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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1918, A07-1930**

Moorhead Economic Development Authority, petitioner,
Respondent,

vs.

Roger W. Anda, et al.,
Appellants,

Kjos Investments,
Respondent Below (A07-1930).

**Filed October 28, 2008
Affirmed
Klaphake, Judge**

Clay County District Court
File No. 14-C0-06-000708

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Considered and decided by Worke, Presiding Judge; Klaphake, Judge; and Peterson, Judge.

UNPUBLISHED OPINION

KLAPHAKE, Judge

This consolidated appeal involves a condemnation action and a claim for liability resulting from contamination of properties adjacent to the condemned parcel. Appellant

Roger W. Anda, owner of the condemned property, challenges (1) the district court's jury instruction regarding valuation; (2) the jury's special verdict on valuation of the condemned property; and (3) liability for contamination to the neighboring properties. Appellant further alleges that the court abused its discretion by denying his motion for a new trial because of bias.

Because the record supports the court's jury instruction and the jury's special verdict and because we observe no evidence of bias, we affirm.

D E C I S I O N

Valuation Date: Condemnation Action

Appellant argues that the district court erred by instructing the jury in the special verdict form to determine the value of the property as of June 29, 2001, assuming that it had not been impaired by contamination, and the value of the property as of June 29, 2001, taking into account the contamination. We review the district court's choice of wording on a special verdict form for an abuse of discretion. *Cox v. Crown Coco, Inc.*, 544 N.W.2d 490, 499 (Minn. App. 1996).

Generally, damages in a condemnation action are determined as of the time the commissioners file their award. *City of Chisago v. Holt*, 360 N.W.2d 390, 393 (Minn. App. 1985). The commissioners here filed their award on May 10, 2003, but the district court apparently used the date of June 29, 2001, because that was date on which the district court issued its order for condemnation. According to the record, contamination of the property began years earlier and continued until its discovery in August 2001.

The real question here is whether the jury should have been allowed to consider the effects of contamination on the value of the property and therefore whether the district court erred by instructing the jury to consider the value of the property with and without contamination. No cases in Minnesota squarely address the effect of contamination on the value of a condemned property when the contamination is discovered after the condemnation order.

Under Minnesota law, when the owner of property appeals a condemnation award to the district court, the district court or jury assesses damages “de novo and apportion[s] the same as the evidence and justice may require.” Minn. Stat. § 117.175 subd. 1 (2006). Any competent evidence may be considered but, traditionally, three methods are used to determine fair market value of real property: (1) market data based on comparable sales; (2) income-capitalization; or (3) reproduction costs. *Ramsey County v. Miller*, 316 N.W.2d 917, 919 (Minn. 1982); *see id.* at 922 (allowing fourth method, development cost, to be used). Further, the measure of compensation is the amount a willing buyer would pay a willing seller for the property. *Id.* at 919. Using this standard, the existence of contamination on the property on the date of condemnation legitimately bears on the market value. The district court did not abuse its discretion by including this question on the special verdict form.

Liability for Contamination

Appellant challenges the district court’s conclusion holding him strictly liable for contamination of adjoining properties. In its special verdict, the jury found that appellant was liable because of negligence and nuisance. Based on this special verdict, the district

court concluded that appellant was negligent, had created a nuisance, and thus, was strictly liable as a matter of law. Appellant appealed the court's strict liability and negligence determinations.

Appellant has not, however, challenged the jury's finding that he is liable for damages based on nuisance. A nuisance is an interference with the free use or enjoyment of property. *Anderson v. Dep't of Natural Res.*, 693 N.W.2d 181, 192 (Minn. 2005); *see also* Minn. Stat. § 561.01 (2006) (defining nuisance). Nuisance is defined by the resultant harm, rather than as a certain kind of conduct. *Highview North Apts. v. Ramsey County*, 323 N.W.2d 65, 70 (Minn. 1982). It may involve negligent or intentional conduct, ultra-hazardous activity, violation of a statute, or other tortious activity. *Id.* at 71. The conduct must be "wrongful" in the sense that the defendant can be said to be at fault, a standard less stringent than unlawfulness. *Wending v. Forst Farms, Inc.*, 662 N.W.2d 546, 551 (Minn. App. 2003), *review denied* (Minn. Aug. 5, 2003). There is an element of intent, but intent can be discerned by evidence of the defendant's awareness of his conduct's impact on use and enjoyment. *Id.* at 552. *But see Citizens for a Safe Grant v. Lone Oak Sportsmen's Club, Inc.*, 624 N.W.2d 796, 804 (Minn. App. 2001) (noting that the statute does not require evidence of motive or intent). Here, the incursion of fuel oil onto adjacent properties and the resultant contamination is a nuisance.

Because the jury's nuisance finding provides a basis for the court's conclusion of appellant's liability for contamination, we affirm the court's order. Because of our decision, we do not address appellant's request for a contributory negligence instruction.

New Trial Motion

Appellant claims that the district court erred by refusing to grant his motion for a new trial. Appellant argues that he was deprived of his right to a fair trial by the district court based on bias, and by improper closing argument by respondent's counsel. We will not disturb the district court's decision on a motion for a new trial absent an abuse of discretion. *Halla Nursery, Inc. v. Baumann-Furrie & Co.*, 454 N.W.2d 905, 910 (Minn. 1990).

A reading of the transcript does not support appellant's claim of bias; the district court exhibited considerable patience and restraint during the trial. Appellant did not object to respondent's closing argument. If an improper closing argument is to be a basis for a new trial

[a]n objection to improper remarks, a request for curative instruction, and a refusal by the trial court to take corrective action are generally prerequisites to the obtaining of a new trial on appeal except where the misconduct is so flagrant as to require the court to act on its own motion, or is so extreme that a corrective instruction would not alleviate the prejudice.

Lake Superior Ctr. Auth. v. Hammel, Green & Abrahamson, Inc. 715 N.W.2d 458, 479 (Minn. App. 2006) (quoting *Hake v. Soo Line Ry. Co.*, 258 N.W.2d 576, 582 (Minn. 1977)), *review denied* (Minn. Aug. 23, 2006).

Appellant's contention that he was deprived of a fair trial is not supported by the record; the district court did not abuse its discretion by refusing to grant his motion for a new trial.

Affirmed.