

NO. A06-2400

State of Minnesota
In Supreme Court

Metropolitan Airports Commission,

Respondent,

v.

Thomas W. Noble,

Respondent,

Speedway SuperAmerica LLC,

Appellant,

Northern States Power Company, n/k/a Xcel Energy;

State of Minnesota; County of Hennepin;

City of Bloomington,

Respondents.

BRIEF AND APPENDIX OF RESPONDENT THOMAS W. NOBLE

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STATEMENT OF THE LEGAL ISSUES

- I. Does a tenant have any interest in the condemned property at the time of condemnation upon which it can share in the award of damages, where the lease automatically terminates upon condemnation?**

The Minnesota Court of Appeals held “no.”

Apposite Law

Housing and Redevelopment Authority of the City of St. Paul v. Lambrecht (Shannon Kelly), 663 N.W.2d 541 (Minn. 2003)

County of Hennepin v. Holt, 296 Minn. 164, 207 N.W.2d 723 (1973)

Korengold v. City of Minneapolis, 254 Minn. 358, 95 N.W.2d 112 (1959)

In re Widening Third Street, St. Paul, Buckbee-Mears Co. v. City of St. Paul, 178 Minn. 552, 228 N.W.2d 162 (1929)

- II. Does a tenant have any interest in the portion of the condemnation award allocated to the taking of immovable fixtures where the lease automatically terminated upon condemnation and where the lease contains a surrender clause that provides that trade fixtures not removed are deemed abandoned, and all alterations, additions, improvements and fixtures whether installed by Tenant or Landlord, are surrendered with the lease premises when the lease terminates?**

The Minnesota Court of Appeals declined to apply the “surrender” clause, but stated that pursuant to its terms, if the lease terminated by any means including through eminent domain, any fixture not removed would have been the property of the Landlord.

Apposite Law

County of Hennepin v. Holt, 296 Minn. 164, 207 N.W.2d 723 (1973)

City of Rochester v. Northwestern Bell Telephone Co., 431 N.W.2d 874, 878 (Minn. Ct. App. 1988) *rev. denied* (Minn. Jan. 13, 1989)

National R.R. Passenger Corp. v. Faber Enter., 931 F.2d 438 (7th Cir. 1991)

- III. Is the Tenant entitled to the portion of the award allocated to immovable fixtures where the lease specifically provided that “all damages awarded for the taking...shall belong to and be the property of Landlord whether such damages shall be awarded” for the value of the leasehold or fee,**

“provided, however, that Landlord shall not be entitled to any award made to Tenant for the fair value of, and cost of removal

of stock and fixtures, provided a separate award is permitted by the taking authority directly to Tenant,”

but, the lease automatically terminates upon condemnation, and the Tenant otherwise had no interest in the immovable fixtures under the express surrender clause?

The Minnesota Court of Appeals held that the Tenant was not entitled to the portion of the award allocated to the immovable fixtures because it was not a “separate award” to Tenant nor was it “permitted by the taking authority directly to Tenant.”

Apposite Law

County of Hennepin v. Holt , 296 Minn. 164, 207 N.W.2d 723 (1973)

State v. Robinson, 266 Minn. 166, 123 N.W.2d 812 (1963)

In re Oronoco School Dist. v. Town of Oronoco, 170 Minn. 49, 212 N.W. 8 (1927)

MINN. STAT. § 117.085

MINN. STAT. § 117.50, *et. seq.* (2006)

IV. Should this Court overrule or change the longstanding Minnesota rule that when a tenant agrees to a lease clause that automatically terminates the lease at the time of condemnation, the tenant has no right which persists beyond the taking and can be entitled to nothing?

The Minnesota Court of Appeals did not consider this issue because it was not argued by SA in the lower court proceedings.

Apposite Law

Housing and Redevelopment Authority of the City of St. Paul v. Lambrecht (Shannon Kelly), 663 N.W.2d 541 (Minn. 2003)

Korengold v. City of Minneapolis, 254 Minn. 358, 95 N.W.2d 112 (1959)

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City of Rochester v. Northwestern Bell Telephone Co., 431 N.W.2d 874 (Minn. Ct. App. 1988) *rev. denied* (Minn. Jan. 13, 1989)

STATEMENT OF THE CASE

The Metropolitan Airports Commission (the "MAC") commenced this condemnation action to acquire a gas station and convenience store property, (the "Property") owned by Thomas W. Noble ("Noble") and leased to Speedway SuperAmerica LLC ("SA"). The public purpose of the taking was to eliminate the use of the Property, because it was located in the Runway Protection Zone of the new "north/south runway" then under construction (and now operational) at the Minneapolis-St. Paul International Airport.

The Honorable Pamela G. Alexander, Judge of the Fourth Judicial District, granted the MAC's Petition for Condemnation and its motion to take title and possession of the Property under Minnesota's "quick-take" statute, MINN. STAT. § 117.042 (2006). (RA.3-4). Pursuant to the order for quick-take, on December 14, 2004, the MAC deposited with the District Court Administrator its approved appraisal of value for the Property in the amount of \$2,380,000, and the MAC took title and possession of the Property. (RA.6-8).

The MAC's approved appraisal valued the land and building taken at \$2,000,000 and valued the immovable fixtures taken at \$380,000. (A.49). The valuation of the immovable fixtures was based on their use value over their then remaining life. (A.50).

On February 3, 2005, Noble moved for an order to disburse to him the portion of the deposited funds attributable to land and buildings in the amount of \$2,000,000. (A.62-64). On February 28, 2005, the District Court granted Noble's motion and \$2,000,000 was paid to Noble from the quick-take deposit, plus accrued interest thereon.

(A.65-66). Noble did not move for disbursement of the \$380,000 portion of the deposit made for immovable fixtures, because Noble anticipated that SA might assert a claim for it, which might delay disbursement of the \$2,000,000 allocated to the real estate, excluding immovable fixtures. (RA.15-16).

On June 22, 2006, after several days of hearings, the court-appointed commissioners filed with the District Court their award of damages for the taking of the Property (Parcel R-106 designated in the Petition) in the amount of \$2,760,000. (A.71-72). SA did not participate in the hearings. Based on the MAC's and Noble's competing appraisals, the commissioners' award specifically allocated \$2,400,000 to Noble for "Land and Improvements," and it allocated \$360,000 to "Thomas W. Noble or Speedway Superamerica LLC" for "Immovable Fixtures." *Id.* With respect to the allocation of the award for "Immovable Fixtures," the award stated that "[a] hearing to determine the legal right to said damages will be held on June 30, 2006 before the Honorable William R. Howard,¹ Judge of Hennepin County District Court." *Id.*

The parties filed cross-motions to determine whether Noble or SA was entitled to disbursement of the portion of the award allocated to immovable fixtures in the amount of \$360,000. (A.67-70). Noble appealed from the commissioners' award in order to grant jurisdiction over the award to the District Court pursuant to MINN. STAT. § 117.145 (2006). Pursuant to stipulation between Noble and SA and to MINN.R.CIV.P. 56, the

¹ During the course of the condemnation proceedings, the district court assigned Judge Howard to preside over the case.

District Court heard the cross-motions for disbursement as a cross-motions for summary judgment.

The District Court granted SA's motion and denied Noble's motion, holding that as a matter of law SA was entitled to the \$360,000 portion of the award allocated by the condemnation commissioners to "Immovable Fixtures." (A.21). The District Court entered judgment on October 24, 2006. *Id.* On December 19, 2006, Noble appealed from Judge Howard's decision.

After briefing and oral argument, the Court of Appeals, in an unpublished opinion, reversed the District Court in an opinion dated February 19, 2008. *Metro. Airports Comm'n v. Noble*, 2008 WL 434721 *5 (Minn. Ct. App. 2008). The Court of Appeals held as a matter of law the Noble was entitled to the \$360,000 portion of the award allocated by the commissioners to the "Immovable Fixtures." *Id.* at *4. Judge Kalitowski wrote the Court of Appeals' decision, in which Judge Hudson joined, and Judge Randall wrote a dissenting opinion. SA petitioned this Court for review on March 20, 2008, and this Court granted review on April 29, 2008.

STATEMENT OF THE FACTS

On May 1, 1992, SA entered into a Lease Agreement ("Lease") with 24th Avenue Motel Corporation to lease the Property for an initial term of ten years. (A.27). The Property is located at 2400 East 79th Street, Bloomington, Minnesota. *Id.* At the time of the making of the Lease, the Property was already improved with an operating gas station and convenience food store. *Id.* The 24th Avenue Motel Corporation transferred its interest in the Property and in the Lease to Noble on October 1, 1992. (RA.17-21).

The Lease contained what is commonly referred to as a “condemnation clause,” which provided in relevant part as follows:

18. EMINENT DOMAIN.

- (a) Entire Premises. If substantially all of the leased premises shall be taken by any public authority under the power of eminent domain **then the term of this Lease shall cease as of the day possession shall be taken by such public authority** and the rent shall be paid up to that day with a proportionate refund by Landlord of such rent as may have been paid in advance.

...

- (c) Damages. In any event all damages awarded for such taking under the power of eminent domain whether for the whole or a part of the leased premises **shall belong to and be the property of Landlord** whether such damages shall be awarded as compensation for diminution in value to the leasehold or to the fee of the premises; provided, however, **that Landlord shall not be entitled to any award made to Tenant** for the fair value of, and cost of removal of stock and fixtures, **provided a separate award is permitted by the taking authority directly to Tenant.**

(A.35-36) (emphasis added).

The Lease further contained a “surrender clause” providing the following with respect to “the last day of the term demised or the sooner termination thereof”:

20. SURRENDER. **On the last day of the term demised or on the sooner termination thereof,** Tenant shall peaceably surrender the leased premises in good order, condition and repair, broom-clean, fire and other unavoidable casualty and reasonable wear and tear only excepted. **On or before the last day of the term or the sooner termination thereof, Tenant shall at its expense, remove its trade fixtures, signs, and carpeting from the leased premises and any property not removed shall be deemed abandoned.** Any structural damage caused by Tenant in the removal of such items shall be repaired by and at Tenant’s expense. **All alterations, additions, improvements and fixtures (other than Tenant’s trade fixtures, signs and carpeting) which shall have been made or installed by either Landlord or Tenant upon the leased premises and all hard surface bonded or adhesively affixed flooring and all lighting fixtures shall**

remain upon and be surrendered with the leased premises as a part thereof, without disturbance, molestation or injury, and without charge, at the expiration or termination of this Lease.

(A.37) (emphasis added).

The MAC initiated a condemnation action for the acquisition of the Property, and on December 14, 2004, took title and possession by depositing with the District Court its approved appraisal of value in the amount of \$2,380,000. (RA.6-8). Immediately before the MAC took title and possession, the Lease was in operation and effect under the first renewal option. (A.27). On that date, pursuant to Article 18(a) of the Lease, the term of the Lease ceased and the Lease terminated.

ARGUMENT

STANDARD OF REVIEW

When reviewing a summary judgment, this Court asks whether there are any genuine issues of material fact and whether the lower courts erred in their application of the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). Here, the material facts are not in dispute. The issue before this Court is whether the lower courts correctly applied the law, and this Court gives no deference to the lower courts' decisions.

The issue of whether SA had a compensable interest in the leased premises at the date of taking requires interpretation of the Lease. Accordingly, this Court reviews the issue of whether SA had an interest in the Property *de novo*. *Hous. and Redev. Auth. of the City of St. Paul v. Lambrecht (Shannon Kelly)*, 663 N.W.2d 541, 545 (Minn. 2003).

SUMMARY OF ARGUMENT

SA is not entitled to any portion of the commissioners' award allocated to immovable fixtures, because at the moment the MAC condemned the Property, SA had no interest in the Property upon which an award of damages could be made to it. SA had no compensable interest in the Property because it had contracted away its interests in the Lease under the Lease provisions.

First, SA agreed to a "condemnation clause" providing the Lease would automatically terminate upon condemnation of the Property. (A.35-36). Under the well-established precedent of this Court, if a lease provides that it will terminate upon condemnation of the leased premises, the tenant has no interest in the property taken and will be entitled to no portion of the condemnation award for the taking of the leased premises.

Second, SA agreed to a "surrender clause" whereby all immovable fixtures and all other fixtures left in place would become the property of Noble upon termination of the Lease. (A.37). Accordingly, under either Articles 18(a) or 20 of the Lease, at the moment the MAC condemned the Property, SA had no property interest in the leased premises, including in the immovable fixtures, upon which a portion of the award of damages could be allocated to it.

Third, the first clause of Article 18(c) of the Lease provides that "all damages awarded for the taking...shall belong to and be the property of Landlord" whether they be for the leasehold or the fee.

Absent the automatic termination clause, surrender clause, and the first clause in Article 18(c), SA as Tenant would only have been entitled to the value of its leasehold interest, not the portion of the award allocated to the immovable fixtures. As SA correctly points out, the measure of the value of a leasehold interest is “the fair rental value of the premises less the amount of the rent for the remainder of the term.” (App.Br. 12-13) (citing *Naegele Outdoor Adver. Co. v. Vill. of Minnetonka*, 281 Minn. 492, 162 N.W.2d. 206, 214 (1968)).

Under the proviso in Article 18(c) to the Lease, Noble is not entitled to “any award made to Tenant for the fair value of, and cost of removal of stock and fixtures, provided a separate award is permitted by the taking authority directly to Tenant.” This clause does not provide that the allocation of a portion of the award to the Immovable Fixtures should go to Tenant, SA, and it should not go to SA for at least two reasons.

First, under of the automatic termination and surrender provisions of the Lease, SA had no interest in the Property, and SA specifically had no interest in the immovable fixtures at the time of condemnation. Accordingly, SA had no interest in the Property upon which any award of damages can be made to it.

Second, there has been no “separate award” made directly to SA that has been permitted by the MAC. The condemnation commissioners made a single award in the amount of \$2,760,000 for the taking of the Property. Of that award, the commissioners allocated \$2,400,000 to the Land and Buildings and they allocated \$360,000 to the Immovable Fixtures.

Under Minnesota law, there is only one award, and the allocation of that award does not convert it to multiple or separate awards. *County of Hennepin v. Holt*, 296 Minn. 164, 173, 207 N.W.2d 723, 728 (1973). Also, under Minnesota law there is no constitutional right to compensation for removal of personal property or movable fixtures because they are not taken. *Korengold v. City of Minneapolis*, 254 Minn. 358, 361, 95 N.W.2d 112, 115 (1959); *see also U.S. v. Petty Motor Co.*, 327 U.S. 372, 378 (1946) (holding that evidence of costs of removal or relocation should not be admitted); *In re Minneapolis Cmty. Dev. Agency*, 417 N.W.2d 127, 131 (Minn. Ct. App. 1987) (holding that there is no constitutional right to be compensated for removable personal property in a condemnation proceeding), *rev. denied* (Minn. Feb. 24, 1988).

Therefore, it is submitted that the “separate award” contemplated by the proviso in Article 18(c) must be an additional award over and above the award for the taking of the property. The proviso requires that it must be permitted by MAC, the taking authority, because it is an additional award, and it would be coming out of the MAC’s pocket—not out of Noble’s pocket or award. Except in the case of an additional “separate award,” MAC, as the taking authority, would have no role in permitting any parties to these proceedings to share in a portion of the award. That is a determination that is made by the commissioners and the courts interpreting the Lease terms and applying Minnesota law.

Thus, the proviso of Article 18(c) most likely is intended to preserve the payment for relocation costs and expenses to the Tenant. These payments are not damages awarded in the condemnation proceedings, but instead are additional statutorily-imposed

benefits that the MAC, as the taking authority, actually has authority to permit directly to SA. Minn. Stat. § 117.50, *et. seq.* This is the plain meaning of the terms “separate award...permitted by the taking authority directly to Tenant.”

In its “summary of argument,” SA asserts that the Lease contains “express language that provides for the allocation of a portion of the taking award to tenant.” (App.Br. 10). But SA’s assertion is a misstatement of the express terms of the Lease. The Lease provides only that Noble is not entitled to a **separate award** permitted by the MAC and made directly to SA. As the Court of Appeals stated, the plain meaning of “separate award” is not an allocation of the award. *Noble*, 2008 WL 434721 at *4.

Also in its “summary of argument,” SA characterizes and would have this Court interpret the term “separate award” to mean an *allocation of an award*, but this Court has explicitly rejected such a construction. *Holt*, 296 Minn. at 173, 207 N.W.2d at 728. An award of damages has a precise meaning in Minnesota eminent domain law, and where, as here, condemnation commissioners have allocated a portion of its award to a certain type of real property, the commissioners’ allocation does not constitute a separate award. *Id.*

Appellant SA asserts that the Court of Appeals’ decision would deprive a tenant of its “freedom to contract and dictate that a tenant has relinquished or waived its right to just compensation despite contract provisions expressing the exact opposite intent.” (App.Br. 9). To the contrary, the Court of Appeals’ decision upholds a long-standing rule of this Court that provides certainty and clarity to parties negotiating the terms of a lease. As the Court of Appeals said, the parties are free to negotiate a lease that does not include

an automatic termination clause. (A.7). But, if the parties include such a provision, the parties know that under Minnesota law the tenant will have no property interest upon which it can share in the condemnation award.

It has long been the practice in Minnesota for landlords to require automatic termination of condemnation clauses in their leases for precisely the reasons demonstrated by this case. Landlords do not want to have to fight with their tenants over the allocation of awards in the event of condemnation. Tenants are free to negotiate with landlords to eliminate the automatic-termination-upon-condemnation clauses, but landlords are often simply not willing to lease their property without the lease containing such a condemnation clause. In such a case, tenants are free to contract away their property interest upon condemnation, offer to pay more rent if the landlord agrees to remove the automatic termination clause, or go elsewhere where the landlord is willing to lease its property without a condemnation clause. In any event, they are free to contract.

SA would have this Court adopt a new rule for Minnesota that would require a lease to contain in addition to automatic termination clauses, language that would explicitly extinguish a tenant's claim to a portion of a condemnation award. Actually, the Lease here contains such language in Article 18(c) where it provides that the Landlord shall be entitled to all damages awarded whether for the fee or the leasehold interest. If the Court were to adopt SA's proposed new rule, the Court will not have expanded on a tenant's freedom to contract in a lease negotiation. Rather, the Court will only have overruled what is now a clear rule, and will have made uncertain what has long been certain under Minnesota law. This Court should not depart from its long-standing rule

upon which parties to leases in Minnesota have relied for decades in negotiating and agreeing to lease terms regarding the tenant's rights upon condemnation.

I. SA GAVE UP ITS RIGHT TO COMPENSATION WHEN IT AGREED THAT ITS LEASE AUTOMATICALLY TERMINATED UPON CONDEMNATION.

To be entitled to any share of the award of damages, SA must prove that "(a) [it] had an interest in the condemned property; (b) [its] interest in the condemned property was taken by [the MAC] in the course of the condemnation; and (c) the interest taken is compensable." *Lambrecht*, 663 N.W.2d at 545. SA discusses at length cases establishing the basic proposition that tenants have a compensable interest in a condemned leased premises. (App.Br. 11-13). But, as SA correctly acknowledges, a tenant may contract away that property interest in its lease. (App.Br. 13-17). In this case, as tenants often do, SA contracted away any claim to any portion of the condemnation award by agreeing to an automatic termination of the Lease upon condemnation.

Under well-settled Minnesota law, when a lease terminates upon condemnation, the tenant has no right in the leased premises which persists beyond the taking and is entitled to no part of the condemnation award. *Lambrecht*, 663 N.W.2d at 546 (holding tenant not entitled to going concern value of its business); *Holt*, 296 Minn. at 172, 207 N.W.2d at 728 (finding tenant not entitled to value of leasehold improvements or trade fixtures); *Korengold*, 254 Minn. at 363, 95 N.W.2d at 116 (holding tenant not entitled to value of equipment and trade fixtures); *In re Widening Third St., St. Paul, Buckbee-Mears Co. v. City of St. Paul*, 178 Minn. 552, 228 N.W. 162 (1929) (stating tenant not entitled to value of leasehold interest including improvements); *City of Rochester v. Nw.*

Bell Tel. Co., 431 N.W.2d 874, 878 (Minn. Ct. App. 1988) (tenant not entitled to value of improvements,) *rev. denied* (Minn. Jan. 13, 1989); *In re Minneapolis Cmty. Dev. Agency*, 417 N.W.2d at 130 (finding tenant not entitled to damages for removable personal property). In *Lambrecht*, this Court said, “[I]f a tenant agrees to a lease clause that automatically terminates a lease at the time of condemnation, the tenant has no right which persists beyond the taking and can be entitled to nothing.” *Lambrecht*, 663 N.W.2d at 547 (internal quotation omitted) (emphasis added).

In *Lambrecht*, the tenant, Shannon Kelly, sought compensation for its going concern value destroyed by the condemnation. Shannon Kelly sought to distinguish its claim from the dentist’s claim in *Korengold* on the ground that loss of going concern, rather than fixtures, is clearly a tenant property. *Lambrecht*, 663 N.W.2d at 547. This Court, however, rejected this argument stating “[w]hether the claim is for fixtures, equipment, or loss of going concern, the condemnation clause unequivocally terminates [the tenant’s] rights in the property at the time of condemnation.” *Id.*² (emphasis added). Thus, this Court in *Lambrecht* reaffirmed the fundamental rule that a tenant has no rights in the property taken or destroyed, even in tenant-created or contributed property, when the lease automatically terminates by reason of the condemnation.

² In *Lambrecht*, three Justices, Justice Gilbert, Justice Page, and Justice Paul H. Anderson, filed concurring opinions that the Court “should have ended [its] discussion with the termination of condemnation rights in the lease.” *Id.* at 549. Having concluded “that Shannon Kelley did not have an interest in the condemned property, nothing more needed to be or should have been said.” *Id.* at 550.

This Court reached the same result 44 years earlier in *Korengold*, where the tenant, a dentist, had made significant improvements to adapt the property for use as a dental laboratory and dental office. *Korengold*, 254 Minn. at 359, 95 N.W.2d at 113. The dentist sought compensation for the costs to remove and relocate the improvements he had made. *Id.* But the lease contained the following provision:

The tenant further agrees that if the demised premises, or any part thereof, or any part of the improvements of which they form a part, shall be taken for any street or public use, or shall during the continuance of this lease be destroyed by the action of the public authorities, **then this lease and the term demised shall thereupon terminate.**

Korengold, 254 Minn. at 359-60, 95 N.W.2d at 114 (emphasis added). Based solely on this clause in the lease, the Court concluded that the dentist had no compensable interest in the premises including the equipment and fixtures. *Id.* at 362, 95 N.W.2d at 115. Thus, even in a case where the tenant sought recovery for tenant installed property, this Court held that the automatic termination of the lease upon condemnation destroyed the tenant's interest in that property.

Similarly, in *Holt*, the lease provided that upon taking of at least 25% of the property, either party could "cancel" the lease within 30 days. 296 Minn. at 171, 207 N.W.2d at 727. The condemnor took the entire leased premises, and following its reasoning in *In Re Widening of Third St.*, this Court concluded that the lease automatically terminated 30 days after the condemnation of the leased premises. *Id.*

The Trial Court determined that because the lease terminated within 30 days of the condemnation, the tenant's right to damages were limited to the value of its leasehold interest for the 30-day period. *Id.* at 171, 207 N.W.2d at 727. This Court affirmed the

Trial Court's decision, holding that the tenant could only recover damages from the condemnor up to the date the lease terminated, which was 30 days after the date of taking. *Id.* at 172, 207 N.W.2d at 728. This Court said pointedly that the tenant “**contracted away** its right to recover more than the value of the 30-day leasehold estate.” *Id.* (emphasis added).

Here, as in the above Court decisions, there is no dispute that under its terms the Lease terminated automatically upon condemnation. Article 18(a) of the Lease provides as follows:

18. EMINENT DOMAIN.

(a) Entire Premises. If substantially all of the leased premises shall be taken by any public authority under the power of eminent domain **then the term of this Lease shall cease as of the day possession shall be taken by such public authority** and the rent shall be paid up to that day with a proportionate refund by Landlord or such rent as may have been paid in advance.³

(A.35) (emphasis added).

Thus, SA had no property interest in the condemned Property upon which it could receive any portion of the award, or any “separate award.”

Also, similar to *Holt*, the Lease contained explicit language purporting to reserve to the tenant the right to seek an award “from the condemnor,” but this Court nevertheless

³ The plain meaning of the words “cease” and “terminate” are essentially identical. See *THE AMERICAN HERITAGE COLLEGE DICTIONARY* (3d ed. 1993) (defining the word “cease” at page 224 to mean “[T]o put an end to, discontinue, to come to an end; stop.” “Terminate” is defined by the same dictionary at page 1399 as “[T]o bring to an end or a halt; to occur at or form the end of; conclude; to come to an end; to have as an end result.”). Obviously, there is little difference in these definitions, and in this case, the effect with respect to the self-destruction of the Lease is the same.

concluded that the tenant had no rights upon which any award could be made once the lease terminated. As in *Holt*, upon termination of the lease by condemnation of the leased premises, SA simply had no interest in or rights to the leased property including immovable fixtures it may have installed, upon which it could recover any part of the damages.

Minnesota courts are not alone in following this rule regarding the effect of an automatic termination clause.⁴ The United States Supreme Court established this rule long ago in *United States v. Petty Motor Co.*, 327 U.S. 372, 376 (1946). In *Petty Motor*, the lessee tool company entered into a lease with the landlord that contained the following condemnation clause:

If the whole or any part of the demised premises shall be taken by Federal, State, county, city, or other authority for public use, or under any statute, or by right of eminent domain, then when possession shall be taken thereunder of said premises, or any part thereof, the term hereby granted and all rights of the Lessee hereunder shall immediately cease and terminate, and the Lessee shall not be entitled to any part of any award that may be made for such taking, nor to any damages therefor except that the rent shall be adjusted as of the date of such termination of the Lease.

Id. The Court held that the lessee tool company was not entitled to any portion of the condemnation proceeds. *Id.* The Court explained,

We are dealing here with a clause for automatic termination of the lease on a taking of property for public use by governmental authority. With this

⁴ A treatise on the subject noted that “[t]he view has been taken in a substantial number of cases that under the automatic termination clause involved, the lessee is not entitled to share in the condemnation award....” Jay M. Zitter, *Validity, Construction, and Effect of Statute or Lease Provision Expressly Governing Rights and Compensation of Lessee Upon Condemnation of Leased Property*, 22 A.L.R.5th 327 (1994), §§ 2[a] & 8.

type of clause, at least in the absence of a contrary state rule, the tenant has no right which persists beyond the taking and can be entitled to nothing.

Id. (emphasis added).

In *Korengold*, this Court quoted the holding in *Petty Motor* with approval. *Korengold*, 254 Minn. 358 at 362-63, 95 N.W.2d at 115-16 (quoting *Petty Motor*, 327 U.S. 372, and observing that this is the general rule in Minnesota and in a majority of other state jurisdictions). *Id.* at 363, 95 N.W.2d at 116.

Here, Article 18(a) unequivocally terminated the Lease upon condemnation of the Property. Accordingly, SA contracted away any rights it may have had in the Property, and upon condemnation did not have any ownership interests in the Property upon which it could share in the award.

II. SA CONTRACTED AWAY ANY INTEREST IN THE PORTION OF THE CONDEMNATION AWARD ALLOCATED TO IMMOVABLE FIXTURES BY AGREEING TO THE ARTICLE 20 SURRENDER CLAUSE.

Under Article 20 of the Lease, SA also specifically contracted away any property interest in the immovable fixtures upon termination of the Lease. Article 20 provides as follows:

20. **SURRENDER.** On the last day of the term demised or on the sooner termination thereof, Tenant shall peaceably surrender the leased premises in good order, condition and repair, broom-clean, fire and other unavoidable casualty and reasonable wear and tear only excepted. On or before the last day of the term or the sooner termination thereof, Tenant shall at its expense, remove its trade fixtures, signs, and carpeting from the leased premises and any property not removed shall be deemed abandoned. Any structural damage caused by Tenant in the removal of such items shall be repaired by and at Tenant's expense. All alterations, additions, improvements and fixtures (other than Tenant's trade fixtures, signs and carpeting) which shall have been made or installed by either Landlord or Tenant upon the leased premises and all hard surface

bonded or adhesively affixed flooring and all lighting fixtures **shall remain upon and be surrendered with the leased premises as a part thereof, without disturbance, molestation or injury, and without charge, at the expiration or termination of this Lease.**

(A.37) (emphasis added).

Article 20 applied when the lease “sooner” terminated under Article 18(a) of the Lease on the date of taking. Accordingly, at the date of taking SA abandoned all fixtures not removed from the Property and such fixtures became part of the real property owned by Noble. Moreover, at the date of taking SA surrendered all other “alterations, additions, improvements **and fixtures** (other than Tenant’s trade fixtures, signs and carpeting) which shall have been made or installed by either Landlord or Tenant upon the leased premises and all hard surface bonded or adhesively affixed flooring and all lighting fixtures,” which became part of the real property owned by Noble. (A.37). Thus, under Articles 18(a) and 20, on the date of taking, the Lease terminated and all the “immovable fixtures” became the property of Noble, the landlord. The tenant SA had no further property interest in the immovable fixtures upon which it could receive the portion of the award allocated to the “Immovable Fixtures.”

In *Holt*, this Court interpreted lease provisions similar to Article 20. It held that upon expiration of the lease, the leasehold improvements installed by lessee became the property of the lessors, and therefore the lessee could not recover for the value of the improvements when the property was taken for a public use. 296 Minn. at 173, 207 N.W.2d at 728. The Court reasoned that “since [lessee] would not receive the improvement or their value upon expiration of the lease, it could not receive their value

upon condemnation under the self-destruction clause of the lease.” *Id.*; see also *Nw. Bell Tel. Co.*, 431 N.W.2d at 874.

Article 20 is consistent with black-letter lease law, which provides that if a tenant fails to remove trade fixtures, then the fixtures become a part of the realty owned by the landlord. 35A Am. Jur. 2d *Fixtures* § 123 (2008); see also *Hanson v. Vose*, 144 Minn. 264, 267-69, 175 N.W. 113, 114-15 (1919) (explaining that fixtures are part of the realty and pass to the subsequent purchasers of the land).

Under similar circumstances to the instant case, the United States Court of Appeals for the Seventh Circuit reached the same result in *Natl. R.R. Passenger Corp. v. Faber Enter.*, 931 F.2d 438, 441-42 (7th Cir. 1991). In *Faber*, the sublessee, Faber Enterprises, sought compensation for personal property and immovable fixtures after Amtrak condemned the leased premises. *Id.* at 439. The lease at issue contained the following condemnation clause:

If the whole or any part of the demised premises shall be acquired or condemned by Eminent Domain for any public or quasi public use or purpose, then and in that event, the term of this lease shall cease and terminate from the date of title vesting in such proceeding and Tenant shall have no claim against Landlord for the value of any unexpired term of said lease. The provisions of this Article ELEVENTH shall not prohibit Tenant from filing and proving *any claim it may have with respect to its fixtures and personal property* taken in such acquisition or condemnation.

Id. at 440 (emphasis in original). The lease also contained the following surrender clause:

All alterations, decorations, installations, additions or improvements upon the demised premises, made by either party, (including panelling, partitions, railings, mezzanine floors, galleries and the like) except movable trade fixtures, shall become the property of the landlord.

Id. at 440-41 (emphasis in original).

As in *Holt*, even though the condemnation clause included language purporting to preserve the tenant's right to pursue a claim for fixtures against the condemnor, the court held that under the surrender clause all fixtures became the property of the landlord upon termination of the lease by condemnation. *Id.* As the court explained, “[t]he **immovable fixtures** for which Faber seeks compensation thus did not belong to Faber at the time of the taking.” *Id.* (Emphasis added.) The court rejected arguments that the condemnation clause preserved Faber's right to seek an award for immovable fixtures. *Id.*

Here, Noble's Lease specifically provides in Article 20 that Tenant has no interest in immovable fixtures, whether installed by the Landlord or the Tenant. Upon termination of the Lease, the Landlord owns the immovable fixtures. Thus, SA has no claim under Article 20 of the Lease to any portion of the award for the value of the immovable fixtures, because upon the termination of the Lease, all such immovable fixtures became the property of Noble.

III. THE PROVISIO OF SECTION 18(C) DID NOT RESERVE OR RECREATE A PROPERTY INTEREST IN SA IN THE IMMOVABLE FIXTURES NOR DID IT CREATE A RIGHT IN SA TO THE PORTION OF THE AWARD ALLOCATED TO IMMOVABLE FIXTURES.

A. Article 18(c) Did Not Reserve or Recreate Any Property Right in SA in the Immovable Fixtures.

A condemnation proceeding is an *in rem* and not an *in personam* proceeding. *In re Oronoco Sch. Dist. v. Town of Oronoco*, 170 Minn. 49, 52, 212 N.W. 8, 9 (1927).

“The award becomes a fund standing in place of the land, and whoever owns the land is

entitled to the award.” *Id.* Here, the automatic termination of the Lease explicitly ended all SA’s interest in the Property upon condemnation. The Lease contains no language that reserves or recreates any interest in the Property for SA upon condemnation that would give SA any right to the fund standing in the place of the Property. SA contends that despite the destructive clause of Article 18(a), it is entitled to the portion of the award attributed to immovable fixtures because of language in Article 18(c). This argument is without merit.

Article 18(c) provides as follows:

18. EMINENT DOMAIN.

(c) Damages. In any event **all damages** awarded for such taking under the power of eminent domain whether for the whole or a part of the leased premises **shall belong to and be the property of Landlord whether such damages shall be awarded as compensation for diminution in value to the leasehold or to the fee of the premises; provided, however, that Landlord shall not be entitled to any award made to Tenant for the fair value of, and cost of removal of stock and fixtures, provided a separate award is permitted by the taking authority directly to Tenant.**

(A.36) (emphasis added). The first clause of Article 18(c) provides that all damages awarded for the taking for both leasehold and fee interests belong to Noble. The proviso clauses in Article 18(c) say only that Noble is not entitled to an award when two conditions are met, namely that (1) there is an “award” made to SA for the fair value of, and cost of removal of stock and fixtures, and (2) the MAC “permits” a “separate award” “directly” to SA. Thus, only if the MAC permitted an additional separate award made directly to SA “for the fair value of, and cost of removal of stock and fixtures,” would SA be entitled to that amount.

Article 18(c) contains no language that either explicitly or implicitly reserves or recreates a property interest for the tenant in the Leased Premises or the award of damages for its taking. As discussed above, this Court rejected such an argument for an implied reservation in a similar situation in *Holt*. This Court held in *Holt* that the tenant had no interest in the leased premises upon termination of the lease, even though the lease attempted to reserve a right for the tenant to seek an award from the condemning authority for the damages to its leasehold interest and improvements. *Holt*, 296 Minn. at 172, 207 N.W.2d at 728.

Thus, Article 18(c) first says that Noble, as landlord, is entitled to all damages awarded for the taking of the leasehold and fee of the Property, and it does not otherwise provide to SA, as tenant, a property interest upon which it can receive any portion of the award of damages for the taking of the Property.

B. Article 18 (c) Does Not Give SA Rights to an Allocation of a Single Award.

SA asserts that it is entitled to a portion or allocation of the award under the proviso language in Article 18(c). But, the plain meaning of Article 18(c) does not support SA's strained reading of it. The condemnation commissioners in this case filed with the District Court their award of damages for the taking of the Leased Premises in the amount of \$2,760,000. (A.71-72). The commissioners specifically allocated \$2,400,000 to Noble for "Land and Improvements," and they allocated \$360,000 to "Thomas W. Noble or Speedway Superamerica LLC" for "Immovable Fixtures." *Id.* SA contends that under the second clause—the proviso—in Article 18(c), it is entitled to

the portion of the award allocated to immovable fixtures. This argument is without merit because, **first**, the plain meaning of “separate award” is not allocation, and **second** the MAC did not and cannot “permit” a separate award made “directly” to SA.

1. A “separate award” is not an allocation from a single award.

Under rules of contract construction established by this Court, unambiguous contract language “must be given its plain and ordinary meaning, and shall be enforced by courts even if the result is harsh.” *Minneapolis Pub. Hous. Auth. v. Mailor*, 591 N.W.2d 700, 704 (Minn. 1999). Here, the parties agree that the relevant language in Article 18 is unambiguous.

The Lease provides in Article 28 that Minnesota law governs the enforcement of the Lease. (A.42). Under Minnesota law, an *award* is distinguished from an *apportionment or allocation* of the award. *Holt*, 296 Minn. at 170, 207 N.W.2d at 727; *State v. Robinson*, 266 Minn. 166, 175, 123 N.W.2d 812, 820 (1963) (“The rule is that the gross damages to be awarded shall first be determined, and then the award is to be apportioned among those **who have various interests in the land.**”) (Emphasis added). As stated above, a condemnation proceeding is an *in rem* and not an *in personam* proceeding. *In re Oronoco Sch. Dist.*, 170 Minn. at 52, 212 N.W. at 9.

The commissioners must make an award of damages “which in their judgment will result to each of the owners of the land by reason of such taking and report the same to the court.” MINN. STAT. § 117.085 (2006). The commissioners may allocate the award, after the making of the award. If requested by an owner, “the commissioners shall show in their report *the amount of the award of damages* which is to reimburse the owner and

tenant or lessee for the value of the land taken....” MINN. STAT. § 117.085 (emphasis added). But an apportionment of an award into two parts does not create two separate awards. *Holt*, 296 Minn. at 170, 207 N.W.2d at 727.

SA contends that this Court’s decision in *Holt* is inapposite because it concerned a jurisdictional question not at issue here. (App.Br. 29). While the Court in *Holt* answered a jurisdictional issue, resolution of that issue required answering the very question before this Court: whether an apportionment of a single award constitutes a separate award. This Court wrote in *Holt*,

the gist of [the tenant’s] argument is that the commissioners’ apportionment of the award constituted a separate award to [the tenant] which was independent in law and fact from the total award for the taking of the entire property. We reject this construction of the award.

Id. at 168-69, 207 N.W.2d at 728.

The Court explained that Minnesota courts adhere to the “unit rule” in valuing real property subject to separate estates in eminent domain proceedings. *Id.* at 169, 207 N.W.2d at 727. The unit rule is as follows:

Where several persons have separate estates or interests in a single tract or parcel of land taken in condemnation proceedings, the proper mode of reaching a fair valuation of the property, and of ascertaining the damages of those interested, is to treat the property as though the entire estate and all interests therein were in a single person, and to find the value and damage in gross, **leaving the apportionment of the award to be thereafter made according to the previous interests of the parties in the property.**

Id. at 170, 207 N.W.2d at 727 n.3 (emphasis added). The Court in *Holt* concluded,

In the instant case, the commissioners made an award in gross which the fee owners felt was inadequate and then apportioned the award in a manner the fee owners felt was contrary to their lease with [the tenant]. Despite [the

tenant's] arguments, the apportionment made by the commissioners does not convert the award into two separate awards.

Id.

This Court's holding in *Holt* applies directly to the Lease at issue here. Under its terms, Minnesota law governs the Lease. Accordingly this Courts' previous rulings on the meaning of the term "award" in the context of a condemnation are relevant.

SA argues that a "separate award" means "allocation" from a single award, but in *Holt*, this Court rejected that argument. In *Holt* this Court distinguished an "apportionment" or "allocation" of an award from an "award" with the context of an important jurisdictional question. Contrary to SA's assertion, the context of the *Holt* decision only lends more credence to the distinction between the terms that this Court drew. The distinction holds even greater weight because the distinction was dispositive of the important question of jurisdiction—whether the Court had the power to decide the issues before it at all.

The commissioners here made a single award of damages, and they allocated a portion of that award of damages for the value of land and improvements to Noble. They allocated another portion of the award for the value of immovable fixtures and effectively left it to the courts to determine who was entitled to the allocation under the terms of the Lease and applicable Minnesota law. The commissioners simply and clearly did not make a "separate award" "directly" to SA.

3. The MAC Did Not “Permit” a Separate Award of Damages “Directly” to SA.

Under Minnesota law, the taking authority does not have any role in permitting or authorizing the commissioners’ award. The commissioners’ duty to render an award arises from Chapter 117, and the taking authority does not have any say over whether it will permit a separate award. *See* MINN. STAT. § 117.085 (2006). Indeed, in this case, the MAC takes no position as to whom is entitled to receive the portion of the award allocated to the immovable fixtures.

The reason that the MAC has taken no position is obvious. It doesn’t care who receives the \$360,000 portion of the award allocated to the immovable fixtures. One way or the other, it had to pay that amount to someone. Having paid the portion of the award allocated to the “Land and Improvements” to Noble, and having paid into Court an amount sufficient to pay the portion of the award allocated to the “Immovable Fixtures,” the MAC has fulfilled all of its constitutional obligations to pay the compensation for the taking of the Property in the condemnation proceedings.

Furthermore, MAC should not and cannot have any role in allocating the award among the parties with real or imaginary interests in the Property taken. It cannot “permit” SA to share in the award of damages that under the Lease terms and under Minnesota law belong solely to Noble. The Lease had terminated, and SA simply had no compensable interests in the Property upon which it could share in the award or upon which the MAC could permit it to share in the award.

Accordingly, in order for SA to be entitled to anything, there must be an additional separate award that requires the MAC's permission because the payment of that additional separate award will most certainly be coming out of the MAC's pocket and will be an additional payment over and above the payment of damages required by the Constitutions for the taking of the Property. As will be discussed below, it is suggested that this additional payment contemplated by the proviso in Article 18(c) is the payment of relocation benefits.

In any event, MAC did not permit a separate award directly to SA in this condemnation case. Dictionaries define the term "permit" as giving formal or express consent. *BLACK'S LAW DICTIONARY* (8th ed. 2004) (defining permit as "1. To consent to formally"; or "2. To give opportunity for...."); *WEBSTER'S 3RD NEW INTERNATIONAL DICTIONARY*, (unabridged ed. 1971) (defining permit as "1. To consent to expressly or formally"; or "2. To give (a person) leave...."). The plain meaning of "permit" is not the passive meaning SA would give it—which is to "allow the doing of." (App.Br. 32). Here, the record does not show that the MAC gave any consent, formal or otherwise, to a separate award made directly to SA.

The fact that the MAC's appraiser valued the immovable fixtures separately from the other real property does not make the appraiser's valuation of immovable fixtures a separate award. (App.Br. 5). The MAC appraiser has no authority to allocate or apportion an award to any of the parties having an interest in the Property. That determination is made first by the commissioners, then by the courts based on the property interests that the parties had at the time of the taking.

Applying the decision in *Holt* and the plain meaning of “permit” does not lead to an absurd or a harsh result for SA. SA will receive its bargain under the Lease. It has contracted away its rights to immovable fixtures and to any condemnation damages apportioned to them. This was precisely the result in *Lambrecht, Korengold*, and *Holt*, as well as Minnesota Court of Appeals decisions that this Court declined to review. *See, e.g. Nw. Bell Tel. Co.*, 431 N.W.2d 874, *rev. denied* (Minn., Jan. 13, 1989); *In re Minneapolis Cmty. Dev. Agency*, 417 N.W.2d 127, *rev. denied* (Minn. Feb. 24, 1988). The result reflects the long-standing rule relied upon for years by parties to lease agreements, that an automatic termination clause in a lease extinguishes the tenant’s interests in the leased premises.

C. Under the Lease, SA May Retain Any Payment for Relocation Expenses.

Because the term “separate award,” as used in the proviso in Article 18(c) includes the requirement that the “taking authority” “permit” the award, the term “separate award” only makes sense in the context of a situation where the taking authority has the power to permit the separate award for the fair value of, and costs of removal of stock and fixtures.

The only situation that exists under Minnesota law where the taking authority has that power is in the context of granting relocation payments for the removal of personal and fixtures property. The proviso in Article 18(c) that gives the tenant the right to retain a separate award in limited circumstances, relates to “the fair value of, and cost of **removal** of stock and fixtures.” (Emphasis added). This language suggests that any payments the tenant may be entitled to receive relate to fixtures that are removable, or in

other words movable fixtures. “Stock” is clearly personal property and can always be moved. Under Minnesota law, condemnation commissioners cannot make an award for movable stock and fixtures, because such items are personal property, they are not real property, and they are not taken in condemnation. *See Korengold*, 254 Minn. at 361, 95 N.W.2d at 115; *In re Minneapolis Cmty. Dev. Agency*, 417 N.W.2d 127, *rev. denied* (Minn. Feb. 24, 1988).

Minnesota law requires condemning authorities to pay relocation costs for personal property within certain limits. *See* MINN. STAT. § 117.50, *et seq.* (2006) (incorporating the federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (“URA”), United States Code, title 42, sections 4601 to 4655, as amended by the Surface Transportation and Uniform Relocation Assistance Act of 1987, Statutes at Large, volume 101, pages 246 to 256 (1987)).⁵ The condemning authority accordingly may permit or award such payments or benefits under that law and pay them directly to a tenant in cases such as this.

In some circumstances, relocation benefits can be used to pay for the value of movable fixtures as well as the cost of moving them. *Pou Pachero*, 833 F.2d at 400-401. In *Pou Pachero*, the United States Court of Appeals for the First Circuit upheld the district court’s ruling that the displaced person could recover the fair value of new equipment and machinery, as well as recover costs and expenses for moving the old

⁵ The United States Congress established the URA when it became clear that the “application of traditional concepts of valuation and eminent domain resulted in inequitable treatment for large numbers of people displaced by public action.” *Pou Pachero v. Soler Aquino*, 833 F.2d 392, 396 (1st Cir. 1987) (quoting H.R. Rep. No. 91-1656, 2d Sess., reprinted in 1970 U.S. Code Cong. & Admin. News 5850, 5851.

equipment and machinery. *Id.* Regulations promulgated under the URA specifically allow displaced persons to recover the cost of substitute personal property, including installation costs at the replacement site, if those costs do not exceed the cost to move and reinstall the personal property. 49 C.F.R. § 24.301 (g)(16).

Under the applicable relocation regulations, the tenant makes a direct claim for relocation payments to the condemning authority, and the condemning authority then decides whether it will permit that claim, or not. 49 C.F.R. § 24.207. The MAC awards relocation benefits separate and apart from the damages for the taking in the condemnation proceedings. Parties to leases often do not understand that relocation benefits are not awarded as a part of the damages in the condemnation, thus perhaps explaining the term “separate award” in the Lease.

The best reading of Article 18(c) is that SA receives the MAC’s direct award of relocation benefits. Noble has not made any claim to the relocation benefits and payments made to SA in this case, and has no right to receive such payments that are permitted by the MAC and made directly to SA.

IV. THIS COURT SHOULD NOT OVERRULE OR CHANGE THE LONGSTANDING MINNESOTA RULE THAT WHEN A LEASE AUTOMATICALLY TERMINATES AT THE TIME OF CONDEMNATION, THE TENANT HAS NO PROPERTY RIGHT WHICH PERSISTS BEYOND THE TAKING AND CANNOT SHARE IN THE AWARD.

A. SA’s Forfeiture of Its Right to Compensation was Clear.

SA argues a rule of contract construction that the law looks with disfavor on forfeiture in contracts. SA’s reliance on this rule is misplaced here. (App.Br. 18-26).

Where as here, the terms of the Lease are unambiguous, reference to a further rule of contract construction is improper and unnecessary. *Carl Bolander & Sons v. United Stockyards Corp.*, 298 Minn. 428, 433, 215 N.W.2d 473, 476 (1974). Instead, the reviewing court looks to the plain meaning of the terms of the lease. *Mailor*, 591 N.W.2d at 704. Here, the unambiguous language of the Lease discussed above requires that Noble receive the entire condemnation award.

In *Nw. Bell Tel. Co.*, the Court of Appeals rejected the same argument with respect to forfeiture that SA makes here. 431 N.W.2d at 876. The Court of Appeals concluded that the automatic termination clause was sufficiently clear to overcome concerns about forfeiture. *Id.* Similarly, the 7th Circuit Court of Appeals rejected a tenant's "spectre of forfeiture" argument. *Natl. R.R. Passenger Corp.*, 931 F.2d at 441. The Court concluded that the lessee forfeited its rights to compensation for immovable fixtures where the lease unequivocally provided that a condemnation by eminent domain would terminate the lease. *Id.*

SA also asserts that lease provisions providing for the forfeiture of a tenant's rights in the property upon condemnation must be strictly construed against the landlord (App.Br. 25), but SA provides no citation for such a proposition, and the Court of Appeals in *Nw. Bell Tel. Co.* applied no such standard.

B. Adopting SA's Proposed Rule Will Not Enhance Parties' Freedom to Contract.

Citing *Lambrecht*, SA maintains that parties to a lease agreement should have “the ability to agree upon the distribution of portions of a condemnation award.” (App.Br.

17). The language in *Lambrecht* is as follows:

The condemnation clause in Shannon Kelly's lease was designed to describe the rights of each party upon the occurrence of certain events. **Had Shannon Kelly's intended to retain some rights in the property after condemnation, it could have retained those rights through the lease agreement.** We conclude that Shannon Kelly's contracted away all its rights in the property, including any claim for loss of going concern.

Lambrecht, 663 N.W.2d at 547 (emphasis added).

This highlighted dicta in *Lambrecht* supports the uncontroversial proposition that parties to a lease agreement can agree to terms giving tenants rights in the **property** upon condemnation. *Lambrecht* does not give specific examples as to how parties to a lease agreement would preserve the tenant's property rights. **It does reaffirm that basic rule that if the lease will automatically terminates upon condemnation, the tenant will have no interest in the property and will be entitled to nothing.** The above-cited language in *Lambrecht*, moreover, relates to preservation of *property rights* and not rights to an *allocation of* an award.

Parties to a lease are not deprived of the freedom to contract as asserted by SA. Parties to a lease are free to agree that it does not terminate upon condemnation.

C. SA's Argument For a Benefits Disclaimer Clause Requirement is Unpersuasive.

1. There is no precedent in Minnesota case law.

This Court should not depart from its long-standing rule that an automatic termination clause is sufficient in itself to extinguish a tenant's interests in a condemned lease premises and its right to any portion of the condemnation award. SA "submits that the constitutional magnitude of the property right at stake compels the conclusion that *more than* simple automatic termination language must be present to deprive a tenant of just compensation." (App.Br. 27-28) (emphasis in original). SA's argument, especially as applied to this case, is unpersuasive.

First, Article 18(c) in the Lease **actually contains such language**, as follows:

In any event all damages awarded for such taking under the power of eminent domain whether for the whole or a part of the leased premises shall belong to and be the property of Landlord whether such damages shall be awarded as compensation for diminution in value to the leasehold or to the fee of the premises....

(App.Br. 36). Accordingly, even if this Court were to adopt a specific requirement for a disclaimer of tenant's right to an award of damages, as SA suggests, the requirement would be met under the provisions of the Lease.

Second, SA can cite no decision of this Court or the Minnesota Court of Appeals that supports its argument that such disclaimer language is necessary. In a long line of cases, this Court has not required such language in holding that a tenant is not entitled to any portion of the condemnation award where the lease automatically terminates upon condemnation. *See, e.g., Lambrecht*, 663 N.W.2d at 546; *Holt*, 296 Minn. at 172, 207

N.W.2d at 728; *Korengold*, 254 Minn. at 363, 95 N.W.2d at 116; *In re Widening Third St.*, 178 Minn. at 554, 228 N.W. at 163.

The Minnesota Court of Appeals, in *Nw. Bell Tel. Co.*, explicitly rejected the view advocated by SA. 431 N.W.2d at 878. In *City of Rochester*, which this Court declined to review, the tenant argued that under *Petty Motor* both an automatic termination and a disclaimer clause is required before it would lose its right to condemnation proceeds. *Id.* at 876-78. The Court of Appeals disagreed, noting that while the condemnation clause in *Petty Motor* contained a disclaimer provision, the Court in *Petty Motor* “**only specifically mentioned the automatic termination clause as causing the forfeiture.**” *Id.* (emphasis added).

The Court of Appeals held that the forfeiture of condemnation proceeds can be based on an automatic lease termination clause alone, and affirmed the rule that

[w]here a lease contains a valid clause for its automatic termination on the taking of property for public use by the taking authority, the lessee thereby contracts away any rights it might otherwise have to compensation, and the lessee is entitled to nothing

Id. at 877. The Court of Appeals in *City of Rochester* held that the lessee was not entitled to compensation for improvements it had made to the property. Similar to Article 20 of the Lease in the instant case, the Court observed that the lessor had entered into a long-term lease with fixed rental payments providing that improvements made by the lessee would belong to the lessor upon termination of the lease. *Id.* at 878.

2. **The decisions from foreign jurisdictions cited by SA either do not reflect long-established Minnesota law, or in some cases support Noble's claim to the portion of the award allocated to immovable fixtures.**

The cases from other state jurisdictions cited by SA that require explicit award disclaimer language are inapposite primarily because the Court has not adopted such a rule. Even so, SA asserts **incorrectly** that the highest court in New York rejected the rule followed by Minnesota courts. (App.Br. 19). See *Zitter, Validity, Construction, and Effect of Statute or Lease Provision Expressly Governing Rights and Compensation of Lessee Upon Condemnation of Leased Property*, 22 A.L.R.5th 327 at §8 (citing cases from New York following the automatic termination rule).

In several of the cases cited by SA, the courts relied on lease language that does not exist in the Lease at issue here. In *Maxey v. Redev. Auth. of Racine*, for example, where the condemnation clause provided for the termination of "further liabilities" only, the court concluded the termination language was not explicit enough to cause a forfeiture. 288 N.W.2d 794, 807 (Wis. 1980). Similarly, in *Musser v. Bank of Am.*, 964 P.2d 51, 53 (Nev. 1998) and *Wayne Co. v. Newo, Inc.*, 182 A.2d 369, 372 (N.J.Super.Ct.App.Div. 1962), the lease contained express language providing for an **apportionment** of the award of damages. In *Trump Enter., Inc. v. Publix Supermks., Inc.*, 682 So.2d 168, 170 (Fla.Dist.App. 1996), the lease did not actually contain a condemnation clause terminating the lease upon condemnation.

In this case, Article 18(a) contains clear and explicit language providing that the Lease terminates upon condemnation, and Article 18(c) of the Lease does not contain any language providing for any *apportionment* of the award of damages.

In *Marraro v. State*, the tenant argued that it had not contracted away its right to compensation for **removable** fixtures. 189 N.E.2d 606, 609 (N.Y. 1963). The court observed that a separate award *cannot* be made for fixtures that have become an integral part of the realty. *Id.* The court explained that those items belong to the realty in the wake of an automatic termination clause, and the court cited to another New York case holding that compensation for those items belongs to the landlord. *Id.* at 611. Similarly, the instant case involves immovable fixtures, which by definition are not removable and have become an integral part of Noble's property.

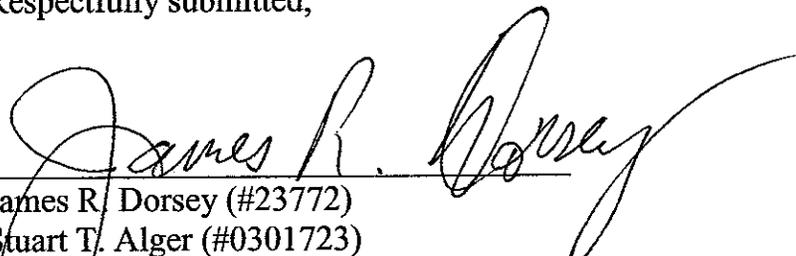
CONCLUSION

This Court should reaffirm its long-standing rule, upon which parties to lease agreements have relied for years. An automatic termination provision in a condemnation clause ends the tenant's interest in the property and extinguishes a tenant's right to any part of an award of damages for the taking of the leased premises. This Court should not overturn its well-established precedent, especially under the terms of the Lease here.

For the foregoing reasons, Noble respectfully requests that this Court affirm the decision of the Court of Appeals, and hold that Noble, the Landlord, is entitled to the portion of the award allocated to the immovable fixtures in the amount of \$360,000.

Respectfully submitted,

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