

SEP 13 2010

Nos. A07-1918 and A07-1930

FILED

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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.,

*Appellant,*

and

Kjos Investments,

*Respondents-Below.*

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PETITION FOR REHEARING IN THE SUPREME COURT

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**TO: THE SUPREME COURT OF THE STATE OF MINNESOTA.**

**I. INTRODUCTION**

Pursuant to Minn. R. Civ. App. P. 140.01, Respondent Moorhead Economic Development Authority ("MEDA") respectfully petitions this Court to grant a rehearing to reconsider its September 2, 2010, decision in the instant case.<sup>1</sup> The grounds upon which this petition is made are two-fold: (1) a contributory fault instruction in the tort case was not necessary because Minn. Stat. § 604.01, addresses actions by the injured party, which *at the time the injury occurred*, would have mitigated damages. In the instant case there is nothing that MHA or its predecessors in title could have done *at the time the contamination was occurring* to mitigate their damages; and (2) the new rule announced by this Court requiring contaminated land taken by eminent domain to be valued as "remediated" creates serious and significant practical evidentiary issues that were not considered by this Court.

**II. MATERIAL FACTS WHICH SHOULD HAVE BEEN CONSIDERED**

Immediately east and adjacent to the Anda property is Parcel I. (R.A. 213.) Located on Parcel I was a hotel named the Regency Inn. *Id.* The hotel was operational in the 1960s through 1990s, as were the businesses located on Parcel II.

Leisch Associates determined that an underground storage tank (hereinafter referred to as a "UST") located on the Anda property caused the environmental contamination of Parcels I and II by releasing fuel. The fuel oil then migrated and contaminated the soil of Parcels I and II. The fuel oil contamination was caused by the repeated filling of the UST which was experiencing progressive corrosion. (R.A. 183 - R.A. 219.) The UST leaked during the time that Mr. Anda owned the Anda property and while the businesses on Parcels I and II were active and operational. *Id.* The fuel oil

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<sup>1</sup>Moorhead Economic Development Authority v. Roger W. Anda, et. al., Slip Op, filed Sept. 2, 2010, \_\_\_ N.W. 2d \_\_\_, 2010 WL 3430871 (Minn. 2010).

percolated through the soil, which was covered by paving or grass and thus the adjacent property owners had no knowledge of the ongoing contamination and were unable to take any reasonable or foreseeable action to reduce or avoid damage to their property. Id.

The remediation of the site did not occur until *after* the contamination of Parcels I and II had already occurred. Id. This means that while the actual injury was occurring the owners of Parcels I and II were unaware of the ongoing contamination and were unaware of the need to take action to protect themselves.

### III. ARGUMENT

A. **A comparative fault instruction was not required in the tort case because at the time the injury occurred neither Moorhead Holiday Associates or its predecessors in title could have undertaken any reasonable action to avoid or mitigate their damages.**

This court has upheld the jury's finding that Mr. Anda is liable for causing the contamination of Parcels I and II and ordered a new trial solely on the issue of damages. Moorhead Economic Development Authority, Slip. Op., 3, 57 and C/D-1. The basis of this Court's decision was that the District Court should have given a comparative fault instruction regarding mitigation of damages. MEDA respectfully requests this court reconsider its holding that a comparative fault instruction should have been given in the tort case and instead affirm.

The comparative fault statute contemplates that an instruction pursuant to the statute with respect to mitigation of damages is only given when the evidence indicates that the actions by the injured party *at the time the injury occurred* would have mitigated or avoided damages. The comparative fault statute provides in pertinent part:

The term also includes breach of warranty, unreasonable assumption of risk not constituting an express consent or primary assumption of risk, misuse of a product and *unreasonable failure to avoid an injury or to mitigate damages*, and the defense of complicity under section 340A.801. *Legal requirements of causal relation apply both to fault as the basis for liability and contributory fault.* The doctrine of last clear chance is abolished.

Evidence of unreasonable failure to avoid aggravating an injury or to mitigate damages may be considered only in determining the damages to which the claimant is entitled. It may not be considered in determining the cause of an accident.

Minn. Stat. § 604.01, subd. 1a. (Emphasis added).

In the instant case, the actual injury to Parcels I and II occurred *prior* to the time MHA and MEDA took actions to cure the injury. This court has previously held that:

With respect to mitigation, the statute [Minn. Stat. §604.01] appears to contemplate action by the injured party, here the school district, ***which at the time the injury occurred would have limited the damages.*** Under the facts of this case, short of refusing to permit the installation of Pyrospray, there was nothing that the school district could have done to ***reduce the damages at the time of installation.*** ***The school district had no independent reason to know that Pyrospray was a problem, and clearly Keene did nothing to inform the district of the damages associated with Pyrospray. Thus, there was nothing to submit to the jury on the school district's comparative fault.***

Independent School District No. 622 v. Keene Corp., 511 N.W.2d 728, 731 (Minn. 1994). (Brackets and Emphasis added.) (*Overruled on other grounds*).<sup>2</sup> This court also held that, "We have never held that a party has a duty to choose the lowest cost option to cure an injury." Id. In the instant case, MHA and its predecessors in title had no independent reason to know of the contamination at the time it was occurring and Mr. Anda did nothing to inform them of the leaking UST.

Under the rule set forth in Keene Corp., this court separated mitigation into two distinct categories each with different instructions. The first is fault for failure to mitigate damages ***at the time the injury occurred.*** This type of fault is subject to the comparative fault state (Minn. Stat. § 604.01).<sup>3</sup> The second is the common law duty to mitigate damages, which is not subject to the

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<sup>2</sup>This court cited to Keene Corp. in the instant case. Moorhead Economic Development Authority, Slip op. p. 52-56.

<sup>3</sup>In McKay's Family Dodge v. Hardrives, Inc., 480 N.W.2d 141 (Minn. App. 1992) (*review denied*). The Court of Appeals reversed the trial court's refusal to submit a comparative fault instruction where the plaintiff failed to prevent or mitigate damages to vehicles on its car lot by washing them on a regular basis to prevent damage from dust. Id. at 147. This analysis is consistent with the language of Minn. Stat. § 604.01, which provides that a comparative fault instruction is given when the failure to mitigate damages occurs ***at the time of the injury.***

comparative fault statute. This analysis is logical because the first category of mitigation allows the finder of fact to compare the fault of the parties, which requires evidence of the parties' knowledge and ability to avoid incurring the injury *at the time the injury occurred*. The second category involves the mitigation of damages after the injury occurs. In this category there is nothing for the finder of fact to compare. The fact that an injury was later cured by a more expensive remedy, does not mean that the injured party could have intervened at the time the injury occurred to avoid or mitigate the effects of the ongoing injury.

In the instant case, the actual contamination of Parcels I and II occurred *prior to* the 2001 remediation. Mr. Anda's allegation regarding transferring the property as a "clean site," less costly alternatives to remediate, and the possibility of reimbursement from other sources, relate to curing the injury after the injury happened. Thus, Mr. Anda's arguments relate to the common law duty to mitigate damages which is not subject to the comparative fault statute. Quite simply, there is nothing for the jury to compare because MEDA was curing damages caused by an injury which occurred *prior to* the remedy.

However, evidence of the less expensive remedy is nevertheless admissible. In the instant case, Mr. Anda was able, and did argue, the common law duty to mitigate damages *and the jury instructions specifically provided:*

**CIVJIG 92.15  
MITIGATION OF DAMAGES-PROPERTY**

**Duty to prevent loss**

Moorhead Economic Development Authority's damages for harm to Parcels 1 and 2 must not include any loss that Moorhead Economic Development Authority or Moorhead Holiday Associates could have prevented by reasonable care.

(A. 84.)

Thus, the jury was correctly instructed because the arguments made by Mr. Anda with respect to mitigation, relate to the mitigation of damages *after the injury occurred*, not during the actual

contamination of the adjoining Parcels I and II. Therefore, an instruction on comparative fault with respect to the duty to mitigate damages was not required as the allegations and arguments made by Mr. Anda relate to the common law duty to mitigate damages after the injury has occurred. Therefore, MEDA respectfully requests this Court grant rehearing in this matter so as it may reconsider its decision in this regard.

**B. The new rule announced by this Court creates significant practical evidentiary issues.**

This Court has determined the valuation date in a quick take proceeding is the date upon which "title to and possession of the [subject] property transfers to the condemning authority." MEDA v. Roger Anda, et al., slip. op., p. 23. (citations omitted and brackets added). This Court has also determined that the value of contaminated property should be the "remediated" value of the property on the date of the taking. Id. at p. 39. The "remediated value" is established by admitting evidence of contamination only to the extent necessary to determine if any "stigma" has attached to the property. Id. at 40.

A rehearing should be granted so this new rule can be reconsidered, as its application will result in serious and substantial evidentiary problems during both the pre-litigation and litigation stages of future eminent domain actions. Specifically, recent legislative changes<sup>4</sup> require the condemning authority to provide an appraisal to the property owner *prior* to commencing an eminent domain proceeding. See Minn. Stat. § 117.036 (2006). The new rule announced by this Court places appraisers and governmental entities in the untenable position of having to provide an appraisal to a landowner prior to commencing an eminent domain action *and* prior to conducting any remediation of the subject property.

Undoubtedly, the application of the new rule may also create two different appraisals for contaminated subject properties. The first appraisal will value the subject property at fair market

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<sup>4</sup>This legislative requirement was added after the instant case was commenced.

value for the purposes of negotiating an arms length transaction with the landowner. This appraisal will likely take into account the actual condition of the property as would occur in a normal commercial transaction where private parties would conduct the necessary environmental investigations.

The second (court room) appraisal would be produced if the governmental entity could not negotiate a sale with the landowner and had to initiate eminent domain proceedings. This appraisal would create a new "as remediated" value that would likely be different from the fair market value of the subject property.

The rule can also lead to absurd results. If a governmental entity remediates the subject property to the minimal level, it can effectively lower the appraised value of the property by attaching more "stigma" to the property. By way of example, if contamination of the subject property is simply isolated and monitoring wells are installed, the "stigma" associated with the property will be high. Conversely, if a governmental entity cleans the subject property to a higher "clean" standard, the "stigma" may be non-existent. Different types of contamination will also have higher "stigmas" even though the cost of remediation will be similar. For example, if it costs one million dollars to clean up each of two subject properties, but one has fuel oil contamination and other nuclear contamination, the later property will have a much higher "stigma" even though both properties are considered clean.

Further, under the new rule an appraiser called to testify will be required to formulate an opinion regarding the "remediated value" even before remediation has taken place. In the traditional eminent domain proceeding<sup>5</sup> the governmental entity will not even have possession of the subject

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<sup>5</sup>This court has stated that, "in a standard proceeding, the condemning authority, 'has the right to the title and possession after the filing of the award by the court appointed commissioners' when the condemning authority has either paid the award, or-if there is an appeal of the award- has paid a portion of the award to the party or the court." Moorhead Economic Development Authority, Slip Op. 20.

property until after the commissioners have made their determination as to value. Without knowledge of the nature and extent of the contamination, it is impossible to know the type of remediation utilized and the nature and extent of any remaining "stigma." This will lead appraisers to formulate an opinion of value which is based upon speculative facts and can lead to inaccurate offers or awards to landowners. In effect, the rule is instructing appraisers to make up or create facts and arrive at opinions based upon those fictional facts.

Further, the issue of whether "contamination" is an actual condition of property will be unknown. If the subject property has a landfill (or an old buried farmstead) located upon it, is that landfill now considered environmental contamination or is it merely a condition of the property?<sup>6</sup> Quite simply, the distinction between a condition of the property such as a landfill and environmental contamination will become blurred under this new rule. The new rule also leads to potential windfalls for property owners. A property owner could purchase a contaminated property on the private market for a discount, and when the property is subsequently condemned and valued as "remediated" under the new rule, that owner will reap a windfall of tax dollars.

Finally, the new rule will destabilize acquisition of environmentally contaminated property. Owners of such property will be unlikely to settle with governmental entities on a purchase price, and instead resist in an effort to obtain higher purchase prices through eminent domain proceedings. This will result in a greater amount of limited judicial resources being expended upon eminent domain proceedings. Simply, why would a landowner want to settle with the governmental entity?

The new rule should be reconsidered because law should not be fashioned in a hypothetical vacuum. Rather law should be fashioned based upon real conditions as they exist in the private

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<sup>6</sup>See generally United States v. 50 Acres of Land, 469 U.S. 24 (1984). At issue in 50 Acres of Land was a landfill owned by the City of Duncanville. The City argued that the replacement value approach should be utilized instead of the fair market value approach. The United States Supreme Court declined noting that just compensation is normally measured by fair market value.

market. A willing buyer will pay less for a contaminated property as would a willing buyer pay more for property with gold or coal reserves. The new rule requires appraisers, witnesses, courts and the finders of fact to ignore reality in order to arrive at a fictional value. Therefore, MEDA respectfully requests this Court rehear this matter to reconsider its application of the new rule to the facts of this case.

#### IV. CONCLUSION

For all of the above reasons, Moorhead Economic Development Authority respectfully requests this Court grant its Petition for Rehearing.

Respectfully submitted this 10th day of September, 2010.



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Roger W. Anda, et al.

Supreme Court File  
Nos. A07-1918 & A07-1930

STATE OF NORTH DAKOTA    )  
  ) ss.  
COUNTY OF CASS            )

**AFFIDAVIT OF  
SERVICE BY MAIL**

Karen Thompson, being first duly sworn and being of legal age, deposes and says that on the 10th day of September, 2010, she served the following:

**1.     Petition for Rehearing in the Supreme Court;**

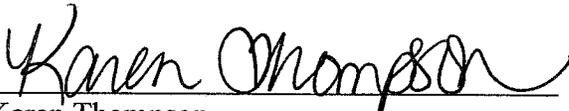
upon Mr. Roger J. Minch, Mr. Howard A. Roston and Bradley J. Gunn, and Ms. Susan L. Naughton, by placing true and correct copies thereof in envelopes addressed as follows:

Mr. Roger J. Minch  
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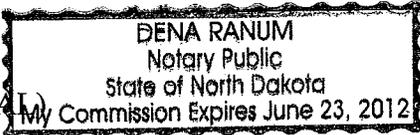
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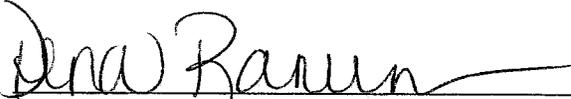
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and deposited the same in the U.S. Mail, at West Fargo, North Dakota.

  
\_\_\_\_\_  
Karen Thompson

Subscribed and sworn to before me this 10th day of September, 2010.

(SEAL) 

  
\_\_\_\_\_  
Notary Public, State of North Dakota