

Nos. A07-1918 and A07-1930

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State of Minnesota  
In Supreme Court

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Moorhead Economic Development Authority,

*Respondent,*

vs.

Roger W. Anda, et al.,

*Appellants,*

Kjos Investments,

*Respondent Below.*

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APPELLANT'S REPLY BRIEF

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**I. FUNDAMENTAL CONSTITUTIONAL RIGHTS ARE AT STAKE.**

At stake are fundamental constitutional rights protected by the Constitution of the United States of America and the State of Minnesota, including the right to due process of law and just compensation for property taken.

These issues were raised in the district court, argued in the Court of Appeals, and are properly before this Court.

Even if they weren't, they should be addressed by this Court.

If fundamental constitution rights depend on the skill of attorneys performing under the pressure of a trial, briefing deadlines and fine points of appellate practice and procedure, they would not be fundamental rights at all.

**II. ALL ISSUES ARE BEFORE THIS COURT.**

All eight issues outlined by Anda in his brief were also raised in the district court, argued in the Court of Appeals and are preserved in this appeal.

Anda generally stated his strongest issues in his Petition for Review, always mindful of the five-page limitation. This Court should consider all eight more specifically stated issues. In *In re GlaxoSmithKline, PLC*, 699 N.W.2d 749, 757 (Minn. 2005) the court recognized that the court may deviate from its usual procedure in the interest of justice. In *Putz v. Putz*, 645 N.W.2d 343, 350 (Minn. 2002) the court concluded that the "justice requires" consideration where child support issues not previously raised were at stake would be satisfied because the court system has a key role in insuring the welfare of children. So too it is with fundamental constitutional rights. MEDA has had notice and ample time to

address the issues Anda identified in his brief served and filed on March 27, 2009. MEDA obtained an extension of time to file its brief until May 15, 2009.

Fairly taken, MEDA was given notice of all eight issues raised in Anda's brief in the "legal issues" portion of Anda's Petition for Review, R. A. 177. Each of Anda's eight issues are a more detailed breakdown of the issues identified in the Petition for Review.

MEDA argues that Anda's issue number one "In a quick-take eminent domain action can the fair value paid for property be reduced for contamination discovered after a taking?", is not before this Court because Anda did not raise it in the Court of Appeals. It was clearly stated as an issue in Anda's Court of Appeals Brief. R. A. P. 125, and was thoroughly argued, R. A. PP. 170-172, going beyond arguments about the special verdict form.

MEDA argues that Anda's issue number two "Can a property owner, not in exclusive control of property, be strictly liable as a matter of law for latent environmental problems discovered after a taking?", is not before this Court because Anda did not challenge the jury's finding of liability for nuisance.

MEDA neglects to include Anda's reply brief to the Court of Appeals in its appendix. We attach pages i and 4-6 to this Brief, Attach. No. 1, to show that Anda argued that there is no nuisance if there is no negligence, based on the jury instruction.

MEDA argues that the issue of comparative fault is not properly before this Court, because, although Anda raised the issue in his motion for a new trial, he failed to brief a specific argument.

As with the other issues, the issue was specifically stated, R. A. P. 124, and thoroughly argued. R. A. P. 168-170.

MEDA also contends that Anda did not brief the issue of whether the district court correctly denied his motions for summary judgment and JMOL in his brief to the Court of Appeals.

The issue was precisely stated as issue number two in the Court of Appeals brief. R. A. P. 124. This, together with the over ten pages Anda spent arguing the issue in his Court of Appeals brief, R. A. PP. 134-148, should be sufficient.

MEDA's emphasis on the sanctity of jury verdicts is misplaced. MEDA argued that the jury should have made findings to support strict liability. Jury's must be properly instructed, and they must follow the law.

The issues of statewide importance, as well as the lesser issues, are matters of law that cannot be changed by any jury verdict. Jurys follow the law, the law does not follow jurys.

MEDA argues that Anda has waived his argument that the fair market value of condemned property cannot be reduced because of environmental contamination found after the taking because Anda allowed evidence of the contamination, through Mr. Amo's appraisal report.

Anda had good reason to allow the appraisal report. It put a “floor value” of \$410,000.00 on HOP, and it was Mr. Amo who testified that HOP did not lose its value until the public became aware of the contamination. Tr. P. 748.

It is one thing to say that Anda has waived any objection to the Amo appraisal, and evidence of contamination, and quite a different thing to say that he has waived the general argument about the effect of that contamination on the valuation issues, particularly where the Court of Appeals recognized that the issue was before, and considered it.

### **III. WHICH ISSUES SHOULD THIS COURT ADDRESS?**

If this were an error correcting court, it might focus on whether Anda was entitled to a comparative fault instruction. Anda plead comparative fault as a defense, specifically requested a comparative fault instruction, persisted until the district court indicated that there would be no comparative fault instruction, and if Anda did not like it, he could appeal. Since MEDA stood in the shoes of MHA because of assigned cleanup claims, Add. Tab No. 9, it would be the negligence of MHA, a private developer, that would be compared with any negligence of Anda. MEDA presented no evidence about any standard of care applicable to Anda, a minority owner, in 1972 or 1973, that would have required him or the other owners to do anything more than empty and abandoned the tank, where it showed no signs of trouble. It is reversible error to refuse to give an instruction on comparative fault, which Minnesota courts have liberally applied. *McKay's Family Dodge v. Hard Drives, Inc.*, 480 N.W.2d 141, 147 (Minn. App. 1992).

This is not an error correcting court, but a court whose mission is to use the limited number of petitions for review it grants to recurring matters of statewide impact that develop, clarify or harmonize the law or call for the application of a new principal or policy. Rule 117(d) Minnesota Rules of Civil Appellate Procedure.

The two issues that fit that criteria as stated in Anda's Petition for Review are:

- 1) Can the value of property condemned in a quick-take condemnation be reduced because of contamination first discovered as a result of an after the taking? and
- 2) Should the Petitioner ("Anda") be strictly liable to pay for clean up costs where he was not negligent? R. A. P. 177.

On the first issue, the court can clarify what we believe to be the standard existing practice, and required by the statute, that is, even in a quick-take condemnation, valuation is done at the time of the taking, even though the condemnation commissioners might make their award later.

On the second issue, there are two parts.

First, is the general issue of whether strict liability should any longer be applicable to leaking tank cases? In other words, is there anything about unlicensed and unregulated small underground fuel oil tanks, which should make owners strictly liable for problems with them, anymore than other modern day

items like automobiles or airplanes? This is a matter of statewide importance calling for a clarification of the law or new principal or policy.

The other issue on strict liability is narrower. It is already settled law that one not in exclusive control of property, cannot be strictly liable for activities on the property. Here, there is no dispute that Anda was only a 25% owner of HOP until as late as 1995.

The issue of whether nuisance can be an independent basis of liability where the jury instruction on nuisance required negligence or wrongdoing is another issue for an error correcting court.

We hope that even if this Court does not reverse on the issues of statewide importance (valuation, and strict liability in general), it will, nonetheless, reverse on the lesser issues before it, in the interests of fairness, justice and to protect fundamental constitutional rights.

**IV. THERE WILL BE NO ECONOMIC IMPACT ON MUNICIPALITIES IF THE COURT HOLDS THAT VALUATION IN A QUICK-TAKE CONDEMNATION IS DONE AS OF THE DATE OF TAKING, OR HOLDS THAT A LANDOWNER IS NOT STRICTLY LIABLE FOR RELEASES FROM AN UNDER GROUND TANK?**

Such a holding will have no negative impact on any condemnor, other than perhaps MEDA in this case.

Condemnors always can make the initial decision about what to condemn after making whatever environmental investigations or studies deemed necessary, whether the landowner consents or not. Minn. Stat. § 117.041, Add. Tab No. 11.

A timetable of events will be helpful to show MEDA's efforts to develop HOP and surrounding properties, the progress with its quick-take condemnation, and the problems faced by MHA after MEDA took HOP for MHA.

DATE	EVENT	VALUATIONS
09/19/00	Developer Agreement between Moorhead Holiday Associates and Moorhead Hospitality Limited Partnership, Add. Tab No. 8, with "clean site" requirement. Add. P. 51.	
03/29/01	MEDA's quick-take condemnation petition, R. A. P. 1.	
06/29/01	MEDA takes title to HOP, App. Tab No. 1.	\$455,000.00 (Jury value not taking into account contamination), App. Tab. No. 17.
07/02/01	MEDA takes possession of HOP, App. Tab No. 1.	
08/01/01	Developer Agreement closing deadline, Add. P. 52.	
08/07/01	Contamination discovered at HOP, Tr. P. 122.	
08/09/01	MEDA deeds HOP to Moorhead Holiday Associates, App. Tab No. 33.	
08/14/01	Date to which closing deadline in Developer Agreement was extended, Tr. PP. 397-398.	
03/10/03	Report of Commissioners	\$488,750.00, App. P. 9.

The highlight is that MEDA took possession of HOP on July 2, 2001, MHA did not start digging on the HOP site until August 7, 2001, which caused MEDA to deed HOP to MHA two days later, while MHA was frantically excavating over 10,000 cubic yards of soil to meet the August 14, 2001, clean site requirement of the developer agreement. Meanwhile, it is not until seventeen months later that the condemnation commissioners finally made their award.

The problem for MEDA was that it hired an inexperienced developer that did not properly inspect HOP and other condemned properties, as it admitted it should have done. Tr. PP. 324-325. The developer locked itself into a development contract with a deadline to provide a clean site, which it chose to perform, even though that meant digging up and hauling away all of the contaminated dirt in 7 days, without bids, and without knowing how to negotiate the contract.

As the district court noted, the developer had done a disservice to the City of Moorhead, Tr. PP. 791-792.

No governmental body using an experienced developer, doing proper pre-condemnation testing, and otherwise operating in a non-negligent manner will need to suffer by a rule that if you take it, you pay for it in the condition taken.

Here, if MEDA had tested for underground contamination, it could simply have reconfigured its redevelopment, taken other property, or simply abandoned the redevelopment altogether.

If this Court clarifies the law to say, as we believe the statute already does, that just as in a regular condemnation, in a quick-take condemnation, valuation is done on the basis of the value and known condition of the property at the time of the taking; the statute will be properly construed, fundamental constitutional rights will be protected, and condemnors will be reminded to do what they already should be doing, and have the power to do; carefully check property before taking it. Add. Tab No. 11.

**V. THE COURT SHOULD CLARIFY THAT IN A QUICK-TAKE CONDEMNATION, VALUATION MUST BE DONE AS OF THE DATE OF TAKING, NOT TAKING INTO ACCOUNT CONTAMINATION FOUND LATER BEFORE THE CONDEMNATION COMMISSIONERS MAKE THEIR AWARD.**

In a traditional non quick-take condemnation, the taking occurs when the condemnation commissioners make their award. Minn. Stat. § 117.042, last clause of the first paragraph. Add. Tab. No. 12. For the same rule to apply in a quick-take condemnation, valuation must be done as of the date of taking, even though the condemnation commissioners might not make their award until some indeterminate, much later time.

This is a fair rule because MEDA had every opportunity to check HOP for contamination, and bore ultimate responsibility for blindly going ahead with the condemnation, even though the Courtyard by Marriott could have been built on other nearby condemned property.

Here the Court has the opportunity to clarify that in a quick-take condemnation, the rule stays the same; ie, valuation must be done at the time of the taking. The rule is and should be the same in both types of condemnation. Those subject to a quick-take condemnation should not be prejudiced by the expedited taking because of problems coming up before the condemnation commissioners eventually make their award. In a non quick-take condemnation this could not occur because the taking would occur at the same time the condemnation commissioners make their award.

Because our statute, read fairly and consistently, requires valuation to be done at the time of taking, the cases is cited by MEDA from other jurisdictions are irrelevant.

**VI. THERE ARE ONLY TWO INAPPLICABLE BASES OF LIABILITY, STRICT LIABILITY AND NEGLIGENCE.**

MEDA steadfastly insists that there are three basis of liability for the hasty clean up expense incurred by MHA on the adjacent property, strict liability, negligence and nuisance.

In this case, because of the jury instruction on a wrongful nuisance, the comments of the district court, and the opinion of the Court of Appeals, negligence and nuisance are the same thing, and there is no nuisance without negligence.

Thus, there are only two theories of liability, strict liability and negligence.

**A. Strict Liability.**

There is no strict liability because it is not an ultra hazardous activity to use fuel oil from a small back-up underground tank.

In this jury case, there were no findings submitted to the jury on strict liability, despite MEDA's argument that the jury would need to make findings.

The district court cannot supply those findings for MEDA after the jury verdict as a "ninth" juror.

MEDA conceded that "The claim of strict liability is dependent upon the factual determinations made by the finder of the fact." App. P. 71. MEDA told

the district court that it should submit six factual determinations to the jury. Compare MEDA's requested factual determinations 3 and 4, App. P. 71, with findings 12 and 13 made by the district court (not the jury) in its Findings of Fact and Conclusions of Law, Add. P. 23.

But no matter. A necessary depositive element of strict liability is "exclusive control", something conceded by MEDA on page 36 of its brief. It is undisputed that Anda only had a 25% interest in HOP from 1971 through 1995.

MEDA argues that Anda had to know of the tank that was emptied and abandoned with no sign of leaking in 1972 or 1973 because the manager, Monte Kjos, knew of the tank. But knowledge is not exclusive control.

If a judge in a jury case, can supply its own findings to support strict liability, as a matter of law, then no defendant in any jury case will be safe from a court finding, as a matter of law, of strict liability based on any unlimited number of things based on whatever findings the judge wants to make. In the modern world, almost everything we use or touch is "an artificial condition on the land", which could "naturally cause harm".

**B. No Negligence And Thus No Nuisance.**

The jury instruction on private nuisance, Add. Tab No. 10, defined nuisance in terms of negligence or other wrongful conduct. The instruction limited nuisance to situations where "He was negligent ..." or "He acted in other ways to wrongfully create the nuisance." Anda had no reason to object to this instruction, as he did with the other incomplete and limited instructions on

negligence. Anda argued this to the Court of Appeals. See pages i and 4-6 of Anda's Court of Appeals Reply Brief attached to this Brief. Attach. No. 1.

MEDA thought so little of the nuisance theory of liability that on the sixth and penultimate day of trial (a Friday) MEDA voluntarily dismissed its nuisance claim. The following Monday it voluntarily dismissed its trespass claim, but over Anda's objections, reinstated its nuisance claim, saying that it had made a mistake.

The district court explained that what we had was "negligent nuisance". App. P. 215.

The Court of Appeals too recognized that for there to be liability for a nuisance, there must be some negligent or intentional conduct, ultra-hazardous activity, violation of the statute, other tortuous activity, or some type of "wrongful" conduct in the sense that the defendant can be said to be at fault. App. P. 4. Nuisance, under the common law, is no substitute for strict liability, and under the jury instruction and theory of the district court, there can be no wrongful nuisance without negligence.

MEDA produced no testimony or evidence that there was any duty in 1972 or 1973 to do anything more than empty and abandon an underground tank where there was no evidence of leaking.

But MEDA cannot have it both ways on the need for proof of a duty of care. It argues that Anda did nothing to prove any duty on the part of MEDA to Anda, so there could be no comparative fault instruction or special verdict. See pages 40 and 41 of its brief.

So then, if MEDA proved no duty of care for Anda, there also is no negligence on his part.

But the difference is that Anda was cut off during his efforts to convince the district court and present the evidence that MEDA had been negligent about the way it conducted the condemnation and the clean up, as if a partial motion for summary judgment, never brought by MEDA, had been granted. As the district court ruled, if you don't like it, you can appeal, and if the Court of Appeals disagrees with me we'll retry this case under whatever guidelines the Court of Appeals offers. App. P. 174.

MEDA had every opportunity to present whatever evidence it wanted about Anda's negligence or any duty of care applicable to minority owners and underground fuel oil tanks in 1972 or 1973.

MEDA stood in the shoes of its assignor, MHA, a private developer, and thus the negligence of MHA is the negligence of MEDA, and should have been compared with any negligence of Anda. Add. Tab. No. 9.

It was not for the district court in a jury case to determine in a sidebar that MEDA could not be negligent, cut off evidence of it, and simply tell Anda that if he did not like it, he could appeal. App. P. 174.

The issue of negligence never should have gone to the jury in the first place, and the district court should have granted one of Anda's two motions for summary judgment.

The vent pipe, fuel oil furnace, fill cap, and other things were literally hiding in plain site, for anyone who wanted to look. There was no reason for Anda to notice any problems with fuel oil contamination under the asphalt parking lot under HOP because HOP had no basement and was built on stilts. Add. Tab No. 7.

**VII. THE OTHER UNCOMPENSATED TAKINGS AND SPOILIATION OF EVIDENCE.**

MEDA took a \$2,000,000.00 income producing office building Anda never intended to sell where he knew nothing of the fuel oil tank, and had spent substantial sums to upgrade HOP.

Roger Hendricks, one of MEDA's "blight" experts testified that the cost to replicate HOP was \$1,950,800.00. App. P. 149. Peter Doll, the city's assessor, who rounded off the square footage of HOP to 15,000 square feet, testified that according to his guidelines, it would cost \$100.00 per square foot to build a wooden office building. This suggested a value of HOP, not taking into account the steel, glass, concrete and fireproof nature of HOP, of \$1,500,000.00. Tr. P. 193.

No matter the value of HOP, even more than the loss of that value, was the taking of Anda's ability to calmly and relatively inexpensively address any environmental problems, had they ever become evident, if he were determined to be a responsible person. The cost to do so would have been only between \$100,000.00 and \$150,000.00, 90% of which would likely have been reimbursed

by the Minnesota Petroleum Fund. Anda would have had no need to frantically haul away over 10,000 cubic yards of dirt in seven days, without even letting bids.

Also taken from Anda was control of the property, and thus the ability to find out the true cause of the contamination, something made impossible after MHA hauled everything away, including the 28% of the excavation area, App. P. 146, located under the old Regency Inn whose blueprints showed an underground tank and where Anda's private investigator, was kicked out of City Hall when viewing public records about the Regency Inn to learn more.

#### **VIII. RESPONSE TO BRIEF OF MINNESOTA LEAGUE OF CITIES**

The League's brief recognizes the first impression issue of statewide importance before the Court, whether evidence of environmental contamination, first discovered after a taking, should be admissible when determining just compensation.

The League's time might be better spent advising its members about their right to carefully and completely inspect property for environmental testing, BEFORE the decision to condemn is made, whether the landowner consents to the testing or not. Minn. Stat. § 117.041, Add. Tab. No. 11. It might also stress the need for unhurried actions to be done by competent developers, using proper contracting and bidding procedures and other safeguards, both for the condemnor AND the person whose property is taken.

Noteworthy is that in this case, the condemnation commissioners made an award of \$488,750.00 even taking into account evidence of contamination. Pages

2 and 3 of the report of commissioners summarize the exhibits offered by MEDA, App. PP. 6-7, most of which concern the environmental contamination and the response costs.

Because the issue can be resolved by proper interpretation of Minn. Stat. § 117.042, Minnesota's statutes on environmental responsibility, and even, on an equitable basis, Minn. Stat. § 117.041, it is not relevant what positions different states have taken. There is no majority or minority opinion about what these Minnesota statutes mean in Minnesota. The issues of first impression, and statewide importance, and statutory construction are for this Court alone to decide.

The due process concerns addressed by the League are too narrow. It may be that, from a fair market value approach, income generating property might have no value taking into account environmental problems. Still, if such property is taken, the owner loses something if the owner had no intention of ever selling the income generating property. If, as here, the owner had been left in control of the property, he could have calmly and relatively cheaply addressed the environmental problem over time, using competitive bidding, reimbursement from the petro fund, all for a fraction of the cost incurred by MEDA to hastily remove over 10,000 cubic yards of soil, with no bidding, or other involvement of Anda. Left in control of the property, Anda might even have been able to determine the true source of the environmental contamination, and he too might have had a third party claim against the true responsible party, likely the owners of the Regency Inn to the east, and their successors in interest.

If the Court holds that a municipality can use a quick-take condemnation to take property, without properly checking it first, and then have months or years to find fault with the property before going before the condemnation commissioners, then municipalities will be encouraged to use that process, rather than competently checking property first, hiring competent developers, all to the loss of fundamental constitutional rights for the citizens of Minnesota, and all in derogation of Minnesota's comprehensive environmental statutes with their built in safeguards. Minn. Stat. Ch. 116.

#### **IX. THE FAIRNESS OF THE TRIAL**

MEDA highlights a few examples of where it believes the district court should have interrupted Anda's arguments or examination of witnesses. But this is no explanation nor justification for the dozens of other interruptions contained verbatim in the Supplemental Record filed in the Court of Appeals, whose table of contents appears in the Appendix at Tab No. 37. No one has suggested how counsel would have objected to these types of interruptions by the district court, nor why Anda's counsel would have been in a better position to instruct the district court about Rule 2.02(d) of the General Rules of Practice for the District Courts, requiring a miscarriage of justice or obvious error of law; Add. Tab No. 13, than the Court enacting the Rules.

The Court should err in favor of individual fundamental rights and freedom and against those in control of the process, and as a political matter, the outcome.

Dated this 1<sup>st</sup> day of June 2009.



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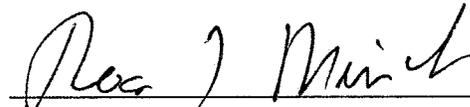
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**CERTIFICATE OF COMPLIANCE**

The undersigned, as attorney for the Appellant in the above matter, and as the author of the above Brief, hereby, certifies, in compliance with Rule 132.01, Subd. 3 of the Minnesota Rules of Appellate Procedure, that the above Reply Brief, excluding words in the table of contents, table of citations, any addendum containing statutes, rules, regulations, etc. and any appendix, signature block, Certificate of Service and this Certificate of Compliance, which was done in Microsoft Word format, Microsoft Windows XP 2000, using Times New Roman font, totals 4,207 words.

Dated this 1<sup>st</sup> day of June 2009.



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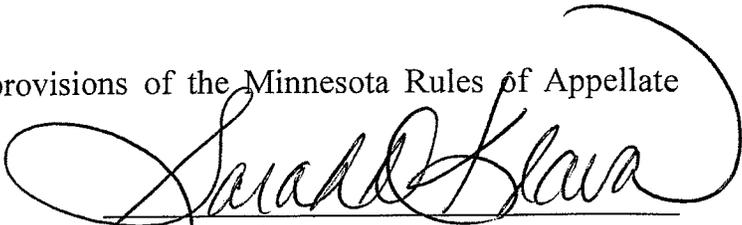
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Sarah D. Klava

Subscribed and sworn to before me on June 1, 2009.

  
Notary Public

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Notary Public  
State of North Dakota  
My Commission Expires Mar. 25, 2015