20190227

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
NOVEMBER 21, 2019
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

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

Appeal from the Judgment Entered January 22, 2019 (Index No. 109), Pursuant to the Findings of Fact, Conclusions of Law, and Order Granting Plaintiff's Motion for Summary Judgment and Directing Entry of Judgment Entered January 16, 2019 (Index No. 107), and the Order Denying Defendants' Motion to Amend Order and Judgment Entered May 30, 2019 (Index No. 156)

The Honorable Douglas L. Mattson, District Judge, Presiding

BRIEF OF APPELLEE

Patrick D.J. Mahlberg, ND Bar #06659
FREDRIKSON & BYRON, P.A.
200 S 6th St., Suite 4000
Minneapolis, MN 55414
pmahlberg@fredlaw.com
Telephone: 612.492.7419
Facsimile: 612.492.7077

Attorneys for Northern States Power Co.

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[1] STATEMENT OF THE ISSUES

[2] Appellants Laverne and Kandi Mikkelson (the "Mikkelsons") present four ostensible issues on appeal. All of them should be answered in the negative.

[3] Appellee Northern States Power Company ("NSP") submits that the issues on appeal are properly stated as follows:

A. Did the District Court err in granting summary judgment on the issue of damages in this partial taking case based on the evidence before it?

B. Did the District Court commit an abuse of discretion in denying the Mikkelsons' Motion to Amend its Order Granting Summary Judgment?

[4] STATEMENT OF FACTS

[5] I. GENERAL BACKGROUND.

[6] NSP commenced a condemnation action in the Ward County District Court in May 2017 to obtain an electric transmission line easement across certain property owned by the Mikkelsons (the "Subject Property"). (*See* Appellants' Appendix ("App.") 10-23.)

[7] On November 20, 2017, the District Court granted NSP's motion for partial summary judgment affirming the public purpose and necessity of the taking over an objection by the Mikkelsons that, among other things, they needed more time to conduct discovery about the fair market value of the property being taken. (*See* App. 6, Index No. 39, ¶ 18.) Thereafter, the only remaining issue before the District Court was the amount of just compensation that the Mikkelsons were entitled to receive from NSP.

[8] NSP and the Mikkelsons reached an agreement that allowed NSP to construct the transmission line project while the case followed a more thorough discovery process than proceeding under N.D.C.C. § 32-15-13 would have allowed. Pursuant to the agreement,

(App. 6, Index No. 41, ¶¶ 1-2), the date of taking or date of valuation was set at December 27, 2017 (App. 6, Index No. 43).

[9] II. THE MIKKELSONS' WITNESSES' DEPOSITION TESTIMONY.

[10] The Mikkelsons' potential witnesses included themselves and their appraiser, Roger Cymbaluk. During discovery, NSP deposed both Mr. and Mrs. Mikkelson twice, and also deposed Mr. Cymbaluk. (*See* App. 5, Index No. 24, Exs. 1, 2; App. 6, Index Nos. 85, 86, Exs. 1, 2, 3.)[1]

[11] A. Mr. Mikkelson Testified That He Did Not Have, And Could Not Form, an Opinion About The Diminution in Market Value Caused by The Taking.

[12] The Mikkelsons disagree with the premise that just compensation should be tied to market value. Accordingly, the Mikkelsons intended to go to trial under the theory that NSP should have to pay a premium because the Mikkelsons were not willing sellers:

> Q. Okay. And why is it, Mr. Mikkelson, that you think you should be paid more than the fair market value of the property?
>
> A. Because I don't want to sell it.
>
> Q. And if -- if I bring that into sort of the legal issues that we're talking about, it's that because you're not a willing seller, that NSP should have to pay more than the fair market value of the property for condemning an easement across your property?
>
> A. Absolutely.

---

[1] The Mikkelsons' first depositions (App. 5, Index No. 24, Exs. 1 & 2), were taken in connection with NSP's Motion for Partial Summary Judgment to affirm the taking. The Mikkelsons' second depositions (App. 6, Index Nos. 85, 86, Exs. 1, 2), were taken after the Court granted that motion. The Mikkelsons included the transcript of Mr. Mikkelson's second deposition in its entirety in Appellants' Appendix (App. 29-64), and NSP cites thereto in this Brief. Citations to portions of Mr. Cymbaluk's testimony not included in Appellants' Appendix will be to Index No. 86, Ex. 3. Mrs. Mikkelson testified that she does not have an opinion of the value of the Subject Property or NSP's taking's impact. (*See* App. 7, Index No. 86, Ex. 2, 6:17-7:15).

(App. 33, 9:1-11.)

> Q. All right. So this goes back, Mr. Mikkelson, to the idea that, as you see it, just compensation is not a function of market value; correct?
>
> A. Absolutely not.
>
> Q. It is a function of you getting paid what you think you should be paid because the land's not for sale; right?
>
> A. It's fair compensation for the taking.
>
> Q. Right. It's a number that you should be paid in order to not have to go through this, in order to not have to pay your lawyers anymore, to go through the hassle and to account for the fact that the land wasn't for sale to begin with; right?
>
> A. Well, I see it as a number that you want something that I have that isn't for sale. And so if I have to sell it, then I should be the one that controls the number.
>
> Q. Right. And market value doesn't matter?
>
> A. No.

(App. 37, 26:20-27:23; *see also* App. 63, 129:1-14 (claiming compensation "not based on market value").)

[13] NSP repeatedly probed Mr. Mikkelson for an opinion about market value-based damages. While Mr. Mikkelson testified that the property's market value was about $3,000 per acre before NSP's easement taking, (App. 46, 60:2-6), he repeatedly testified that he had no opinion, and could not form an opinion, about the impact of the taking on the Subject Property's market value:

> Q. What would you need to know to be able to give me [an opinion of the after value]?
>
> A. Couldn't do it.

Q. Couldn't do it?

A. No.

Q. Doesn't matter what facts you could acquire, you don't have an opinion as to the amount of diminution of the market value of the property because of the new transmission line easement taking; right?

A. Right.

(App. 46, 61:13-23.)

Q. What would it take for you to be able to reach an opinion as to the market value impact of the new transmission line being built on the property?

A. I suppose we'd have to hire someone to give an appraisal what it was worth before and what it was worth after.

Q. Okay. And you have not done that?

A. No.

Q. And you're saying that you are unable to give that opinion yourself?

A. Correct.

Q. And no facts or information would let you form an opinion; correct?

A. Correct.

Q. You'd have to hire an appraiser?

A. Yes.

Q. And you didn't?

A. No.

(App. 56, 100:6-24.)

Q. I'm asking for your opinion about what you think the entire property would go for in an open market transaction with the new

transmission line easement in place. You do not have an opinion on that; correct?

A. Well, it would be less because of it.

Q. But you do not have any opinion about how much less; right?

A. No. No.

Q. And you're not qualified - -

A. Right.

Q. - - to reach a conclusion about that?

A. Right.

Q. Right?

A. Right.

Q. And you will not be qualified to reach a conclusion about that before trial; correct?

A. I don't think so.

Q. Correct?

A. Well, I don't know. I don't think I will be. Maybe I can go to a quick appraisal school.

Q. Fine. And I - - I get that you're being lighthearted about that one. You're saying that an appraiser would have to do that?

A. Yes.

(App. 60, 117:12-118:11.)

[14] **B. Mr. Cymbaluk Was Not Asked To, And Did Not Form, an Opinion About The Diminution in Fair Market Value.**

[15] The Mikkelsons' appraiser, Mr. Cymbaluk, was not asked to form an opinion regarding the impact of NSP's easement taking on the Subject Property's market value:

> Q. And were you asked to come up with an opinion of the damages to the fair market value of the land on account of the new easement taking?
>
> A. I was not.

(App. 7, Index No. 85, 86, Ex. 3, 9:25-10:1.) Accordingly, he did not form one:

> Q. So, understood, you don't have an opinion about what ought to be paid in this case; right?
>
> A. I do not.
>
> Q. And you don't have an opinion about the diminution in the fair market value of the property in this case; right?
>
> A. I have not thought about it.

(*Id.* at 43:15-21.)

[16] III. THE EVIDENCE AND ARGUMENT BEFORE THE DISTRICT COURT ON NSP'S MOTION FOR SUMMARY JUDGMENT.

[17] A. NSP's Motion.

[18] Because of the Mikkelsons' and their appraiser's stark testimony disclaiming any opinion regarding the impact of NSP's taking on the fair market value of the Subject Property, NSP moved for summary judgment on damages. (App. 7, Index No. 83.)[2]

[19] NSP's brief set forth the Mikkelsons' and their appraiser's testimony, and explained the Mikkelsons' complete lack of evidence on the issue of damages under applicable law. (App. 7, Index No. 84.) NSP also submitted an affidavit of its appraiser, Mr. Gerald Bock, who performed a detailed appraisal and opined the taking diminished the Subject Property's market value by $10,620. (App. 7, Index Nos. 87, 88; App. 72.)

[2] NSP moved *in limine* on several related grounds at the same time it moved for summary judgment. (App. 7, Index No. 78.)

[20] **B. In Response to the Motion, the Mikkelsons Admitted Their Witnesses "did not have an opinion as to the diminution of value."**

[21] The Mikkelsons opposed NSP's summary judgment motion. But in doing so, the Mikkelsons did not cite to any deposition testimony or other evidence to support the proposition that there was a genuine issue of material fact about the diminution in the fair market value of the property. (App. 7, Index No. 93.)

[22] Instead, the Mikkelsons affirmed what their witnesses stated under oath—none of them had an opinion about the impact of NSP's easement taking on the Subject Property's market value:

> "Mr. Mikkelson's opinion is what it is. NSP cannot justify its demand simply because Mr. Mikkelson did not speak to a particular piece of information. He stated on the record that he did not have an opinion as to the diminution of value."
>
> "NSP cannot justify its demand simply because Mr. Cymbaluk did not speak to a particular piece of information. He stated on the record that he did not have an opinion as to the diminution of value."

(App. 7, Index No. 93, ¶¶ 16, 22.)

[23] **C. Oral Argument on NSP's Motion for Summary Judgment.**

[24] Oral argument was held before the District Court on January 7, 2019. (App. 91-109.) There, for the first time, the Mikkelsons' counsel cited a portion of the transcript from Mr. Mikkelson's deposition in which Mr. Mikkelson stated that he would personally consider the property subject to NSP's easement to have no value, reasoning that he could not sell the easement strip to anybody. (*See* App. 98-99; App. 59, 112:9-113:2.)

[25] **D. The District Court Granted NSP's Motion.**

[26] The District Court granted NSP's Motion for Summary Judgment, (*see* App. 76-82), determining that the opinion of Mr. Bock was the only admissible evidence on

damages. (App. 78, ¶¶ 11-12.) The District Court accordingly ordered that judgment of $10,620.00 be entered in favor of the Mikkelsons. (App. 81.)

[27] **IV. THE MIKKELSONS' MOTION TO AMEND BEFORE THE DISTRICT COURT.**

[28] The Mikkelsons filed a Motion to Amend the Court's Order and Judgment. (App. 8, Index No. 123.) In connection with the Mikkelsons' Motion to Amend, the Mikkelsons' references to the record consisted of: 1) citations to portions of deposition transcripts that were never presented to the District Court or referenced in connection with NSP's Motion for Summary Judgment; and 2) material attached to a new affidavit by counsel that was also never presented to the District Court or referenced in connection with NSP's Motion for Summary Judgment. (App. 8, Index Nos. 124, 125, 126, 127.)

[29] In their brief in support of their Motion to Amend, the Mikkelsons represented that certain portions of the transcript from Mr. Mikkelson's deposition cited in the brief were brought to the District Court's attention at oral argument on NSP's Motion for Summary Judgment, when they in fact were not. (*Compare* App. 8, Index No. 124, ¶ 13 (asserting that the Mikkelsons had cited 124:24-126:7 of Mr. Mikkelson's deposition transcript at oral argument) *with* App. 91-109 (transcript of oral argument).)

[30] The Mikkelsons presented these new citations in new arguments claiming that the District Court erred in granting summary judgment on the issue of damages, and that the District Court must amend its order and vacate its judgment. (App. 8, Index No. 124.)

[31] The District Court denied the Mikkelsons' Motion to Amend. (App. 88-90.)

[32] **V. THE MIKKELSONS' CURRENT APPEAL.**

[33] As with the Mikkelsons' Motion to Amend before the District Court, the Mikkelsons' principal brief relies on evidence and arguments not presented to the District

Court in connection with NSP's Motion for Summary Judgment. In fact, none of the deposition testimony referenced in the Mikkelsons' "Statement of Facts" was raised by the Mikkelsons to the District Court—either in briefing or at oral argument—prior to the District Court's Order Granting Summary Judgment. (*Compare* Mikkelsons' Br. ¶¶ 16–24 *with* App. 7, Index No. 93 *and* App. 91-109.)

[34] **ARGUMENT**

[35] As an initial matter, the Mikkelsons' presentation of issues and arguments on appeal is misleading. The vast majority of the evidence that the Mikkelsons present on appeal, and claim demonstrated a material dispute of fact that should have prevented summary judgment before the District Court, was either presented to District Court in connection with the Mikkelsons' Motion to Amend *only after* the District Court's Order Granting Summary Judgment, or was not presented to the District Court at all. It is important to distinguish the evidence that was presented to the District Court during the different phases in this case, because it impacts this Court's evaluation of the District Court's Orders. Therefore, the Argument below addresses evidence and arguments as they are relevant to the respective Orders subject to appeal.

[36] **I. THE DISTRICT COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT ON THE ISSUE OF DAMAGES.**

[37] The Mikkelsons' principal brief ignores the substantive law that governs the legal issue before the District Court on summary judgment (the standard of damages for a partial taking), the Mikkelsons' duty to present competent admissible evidence on damages, and the evidence and arguments actually presented to the District Court. Based on applicable law and the record before it, the District Court did not err, and was in fact compelled to grant summary judgment.

[38] **A. The Mikkelsons Bore the Burden of Proving Damages (i.e., Just Compensation), Which Are Measured by the Diminution in the Fair Market Value of the Subject Property Caused by the Partial Taking.**

[39] The Mikkelsons bore the burden of proving their entitlement to damages, as well as the amount of those damages. *E.g.*, *City of Hazelton v. Daugherty*, 275 N.W.2d 624, 627 (N.D. 1979); *see also* N.D. Pattern Jury Inst. C-75.04 ("The owner of the [interest in the] property must prove, by the greater weight of the evidence, any entitlement to [compensation] [and] [damages] and the amount of those damages.").

[40] To meet their burden, the Mikkelsons were required to show through competent and admissible evidence how much "fair market value" they have lost in the Subject Property because of the taking, as of the date of the taking. *See* N.D.C.C. § 32-15-22 (reprinted at Mikkelsons' Br. ¶ 34); *City of Devils Lake v. Davis*, 480 N.W.2d 72, 725 (N.D. 1992); Nichols on Eminent Domain, (rev. 3d ed.), § 12.04[1] ("It is the loss to the owner which measures the amount of compensation to which he is entitled."). "Fair market value" is the price a willing buyer would pay a willing seller for the property in the open market. *See, e.g.*, *City of Hazelton*, 275 N.W.2d at 627.

[41] The amount that has been lost is shown in a partial easement taking case by measuring the difference between the property's market value before and after the taking at issue. N.D.C.C. § 32-15-22; *see* N.D. Pattern Jury Inst. C-75.05 and 75.10; *N. States Power Co. v. Effertz*, 94 N.W.2d 288, 293-94 (N.D. 1958); *see also* Nichols on Eminent Domain, (rev. 3d ed.), § 12D.01[2][c][i] ("Eminent domain often takes less than the fee interest in the property. In this case, the measure of damages is normally the difference in the market value of the land free of the easement and the market value as burdened

with the easement which has been imposed.") (citing *Otter Tail Power Co. v. Von Bank*, 8 N.W.2d 599 (N.D. 1942)); *Lenertz v. City of Minot*, 2019 ND 53, ¶ 4, 923 N.W.2d 479.

[42] **B. To Overcome NSP's Motion for Summary Judgment, the Mikkelsons Needed to Present Evidence to the District Court Demonstrating a Material Dispute Regarding the Diminution in Fair Market Value Caused by The Taking.**

[43] Summary judgment "shall be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." N.D.R.Civ.P. 56(c)(3). The party moving for summary judgment bears the burden to demonstrate clearly that there is no genuine issue of material fact. *Latendresse* v. *Latendresse,* 294 N.W.2d 742, 748 (N.D. 1980).

[44] The purpose of summary judgment is to promote the prompt and expeditious disposition of a legal conflict on its merits, without trial, if no material dispute of fact exists or if only a question of law is involved. *Cmty. Credit Union* v. *Homelvig,* 487 N.W.2d 602, 603 (N.D. 1992). A disputed fact is only "material" if the resolution of the factual dispute will, under the law, alter the ultimate result. *Frey* v. *City of Jamestown,* 548 N.W.2d 784, 787 (N.D. 1996).

[45] A district court's decision on a motion for summary judgment requires it to consider which party bears the applicable burden of proof at trial. *Johnston Law Office, P.C. v. Brakke*, 2018 ND 247, ¶ 8, 919 N.W.2d 733. The Court has stated as follows:

> When the moving party does not have the burden of proof at trial on the claim and the non-moving party has had a reasonable time for discovery, the moving party's initial burden on summary judgment may be discharged by showing—that is, pointing out to the district court—that there is an absence of evidence to support the non-moving party's case. The [moving party] must show why the opponent's allegations of fact are

> insufficient to support the claim for relief as a matter of law or why the court should conclude that its opponent lacks sufficient evidence.

Id. at ¶ 29 (internal citations and quotations omitted).

[46] After the requisite showing has been made by the moving party, the non-moving party is "required to present *competent admissible* evidence to show the existence of a genuine issue of material fact." *Id.* at ¶ 32 (emphasis added). "The party opposing the motion must present enough evidence for a reasonable jury to find for [that party]." *Id.* (internal quotations omitted); *see also Black v. Abex Corp.*, 1999 ND 236, ¶ 23, 603 N.W.2d 182 ("Summary judgment is appropriate against a party who fails to establish the existence of a factual dispute on an essential element of her claim and on which she will bear the burden of proof at trial.").

[47] As this Court has further explained, courts are not "ferrets" obligated to search the record for evidence opposing summary judgment. *Earnest v. Garcia*, 1999 ND 196, ¶ 10, 601 N.W.2d 260; *see also Tarnavsky v. Rankin*, 2009 ND 149, ¶ 8, 771 N.W.2d 578. The obligation is on the party opposing summary judgment to "explain the connection between the factual assertions and the legal theories in the case, and cannot leave to the court the chore of divining what facts are relevant or why facts are relevant, let alone material, to the claim for relief." *Earnest*, 1999 ND 196, ¶ 10, 601 N.W.2d 260.

[48] **C. The District Court Was Correct to Grant Summary Judgment on the Issue of Damages Based on Black Letter Law, and the Evidence, Argument, and Stark Admissions Before it.**

[49] As set forth above, and presented to the District Court, the Mikkelsons and their appraiser repeatedly and unequivocally disclaimed any opinion on the matter of the fair market value impacts of the taking. Accordingly, NSP moved for summary judgment.

[50] New evidence and arguments on appeal notwithstanding, the Mikkelsons utterly failed to present any competent admissible evidence to the District Court to oppose summary judgment on the issue of damages. Instead, the Mikkelsons told the District Court—contrary to what they now tell this Court on appeal—that this evidence did not exist. A comparison of the Mikkelsons' argument on appeal with their admissions to the District Court in connection with NSP's Motion for Summary Judgment (and also in connection with NSP's Motion *in Limine* pending at the same time) is telling:

> **The Mikkelsons' Principal Brief on Appeal:**
>
> ¶ 33: "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: "[T]he 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. . . ."
>
> ¶ 50: "Roger Cymbaluk, the Mikkelsons' appraiser, provided admissible evidence about the damages to the Market Value of the Subject Property."
>
> **The Mikkelsons' Brief to the District Court in Response to NSP's Summary Judgment Motion (App. 7, Index No. 93):**
>
> ¶ 16: "Mr. Mikkelson's opinion is what it is. NSP cannot justify its demand simply because Mr. Mikkelson did not speak to a particular piece of information. He stated on the record that he did not have an opinion as to the diminution of value."
>
> ¶ 22: "NSP cannot justify its demand simply because Mr. Cymbaluk did not speak to a particular piece of information. He stated on the record that he did not have an opinion as to the diminution of value."
>
> **The Mikkelsons' Brief to the District Court in Response to NSP's Motion *in Limine* (App. 7, Index No. 90, ¶ 24):**
>
> "Mr. Mikkelson clearly stated his intent was to gather more evidence before making an opinion. When asked in deposition that:

> Q. You will have no evidence at trial as to the actual market value impact on account of the transmission line taking; correct?
>
> Mr. Mikkelson's response was that:
>
> A. That isn't true. I might have to - still have to hire someone.
>
> (Second Deposition of Laverne Mikkelson, 122:4.)
>
> Mr. Mikkelson's statements on the record clearly indicate that he was not qualified to offer an opinion at that point in time."

[51] A review of the parties' briefs in District Court shows the Mikkelsons' position on appeal is revisionist history. Save for one limited and out of context portion of Mr. Mikkelsons' deposition testimony raised for the first time at oral argument, (which is addressed in the section immediately below), *none* of the deposition testimony that the Mikkelsons cite in their principal brief was presented to the District Court in connection with NSP's Motion for Summary Judgment. Rather, the District Court was faced with repeated, sworn statements by the Mikkelsons and Mr. Cymbaluk that they did *not* have an opinion as to the diminution in the market value caused by NSP's easement taking. Were there any question remaining as to whether the door should still be open to trial, the Mikkelsons' written arguments slammed it shut when they stated unequivocally that their witnesses did not have opinions. The only competent admissible evidence before the District Court was that of NSP's appraiser.

[52] Given the well-settled law regarding damages and the burden on the Mikkelsons to prove their damages at trial, the Mikkelsons' burden at the summary judgment stage to present competent and admissible evidence to the District Court of their claimed damages, and the actual evidence, argument, and stark admissions before the District Court, summary judgment was required and appropriately granted.

[53] **D. The Out-of-Context Snippet of Mr. Mikkelson's Deposition Testimony, Raised for the First Time at Oral Argument, Did Not Provide a Basis to Withstand Summary Judgment.**

[54] In portions of their principal brief, the Mikkelsons present an argument based on lines 112:3-113:2 of Mr. Mikkelson's deposition testimony. (Mikkelsons' Br. ¶¶ 40, 41, 46, 47.) The Mikkelsons did not present this in their briefing before the District Court, but did refer to it briefly at oral argument. For several reasons, this limited, out-of-context testimony does not provide any basis to reverse the District Court's Order granting summary judgment.

[55] First, the Mikkelsons provide only a part of this citation. The Mikkelsons dwell on the following question and partial answer: "On its own, the statement that 'if the property went up for sale, do you think the market would say that the easement acreage is worth zero? — Yeah', is a factual statement as to the after value of the Mikkelsons' property." The Mikkelsons ignore that Mr. Mikkelson's answer, in full, was: "Yeah. Do you think I can sell take that strip and sell it to anybody?" (App. 59, 112:22-113:2.) The ability to sell "that strip' in isolation is irrelevant, because that is not how the condemnation law requires values to be determined under North Dakota law.[3]

[56] Second, at best, what the Mikkelsons are suggesting is that the District Court erred in failing to infer from this single citation that Mr. Mikkelson did have an opinion about the market value impacts of the taking. But such an inference would have been as

[3] While the Mikkelsons dwell on the single question and partial answer contained in lines 112:22-113:2 of Mr. Mikkelson's deposition in their appeal, at no point during oral argument did the Mikkelsons' counsel ever fully present lines 112:22-113:2 or argue why these particular statements purportedly demonstrated a genuine dispute regarding damages. (App. 98-99, 8:15-9:6.) Also notably, even on the Mikkelsons' Brief in Support of Motion to Amend Order and Judgment, the Mikkelsons did not reference lines 112:3-113:2 of Mr. Mikkelsons' deposition testimony at all. (App. 8, Index No. 124.)

unreasonable then as it would be now. Mr. Mikkelson repeatedly and unequivocally stated at his deposition, before and after the quote identified above, that he does not have, and is not qualified to form, an opinion regarding the diminution in market value resulting from NSP's easement taking both before and after the limited exchange on pages 112 and 113 of Mr. Mikkelson's deposition.

[57] As but one example, immediately following Mr. Mikkelson's vague comment indicating that he personally would consider the property subject to NSP's easement to have "zero value," he again confirmed that he did not have any opinion regarding the diminution in the Subject Property's market value caused by the taking, and this would need to be determined by an appraiser. (App. 59, 113:3-25.)[4]

[58] Moreover, on questioning seeking to further clarify Mr. Mikkelson's testimony, he left no doubt that he could not speak to the impact of NSP's easement taking on market value—the standard of damages in this case. (App. 60, 117:12-118:11.)

[59] To the extent that the Mikkelsons cite *Jim's Hot Shot Serv., Inc. v. Cont'l W. Ins. Co.*, 353 N.W.2d 279 (N.D. 1984) in their principal brief for the unremarkable and undisputed proposition that a property owner may generally testify to the value of his or her property, *if* it is given with a valid basis and is based on proper facts and analysis, they attack the strawman. (Mikkelsons' Br. ¶ 48.)[5] The question in this case is not whether landowners with otherwise admissible opinions should be allowed to testify to

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[4] In the District Court's Order denying the Mikkelsons Motion to Amend, it specifically addressed this testimony, and noted that Mr. Mikkelson qualified his subjective comment on value by "admitting that an appraiser or sale would be needed to determine the value of the property after installation of the new transmission line." (App. 90, ¶ 7.)

[5] The Mikkelsons appear to concede on appeal that Mr. Mikkelson may *not* testify to a subjective "premium" valuation standard. (Mikkelsons' Br. ¶ 48.)

the appropriate valuation standard. Rather, in this case, the record shows, and the Mikkelsons admitted to the District Court, that "[Mr. Mikkelson] stated on the record that he did not have an opinion as to the diminution of value." (App. 7, Index No. 93, ¶ 16.) The Mikkelsons' *post hoc* attempt to twist a passing remark at a deposition out of context does not change this immutable fact, or provide any basis to reverse the District Court.

[60] **E. The Argument that Mr. Cymbaluk Provided Evidence of Damages Is a Non-Starter.**

[61] The Mikkelsons' argument regarding Mr. Cymbaluk in paragraphs 50-53 of their principal brief ignores how summary judgment operates, and the Mikkelsons' obligation at the summary judgment stage, as the party claiming damages, to present *competent admissible* evidence of damages sufficient to present the issue to a jury.

[62] The Mikkelsons correctly represented to the District Court in their briefing, Mr. Cymbaluk "stated on the record that he did not have an opinion as to the diminution of value." (App. 7, Index No. 93, ¶ 22.) The Mikkelsons also confirmed this fact at oral argument: "[Mr. Cymbaluk] has not made a determination on the after value." (App. 100:22-101:2.) The Mikkelsons even concede this again on appeal, "[Mr.] Cymbaluk did not prepare a before an[d] 'after' valuation." (Mikkelsons' Br. ¶ 52.) The fact that Mr. Cymbaluk opined to the *before value* of the subject property in a vacuum is irrelevant to the question of damages in this case. Mr. Cymbaluk's opinion is legally incompetent to answer the question of damages, because he speaks only to one-half (the before value) of a two-part analysis (before value and after value).

[63] The assertion that Mr. Cymbaluk stated that "he would testify at trial to support the Mikkelsons' conclusion as to the diminution in value", (*id.*), is similarly unpersuasive. It was clear then, as it is now, that Mr. Cymbaluk had no idea what Mr.

Mikkelson's opinion was. (App. 7, Index No. 85, 86, Ex. 3, 47:8-48:3 (Mr. Cymbaluk explaining that, he did not know what Mr. Mikkelson's opinions on diminution might be: "I have not heard what Mr. Mikkelson's diminution is or his frustration. I have not talked to him.").) As the Mikkelsons conceded at oral argument, the best they can say is Mr. Cymbaluk would support Mr. Mikkelson's opinion "if he agrees" with it. (App. 99:14-18.) That sort of hypothetical position is not affirmative evidence that creates a genuine issue of material fact.

[64] Likewise, the suggestion that the Mikkelsons can avoid summary judgment because Mr. Cymbaluk might rebut Mr. Bock's conclusion of damages also fails.

[65] First, the mere promise that different evidence could be adduced at trial is not enough to withstand summary judgment. *See* N.D.R. Civ. P. 56(e)(2); *Johnston*, 2018 ND 247, ¶ 8 919 N.W.2d 733 ("Rule 56 requires the entry of summary judgment against a party who fails to establish the existence of a material factual dispute as to an essential element of the claim and on which the party will bear the burden of proof at trial.").

[66] Second, Mr. Cymbaluk had not even looked at what the Mikkelsons claim he might have rebutted or testified about if the matter went to trial. (App. 7, Index No. 85, 86, Ex. 3, 87:11-18 (Q: Have you – were you asked to look at Mr. Bock's report at all? A: No, I have not seen it. Who's Mr. Bock? . . . First time I've heard his name.").)

[67] A party may not meet its burden of proof, or avoid summary judgment, by merely predicting that they may disagree with an opposing party's affirmative evidence at trial. It is not proper—as Mikkelsons suggest that they have a "right" to do—to call a witness to simply say that he disagrees with another side's witness. Rather, the witness must have his own competent qualified opinion as to the question at hand. *See, e.g.*, *Walton v.*

McDonnell Douglas Corp., 167 F.3d 423, 428 (8th Cir. 1999) ("[T]o defeat summary judgment, [the party opposing summary judgment] must present affirmative evidence, not simply contend that a jury might disbelieve [the moving party's] evidence.") (internal quotation omitted); N.D.R. Civ. P. 56(e)(2) (requiring competent affirmative evidence).

[68] The Mikkelsons presented no evidence to withstand summary judgment on the issue of damages through an appraiser who deliberately did not address the issue.

[69] II. THE DISTRICT COURT DID NOT ERR IN DENYING THE MIKKELSONS' MOTION TO AMEND.

[70] Section I above addresses all of the evidence that was (arguably) raised before the District Court in connection with NSP's Motion for Summary Judgment. To the extent that the Mikkelsons argue on appeal that other purported evidence demonstrated a material dispute of fact that should have prevented summary judgment, that evidence was raised before the District Court, if at all, only after its Order Granting Summary Judgment. These arguments—presented in an attempt to re-litigate the Motion for Summary Judgment—must be considered under the deferential standard that applies to the District Court's decision on a motion to amend.

[71] A. The Standard Applicable to the Motion to Amend.

[72] A district court's decision on a motion to amend a judgment under N.D.R.Civ.P. 59(j) rests in the district court's sound discretion. *Werven v. Werven*, 2016 ND 60, ¶ 24, 877 N.W.2d 9. The district court's decision will not be reversed unless it abuses its discretion by acting in an arbitrary, unreasonable, or unconscionable manner, or when it misinterprets or misapplies the law, or when its decision is not the product of a rational mental process leading to a reasoned determination. *Id.*; *see also Ellingson v.*

Knudson, 498 N.W.2d 814, 818 (N.D. 1993) ("We will disturb a district court's ruling on a motion to reconsider only if an abuse of discretion is shown.").

[73] As the Court has explained, (specifically in the context of upholding district court denials to amend orders granting summary judgment under Rule 59(j)), it is the duty of the party opposing a motion for summary judgment to set forth *specific facts* demonstrating why summary judgment is purportedly not appropriate *at the summary judgment stage*. *E.g.*, *Ellingson*, 498 N.W.2d at 818.

[74] "A motion to amend a judgment may not be used to re-litigate factual questions and present evidence that was available to be presented at trial." *Werven*, 2016 ND 60, ¶ 24, 877 N.W.2d 9. Relatedly, "[t]he district court may decline to consider an issue or argument raised for the first time on a motion for reconsideration [under N.D.R.Civ.P. 59(j)] if it could have been raised in earlier proceedings." *Flaten v. Couture,* 2018 ND 136, ¶ 28, 912 N.W.2d 330 (alteration in original) (citation omitted).

[75] It is likewise improper for a party to argue for a new interpretation of evidence previously submitted to the district court as part of a motion to amend. *Ellingson*, 498 N.W.2d at 818 ("[W]e cannot say the district court abused its discretion by declining to entertain a new interpretation of the evidence raised after summary judgment. [This] kind of afterthought, or shifting of ground, is not one of the circumstances in which a motion for reconsideration is appropriate.") (quotation omitted).

[76] **B. The Mikkelsons' Argument that New Deposition Testimony Purportedly Shows that Mr. Mikkelson Provided an Opinion Regarding the Impact of NSP's Easement Taking on Market Value Is Unavailing.**

[77] In their principal brief, the Mikkelsons rely heavily on Mr. Mikkelson's testimony from pages 124 to 127 of his deposition. (*See* Mikkelsons' Br. ¶¶ 22, 23, 35-39.) There,

Mr. Mikkelson explained that he personally would *start* a negotiation for land encumbered by a transmission line by giving it zero value. (*See id.* (citing App. 62, 124:24-127:18).) The Mikkelsons assert that these statements show a "working theory that diminution to the property would be 100%." (Mikkelsons' Br. ¶ 37.) The Mikkelsons are wrong for many reasons.

[78] First, *none* of this testimony was presented to the District Court, either in briefing or at oral argument, prior to the Court's Order granting summary judgment. (*See* App. 7, Index No. 93 *and* App. 91-109.) Instead, the portions of this testimony that were presented to the District Court under any circumstances, were raised for the first time in connection with the Mikkelsons' Motion to Amend. (*See* App.8, Index. No. 124, ¶¶ 11-13.) The District Court had no obligation to consider this evidence, and it provides no basis for this Court to reverse either of the District Court's Orders.

[79] Second, the Mikkelsons had already "stated on the record that [they] did not have an opinion as to the diminution in value" caused by NSP's easement taking. (App. 7, Index No. 93, ¶¶ 16, 22). The Mikkelsons' "afterthought, or shifting of ground [in offering a new interpretation of the evidence raised at summary judgment], is not one of the circumstances in which a motion for reconsideration is appropriate." *Ellingson*, 498 N.W.2d at 818. The testimony showing that Mr. Mikkelson does not have, and is not qualified to form, an opinion regarding the diminution in market value resulting from NSP's easement taking, is unequivocal and overwhelming. (*See supra*, Statement of Facts, Section II.A.) The Mikkelsons' disingenuous invitation to the District Court to revise history was appropriately rejected.

[80] Third, this testimony is nothing more than Mr. Mikkelson's statements about how he, in a negotiation that he was involved in, *could start* negotiations over land encumbered by a transmission line easement (again, without any regard for market value). But how he or any other person would start a negotiation does not go nearly far enough to create a genuine issue of material fact. Such testimony is not competent, admissible evidence about the actual measure of just compensation that the jury would have to decide, which is the amount of market value lost on account of the easement. Mr. Mikkelson did not testify as to how any negotiation scheme (whether he were involved or not) would actually play out in the market, and it is that market value result that matters. Indeed, he repeatedly testified that he had no opinion on that topic, that he was not able to develop such an opinion, and that he would not be able to do so at trial either. As a result, the testimony would force the jury to speculate and conject about the actual market value impacts.

[81] Fourth, cobbling together this purported "working theory" goes too far. The testimony does not constitute an admissible opinion about the market value-based impacts of the transmission line easement. The Mikkelsons' citation tries to cover this fact up, by omitting the bulk of Mr. Mikkelson's testimony. On the specific testimony that the Mikkelsons now rest their argument, the Mikkelsons' out-of-context presentation of the testimony does not withstand scrutiny. After Mr. Mikkelson testified about how he would start the negotiations, purportedly by giving the easement area no value, he then testified that he had never actually approached negotiations that manner and, in fact, would not do so. (App. 62, 125:25-126:23.) Instead, Mr. Mikkelson said that he would spread out the impacts when offering less for the property overall. (*Id.* at 126:24-127:18

(explaining that a before-and-after approach would be the appropriate way to determine the easement's impacts).) But, despite repeated attempts to elicit testimony on the actual amount of those impacts, Mr. Mikkelson expressly and repeatedly disclaimed that he could offer such an opinion. Instead, he again testified that his opinion was that he was entitled to a premium amount of up to $20,000 per acre, and that his opinion was "not based on market value." (*Id.* at 127:19-129:14.)

[82] Even if the District Court was inclined to consider this *post hoc* evidence, it did not in any way err in refusing to disturb its Order and Judgment.

[83] C. The Mikkelsons' Miscellaneous Arguments in Section IV.D of Their Brief All Fail.

[84] In Section IV.D of their principal brief, the Mikkelsons argue that certain evidence other than Mr. Mikkelson's and Mr. Cymbaluk's purported opinions regarding damages (which did not in fact exist) demonstrated a genuine issue of material fact regarding damages. Each of these arguments fail.

[85] 1. The Argument Regarding "Compensation Received by Similarly Situated Landowners" Fails.

[86] The Mikkelsons argue that purported evidence regarding "compensation received by similarly situated landowners" should have precluded summary judgment. (Mikkelsons' Br. ¶¶ 56-59.) This argument fails factually and legally.

[87] First, the Mikkelsons did not actually present *any* of the evidence referenced in this section of their principal brief in connection with NSP's Motion for Summary Judgment. Rather, the Mikkelsons presented this purported evidence for the first time in connection with their Motion to Amend. (*Compare* App. 7, Index No. 93 *with* App. 8, Index. No. 124.) The District Court had no obligation to consider this new evidence,

presented as part of the Mikkelsons' attempt to re-litigate the summary judgment motion, and it provides no basis to reverse either of the District Court's Orders.

[88] Second, this evidence does not competently speak to the impact NSP's easement taking had on the market value of the Subject Property. As even Mr. Cymbaluk explained in his deposition testimony, compensation received by landowners for utility easements is not representative of market value of the property involved, but is instead related to compromises reached between other infrastructure builders and landowners. (App. 7, Index No. 85, 86, Ex. 3, 42:5-43:17). Mr. Cymbaluk explained that these transactions are not fair market value representative transactions. (*Id.* at 29:16-25; *see also id.* at 30:3-32:6 (describing the multiples analysis as "irrelevant" to market value); 17:10-22:6 (explaining a variety of reasons why these transactions are not fair market value transactions).)[6]

[89] Trial in an eminent domain case is not about determining what settlement amounts have been acceptable to parties in unrelated non-market-value transactions. Even if this evidence had been appropriately presented to the District Court (it was not), it does not create a genuine dispute of material fact as to market value damages.

[90] **2. The Argument Regarding "Offers that NSP made to the Mikkelsons and other Landowners" Fails.**

[91] The Mikkelsons also argue that purported evidence regarding "offers that NSP made to the Mikkelsons and other landowners" creates a material dispute of fact

[6] The Court has recognized that a sale to an entity that possesses (but is not exercising and has not threatened to use) the power of eminent domain does not mean that evidence of the sale is inadmissible to speak to market value *per se*. *See Frederickson v. Hjelle*, 149 N.W.2d 733, 738 (N.D. 1967). However, the admissibility of any such evidence depends on a demonstration and finding that the transaction in question actually reflected market value. *See id.* at 738-39. *Frederickson* is not applicable here and, again, this evidence was not even presented to the District Court at the summary judgment stage.

regarding damages in the Mikkelsons' case that should have precluded summary judgment. (Mikkelsons' Br. ¶¶ 60-64.) This argument also fails factually and legally.

[92] Here, again, the Mikkelsons did not actually present *any* of the evidence referenced in this section of their principal brief in connection with NSP's Motion for Summary Judgment. (*See* App. 7, Index. No. 93.) Rather, the Mikkelsons presented this evidence for the first time in connection with their Motion to Amend. (*See* App. App. 8, Index. No. 124, ¶¶ 22-25; Index Nos. 125, 126, 127.) This new evidence, presented as part of the Mikkelsons' attempt to re-litigate the summary judgment motion, provides no basis to reverse either of the District Court's Orders.

[93] Regardless, this evidence does not competently speak to the impact NSP's easement taking has on the market value of the Subject Property. As explained above, market value is based on transactions between willing buyers and willing sellers, neither acting under undue stimuli. *See, e.g., City of Hazelton*, 275 N.W.2d at 627. Transactions that involve unwilling buyers or unwilling sellers, or that involve participants subject to atypical stimuli or pressures, are not evidence of market value. *See, e.g.*, *id.*

[94] Even ignoring the context of any particular offer for purchase, the Court has recognized that evidence of unaccepted offers to purchase property are generally inadmissible in condemnation cases because they do not reflect the value ultimately agreed to by a buyer and seller. *See, e.g.*, *Geck v. Wentz*, 133 N.W.2d 849, 851 (N.D. 1964) ("The rule concerning offers to purchase in eminent domain proceedings . . . is: In proving the value of property it is improper to admit testimony of an alleged offer of a particular price for the property as tending to show its value.") (internal quotations omitted); *see also United States v. An Easement & Right-of-way Over 6.09 Acres of*

Land, More or Less, in Madison Cty., Alabama, 140 F. Supp. 3d 1218, 1257 (N.D. Ala. 2015) ("It is clear as a general rule, however, that unaccepted offers are improper evidence by which to estimate value.").

[95] As the Court further emphasized in *Geck*, this is a *rule* of condemnation law, not a factor-based test. *See Geck*, 133 N.W.2d at 851. The Court cited a secondary source, (C.J.S. Evidence), which provided five general reasons why this rule against admitting evidence of unaccepted offers exists in the majority of jurisdictions across the United States. *See id.* The Court did not in any way indicate that these five reasons should be analyzed as part of a factor-based test. Rather, the court held simply and unequivocally as follows: "We agree with the weight of authority that such evidence is not admissible and, therefore, the court properly excluded the proffered testimony concerning offers to purchase." *Id.*

[96] Contrary to the Mikkelsons' assertion, the *Geck* Court did not "admit that exceptions to the rule occur," nor did the *Geck* Court establish or endorse anything like the factor-based analysis that the Mikkelsons present in their brief.

[97] Beyond this general prohibition against the admissibility of unaccepted offers of purchase, as a fundamental principle of condemnation law, "an offer to purchase land that is made by the party which subsequently took it by eminent domain is inadmissible to show market value." Nichols on Eminent Domain, (rev. 3d ed.), Ch. 21, § 21.03[1]. "This is the case because such an offer does not presuppose a willing seller and a willing buyer. Instead it is based on the price which the offeror, intending to take the land by eminent domain if need be, is willing to pay to avoid the expense of litigation and the chance of an excessive verdict from an unsympathetic jury." *Id.* For similar reasons, any

compromise reached by NSP with a different landowner as part of the same project is inadmissible as a matter of law. *See, e.g.*, Nichols on Eminent Domain, (rev. 3d ed.), Ch. 12B, § 12B.07[2] ("The reasoning which forbids consideration of forced sales also renders it incompetent for either party to put in evidence the amount paid by the condemnor to the owners of neighboring lands. . . . It would be equally unwise, unjust, and impolitic to make it impossible for a condemnor which has taken land by eminent domain to compromise the claims of one owner without furnishing evidence against itself in all similar claims.").

[98] In recognition of this principle, the North Dakota Pattern Jury Instructions prohibit the jury from considering the particular purpose for which property is sought or any special value to the condemning authority:

> **C - 75.06. Special Needs and Values Disregarded**
>
> In determining fair market value, you must not consider the particular purpose for which the [condemnor] desires the property. You must disregard any special value it may have to the [condemnor] as distinguished from others who may or may not have the power to take this property. In other words, you must not consider the necessity of the taking authority.

[99] In this case, the issue was the fair market value of the property lost on account of the partial taking, not what a condemning authority would be willing to pay for the certainty of securing the right-of-way, minimizing costs increased by piecemeal right-of-way, avoiding condemnation, or any number of other non-market-value factors.

[100] North Dakota Rule of Evidence 408 provides another independent basis to exclude NSP's offers of compromise or agreements with other landowners along the project route. Rule 408 applies when there is an "apparent difference of view between the parties as to the validity *or* amount of the claim." N.D.R.Ev. 408(a) (emphasis

added); *see also W. Horizons Living Centers v. Feland*, 2014 ND 175, ¶ 16, 853 N.W.2d 36. The existence of a "claim" in this case is undisputed, but the amount of the claim was disputed. Rule 408 forbids any attempt to present NSP's offers of compromise during negotiations as evidence of the "amount" of the market value lost because of the taking.

[101] Finally, beyond the basic, substantive inadmissibility of a condemning authority's offers to landowners, any attempt by Mr. Mikkelson to speak to NSP's offers to or interactions with other landowners would be prohibited by the rule against hearsay. *See* N.D.R.Ev. 802.

[102] Quite simply, *if* the Mikkelsons had in fact attempted to present offers of compromise from NSP to the Mikkelsons and other landowners as evidence of damages to withstand summary judgment, this evidence would have been necessarily excluded on several grounds. The Mikkelsons' current argument not only misanalyzes or ignores evidentiary law that prohibits evidence of these types of offers, but also ignores the procedural posture of this case and the issues subject to this Court's review—whether the District Court erred in granting summary judgment on the record before it, and whether it abused its ample discretion in declining to amend its judgment. The Mikkelsons *did not present any evidence of offers as a purported basis to withstand summary judgment*, and as set forth above, the District Court did not err in declining to amend its judgment based on clearly incompetent evidence presented for the first time on a motion to amend.

[103] **D. The District Court Properly Denied the Mikkelsons' Motion to Amend.**

[104] The Mikkelsons' Motion to Amend was an improper attempt to re-litigate the Motion for Summary Judgment with new evidence and argument that, in hindsight, Mikkelson wish they would have previously presented, but nonetheless is unavailing.

The District Court properly declined to disturb its Judgment. Its explanation was logical and supported by the law and record. (*See* App. 88-90.) The Mikkelsons argue that the District Court was "arbitrary and unreasonable" to "exclude the testimony of a landowner" and "exclude the testimony of an appraiser," (Mikkelsons' Br. ¶ 67), but the District Court did not exclude anything. Rather, the Mikkelsons failed entirely to present any competent or admissible evidence, and admitted that the "landowner" and "appraiser" had no opinion regarding the issue of damages in this case.

[105] **III. THE COURT'S OPINION IN *LENERTZ V. CITY OF MINOT* FIRMLY SUPPORTS AFFIRMING THE DISTRICT COURT'S ORDERS.**

[106] The Court's recent decision in *Lenertz v. City of Minot*, 2019 ND 53, 923 N.W.2d 479, is instructive, and firmly supports affirmance of the District Court here.

[107] In *Lenertz*, a landowner brought an inverse condemnation claim against the City of Minot alleging that the City's installation of a street and upgrades to a storm water system adjacent to the landowner's property led to flooding of the property that constituted a "taking" under the North Dakota Constitution. The district court concluded that the evidence supported the landowner's claim that a "partial taking" had in fact occurred (which is undisputed in this case involving NSP's direct easement taking). *Lenertz*, 2019 ND 53, ¶¶ 14-15, 923 N.W.2d 479.

[108] The remaining question in *Lenertz* (as was before the District Court in this case) was damages (i.e., just compensation). The City moved for a directed verdict asserting that the landowner could not meet its burden of proving damages because the landowner did not present any competent, admissible evidence regarding the diminution in fair market value of the landowner's property caused by the taking. *Id.* at ¶ 4. Although the landowner in *Lenertz* offered evidence of damages in the form of 1) the landowner's own

testimony, and 2) the landowner's appraiser's testimony, the district court granted the City's motion for a directed verdict. As the district court explained in detail, this was based on the fact that the proffered evidence did not competently speak to the applicable legal standard for a partial taking—diminution in fair market value. *See id.*

[109] On appeal, the landowner argued that the district court erred in excluding the testimony of his appraiser, claiming that proper metric for just compensation under the statute governing damages in all eminent domain cases (N.D.C.C. § 32-15-22), is the measurement of "damages," not the loss of fair market value, that the appraiser should have accordingly been able to speak to his assessment of damages, and that any issues with his opinion were issues of weight. *Lenertz*, 2019 ND 53, ¶ 19, 923 N.W.2d 479. In rejecting this argument, this Court affirmed the district court's application of the principle that if a taking is partial, the measure of damages is the difference between the market value of the property before and after the taking, that a district court has broad discretion to determine whether an expert's testimony would be helpful to the jury, and that a district court also has discretion in deciding the relevance and admissibility of evidence about the fair market value of property. *See id.* at ¶¶ 17-24. The Court found that the district court did not err in concluding that the appraiser's testimony was inadmissible because he did not speak to the proper valuation question, and because the jury "would be left to speculate as to the amount of damages." *Id.* at ¶ 23.

[110] On appeal, the landowner also argued that the district court erred in granting a directed verdict because the landowner's own testimony regarding damages raised a factual issue for the jury that precluded a directed verdict. *See id.* at ¶¶ 25-26. The landowner specifically cited the general rule (cited by the Mikkelsons here) that a

landowner is qualified to testify to the value of his own land, and argued that because the landowner testified "on value and his loss, and he placed a value on the tract . . . the jury had a range of values and the court's judgment as a matter of law was inappropriate." *Id.* at ¶ 26. The Court rejected this argument, noting that while "[the landowner] testified he suffered damages, he did not provide more than a general statement about his damages" claiming that the total diminution was 100%. *Id.* at ¶¶ 27-28. The Court noted that the "district court did not err in holding the [landowner's testimony] was insufficient to have the jury decide damages." *Id.* at ¶ 28.

[111] The specific facts and procedural posture of *Lenertz* and the Mikkelsons' case before the District Court differed, but the relevant legal and evidentiary principles are on all fours. Both cases ultimately involved a district court's consideration of whether a landowner produced sufficient evidence of damages in a partial taking case to create a genuine issue of fact for a jury. In *Lenertz*, just as in this case, the landowner sought damages inconsistent with the applicable measure of damages in a partial taking case. In *Lenertz*, just as in this case, the district court found that the landowner's proffered evidence was not competent and admissible to speak to the question of damages before the jury under the applicable legal standard.

[112] The Mikkelsons' position was demonstrably worse than that of the *Lenertz* plaintiff. The Mikkelsons unequivocally confirmed that they had no opinion regarding the diminution in fair market value resulting from the taking. Unlike the *Lenertz* plaintiff's appraiser, who at least specifically attempted to speak to damages, the Mikkelsons' appraiser confirmed that he was not asked to, and did not form, any opinion whatsoever on the matter at the summary judgment stage.

[113] The Mikkelsons' burden of presenting a claim for damages sufficient to preclude summary judgment was not onerous, but as with the *Lenertz* plaintiff—though even more clearly here—they failed to meet it.

[114] **CONCLUSION**

[115] Summary judgment will not typically be appropriate on the issue of damages in an eminent domain case. In this case, however, it was not only the appropriate outcome, but the necessary one. The District Court likewise did not abuse its ample discretion by declining to disturb the judgment based on new evidence presented for the first time on the Mikkelsons' Motion to Amend, which nonetheless did not demonstrate a genuine dispute of fact on the issue of damages. NSP respectfully requests that this Court affirm the District Court's summary judgment order and resulting judgment, as well as its order denying the Mikkelsons' Motion to Amend.

Dated this 21st day of November, 2019.

FREDRIKSON & BYRON, P.A.

By: */s/ Patrick D.J. Mahlberg*

Patrick D.J. Mahlberg, ND Bar #06659
200 S. 6th St., Suite 4000
Minneapolis, MN 55414
pmahlberg@fredlaw.com
Telephone: 612.492.7419
Facsimile: 612.492.7077

Attorneys for Northern States Power Company

CERTIFICATE OF COMPLIANCE

The undersigned, as attorney for the Appellee Northern States Power Company, hereby certifies the above brief is in compliance with Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure. The total number of pages in the brief, excluding this certificate of compliance, the addendum, and the certificate of service, is 37.

Dated this 21st day of November, 2019.

FREDRIKSON & BYRON, P.A.

By: */s/ Patrick D.J. Mahlberg*

Patrick D.J. Mahlberg, ND Bar #06659
200 S. 6th St., Suite 4000
Minneapolis, MN 55414
pmahlberg@fredlaw.com
Telephone: 612.492.7419
Facsimile: 612.492.7077

Attorneys for Northern States Power Company

ADDENDUM

Relevant Portions of N.D.R.CIV.P. 56:

(b) By a Defending Party. A party against whom relief is sought may move at any time, with or without supporting affidavits, for summary judgment on all or part of the claim.

(c) Serving the Motion; Proceedings.

. . . .

(3) Judgment. The judgment sought shall be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Summary judgment, when appropriate, may be rendered against the moving party.

. . . .

(e) Affidavits; Further Testimony.

(1) In General. A supporting or opposing affidavit must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated. If a document or part of a document is referred to in an affidavit, a sworn or certified copy must be attached to or served with the affidavit. The court may permit an affidavit to be supplemented or opposed by depositions, answers to interrogatories, or additional affidavits.

(2) Opposing Party's Obligation to Respond. When a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must, by affidavits or as otherwise provided in this rule, set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment shall, if appropriate, be entered against that party.

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

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<tr>
<td>Northern States Power Company, a Minnesota corporation, by its Board of Directors,

Plaintiff and Appellee,

v.

Laverne Mikkelson a/k/a Laverne C. Mikkelson Sr.; Kandi Mikkelson a/k/a Kandi Mikkelson,

Defendants and Appellants,

and

SRT Communications, Inc., a North Dakota cooperative association; Verendyre Electric Cooperative, Inc., a North Dakota cooperative association; Brett Livingston; Lisa Livingston; Jarrod Livingston; New Prairie Township; and Ward County,

Defendants.</td>
<td>Supreme Court No. 20190227

Ward County District Court
No. 51-2017-CV-00812</td>
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STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that the Brief of Appellee was, on November 21, 2019, filed and served electronically with the Clerk of the North Dakota Supreme Court and served by e-mail on the following:

Richard P. Olson
rpolson@minotlaw.com

Ryan G. Quarne
rgquarne@minotlaw.com

Jessica L. Merchant
jmerchant@srt.com

Rozanna Larson
51wardsa@wardnd.com

and also served the same by United States mail upon the following:

Brett Livingston
Lisa Livingston
1337 14th Street South
Fargo, ND 58103

Jarrod Livingston
1017 17th Street South
Fargo, ND 58103

Dated this 21st day of November, 2019.

FREDRIKSON & BYRON, P.A.

By: */s/ Patrick D.J. Mahlberg*

Patrick D.J. Mahlberg, ND Bar #06659
200 S. 6th St., Suite 4000
Minneapolis, MN 55414
pmahlberg@fredlaw.com
Telephone: 612.492.7419
Facsimile: 612.492.7077

Attorneys for Northern States Power Co.