

Nos. A07-1918 and A07-1930

State of Minnesota
In Supreme Court

Moorhead Economic Development Authority,
Respondent,

vs.

Roger W. Anda, et al.,
Appellant,

and

Kjos Investments,
Respondents-Below.

RESPONDENT'S BRIEF

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STATEMENT OF THE ISSUES

1. Which of Mr. Anda's issues are properly before this Court when Mr. Anda raised three issues in his petition for review and only two of those were raised before the Court of Appeals?

Mr. Anda raised three legal issues in his petition for review. The first issue was, "Can the value of property condemned in a quick take condemnation be reduced because of contamination first discovered as a result of and after the taking?" However, this issue was not raised in the Court of Appeals. Instead, the Court of Appeals observed in *dicta* that the real question here is whether the jury should have been allowed to consider the effects of contamination on the value of property and therefore the district court did not abuse its discretion by instructing the jury to consider the value of property with and without contamination.

Apposite cases:

Hapka v. Paquin Farms, 458 N.W.2d 683 (Minn. 1990).
George v. Estate of Baker, 724 N.W.2d 1 (Minn. 2006).
Putz v. Putz, 645 N.W.2d 343 (Minn. 2002).
Matter of Welfare of M.D.O., 462 N.W.2d 370 (Minn. 1990).

2. Did the Court of Appeals err in affirming the judgment in the environmental contamination action when Mr. Anda did not challenge in the Court of Appeals the jury's unanimous finding of liability for damages for environmental contamination based upon the legal theory of nuisance?

The Court of Appeals concluded that, "[b]ecause the jury's nuisance finding provides a basis for the court's conclusion of appellant's liability for contamination, we affirm the court's order."

Apposite cases:

Hinkle v. Christensen, 733 F.2d 74 (8th Cir. 1984).
LeSueur Creamery, Inc. v. Haskon, Inc., 660 F.2d 342 (8th Cir. 1981).

3. Did the Court of Appeals err when it held the district court did not abuse its discretion by denying appellant's motion for a new trial when Mr. Anda's counsel ignored court orders, asked irrelevant, badgering, and repetitive questions and did not object to the district court's actions?

The Court of Appeals held that appellant's claim they did not receive a fair trial was not supported by the record.

Apposite cases:

Reese v. Ross & Ross Auctioneers, Inc., 149 N.W.2d 16 (Minn. 1967).

Bartl v. City of New Ulm, 72 N.W.2d 303 (Minn. 1955).

Merch. & Farmers Mut. Cas. Co. v. St. Paul-Mercury Indem. Co., 16 N.W.2d 463 (Minn. 1944).

STATEMENT OF THE CASE AND FACTS

1. Statement of the Case

a. Introduction

The instant case arises from two actions which were consolidated for purposes of a joint trial. R.A. 11-12. The first action involves an eminent domain action (hereinafter the "eminent domain action"). The second action involves Mr. Anda's liability for the environmental contamination of properties adjoining the property condemned in the eminent domain action (hereinafter "environmental contamination action").

The consolidated cases were tried before a jury in the Seventh Judicial District, Clay County District Court. The Honorable Steven J. Cahill presided over the trial. On August 15, 2007, judgment was entered in the environmental contamination action awarding MEDA \$474,512.00 together with costs and disbursements in the amount of \$8,977.07. A. 138. On August 29, 2007, judgment was entered in the eminent domain action awarding Mr. Anda \$0.00 as net damages for the taking of the Holiday Office Park property. A. 139.

b. Procedural History

On March 21, 2001, MEDA passed a resolution determining it was necessary to acquire the Holiday Office Park property (hereinafter the "HOP property"). R.A. 5-6. Subsequently, MEDA presented a petition requesting the HOP property be condemned and the appointment of commissioners to appraise the damages occasioned by the taking. R.A. 1-4. On June 29, 2001, the district court entered an order finding the proposed taking was for a public purpose and ordering the

condemnation and appointment of commissioners. A. 1-4. The order was not appealed. R.A. 74.

On March 10, 2003, the commissioners determined the amount of damages arising from the taking were \$488,750.00. A. 9. On April 28, 2003, Mr. Anda appealed the award of the commissioners to the district court. A. 10. MEDA cross appealed the award of the commissioners to the district court. R.A. 7-8. MEDA then served upon Mr. Anda a complaint seeking damages for the environmental contamination of properties adjoining the HOP property. A. 17-20.¹ On April 13, 2006, Mr. Anda served and filed his answer. A. 21-25. The district court held a scheduling conference on May 11, 2006, at which time Mr. Anda, "requested a sixty day period within which they could bring a motion to dismiss on the grounds of *res judicata*." A. 26. Rather than bringing a motion to dismiss, Mr. Anda brought a motion for summary judgment. A. 26. The motion was considered premature and denied. A. 27.

On September 28, 2006, MEDA moved to consolidate the eminent domain action and the environmental contamination action. R.A. 11. Mr. Anda responded by stating, "[t]he Andas do not oppose the Motion to Consolidate, and will consent to a simple order consolidating these two actions." R.A. 11. Based upon MEDA's motion and Mr. Anda's response, the two cases were consolidated for a joint trial. R.A. 11.

¹The Complaint alleged four causes of action. A. 17-20. The four alternative causes of action are negligence (§ 9 of the complaint), trespass (§ 10 of the complaint), nuisance (§ 11 of the complaint), and strict liability (§ 12 of the complaint).

Mr. Anda brought a second motion for summary judgment. On March 28, 2007, the court denied Mr. Anda's motion for summary judgment. R.A. 43. The court also denied Mr. Anda's motion to compel discovery of MEDA's nontestifying expert witness, Mr. Sapa, and granted MEDA's motion to exclude Mr. Sapa's testimony. R.A. 43. The reason for this action was that Mr. Anda's attorney had engaged in *ex parte* contacts with MEDA's nontestifying expert witness, even going so far as to obtain his affidavit outside the presence or knowledge of MEDA's attorneys. R.A. 47-48. The court was concerned by Mr. Anda's attorney's conduct and determined the *ex parte* contacts violated the rules of civil procedure and jeopardized the attorney work product and privileges of MEDA. R.A. 47-48.

On April 26, 2007, the court entered an order on the parties' motions *in limine*. R.A.49-52. On April 27, 2007, a jury was impaneled in both actions. (During the trial the court heard a renewed motion by Mr. Anda to allow him to call Mr. Sapa as an expert witness. This motion was denied and a formal order was entered on May 10, 2007. R.A. 53-54.)

On May 3, 2007, out of the presence of the jury, counsel for Mr. Anda argued that he should be allowed to present to the jury the defense of contributory negligence. T. 768. The court responded, "What is the negligence of Moorhead Economic Development Authority and Moorhead Holiday Associates [hereinafter "MHA"]?" T. 768, l. 15-17. Over the course of nearly 45 minutes and 33 pages of transcript, counsel for Mr. Anda was unable to identify the legal duty that MEDA or MHA² owed to Mr. Anda. The court then issued an order that the conduct described by

²The role of MHA is explained in the Statement of the Facts.

counsel for Mr. Anda did not constitute a breach of a legal duty owed to Mr. Anda. T. 802.

On May 3, 2007, MEDA rested its case. T. 871. On the same day Mr. Anda brought a Minn.R.Civ.P. Rule 50 motion for a directed verdict. T. 904. The Rule 50 motion addressed only the negligence claim in the environmental contamination action.³ T. 905. The court denied Mr. Anda's motion. T. 922-924. On May 4, 2007, Mr. Anda renewed his motion for directed verdict after he rested in both cases. T. 1150. The court denied the motion. T. 1160.

On May 6, 2007, MEDA moved to voluntarily dismiss its trespass claim in the contamination case. A. 65. The district court granted MEDA's motion. T. 1166. Since the trial consisted of two cases, the court and counsel for both parties discussed the order of closing arguments. R.A. 82. The district court noted:

It was agreed among counsel and the court that counsel for respondent would argue first, addressing only the environmental contamination case. Mr. Hoy would argue next, addressing both cases, and counsel for respondent would then address the jury again to argue only the eminent domain case.

R.A. 82.

On May 7, 2007, both actions were given to the jury and the jury retired to deliberate. In the eminent domain action the jury unanimously found the fair market value of the HOP property free from environmental contamination was \$455,000 and as contaminated \$0.00. A. 90. The jury also unanimously found Mr. Anda negligent for the contamination of the adjoining Parcels I and II. A. 87. The jury unanimously found that Mr. Anda had created a nuisance on the adjoining properties. A. 88. The

³Counsel for Mr. Anda acknowledged that his Rule 50 motion was for the negligence claim only. T. 905; see also T. 921.

jury unanimously determined that the damages were \$454,277 (Parcel I) and \$20,235 (Parcel II). A. 88. Mr. Anda did not request the jury to be polled. T. 1348.

On May 29, 2007, the court entered its findings of fact, conclusions of law and order for judgment (hereinafter "Findings") in the eminent domain action concluding the HOP property valued as contaminated had a net value of \$0.00. R.A. 58-64. The findings in the eminent domain case included *inter alia* the property taken, the procedural history, and the findings of the jury. R.A. 58-60. On May 29, 2007, the court also entered its findings in the environmental contamination action. R.A. 55-57. In addition to the jury's findings of negligence and nuisance, the court concluded that as a matter of law Mr. Anda was also strictly liable. R.A. 57 ("Respondent [Mr. Anda] is liable to petitioner for damages in the amount of \$474,512 for negligence, private nuisance and strict liability") (emphasis added). On June 4, 2007, Mr. Anda moved for a new trial, summary judgment, motion for judgment as a matter of law and remittitur. A. 106-128. The court denied all of Mr. Anda's motions. R.A. 74. The court granted MEDA's request to tax costs and disbursements. R.A. 65-72.

Mr. Anda filed his notice of appeal in the environmental contamination action on October 5, 2007, and in the eminent domain action on October 8, 2007. A. 140-143. On October 24, 2007, the Court of Appeals ordered the two appeals consolidated for briefing, oral argument and decision. A. 144-145. Mr. Anda stipulated to an order in the trial court whereby he would deposit with the court a Certificate of Deposit sufficient to cover the principal amount of the judgments during the pendency of the appeal. R.A. 95-99.

On September 18, 2008, oral argument was held before the Court of Appeals and on October 28, 2008, the Court of Appeals rendered its decision. R.A. 105-109.⁴ On or about October 29, 2008, MEDA taxed its costs on appeal. R.A. 110. Mr. Anda filed a motion with the Court of Appeals to reconsider its decision. Mr. Anda's motion was denied. R.A. 112-113.

Subsequently Mr. Anda petitioned this court for review⁵ and his petition was granted on January 28, 2009. R.A. 114-115. In his petition for review Mr. Anda raised only three legal issues for review. R.A. 177.

2. Statement of the Facts.

a. Introduction.

MEDA, the City of Moorhead, and MHA entered into a development assistance agreement for the redevelopment of certain distressed properties. See T. 319-321; see also Exhibit 6 (indicating the properties that were part of the redevelopment). In accordance with the redevelopment plan the developer, MHA, obtained title to Parcel I on March 28, 2001 (Parcel I is legally described in ¶ 2 of the Complaint in the environmental contamination action. A. 17). Parcel I had a structure on the property which was identified as the Regency Inn (sometimes referred to as the Holiday Inn). See Exhibit 8 (Bates stamp #00478); T. 227; see also A. 146. In accordance with the redevelopment plan, MHA also acquired title to Parcel II on March 28, 2001 (Parcel II is legally described in ¶ 3 of the Complaint in the

⁴Moorhead Economic Development Authority v. Anda, 2008 WL 4705663 (Minn.App. 2008) (unpublished).

⁵Howard A. Roston and Bradley J. Gunn were given permission to file a brief of *amici curiae* (hereinafter "*Amici's* brief") as well as the League of Minnesota Cities. R.A. 114-115; R.A. 117.

environmental contamination action. A. 17-18.) Exhibit 8 (Bates Stamp #00477-00478); see also A. 146. Parcel II had a structure on the property known as the old Fryn' Pan restaurant. Id. See also Exhibit 8; Exhibit 6, Building #7. MHA was successful in acquiring all but two of the properties in the redevelopment area. T. 323. Subsequently, MEDA utilized its power of eminent domain to acquire the two remaining parcels. T. 323; see also R.A. 1-6.

One of the properties condemned was known as the HOP property. This is the property which is the subject of the eminent domain action. (The HOP property is legally described in ¶ VI of the Petition. R.A. 3.)⁶

Prior to beginning demolition and redevelopment of the area, a Phase I Environmental Site Assessment (known as a Phase I ESA) was completed by Legend Technical Services. Exhibit 8; T. 284-285 (describing Phase I investigation). Unfortunately, Legend was unable to gain permission to access the HOP property and the HOP building and therefore did not conduct a Phase I ESA investigation of the property or building. Exhibit 8, Bates stamp #00472; T. 287.

On or about July 2, 2001, MEDA gained possession and therefore access to the HOP property. A. 3. After access to the HOP property was gained, representatives of Legend and MHA inspected the property by walking through it and quickly discovered a fuel oil furnace and what appeared to be a fuel port and filler pipe for an underground storage tank (hereinafter a "UST"). T. 287-289; see also T. 325-326 and T. 341-343 (Mr. Bradley discussing his initial inspection). The HOP building was subsequently demolished and MEDA, along with MHA and their experts and

⁶Located on the HOP property was the Holiday Office Park building (hereinafter "HOP building"). See Exhibit 8; A. 146.

contractors, began the process of trying to determine if a UST was present, if it leaked, and if it did, what was the extent, cause and magnitude of the leak. T. 343-345.

b. Extent of environmental contamination.

After the HOP building had been demolished, the ground beneath it remained undisturbed until Mark II of Fosten, MN (a contractor specializing in environmental remediation) and Leisch Associates were on site to conduct a site assessment and cleanup. T. 533. Initially, the soil was removed around the area where the UST was suspected to be located by tracing the vent pipes and other openings for the UST. T. 534-535. After the initial removal of soil, it became obvious that a UST was present on the HOP property. Exhibit 13 (series of photos showing on site excavation); T. 95-113 (testimony of Pete Doll). The UST was then removed from the ground.⁷ T. 95-98; Exhibit 13. Mr. Doll broke off a part of the UST and gave it to Lt. Greg Anderson of the Moorhead Police Department to place it in the evidence room. T. 111-112. This part of the UST was received into evidence without objection from Mr. Anda. T. 113.

The contaminated soil around the UST was removed from the site. Exhibit 11 (report of the onsite excavation); see also T. 534-535. Mr. Doll reported there was a strong odor associated with the excavated soil. T. 106. Eventually the extent and magnitude of the soil contamination was determined to have extended from the HOP property onto the adjoining properties. Exhibit 1; A. 146. It was also determined that

⁷As the UST was unearthed, there was large amounts of water around the UST which had petroleum product floating on top of it. T. 102-103. Mr. Anda, through his attorney, was provided written notice of the cleanup. T. 997-998; R.A. 337.

the highest levels of soil contamination centered around the UST and slowly reduced in level as the excavation moved outward from the UST. T. 557; Exhibit 10. When the excavation limits were compared in Exhibit 10 to the outlines of the contamination Exhibit 1, it was an exact match. See T. 558-560. Mr. Benker confirmed the excavation limits of the contamination extended off the HOP property and onto the adjoining properties. T. 560. Mr. Benker then testified the source of the contamination was the UST located on the HOP property. T. 560-561. MEDA's expert witness, Kenneth P. Olson, also testified the UST on the property was the cause and source of the petroleum which had in fact migrated onto the adjoining properties. T. 661; R.A. 192-193. Mr. Olson reported the tank caused the contamination over a period of time starting after Mr. Anda became an owner of the HOP property and continued unabated for a significant amount of time leading to the contamination of the adjoining parcels. R.A. 192-193. The total amount of soil contaminated by the UST was calculated to equal 10,751 cubic yards. R.A. 187. The amount of contaminated soil on Parcel I was calculated to be 3,053 cubic yards and 28.4 percent of the total amount of the contamination. T. 673; R.A. 197. The amount of contaminated soil on Parcel II was calculated to be 140 cubic yards and 1.4 percent of the total amount of the contaminated soil. T. 674; R.A. 197. The amount of contaminated soil located on the HOP property was calculated to be 7,558 cubic yards and 70.3 percent of the total amount of contaminated soil. T. 674.

c. Control and management of the HOP property.

In 1972, Mr. Anda acquired an ownership interest in the HOP property. T. 1110 (Mr. Anda's testimony); T. 483-486. Prior to purchasing the HOP property, Mr. Anda, along with Mr. Kjos, conducted a walk through of the building and

received an explanation of how the HOP building operated, **including its heating system**. T. 487. Mr. Anda testified that Mr. Kjos became the HOP building manager immediately after Mr. Anda purchased his interest in the building. T. 1110-1111. Mr. Kjos testified that he became manager of the HOP building in 1972 and was responsible for managing the HOP property and building. T. 492. Mr. Kjos continued to manage the building until 1995. T. 497.

Mr. Kjos testified that when he first walked through the building, the HOP building was heated with a dual fuel system utilizing both natural gas and fuel oil. T. 489-491. Mr. Kjos testified that fuel oil was delivered to the building's boiler by a copper tube which connected the UST to the building's boiler. T. 490. Mr. Kjos testified the UST existed on the property from the time he was first involved in the property until the HOP building was demolished. T. 491. When Mr. Bradley and Mr. Waltz first inspected the HOP building in 2001 (after it had been condemned), they discovered the oil burner was still in place. T. 287-289.

Mr. Kjonaas also testified a UST was present on the HOP property. T. 518. Mr. Kjonaas testified he filled the UST with fuel oil on a "keep full" basis for eight years. T. 519. Mr. Kjonaas stated, a "keep full" basis meant that, the company he was employed by, Mattson Oil, would go out to the UST and make sure it was full of fuel oil by filling it. T. 519. During Mr. Anda's cross examination the following questions and answers occurred:

Q: When was the first time that you heard that
[by Mr. Hoy] there was a leaky tank and it contaminated the
ground out there?

A: I don't remember. I did hear it, though, which
[by I had a hard time believing, because I thought
Mr. Anda] it was all--and I said before, is it gas fired. And I think we--Monte says we didn't buy hardly any oil. And that's what he told me. I didn't know we ever bought any oil.

Q: He's apparently told you that he did [buy oil], but just not a whole lot?

A: Yeah.

T. 1138, lines 14-25 (emphasis added).

d. Cost to clean up environmental contamination caused by the HOP property.

MHA initially paid the cost of cleaning up the environmental contamination caused by the release of petroleum product from the UST located on the HOP property. T. 346-348. MHA then sought reimbursement from the City of Moorhead for these costs. T. 346-348. MHA, through Mr. Bradley, documented these cleanup costs. T. 347-348. These costs were documented on Exhibit 3, which was admitted into evidence without objection from Mr. Anda. T. 348. The total cost of the cleanup was \$1,599,568.00. T. 350. Mr. Olson calculated the cost of cleaning up the HOP property was \$1,124,496. R.A. 198. He also calculated the cost of cleaning up Parcel I was \$454,277 and the cost of cleaning up Parcel II was \$20,235. R.A. 198.

e. Testimony regarding the fair market value of the HOP property.

MEDA provided the testimony of licensed appraisers, Mr. Amo and Mr. Koehlinger. Mr. Amo provided an opinion with respect to the fair market value of the HOP property and Mr. Koehlinger provided an opinion with respect to the value of the larger piece of property which was contaminated by the HOP property.

Mr. Koehlinger's opinion encompassed, *inter alia*, the HOP property and the adjoining properties, Parcels I and II.

Mr. Amo testified the fair market value of the HOP property was \$410,000, assuming it was free from environmental contamination, and as contaminated \$0.00. T. 743-744; R.A. 224. Mr. Amo's appraisal was offered into evidence and Mr. Anda stipulated that it would be received into evidence. T. 723-724.

Mr. Anda did not offer the testimony of a licensed appraiser. Mr. Anda did not give an opinion as to the fair market value of the HOP property, or whether its value was adversely affected by environmental contamination. Rather, Mr. Anda simply testified that he would not take \$2 million for the HOP property. T. 1120. On cross examination Mr. Anda agreed he was not a willing seller and would not have taken \$2 million or even \$3 million for the HOP property. T. 1136.

f. Conduct of counsel for Mr. Anda during the joint trial.

Prior to the start of trial, *voir dire* of prospective jurors was conducted by the attorneys for both parties. R.A. 81. When counsel for Mr. Anda conducted *voir dire*, he engaged in open argument which required the court to call counsel for both parties to the bench to caution against argument during *voir dire*. R.A. 81. During his opening statement counsel for Mr. Anda again engaged in open argument and the court again called counsel to the bench to caution counsel for Mr. Anda against such conduct. T. 77; R.A. 81. The district court's comments were made out of the presence of the jury. T. 77. Further, counsel for Mr. Anda did not object to the district court's action or comments. T. 77.

During cross examination of Mr. Doll, the district court intervened when counsel for Mr. Anda asked questions concerning irrelevant uncontested issues and

was misrepresenting prior testimony. T. 131-132. During the cross examination of Mr. Doll, counsel for Mr. Anda asked repetitive and badgering questions. T. 149-150. The court occasionally intervened to enforce its orders, however counsel for Mr. Anda did not object to the court's actions either in the presence of the jury or outside of the presence of the jury. R.A. 81.

During cross examination of Mr. Bradley, counsel for Mr. Anda asked Mr. Bradley a question which stated the developers had asked him to undertake unethical action. T. 389. Counsel for MEDA timely objected to the question as argumentative and irrelevant. T. 389. The court recessed the jury and heard arguments on the objection. T. 389-391. Counsel for Mr. Anda was specifically instructed not to ask Mr. Bradley about allegedly unethical actions or concerns about the developers. T. 391. A short time later counsel for Mr. Anda asked Mr. Bradley about the code of professional responsibility for accountants and a second question with concerns about Mr. Jordahl (one of the developers). T. 465. MEDA objected to the question and the court reiterated that it had instructed counsel for Mr. Anda not to get into the subject. T. 465.

Further, at one point during the examination of Mr. Hutchins, counsel for Mr. Anda offered Exhibit 86 into evidence. T. 1083. MEDA timely objected on the grounds the exhibit was incomplete and hearsay. T. 1083. The court sustained MEDA's objections. T. 1084. Nonetheless, counsel for Mr. Anda attempted in the presence of the jury to read from Exhibit 86. T. 1084. The court responded by instructing counsel for Mr. Anda not to read from an exhibit not yet in evidence. T. 1084.

Overall, the court summed up the questions by counsel for Mr. Anda as follows, "During the trial respondent's [Mr. Anda's] counsel asked many leading questions, irrelevant questions, and made testimonial comments and statements during his questioning." R.A. 81. Throughout the trial counsel for Mr. Anda never raised an objection to the court's actions.

During the trial the court did not rule there could be no strict liability. Mr. Anda alleges in his brief that the district court made such a ruling. App. Br., p. 13. However, the page of the transcript which he cites are statements made only by counsel for Mr. Anda, not the district court. See T. 766; T. 906-907.

At the conclusion of the trial, the parties met in chambers with the court to discuss the closing arguments in a consolidated case. The closing arguments of counsel for Mr. Anda are best described by the district court when it noted:

Having reservations about Respondent's [Mr. Anda's] counsel's ability to refrain from taking the opportunity to make arguments on the condemnation issue during both of his arguments, the court stressed to him that his first closing argument should not, in any way, touch upon the issues in the condemnation case. As counsel's initial closing argument proceeded, he soon began arguing about the value of the condemned property. At least four times during his initial argument the court cautioned him against arguing the condemnation issues, the third time telling him: "Mr. Minch, I'm going to hold that you do not get another argument after Mr. Hoy unless you immediately stop arguing about the condemnation issue. We are not here - you are not here to talk about the condemnation, so if you wish to be considered to have waived your right to a closing argument on the condemnation issue, I suggest that you tailor your argument appropriately." Notwithstanding this admonition, counsel for Respondent injected at least one more argument about the condemnation case, questioning yet again the decision of MEDA to condemn the property and whether it was blighted, despite the court having not only cautioned him several times about arguing the condemnation issue during his first argument, but also despite the court having reminded him numerous times during the preceding six trial days that the reasonableness and necessity of the taking and the motivation of MEDA and the developers were not properly issues in the environmental contamination case.

Nonetheless, the court did permit counsel for Respondent a second closing argument relating to the condemnation case, during which he persistently argued facts not in evidence regarding insurance industry customs and practices as they relate to the amount of money for which the Anda property was insured. After the court interrupted counsel for Respondent several times to caution him that the argument he was making was based upon facts not in evidence, and that he cannot create new evidence during closing argument, he persisted. When he kept going on the same point, the court interrupted him again saying: "Mr. Minch, how many times do I have to tell you -".

R.A. 55-56.

SUMMARY OF THE ARGUMENT

Mr. Anda has attempted to raise eight issues. App. Br., p. 1-3. These eight issues are summarized as: (1) Can the value of property condemned in a quick take condemnation be reduced because of contamination discovered after the taking?; (2) Does strict liability apply?; (3) Have Mr. Anda's due process rights been violated?; (4) Were Mr. Anda and his agents negligent in the operation and maintenance of a UST?; (5) Did Mr. Anda create a nuisance?; (6) Should the district court have given a comparative negligence instruction?; (7) Should the district court have granted Mr. Anda's motions for summary judgment and JMOL?; and (8) Was Mr. Anda given a fair trial? App. Br., p. 1-3.

Although, Mr. Anda attempts to entice this Court into reviewing all eight issues, he raised only issues 1, 2 and 8 in his petition for review. R.A. 177. (Mr. Anda's statement of "Legal Issues"). This Court has held that issues which are not raised in the petition for review will not be considered. In re GlaxoSmithKline, PLC, 699 N.W.2d 749, 757 (Minn. 2005). Therefore, this Court should decline to review issues 3, 4, 5, 6, and 7.

Of the three issues raised in Mr. Anda's petition for review, only two were raised in the Court of Appeals. Specifically, in the Court of Appeals Mr. Anda did not raise issue 1. R.A. 106-107. Instead, Mr. Anda argued that the district court abused its discretion in the drafting of the special verdict form. R.A. 106; R.A. 170-172 (Mr. Anda's argument). As a result, Mr. Anda has waived review of issue 1. Matter of Welfare of M.D.O., 462 N.W.2d 370, 379 (Minn. 1990). Thus, only issues 2 and 8 are properly before this Court. Nonetheless, both issues must fail.

Assuming, for purposes of argument only, that issue 1 is properly before this Court, the Court of Appeals correctly held the district court did not abuse its discretion in the drafting of the special verdict form. The Court of Appeals was correct because:

[t]he measure of compensation is the amount which a purchaser willing but not required to buy the property would pay to an owner willing but not required to sell it, taking into consideration the highest and best use to which the property can be put.

Ramsey County v. Miller, 316 N.W.2d 917, 919 (Minn. 1982) (citations omitted). Further, this Court has previously recognized that the presence of environmental contamination reduces the market value of contaminated properties. Dealers Mfg. Co. v. County of Anoka, 615 N.W.2d 76, 79 (Minn. 2000); Westling v. County of Mille Lacs, 543 N.W.2d 91, 93 (Minn. 1996). As a result, any evidence legitimately bearing upon fair market value (including environmental contamination) should be considered by the finder of fact. State by Humphrey v. Strom, 493 N.W.2d 554, 559 (Minn. 1992). Thus, this Court should affirm the judgment in the eminent domain action.

Mr. Anda's argument regarding issue 2 must fail because in the Court of Appeals Mr. Anda did not challenge the jury's unanimous finding of liability for nuisance (issue 5 in his brief to this Court) and thus waived the issue for review by this Court. Welfare of M.D.O., 462 N.W.2d at 379. This is dispositive because Mr. Anda was found liable on **three** legal theories, including strict liability, negligence, and nuisance. R.A. 57. Thus, assuming for purposes of argument only that strict liability does not apply (which it does) and a comparative fault instruction should have been given (which it should not) or that Mr. Anda was not negligent

(which he was), the result in the environmental contamination action remains unchanged because it can be sustained on at least one theory. Therefore, this Court should affirm the judgment in the environmental contamination action.

Mr. Anda's argument with respect to issue 8 fails for lack of factual support and objections to the actions of the district court. Nugent v. Kerr, 543 N.W.2d 688, 692 (Minn. App. 1996); Hake v. Soo Line Ry. Co., 258 N.W.2d 576, 582 (Minn. 1977). Indeed, it was the action of counsel for Mr. Anda that prompted the district court to intervene.

ARGUMENT

1. Introduction.

Mr. Anda has the burden to demonstrate to this Court that no reasonable jury could have found as the jury did and that the district court abused its discretion by giving improper jury instructions or by denying his motion for a new trial. Mr. Anda has improperly advanced generalized nonspecific allegations and contentions in his fact section⁸ and raised only three issues in his Petition for Review, but has attempted to raise eight issues before this Court, few of which were actually raised below.

2. Only two of the three legal issues raised in Mr. Anda's petition for review are properly before this court.

Only two of the eight issues raised by Mr. Anda are properly before this Court. Rule 117 mandates that the appellant's petition provide, "a statement of the legal issues sought to be reviewed and the disposition of those issues by the court of appeals." Minn.R.Civ.App.P. 117(3)(a). This Court has held that:

⁸Minn.R.Civ.App.P. 128(1)(c) provides in pertinent part, "The facts must be stated fairly, with complete candor, and as correctly as possible."

Rule 117 not only provides a procedural mechanism by which a petitioner may seek further review of a court of appeals decision by the supreme court, but is designed to facilitate effective appellate review of that petition by imposing on the petitioner a burden of identifying and discussing all critical issues. Certainly, parties cast in the role of respondent are entitled to know that issues relating to them will be raised and, more significantly, this court must be aware of the scope of the review requested.

Hapka v. Paquin Farms, 458 N.W.2d 683, 686 (Minn. 1990). This Court has also held issues not raised in a petition for review will not be considered. In re GlaxoSmithKline, PLC, 699 N.W.2d 749, 757 (Minn. 2005); George v. Estate of Baker, 724 N.W.2d 1, 7-8 (Minn. 2006); Peterson v. BASF Corp., 711 N.W.2d 470, 482 (Minn. 2006) ("issues must be raised in a petition for review or they are waived.").

In the instant case, Mr. Anda raised only three issues in his petition for review.

Those three issues are:

[1] Can the value of property condemned in a quick take condemnation be reduced because of contamination first discovered as a result of and after the taking?; [Issue 1 in his brief to this Court.]

[2] Should the petitioner ("Anda") be strictly liable to pay for cleanup costs where he was not negligent?; [Issue 2 in his brief to this Court.]

[3] Did Anda receive a fair jury trial where the district court interrupted Anda's arguments and examination of witnesses dozens of times? [Issue 8 in his brief to this Court.]

R.A. 177 (brackets and numbering added).

Of these three issues, only two are properly before this Court. Issue 1 was not raised in the Court of Appeals nor can it be found in Mr. Anda's brief to the Court of Appeals. R.A. 170-172. (Argument section of Mr. Anda's brief.) The Court of Appeals stated that Mr. Anda challenged the district court's drafting of the special

verdict form (R.A. 106), not whether the FMV of property in an eminent domain action can be reduced due to contamination.

This Court has long held that issues not raised below will not be considered. Putz v. Putz, 645 N.W.2d 343, 350 (Minn. 2002). "The failure to raise and preserve an issue before the court of appeals constitutes a waiver in a subsequent appeal to this court." Welfare of M.D.O., 462 N.W.2d 370 at 379; Big Lake Ass'n v. Saint Louis County Planning Com'n, 761 N.W.2d 487, 492-493 (Minn. 2009) ("We conclude that this issue is not properly before us. The association did not raise this issue before the court of appeals or in its petition for review.") Therefore, because issue 1 was not raised before the Court of Appeals, it is not properly before this Court. As a result, only issues 2 and 8 in Mr. Anda's brief are properly before this Court.

3. Assuming, for purposes of argument only, that the issue is properly before this Court, the HOP property was properly valued.

a. Standard of Review.

The admission or exclusion of evidence rests within the broad discretion of the trial court and will not be disturbed absent an abuse of discretion or if such an act is based upon an erroneous view of the law. Kroning v. State Farm Auto Ins. Co., 567 N.W.2d 42, 45-46 (Minn. 1997); Bergh and Mission Farms, Inc. v. Great Lakes Transmission Co., 565 N.W.2d 23, 26 (Minn. 1997).

The district court's drafting of a special verdict form is reviewed for abuse of discretion. Hill v. Okay Const. Co. Inc., 252 N.W.2d 107, 118 (Minn. 1977). When reviewing the verdict of the jury in an eminent domain case, "[a]n appellate court should not substitute its own judgment for that of the jury, even when we are of the view that evidence submitted would justify a substantially larger verdict." Ind. Sch.

Dist. No. 13 v. Minneapolis Elec. Steel Castings Co., 214 N.W.2d 469, 470 (Minn. 1974).

b. Argument.

i. Waiver.

Mr. Anda argues the jury should not have been allowed to consider evidence regarding the environmental contamination of the HOP property. However, he has waived this argument by stipulating to the admission of such evidence. This Court has long held that an assignment of error regarding the admissibility of evidence which was not presented to the district court will not be reviewed on appeal to this Court. Gruenhagen v. Larson, 246 N.W.2d 565, 568 (Minn. 1976); Thiele v. Stich, 425 N.W.2d 580, 582 (Minn. 1988) ("A reviewing court must generally consider only those issues that the record shows were presented and considered by the trial court in deciding matters before it.")

Mr. Anda challenges the admission of evidence of the actual condition of the HOP property on the grounds that at the precise moment the HOP property was condemned, the condemning authority did not know of the environmental contamination of the HOP property. Mr. Anda does not dispute that the property was actually contaminated nor that the contamination had an adverse effect on the fair market value of the HOP property. Rather Mr. Anda challenges the admission of evidence solely on the basis that such evidence was unknown at the time of taking. Mr. Anda makes this argument even after he stipulated that Mr. Amo's appraisal report (R.A. 220-341, which discussed the adverse effect of environmental contamination on the fair market value of the HOP property) could be received into

evidence. T. 273. Thus Mr. Anda's argument must fail because he has waived any objection to this evidence and the issue is not properly before this Court.

Amici Roston and Gunn appear to suggest that the eminent domain action and the environmental contamination case should not have been consolidated. *Amici's* brief at 8. However, Mr. Anda consented to the consolidation (R.A. 11), and the issue was not raised in the Court of Appeals, and therefore is not properly before this Court. Thus, the arguments of *Amici* Roston and Gunn in this regard must fail.

ii. Mr. Anda's and *Amici's* distinction between the process of determining fair market value in a "quick take" eminent domain action and a "normal" eminent domain action is a distinction without a difference.

In eminent domain actions the dispositive issue is the fair market value (hereinafter the "FMV") of the property which has been taken. State, by Lord v. Pahl, 100 N.W.2d 724, 728 (Minn. 1960). The process for determining the FMV of property taken is procedurally and substantively similar in both a "quick take" and a "normal" eminent domain action.

In all eminent domain actions the condemning authority is required to present a petition requesting the approval of the public purpose and necessity of the taking. Minn. Stat. § 117.055. (This occurred in the instant case. A. 1-4) The district court must then approve the petition. Id. The district court then appoints commissioners to determine and appraise the damage arising from the taking, **after** the petition is approved. Minn. Stat. § 117.075(2). Thus, in all eminent domain actions, after the taking occurs the damages arising from the taking are determined and assessed. (Indeed, the order approving the public purpose or use and public necessity must be appealed within 60 days or it is final. Minn. Stat. § 117.075(1)(c).) Therefore,

procedurally, the date of the taking is different than the date of the assessment of the damages in all proceedings.

Substantively, the damages arising from the taking are assessed as of the date the commissioners file their award. City of Mankato v. Hilgers, 313 N.W.2d 610, 612-613 (Minn. 1981); State, by Lord, 100 N.W.2d at 728; Iowa Elec. Light & Power Co. v. City of Fairmont, 67 N.W.2d 41, 46 (Minn. 1954) (award based upon condition of property at the time the damages are assessed). This Court has held that:

In condemnation proceedings the owner of an interest in premises to be taken thereunder is entitled to compensation for such interest at its fair market value. Ordinarily such value is determined as of the date of the taking rather than as of the date of the institution of the condemnation proceedings, and the former is generally held to be that upon which the commissioners appointed by the court file their award of damages in the proceedings.

State by Lord, 100 N.W.2d at 728 (citations omitted). In Ford Motor Co., this Court stated, "[t]he commissioners appointed by the city, assess the damages of the landowner as of the date they make and file their award and with respect to the value and condition of the property at the time, and the property is deemed to be taken as of that date." Ford Motor Co. v. City of Minneapolis, 173 N.W. 713, 714 (Minn. 1919). Thus, the damages are assessed when the commissioners make their award. Indeed,

[i]f the damages are reassessed on appeal, such reassessment is made as of the date of the original award and the damages are based on the value and condition of the property at the time of the original award, and the landowner is entitled to interest from the date of the original award upon the amount of the damages as finally assessed and determined.

Id. (Emphasis added). Thus, in all eminent domain actions, the commissioners formulate their award of damages **after** the taking has procedurally occurred by

considering all evidence known as of the date of the commissioners' award. The date of the taking is merely the artificial date in which the commissioners or finder of fact assume a hypothetical buyer and a hypothetical seller will meet and transact the hypothetical sale having available to them all known evidence about the property. Therefore, Mr. Anda and *Amici's* argument in this regard is a red herring.

iii. The district court did not abuse its discretion by utilizing the term fair market value on the special verdict form in the eminent domain action.

Mr. Anda struggles to challenge the special verdict form in the eminent domain action. Mr. Anda's single "objection" to the special verdict form is that the district court utilized the term "fair market value." App. Br., p. 19. Mr. Anda's alleged error must fail because the term "fair market value" is a correct recitation of the law. Just compensation is defined as the FMV of property at the time of the taking. Minneapolis-St. Paul Sanitary Dist. v. Fitzpatrick, 277 N.W. 394, 398 (Minn. 1937); Olson v. United States, 292 U.S. 246, 255 (1934); see also CIVJIG 52.35. Fair market value is defined as:

the amount which a purchaser willing but not required to buy the property would pay to an owner willing but not required to sell it, taking into consideration the highest and best use to which the property can be put.

Ramsey County, 316 N.W.2d at 919. Thus, Mr. Anda's argument that the special verdict form should not have included the term FMV is without a basis in law and therefore is without merit. The district court did not abuse its discretion in the drafting of the special verdict form.

iv. Any condition of property which affects its value should be considered by the finder of fact.

Evidence of environmental contamination should be considered by the finder of fact because it is relevant evidence that necessarily affects the FMV of the real property at issue. State v. Brandon, 898 S.W.2d 224, 226 (Tenn. App. 1994) ("There can be no doubt that the contaminated nature of the property would be evidence relevant to the issue of valuation."); see generally Minn.R.Evid. 401. This Court has previously recognized that the presence of environmental contamination on property reduces its value. Westling, 543 N.W.2d at 93 (affirming reduction in taxable value because of stigma associated with environmental contamination). Specifically, this Court has noted, "we have recognized the practice of considering the market value impact of both the present value of clean-up costs and the stigma devaluative factor as appropriate considerations in determining the market value of contaminated properties." Dealers Mfg. Co., 615 N.W.2d at 79. Because the presence of environmental contamination and the stigma associated with the contamination is a factor legitimately bearing upon the FMV of property, it is both relevant and admissible. State by Humphrey, 493 N.W.2d at 559 (Minn. 1992). (Any evidence will be admitted concerning any factor which would affect the FMV of the subject property.) Mr. Anda argues that the admission of relevant evidence of the actual condition of the HOP property violates his "due process rights." App. Br., p. 25. Mr. Anda makes this argument in spite of the fact he stipulated to the admission of such evidence and did not raise this argument in the Court of Appeals. Therefore, he has waived this argument. Gruenhagen, 246 N.W.2d at 568-69; Putz, 645 N.W.2d at 350.

Mr. Anda and *Amici* Roston and Gunn also fail to disclose to this Court that the majority of courts which have considered the question have held such evidence is admissible for the reduction of a landowner's damages in an eminent domain action. Northeast Ct. Econ. Alliance, Inc. v. ATC Partnership, 776 A.2d 1068, 1080 (Conn. 2001); Finkelstein v. Dept. of Transp., 656 So.2d 921, 924-925 (Fla. 1995) (contamination is relevant to market value of property in eminent domain proceedings); City of Olathe v. Stott, 861 P.2d 1287 (Kan. 1993); State ex rel. Dept. of Transp. v. Hughes, 986 P.2d 700 (Or. App. 1999); Brandon, 898 S.W.2d at 228-229; Redevelopment Agency v. Thrifty Oil Co., 4 Cal. App. 4th, 469 (Cal. App. 2 Dist. 1992).⁹ Thus, the majority rule is that evidence of environmental contamination is admissible. Northeast Ct. Econ. Alliance, Inc., 776 A.2d at 1079.

Not only is admitting evidence of environmental contamination the majority rule, it is also the better reasoned rule. The two cases cited by Mr. Anda and *Amici Curiae* represent the minority view and represent a fatally flawed analysis in that those cases ignore that eminent domain actions are *in rem*. See Dept. of Transp. ex rel. People v. Parr, 633 N.E.2d 19, 21-23 (Ill. App. 1994); Aladdin, Inc. v. Black Hawk County, 562 N.W.2d 608, 615-616 (Iowa 1997). (Justice Carter notes in his dissent that the real issue is the valuation of property in an eminent domain proceeding.) Simply, the dispositive issue in eminent domain actions is the FMV of the subject property and this Court has held that any evidence legitimately bearing upon FMV is admissible. State by Humphrey, 493 N.W.2d at 559.

⁹See also Stafford v. Bryan County Bd. of Educ., 466 S.E.2d 637, 640-641 (Ga. App. 1995); *reversed on other grounds*; U.S. v. 429.59 Acres of Land, 612 F.2d 459, 462-463 (9th Cir. 1980) (a buyer might be affected in his valuation of the subject property because of delays caused by environmental concerns).

Further, the minority rule must fail because it would require expert witnesses and landowners to assume away actual conditions of property and would set forth a factually incorrect analysis of FMV. The Connecticut Supreme Court summed up the issue by writing:

[e]xcluding contamination evidence, as a matter of law, is likely to result in a fictional property value—a result that is inconsistent with the principles by which just compensation is calculated. It blinks at reality to say that a willing buyer would simply ignore the fact of contamination, and in deciding how much to pay for property. Contamination may affect the market value of property in a number of other ways.

Northeast Ct. Econ. Alliance, Inc., 776 A.2d at 1080. Thus, the minority rule is inappropriate and should not be adopted by this Court because it would require witnesses and the finders of fact to simply assume away facts and make decisions based upon legal fiction.

Finally, the minority rule represents poor policy. First and foremost, if evidence of environmental contamination is not admissible, landowners whose contaminated property is condemned would receive a windfall because they would receive more than the FMV of the subject property. Further, as a result of Westling, if Minnesota courts do not recognize a reduction of value for contaminated property in an eminent domain proceeding, the property owner would be able to argue that his property is worth zero for tax purposes and fully valued for eminent domain purposes. Such a result is absurd.

Therefore, should this Court determine this issue is properly presented, it should adopt the majority rule because it is based upon superior logic which holds eminent domain proceedings are *in rem*, it does not require witnesses and finders of

fact to assume away facts, and there are strong policy reasons against the minority rule.

v. **Other jurisdictions have held that evidence concerning the condition of property discovered after the taking is admissible.**

Because the date the court approves the petition and the date the commissioners make their award is different, it naturally follows that evidence discovered after the petition is approved but before the commissioners meet is admissible. Other jurisdictions have previously held information about the condition of property which happens to be discovered after the date the property was condemned, must be considered. Tyson Creek R. Co. v. Empire Mill Co., 174 P. 1004, 1006 (Idaho 1918) ("Actual value is market value, when true conditions are fully disclosed.") In re Board of Water Supply of City of New York, 209 A. D. 231, 232 (N.Y. App. Div. 1924); City of Little Rock v. Moreland, 334 S.W.2d 229, 230 (Ark. 1960); San Diego County Water Authority v. Mireiter, 18 Cal. App. 4th 1808, 1811-1815 (Cal. App. 4 Dist. 1993); State by Com'r of Transp. v. Shein, 662 A.2d 1020, 1026 (N.J. Super. Ct. App. Div. 1995).

In City of Little Rock, after land was condemned for a reservoir it was discovered the land contained bloating clay, which had a greater value than normal soil. City of Little Rock, 334 S.W.2d at 230. The city argued the actual condition of the land should not be considered in determining the land's value because it was discovered after the land had been condemned. Id. The court disagreed and held:

The city points out that this Court has held many times that the date of the taking is the date to be considered in determining the value of the land. Actually, the land had just as much value at the time of the taking as it has had at any time since that date. Nothing has changed to give it any different valuation. True, facts have been developed since the

taking that show the land's true value. But the value was there at the time of the taking, and the facts were fully developed before any valuation was agreed upon and before any court fixed such valuation. It would be a harsh rule to say that the State, or some subdivision thereof, or some private corporation, could take private property containing a deposit of diamonds and pay therefore the price of land having very little value because at the very moment of the taking it was not known that the diamonds were there.

Id.

Similarly, in Mireiter, the court held that in determining the amount of compensation due to a property owner, the court must consider facts discovered between the date of the valuation and the trial because these factors affect property value. Mireiter, 18 Cal. App. 4th at 1815. In Shein, the court held that, "The definition of fair market value assumes that parties are fully knowledgeable concerning the physical condition of the condemned party as of the date of valuation whether they are actually aware or could reasonably have been aware of the conditions." Shein, 662 A.2d at 1026.

Therefore, the same logic justifying the admission of evidence of the actual conditions of property discovered after the taking also justifies the admission of evidence of environmental contamination. Simply, if the finder of fact is required to determine the price that would be paid by a willing buyer to a willing seller, the finder of fact must have all of the information that would have been available to the hypothetical seller and buyer. See CIVJIG 52.40.

vi. After hearing the evidence a reasonable person could conclude as the jury did.

Mr. Anda stipulated to the introduction of Mr. Amo's report (R.A. 220-341) and the expert report of Mr. Olson (R.A. 183-219) which establishes the environmental contamination occurred prior to the date the HOP property was taken

and the environmental contamination had an adverse effect on the FMV of the HOP property.

The jury heard extensive testimony that a willing buyer would take into account the environmental contamination of the HOP property when formulating a purchase price, which would result in a reduction in the FMV of the HOP property. T. 324-325; T. 466-468; T. 684-687; T. 743-747; T. 853-856. Further, Mr. Amo testified that the value of the HOP property as contaminated would be zero. T. 747. See also R.A. 338-340. Mr. Anda did not attempt to offer any testimony on the effect of environmental contamination on the FMV of the HOP property.

After hearing all of the evidence and the arguments of the parties, the jury made the following finding:

2. What was the fair market value of the Holiday Office Park property as of the date of the taking of the property by the Moorhead Economic Development Authority on or about June 29, 2001, taking into account the fuel oil contamination?

[Answer] \$0.00

A. 90 (emphasis added). Thus, the HOP property was valued by the jury as of June 29, 2001. The jury reasonably concluded that the FMV of the HOP property decreased because of the actual conditions on the HOP property. These conditions would have been considered by a willing buyer who would have discounted any offer made to purchase the property to offset the cleanup costs and risks associated with the contamination. Therefore, the judgment in the eminent domain action should be affirmed.

4. The Court of Appeals did not err in affirming the judgment in the environmental contamination action because Mr. Anda only challenged two of the three legal theories supporting the damages award in the environmental contamination action.

In the Court of Appeals Mr. Anda did not challenge the jury's unanimous finding of liability under the theory of nuisance. R.A. 108; R.A. 124-127. Mr. Anda's failure to challenge the jury's finding of liability for creating a nuisance is dispositive because the environmental contamination action is a multiple claim case with a single award of damages. In a multiple claim case, the appellant bears the burden of establishing that the damages award cannot be sustained under any theory. Hinkle v. Christensen, 733 F.2d 74, 76 (8th Cir. 1984); LeSueur Creamery, Inc. v. Haskon, Inc., 660 F.2d 342, 346 (8th Cir. 1981).

In the environmental contamination action, Mr. Anda was found liable by the jury on the two theories of negligence and nuisance. A. 87-89. The damages were submitted in a single question. A. 89. In addition to the negligence and nuisance claim, the district court concluded as a matter of law Mr. Anda was also strictly liable for the environmental contamination of Parcels I and II. R.A. 57. Therefore, in the Court of Appeals Mr. Anda had the burden of establishing that the damages award in the environmental contamination action could not be sustained under any of the theories of negligence, nuisance or strict liability.

Because Mr. Anda did not challenge the jury's finding of liability for nuisance, the award of damages in the environmental contamination action could be reconciled on at least one unchallenged theory. Raze v. Mueller, 587 N.W.2d 645, 648 (Minn. 1999). ("The verdict should stand if the answers can be reconciled on any theory.") The Court of Appeals correctly applied precedent which held that Mr. Anda failed to

meet his burden due to waiver, and correctly affirmed the judgment in the environmental contamination. Frank v. Winter, 528 N.W.2d 910, 913 (Minn. App. 1995); Melina v. Chaplin, 327 N.W.2d 19, 20 (Minn. App. 1982); Pautz v. American Ins. Co., 128 N.W.2d 731, 738 (Minn. 1964). Thus, the Court of Appeals correctly affirmed the judgment in the environmental contamination action.

Mr. Anda has improperly raised the issue of his liability for creating a nuisance in his brief to this Court. App. Br., p. 30. This issue is not properly before this Court and should not be reviewed. Welfare of M.D.O., 462 N.W.2d 370 at 379; Pomush v. McGroarty, 285 N.W.2d 91, 93 (Minn. 1979) (a party may not raise a new theory on appeal). As a result this Court should affirm the judgment in the environmental contamination case.

5. Mr. Anda is strictly liable for the escape of petroleum products from the UST located on the HOP property.

a. Standard of Review.

The verdict of the jury must not be disturbed unless it is, "manifestly and palpably contrary to the evidence." Dang v. St. Paul Ramsey Medical Center, Inc., 490 N.W.2d 653, 657 (Minn. App. 1992) (citations omitted). This Court has held that, "[a]n appellate court must reconcile the special verdict answers 'in a reasonable manner consistent with the evidence and its fair inferences.' The verdict should stand if the answers can be reconciled on any theory." Mueller, 587 N.W.2d at 648. Further, "on appeal from a jury verdict, an appellate court must view the evidence in the light most favorable to the prevailing party and disturb the verdict only if no reasonable person could find as the jury did." Estate of Hartz v. Nelson, 437 N.W.2d 749, 754 (Minn. App. 1989) (citing Remiarz v. Polish American Club, 270 N.W.2d

289, 290 (Minn. 1978)). Questions of law are reviewed *de novo* National Hydro Systems, a div. of McNish Corp. v. M.A. Mortenson Co., 507 N.W.2d 27, 28 (Minn. App. 1993).

b. Argument.

i. The jury's findings of fact.

Mr. Anda is strictly liable for the escape of petroleum products from the UST on the HOP property. Mr. Anda alleges that factual findings to support strict liability did not go the jury. App. Br., p. 20. However, Mr. Anda's attorney conceded the jury would make the factual findings necessary to determine strict liability. The following exchange occurred in the district court:

[by Mr. Minch]: I think that questions one and two, if the Court wants to view this as a strict liability case, gives the Court that option. We don't need to go beyond that.

THE COURT: I agree. I think that they're -- given the state of the record, that the Court is capable of making decisions on the strict liability issue based upon the questions that are already in the verdict form.

T. 1212, l. 7-14.

The evidence introduced at trial overwhelmingly indicated a UST was present on the HOP property. R.A. 76. The evidence established the installation of a UST is an unnatural condition. T. 849-850. Subsequently, the jury found Mr. Anda, his agents or partners, kept fuel oil in the UST. A. 87. (Question 1) The jury also found the fuel oil escaped from the UST and migrated onto Parcels I and II. A. 87. (Question 2) The district court noted, "[t]he evidence was overwhelming and conclusive that the underground storage tank on the Holiday Office Park property was the source of contamination on that property as well as the two adjacent properties.

There was no contrary credible evidence." R.A. 76. The jury found the escape of fuel oil created a nuisance and resulted in significant damages to Parcels I and II. A. 88. Thus, the necessary factual findings were made by the jury.

Mr. Anda strains credibility by arguing the UST located on his land and filled and operated by his agents and partners was not under his control. This argument ignores the jury's findings which are supported by substantial evidence. Mr. Anda testified he was part owner of the HOP property since 1972 and his manager and eventually partner, Monte Kjos, testified Mr. Anda eventually bought out Mr. Kjos in the mid 1990s and became a 100 percent owner of the property. T. 1127-1130. Mr. Anda admitted that his manager and former partner had told him fuel oil had been used at the HOP property. T. 1138. This evidence, along with the testimony of experts, onsite pictures, excavation reports, detailed maps and other testimony, overwhelmingly supports the jury's finding that the UST was under the control of Mr. Anda, his agents and partners.

This evidence is consistent with Minnesota's case law addressing knowledge of partners and agents. The knowledge of a partner is attributable to the partnership. Linneman v. Swartz, 50 N.W.2d 47, 50 (Minn. 1951); see also Minn. Stat. § 323A.0102(f). Further, when an agent has actual notice of facts, constructive notice of those facts are imputed to the principle. Centennial Ins. Co. v. Zylberberg, 422 N.W.2d 18, 21 (Minn. App. 1988). Thus, Mr. Anda, his agents and his partners had knowledge of the UST's existence and use.

ii. Strict liability pursuant to Rylands.

In his brief Mr. Anda fails to articulate the correct rule of Rylands v. Fletcher¹⁰ as adopted in Minnesota. Mr. Anda attempts to entice this Court into overruling precedent by following the second restatement of torts, which is not the law of Minnesota. "Minnesota was one of the first American jurisdictions to adopt the strict liability rule of Rylands v. Fletcher." Minn. Mining and Mfg. Co. v. Travelers Indem. Co., 457 N.W.2d 175, 183 (Minn. 1990). The rule established by Rylands holds that, "a party who, for his own profit, keeps on his premises anything not naturally belonging there, the natural tendency of which is to become a nuisance and to do mischief if it escapes, is liable if it escapes, without proof of negligence, for all damages directly resulting therefrom. Wiltse v. City of Red Wing, 109 N.W. 114, 115 (Minn. 1906); Berger v. Minneapolis Gaslight Co., 62 N.W. 336, 388 (Minn. 1895); Kennedy Bldg. Associates v. Viacom, Inc., 375 F.3d 731, 737-740 (8th Cir. 2004). The focus of the Rylands rule, as adopted by Minnesota, is on the natural state of the land itself and the alteration of that land which has a natural tendency to cause a nuisance and the damages that flow from that alteration. The second restatement of torts departs from this rule and instead improperly focuses on the activity undertaken by the defendant.

In Berger, an action was commenced against the Minnesota Gaslight Company to recover damages caused by the release of petroleum stored in an iron tank embedded in the ground. Berger, 62 N.W. at 336-337. The petroleum escaped and migrated onto adjoining properties causing damage to those properties. Id. at 337.

¹⁰L.R. 3 H.L. 330 (1868).

This Court upheld the verdict for Berger which found the Minnesota Gaslight Company was strictly liable for the escape of petroleum products onto adjoining properties. Id. at 337-338.

Similarly, Mr. Anda was utilizing a petroleum product in the form of fuel oil on his property. The UST in which the fuel oil was stored is not a naturally occurring condition and it is common knowledge that if fuel oil leaks from a UST, such leaks are likely to cause damage to the property in the form environmental contamination. The evidence throughout the trial overwhelmingly and conclusively established fuel oil did escape from the UST, which created a nuisance on the adjoining parcels. R.A. 88. Thus, Mr. Anda is liable under the theory of Rylands.

Mr. Anda relies upon Mahowald in his brief. However, in Mahowald this Court did not depart from the rule of Rylands. Rather this Court declined to extend Rylands to gas mains in the public right of way. Mahowald v. Minnesota Gas Co., 344 N.W.2d 856, 860 (Minn. 1984). In Mahowald, the defendant gas company had installed a gas main which later ruptured causing an explosion. Id. at 858. The gas main was installed in the public right of way. Id. at 859. The plaintiff argued this Court should apply strict liability pursuant to the Rylands rule. Id. This Court analyzed the long line of cases upholding the Rylands rule and determined the dispositive element distinguishing those cases from the facts presented in Mahowald was the defendant's exclusive control of the instrumentality causing the damage. Id. at 860. This Court recognized that gas mains were located in the **public right of way** and therefore not under the exclusive control of the gas company. Id. Mahowald is consistent with this Court's precedent regarding strict liability which focuses on the alteration of the natural state of the land and the damages that naturally flow from the

alteration. In the instant case, Mr. Anda, as owner of the HOP property, had exclusive control of the UST. It was located on private land, not in the public right of way. Further, all of the factual elements of Rylands have been established and Berger is directly on point. Berger, 62 N.W.2d at 338. Therefore, the district court's determination that Mr. Anda is strictly liable for the environmental contamination of Parcels I and II comports with this Court's precedent and should be affirmed.

6. Mr. Anda did not challenge the jury's unanimous finding of liability for negligence in the Court of Appeals and therefore the issue is not properly before this Court.

Mr. Anda did not challenge the jury's unanimous finding of liability for negligence in the Court of Appeals. R.A. 97-124. Rather, Mr. Anda only argued that the jury should have been given a comparative negligence instruction. R.A. 124; R.A. 168-170. Thus, Mr. Anda has waived any challenge to the jury's unanimous finding of liability for negligence. Putz, 645 N.W.2d at 350.

Assuming for purposes of argument only that the issue is properly before this Court, Mr. Anda and his agents were negligent in the maintenance and operation of the UST located on the HOP property. A. 87. Negligence requires (1) a duty owed by the defendant; (2) a breach of that duty; (3) causation; and (4) injury. Lubbers v. Anderson, 539 N.W.2d 398, 401 (Minn. 1995); Hudson v. Snyder Body, Inc., 326 N.W.2d 149, 157 (Minn. 1982).

Mr. Anda had a duty to use his property so as not to injure others. O'Brien v. City of St. Paul, 25 Minn. 331, 335 (Minn. 1878); Anderson v. DNR, 693 N.W.2d 181, 186 (Minn. 2005); see also A. 82. In the instant case, the evidence overwhelmingly established that Mr. Anda owned and maintained a UST on the HOP property. It is common knowledge that USTs are subject to corrosion and will leak

over time. See Lerro v. Thomas Wynne, Inc., 301 A.2d 705, 708 (Pa. 1973); see also Berger, 62 N.W.2d at 338. With common knowledge of the propensity for USTs to leak, Mr. Anda and his agents simply ignored the UST, in the hope that something which was out of sight would also be out of mind so they could escape liability for any leaks that would result from an unmaintained UST.

It was reasonable for the jury to conclude the HOP property continued using fuel oil long after Mr. Anda took ownership of the property. Mr. Anda testified fuel oil was used during the time he owned the property. T. 1138. Mr. Olson testified the size and the scope of the contamination would have occurred over years. T. 669. Mr. Olson also testified UST leaks start small and get larger over time. T. 658-687; R.A. 188. This means the contamination would have occurred during the years of Mr. Anda's ownership because new tanks are unlikely to leak. T. 663-669. R.A. 188. (The HOP was built in the mid to late 1960s and Mr. Anda took ownership in 1972.) Based upon his own testimony, and that of Mr. Benker, pictures of the site and the jury's observation of the credibility of the witnesses, it was reasonable for the jury to conclude Mr. Anda and his agents were negligent in maintaining the UST by continuing to fill it while simply ignoring its condition. A. 87.

The testimony, exhibits and pictures overwhelmingly establish that fuel oil migrated onto Parcels I and II. By continuing to allow the UST to sit in the ground and contaminated soil under the building to remain, Mr. Anda allowed fuel oil to migrate onto adjoining properties and damage those properties. Mr. Anda simply refused to properly maintain the UST by testing it, abating it or removing it. Thus in addition to being negligent, Mr. Anda also created a nuisance. A. 88.

The evidence overwhelmingly established that Mr. Anda was negligent and created a nuisance and the jury reasonably concluded that Mr. Anda and his agents were negligent in maintaining the UST.

7. The submission of the affirmative defense of comparative fault to the jury was unnecessary because Mr. Anda failed to establish the existence of a legal duty in the district court and has failed to establish a legal duty in this Court.

a. Standard of Review.

On appeal, the review of jury instructions is confined to a determination of whether the district court gave instructions that clearly and adequately stated the applicable law. Hilligoss v. Cargill, Inc., 649 N.W.2d 142, 147 (Minn. 2002). "The district court has wide discretion to determine the jury instructions and we will not reverse in the absence of an abuse of discretion." Id. Alholm v. Wilt, 394 N.W.2d 488, 490 (Minn. 1986). It is not enough that the appellant is simply dissatisfied with an instruction because the appellant preferred to use other language. Alholm, 394 N.W.2d at 490. An instruction may not be successfully attacked simply by lifting a single sentence or word out of the jury instruction and attacking it out of context. Hilligoss, 649 N.W.2d 2d at 147.

b. Argument.

i. No legal duty exists.

The district court correctly denied Mr. Anda's request to submit a comparative fault instruction to the jury. Although it is difficult to discern, and therefore respond, to Mr. Anda's arguments, it appears he is arguing the district court erred in failing to submit jury instructions and a special verdict question regarding whether MEDA or MHA was contributorily at fault. See App. Br., p. 30-33. During the trial Mr. Anda

argued MEDA and MHA were contributorily negligent and the jury should be permitted to compare the negligence of the parties. T. 768. After extensive argument the district court correctly held the evidence and conduct cited by Mr. Anda did not constitute a breach of a duty owed by MHA or MEDA to Mr. Anda. T. 802. The district court correctly held that no legal duty existed which was owed by MEDA or MHA to Mr. Anda. T. 802. In this Court, Mr. Anda has made numerous allegations concerning the conduct of MHA or MEDA. See App. Br., p. 31. However, once again, Mr. Anda has failed to identify a legal duty and evidence establishing a breach of that duty to this Court sufficient to justify a contributory fault instruction to the jury.

ii. Waiver.

The issue of requiring a contributory fault jury instruction is not properly before this Court. In his motion for a new trial, Mr. Anda raised the issue of comparative negligence, but failed to brief a specific argument with respect to the issue. A. 106-128. This failure must be deemed a waiver of that issue as a basis for a new trial. This Court has long held that, "matters such as trial procedure, evidentiary rulings and jury instructions are subject to appellate rule only if there has been a motion for a new trial in which such matters have been assigned as error." Sauter v. Wasemiller, 389 N.W.2d 200, 201 (Minn. 1986); Alpha Real Estate Co. of Rochester v. Delta Dental Plan of Minn., 664 N.W.2d 303, 309-310 (Minn. 2003). Sauter states, "Counsel is required to focus the trial court's attention on the specifics of an objection which though properly framed at trial, might not have been fully explained or the impact of which may not have been understood during trial." Sauter, 389 N.W.2d at 201. Mr. Anda's motion for a new trial did not brief the issue of

contributory fault and therefore falls well short of Sauter's requirements of specifically framing an issue to the district court. Therefore, the issue of contributory fault is not properly before this Court.

iii. Lack of evidence supporting comparative fault instruction.

Assuming for purposes of argument only, that the issue is properly before this Court, the district court was correct in refusing to give a comparative fault instruction. Mr. Anda implies that Minn. Stat. § 604.01 mandates the district court provide jury instructions regarding comparative fault upon the request of a party. App. Br., p. 32. However, this literal reading of Minn. Stat. § 604.01 produces absurd results and contradicts precedent which requires the existence of evidence reasonably tending to support the requested instruction. Oltmans v. Orthopaedic and Fracture Clinic, P.A., 278 N.W.2d 538, 541 (Minn. 1979) ("It is prejudicial error for the trial court to submit an issue to the jury when there is no evidence reasonably tending to prove its existence."). Marshall v. Galvez, 480 N.W.2d 358, 362 (Minn. App. 1992). Thus, evidence supporting the instruction of comparative fault must exist prior to the court giving such an instruction or its submission to the jury. Krein v. Raudabough, 406 N.W.2d 315, 320 (Minn. App. 1987) (trial court properly refused to instruct the jury on issues of failure to warn where there was no reasonable evidence to support the instruction).

In the instant case, there is neither legal nor evidentiary support sufficient to require the submission of an instruction on comparative fault to the jury. Mr. Anda has the burden of proof to establish that a comparative fault instruction should have been submitted to the jury. Musicland Group, Inc. v. Ceridian Corp., 508 N.W.2d 524, 535 (Minn. App. 1993). The term "fault" as used in Minn. Stat. § 604.01

includes, *inter alia* acts or omissions that are negligent to property or person. Minn. Stat. § 604.01(1)(a). In the district court, Mr. Anda argued that MEDA and MHA were comparatively negligent as his basis for requesting a comparative fault instruction. T. 768. The district court then queried, "What is the negligence of MEDA and MHA? T. 768. In response to this simple question counsel for Mr. Anda launched into a lengthy recitation of generalizations, contentions and what sounded like a closing argument. T. 768-801. After nearly 45 minutes Mr. Anda completed his argument still unable to provide the district court with a legal duty or evidence to establish a breach of that duty. T. 768-801. The district court properly held there was no identifiable **legal duty** or evidence to support the theory of comparative negligence. T. 802-803. Similarly, Mr. Anda has provided this Court with regurgitated generalizations, allegations and an attack on the facts presented to the jury, yet has again failed to identify a legal duty owed by MEDA or MHA to Mr. Anda. Therefore, Mr. Anda's allegation that error occurred because the jury did not receive an instruction on comparative fault must fail.

8. **Mr. Anda's allegation that, "[t]he district court should have granted Anda's motions for summary judgment or a judgment as a matter of law arguing that he was not liable for cleanup costs" is not properly before this Court because he did not brief this argument in the Court of Appeals.**

a. **Standard of Review.**

The district court's denial of a motion for summary judgment may be raised on appeal from the judgment. Reinhardt v. Milwaukee Mut. Ins. Co., 524 N.W.2d 531, 533 (Minn. App. 1994) *review denied* (Minn. Feb. 14, 1995). "On appeal from a denial of summary judgment this court determines whether any genuine issues of material fact exist and whether the district court erred in applying the law." Zank v.

Larson, 552 N.W.2d 719, 721 (Minn. 1996). JMOL is appropriate only when a jury verdict has no reasonable fact support or is contrary to the law. Longbehn v. Schoenrock, 727 N.W.2d 153, 159 (Minn. App. 2007).

b. Argument.

i. Waiver.

Mr. Anda did not brief the issue of whether the district court correctly denied his motions for summary judgment and JMOL in his brief to the Court of Appeals. R.A. 160-173. As a result, the issue was waived in the Court of Appeals and is not properly before this court. Frank v. Winter, 528 N.W. 2d 910, 913 (Minn. App. 1995). Even if the issue was raised by Mr. Anda in his brief to the Court of Appeals, but not argued in the brief, the issue is deemed waived. Melina v. Chaplin, 327 N.W.2d 19, 20 (Minn. 1982); Pautz v. American Ins. Co., 128 N.W.2d 731, 738 (Minn. 1964). Because this issue was not argued in the Court of Appeals, it is not properly before this Court. Putz, 645 N.W.2d at 350.

In his brief to this Court, Mr. Anda argues only that he is dissatisfied with the district court's decisions to deny his motions for summary judgment and JMOL. Thus, Mr. Anda has also failed to meet his burden to present cogent and concise arguments to this Court to justify disturbing the district court's decision. See Chang v. Lundry, 117 S.W.3d 161, 163 (Mo. App. S.D. 2003) ("As an appellate court, we should not ferret out the facts, reconstruct points, and decipher arguments because we are then acting as an advocate for a party.") McCarthy v. S.E.C., 406 F.3d 179, 186 (2nd Cir. 2005); Luddington v. Indiana Bell Telephone Co., 966 F.2d 225, 230 (7th Cir. 1992).

ii. The record establishes the jury's verdict (finding liability for both negligence and nuisance) is supported by substantial evidence.

Mr. Anda's allegation that MEDA was only able to establish that Mr. Anda was an owner of the HOP property at the time of the second motion for summary judgment is factually incorrect. See App. Br., p. 33. In response to Mr. Anda's second motion for summary judgment, MEDA identified numerous facts which were in dispute based upon the reports by Legend Technical Services, deposition testimony of Wayne Bradley, Mr. Kjos, Mr. Kjonaas, and numerous reports including that of Mr. Olson. R.A. 14-25 (MEDA's disputed fact section). This evidence, in addition to other evidence, was presented to the jury. In the district court, Mr. Anda provided only generalized attacks on MEDA's evidence, leading the district court to later summarize, "There was no contrary credible evidence." R.A. 76. Thus, the jury verdict should not be set aside because it is based upon substantial evidence and the jury instructions were standard JIG instructions. As a result, the district court correctly denied Mr. Anda's motions for summary judgment and JMOL.

9. Mr. Anda received a fair trial.

a. Standard of Review.

The district court has discretion to grant a new trial and "[o]n appeal from a denial of a motion for a new trial, the verdict must stand unless it is manifestly and palpably contrary to the evidence viewed in the light most favorable to the verdict." ZumBerge v. Northern States Power Co., 481 N.W.2d 103, 109 (Minn. App. 1992); Halla Nursery, Inc. v. Baumann-Furrie & Co., 454 N.W.2d 905, 910 (Minn. 1990).

b. Argument.

Mr. Anda first accuses the district court of acting improperly. This allegation is without merit. The district court acted appropriately to preserve the integrity and order of the trial and to prevent a miscarriage of justice in the instant case. This Court has held:

Trial judges have the clear duty to take whatever action may be necessary to meet the situation and to counteract any attempt to appeal to prejudice by clear, specific, and unequivocal admonition.

Reese v. Ross & Ross Auctioneers, Inc., 149 N.W.2d 16, 19-20 (Minn. 1967). This Court has noted, "the integrity of jury trials must not be jeopardized by questions which embrace testimonial assertions by counsel, intimations of guilt by association, and disparagement of counsel for the adverse party." Id. Further, the court is under a duty to supervise and manage the trials before them. State v. Erickson, 610 N.W.2d 335, 341 (Minn. 2000).

This Court has also noted that:

If counsel made inadvertent misstatements of fact in his argument, it was clearly permissible for the trial court in its discretion to correct any erroneous impression which the jury might gain therefrom.

Bartl v. City of New Ulm, 72 N.W.2d 303, 307 (Minn. 1955). And further that:

While it is the rule that in the summation of a case to the jury counsel should be given considerable latitude in pointing out such inferences as he believes reasonably may be drawn from the evidence, the rule does not confer on counsel a privilege which has no bounds. Where counsel seeks to have the jury draw inferences which clearly are not justified by the evidence, it is not only permissible for the trial court to call the jury's attention to the fact that such inference is not warranted by the evidence, but it is the court's duty to do so.

Miller v. Hughes, 105 N.W.2d 693, 697 (Minn. 1960) (citations omitted). Therefore, courts have the authority, indeed the duty, to protect the jury and the process from actions of counsel that threaten the integrity of the process.¹¹

In the instant case, counsel for Mr. Anda engaged in several significant acts of misconduct. Repeatedly, counsel for Mr. Anda testified during questioning of witnesses. Repeatedly counsel for Mr. Anda violated the district court's orders and admonitions. Ultimately, the court is charged with the duty of protecting the jury from inappropriate comments made by counsel for Mr. Anda. The court also had to intervene to enforce its orders with respect to evidentiary decisions and the order and scope of closing arguments.

At no point during the trial did Mr. Anda object to the district court's efforts to control the trial proceedings. Mr. Anda cannot now utilize these instances as grounds for a new trial when his attorney did not properly interpose an objection to such alleged acts. Merch. & Farmers Mut. Cas. Co. v. St. Paul-Mercury Indem. Co., 16 N.W.2d 463, 466 (Minn. 1944).¹²

Due to Mr. Anda's failure to properly interpose an objection to any alleged judicial misconduct, he cannot receive a new trial on the basis of conduct he now

¹¹See generally Federal Rules Practice and Procedure, 11 Fed. Prac. & Proc. Civ. 2d § 2809. (One court has stated that in order for a judge's comments on evidence to rise to the level requiring a new trial, it must "become so one sided as to become advocacy." Another court has commented that "active participation by a district judge in trial proceedings is in itself neither improper nor unfair.")

¹²The U.S. Court of Appeals for the Fifth Circuit held that an objection to alleged misconduct of a judge is required. Bacon v. Kansas City Southern Ry. Co., 373 F.2d 515, 517 (5th Cir. 1967). ("The point is meritless. In the first place, we find no error in the trial judge's actions, and in the second place, the appellant failed to object to the action."); See also Rule 46, Minn.R.Civ.P.

deems objectionable. Kenney v. Chicago Great Western Ry. Co., 71 N.W.2d 669, 673 (Minn. 1955). This Court has applied this principle to counsel who take exception to remarks made by the court, and require that counsel must make an objection to those remarks to preserve such alleged grounds for a new trial or appeal. Merch. & Farmers Mut. Cas. Co., 16 N.W.2d at 466; see also Ryan v. City of Crookston, 30 N.W.2d 351, 353 (Minn. 1947) (complained of remarks were made for purposes of maintaining an orderly trial.); Nugent v. Kerr, 543 N.W.2d 688, 692 (Minn. App. 1996). Therefore, because Mr. Anda did not properly interpose an objection to statements he now claims are objectionable, he has waived any right to challenge these remarks or to assert these remarks as grounds on appeal.

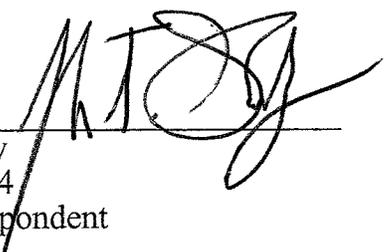
Finally, the Court did not comment upon the quality, quantity or merits of the evidence in the case. The district court did not make or reveal any observations to the jury concerning the credibility or testimony of any witness. Instead, the district court's comments and statements were related solely to preserving order in the courtroom and protecting the integrity of the jury. The district court did not abuse its discretion in refusing to grant a new trial because it was the actions of counsel for Mr. Anda that necessitated the district court's efforts to control the trial proceedings.

Based upon the record and the law, the Court of Appeals correctly held that, "the district court exhibited considerable patience and restraint during the trial." R.A. 82. Therefore, Mr. Anda's argument in this regard is without merit and should be rejected in its entirety.

CONCLUSION

For all of the above reasons, respondent, MEDA, respectfully requests this Court affirm the judgments in both the eminent domain action and in the environmental contamination action.

Respectfully submitted this 15th day of May, 2009.



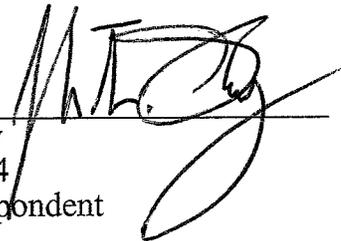
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CERTIFICATE OF COMPLIANCE

The undersigned, as attorney for the Respondent in the above matter, and as the author of the above Brief, hereby certifies that in compliance with Rule 132.01, subd. 3, of the Minnesota Rules of Appellate Procedure, the above Brief, excluding words in the table of contents, table of authorities, any addendum containing statutes, rules, regulations, etc. and any appendix, signature block, Affidavit of Service and this Certificate of Compliance, which was done in Corel WordPerfect 12, using Times New Roman font, totals 13,999 words.

Dated this 15th day of May, 2009.



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