgment has the burden of showing there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. In determining whether summary judgment was appropriately granted, we must view the evidence in the light most favorable to the party opposing the motion, and that party will be given the benefit of all favorable inferences which can reasonably be drawn from the record. On appeal, this Court decides whether the information available to the district court precluded the existence of a genuine issue of material fact and entitled the moving party to judgment as a matter of law. Whether the district court properly granted summary judgment is a question of law which we review de novo on the entire record."

Great W. Cas. Co. v. Butler Mach. Co., 2019 ND 200, ¶ 7, quoting Krenz v. XTO Energy, Inc., 2017 ND 19, ¶ 17 (citations omitted).

[¶ 30] The district court may not weigh the evidence, determine credibility, or attempt to discern the truth of the matter when ruling on a motion for summary judgment." Great W. Cas., supra., quoting Farmers Union Oil Co. of Garrison v. Smetana, 2009 ND 74, ¶ 10, 764

N.W.2d 665.

[¶31] **2. Standard of review for Motions for Reconsideration**

[¶32] A district court's "denial of a motion for reconsideration will not be reversed on appeal absent a manifest abuse of discretion." Larson v. Larson, 2002 ND 196, ¶ 11, 653 N.W.2d 869, 873-874. "A trial court abuses its discretion only when it acts in an arbitrary, unreasonable, or unconscionable manner, or when its decision is not the product of a rational mental process leading to a reasoned determination." *Id.*

[¶33] **B. The District Court erred when it determined that Laverne Mikkelson does not have an opinion regarding the impact of the easement taking on the market value of the Subject Property.**

[¶ 34] It is undisputed that the Mikkelsons are entitled to just compensation in return for NSP taking their property for use in its easement. N.D. Const. Art. I, § 16, North Dakota's Constitution further provides that compensation is to be ascertained by a jury unless the jury is waived. *Id.* Further, North Dakota's eminent domain statutes provides that damages are to be ascertained by a jury, if it has not been waived:

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 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.

N.D.C.C. 32-15-22

In its Findings of Fact, Conclusions of Law, and Order, the District Court found that “Mr. Mikkelson further attested at his deposition that he does not have an opinion regarding the impact of NSP’s easement taking on the market value of the Subject Property, and conceded that he is not qualified to render any such opinion.” Appx. pg. 78, Order, ¶ 12. However, the Deposition of LaVerne Mikkelson shows that he does have an opinion of the impact of NSP’s easement taking on the market value of the Subject Property, and therefore he is entitled under the North Dakota Constitution, and under N.D.C.C. 32-15-22 to provide this evidence to a jury for a determination on damages. As such, summary judgment was inappropriate.

[¶ 35] In his deposition of September 14, 2018, LaVerne Mikkelson gave the below answers to diminution to questions asked by NSP's counsel regarding the fair market value of the Subject Property:

Q: Is it your belief, your opinion that acreage subject to a transmission line has no value whatsoever to a potential purchaser?

A: I don't believe it would. I mean you're saying zero. If I was dealing on it, that would be the first thing that I would, yeah, say, that that has no value to me because you don't own it.

Q: The land is free.

A: Yeah.

Q: It has no value whatsoever - -

A: And so - -

Q: Right?

A: Well you're going to go back to where I said earlier that this stuff doesn't have a zero value, but to me, no, it wouldn't have a value because I would want to pay for the other but I wouldn't want to pay for it.

App. pg. 62, Laverne Mikkelson Depo., 124:24 - 125:16.

[¶36] Mr. Mikkelson clarified with the following statements:

Q: And here if I hear you correctly, what you're saying now is you would start in a negotiation if you were buying a piece of land and you're talking with the seller, you would say I think that the land underneath that easement or encumbered by that easement is worth zero dollars and I'm not paying you for it; right?

A: That's where I'd start, yes.

App. pg. 62, Laverne Mikkelson Depo., 125:25 - 126:7.

[¶ 37] While these statements are not couched in the terminology of eminent domain condemnation, they firmly illustrate the Mikkelsons' working theory that the diminution to the property would be 100%. This statement is competent, admissible evidence regarding the Mikkelsons' theory of damages and of a material dispute on the fact question of damages.

[¶ 38] NSP argued that LaVerne Mikkelson testified that he had not approached negotiations in that manner, and would not do so. App. pg. 62, Laverne Mikkelson Depo.,

125:25-126:23. NSP also argued that Mikkelson did not provide a before and after valuation for a partial taking, even though the following line of questioning occurred:

Q. So you would look at it as a blended price for the entire property?

A. Yes.

Q. And that would be an appropriate way to measure the market value impact of a transmission line easement; right?

A. Yes.

Q. You would look at the overall price that the whole property would fetch in the open market before the encumbrance was in place; right?

A. Yes.

Q. And then you would compare that to what the overall property would sell for after the encumbrance was in place; right?

A. Yes.

Q. And then you would take the difference between those two and that would identify for you the market value impact that the transmission line easement had to the property; right?

A. Yes.

Laverne Mikkelson Depo., App. pg. 62, 126:24-25-127:18.

[¶ 39] This cannot be taken to mean LaVerne Mikkelson cannot provide competent admissible evidence, because the above described testimony clearly shows that he can form a before valuation, and an after valuation, and apply that to a partial taking of his property. To the extent that he may or may not be entitled to a *premium*, then that information can used to cross-examine Mikkelson at trial, or dealt with in other ways besides a ruling of summary judgment. However, that is not the *only* evidence Mikkelson was able to provide, and as such, the fact that a premium amount may not be admissible trial, is not proper reason to decide this matter via summary judgment.

[¶ 40] Counsel for the Mikkelsons raised the following specific deposition testimony at the District Court's hearing on the motion for summary judgment:

Q. You would agree with me that the presence of the transmission line does not make the market value of the underlying property go to zero; right?

A. No.

Q. It's not free; right?

A. No.

Q. There is some value that is retained even within the new easement area; right?

A. Well, kind of what we went through, I consider the added cost that it's going to cost me every year to do this.

Q. Fine. But what you just told me is even with that in mind that area is not worth zero. It's worth something.

A. Well, to me it's worth zero as far as – because it's going to cost me the same to use it. So for me it's a zero value. I know I said earlier that, no, it wouldn't be zero, but I consider it a zero.

Q. Fine. Do you think the market would -- if this property went up for sale, do you think the market would say that easement acreage is worth zero?

A. Yeah. Do you think I can take that strip and sell it to anybody?

App. pg. 59, Laverne Mikkelson Depo., 112:3 - 113:2.

[¶41] On its own, the statement that "if the property went up for sale, do you think the market would say that easement acreage is worth zero? – Yeah", is a factual statement as to the after value of the Mikkelsons' property. As such, LaVerne Mikkelson should be permitted to testify that the market would treat the easement acreage as worth zero, even to the extent the easement area has a value of zero taken across the whole of the Subject Property. For summary judgment purposes, the evidentiary assertions of the party opposing

the motion are assumed to be true. Burke v. State, 2012 ND 169, ¶ 10, 820 N.W.2d 349, 353. Mikkelson should be able to present this information, if nothing else, to a finder of fact.

[¶ 42] Therefore, the Court’s finding was erroneous, and the Mikkelsons should be granted the opportunity to provide testimony regarding the before and after valuation of his land to the Jury.

[¶ 43] **C. The District Court erred when it determined that Laverne Mikkelson offered a subjective valuation of the property’s value after installation of the new transmission line.**

[¶ 44] **1. Laverne Mikkelson’s testimony was admissible and was not subjective.**

[¶ 45] In its Findings of Fact, Conclusions of Law, and Order, the District Court found that “During deposition, Mikkelson attested that he intends to testify to damages at trial not based on the market value of the Subject Property or the impact of NSP’s taking thereon, but instead, but on what the Mikkelsons personally desire because they are not willing sellers.” App. Pg. 77, Order ¶ 11. Similarly, in its Order Denying Defendant’s Motion to Amend Order and Judgment, the District Court found that “Laverne Mikkelson offered only a subjective valuation of the property’s value after installation of the new transmission line - an opinion he qualified by admitting that an appraiser (or a sale) would be needed to determine the value of the property after installation of the new transmission line”. However, whether for the purposes of summary judgment, or for a motion for reconsideration, these findings must be overturned.

[¶ 46] Mikkelson offered the above analysis in Section B as the impact of the easement. This analysis was based in Mikkelsons' fifty-five years of farming experience, and unrelated

to prior discussions regarding whether fair market value calculations could include a premium to reflect an unwilling seller's reluctance. Specifically, based on his vast experience with sales and farming experience, LaVerne Mikkelson testified that the property would be worth zero, and that in a sale the parties would likely put a lesser value on the whole property. App. pg. 59, LaVerne Mikkelson Deposition 112:3 - 113:2. While Mikkelson did state that an appraiser or a sale would be needed to determine the exact amount of decrease in value, it cannot be denied that he did in fact describe the amount the value would be decreased by. Namely, \$3,000 per acre, spread across the Subject Property.

[¶47] While these statements are not couched in the terminology of eminent domain condemnation, they firmly illustrate the Mikkelsons' working theory that the diminution to the property would be 100%. This statement is competent, admissible evidence regarding the Mikkelsons' theory of damages and of a material dispute on the fact question of damages. Counsel for the Mikkelsons brought this to the Court's attention during oral arguments at the hearing of January 7, 2019. App. pg 98-99, Transcript of Hearing.

[¶48] In any event, to the extent LaVerne Mikkelson testified as to some measures of damages which would be inadmissible at trial, that does not necessarily mean that summary judgment was appropriate. This Court has recognized that an owner may testify as to the value of his property without qualification other than the fact of ownership. Jim's Hot Shot Serv. v. Cont'l W. Ins. Co., 353 N.W.2d 279, 282 (N.D. 1984). However, an opinion of value is not sufficient if given without a valid basis or is based on improper facts or analysis. Id. Arguably, a value based on a “premium” may not be applicable, to the extent that Mr.

Mikkelson based that amount on improper facts or analysis. However, the value to Mr. Mikkelson, based on his many years of experience both as a landowner, and a buyer and seller of property, is exactly the type of *opinion* of value that should be heard by a jury.

[¶49] If anything, resolution of those measures of damages should have been determined by the motion in limine that was filed by NSP at the same time as its motion for summary judgment. For the purposes of summary judgment, LaVerne Mikkelson's opinion of value should have been given all favorable inferences, which in this case would preclude summary judgment. As it relates to the Motion to Amend Order and Judgment, the District Court's determination was an abuse of discretion and must be overturned because the decision was arbitrary, unreasonable, and most critically unconscionable to preclude a landowner from testifying as to the value of his property when it was based on proper facts and analysis. See Larson, 2002 ND 196, ¶ 11. In that respect, the District Court's findings were overbroad, and in error. For this reason, the Mikkelsons' request that the District Court's orders be overturned, and to the extent necessary, remanded to the District Court.

[¶50] **2. Roger Cymbaluk, the Mikkelsons' appraiser, provided admissible evidence about the damages to the Market Value of the Subject Property.**

[¶51] The District Court found that "[...] Mr. Cymbaluk attested at his deposition that he was only asked to appraise the Subject Property *before* and without regard for NSP's taking. Mr. Cymbaluk attested that he was not asked and did not form an opinion regarding the impact of NSP's taking on the fair market value of the Subject Property." App. Pg. 78 at

¶ 14. Specifically, Roger Cymbaluk in his appraisal set forth a value of \$2,500.00 per acre. App. pg. 71, Cymbaluk Appraisal.

[¶52] While Cymbaluk did not prepare a before an “after” valuation, he did attest that he would testify at trial to support the Mikkelsons’ conclusions as to the diminution in value. At trial, NSP will have the chance to ask Cymbaluk about the basis of the Mikkelsons’ conclusions, and about his own experience and qualifications, including his prior assessments of diminution in value. Similarly, Cymbaluk attested that he would provide rebuttal testimony as to NSP's expert report. Cymbaluk's expert disclosure was filed with the court. App. pg. 68-69, Disclosure of Expert Witness. NSP's expert has testified that the diminution in value to the property underlying the proposed easement is 50%, so at the very least Cymbaluk’s testimony would be relevant as to the before valuation, from which a different after valuation can be reached. App. pg. 72-75, Bock Appraisal.

[¶53] Therefore, Cymbaluk’s statements regarding prospective testimony showed there was a material dispute of fact regarding the diminution in value. This material dispute should have precluded summary judgment. As such, the District Court’s Conclusions of Law were erroneous and should be overturned.

[¶54] **D. The District Court erred when it made its Findings of Fact, Conclusions of Law, and Order granting summary judgment in favor of NSP and directing entry of the Mikkelsons’ damages as \$10,620.00.**

[¶55] As shown above, the Mikkelsons and Cymbaluk were prepared to offer admissible evidence regarding the amount of damages the Mikkelsons are entitled to. The proposed evidence sets forth an amount of damages greater than \$10,620.00. The amount of damages

in an eminent domain action is a question of fact. Cass Cty. Joint Water Res. Dist. v. Erickson, 2018 ND 228, ¶ 8, 918 N.W.2d 371, 375. This is in line with the general rule that damages are a question of material fact. First Nat. Bank & Trust Co. of Williston v. Jacobsen, 431 N.W.2d. 284, 288 (N.D. 1988). Summary judgment is inappropriate if any question of material fact remains in dispute. E.g. Johnston Law Office, P.C. v. Brakke, 2018 ND 247, ¶ 7, 919 N.W.2d 733, 737. Further, it has been noted that Summary Judgment is not appropriate in eminent domain proceedings. See, e.g. Guerard v. State, 220 N.W.2d 525, 529 (N.D. 1974) (J. Knudson, concurring). Finally, opinion evidence in eminent domain actions is usually admitted from persons who are not strictly experts, but who from residing and doing business in the vicinity have familiarized themselves with land values and are more able to form an opinion on the subject at issue than citizens generally. The rule is liberally applied in case of farm lands, as other evidence is often not easily obtained. Otter Tail Power Co. v. Malme, 92 N.W.2d 514, 527 (N.D. 1958). Beyond the straightforward analysis of before and after damages discussed above, Mikkelson has proffered additional evidence which precludes summary judgment.

[¶56] 1. **The compensation received by similarly-situated landowners for is admissible evidence that precludes summary judgment.**

[¶57] The trial court has discretion in deciding the admissibility of evidence about the value of the land, including determining the relevance of evidence about the value and comparability of other properties. Cass Cty. Joint Water Res. Dist. at ¶8. While NSP's arguments focused on Laverne Mikkelson's testimony regarding "market value", it is clear

that for the purposes of determining fair market value, the value is the price to be paid by a willing buyer and a willing seller.

[¶58] LaVerne Mikkelson testified that the standard for easement sales is that easement seekers will pay three to five times the value of the market value. App. pg. 48, Laverne Mikkelson Depo., 71:1-9. In context, Mikkelson conveyed that for the purposes of a party seeking to purchase an easement, is three to five times the value for a sale of farmland, and has also noted that "when it is a small parcel being taken, and we're talking about three to five times valuation of the farmland." App. pg. 48, Laverne Mikkelson Depo., 70:1-5. Here, Mikkelson also sought to introduce evidence regarding the comparable sale of Nathan Smith's property. Specifically, the sale of Nathan Smith's property for \$10,000.00 is a comparable sale, and similarly the offer to Saugstad, who granted an easement on nearby property, are similar in nature, and support his position.

[¶59] Cymbaluk testified that "The law says that they're entitled to fair market value, and we all agree to that. I think we all understand that. However, we have found that a willing and a responsible operator, whether it be a power line company or a well - oil company or putting in pipelines, they try to come out and negotiate in good faith with the landowners and use anywhere from - and they usually bump it up anywhere from three to five times what the per-acre value is of that land that they're affecting". App. pg. 66, Roger Cymbaluk Depo., 13: 15-24. Cymbaluk is referring not only to holders of eminent domain authority, but other entities that enter into similar transactions, so this testimony is relevant for the initial value from the standpoint of comparable easement transactions.

[¶60] 2. **The offers that NSP made to the Mikkelsons and other landowners are admissible evidence showing a dispute of material fact.**

[¶61] NSP argued that the North Dakota Supreme Court has recognized that evidence of unaccepted offers to purchase property are generally inadmissible because they do not reflect the value ultimately agreed to by a buyer and seller. NSP cited to the Geck v. Wentz, but fails to note that the Geck case discusses unaccepted offers made by third parties. So many of the arguments related to that case are not appropriate. Instead, the considerations discussed in Geck show why the offers of NSP to the Mikkelsons and to other landowners in this instance are distinguishable from those at issue in Geck, and therefore should be admissible. NSP's primary legal support of its assertion is Geck v. Wentz, 133 N.W.2d 849 (N.D. 1964). However, the Geck court also admits that exceptions to the rule occur. Geck at 851. The Geck court relied on the following considerations in determining that evidence of prior offers was inadmissible:

- 1) Evidence of offers to buy is too easily manufactured.
- 2) The difficulty of determining whether or not an unaccepted offer was made in good faith required the rejection of such evidence.
- 3) Such testimony simply gives the opinion of the offeror as to the value of the land.
- 4) The admission of such evidence would raise a collateral issue.
- 5) An unaccepted offer of this kind may be influenced by so many considerations entirely foreign to such an issue, and may put the opposing party at such disadvantage affording him, as it does, no fair opportunity to either anticipate or combat it.'

Id.

[¶62] Under the instant facts, the Geck court's analysis clearly weighs in favor of admissibility. There is no concern that the prior offers are manufactured, because NSP admits it made the offers. There is no question of whether the offer was rejected in good faith. There is no question whether the testimony simply gives the opinion of the offeror, because NSP has documented its calculations backing the offer. In fact, these calculations would be highly probative as to market value. There is no risk of raising a collateral issue, because the trial has been clearly restricted to the question of damages. Finally, the evidence does not carry a risk of unfair disadvantage to NSP, again because of the narrow scope of the issue to be tried. Again, the trial court has discretion in deciding the admissibility of evidence about the value of the land, including determining the relevance of evidence about the value and comparability of other properties. Cass Cty. Joint Water Res. Dist., supra. at ¶8.

[¶63] Similarly, the offers to LaVerne, Saugstad, and Smith are not inadmissible, simply because they were made by NSP. App. pg. 85. The offers are not inadmissible by virtue being made pursuant to N.D.R. 408. In the legal context of a condemnation action, past offers made by NSP are not settlement offers or compromise offers as excluded by Rule 408, because “for Rule 408 to apply, there must be an actual dispute, or at least an apparent difference of opinion between the parties, as to the validity of a claim.” Dallis v. Aetna Life Ins. Co., 768 F.2d 1303, 1307 (11th Cir. 1985), citing 2 J. Weinstein & M. Berger, Weinstein's Evidence para. 408[01], at 408-10 to 11 (1982). Here, the other offers made by NSP were made into regards to admitted, undisputed claims occurring under NSP's condemnation power. Therefore, offers are not excluded by Rule 408. Specifically, Laverne Mikkelson's deposition provided information on the following offers:

Smith:

Q: What was Nathan Smith Paid per acre?

A: Over 10,000.

Q: How much over 10,000?

A: I just know it was over 10,000.

App. pg. 39, Laverne Mikkelson Depo., 33:9-13; App. pg 86, Nathan Smith Warranty Deed.

Saugstad:

Q. Do you know what deal Mr. Saugstad ultimately struck?

A. Yes.

Q. And was he paid the full fee value of the property?

A. What do you mean full fee?

Q. Well, you said you thought you were at 10,000 but then there was this deduction. Do you know whether Mr. Saugstad was paid the 10,000 per acre for the easement?

A. No. No. He accepted the 80 percent.

App. pg. 57, Laverne Mikkelson Depo., 105:10-20.

[¶64] These offers are admissible evidence of a genuine issue of material fact.

[¶65] **E. The District Court erred in denying Defendants' Motion to Amend Judgment and Order when it determined the Mikkelsons did not present evidence to avoid summary judgment on the issue of just compensation.**

[¶66] As shown, the District Court erred in granting NSP's motion for summary judgment and directing entry of damages of \$10,620.00. Similarly, the District Court erred in denying the Mikkelsons' Motion to Amend Judgment and Order when it determined the Mikkelsons did not present evidence to avoid summary judgment on the issue of just compensation.

[¶67] It is arbitrary and unreasonable to exclude the testimony of a landowner regarding the value of their own real property. It is arbitrary and unreasonable to exclude the testimony

of an expert appraiser regarding the appraiser's opinion of a parcel of real property. Therefore, the District Court's decision to deny the Mikkelsons' Motion for Reconsideration was not the result of a rational mental process and should be reversed for further proceedings.

[¶68]

V. CONCLUSION

[¶69] The District Court erred in granting summary judgment in favor of NSP and directing entry of damages in the amount of \$10,620.00. The District Court erred in denying the Mikkelsons' Motion for Reconsideration. Therefore, the Supreme Court may reverse the District Court's Order and remand this matter to the District Court so that it may proceed to trial.

[¶70] Dated this 22nd day of October, 2019.

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[¶71]

CERTIFICATE OF SERVICE

I, Jessica L. Merchant, attorney for Appellants do hereby certify that on the 28th day of October, 2019, a copy of the BRIEF OF APPELLANTS with corrections and APPELLANTS' APPENDIX were served on the following by electronic mail transmission, per N.D. Sup.Ct. Admin. Order 14(D):

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[¶72]

CERTIFICATE OF COMPLIANCE

I, Jessica L. Merchant, attorney for the Appellants Laverne Mikkelson and Kandi Mikkelson, do hereby certify that the above brief complies with all type-volume limitations as set forth in the North Dakota Rules of Appellate Procedure.

I further certify that the attached Brief of Appellant complies with N.D.R.App.P. 32 in that the brief does not exceed the principal brief limitation of 38 pages, and was prepared using WordPerfect 10.0, Times New Roman font, size 12.

Dated this 22nd day of October, 2019.

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I, Jessica L. Merchant, attorney for Appellants do hereby certify that on the 22nd day of October, 2019, a copy of the BRIEF OF APPELLANTS and APPELLANTS' APPENDIX were served on the following by electronic mail transmission, per N.D. Sup.Ct. Admin. Order 14(D):

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IN THE SUPREME COURT

FOR THE STATE OF NORTH DAKOTA

Northern States Power Company, a Minnesota)	
corporation, by its Board of Directors,)	
)	
Plaintiff and Appellee,)	
)	Supreme Court No. 20190227
vs.)	
)	
Laverne Mikkelson a/k/a Laverne C. Mikkelson Sr,)	
Kandi Mikkelson a/k/a Kandi K. Mikkelson,)	Ward County District
)	Court No. 51-2017-CV-00812
Defendants and Appellants,)	
)	
)	
SRT Communications, Inc., A North Dakota)	
cooperative association; Verendrye Electric)	
Cooperative, Inc., a North Dakota cooperative)	
association; Brett Livingston; Lisa Livingston;)	
Jarrold Livingston; New Prairie Township; and)	
Ward County,)	
)	
Defendants.)	

APPEAL FROM THE JUDGMENT ENTERED JANUARY 22, 2019 (DOCUMENT NO. 109), PURSUANT TO THE FINDINGS OF FACT, CONCLUSION OF LAW, AND ORDER GRANTING PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT AND DIRECTING ENTRY OF JUDGMENT ENTERED JANUARY 16, 2019 (DOCUMENT NO. 107), AND THE ORDER DENYING DEFENDANTS’ MOTION TO AMEND ORDER AND JUDGMENT ENTERED MAY 30, 2019 (DOCUMENT NO. 156)

THE HONORABLE DOUGLAS L. MATTSON, PRESIDING

BRIEF OF APPELLANTS AND ADDENDUM

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STATUTES

N.D.C.C. § 32-15-06.1

32-15-06.1. Duty to negotiate - Just compensation - Appraisals.

1. A condemnor shall make every reasonable and diligent effort to acquire property by negotiation.
2. Before initiating negotiations for the purchase of property, the condemnor shall establish an amount which it believes to be just compensation therefor and promptly shall submit to the owner an offer to acquire the property for the full amount so established. The amount shall not be less than the condemnor's approved appraisal or written statement and summary of just compensation for the property.
3. In establishing the amount believed to be just compensation, the condemnor shall disregard any decrease or increase in the fair market value of the property caused by the project for which the property is to be acquired or by the reasonable likelihood that the property will be acquired for that project, other than a decrease due to physical deterioration within the reasonable control of the owner.
4. The condemnor shall provide the owner of the property with a written appraisal, if one has been prepared, or if one has not been prepared, with a written statement and summary, showing the basis for the amount it established as just compensation for the property. If appropriate, the compensation for the property to be acquired and for the damages to remaining property shall be separately stated.

RULES

N.D.R. Evid. 408

RULE 408. COMPROMISE OFFERS AND NEGOTIATIONS

- (a) Prohibited Uses. Evidence of the following is not admissible, on behalf of any party, either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:
- (1) furnishing, promising, offering, accepting, promising to accept, or offering to accept a valuable consideration in compromising or attempting to compromise the claim; and
 - (2) conduct or a statement made during compromise negotiations.
- (b) Exceptions. The court may admit this evidence for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution. The court need not exclude evidence otherwise discoverable merely because it is presented in the course of compromise negotiations.

OTHER AUTHORITY

N.D. Const. Art. I, §16

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. No right of way shall be appropriated to the use of any corporation until full compensation therefor be first made in money or ascertained and paid into court for the owner, unless the owner chooses annual payments as may be provided by law, irrespective of any benefit from any improvement proposed by such corporation. Compensation shall be ascertained by a jury, unless a jury be waived. When the state or any of its departments, agencies or political subdivisions seeks to acquire right of way, it may take possession upon making an offer to purchase and by depositing the amount of such offer with the clerk of the district court of the county wherein the right of way is located. The clerk shall immediately notify the owner of such deposit. The owner may thereupon appeal to the court in the manner provided by law, and may have a jury trial, unless a jury be waived, to determine the damages, which damages the owner may choose to accept in annual payments as may be provided for by law. Annual payments shall not be subject to escalator clauses but may be supplemented by interest earned. For purposes of this section, a public use or a public purpose does not include public benefits of economic development, including an increase in tax base, tax revenues, employment, or general economic health. Private property shall not be taken for the use of, or ownership by, any private individual or entity, unless that property is necessary for conducting a common carrier or utility business