

STATE OF MINNESOTA
IN SUPREME COURT
A07-1918; A07-1930

SEP 23 2010
FILED

Court of Appeals

Anderson, Paul H., J.
Concurring in part, dissenting in part,
Dietzen, J.
Took no part, Stras, J.

Moorhead Economic Development
Authority, petitioner,

Respondent,

vs.

Filed: September 2, 2010
Office of Appellate Court

Roger W. Anda, et al.,

Appellants,

Kjos Investments,

Respondent-Below.

APPELLANT'S ANSWER TO PETITION FOR REHEARING IN THE
SUPREME COURT

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TO: THE SUPREME COURT OF THE STATE OF MINNESOTA.

I. INTRODUCTION

MEDA's Petition fails to cite any controlling statute, decision, principal of law, material fact or material question the Court has overlooked, failed to consider, misapplied or misconceived. The Petition is based on a transparent misinterpretation of Indep. Sch. Dist. No. 622 v. Keene Corp., 511 N.W.2d 728 (Minn. 1984) cited and discussed in the Court's opinion, PP. 53-54 and 56-57, and a dismissive and disrespectful interpretation of the Court's opinion. MEDA accuses the Court of adopting a "new rule" that has been "fashioned in a hypothetical vacuum" and which "can also lead to absurd results". Petition PP. 1, 6 and 7.

None of the four cases cited by MEDA in its Petition are cited in its May 15, 2009, brief, nor in the May 21, 2009, amicus curiae brief of the League of Minnesota Cities. So too, the arguments stated in the Petition about why comparative fault should not apply were not articulated in either brief.

As MEDA has been quick to point out, issues not raised below cannot be raised for the first time on appeal.

The tone of MEDA's Petition is that anything difficult for governmental bodies cannot stand, despite the Court's clear pronouncement about the paramount importance of individual property rights, and the right to due process.

In fact, any governmental body using the power of condemnation controls the initial decision about whether to condemn and what to condemn. The law has long given

those using eminent domain the right to inspect property for environmental issues, before the condemnation process even begins.

Governmental bodies retain the ultimate discretion to control their actions, and the ability to avoid any unnecessary expense or hardship because of the Court's perfectly balanced rule of valuing condemned property at its "remediated value".

It was MEDA at the trial that had its expert appraiser testify about "stigmatic injury" to the jury. Tr. PP. 854-856. It is disingenuous and too late for MEDA to argue that testimony about such injury "... creates serious and significant practical evidentiary issues that were not considered by this Court." Petition P. 1.

MEDA, and the City of Moorhead, obstructed Mr. Anda's efforts to view public records to verify the existence of another fuel oil tank, just east of Holiday Office Park. Anda's private investigator was kicked out of Moorhead City Hall while reviewing public record on the subject. Tr. PP. 893-896. The Petition continues this pattern, increases the cost of litigation and the burden on Anda, and thus Anda requests attorney fees of \$500.00 under Rule 140.03.

II. ALL MATERIAL FACTS WERE CONSIDERED

The Supreme Court considered all necessary material facts.

The eight year old fuel oil tank under HOP was emptied and abandoned in 1972 or 1973. The person emptying the tank testified that it was emptied down to two gallons of remaining fuel oil, the tank had not been leaking, and the fuel oil was checked and burned in his employer's own fuel oil tanks, with no problem. HOP was built on stilts, with no basement where fumes would be present. After years of inspections by the Moorhead

Sanitation Department and Fire Department, no problems were noted. Any evidence of the tank was “hiding in plain sight”, for anyone choosing to look, including an outside vent pipe, and the fuel oil furnace itself in a ground floor storage room under HOP.

III. ARGUMENT

A. The comparative fault instruction required by this Court is appropriate under the Court’s findings and controlling prior precedent.

Fairly read, Indep. Sch. Dist. No. 622 v. Keene Corp., 511 N.W.2d 728 (Minn. 1984) specifically authorizes a comparative fault instruction under the facts and circumstances before the Court.

In Keene Corp., a school district sought a recovery against manufactures of asbestos-containing fire proofing material. The manufactures sought a comparative fault instruction, the district court failed to give it, and the Court affirmed.

However, the ruling was limited to circumstances where there was no evidence of improper installation, any fault, any unreasonable failure to mitigate damages, and nothing in the record to show that the school district could have done anything to reduce the damages at the time of installation and there was no evidence that the school district unreasonably increased the cost of curing the asbestos problem or that the school district’s conduct was unreasonable.

In our case, the Court, after itself citing and discussing the Keene Corp. case, clearly articulated why MHA may not have acted reasonably, and failed to mitigate its damages. The Court noted that MHA was under a very tight self imposed cleanup schedule, signed a “clean sight” contract before completing any investigation or

environmental assessment of HOP, used the most thorough and expensive remediation method, instead of a method Mr. Anda could have chosen, monitoring and venting the remaining soil, at a cost of only \$100,000.00 to \$150,000.00. P. 55. The Court noted that MHA did not seek to recover reimbursement of its remediation costs from any other source, including the Petrofund. P. 55. The Court noted that MHA received only one bid for the excavation work, and eventually lost \$687,775.00 in an arbitrated dispute with the sole bidder. P. 56.

Thus, the Keene Corp. case, specifically considered by the Court, allows a comparative fault instruction given the findings of the Court.

The comparative fault statute, Minn. Stat. 604.01 also allows the fault of nonparties to be considered. Lines v. Ryan, 272 N.W.2d 896 (Minn. 1978).

B. The new rule announced by the Court creates no hardship for any condemning authority, nor significant practical evidentiary issues.

All of the unfortunate scenarios invented by MEDA are answered by Minn. Stat. § 117.041, the subject of a requested jury instruction, App. P. 115, (Court of Appeals) and App. P. 51, (this Court), cited in Anda's brief, PP. 9 and 16, which has allowed, for at least 35 years, state agencies and political subdivisions "by resolution" to enter upon land to check for the existence or release of hazardous substances, pollutants or contaminants before the condemnation decision is made. Minn. Stat. § 117.041 Subd. 2 (1).

Thus, there is no reason for surprise, and if proper testing is done, the condemning authority can decide to reconfigure the redevelopment, or give up on it all together. Either way, it can get all of the information it needs to provide whatever appraisal might

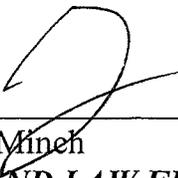
be necessary under the recent legislative changes, done for the good of property owners, to prove whatever damages relate to any "stigma" attached to the property. Any remaining evidentiary problems of the condemning authority, which always has the ultimate condemnation decision, must give way to protecting the due process rights of the landowner.

There will be no need for two different appraisals if proper inspections are done. No absurd results will obtain, simply because a landowner's due process rights are protected. Any information the appraiser might need would come from the report the condemning authority could obtain by invoking Minn. Stat. § 117.041.

IV. CONCLUSION

FOR ALL OF THESE REASONS, Anda respectfully requests that the MEDA Petition for Rehearing be denied and that Anda be awarded \$500.00 in attorney fees under Rule 140.03. The Petition is based on a misinterpretation of a case cited by this Court, and disregards a statute well known to MEDA about inspection rights. The Petition increases the cost of litigation for Anda, the prevailing party, and the burden on the Court.

Dated this 20th day of September 2010.



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