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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Allen Lenertz, Plaintiff, Appellant vs. City of Minot N.D., Defendant, Appellee.	)	Supreme Court Case No: 20180153 Civil Case No. 51-2016-CV-01874

*** *** ***

APPEAL FROM JUDGMENT DATED APRIL 9, 2018 ENTERED IN THE DISTRICT COURT, NORTH CENTRAL JUDICIAL DISTRICT, WARD COUNTY, NORTH DAKOTA BY THE HONORABLE GARY H. LEE, CIVIL NO. 51-2016-CV-01874

APPELLEE BRIEF OF CITY OF MINOT N.D.

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I. Statement of Issues Presented for Review

[¶1] City of Minot presents the following responses to Lenertz' issues (italicized) presented for review:

A. *Did the lower court err by concluding that Lenertz suffered a temporary taking instead of a total taking or damaging of his property.*

The answer is no. The court never concluded Lenertz suffered a temporary taking instead of a total taking or damaging of his property, but rather concluded on the evidence presented during Lenertz' case in chief that he made a prima facie showing of a temporary taking, subject to City's evidence. That prima facie finding was not clearly erroneous.

B. *Did the lower court improperly deny Plaintiff's expert witness testimony.*

The answer is no. Lenertz' expert could only offer testimony of a total devaluation of the property, and no trial evidence of total devaluation was presented during Lenertz' case. Thus the court's exclusion of the expert on the basis his opinions were unreliable, irrelevant, and would not assist the jury was not an abuse of discretion.

C. *Did the Lower court improperly dismiss the case and Lenertz' claims when the record contained admitted evidence on damages sustained by the Plaintiff that was not objected to by Defendant.*

The answer is no. Lenertz never offered any specific evidence of damage by City in relation to flood events. On the contrary, all evidence provided at trial showed the property was entirely devalued and continued to have substantial value. Thus the Court did not err in concluding Lenertz failed in an essential element of his claim and in entering judgment as a matter of law in favor of City. City did not admit Lenertz sustained any damages.

D. *Did the lower court err in assessing costs against the landowner and in favor of the taking governmental entity.*

The answer is no. Lenertz failed in his burden of proof on the essential elements of his inverse condemnation claim, making City the prevailing party entitled to costs and disbursements.

II. Statement of Case

[¶2] Defendant-Appellee City of Minot ("City") disagrees with the statement of the case of Plaintiff-Appellant Alan Lenertz ("Lenertz") in several respects, and thus offers its own. This case is for inverse condemnation due to claimed flooding of Lenertz' commercial property in southwest Minot. Certain municipal road and sewer improvement projects were constructed and completed from 2013-2014, after which Lenertz property suffered three discrete minor flood events in June of 2014 and 2015, resulting in no damage to any real or personal property. Lenertz claims those rain events and minor flooding, and alleged inevitable future rain events, have totally devalued the property and he should be compensated for the value of the entire property he considers to now be worthless. City denied a taking occurred and raised affirmative defenses.

[¶3] At trial (which included a jury to determine the sole issue of damages), Lenertz testified his property has been in use and nearly fully occupied by commercial tenants, with no reduction in rents charged or collected, during all relevant time periods prior to and after the public improvement projects and after the three minor flood events. City introduced evidence through Lenertz of his yearly rental income of approximately $85,000 per year during 2015 and 2016. Only the south rental building, non-heated and used for cold storage, took on a small amount of water in one of the three flood events. The larger north rental building never took on any water at all. The minor flooding from those events quickly dissipated from the property. Although he claimed to have been damaged, Lenertz conceded he has not suffered any personal or property damage. While Lenertz twice listed

the property for sale, once during and once following the City's projects, he had no offers and he has not since attempted to sell the property. He conceded the asking price for the property was inflated and unrealistic and did not testify the failure to sell was due to flooding.

[¶4] After Lenertz concluded his case in chief – excepting only the testimony of his Minneapolis appraiser Dan Boris ("Boris") – the district court ("court") heard Lenertz' offer of proof on damages. Boris, consistent with his appraisal report, offered an opinion the property should have been valued at $750,000 but was worthless because of flooding. Boris only offered testimony that a complete taking of the property occurred and offered no proffer on diminishment. Lenertz did not present evidence of a diminishment in value despite the fact his own appraisal expert offered testimony conceding diminishment is the correct metric under ND law. Nor did Boris' appraisal consider the income approach despite the fact the property continued at all relevant times to earn rental incomes for Lenertz. Lenertz and his appraiser Boris put all their "eggs in one basket" claiming total devaluation of the property, when there was no evidence to support that theory.

[¶5] Following the offer of proof, the court made a detailed record, concluding Boris' all-or-nothing valuation was contrary to ND law, internally inconsistent, contrary to the evidence of a less than total taking, and would not assist the jury. The court correctly determined Boris' valuation opinion was speculative and not based on evidence. The court therefore correctly excluded Boris and granted City's motion for judgment as a matter of law because Lenertz failed on an essential

element of his claim at trial. After trial, the court properly granted prevailing party City's request for costs and disbursements.

[¶6] Lenertz' assignments of error are incorrect and the court's rulings should be affirmed in all respects.

III. Statement of Facts Relevant to the Issues

[¶7] City disagrees with numerous aspects of Lenertz' statement of the facts and therefore offers its own.

A. The Property and the Claims.

[¶8] There are two lots at issue: 3305 and 3315, 4th St. SW Minot, N.D. 58701. (supp.app.005).[1] Lenertz' lots ("the property") are relatively flat in relation to the surrounding properties, contain a parking lot for trucks, and two separate buildings, known as the "north" and "south" buildings. Lenertz claims City's actions caused past and future flooding of the property and he demands damages pursuant to the procedures for inverse condemnation contained within N.D.C.C. Chapter 32-15. (app.13). City answered the Complaint and raised affirmative defenses including Act of God / act of nature, no taking had occurred, and that Lenertz' claims were without any merit. (app.17).

B. Municipal Improvement Projects.

[¶9] Two City public improvement projects encompassing Lenertz' property were constructed between 2013 and 2014: Paving Improvement District 473 and Storm Sewer Project 118 ("the project"). (supp.app.005). The paving project

[1] Materials and evidence referenced herein are to the court's docket ("doc.___"), to the appendix ("app.___"), or to City's supplemental appendix ("supp.app.___")

converted 4th Street SW (adjacent to the western edge of Lenertz' property) from a rural gravel road with ditches to a paved street with curb and gutter, storm sewer inlets, and piped drainage. (docs.234,235; supp.app.007-009). The storm sewer project was built to provide drainage for streets, as well as developed and developing properties within the 4th Street Watershed consisting of approximately 138 acres. (supp.app.006,065). Lenertz' property lies within or near the area improved by the projects. (supp.app.065).

C. *Rain and Minor Flood Events in 2014 & 2015.*

[¶10] After a significant high intensity rainfall event on June 4, 2014, Lenertz' south building, an unheated pole barn constructed building used for cold storage, was temporarily flooded with about four inches of water on the floor. (supp.app.013,017,024). After two additional rainfall events in the summer of 2015, June 6 and 25, water came near to the doors but did not enter the south building and water has never entered the north building, which sits at a higher elevation. (supp.app.024-025,058-059). The north building was built by Lenertz many years prior to the projects on an additional foot of fill material in order to safeguard against flooding off the street:

> Q. Did any water physically penetrate the structure on the north building?
> A. No, it did not.
> Q. How far up did the water get?
> A. It got up to about -- I would say four inches from the doors.
> Q. So raising the ground level saved the building from getting flooded?
> A. That's correct.
> Q. And again, why was that elevation raised in relationship to the 33rd Street condos?
> A. I didn't like how it was sitting there at the same level as the street, **so I raised it up a foot to prevent from flooding off the street**.

(supp.app.032,055-056) (emphasis added).

[¶11] During the heaviest rain event in June of 2014 Lenertz testified all water drained off the property within six to eight hours. (supp.app.025). Lenertz also agreed, despite many rain events after the project, that he only experienced minor flooding on those three occasions, June of 2014 (once) and June of 2015 (twice). (supp.app.040) ("Q. [Flooding] [o]nly happened three times. A. Yes.").

D. Mitigation Efforts, Post-Project

[¶12] Without admitting fault, after project completion, City undertook efforts to address concerns about minor flooding. Those "mitigation" efforts were (1) to improve an already existing concrete valley gutter known as a "**swale**" on Lenertz' property in order to channel surface water and move it more quickly and efficiently off the property (supp.app.039); (2) a **berm** placed on the neighbor's property to the south in order to stop potential overland flooding from that direction (supp.app.010); and (3) a "**tideflex gate**" installed in the 15" culvert that served to stop possible backflow from the storm sewer and to facilitate removal of surface water. (supp.app.061-062).

[¶13] No flooding occurred since June 2015, by which time two of the mitigation measures were in place. (supp.app.038,066-067):

> Q. And incidentally June of 2015, that would have been the last time that [you] experienced any flood event; is that correct?
> A. What date, sir?
> Q. June of 2015.
> A. Correct.
> Q. So not quite three years ago now?
> A. That's correct.
> Q. So not quite three years ago now?
> A. That's correct.

E. Lenertz' Damages Testimony.

[¶14] Lenertz responded to a question by his attorney that he was damaged by the flooding but he never offered any specific evidence of what those damages were. (supp.app.030) ("Q [by Mr. Rau]. In your view, is your property damaged by this event? This construction improvement and the subsequent water flowing on it? A. Yes."). Yet, Lenertz denied any personal property loss or damage to the one building that took on some water on a single occasion, the south building:

> Q. Let's turn back to the south building. Am I correct in understanding you don't have any personal property loss as a result of any flood water entering your building?
> A. I have not checked for mold on the poles that are in the ground from the water being there. No, I have not. The answer to your question is no.
> Q. And you're not aware of any mold?
> A. I'm not aware at this particular time.
> Q. And nobody has reported any mold to you?
> A. No.
> Q. And you didn't have any personal property damaged or destroyed as a result of these water events?
> A. No.

(supp.app.052-053).

[¶15] Lenertz testified he used both buildings since 2009 almost entirely for rental income, (supp.app.036-037), and the buildings continued to keep tenants and earn rents, even after minor flooding:

> Q. What have you done with regard to the rent?
> A. I have lowered the rent.
> Q. Would you tell the Court in your own words why rents were lowered?
> A. The rents were lowered because of the economy turn down.
> Q. So [you] did not lower the rent because of the flooding incident?
> A. That's correct.
> Q. Did anybody leave the property after the flooding incidences because of anything having to do with flooding that you were aware of?
> A. No one did.

(supp.app.031-032). Lenertz earned annual gross revenues from rents during 2015 and 2016 averaging about $85,000 per year:

> Q. And so then Exhibit 115 shows that for 2015 you had rental income of $82,472; correct?
> A. Under gross, yes.
> Q. And for 2016, which is the last year that you provided to us, you show your income from the rental units being 86,190.
> A. Under gross, yes.

(supp.app.054; docs.263,265,266,267).

[¶16] Lenertz never offered evidence at trial he attempted to sell the property but was unsuccessful because of flooding. Rather, he listed the property on a few occasions, had it significantly overpriced, and received no interest. (supp.app.028-029; 047-049) ("Q. In fact, [during the initial listing] your understanding was [your realtor] thought that [price of $1,597,000] was way too high? A. That's correct. Q. And you got no offers? A. That's correct. Q. And this was during the oil boom time period where you were kind of exploring the market to see if you could sell at a huge price? A. That's correct . . . Q. And [the second] listing expired in January of 2015? A. Yes. Q. Received no offers whatsoever? A. Not that I'm aware of. Q. Didn't have anyone look at the property to your knowledge? A. Not that I'm aware of. Q. And you have not listed the property at all since January of 2015? A. That's correct."). Lenertz did not testify he had offers or lost offers due to flooding.

[¶17] Neither did Lenertz' expert engineer see any evidence of damage to the property other than some minor soil erosion caused by cars driving on the flooded street he identified in photographs. (supp.app.060). Lenertz himself never testified he was claiming soil erosion as a component of his alleged damages. (*See generally*

Trial Day 1 [supp.app.004 et seq.] and Trial Day 2 [supp.app.027 et seq.]). No witness provided evidence as to a cost to repair the property to place it in the same condition prior to the project. *Id.*

F. *Trial Discussion in Relation to Lenertz' Lack of Damages Evidence.*

[¶18] At the close of evidence on the second day of trial, the court had a lengthy exchange with the parties' legal counsel about the evidence to be heard the next day from Lenertz' Minneapolis appraiser, Boris. (supp.app.068-095). The court allowed lengthy discussion and argument on the issue:

> [The court] What was the value of the property before the event, what's the value after the event? I would assume that's what Mr. [Boris] . . . is going to come in and testify to. That it was worth $600,000 before, it's worth $450,000 now, so the damages would be, for the partial taking, 150,000. Or something like that. I'm assuming that's what he's going to testify to.
>
> MR. BAKKE: He's not. . . His report indicates that because of the flood events it's worth zero. And so he's going to offer testimony that it's worth zero, and the only number he has given is the value of the entire property as of September of 2016. I would have expected just what the Court said in an appraisal as well. We didn't get that. So there's nobody who is going to come in and talk about diminution in value due to these flood events. They are saying either it's a permanent taking or nothing.
>
> (. . . .)
>
> THE COURT: All the evidence says to the contrary. The property is still there, it's still being use[d], it's still being rented out, it's still generating income. It's still a valuable, viable piece of property. So it's not a permanent taking of the entirety. It's a partial taking of the property. And if it's a partial taking, the damages are diminution in value, not the full value of the property. . .

(supp.app.069-071).

[¶19] Lenertz attempted to blame City's counsel for not asking the right questions:

> MR. RAU: [referring to City's deposition questioning of Boris] The way he's asking the question is as to the utility value of the property. If he had asked the right question, we'd have a different answer. The question has to do with the marketability and that's what Mr. Boris is answering the questions on. Not something else.
>
> THE COURT: Page 98 [referring to Boris deposition transcript]: "Does that mean he can't sell? No. What it means is that he has to disclose the shortcomings and if he has to disclose that there are flooding issues with the property, effectively he can't sell unless he wants to significantly discount for that." That's the diminution in value is the significant discount. The property isn't worth zero.
>
> MR. RAU: I never said it was worth zero.
>
> THE COURT: That's what your appraiser is saying.

(supp.app.074-075,002; doc.221 [Boris Dep.Tr.]).

[¶20] Lenertz' counsel insisted the property had no value and the evidence should go to the jury, but the court did not agree:

> MR. RAU: Well, now you're taking from the jury what the jury is entitled to decide.
>
> THE COURT: No, Mr. Rau, I have to properly instruct the jury. And if I properly instruct the jury that what their burden is, if I properly instruct the jury that your burden of proof is to come forward with evidence of diminution in value and you haven't done it, you haven't met your burden of proof and the case doesn't even go to the jury.

(supp.app.077-078).

> MR. RAU: Our burden is what was the effect on this property. This expert looked at it, without any resolution, without any cure, without any fix, whatever else, who is going to buy this piece of property. That's his opinion. That's within the province of the jury to consider.
>
> THE COURT: That's not even what his own opinion is. His own opinion is that you have to discount it. And he hasn't given us what the discount is. That's his own opinion. He doesn't say you can't sell it. He says you have to significantly discount it. . . It's absurd to say it's worth nothing. And I wouldn't instruct the jury that it's

> worth nothing. Which is what I would be doing if I gave them the case in this posture.

(supp.app.079-080).

G. *Offer of Proof of Appraiser Boris*

[¶21] On the morning of the third day of trial Lenertz made an offer of proof concerning Boris. (supp.app.097). Boris answered numerous questions, including referencing his Appraisal. (app.101; doc.262).

[¶22] Boris tried to retool his opinions to include a cost of restoring the property to its state prior to the project and assumed a 100% discount in value on that basis:

> Q. What was your conclusion, sir, as to the measure of damage in this matter? And I'm looking at your page 35 [referring to doc.262-Boris' Appraisal].
> A. 750,000.
> Q. What is the basis for your determination of loss?
> A. Again, I will repeat what I said earlier. Basically if you have a problem property, the way you measure damages is to start with the property without problems. And then you quantify as best you can either through your own resources or third party resources what are the costs to correct the problem, and then you end up with a value after deduction. Now every indication is that the cost to cure this exceeds the value of the property in total.
> Q. Has there been a cure that you're aware of, or resolution of the underlying flooding problems that lead to you being involved in this case?
> A. I have not seen in articulation by any engineer, dollar amount as to how much that would be.
> Q. Let's put aside the question of dollar amount, we've got the dollar amount. Is there a physical correction of the damage?
> A. No, there is not.
> Q. So that's how you have determined that the value is a loss of material nature; correct?
> A. Yes.
> [Mr. Rau] Excuse me, and I think I misspoke. It's on page 75 -- 55 of the report. I'm looking -- you have some bold underlined type. Would you read your bold underlined type just above the boxed area? On page 55.

> A. I assume this is what you're referencing: "This value is considered as the full damages of property since a property which has recurring flooding is not marketable in today's environment."

(supp.app.118-119).

[¶23] Boris also paid "lip service" to a buyer's ability to discount the price:

> Q. [by Mr. Rau] And the divulging of that issue to the would-be buyer, how does that effect their ability to enter into a transaction for a piece of property?
> A. Obviously, if there are some impediments to the property, and they are disclosed, either one of two things would happen: either they would not enter into some type of transaction **or significantly discount the property because of it**.

(supp.app.121 (emphasis added)).

[¶24] Finally, he insisted there was a total loss of marketability (and value) due to a loss of one of the "sticks" in the "bundle" of rights:

> Q. Does this flooding event materially effect those bundle of rights?
> A. Absolutely.
> Q. And if I told you that there was no easement or permissive right granted in perpetuity on the adjoining landowner to back up water, does that effect this property and the ability to be marketed?
> A. Absolutely.
> Q. Does that effect the ability to reduce damages?
> A. Yes.
> Q. Is there a complete taking?
> A. Is there a complete taking?
> Q. Or complete damaging of this property?
> A. I was going to say damage-wise, yes.

(supp.app.122-123). Following the offer of proof, the court made a lengthy oral record (encompassing the court's Order discussed below), of its analysis on the exclusion of Boris' testimony and motion for judgment as a matter of law. (supp.app.123-144).

H. *The Court's Order.*

[¶25] Following trial, the court entered its Order for Judgment (app.39) and Judgment was entered (app.48) thereon. The court's analysis contained "the reasons stated by the [c]ourt on the record", including:

> [The court] So on a prima facie basis, again, I'm not saying this is an absolute because Mr. Bakke hasn't had a chance to put his defense in yet. But on a prima facie basis, I believe that Mr. Lenertz has established that an inverse condemnation may have occurred.

(supp.app.041).

[¶26]

> [The court] [] And this sort of intermittent flooding I think would satisfy that definition [of a short-term interference with a landowner's interest]. . . In this case, I would find as a matter of law that there was a partial taking only. And I'd let it go to the jury on a question of a partial taking.
>
> And it is a partial taking, because Mr. Lenertz still has the property. He still has [its] use, he still is conducting business there just as before. He still is generating income. The flooding is temporary, short-term events. So this is at most, a partial taking.
>
> Now having made that as a determination, Mr. Lenertz would be entitled to what's called just compensation for that partial taking . . [which] is the difference between the fair market value of the property before the partial taking and the fair market value of the property after the taking. It's the diminution in value, which even Mr. Boris agrees is the proper measure, the diminution in value.

(supp.app.042).

[¶27]

> [The court] [] And in this case, I don't believe Mr. Boris' testimony is of any assistance to the trier of fact. Mr. Boris states that the property -- a property that suffers only intermittent, temporary flooding, which has not [a]ffected its use, it's not [a]ffected its occupancy, it's not [a]ffected the income, that that property has no value. Hence, his diminution in value, he states the property is worthless. This is not of any assistance to the trier of fact.

> [H]e states his diminution in value is derived by the fact that it would be the difference between the price of the property and the cost of the cure. I don't think that's the proper way to determine diminution in value. The diminution in value is the fair market value before the property and the fair market value after the property. It's not what would it cost to repair it and if the repairs cost more, [then] it's worth nothing. That's not diminution in value.

(supp.app.043).

[¶28]

> [The court] He has no basis for the opinion that the cost of repair would be more than the value of the property. So not only is he using an improper measure of damages, he has no basis for his statements because he doesn't know. He fully admits.
>
> I actually wrote this down. His comments were "what little I know about this", then he says "my guess [would] be". That was in direct testimony. That's not a basis for an expert opinion. An expert has to have some basis of knowledge. So to say that the cost of repairs would be more than a million dollars, he has no basis for that.

(supp.app.044).

[¶29]

> [The court] [] He said what would have to happen in a sale situation?, [Y]ou'd have to disclose the flooding. What happens then? The buyer walks away, or you have to discount the value in order to effectuate the sale. That discount in value is the diminution in value in my mind.
>
> What is that, is it a percentage? Is it a dollar amount? What is it. We have nothing. Mr. Boris offers nothing to give us what that discount would be. That discount is the diminution in value. Mr. Boris didn't do this. So his testimony is not useful to the jury. It does not help the jury come to a determination of just compensation.
>
> It is Mr. Lenertz's burden of proof to show what the diminution of value would be, and he has offered nothing. The failure of proof on the diminution in value requires the Court to dismiss and to grant judgment in favor of the City.

(supp.app.044-045).

I. *Costs and Disbursements.*

[¶30] Following the entry of the initial Judgment, City submitted its request for costs and disbursements because it was the prevailing party at trial. (doc.290; app.103). Lenertz objected (doc.295) arguing the Rules of Civil Procedure did not apply to a prevailing defendant in an inverse condemnation lawsuit. In its Order, the court ruled ND's rules and statutes applied to City as the prevailing party, and awarded part of City's requested costs of $3,070. (app.49). Amended Judgment was entered (app.61) including the award of costs. Lenertz appealed the Amended Judgment. (app.112).

IV. Standard of Review

[¶31] Lenertz statement of the standard of review is incorrect.

[¶32] This Court reviews the partial taking finding (Lenertz' **Issue A**) under the clearly erroneous standard of review. *Forbes Equity Exch., Inc. v. Jensen*, 2014 ND 11, ¶ 8, 841 N.W.2d 759, 762 (citations and internal quotations omitted); N.D. R. Civ. P. 52(a).

[¶33] This Court review of the court's conclusion Lenertz failed in his burden of proof on an essential element of his claim, thus granting Rule 50 judgment as a matter of law (Lenertz' **Issue C**), under the *de novo* standard of review. *Haggard v. OK RV Sales*, 315 N.W.2d 475, 477 (N.D. 1982) (examining prior Rule 50 known as "directed verdict").

[¶34] This Court's review of the exclusion of Boris (Lenertz' **Issue B**) is subject to the abuse of discretion standard. *Perius v. Nodak Mut. Ins. Co.*, 2012 ND 54, ¶ 10, 813 N.W.2d 580, 583 ("Trial judges are given wide discretion to determine appropriate sanctions. Although exclusion of a witness is a drastic measure, we

cannot say it was unwarranted in this case."); *Myer v. Rygg*, 2001 ND 123, ¶ 18, 630 N.W.2d 62, 68 (upholding district court's limitation of expert witness testimony under N.D. R. Evid. 702 under abuse of discretion standard); *Dewitz by Nuestel v. Emery*, 508 N.W.2d 334, 339–40 (N.D. 1993).

[¶35] This Court's review of the prevailing party costs and disbursements determination (Lenertz' **Issue D**) is subject to the abuse of discretion standard of review. *WFND, LLC v. Fargo Marc, LLC*, 2007 ND 67, ¶ 47, 730 N.W.2d 841, 857. To the extent the prevailing party determination is premised on statutory interpretation, that determination is subject to a de novo standard of review. *Id.* at ¶ 49.

V. Argument

A. The Court's Prima Facie Partial Taking Finding Was Not Clearly Erroneous.

[¶36] The ND Constitution holds "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." Article I, § 16, North Dakota Constitution. "Inverse condemnation actions are a property owner's remedy, exercised when a public entity has taken or damaged the owner's property for a public use without the public entity's having brought an eminent domain proceeding." *Bala v. State*, 2010 ND 164, ¶ 8, 787 N.W.2d 761 (citations omitted). "To establish an inverse condemnation claim, a property owner must prove a public entity took or damaged the owner's property for a public use and the public use was the proximate cause of the taking or damages." *Id.* (citations omitted). A governmental taking to support an inverse condemnation claim can be total or partial. *Minch v. City of Fargo*, 297

N.W.2d 785, 789 (N.D. 1980) ("In this state a public entity can cause compensable damage to property without fully taking it."); *Viestenz v. Arthur Twp.*, 78 N.D. 1029, 1060, 54 N.W.2d 572, 589 (1952) (acknowledging concept of partial taking where a dam periodically floods agricultural land). The court decides the issue of a taking in an inverse condemnation action, while the sole function of the jury is to decide damages. *City of Minot v. Minot Highway Ctr., Inc.*, 120 N.W.2d 597, 599 (N.D. 1963).

[¶37] Lenertz argues the court erred when it determined City's taking of his property was less than the total property, what the court termed a "partial" taking. Lenertz relies entirely on the proposed testimony of his appraiser Boris for the proposition the lack of the single "stick" in the bundle of real property rights, marketability, completely devalued the property. Lenertz' theory for the court being in error on its taking determination is wrong not only because it was a prima facie determination prior to City's presentation of its case, but more importantly because Lenertz theory of a total taking conflicted with *all* of the record evidence presented at trial.

[¶38] The court was presented with a substantial amount of documentary and testimonial evidence presented during Lenertz' own case in chief that the property continued to have economic value despite the three minor flood events and despite any such similar events that could conceivably occur in the future. Lenertz himself conceded the buildings were essentially fully occupied prior to and after the flood events, he never lost a tenant and never decreased rents because of flooding, he earned an average of around $85,000 per year in gross rental income, he never had

an offer to purchase the property fall through because of flooding, he had never experienced any building or personal property damage because of flooding, and the floodwaters dissipated relatively rapidly (6-8 hours at the most) following the three discrete historical flood events in June of 2014 and 2015. Not only is there a preponderance of evidence that Lenertz did not lose the entire value of the property because of the flooding, but the evidence is unanimous there could have only been at worst a partial taking. While Lenertz' engineer Moses Jacobs testified he thought he had seen some soil erosion near the roadway curb, Lenertz has never claimed or testified soil erosion is a component of his damages. Other than the "fact" determined by the court on a prima facie basis that water would likely cause short term minor flooding problems in the future like the problems Lenertz had described, he presented no other damages evidence at all. And as discussed below, the proposed testimony by appraiser Boris was speculative, contrary to all other evidence, and contrary to North Dakota law, and thus properly excluded.

[¶39] The court correctly determined under North Dakota law that Lenertz had at best made a prima facie showing of a less than total taking, which it correctly termed a "partial taking". That determination was sound not only from a legal perspective, *Minch*, 297 N.W.2d at 789, but was also based on much more than substantial evidence at trial. *See Arneson v. City of Fargo*, 331 N.W.2d 30, 38 (N.D. 1983) (upholding jury verdict on substantial evidence standard proving dam restricted drainage and resulted in "a permanent diminution" of the value of plaintiff's farmland). Lenertz has not shown any legal or evidentiary error by the court in its partial taking determination and has not shown any evidence

contradicting the evidence actually presented at trial of less than a total taking of the property. This Court should not overturn the court's evidentiary findings on a partial taking unless it is "left with a definite and firm conviction a mistake has been made." *Forbes Equity Exch., Inc. v. Jensen*, 2014 ND 11 at ¶ 8. As no such mistake in the evidence was made, Lenertz' appeal as to this issue should be rejected and the court's evidentiary determination affirmed in all respects.

B. The Court's Exclusion of Appraiser Boris Was Not an Abuse of Discretion.

[¶40] Expert testimony can be offered at trial wherever "scientific, technical, or other specialized knowledge [will] help the trier of fact to understand the evidence or to determine a fact in issue[.]" N.D. R. Evid. 702. "Expert testimony is required if any issue is beyond the area of common knowledge or lay comprehension, or the issue is not within the ordinary experience of the jurors." *Klimple v. Bahl*, 2007 ND 13, ¶ 6, 727 N.W.2d 256, 259 (internal quotations and citations omitted). Although "Rule 702, N.D.R.Ev., envisions *generous allowance* of the use of expert testimony if the witness is shown to have some degree of expertise in the field in which the witness is to testify", *State v. Hernandez*, 707 N.W.2d 449 (citation omitted), it is the district court's responsibility to ensure "expert testimony is reliable and relevant." *Langness v. Fencil Urethane Sys., Inc.*, 2003 ND 132, ¶ 9, 667 N.W.2d 596, 601 (citation omitted).

[¶41] Lenertz argues the court erred in excluding the testimony of his appraiser Boris. But Lenertz' argument is wrong because: (1) all of the evidence at trial confirmed the property still had substantial value and Boris' testimony would have improperly ignored or contradicted that very real value – making the testimony

inherently unreliable; (2) Boris' testimony about the property being worthless conflicted with his other testimony on the correct measure of damages - found in his deposition testimony, in his appraisal, and in his offer of proof – that where property is damaged but not completely devalued by some problem, the potential buyer has the option to "discount" the price, which is consistent with diminishment in value; and (3) Boris' re-tooled proffered testimony about the diminishment in value being the cost to repair – a cost he speculated was more than $1 million – directly conflicts with the established North Dakota law and was not based on any evidence at trial, also making that proposed testimony unreliable.

[¶42] The court correctly evaluated the factors that must be considered under Rule 702 (reliability, relevance, and usefulness to the jury's determination) and determined Boris' anticipated testimony was not reliable from a legal perspective as well as a consistency of evidence perspective and thus would not assist the jury in its damages determination. Lenertz primarily argues the court misapplied the law when it chose to reject Boris all or nothing approach based on his "bundle of sticks" theory of marketability. Both Boris and counsel for Lenertz argued during and after the offer of proof that the loss of just one of the "sticks" in the bundle resulted in the property being worthless. The problem with that theory was there was no evidence to support a total loss of marketability. Some of Boris' proffer in this regard shows him opining about a total loss of marketability due to access problems:

> A. [by Boris] Again, it really gets down to the ability to market the property. If you have significant issues of access that you cannot access the property, effectively, you know, in many cases the property might be condemned.

(supp.app.123). Discussion about a lack of access to Lenertz' property obviously had no relevance to the case at bar as all of the evidence showed there never was any access problem. Such testimony was appropriately excluded as completely irrelevant.

[¶43] While the "bundle of sticks" is indeed part and parcel of ND real property law as a useful analogy describing the various aspects of ownership interests in realty, *e.g.*, *Sanford v. Sanford*, 301 N.W.2d 118, 122 (N.D. 1980) ("These rights [shown by way of the "bundle of sticks" analogy] are inherent in ownership of real property and consist of the right to use real property, to sell it, to give it away, to lease it, and the right to refuse to exercise these rights"), Lenertz has not pointed to any controlling case or statute for the proposition that partial damage by periodic flooding equates with a complete loss of "marketability". While Boris' proffer about the loss of marketability had a *theoretical* underpinning in bona fide North Dakota law, his theory suffered from the fatal flaw of having absolutely no *actual* evidentiary support. The trial evidence that contradicted the bundle of sticks theory is that Lenertz continued to **use** the property, continued to **lease** the property, and never was prevented from **selling** the property. While Lenertz did indeed twice list the property for sale and was not successful, he agreed he had it priced sky high during the oil boom on the first occasion and then he simply had no offers on the second occasion. Lenertz never testified he lost a sale because of flooding, likely because he was being honest and did not believe for one instant his property could not be sold even at a discount.

[¶44] The court was correct to point out in its oral ruling on this issue that the buildings and indeed the underlying realty continued to have value regardless of the potential for flooding, and regardless whether Lenertz may have been somewhat hamstrung in his ability to sell the property without taking a discount. The court recognized the "bundle of sticks theory" was totally inconsistent with the evidence at trial. And even Boris conceded himself at his deposition and during the offer of proof that a potential buyer had two options: (1) to walk away from a sale when he learned of the flooding or (2) offer a discounted rate. At his deposition, he testified:

> [Boris] And if he has to disclose that there are flooding issues with the property, effectively he can't sell the property. Unless somebody wants to significantly discount that, or, for that matter, let's try and find a buyer for the property that is accepting of the flooding.

(supp.app.002). And during the offer of proof, he stated:

> A. [by Boris] Obviously, if there are some impediments to the property, and they are disclosed, either one of two things would happen: either they would not enter into some type of transaction or significantly discount the property because of it.

(supp.app.121). While Boris paid "lip service" to the reality a sale could realistically be consummated despite impediments like flooding, his appraisal and his proffer provided no wiggle room and insisted Lenertz' property was worthless. The same analysis applies to Boris' re-tooled testimony it would cost over $1 million to fix the flooding problems. None of the witnesses testified about the cost to repair the property or even that any further repairs were required. That proffered testimony was wholly speculative and not supported by any evidence in the case.

[¶45] Additionally, Boris ascribed the valuation date in 2016, which conflicts with ND law. N.D.C.C. § 32-15-23; *Hager v. City of Devils Lake*, 2009 ND 180, ¶ 42,

773 N.W.2d 420, 434 (holding, "The right to compensation [in] inverse condemnation action [] accrues on the date the property is taken." (citation omitted)). Boris' valuation using a date in 2016 did not coincide with the "date of the taking", another reason the proffered testimony was unreliable and irrelevant. In the end, the court gauged the reliability of Boris' testimony, and correctly determined the jury would not be assisted by it because it was internally inconsistent, contradicted the law, and had no evidentiary support. Given all the problems with Boris' proffered testimony, the court's exclusion was not an abuse of discretion. The court's decision in this regard should be affirmed and Lenertz' appeal as to this issue rejected.

C. The Court's Rule 50 Decision Granting Judgment as a Matter of Law Was Correct.

[¶46] Rule 50(a) provides:

> If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may:
> (A) resolve the issue against the party; and
> (B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.

N.D. R. Civ. P. 50(a). The standard applied to the court's rule 50 judgment as a matter of law determination is the same as it was under the former "directed verdict" Rule 50. *Haggard v. OK RV Sales*, 315 N.W.2d 475, 476–77 (N.D. 1982) (quoting *Undlin v. City of Surrey*, 262 N.W.2d 742, 745 (N.D.1978) (internal citations in original)); *see also* N.D. R. Civ. P. 50 Explanatory Note (providing standard substantially similar to standard in *Haggard*).

[¶47] In its Rule 50 ruling, the court cited the state of the damages evidence offered at trial and also cited to the proffered evidence of appraiser Boris. The court did not conduct any impermissible weighing of the evidence or the credibility of the witnesses as there was nothing to weigh. This is true precisely because all of the damages evidence came in through Lenertz' case in chief, which the court took at face value for the purposes of the Rule 50 motion. That evidence was of one accord: the property continued to have value due to its achieving substantial rental income with no disruption to its leases or its tenants, the property continued to be used for its intended purpose with only three minor flood events that quickly dissipated, no buyer ever refused to purchase the property, and Lenertz never testified he was unable to sell the property because of those minor flood events. Again, this damages testimony was offered by the plaintiff himself and the evidence overwhelmingly demonstrated only one conclusion could be reached that there was no total devaluation of the property.

[¶48] Moreover, all of the evidence, excepting only the inherently unreliable and legally defective proffered and rejected Boris testimony, was consistent that the property had only been at most partially damaged or partially taken allegedly by the actions of the City. It was only Boris and Lenertz' legal counsel, which is not actual evidence, who insisted there was a total taking or total devaluation of the property. With respect to Boris, the court did not weigh his credibility but rather performed the mandatory function under the North Dakota Rules of Evidence to keep out unreliable and irrelevant testimony at trial that would not assist the jury. Boris' bundle of sticks testimony was both unreliable and irrelevant as it was

contrary to North Dakota law on diminishment in value being the appropriate measure, it was internally contradictory as to possibility it could be sold at a discounted rate, it relied on a speculative and unsupported repair in excess of $1 million to support the all-or-nothing valuation approach, and it conflicted with the only damages evidence that had actually been adduced at trial through Lenertz himself.

[¶49] The court did not weigh the credibility of Lenertz' damages witnesses, which is prohibited under the Rule 50 standard, but simply discussed what that evidence was. That evidence considered under the Rule 50 standard is such "that reasonable [people] . . . could not disagree upon the conclusion to be reached", *Waletzko v. Herdegen,* 226 N.W.2d 648, 651 (N.D.1975), which is that Lenertz failed in his burden of proof on the damages element of his inverse condemnation claim in light of his theory there was a total taking. To the extent Lenertz relies upon his single statement during trial in response to his own attorney that he had been "damaged" by the flooding but never discussed how or why, that conclusory testimony need not be considered. Albeit the testimony of the real property owner, the statement he had been damaged and no other explanation is only a "scintilla" of evidence this Court has determined to be insufficient grounds to reverse the court's Rule 50 conclusion. And upon cross-examination, Lenertz conceded he had suffered no real property or personal property damages due to these minor flood events. The court did not err in ruling against Lenertz as a matter of law. Lenertz' assignment of error on this issue should be rejected and the Court's legal conclusions and order should be affirmed in all respects.

D. The Court's Prevailing Party Determination Was Correct and There Was No Abuse of Discretion in Amounts Awarded.

[¶50] North Dakota law allows the "prevailing party" to a lawsuit to recover certain statutory costs and disbursements. N.D.C.C. §§ 28-26-(02) & (06); *Carpenter v. Rohrer*, 2006 ND 111, ¶ 35, 714 N.W.2d 804, 815 ("Generally, the prevailing party . . . is the one who successfully prosecutes the action **or successfully defends against it**, . . . the one in whose favor the decision or verdict is rendered and the judgment entered." (emphasis added)).

[¶51] Lenertz makes essentially two arguments, that City did not in fact prevail on any claim and that North Dakota's prevailing party rules and statutes are inapplicable in the context of inverse condemnation actions. Lenertz is wrong on both accounts.

[¶52] City is absolutely the prevailing party per the plain language contained in the *Order for Judgment* (app.39 [doc. 289]). Lenertz also argues City "only prevail[ed] on damages and no more". But that is clearly incorrect as the court dismissed the Complaint against City with prejudice, and as reflected in the court's oral ruling at trial determined Lenertz failed in his burden of proof. There was a trial on the merits in relation to both liability and damages and the court granted the City judgment as a matter of law as to both. The City in fact prevailed on its defenses, and is entitled to certain costs and disbursements. N.D. R. Civ. P. 54(e); N.D.C.C. §§ 28-26-(02) (05) & (06).

[¶53] Lenertz relies on holdings in a handful of North Dakota cases to argue City, as the successful litigant at the inverse condemnation trial, cannot recover costs and disbursements. Those cases relied on by Lenertz do not support his argument and

are distinguishable. *Gissell v. Kenmare Township*, 512 N.W.2d 470 (1994) (condemnation case disallowing fee shifting in N.D. R. Civ. P. 68 as incompatible with specific fee shifting arrangement found in N.D.C.C. § 32-15-32); *City of Jamestown v. Leevers Supermarkets, Inc.*, 552 N.W.2d 365, 375 (N.D. 1996) (in eminent domain proceeding where the city was successful at trial, the Court found it improper to award city costs and disbursements where N.D.C.C. § 32-15-32 does not specifically allow such costs be awarded against the landowner).

[¶54] Lenertz has not cited to any North Dakota case where the political subdivision successfully defends against the landowner's meritless inverse condemnation claim to support his contention the court erred. In the present scenario, it is only fair and equitable, and wholly consistent with prevailing party law, to provide City its costs and disbursements. The Court's award should be affirmed.

VI. Conclusion

[¶55] For the reasons discussed herein, City of Minot respectfully requests the Court deny all aspects of the appeal and affirm all challenged conclusions and determinations, and judgments entered thereon, of the district court.

[¶56] Dated this 20th day of July, 2018.

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CERTIFICATE OF COMPLIANCE

[¶57] The undersigned, as attorneys for the Appellee in the above matter, and as the authors of the above brief, hereby certify, in compliance with Rule 32(a) of the North Dakota Rules of Appellate Procedure, that the above brief was prepared with proportional type face and that the total number of words in the above brief, excluding words in the table of contents, table of authorities, signature block, certificate of service and certificate of compliance totals 7,995 words.

Dated this 20th day of July, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **APPELLEE BRIEF OF CITY OF MINOT** was on the 20th day of July, 2018, emailed to the following:

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